

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 63/2024 OF 12TH JULY 2024

BETWEEN

ABDULHAKIM AHMED BAYUSUF

AND SONS LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER ROADS AND TRANSPORT SERVICES

COUNTY GOVERNMENT OF KILIFI RESPONDENT

S. S MEHTA AND SONS LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer Roads and Transport Services County Government of Kilifi in relation to Tender No. RTPW/1496779-2/2023-2024 for Proposed Upgrading to Bitumen Standards of Kizingo – Jacaranda Road Phase I in Watamu Ward

BOARD MEMBERS PRESENT

- | | | |
|-------------------------|---|-------------------|
| 1. Mr. Joshua Kiptoo | - | Panel Chairperson |
| 2. Ms. Jessica M’mbetsa | - | Member |
| 3. Mr. Alexander Musau | - | Member |

IN ATTENDANCE

- | | |
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| 1. Ms. Sarah Ayoo | Holding brief for Board Secretary |
| 2. Ms. Evelyn Weru | Secretariat |

PRESENT BY INVITATION

APPLICANT

ABDULHAKIM AHMED BAYUSUF

AND SONS LIMITED

- | | |
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| 1. Mr. Musyoka | - Advocate, Muriu Mungai & Co. Advocates LLP |
| 2. Mr. Solomon Opole | - Advocate, Muriu Mungai & Co. Advocates LLP |

RESPONDENT

**THE ACCOUNTING OFFICER ROADS AND
TRANSPORT SERVICES COUNTY
GOVERNMENT OF KILIFI**

Mr. Faraji Chipinde	- County Solicitor, County Government of Kilifi
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INTERESTED PARTY

S. S MEHTA AND SONS LIMITED

Mr. Gachuba	- Advocate, Mwaniki Gachuba Advocates
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BACKGROUND OF THE DECISION

The Tendering Process

1. The County Government of Kilifi invited qualified and interested tenderers to submit sealed tenders in response to Tender No.

RTPW/1496779-2/2023-2024 for Proposed Upgrading to Bitumen Standards of Kizingo – Jacaranda Road Phase I in Watamu Ward (hereinafter referred to as the “subject tender”). Tendering was conducted under open competitive method (National) and the invitation was by way of an advertisement on 20th June 2024 on the Procuring Entity’s website www.kilifi.go.ke and on the Public Procurement Information Portal (PPIP) website www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the ‘Tender Document’) was available for download. Tenders were to be submitted electronically through the GOK IFMIS portal <https://supplier.treasury.go.ke> and the tender’s submission deadline was scheduled for 28th June 2024 at 1000 hrs.

Submission of Tenders and Tender Opening

2. According to a register dated 28th June 2024 furnished at page 8 of the Procuring Entity’s Bundle of Confidential Documents with respect to the subject tender to the Public Procurement Administrative Review Board (hereinafter referred to as the ‘Board’) by the Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the ‘Act’) and signed by members of the Tender Opening Committee, a total of five (5) tenders were submitted in response to the subject tender and were recorded as follows:

Bidder No.	Name	Amount
1.	Abdulhakim Ahmed Bayusuf and Sons Limited	67,501,486.92
2.	Preston Logistics Limited	72,645,783.02
3.	S.S. Mehta and Sons Ltd	64,502,966.25
4.	Sebam Consultants Limited	74,987,345.37
5.	Southwark Connections Limited	65,245,068.84

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of the five (5) tenders as captured in a GOK IFMIS Evaluation Matrix Report for the subject tender signed by members of the Evaluation Committee (hereinafter referred to as the "Evaluation Report") in the following stages:
- i Preliminary Evaluation;
 - ii Technical Evaluation; and
 - iii Financial Evaluation

Preliminary Evaluation

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Preliminary Examination of Section III- Evaluation and Qualification Criteria at

page 22 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the technical evaluation stage.

5. At the end of evaluation at this stage, two (2) tenders were determined non-responsive, while three (3) tenders, including the Applicant's tender, were determined responsive and proceeded for Technical Evaluation.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Summary of Post-Qualification Criteria of Section III- Evaluation and Qualification Criteria at page 28 of the Tender Document. Tenderers were required to score a minimum of 60 marks so as to proceed to the financial evaluation stage.
7. At the end of evaluation at this stage, three (3) tenders were determined responsive, including the Applicant's tender, having met the minimum technical score and proceeded for evaluation at the Financial Evaluation stage.

Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine tender prices and the lowest evaluated bidder would be awarded the subject tender.

9. Following the conclusion of evaluation at this stage, the Evaluation Committee ranked bids as follows:

EVALUATION TABLE FOR AWARD

<i>Quote No.</i>	<i>Bidder</i>	<i>Technical Score</i>	<i>Bid Total</i>	<i>Price Points</i>	<i>Total Points</i>	<i>Total Points Rank</i>
<i>2120041</i>	<i>Sebam Consultants Limited</i>	<i>70</i>	<i>74,987,345.37</i>	<i>25.81</i>	<i>95.81</i>	<i>3</i>
<i>2120223</i>	<i>Abdulkhikim Ahmed Bayusuf and Sons Limited</i>	<i>69</i>	<i>67,501,486.92</i>	<i>28.67</i>	<i>97.67</i>	<i>2</i>
<i>2120188</i>	<i>S.S Mehta and Sons Limited</i>	<i>70</i>	<i>64,502,996.25</i>	<i>30.00</i>	<i>100.00</i>	<i>1</i>

Evaluation Committee's Recommendation

10. The Evaluation Committee recommended award of the subject tender to the Interested Party, S.S Mehta and Sons Limited, being the lowest evaluated bidder at a total cost of Kenya Shillings Sixty-Four Million,

Five Hundred and Two Thousand Nine Hundred and Ninety-Six and Twenty-Five cents only (Kshs. 64,502,996.25).

Professional Opinion

11. In a Professional Opinion dated 28th June 2024 (hereinafter referred to as the "Professional Opinion"), Ms. Mary Nzaro, P.P.O reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to S.S Mehta and Sons Limited, being the lowest evaluated bidder at a total cost of Kenya Shillings Sixty-Four Million, Five Hundred and Two Thousand Nine Hundred and Ninety-Six and Twenty-Five cents only (Kshs. 64,502,996.25)
12. Thereafter, the Professional Opinion was approved by Mr. Philip Charo, the Respondent herein.

Notification to Tenderers

13. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 28th June 2024.

REQUEST FOR REVIEW NO. 63 OF 2024

14. On 12th July 2024, Abdulhakim Ahmed Bayusuf and Sons Limited, the Applicant herein filed a Request for Review dated 11th July 2024

(hereinafter referred to as the 'instant Request for Review') together with a Statement in Support of the Review Application sworn on 11th July 2024 by Abdullatif Abdulhakim Ahmed, its Director seeking the following orders from the Board in verbatim:

- a) A declaration that the evaluation of Tender Invitation No. RTPW/1496779-2/2023-2024 on the Proposed Upgrading to Bitumen Standards of Kizingo – Jacaranda Road Phase I in Watamu Ward contravened the mandatory provisions of the Public Procurement and Asset Disposal Act 2015 and the Public Procurement and Asset Disposal Regulations 2020 and is null and void.***

- b) The procurement proceedings initiated by the Respondent under Tender Invitation No. RTPW/1496779-2/2023-2024 on the Proposed Upgrading to Bitumen Standards of Kizingo – Jacaranda Road Phase I in Watamu Ward be nullified.***

- c) The Respondent's Notification of Intention to Enter into a Contract which intends to award the Interested Party Tender No. RTPW/1496779-2/2023-2024 on the Proposed Upgrading to Bitumen Standards of Kizingo – Jacaranda Road Phase I in Watamu Ward be declared invalid;***

- d) The Respondent's letter dated 28th June, 2024 notifying the Applicant that it was unsuccessful in its bid submitted in the Tender No. RTPW/1496779-2/2023-2024 on the Proposed Upgrading to Bitumen Standards of Kizingo – Jacaranda Road Phase I in Watamu Ward be annulled and set aside;***
- e) The Review Board be pleased to direct the Accounting Officer of the Respondent to re-advertise and commence anew the procurement process in full compliance of the law.***
- f) The Respondent be ordered to pay the costs of and incidental to these proceedings.***
- g) Such other relief as the Board may deem just and expedient.***

15. In a Notification of Appeal and a letter dated 12th July 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to

mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 12th July 2024.

16. *Vide* a Hearing Notice dated 19th July 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 25th July 2024 at 11.00 a.m. through the link availed in the said Hearing Notice.

17. On 22nd July 2024, the Respondent filed an undated Procuring Entity's Response to the Grounds of Appeal together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

18. On 24th July 2024, the Respondent filed through the County Solicitor, Mr. Faraji Chipinde, a Notice of Appointment dated 24th July 2024 and Grounds of Opposition dated 24th July 2024.

19. *Vide* email dated 24th July 2024, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days.

20. On 24th July 2024, the Applicant filed Written Submissions dated 24th July 2024 together with an Applicant's List and Bundle of Authorities dated 24th July 2024.
21. On 25th July 2024, the Interested Party filed through Mwaniki Gachuba Advocates a Notice of Appointment dated 25th July 2024.
22. When the matter first came up for hearing on 25th July 2024, the Board read out pleadings filed by parties in the matter. Counsel for the Interested Party, Mr. Gachuba sought for an adjournment indicating that he had just come on record and required time to file a preliminary objection together with the Interested Party's response to the instant Request for Review. There being no objection, the application for adjournment was allowed and the Board directed (a) the Interested Party to file and serve its preliminary objection and response by 5.00 p.m. on 25th July 2024, (b) the Applicant to file its rejoinder to the preliminary objection and any further response by 5.00 p.m. on 26th July 2024, and (c) that the matter would proceed for hearing on 29th July 2024 at 11.00 a.m. Parties were cautioned to adhere to the strict timelines as specified in the Board's directions.
23. *Vide* a Hearing Notice dated 25th July 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 29th July 2024 at 11.00 a.m. through the link availed in the said Hearing Notice.

24. On 25th July 2024 the Interested Party filed through its advocates a Preliminary Objection dated 25th July 2024 and an Interested Party's Response dated 25th July 2024.
25. On 29th July 2024, the Interested Party filed through its advocates Written Submissions dated 27th July 2024.
26. On 29th July 2024, the Applicant filed through its advocates Applicant's Further Written Submissions dated 26th July 2024 together with Applicant's Further List & Bundle of Authorities dated 26th July 2024 and Applicant's Further List & Bundle of Authorities dated 29th July 2024.
27. At the hearing on 29th July 2024, the Board sought to know whether parties had complied with orders issued on 25th July 2024. All parties confirmed having complied with directions issued on 25th July 2024. Counsel for the Applicant, Mr. Musyoka sought to know which of the responses to the instant Request for Review filed by the Respondent it would be relying on in view of the fact that it had an undated Procuring Entity's Response to the Grounds of Appeal filed on 22nd July 2024 and Grounds of Opposition dated 24th July 2024. Counsel for the Respondent, Mr. Faraji notified the Board that there was some miscommunication on the Respondent's correct email address leading it not to receive official communication on the proceedings herein. He clarified that the Respondent would be relying on the bundle of documents submitted on 22nd July 2024 to the Board in compliance

with the letter of notification of appeal received from the Board Secretary. He apologized for the undated response accompanying the said documents and confirmed that the same could be expunged from record and that the Respondent would rely on the response filed on 24th July 2024 which was dated and signed.

28. The Board proceeded to allocate time within which each party was required to proceed and highlight their respective cases. The Board also directed that the hearing of the preliminary objection by the Interested Party would be heard as part of the substantive Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of a substantive request for review and deliver one decision. Thus, the matter proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Interested Party's submissions on its preliminary objection

29. In his submissions, counsel for the Interested Party, Mr. Gachuba relied on the Interested Party's documents filed before the Board and submitted that the Interested Party's Preliminary Objection had three limbs.

30. On the objection raised contesting execution and signing of documents by both counsel for the Applicant and Mr. Abdullatif Abdulhakim Ahmed who swore the Statement in Support of the Review Application, counsel indicated that this limb of objection was based on Regulation 203(2)(b) of Regulations 2020 and Section 37(2) and 40 of the Companies Act which require a Board Authority to appoint the Counsel and also authorize Mr. Ahmed to sign and swear the statement in support of the Request for Review. Mr. Gachuba pointed out that such authority had not been sighted and in support of his argument, he referred the Board to the holding by the High Court in *East African Portland Cement Ltd v Capital Markets Authority & 4 others [2014] eKLR* and the Board's decision in *PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another* where the Board declared that authority by a company is mandatory and in the absence of such authority, then the statement in support of the request for review is null and void. Counsel argued that this first limb of the preliminary objection was competent to dismiss the entire request for review.

31. On the objection raised contesting Ground 17(i)(ii)(iii)(iv)(v) of the Request for Review relating to Tender Opening proceedings, Mr. Gachuba submitted that the complaint herein was time barred as it ought to have been raised under Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020. Counsel further submitted that opening of tenders did not have to wait for the

notification to award to be issued for it to be brought to the Board since anything done before notification ought to be brought before the Board before the notification of award is issued. In support of his argument, counsel referred the Board to the holding in *PPARB No. 155 of 2021 - AAR Insurance Kenya Limited v Vice Chancellor of Kenyatta University* and *PPARB No. 48 of 2021 - Fahimyasir Company Limited v The Accounting Officer, Kenya Urban Roads Authority & 2 others* and reiterated that the Board was categorical in its holding that there is a distinction between matters which should be brought before the notification of intention of award is made and Ground 17(i)(ii)(iii)(iv)(v) of the Request for Review as raised relates to matters which have nothing to do with the notification of the intention to award.

32. On the third ground of objection, counsel submitted that the Applicant did not state what loss it has suffered and what risks it is to suffer should the decision of the Respondent on award of the subject tender be upheld. In support of his argument, counsel relied on the holding by the Court of Appeal in *James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR* and argued that stating the loss that an applicant has suffered is fundamental and where such loss is not pleaded, the applicant lacks *locus standi* before the Board. Counsel pointed out that the Applicant herein failed to plead loss or damage suffered in the Request for Review Application as a result of the decision by the Respondent to award the subject tender.

33. He urged the Board to uphold the Interested Party's Preliminary Objection and strike out the instant Request for Review as prayed.

Applicant's submissions and response to the Interested Party's preliminary objection and Respondent's Grounds of Opposition

34. In his submissions, counsel for the Applicant, Mr. Musyoka relied on documents filed before the Board by the Applicant.

35. On whether the Applicant was required to file the Request for Review together with a refundable deposit of 15% of the Applicant's Tender Sum, Mr. Musyoka submitted that the Applicant was not mandated to pay the refundable deposit due to the subsisting conservatory orders issued by Justice Weldon Korir in *High Court Petition No. E226 of 2020 Roads and Civil Engineering Contractors Association & another v Attorney General & 3 others* which stayed Section 167(2) of the Act and Regulation 204(1) of Regulations 2020. In support of his argument, counsel referred to the holding by the High Court in *Republic v Public Procurement Administrative Review Board & 2 others; H Young & Company (East Africa) Limited (Exparte); Comacon Limited JV Gulf Energy Limited (Interested Party) (Judicial Review Miscellaneous Application No. E058 of 2022)* and the Board's decisions in *PPARB Application No. 160 of 2021 KIU Construction Limited v Accounting Officer Kenya National Highways Authority & Associated Electrical & Hardware Supplies Limited* and *PPARB Application No. 93*

of 2021 Power Transmission Line Contractors Association v The Accounting Officer Kenya Power and Lighting Company Limited.

36. On whether Section 167(4) of the Act immunises the Respondent from review by the Board, counsel submitted that Section 167(4) of the Act is not applicable in the circumstances since the Applicant has neither challenged the choice of procurement method or previous termination proceedings as there was no termination of the procurement proceedings in the subject tender. He further submitted that no evidence had been provided to show that a contract had already been signed in accordance with Section 135 of the Act which in any event would be in violation of Section 135(3) of the Act requiring a contract to be signed after lapse of 14 days following notification.
37. On whether the instant Request for Review was filed within the mandatory statutory timelines and whether Ground 17 (i), (ii), (iii), (iv), (v) is time barred, Mr. Musyoka submitted that the Applicant received an email on rejection of its bid on 4th July 2024 and subsequently received a backdated letter dated 28th June 2024 after the Applicant's representative visited the Respondent's office on 5th July 2024. Counsel pointed out that based on the fact that the Applicant was notified via email on 4th July 2024 that its quote had been shortlisted for the next phase of evaluation, it was illogical for it to be issued with a notification letter dated 28th June 2024.

38. He submitted that the 14-day period for filing the instant Request for Review started running from 6th July 2024 after the Applicant's representative visited the Respondent's offices and was issued with a backdated notification letter and the Procuring Entity has not adduced any evidence to controvert the Applicant's assertions and explain away the other notifications of 2nd and 4th July 2024. Counsel reiterated that the instant Request for Review having been filed on 12th July 2024 was filed within the statutory period of 14 days and that the backdating of the notification letter was only meant to deny the Applicant its right of appeal. He referred the Board to the holding by the High Court in *Republic v Public Procurement and Administrative Review Board & another Dochar Construction and Trade Inc. Ltd (Interested Party) Ex parte Xtreme Engineering Services Limited (2009) eKLR* and *PPARB Application No. 46 of 2024 Royal Taste Kitchen Limited V Kenya National Examinations Council* in support of his argument.

39. On the issue of whether the Applicant has *locus standi* to file the instant Request for Review, counsel submitted that it is not denied that the Applicant was a bidder in the subject tender and must have done so with a view of winning the tender and earn money by rendering the services to the Procuring Entity. It is the Applicant's case that this objection would be relevant where the request for review is made in the course of the tender process and the request for review is on the process but not the outcome and it cannot be gainsaid that an unsuccessful bidder has suffered loss or damage.

40. Counsel pointed out that the Applicant has stated that it is greatly prejudiced since it was not invited to the tender opening and due to this omission by the Respondent, the Applicant is unable to ascertain transparency of the exercise and was denied its legitimate expectation with regards to how the whole process from tender opening to notification would be conducted. In support of his argument, counsel made reference to the holding by Justice Chigiti in *Judicial Review No. E031 of 2023 Republic v Public Procurement Administrative Review Board Lake Victoria North Water Works Development Agency & another (Interested Party); Toddy Civil Engineering Company Limited (Ex parte)* and indicated that the Applicant cannot be denied access to justice on the basis of technicalities even where it is able to demonstrate that the procurement process and award of the tender was devoid of transparency and fairness.

41. On whether the Request for Review is fatally incompetent for having been drawn contrary to Section 37(2) and 40 of the Companies Act and Regulation 203(2)(b) of Regulations 2020, counsel submitted that Regulation 208 of Regulations 2020 permits a party to a request for review to be represented by an advocate or a representative of his choice at the hearing of the review. He pointed out that Regulations 2020 provide a format which the request for review ought to take and in the circumstances, the Applicant's Request for Review clearly indicates that the Applicant has appointed the firm of Muriu, Mungai & Company Advocates LLP to represent it and the firms contact details

and address provide as such, the review was rightly signed by the Applicant's Advocates.

42. In support of his argument, counsel made reference to the holding in *PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another* and pointed out that in the said case the request for review indicated the name of the Applicant, its postal address, telephone number and email address and was signed off by the Applicant's advocates on record leading the Board to find the same as fatally defective and bad in law for having been signed off by the Applicant's advocates despite the Request for Review being made in the name of the Applicant. Mr. Musyoka submitted that the Toddy case was distinguishable from the instant Request for Review since it is clear from the face of the Review that the firm of Muriu Mungai & Co. Advocates LLP having been duly appointed as the Applicant's Advocates is making the request for review on behalf of the Applicant and it is on this basis that the Request for Review was signed by the said advocates. Counsel further submitted that there was no confusion or misleading information as to who filed the Request for Review and as such, it was not defective as alleged.

43. Counsel argued that Section 37(2) and 40 of the Companies Act as relied upon by the Interested Party are inapplicable in the circumstances as they relate to documents executed by a company for instance contracts and that the Request for Review is executed by the

Applicant's Advocates on record while the Statement in Support is executed by the Applicant's director.

44. Mr. Musyoka argued that no Articles of Association had been brought to support the contention that there was no authority and in any event failure to file the authority is not fatal to proceedings and it is sufficient for a deponent to state that he has authority and it is upon the party who contends that there is no authority to adduce evidence that no authority was provided. In support of his argument, counsel invited the Board to look at the holding by Justice R. E. Aburili *in Kenya Agricultural and Livestock Research Organization v Okoko & another (Civil Appeal 36A of 2021) (2022) KEHC 3302 eKLR*. He urged the Board to dismiss the Preliminary Objection.

45. With regard to the substantive issues raised in the instant Request for Review, Mr. Musyoka submitted that Article 227 of the Constitution dictates that procurement of goods and services ought to be done in a manner that is fair, equitable, transparent, cost effective and competitive. He argued that the system put in place has been well captured in the Act, Regulations and other policy documents like the IFMIS system and where there is a challenge by a bidder that a procurement process does not adhere to the stipulated principles, it is the duty of the Procuring Entity to review the process.

46. Counsel submitted that the subject tender was supposed to close on 28th June 2024 but there is no evidence in accordance with the law of

how the subject tender was opened. It is the Applicant's case that the Respondent never invited the Applicant for the tender opening process as envisaged in law and the Tender Document and no link was availed to the Applicant to attend and observe the tender opening exercise. Counsel pointed out that the only communication received by the Applicant was on 2nd July 2024 when it was informed that its tender had progressed for Financial Evaluation and on 4th July 2024 when it received communication that its tender was not successful leading it to attend the Respondent's offices where it was issued with a backdated notification letter dated 28th June 2024.

47. Mr. Musyoka submitted that the Applicant's assertions have not been controverted in view of the fact that no tender opening minutes have been availed showing who was in attendance. He further submitted that the Applicant's tender had been removed from the IFMIS platform and there was an allegation that it was the Applicant who deleted its tender from the system yet it does not have protocols or rights to the system as to be able to delete its tender. Counsel pressed on that no plausible explanation had been provided and it is only the Respondent who is capable of deleting the Applicant's bid raising a question of transparency of the entire procurement process in the subject tender which is a constitutional imperative under Article 227 of the Constitution. Counsel indicated that the procurement process of the subject tender was floated with a particular bidder in mind to succeed and that is the only possible explanation as to why there is no transparency in the entire process.

Respondent's submissions

48. In his submissions, counsel for the Respondent, Mr. Faraji relied on documents filed before the Board including confidential documents concerning the subject tender submitted pursuant to Section 67(3)(e) of the Act.
49. Mr. Faraji associated himself with submissions made by Mr. Gachuba, counsel for the Interested Party in view of the objections raised in the instant Request for Review. Counsel submitted that the instant Request for Review as filed is frivolous as it is within the meaning of Section 167(4) of the Act. In saying so, counsel submitted that the procurement of the subject tender was advertised on PPIP and evaluation conducted through the IFMIS system and adhered to Executive Order No. 2 of 2018.
50. Counsel pointed out that bidding was through open tendering in accordance with Section 116 of the Act and advertisement of the subject tender done on 20th June 2024 and a submission deadline provided for 28th June 2024. He indicated that the Procuring Entity received five bids and that tender opening was conducted on 28th June 2024 and evaluation of the said bids including award was also done on 28th June 2024.
51. Mr. Faraji submitted that at the Preliminary Evaluation stage, only 3 bids were responsive and progressed to the Technical Evaluation stage

where they were also responsive and further progressed to the Financial Evaluation stage where upon evaluation, the Interested Party's bid was deemed as the successful bid being the lowest evaluated.

52. Counsel further submitted that the Applicant's bid was not successful having failed at Financial Evaluation noting that it was not the lowest evaluated bidder. He reiterated that evaluation of bids in the subject tender was done in accordance with the Tender Document requirements, the Act, and Regulations 2020 and that the instant Request for Review was unmerited.

53. He pointed out that the Applicant lacks *locus standi* having failed to demonstrate and plead loss and risk suffered as contemplated in Section 167(1) of the Act and in support of his argument, referred the Board to the holding by the Court of Appeal in *James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*. Counsel reiterated that the Applicant took a commercial risk and cannot be perceived to claim loss associated with the tendering process.

54. Mr. Faraji submitted that the Board cannot deal with matters of choice of a procurement method being one of the grounds of opposition by the Respondent in view of Section 167(4) of the Act. He further submitted that the Request for Review was time barred in view of Section 167(1) of the Act read with Regulation 203 of Regulations 2020

and argued that the 14-days statutory period within which the Applicant was required to institute the Request for Review lapsed on 11th July 2024.

55. Counsel submitted that with the procurement process being done through IFMIS system notifications are issued normally and procuring entities moved away from issuing minutes noting that the process is all inclusive in as far as all bidders are notified on their own accounts in line with Regulation 61(1) of Regulations 2020.

56. He indicated that as a point of general knowledge, the government's financial year ends on 30th June and IFMIS system is stopped at the National Treasury level. He further indicated that the Board was within its power to scrutinize the IFMIS system and that it would note that the system would be suspended and that through the intervention of the Council of Governors, the system would be reopened to enable county governments clean up and finish with any procuring business or payment. Counsel reiterated that the system having been suspended and reopened, this may have occasioned the slight lapse raised by the Applicant and that the Procuring Entity cannot interfere with the back end of the IFMIS system in as far as deletion of materials is concerned. He further reiterated that what was within the Procuring entity's power was review of documents and no other interference can emanate from its end.

57. He urged the Board to dismiss the instant Request for Review with costs.

Interested Party's submissions

58. In his submissions, counsel for the Interested Party, Mr. Gachuba submitted that the Interested Party did not object to the timelines within which the Request for Review was filed and did not have an issue with that.

59. On the case of *Kenya Agricultural and Livestock Research Organization v Okoko & another* relied upon by Mr. Musyoka, counsel submitted that the issue for determination in the said case concerned Order 4 Rule 4(1) of the Civil Procedure Rules 2010 while the Interested Party's objection in the instant Request for Review pertains to Sections 37(2) and 40 of the Companies Act as well as Regulation 203(2)(b) of Regulations 2020 and as such, the Board ought not to distinguish the two as the *Kenya Agricultural and Livestock Research Organization v Okoko & another case* was irrelevant to the preliminary objection before the Board.

60. With regard to the substantive issues raised in the instant Request for Review, counsel submitted that the Request for Review was hazy as it failed to set out the grounds clearly nor the prayers precisely and the Statement in Support did not support any of the averments. He indicated that the Request for Review was stating matters of fact.

61. On the complaint by the Applicant regarding the form of the letter of Notification of Intention to Award, counsel submitted that the Applicant was not challenging the contents of the notification letter but rather challenging the dates of the award and notification which in essence means that the notification letter satisfied the requirements stipulated under Section 87 of the Act read with Regulation 82 of Regulations 2020 and ITT 46 of the Tender Document.
62. Counsel pointed to the Request for Review and submitted that one is able to identify that the successful tenderer was the Interested Party being one of the requirements under Section 87 of the Act and having been joined in the proceedings, it was clear that the threshold requirements had been met.
63. Counsel submitted that the Request for Review does not challenge its disqualification nor state that it was unfairly disqualified being an indication that the Applicant was satisfied with the reasons given for its unsuccessfulness in the subject tender. He reiterated that the notification letter met the threshold of the law and ITT 46 of the Tender Document and what was in contest with regard to the notification letter was curable under Section 72 of the Interpretation and General Provisions Act in that nothing had been brought by the Applicant to indicate that any deviation from the form was meant to defraud or to mislead anybody. He indicated that the award of the subject tender was made in line with Section 86 of the Act and that even if there was an issue, it ought to have been dealt with per the

provisions of Section 6 of the Fair Administrative Actions Act and ITT 48 of the Tender Document which empower the Applicant to seek by way of a debrief, the reasons as to why its tender was disqualified.

64. Counsel submitted that the instant Request for Review as filed is frivolous per Section 172 of the Act and ought to be dismissed with costs for being incompetent and an abuse of the court process. In support of his argument, counsel referred the Board to the case of *Speaker of the National Assembly v James Njenga Karume [1992] eKLR* and reiterated that in the absence of the Applicant seeking a debrief or clarifications, it acquiesced the reasons and the instant Request for Review ought not to be entertained.

65. On the allegation made by the Applicant that its bid document was deleted from the system, counsel submitted that this was a very serious allegation involving the developers of the system or the administrators of the system that was used by the Respondent. He indicated that he had not seen any evidence in terms of either cybersecurity audit logs or an investigative report annexed by the Applicant to demonstrate that its tender was deleted from the Respondent's portal and as such, there was nothing for the Board to review, hear and determine on this allegation.

66. Counsel urged the Board to dismiss the instant Request for Review and award costs pursuant to Section 173 (d) of the Act and the scale fees prescribed under Schedule 11 of the Advocates (Remuneration)(Amendment) Order 2014.

Applicant's Rejoinder

67. In a rejoinder, Mr. Musyoka submitted that there was no evidence of the Applicant being notified by way of e-notification and if the same existed, the Respondent would have availed the same.
68. On the submission made by counsel for the Respondent that the Board ought to take judicial notice of closure of the IFMIS platform due to close of the financial year, counsel submitted that Mr. Faraji did not cite any law to support this allegation and neither did this explain why other tenders are still on the platform and why only the Applicant's tender was affected and this speaks to the lack of transparency in the procurement process.
69. Mr. Musyoka submitted that it was not for the Applicant to avail any evidence that the IFMIS system had been compromised since the burden of proof had shifted to the Respondent to prove that the system had not been interfered with. He reiterated that there was concession that the Applicant's bid was not available on IFMIS and that the explanation rendered by the Respondent was wishy-washy. He urged the Board to visit the system and scrutinize what happened.
70. With regard to the objections of Section 37(2) and 40 of the Companies Act, counsel reiterated that this section is applicable when a company is executing documents such as a sale agreement and the request for review and accompanying statement cannot be said to be

documents executed by a company noting that the statement has been executed by a director of the company. He indicated that the Applicant had met all the requirements in execution of the Request for Review as set out by the Board in the Toddy case.

71. With regard to the format of the notification, counsel pointed to ITT 46 of the Tender Document and argued that the notification letter issued to the Applicant did not capture the address of the successful bidder and the Applicant had to source for the said address at the time of filing the Request for Review. He further submitted that the Respondent was required to invite the Applicant for debriefing yet the notification letter did not invite the Applicant for debriefing despite there being a legitimate expectation that the notification ought to include an invitation for debriefing.

72. With regard to the requirement to plead loss and damage, counsel submitted that the Court of Appeal in the *James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR* observed that the Appellant had been eliminated at the Preliminary Evaluation stage of the evaluation process being the reason why it was referred to as a busy body yet in the instant Request for Review, the distinction was that the Applicant was not disqualified at the Preliminary Evaluation stage having qualified for Financial Evaluation and cannot be termed as a busy body. He indicated that the Applicant had a legitimate expectation of being successful and needed not to have pleaded and demonstrated that it has suffered loss

and damage. In support of his argument, he reiterated the holding by Justice Chigiti in *Judicial Review No. E031 of 2023 Republic v Public Procurement Administrative Review Board Lake Victoria North Water Works Development Agency & another (Interested Party); Toddy Civil Engineering Company Limited (Ex parte)*

CLARIFICATIONS

73. When asked by the Board to clarify on when the Applicant learnt about occurrence of the breach complained of relating to tender opening not being in accordance with the law, Mr. Musyoka indicated that there was no formal notification of the tender opening and the communication received pertaining the subject tender was received on 5th July 2024 meaning that there was no communication from the Procuring Entity on when the tender opening occurred.

74. When asked by the Board to expound on whether the Applicant's tender was deleted from the IFMIS portal in view of the principles under Article 227(1) of the Constitution, Mr. Faraji submitted that the Procuring Entity did not delete any information from the system either from its end and what had been uploaded by bidders. He indicated that the IFMIS system is a National Treasury System that guides an end to end procurement process and such interference cannot be done from the Procuring Entity's side. He pointed out that this was a serious allegation and invited the Board pursuant to Section 9 of the Act to look into this allegation not only for this matter but for the betterment

of the IFMIS system and make appropriate recommendations to the National Treasury.

75. Mr. Faraji further clarified that since financial year had changed, the Procuring Entity was not in a position to access or delete what was previously in the system and being a fresh year, it cannot interfere with what was in the system. He indicated that what was uploaded by the Applicant was a google link with regard to attachment of their documentation and the google link requires a password to access the documents and as such the password can only be given from the Applicant's end and the Procuring Entity cannot access the back end to delete any of the uploaded documents.

76. When asked to clarify if it was only the Applicant's bid that was affected by close of the financial year, Mr. Faraji indicated that this would cut across all bids uploaded on the IFMIS portal.

77. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 12th July 2024 was due to expire on 2nd August 2024 and that the Board would communicate its decision on or before 2nd August 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

78. The Board has considered each of the parties' cases, documents, pleadings, written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination.

A. Whether the Board has jurisdiction to hear and determine the instant Request for Review;

In determining the first issue, the Board will make a determination on:

i Whether the instant Request for Review was filed within the stipulated statutory period of 14 days in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.

ii Whether the instant Request for Review as filed is fatally defective.

iii Whether the Applicant has locus standi before the Board.

Depending on the outcome of Issue A;

B. Whether the Applicant has substantiated its case with respect to the allegation that its bid document submitted in

- the subject tender through the IFMIS System was deleted by the Procuring Entity.**
- C. Whether the Applicant's tender was the lowest evaluated responsive tender to qualify for an award of the subject tender.**
- D. Whether the Procuring Entity conducted the tender opening in compliance with Section 78 of the Act and Regulation 57 of the Regulations 2020 and the Tender Document?**
- E. Whether the Letter of Notification dated 28th June 2024 issued to the Applicant in the subject tender met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020;**
- F. What orders should the Board grant in the circumstances?**

Whether the Board has jurisdiction to hear and determine the instant Request for Review;

79. It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before taking any further steps in the matter.

80. Black's Law Dictionary, *8th Edition*, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

81. The celebrated Court of Appeal decision in **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989] eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

82. The Supreme Court added its voice on the source of jurisdiction of a court or other decision making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

83. In the persuasive authority from the Supreme Court of Nigeria in the case of **State v Onagoruwa [1992] 2 NWLR 221 – 33 at 57 – 59** the Court held:

"Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common

place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based.”

84. In the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

“...So central and determinative is the issue of jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain....”

85. Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that:

“whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before

delving into the interrogation of the merits of issues that may be in controversy in a matter."

86. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

87. This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides:

"(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

88. Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

***"(1) The functions of the Review Board shall be—
(a) reviewing, hearing and determining tendering and asset disposal disputes; and
(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

89. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main

function being reviewing, hearing and determining tendering and asset disposal disputes.

90. The jurisdiction of the Board is provided for and also limited under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed. [Emphasis by the Board]

(2)

(3)

.....

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

91. Given the forgoing provisions of the Act, the Board is a creature of the Act and its jurisdiction flows from and is circumscribed under Sections 28 and 167 of the Act. It therefore follows, that an applicant who seeks to invoke the jurisdiction of the Board must do so within the four corners of the aforesaid provisions. Section 167(1) of the Act allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by

the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

92. Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specifically under Regulation 203 of Regulations 2020 read with the Fourteenth Schedule of Regulations 2020 prescribes the format of the request for review as follows:

***PART XV – ADMINISTRATIVE REVIEW OF
PROCUREMENT AND DISPOSAL PROCEEDINGS***

203. Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a)

(b)

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

(d)

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

(4)

93. Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of

the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

94. A reading of the above provisions shows that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made.

95. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a

contract is issued, the same is only complained of after notification to enter into a contract has been issued. We say so because there would be no need to provide under Regulation 203 (2)(c) of Regulations 2020 the three instances within which a Request for Review may be filed.

i Whether the instant Request for Review was filed within the stipulated statutory period of 14 days in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board;

96. The Interested Party contends at ground 3 of its Preliminary Objection dated 25th July 2024 that Ground 17(i)(ii)(iii)(iv)(v) of the Request for Review is time barred by virtue of Section 167(1) of the Act read with regulation 203(2)(c)(i) of Regulations 2020. During the hearing, counsel for the Applicant, Mr. Gachuba submitted that the complaint at Ground 17(i)(ii)(iii)(iv)(v) of the Request for Review relates to the subject tender's opening proceedings and not to the notification of intention to award proceedings and as such, ought to have been raised within the mandatory statutory period of 14 days from the date of occurrence of the breach by the Procuring Entity complained of.

97. The Respondent associated itself with submissions made on this issue by the Interested Party. Counsel for the Respondent, Mr. Faraji submitted that the Request for Review was time barred in view of Section 167(1) of the Act read with Regulation 203 of Regulations 2020

and argued that the 14-days statutory period within which the Applicant was required to institute the Request for Review lapsed on 11th July 2024.

98. In response, counsel for the Applicant, Mr. Musyoka submitted that that there was no formal notification of the subject tender opening and the only communication that the Applicant received pertaining the subject tender was received on 5th July 2024 being a clear indication that there was no communication from the Procuring Entity on when the subject tender's opening occurred. Counsel further submitted that the Applicant filed its Request for Review on 12th July 2024 which fell within the stipulated 14 days' timelines stipulated under the Act and Regulations 2020 and as such, the Board has jurisdiction to hear the instant Request for Review.

99. Having considered parties' pleadings, submissions, and the confidential documents submitted by the Respondent to the Board pursuant to section 67(3)(e) of the Act, the issue that calls for determination by this Board is what were the circumstances in the instant Request for Review that determine the period when the Applicant ought to have approached the Board?

100. We note that the Applicant's contention relates to the Procuring Entity's adherence to the requirements under Section 78 (4) of the Act as read with Regulation 57(7) and (8) of Regulations 2020 and ITT 27.1 of the Tender Document on attendance by bidders at the opening

of tenders. The Applicant contends that the Respondent did not invite it for the subject tender's opening as envisioned under the law and Tender Document and that it did not avail to it a link to enable it attend and observe the tender opening exercise leading it to be left in the dark on what transpired at opening of the subject tender. In our considered view, the Applicant ought to have challenged its lack of invitation to the tender opening of the subject tender by virtue of Regulation 203(2)(c)(i) of Regulations 2020 noting that this alleged breach of duty by the Respondent complained of took place before an award was made in the subject tender.

101. In computing time when the Applicant ought to have lodged the instant Request for Review, we are guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

"57. Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days

(which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.”

102. In computing time when the Applicant ought to have sought administrative review before the Board being aggrieved by the decision of the Procuring Entity not to invite it for the subject tender's opening, we note that it is not in contest that the subject tender was opened on 28th June 2024. As such, the 28th June 2024 is excluded pursuant to Section 57(a) of the IGPA being the date when the subject tender was opened and the alleged breach occurred. This means that 14 days started running from 29th June 2024 and lapsed on 12th July 2024. In essence, the Applicant had between 29th June 2024 and 12th July 2024 to seek administrative review before the Board with respect to its

allegation that the Respondent failed to invite it for the subject tender's opening.

103. In the circumstances, the Request for Review having been filed on 12th July 2024, we find and hold that the instant Request for Review was filed within the statutory timelines of 14 days prescribed under Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020. Accordingly, this ground of objection fails.

ii Whether the instant Request for Review as filed is fatally defective;

104. The Interested Party contends at ground 1 and 2 of its Preliminary Objection dated 25th July 2024 that the instant Request for Review as filed is fatally incompetent and defective since (a) it is drawn, executed and filed by Muriu Mungai & Company Advocates LLP contrary to Section 37(2) and 40 of the Companies Act 2015 and (b) the Affidavit/Statement in Support of the Request for Review is sworn by Abdullatif Abdulhakim Ahmed contrary to Section 37(2) and 40 of the Companies Act 2015 and Regulation 203(2)(b) of Regulations 2020. Mr. Gachuba submitted that no evidence was annexed to demonstrate that Muriu, Mungai & Company Advocates LLP was authorized by the Applicant's Board of Directors to execute the Request for Review on its behalf and that there was also not evidence that Abdullatif Abdulhakim Ahmed was authorized to sign the Statement in support

of the Request for Review. In support of his argument, counsel relied on the holding by the Board in *PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another* (hereinafter referred to as “the Toddy case”)

105. The Respondent associated itself with submissions made on this issue by the Interested Party.

106. In response, counsel for the Applicant, Mr. Musyoka, submitted that Regulation 208 of Regulations 2020 permits a party to be represented by an advocate or a representative of his choice at the hearing of a request for review and that Regulations 2020 provide the format in which a request for review ought to take. He pointed out that the Request for Review application indicated that it had appointed the firm of Muriu Mungai & Company Advocates to represent it and that the firms contact details and address were provided and further that the firm rightly signed the application on behalf of its client.

107. Mr. Musyoka further distinguished the circumstances in the instant Request for Review from those in the Toddy case pointing out that in the Toddy case, the application was made in the name of the Applicant but signed by the Applicant’s advocates while the instant Request for Review is clear from the face of the Application that the firm of Muriu Mungai & Co. Advocates have been duly appointed in making the

request on behalf of the Applicant which was the basis upon which they signed the said application.

108. Mr. Musyoka further reiterated that the Statement in support of the Request for Review was signed by the Applicant's director who was duly authorized and competent to swear the same. He argued that no Articles of Association had been brought to support the contention that no authority had been issued by the Applicant and in any event failure to file the authority is not fatal to proceedings herein. Further that it is sufficient for a deponent to state that he has authority, it is upon the party who contends that there is no authority to adduce evidence that no authority was provided. In support of his argument, counsel relied on the holding by Justice R. E. Aburili *in Kenya Agricultural and Livestock Research Organization v Okoko & another (Civil Appeal 36A of 2021) (2022) KEHC 3302 eKLR*.

109. The question of competence of a request for review lodged with the Board in light of failure by an Applicant to sign the same when represented by counsel is one that the Board has determined in numerous instances.

110. Regulation 208 permits a party to a request for review to be represented by an advocate or a representative of his choice at the hearing of a request for review and provides:

"Reg. 208 Representation by person of own choice

Any party to a request for review filed under regulation 203 shall, at the hearing thereof, be entitled to be represented by an advocate or a representative of his choice."

111. The above provision is in tandem with Order 9 of the Civil Procedure Rules, 2010 which provides for recognized agents and advocates who are duly appointed to act on behalf of others in court proceedings. Order 9 rule 7 provides for a Notice of appointment of advocate as follows:

"Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications."

112. The Board is also cognizant of the provisions of Section 26(2) of the Statutory Instruments Act which provides that:

"Where any form has been prescribed by or under any legislation, a document or statutory instrument which purports to be in such form shall not be void by reason of any deviation there from which does not affect the substance thereof or which is not calculated to mislead."

113. In the same breadth, Section 72 of the Interpretation and General Provisions Act provides that:

"Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead."

114. The Supreme Court weighed in on the import of the above provisions when faced with a question of non-conformity with a statutory form (*form 37C prescribed by the Election (General) Regulations, 2012*) in declaring results of a gubernatorial election in the case of **Alfred Nganga Mutua & 2 others v Wavinya Ndeti & another [2018] eKLR** (hereinafter referred to as "the Alfred Mutua case") where it held:

"In the light of the provisions of Section 72 of Interpretation and General Provisions Act and Section 26 of the Statutory Instruments Act, and in the absence of any challenge to the results posited on it, even if Regulation 87(2)(b)(iii) were not ultra vires, we agree with counsel for the appellants that the variation on Form 37C in this case was minor and inconsequential. Section 72 of the interpretation and General Provisions

Act and Section 26(2) of the Statutory Instruments Act, 2013, provide that "an instrument or document ... shall not be void by reason of a deviation" from the prescribed form if the deviation "... does not affect the substance of the instrument or document thereof or ... is not calculated to mislead."

115. The import of the above provisions under Section 26(2) of the Statutory Instruments Act and Section 72 of the Interpretation and General Provisions Act as well as the Alfred Mutua case is that where a form has been prescribed by a written law, a document or statutory instrument which purports to be in such form shall not be void due to a deviation which is not calculated to mislead or which subsequently does not affect the substance of that document or statutory instrument. As such, any deviation in a request for review application must not be substantive and ought not to be misleading.

116. Turning to the circumstances in the instant Request for Review, we note that the Applicant's Request for Review dated 11th July 2024 and filed on 12th July 2024 reads in part as follows:

"

REPUBLIC OF KENYA

IN THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW

BOARD

APPLICATION NO. _____ OF 2024

BETWEEN

ABDULHAKIM AHMED BAYUSUF AND SONS LIMITED

..... **APPLICANT**

-AND-

THE ACCOUNTING OFFICER, ROADS AND TRANSPORT

SERVICES COUNTY GOVERNMENT OF KILIFI

.....**RESPONDENT**

AND

S.S. MEHTA AND SONS LIMITED INTERESTED

PARTY

(Request to review the decision by the County Government of Kilifi (hereinafter referred to as "the Procuring Entity") in relation to the Notification of Regret dated 28th June 2024 in respect to the Tender Invitation No. RTPW/1496779-2/2023-2024: Proposed Upgrading to Bitumen Standards of Kizingo-Jacaranda Road Phase I in Watamu Ward).

REQUEST FOR REVIEW

ABDULHAKIM AHMED BAYUSUF AND SONS LIMITED having appointed the Firm of MURIU MUNGAI & CO. ADVOCATES LLP, MMC ARCHES, SPRING VALLEY CRESCENT, OFF PEPONI ROAD, WESTLANDS, P.O. BOX 75362-00200 NAIROBI. Tel: 020-

**2167301/2; 0725-585785, Email: litigation@mmcasafco.com
to represent it in this matter, HEREBY REQUESTS the Public
Procurement Administrative Board to review the abpve
mentioned decision on the following grounds, namely:**

.....
**BY THIS MEMORANDUM, the Applicant requests the Board for
orders that:**

.....
**DATED AT NAIROBI this _____11th ___ day of
_____July_____ 2024**

(SIGNED)

MURIU MUNGAI & CO ADVOCATES LLP

ADVOCATES FOR THE APPLICANT

FOR OFFICIAL USE ONLY

**Lodged with the Secretary, Public Procurement Administrative
Review Board on the 12th July 2024**

Signed _____ (SIGNED) _____

Board Secretary (STAMPED)

117. From the above Request for Review filed by the Applicant, we note that it (a) is made in the name of the Applicant and not its Advocate,

(b) indicates that the Applicant has appointed the firm of Muriu Mungai & Co. Advocates LLP to represent it in the instant proceedings indicating the said advocates address of service for purposes of the Request for Review, (c) sets out the request to review the subject tender while laying out the grounds for review and orders sought from the Board; (d) has been signed off by the Applicant's advocates on record Muriu Mungai & Co. Advocates LLP; (e) was lodged and received by the Board's Secretary on 12th July 2024 as evidenced by the signature endorsed Board's Secretary.

118. In **PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another** (hereinafter referred to as "the Toddy case") the Board was faced with circumstances similar to those in the instant Request for Review and held at pages 69 to 70 as follows

".....
Having perused the Applicant's Request for Review dated 1st February 2023 and filed on even date, we note that the same (a) indicates the name of the Applicant, its postal address, telephone number and email address at paragraph 1 of the Request for Review; (b) sets out the request to review the subject tender while laying out eight grounds for review and orders sought from the Board; (c) has been signed off by the Applicant's advocates on record being Migos-

Ogambo & Waudo Advocates; (d) was lodged and received by the Board's Secretary on 1st February 2023 as evidenced by the signature endorsed Board's Secretary. As such, the Applicant indicates that they are requesting the Board to review the decision of the Respondents but at the end of the Request for Review, the same is signed by their Advocate, Migos Ogamba & Waudo Advocates contrary to the provisions of Section 167(1). Regulation 203(1) and Fourteenth Schedule of Regulations 2020 and the form at page 140 of the blank Tender Document.

It would have been different if the Request for Review was by the Applicant's Advocates on behalf of the Applicant and signed by the Applicant's Advocates. However, the instant request for review was by the Applicant but signed by the Applicant's Advocates.

From the foregoing, we find that the instant Request for Review was signed off by the Applicant's Advocates despite the Request for Review being made in the name of the Applicant thus fatally defective and bad in law for not being in the prescribed form and having been signed by the Applicant's Advocates instead of the Applicant in accordance with the mandatory

requirements of Regulation 203(1) read with the Fourteenth Schedule of the Regulations 2020.

Accordingly, this ground of the 1st and 2nd Respondents' Notice of Preliminary Objection dated 6th February 2023 and filed on even date succeeds."

119. The Board's decision in the Toddy case was quashed by Justice Chigiti at the High Court in **Judicial Review No. E031 of 2023 Republic v Public Procurement Administrative Review Board & others Ex-Parte Toddy Civil Engineering Company Limited**. However, the decision of the High Court was appealed at the Court of Appeal in **Civil Appeal No. E295 of 2023 consolidated with Civil Appeal No. E296 of 2023 Lake Victoria North Water Works Development Agency v Toddy Civil Engineering Company Limited & others** and the Court of Appeal in its judgement delivered on 19th June 2023 upheld the Board's decision. As such the decision of the Board in the Toddy case is binding to date.

120. We note that the Applicant in the Toddy case was requesting the Board to review the decision of the Respondents yet the said request for review application was signed by its advocates. The Board pointed out and acknowledged that a request for review can be filed by an Applicant's Advocates, on behalf of the Applicant and signed by the Applicant's Advocates. However, the failure by the Applicant to provide its Advocates address of service for purposes of its Request for Review

and instead availing its own address yet the said advocates signed off the Request for Review was consequential and misleading.

121. Turning to the circumstances in the instant Request for Review, we note that the words **"having appointed the firm of Muriu Mungai & Co. Advocates LLP to represent it in this matter"** as laid out at paragraph 1 of the Applicant's Request for Review correlate to the Board's finding in the Toddy case where it established that a Request for Review can be instituted by an applicant's advocate on behalf of the applicant and signed by the applicant's advocates. We note that the instant Request for Review was filed by the Applicant's Advocates on behalf of the Applicant and was signed off by the Applicant's Advocates.

122. In the circumstances, we find that failure by the Applicant to sign the instant Request for Review and the same being signed by its advocates, does not render it fatally defective and bad in law thus the Request for Review as filed is competent.

123. On the issue of whether the Affidavit/Statement in Support of the Request for Review was sworn by Abdullatif Abdulhakim Ahmed contrary to Sections 37(2) and 40 of the Companies Act 2015 and Regulation 203(2)(b) of Regulations 2020, we note that Regulation 203(2)(b) of Regulation 2020 provides as follows:

"(2) The request referred to in paragraph (1) shall—

(a)

(b) be accompanied by such statements as the applicant considers necessary in support of its request

.....”

124. Regulations 2020 do not provide a format for a Statement in Support of a Request for Review. Despite this, in ordinary practice, Applicants file a request for review supported by a statement which is often made by a director or authorized representative of the Applicant. This Board differently constituted in **PPARB No. 34 of 2022 Dar Al-Handasah Consultants (Shair and Partners) in joint venture with Kurrent Technologoes Limited v Accounting Officer Kenya Pipeline Company Limited & another** held as follows with regard to the import of provisions under Regulation 203 (2)(b) of Regulations 2020:

“.....

It is the Board’s view that the use of the word ‘necessary’ in Regulation 203 (2)(b) of Regulations 2020 does not imply that an applicant has the discretion to decide whether a request for review should or should not be accompanied by a statement in support. It rather denotes that an applicant has the discretion to determine the contents of the statement it ought to file in support of a request for review application. This is in light of the fact that a statement in support of a request for review application provides the evidence necessary to support the grounds as raised in a request for review and ought

to be sworn and signed by an individual authorized to issue the said statement and possessed of the facts or the information that is deponed in the said statement in support of a request for review...."

125. In essence, a statement in support of a request for review ought to be made by an individual authorized to issue the same and one who possesses the facts and information contained therein.

126. Section 37 of the Companies Act No. 17 of 2025 provides for capacity of a company to execute documents. Section 37(2) of the Companies Act provides that:

"A document is validly executed by a company if it is signed on behalf of the company-
(a) by two authorized signatories; or
(b) by a director of the company in the presence of a witness who attests the signature."

127. In essence, for a company to be deemed as having validly executed a document, the said document ought to be signed on behalf of the company by either two authorized signatories or by a director of the company in the presence of a witness who attests the signature.

128. Turning to the circumstances in the instant Request for Review, we note that the Applicant filed on 12th July 2024 a Statement in Support of the Review Application which takes the form of an Affidavit and is

sworn at Nairobi on 11th July 2024 by Abdullatif Abdulhakim Ahmed in the presence of Kuria Njiinu Advocate & Commissioner for Oaths. We further note that Mr. Abdullatif Abdulhakim Ahmed depones at paragraph 1 that he is a Director at Abdulhakim Ahmed Bayusuf and Sons Limited and is duly authorized and competent to swear the affidavit. Having carefully scrutinized the confidential documents submitted by the Respondent pursuant to Section 67(3)(e) of the Act, we note that the Applicant at pages 154 and 155 of its original bid document submitted a CR12 indicating the names of its Directors amongst them being Mr. Abdullatif Abdulhakim Ahmed.

129. In view of the foregoing, we find that the Statement in Support of the Review Application was validly executed on behalf of the Applicant having been signed by the Applicant's director in the presence of an advocate who attested his signature.

iii Whether the Applicant has locus standi before the Board.

130. The Interested Party contends at ground 4 of its Preliminary Objection that the instant Request for Review is fatally incompetent since the Applicant did not demonstrate loss or damage suffered or it risks suffering from the Respondent's decision to award the subject tender.

131. Mr. Faraji, counsel for the Respondent, in support of this ground of objection submitted that the Applicant lacks *locus standi* having failed to demonstrate and plead loss and risk suffered as contemplated in Section 167(1) of the Act and that the Applicant took a commercial risk and cannot be perceived to claim loss associated with the tendering process.

132. On the part of the Applicant, Mr. Musyoka submitted that it is not in contest that the Applicant was a bidder in the subject tender and had a legitimate expectation of being successful and needed not to have pleaded and demonstrated that it has suffered loss and damage. Counsel pointed out that the Applicant had stated that it was greatly prejudiced since it was not invited to the tender opening and due to this omission by the Respondent, the Applicant was unable to ascertain transparency of the exercise and was therefore denied its legitimate expectation with regards to how the whole procurement process from tender opening to notification was conducted.

133. This Board is cognizant of the holding by the Court of Appeal in **James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR** (hereinafter referred to as "the James Oyondi case) where the Court of Appeal was called upon to render itself in an appeal challenging the decision of the High Court which held that the Board ought to have ruled that the Appellants had no locus standi before it as they had not demonstrated

that they had suffered loss or were likely to suffer loss. The Court of Appeal held as follows:

"That ought to dispose of this appeal but on the second issue as well, the learned Judge cannot be faulted. It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;

"(1) subject to the provisions of this part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."

It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every

candidate or tenderer who has a right to file for administrative review. Were that the case, the Board would be inundated by an avalanche of frivolous review applications. There is sound reason why only candidates or tenderers who have legitimate grievances may approach the Board. In the present case, it is common ground that the appellants were eliminated at the very preliminary stages of the procurement process, having failed to make it even to the evaluation stage. They therefore were, with respect, the kind of busy bodies that section 167(1) was designed of keep out. The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge.

[Emphasis]

134. In essence, the Court of Appeal held that in seeking an administrative review before the Board, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage due to the breach of a duty imposed on a procuring entity by the Act or Regulations 2020.

135. Having carefully perused the Request for Review dated 11th July 2024, we note that the Applicant pleaded at paragraph 17 as follows:

"17. The Applicant is aggrieved by the above determination/decision of the Respondent and wishes to challenge it on the following grounds:

....."

18. The Respondent's actions have greatly prejudiced the Applicant which amounts to a denial of the Applicant's rights and render the tender proceedings unfair."

136. Additionally, the Applicant pleaded at paragraph 24 of its Statement in Support of the Review Application as follows:

"That the Respondent's actions have greatly prejudiced the Applicant which amounts to denial of the Applicant's rights and render the tender proceedings unfair and not transparent."

137. In **PPARB Application No. 96 of 2024 Eastr Solutions Ltd v The Director General/Accounting Officer, Parliamentary Joint Services & Others**, this Board differently constituted considered a similar issue on the question of *locus standi* and held at paragraphs 130 to 133 of its Decision dated 11th December 2023 as follows

"130. The question that the Board is now called to answer is whether the Applicant has at the very least claimed that it has suffered or risks suffering loss or

damage due to the breach of duty imposed on the Procuring Entity by the Act or Regulations 2020 from its pleadings in the instant Request for Review to enable it establish whether the Applicant has locus standi.

131. We note that Black Laws Dictionary, 9th Edition defines the word 'aggrieved' as "(Of a person or entity) having legal rights that are adversely affected; having been harmed by an infringement of legal rights." Collins Dictionary defines 'aggrieved' as "having a grievance, wronged; injured in one's legal rights."

132. In view of the above definitions, it is our considered opinion that the word 'aggrieved' as pleaded at paragraphs 6 and 11 of the instant Request for Review denotes a claim by the Applicant of a grievance in the procurement proceedings of the subject tender emanating from a breach of duty imposed upon the Respondent by the Act and that its legal rights have been adversely affected as a result of the decision of the Procuring Entity in awarding the subject tender. This in itself is an express attempt by the Applicant to at least claim in its pleadings that it has suffered or risks suffering loss or damage as a result of breach of duty by the Procuring Entity and therefore meets the threshold

requirement for a tenderer intending to file a review before the Board in terms of Section 167(1) of the Act.

133. In the circumstances, we find and hold that the Applicant has the locus standi to seek an administrative review by the Board in the subject tender. Accordingly, this ground of opposition of the 1st Interested Party's Notice of Preliminary Objection dated 30th November 2023 and filed on 1st December 2023 fails."

138. Further, the High Court in **Kamau Murango v Attorney General & another; Cabinet Secretary Ministry of Water, Sanitation and Irrigation (Interested Party) [2022]**, in **Katiba Institute v Judicial Service Commission & 2 others; Kenya Magistrates and Judges Association & 2 others (Interested Parties) (Constitutional Petition E128 of 2022) [2022] KEHC 438 (KLR) (Constitutional and Human Rights) (3 June 2022) (Ruling)** and in **Okello & another v Assembly & 2 others; Shop & Deliver Limited t/a Betika & 7 others (Interested Party) (Constitutional Petition E010 of 2021) [2021] KEHC 94 (KLR) (20 September 2021) (Ruling)** defined **prejudice** as provided for by the "The Black's Law Dictionary 10th Edition" as "*Damage or detriment to one's legal rights or claims*"

139. In the same vein and in view of the foregoing, we find that the Applicant's claim that it is aggrieved by the decision of the Respondent

and greatly prejudiced by the actions of the Respondent denotes a claim by the Applicant of a grievance in the procurement proceedings of the subject tender emanating from a breach of duty imposed upon the Respondent by the Act and that its legal rights have been adversely affected as a result of the decision of the Procuring Entity in awarding the subject tender. This in itself is an express attempt by the Applicant to at least claim in its pleadings that it has suffered or risks suffering loss or damage as a result of breach of duty by the Procuring Entity and therefore meets the threshold requirement for a tenderer intending to file a review before the Board in terms of Section 167(1) of the Act.

140. In the circumstances, we find and hold that the Applicant has the *locus standi* to seek an administrative review by the Board in the subject tender. Accordingly, this ground of opposition fails.

141. In totality, the Board has jurisdiction to hear and determine the instant Request for Review and now proceeds to address the substantive issues framed for determination in the instant Request for Review.

Whether the Applicant has substantiated its case with respect to the allegation that its bid document submitted in the subject tender through the IFMIS System was deleted by the Procuring Entity.

142. The Applicant contends at Ground 17(ix) of the Request for Review that its bid has since been deleted from the IFMIS portal and is unavailable for reference. The Applicant further contends that deletion of the Applicant's bid contravenes the principle of transparency enshrined under Article 227 of the Constitution since the Applicant was denied an opportunity to monitor the active responses so as to see how other tenderers had quoted and how they had been evaluated.

143. During the hearing, counsel for the Applicant, Mr. Musyoka submitted that the Applicant's tender had been removed from the IFMIS platform by the Procuring Entity and that the Applicant could not have deleted its tender from the IFMIS platform since it has no protocols or rights to the system as to be able to delete its tender. He argued that no plausible explanation had been given as to why only the Applicant's bid was missing from the IFMIS platform and that it is only the Respondent who is capable of deleting the Applicant's bid raising a question of transparency of the entire procurement process in the subject tender.

144. On the part of the Interested Party, Mr. Gachuba submitted that the allegation that the Applicant's bid had been deleted from the IFMIS platform by the Procuring Entity was a very serious allegation involving the developers of the system or the administrators of the system that was used by the Respondent. Counsel further submitted that he had not seen any evidence in terms of either cybersecurity audit logs or

investigative reports annexed by the Applicant to demonstrate that its tender was deleted from the Respondent's portal and as such, there was nothing for the Board to review, hear and determine on this allegation.

145. On the part of the Respondent, Mr. Faraji urged the Board to take judicial notice of the fact that the government's financial year ends on 30th June and that the IFMIS System is a National Treasury System that guides an end to end procurement process and is managed by the National Treasury. Counsel submitted that at the close of the financial year, the system would be suspended and that through the intervention of the Council of Governors, the system would be reopened to enable county governments clean up and finish with any procuring business or payment. He further submitted that the Procuring Entity's only power with regard to the system entailed evaluation of bids and no other interference can emanate from it in as far as deletion of materials is concerned.

146. Counsel reiterated that the system having been suspended and reopened, that may have occasioned the slight lapse raised by the Applicant. He also clarified that since the financial year had changed, the Procuring Entity was not in a position to access or delete what was previously in the system and being a fresh year, it cannot interfere with what was in the system. He indicated that what was uploaded by the Applicant was a google link with regard to attachment of their

documentation and the google link requires a password to access the documents and that such password can only be given from the Applicant's end and the Procuring Entity cannot access the back end to delete any of the uploaded documents.

147. Counsel urged the Board to scrutinize the IFMIS system and look into the Applicant's allegation not only for this matter but for the betterment of performance of the IFMIS system and make appropriate recommendations to the National Treasury in view of the provisions under Section 9 of the Act.

148. It is trite law that he who alleges must prove. The Evidence Act is an Act of Parliament in Kenya that provides for the law of evidence and provides under Section 107, 108, 109 and 112 as follows:

"107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

111.....

112. Proof of special knowledge in civil proceedings

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

149. Our understanding of the aforementioned provisions of the Evidence Act is that (a) he who alleges must prove, (b) the burden of proof lies with the person who would fail if no evidence is given on either side, (c) the burden of proof may shift from the person who wishes a court to believe its existence to another person if provided by law, and (d) the burden of proving or disproving a fact is upon a person who has any fact especially within their knowledge in civil proceedings.

150. Courts have interpreted the above mentioned provisions of the Evidence Act. The Supreme Court of Kenya in **Petition No. 12 of 2019 Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR** (hereinafter referred to as Samson Gwer's case) held as follows with respect to the principle of burden of proof in civil claims:

"[47] It is a timeless rule of the common law tradition ^{3/4} Kenya's juristic heritage ^{3/4} and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the "balance of probability". Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of which the Court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part.

[48]

[49] Section 108 of the Evidence Act provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence,

unless it is provided by any law that the proof of that fact shall lie on any particular person."

[50] This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

"...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

[51] In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

[52]

[53] In spite of the commonplace that proof of "indirect discrimination" is difficult, the petitioners ought to have provided sufficient evidence before the Court, to enable it to make a determination. The 1st respondent, by a more positive scheme, went ahead to counter the bare

allegations. The petitioners failed, in this regard, to discharge their initial burden of proof.

.....

[64] The petitioners having failed to discharge their evidential burden, the plea of unfair process stood unproven, and there was no material before the Court to show unfair determination."

151. The Supreme Court in the Samson Gwer's case recognized that a party making an averment in validation of a claim is always the one to establish the veracity of such claim and that in civil claims, the standard of proof is on a balance of probability which requires evidence, on the basis of which a court can determine that it was more probable than not that a respondent bore responsibility, in whole or in part. The Supreme Court went further to hold that a claimant is under obligation to first discharge its burden of proof (initial burden of proof) before a respondent is invited to bear the evidential burden. Simply put, a claimant/applicant has to prove its case by laying substantial material before a court, and it is only after such proof has been made, that a respondent is called upon to disprove the claimant's/applicant's case and/or to prove the respondent's case. For clarity, the burden of proof is always static and rests on the claimant/applicant throughout a trial and it is only the evidential burden of proof which may shift to the respondent depending on the nature and effect of evidence adduced by the claimant/applicant.

152. We are also guided by the holding of the Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR** which stated:

"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."

153. Turning to the circumstances in the instant Request for Review, we note that the allegation by the Applicant pertains to deletion of its bid document by the Procuring Entity from the IFMIS portal that was used in the procurement process of the subject tender.

154. According to the National Treasury website <https://www.treasury.go.ke/ifmis/>, IFMIS Department, we note that IFMIS (Integrated Financial Management Information System) is an

initiative of the National Treasury and is an Oracle based Enterprise Resource Planning (ERP) being used at both the National and County levels of government with an aim of enhancing accountability and transparency in public procurement. It is a Public Finance Management (PFM) reform initiative to automate and streamline Government financial management processes and procedures. The portal provides a secure, Internet-based access point that enables direct and real-time access for responding to bid invitations and communicating directly with the GOK Procuring Units.

155. The foregoing aligns with the provisions of Section 7 (1) and (2)(c) of the Act which provides the role of the National Treasury in public procurement and asset disposal as follows:

(1) The National Treasury established under section 11 of the Public Finance Management Act, 2012, shall be responsible for public procurement and asset disposal policy formulation.

(2) In performance of its role under subsection (1), the National Treasury shall –

.....

(c) design and prescribe an efficient procurement management system for the national and county governments to ensure transparent procurement and asset disposal as contemplated by Article 227 of the Constitution:

Provided that the National Treasury shall prescribe through Regulations a system under this paragraph which operates, respects and promotes the distinctiveness of the national and county levels of government;

156. Connected to the IFMIS portal is an IFMIS P2P Kenya Supplier Portal Training Manual developed by the National Treasury (hereinafter referred to as "the Training Manual") which outlines how users will (a) access the Kenya Supplier portal and Home page, (b) Use the Orders tab and related functions, (c) Use the Finance tab and related functions, and (d) Use the Sourcing responsibility to respond to bid requests and communicate directly with the GOK procuring unit. Approved supplier users are registered at IFMIS for access to the portal and receive a User ID and Password login credentials via email from the designated IFMIS administrators and the email notification includes the appropriate link to the portal's login page for access.

157. According to pages 27 and 28 of the Training Manual, all portal supplier users can utilize the messaging capabilities to communicate directly with IFMIS Procuring Unit with questions or requests for more information during negotiations. Users receive updates when message responses are received from the IFMIS personnel and all active quote responses are listed in the 'Your Active and Draft Responses' section of the Home Page.

158. The Applicant contends that it prepared and submitted its electronic bid on 27th June 2024 vide quote 2120223 through the IFMIS portal as required. Ideally, an active quote would appear at the "Your Active and Draft Responses" section of the Home Page of the IFMIS portal. However, according to the Applicant's exhibit marked "AAA-6 Screenshot", the Applicant's quote 2120223 is not listed precipitating its assertion that its bid document was deleted by the Procuring Entity.

159. We do however note that no evidence has been adduced by the Applicant before the Board in support of its allegation that the Procuring Entity deleted the Applicant's bid document from the IFMIS portal. We therefore cannot assess whether or not the evidential burden of proof has shifted to the Respondent to disprove the Applicant's allegation that it deleted its bid from the IFMIS portal. We say so because we have established that users of the IFMIS portal are registered at IFMIS for access to the portal and receive a User ID and Password login credentials via email from the designated IFMIS administrators which is confidential to them and under their sole control. All other control functions and administrative rights are held by the National Treasury, and any communication pertaining to any of the active quote responses listed under the "Your Active and Draft Responses" section is raised by initiating an online discussion on the portal.

160. It therefore follows that the subject tender having been finalized as communicated to the Applicant on 9th July 2024 at 1:33 PM vide email

address supplier@treasury.go.ke as evidenced by the Applicant's email Print Out marked "AAA-5", it was no longer active for listing and viewing under the "Your Active and Draft Responses" section of the Home Page of the IFMIS portal and this should be the reason why it was not captured in the exhibit marked "AAA-6 Screenshot".

161. In view of the foregoing, we find that the Applicant has failed to substantiate its case with respect to the allegation that its bid document submitted in the subject tender through the IFMIS System was deleted by the Procuring Entity.

Whether the Procuring Entity conducted the tender opening in compliance with Section 78 of the Act and Regulation 57 of the Regulations 2020 and the Tender Document?

162. During the hearing, the Applicant took issue with the fact that it was not invited for the tender opening of the tenders that were submitted in response to the invitation to participate in the subject tender. According to the Applicant, the Procuring Entity did not comply with ITT 27.1 of the Tender Document which provided for the option of electronic tender opening. It was contended that though Regulation 57(8) of the Regulations 2020 provides that a Procuring Entity may allow for online viewing of the tender opening proceedings by the tenderers, the Procuring Entity did not provide an online link in its

Tender Data Sheet to allow tenderers to join the tender opening exercise.

163. Section 78(3) and (4) of the Act are instructive as to the time when tender opening happens and the persons permitted to participate in the tender opening:

78. Opening of tenders

(1) An accounting officer of a procuring entity shall appoint a tender opening committee specifically for the procurement in accordance with the following requirements and such other requirements as may be prescribed—

...

(2) ...

(3) Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline.

(4) Those submitting tenders or their representatives may attend the opening of tenders.

164. From Section 78 above, the Tender Opening Committee carries out tender opening immediately after the tender submission deadline and tenderers participating in a tender are free to attend the tender opening session, if they so wish to.

165. Regulation 57(8) and (9) of the Regulations 2020 equally affirms that the tender opening process shall be open to all invited tenderers who choose to attend and sign the tender opening register:

57. Opening of e-tenders

(1) ...

(2) ...

(3) ...

(7) All tenders shall be opened in the presence of all invited bidders who choose to attend and sign a record of attendance.

(8) Despite paragraph (7), a procuring entity may allow for online viewing of tender opening proceedings by tenderers.

(9) ...

(10) ...

166. Turning to the instant Request for Review, the Board has sighted ITT 27.1 under Section II- Tender Data Sheet at page 10 of the Tender Document and the same is hereinafter reproduced for ease of reference:

ITT Reference	PARTICULARS OF APPENDIX TO INSTRUCTIONS TO TENDERS
27.1	<i>The Tender Opening shall take place at the time and address for Opening provided below: County Government of Kilifi</i>

	<p><i>P.O. Box 519-80108</i></p> <p><i>Kilifi</i></p> <p><i>http://supplier.treasury.go.ke</i></p> <p><i>Date and time of tender opening is JUNE 28TH 2024 at 1000Hrs</i></p>

167. From the above, it is apparent that the Tender Document spelt out the address for tender opening as well as the time the exercise was scheduled to take place. The tender opening was scheduled to take place on 28th June 2024 at 10:00 a.m. at the offices of the County Government of Kilifi It is therefore apparent that the Procuring Entity communicated details of the date, time and place the Tender opening exercise was to take place.

168. In spite of the Applicant's allegation that they were not invited for the tender opening exercise, the Applicant did not lead any evidence to show that their representatives were sent away from the Procuring Entity's offices when they presented themselves at 10:00 a.m. on 28th June 2024 for purposes of the tender opening. Equally no evidence was led to show that, the Applicant sought to be supplied an online link to participate in the tender opening and that their request was rejected.

169. Absent any evidence by the Applicant of its attempts at accessing the venue of the Tender Opening exercise either physically or virtually, the Board cannot on the Applicant's allegation conclude that the Tender Opening exercise was not conducted in a transparent manner. It should be remembered that attending a tender opening session is a right available to all tenderers but a Tender Opening exercise cannot be faulted merely because no tenderer exercised their right to be present during the tender opening.

170. In view of the foregoing, the Board finds that the Procuring Entity conducted the tender opening exercise in compliance with Section 78 of the Act and Regulation 57 of the Regulations 2020.

Whether the Applicant's tender was the lowest evaluated responsive tender to qualify for an award of the subject tender.

171. The objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

"227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and

asset disposal shall be implemented and may provide for all or any of the following –

- a)***
- b)***
- c) and***
- d)”***

172. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

- (1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected.***

- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding***

regulation of fees chargeable for services rendered.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4)

173. Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires such evaluation criteria to be as objective and quantifiable to the extent possible and

to be applied in accordance with the procedures provided in a tender document.

174. We note that the Applicant was notified in a letter of Notification of Intention to Enter into a contract dated 28th June 2024 that its tender was unsuccessful in the subject tender as follows:

"Reason for Being unsuccessful was:

Your bid was higher than M/S S.S MEHTA AND SONS LIMITED"

175. It is not in contention that the Applicant does not contest the reason advanced by the Respondent for its disqualification. What the Applicant takes issue with is the manner and form in which the notification letter was issued.

176. The evaluation criteria of the bids submitted in the subject tender was laid out under Section III – Evaluation and Qualification Criteria of the Tender Document and page 28 of the Tender Document stipulated that the lowest evaluated bidder would be awarded the subject tender.

177. According to the GOK IFMIS Evaluation Matrix Report, bids were ranked at the Financial Evaluation stage as follows:

Quote No.	Bidder	Technical Score	Bid Total	Price Points	Total Points	Total Points Rank
2120041	Sebam Consultants Limited	70	74,987,345.37	25.81	95.81	3
2120223	Abdulhakim Ahmed Bayusuf and Sons Limited	69	67,501,486.92	28.67	97.67	2
2120188	S.S Mehta and Sons Limited	70	64,502,996.25	30.00	100.00	1

178. In essence, the bid by the Interested Party was ranked first being the lowest evaluated tender price at Kshs. 64,502,996.25 which qualified the Interested Party as the successful bidder having emerged as the lowest evaluated bidder.

179. We are therefore left with the inevitable conclusion and hereby find that the Applicant's bid was not the lowest evaluated responsive tender to qualify for award of the subject tender and that the Evaluation Committee evaluated the subject tender in accordance with the provisions of the Tender Document as read with Section 80(2) of the Act and Article 227(1) of the Constitution.

Whether the Letter of Notification dated 28th June 2024 issued to the Applicant in the subject tender met the threshold required in

Section 87(3) of the Act read with Regulation 82 of Regulations 2020;

180. The Applicant contends that the Procuring Entity did not comply with the provisions of Section 87(3) of the Act on notification of award in that the date of notification of rejection of its bid by the IFMIS system email was 4th July 2024 and this differs from the notification of intention to enter into a contract letter dated 28th June 2024. The Applicant contends that according to the IFMIS notification, the tender was awarded on 2nd July 2024 and this raises a question as to how its bid was rejected on a date which was prior to completion of the evaluation and award noting that its bid had been selected for further evaluation.

181. The Applicant further contends that the letter of Notification of Intention to Enter into a Contract was backdated to 28th June 2024 and did not comply with the format provided in the Tender Document nor invite it for debriefing.

182. We note that Section 87 of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and provides as follows:

“87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security."

183. Section 87 of the Act recognizes that notification of the outcome of evaluation of a tender is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation ought to be done simultaneously to the successful tenderer(s) and the unsuccessful tenderer(s). A disclosure of who is evaluated as the

successful tenderer is made to the unsuccessful tenderer with reasons thereof in the same notification of the outcome of evaluation.

184. The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

"82. Notification of intention to enter into a contract

- (1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.**
- (2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.**
- (3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act."**

185. In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying

the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Articles 227 and 232 of the Constitution. This means that all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

186. In **Judicial Review Miscellaneous Application No. 531 of 2015, Republic v Public Procurement Administrative Review Board & 2 others ExParte Akamai Creative Limited** (hereinafter referred to as "the Akamai Case") the High Court held as follows:

"In my view, Article 47 of the Constitution requires that parties to an administrative proceeding be furnished with the decision and the reasons thereof within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly, where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or

inaction may well be contrary to the spirit of Article 47 aforesaid"

187. From the above case, the Board observes that the High Court was basically expounding on one of the rules of natural justice as provided for in Article 47 (2) of the Constitution which provides:

"If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"

188. In essence, the rules of natural justice as provided for in Article 47 of the Constitution require that a procuring entity promptly notifies tenderers of the outcome of evaluation to afford an unsuccessful tenderer the opportunity to challenge such reasons if need be. Further, the Act does not require that an unsuccessful tenderer must seek clarification in order for the accounting officer to provide it with the outcome of evaluation or reasons leading to its disqualification in a tendering process.

189. We note that the letters of Notification of Intention to Enter into a Contract dated 28th June 2024 were not in the format set out at pages 120 to 122 of the Tender Document. Further, it is not clear how the said notification letters were dated 28th June 2024 yet according to the Applicant, it received an email notification on 4th July 2024 from IFMIS email that its quote had been shortlisted for the next phase of

evaluation and later in the day on 4th July 2024 it received another notification that its quote had been rejected. This is supported by (a) the Applicant's Email Print out marked AAA-4 dated 4th July 2024 and sent to the Applicant at 7:43 AM where it was informed that its bid had been shortlisted for the next phase of evaluation being the Commercial/Financial Evaluation and (b) the Applicant's Email Print out marked AAA-5 also dated 4th July 2024 and sent at 1:33 PM where it was informed that the award of the subject tender was made on 2nd July 2024 at 01:58 p.m. and its bid had been rejected.

190. Notably, the Interested Party in its letter dated 10th July 2024 confirming acceptance of award of the subject tender indicates that it received its Letter of Notification of Intention to Enter into a Contract dated 28th June 2024 on 10th July 2024 being a clear indication that bidders in the subject tender were not notified simultaneously of the outcome of evaluation of the subject tender.

191. In view of the foregoing, it is clear that there were discrepancies in the manner in which the letters of notification of award of the subject tender were issued to both successful and unsuccessful bidders and as such, we find that the Respondent's Letters of Notification of Intention to Enter into a Contract dated 28th June 2024 did not meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

What orders should the Board grant in the circumstances?

192. We have found that the Board has jurisdiction to hear and determine the instant Request for Review.

193. We have established that the Applicant failed to substantiate its case with respect to the allegation that its bid document submitted in the subject tender through the IFMIS System was deleted by the Procuring Entity.

194. We have also established that the Applicant's bid submitted in the subject tender was not the lowest evaluated responsive tender to qualify for award of the subject tender.

195. We have found that there were some discrepancies in the manner in which the letters of notification of intention to enter into a contract in the subject tender were issued to bidders and as such, the Letters of Notification of Intention to Enter into a Contract dated 28th June 2024 did not meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020. Consequently, the Board deems it fit and just to nullify the Letters of Notification of Intention to Enter into a Contract dated 28th June 2024 issued to both successful and unsuccessful bidders to enable the Respondent to simultaneously notify all bidders of the outcome of evaluation of the subject tender in accordance with Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

196. The upshot of our findings is that the instant Request for Review dated 11th July 2024 and filed on 12th July 2024 succeeds only to the extent that the Letter of Notification of Intention Enter into a Contract dated 28th June 2024 issued to both the successful and unsuccessful bidders did not meet the threshold required under Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

FINAL ORDERS

197. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 11th July 2024 and filed on 12th July 2024:

- A. The Interested Party's Preliminary Objection dated 25th July 2024 be and is hereby dismissed.**

- B. The Letter of Notification of Intention to Enter into a Contract dated 28rd June 2024 addressed to the Interested Party with respect to Tender No. RTPW/1496779-2/2023-2024 for Proposed Upgrading to Bitumen Standards of Kizingo – Jacaranda Road Phase I in Watamu Ward be and is hereby nullified and set aside.**

- C. The Letters of Notification of Intention to Enter into a Contract dated 28rd June 2024 addressed to the unsuccessful bidders including the Applicant with respect to Tender No. RTPW/1496779-2/2023-2024 for Proposed Upgrading to Bitumen Standards of Kizingo – Jacaranda Road Phase I in Watamu Ward be and are hereby nullified and set aside.**
- D. The Respondent is hereby directed to simultaneously issue both the successful and unsuccessful bidders with fresh Letters of Notification of Intention to Enter into a Contract with respect to Tender No. RTPW/1496779-2/2023-2024 for Proposed Upgrading to Bitumen Standards of Kizingo – Jacaranda Road Phase I in Watamu Ward in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 within three (3) days from the date hereof taking into consideration the Board’s findings herein.**
- E. Further to Order D above, the Respondent is hereby directed to proceed with the procurement proceedings for Tender No. RTPW/1496779-2/2023-2024 for Proposed Upgrading to Bitumen Standards of Kizingo – Jacaranda Road Phase I in Watamu Ward in accordance with**

provisions of the Act to their logical conclusion while strictly adhering to the Constitution, the Tender Document, the Act and Regulations 2020 and taking into consideration the findings of this Board in this Request for Review.

F. In view of our findings above, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 2nd Day of August 2024.



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PANEL CHAIRPERSON

PPARB



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SECRETARY

PPARB

