

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 67/2024 OF 17TH JULY 2024

BETWEEN

ATTAIN ENTERPRISE SOLUTIONS LIMITED 1ST APPLICANT

CITIMAX TECHNOLOGIES LIMITED 2ND APPLICANT

AND

CHIEF ACCOUNTING OFFICER,

COAST WATER WORKS DEVELOPMENT AGENCY RESPONDENT

SMART PEOPLE AFRICA LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer, Coast Water Works Development Agency in relation to Tender No. CWWDA/AFD/G1/2023 for Supply, Installation, Implementation & Support of an Integrated Web-Based Enterprise Resource Planning System (ERP), Electronic Document Management System (EDMS) and Computers

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb, I.P - Chairperson
2. Dr. Susan Mambo - Member
3. Mr. Daniel Langat - Member



Sanitation and Irrigation invited eligible and qualified bidders for procurement of Tender No. CWWDA/AFD/G1/2023 for Supply, Installation, Implementation & Support of an Integrated Web-Based Enterprise Resource Planning System (ERP), Electronic Document Management System (EDMS) and Computers (hereinafter referred to as the "subject tender") which was in three (3) Lots. Tendering was conducted through International Competitive Procurement using a Standard for Bids as specified in the Guidelines for the Procurement of AFD-Financed Contracts in Foreign Countries published in October 2019.

2. The invitation of the subject was by way of an advertisement on 10th October 2023 on My Gov portal, the Standard Newspaper, the Procuring Entity's website www.cwwda.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. The tender's submission deadline was scheduled on 5th December 2023 at 1200 hrs.

Submission of Tenders and Tender Opening

3. According to the Minutes of the subject tender's opening signed by members of the Tender Opening Committee on 5th December 2023 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents

furnished upon 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'), a total of twenty-eight (28) tenders were submitted in response to the subject tender. The twenty-eight (28) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1.	Brisk Solutions Ltd
2.	Panache Technohub Ltd
3.	Agile Business Solutions Ltd
4.	Carrel Technologies Ltd
5.	MFI Document Solutions Ltd
6.	Plan & Trend EA Ltd JV Prime Telecoms Ltd
7.	Qarandeer Limited
8.	Appkings Solutions Ltd
9.	Softcom Business Solutions Ltd
10.	Smart People Africa Ltd
11.	Iansoft Technologies Ltd
12.	Unimax Company Ltd
13.	Pinnacle Integrated Technologies Ltd
14.	Systems Reengineered Ltd

15.	Ndege Virtual Brain Ltd
16.	Kobby Technologies Ltd
17.	Visible General Supplier Ltd
18.	Afrotick Holdings Ltd
19.	Counterhouse Consultants Ltd JV Computer Revolution Africa Group Ltd
20.	Soft Consult Limited
21.	Sanabil General Suppliers
22.	Coseke Kenya Limited
23.	Once Syn Limited
24.	Attain Enterprise Solutions Ltd JV Skyplus Technologies Africa Ltd
25.	Techsavanna Company Ltd JV Ostatech Limited
26.	Attain Enterprise Ltd JV Citimax Technologies Ltd
27.	Techbiz Infotech
28.	Specicom Technologies Ltd

Evaluation of Tenders

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of the twenty-eight (28) tenders as captured in a Bid Evaluation Report and Recommendation for Award of Contract for the subject tender signed by members of the Evaluation Committee on 24th June 2024 (hereinafter referred to as the "Evaluation Report") in the following stages:
- i Preliminary Evaluation;

- ii Detailed Examination;
- iii Post Qualification Examination of Bids

Preliminary Evaluation

5. The Evaluation Committee was required to examine tenders for completeness as per the requirements of Clause 11.1 of the Instructions to Bidders. All bids were subjected to preliminary evaluation and comparison of technical specifications.
6. At the end of evaluation at this stage (a) under Lot 1, four (4) tenders were determined responsive while fourteen (14) tenders were determined non-responsive, (b) under Lot 2, four (4) tenders were determined responsive while seven (7) tenders were determined non-responsive and (c) under Lot 3, five (5) tenders were determined responsive while four (4) tenders were determined non-responsive.
7. The responsive tenders proceeded for further evaluation at the Detailed Examination stage.

Detailed Examination

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders for computation errors and rank the tenders so as to determine the lowest evaluated bids. At the end of evaluation at this stage, tenders were ranked as follows:

Lot 1: Supply, Installation, Implementation & Support of an Integrated Web-Based Enterprise Resource Planning System (ERP) for CWWDA with Associated Hardware and Software

Bidder No	Bidder Name	Total Comparison price	Ranking
Bidder 5	M/s Mfi Document Solutions Ltd	Kshs. 148,375,890.40	3
Bidder 10	M/s Smart People Africa Ltd	Kshs. 123,208,192.33	2
Bidder 19	M/s Counterhouse Consultants Ltd. JV Computer Revolution Africa Group Ltd.	Kshs. 296,923,649.1299*	4
Bidder 20	M/s Soft Consult Limited	Kshs. 79,836,316.00	1

Lot 2: Supply, Installation, and Implementation of an Electronic Document Management System (EDMS) with Associated Hardware and Software

Bidder No	Bidder Name	Total Comparison price	Ranking
Bidder 5	M/s Mfi Document Solutions Ltd	Kshs. 31,936,029.35	2
Bidder 9	M/s Softcom Business Solutions Ltd	Kshs. 36,967,750.00	3
Bidder 23	M/s Once Sync Limited	Kshs. 37,890,000.00	4
Bidder 22	M/s Coseke Kenya Ltd	Kshs. 21,888,620	1

Lot 3: Supply and delivery of laptops and all in one desktops and laptops

Bidder No	Bidder Name	Total Comparison price	Ranking
Bidder 7	M/s Qarandeer Limited	Kshs. 19,538,000.00	1
Bidder 10	M/s Smart People Africa Ltd	Kshs. 37,357,333.79	5
Bidder 16	M/s Kobby Technologies Ltd	Kshs. 27,318,000.00	3
Bidder 18	M/s Afrotick Holdings Ltd	Kshs. 27,405,000.00	4
Bidder 28	M/s Specicom Technologies Ltd	Kshs. 20,931,918.26	2

Post Qualification Examination of Bids

9. At this stage of evaluation, the Evaluation Committee was required to examine the lowest evaluated responsive bidder using the criteria set out under ITB 36 of Section III- Evaluation and Qualification Criteria and was required to check for Eligibility, Historical Contract Non-Performance, Financial Situation and Performance, and Experience.

10. At the end of evaluation at this stage, (a) under Lot 1 the lowest evaluated responsive bidder, M/s Soft Consult Limited was subjected to the post qualification and failed to meet the minimum qualification criteria for average turnover and experience thus considered non-

responsive and not proposed for award. Subsequently, the second lowest evaluated bidder, M/s Smart People Africa Ltd was subjected to the post qualification, considered responsive and proposed for award, (b) under Lot 2, the lowest evaluated responsive bidder, M/s Coseke Kenya Ltd was subjected to the post qualification, considered responsive and proposed for award, and (c) under Lot 3, the lowest evaluated responsive bidder, M/s Qarandeer Limited was subjected to the post qualification, considered responsive and proposed for award.

Evaluation Committee's Recommendation

11. The Evaluation Committee recommended award of the subject tender as follows:

"6.1 Lot 1 – Supply, Installation, Implementation & Support of an Integrated Web-Based Enterprise Resource Planning System (ERP) for CWWDA with Associated Hardware and Software

*It is therefore recommended that the contract for Supply, Installation, Implementation & Support of an Integrated Web-Based Enterprise Resource Planning System (ERP) for CWWDA with Associated Hardware and Software be awarded to **M/s Smart People Africa Ltd** at a contract price of **Kshs. 123,208,192.33 (One Hundred Twenty-Three Million Two Hundred and Eight Thousand One Hundred and Ninety-Two and Thirty Three Cents only)***



6.2 Lot 2 – Supply, Installation, and Implementation of an Electronic Document Management System (EDMS) with Associated Hardware and Software

*It is therefore recommended that the contract for Supply, Installation, and Implementation of an Electronic Document Management System (EDMS) with Associated Hardware and Software be awarded to **M/s Coseke Kenya Ltd** at a contract price of **Kshs. 21,888,620 (Twenty-One Million Eight Hundred Eighty-Eight Thousand Six Hundred and Twenty only)***

6.3 Lot 3 – Supply and delivery of laptops and all in one desktops and laptops

*It is therefore recommended that the contract for Supply and delivery of laptops and all in one desktops and laptops be awarded to **M/s Qarandeer Limited** at a contract price of **Kshs. 19,538,000 (Nineteen Million Five Hundred Thirty-Eight Thousand only)***

Professional Opinion

12. In a Professional Opinion dated 25th June 2024 (hereinafter referred to as the "Professional Opinion"), the Manager Supply Chain Management, Mr. Stanslus Jira, 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 as recommended by the Evaluation Committee hereinabove.

13. Thereafter, the Professional Opinion was approved by the Ag. Chief Executive Officer, Mr. Martin Tsuma, the Respondent herein, on 26th June 2024.

Notification to Tenderers

14. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 9th July 2024.

REQUEST FOR REVIEW NO. 67 OF 2024

15. On 17th July 2024, Attain Enterprise Solutions Limited and Citimax Technologies Limited, the 1st and 2nd Applicants herein respectively filed a Request for Review dated 16th July 2024 together with a Statement in Support of the Request for Review dated 16th July 2024 and signed by Thomas Kerioh, the 1st Applicant's Managing Director, (hereinafter referred to as the 'instant Request for Review') through Ondieki Mogambi & Associates Advocates seeking the following orders from the Board in verbatim:

a) Compelling the Procuring entity to supply and or make available to the board, the Applicants bid/submitted tender document for purposes of confirming that indeed the Applicants' tender was responsive in line with Section 79 of the PPAD Act as far as the tender in question is concerned.

b) Directing the Respondents to award the Applicant the tender as they were the lowest bidders.

c) Awarding costs of the review to the Applicant.

d) Any other relief that the Review Board deems fit to grant under the circumstances.

16. In a Notification of Appeal and a letter dated 17th 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 17th July 2024.

17. On 22nd July 2024, the Respondent filed through Judith Leli Advocate a Respondent's Notice of Preliminary Objection dated 22nd July 2024, a Respondent's Memorandum of Response dated 22nd July 2024, a

Respondent's Affidavit sworn on 22nd July 2024 by Eng. Martin Tsuma, the Ag. Chief Executive Officer and Respondent herein together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

18. *Vide* email dated 25th 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.
19. On 25th July 2024, the Interested Party filed through Mutanda Law Advocates a Notice of Appointment dated 23rd July 2024, a Notice of Preliminary Objection dated 23rd July 2024, an Interested Party's Response to the Request for Review dated 23rd July 2024, and an Interested Party's Replying Affidavit sworn on 24th July 2024 by Stephen Ndiragu, its Director.
20. *Vide* a Hearing Notice dated 26th 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 31st July 2024 at 11.00 a.m., through the link availed in the said Hearing Notice.

21. On 31st July 2024, the Interested Party filed through its Advocates Written Submissions dated 31st July 2024.
22. At the hearing of the instant Request for Review on 31st July 2024, the Board read out the pleadings filed by parties in the matter. Counsel for the Applicant, Mr. Mogambi indicated that he hadn't been served with the complete response by the Respondent. He sought to be granted leave to file and serve his written submissions noting that the Interested Party had already served its written submissions and indicated that the matter could be canvassed by way of written submissions. On his part, counsel for the Respondent, Mr. Mugambi indicated that he would proceed to serve the Respondent's complete response to the Applicant and was agreeable to canvassing the matter by way of written submissions. On his part, Mr. Mutanda indicated that he was agreeable to canvassing the matter by way of written submissions.
23. Having considered parties' submissions, the Board directed the Respondent to serve the Applicant with its complete response filed in the instant Request for Review. The Board further directed that the instant Request for Review would be canvassed by way of written submissions in the interest of time and directed (a) the Applicant to file and serve its written submissions by close of business at 5.00 p.m. on 31st July 2024, (b) the Respondent to file and serve its written submissions by 11.00 a.m. on 1st August 2024, and (c) the Interested Party to file and serve its supplementary written submissions by 5.00 p.m. on 1st August 2024 if need be. Parties were cautioned to adhere

to the strict timelines as specified in the Board's directions and that any pleading filed outside the stipulated timelines would be struck out since the Board would rely strictly on the documentation filed before it in rendering its decision.

24. Parties were also informed that the instant Request for Review having been filed on 17th July 2024 was due to expire on 6th August 2024 and that the Board would communicate its decision on or before the 6th August 2024 to all parties to the Request for Review via email.

25. On 1st August 2024, the Applicant filed through its advocates Written Submissions dated 1st August 2024.

26. On 1st August 2024, the Respondent filed through its advocates Written Submissions dated 31st July 2024.

27. On 1st August 2024, the Interested Party filed through its advocates Interested Party's Supplementary Written Submissions dated 1st August 2024.

PARTIES' SUBMISSIONS

Applicants' case

28. In their submissions, the Applicants relied on the Request for Review dated 16th July 2024 together with a Statement in Support of the



Request for Review dated 16th July 2024 and signed by Thomas Kerioh and Written Submissions dated 1st August 2024 filed before the Board in the instant Request for Review.

29. On whether the Applicants lack *locus standi* to file the instant Request for Review jointly, the Applicants contends that they have *locus standi* to file the Request for Review application and made reference to Section 2 and 167 (1) of the Act. It is the Applicants case that from their tender documents, it is evident that they submitted their tender in a joint partnership and as such, fall within the meaning of a tenderer and by jointly participating in the tendering process, they do have the *locus standi* to lodge the request for review jointly.
30. The Applicants submitted that they instructed Thomas Kerioh to sign the Statement in Support of the Request for Review on their behalf and at paragraph 2 of the said statement, it is evident that he indicated that he has authority from the Applicants herein to make and sign the statement on their behalf.
31. The Applicants further submitted that a company is an artificial person created in law and cannot act on its own but through a natural person to whom authority is given to act on their behalf. In the circumstances herein, the Applicants aver that being companies who gave authority to Thomas Kerio to act on their behalf as indicated in the Statement in Support of the Request for Review is sufficient proof that he was acting on their behalf.

32. On whether the Board lacks jurisdiction to hear the instant Request for Review for being filed out of time, it is the Applicants submission that the Board has jurisdiction to hear the Request for Review as filed in view of the provisions under Section 167(1) of the Act vis-à-vis the facts that form the subject of review as far as the 14 days are concerned.
33. The Applicants contend that there were two notifications of award that were made and sent to tenderers including the Applicants herein and that the first was sent on 27th June 2024 while the other was sent on 9th July 2024. It is the Applicant's argument that computation of time ought to start from the later notification of award as it goes without saying that the latter notification of award was the correct one and the 14 days' statutory period lapsed on 23rd July 2024.
34. The Applicants further contend that in any event, the review application was sent for filing on 16th July 2024 to the Board's email through the Applicant's counsel's advocates email since the 16th July 2024 was marred with violent Gen Z demonstrations and it was impossible for the firm's representative to visit the Board's registry physically though the filing fees was assessed and payment made on 17th July 2024 thus the receiving stamp of 17th July 2024 on the instant Request for Review.

35. On whether the Board lacks jurisdiction to hear the instant Request for Review by virtue of Section 4(2)(f) as read with Section 6(1) of the Act, the Applicant submitted that the subject tender does not fall within the ambit of the exempted provisions under Section 4 (2)(f) of the Act and this is because the guidelines for the procurement of AFD-financed contracts in foreign countries indicates that the said guidelines shall be used in conjunction with the laws of the countries to which the loans/finances are channeled. The Applicants contend that in any event, any decision made by the Board will not impose the Kenyan law into the foreign (French organization) entity which lent the money as the said organization (AFD) is not directly involved in the procurement process noting that its role was just to lend the money and nothing further. In support of their argument, the Applicants made reference to the holding in *Republic v Public Procurement Administrative Review Board Ex-Parte Geothermal Development Company Limited & another [2017] eKLR*.

36. On whether the Applicants have made out a case to warrant issuance of orders sought, the Applicants contend that all the information that was said to have not been provided in their bid document being (a) the requirements no. 3.4.1.20 -3.4.1.239 in section 3.4.1 Financial Management, (b) the requirement no. 3.4.2.1-3.4.2.7 239 in section 3.4.2 Project Management Administration, (c) requirements no. 3.4.3.1 - 3.4.3.53 in section 3.4.3 Human Resources Management and Payroll, and (d) the requirements no. 3.4.4.17 – 3.4.4.204 in section 3.3.4 procurement supply chain management process requirements

was provided at the point of submission of their bid in the subject tender.

37. The Applicants pointed out that instead of the Respondent annexing the Applicants' full document to the response in order to discredit the Applicant's position that the said information was indeed provided, he chose to discredit the tender document that was submitted by the Applicants before the Board marked as TK-1 and attach irrelevant documents. The Applicants pressed on that what they wanted is evidence that indeed that information was missing and that is why they were disqualified in the subject tender and if indeed the Respondent had nothing to hide, he should have annexed a copy of the Applicant's submitted tender document as evidence that the information was missing.

38. The Applicants submitted that all the elements spelt out under Article 227 of the Constitution were missing in the Procuring Entity's procurement process in the subject tender to which the Applicants have sought review.

39. The Applicant urged the Board to allow the instant Request for Review as prayed with costs and to dismiss the Respondent's and Interested Party's preliminary objections for lacking in merit.

Respondent's case

40. In his submissions, the Respondent relied on the Respondent's Notice of Preliminary Objection dated 22nd July 2024, the Respondent's Memorandum of Response dated 22nd July 2024, the Respondent's Affidavit sworn on 22nd July 2024 by Eng. Martin Tsuma, the Ag. Chief Executive Officer and Written Submissions dated 31st July 2024 filed before the Board in the instant Request for Review together with the confidential documents concerning the subject tender submitted to the Board pursuant to Section 67(3)(e) of the Act.
41. With regard to its preliminary objection contesting the jurisdiction of the Board to hear the instant Request for Review, the Respondent submitted that the preliminary objection was based on Clauses 1 and 3 of the Invitation for Bids read alongside sections 4 (2) (f) and 6 (1) of the Act No and the Request for Review as filed being time barred by virtue of section 167 (1) of the Act.
42. The Respondent submitted that Clause 1 of the Invitation for Bids indicated that the Respondent had received funds from *Agence Francaise de Development* towards the cost of improvement of drinking water and sanitation system in Mombasa - Mwache project and it intended to apply part of the funds to payments under the contract for Supply, Upgrade, Installation, Implementation & Support of an Integrated Web-Based Enterprise Resource Planning System (ERP) and Enterprise Document Management System (EDMS) both with Associated Hardware and Soft-wares. Further, that Clause 3 of

the Invitation for Bids provided that bidding would be conducted through international competitive procurement using a Standard for Bids as specified in the Guidelines for the Procurement of AFD - Financed Contracts in Foreign Countries published in October 2019 (Procurement Regulations).

43. The Respondent contends that the procurement proceedings under review were made under a bilateral agreement between the Government of Kenya and *Agence Francaise de Development* which is a foreign agency and by virtue of sections 4 (2) (f) and 6 (1) of the Act, the procurement proceedings are exempted from the application of the Act and therefore the Board is not clothed with jurisdiction to entertain this matter.

44. The Respondent referred the Board to the holding in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696* and submitted that courts and other decision making bodies can only act in cases where they have jurisdiction. He submitted that the Board is a creature of Section 28 of the Act and is guided by the provisions of the Act.

45. It is the Applicant's case that Section 4 of the Act provides instances when the provisions of the Act come into play and subsection (2) provides instances when the provisions of the Act do not apply while subsection (f) exempts procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya

and any other foreign government agency, entity or multilateral agency from the provisions of the Act.

46. The Respondent submits that Section 6(1) of the Act in turn provides that subject to the Constitution, where any provision of the Act conflicts with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is a party, the terms of the treaty or agreement shall prevail.

47. In support of his case, the Respondent placed reliance on the holding by Justice Nyamweya in *Republic v Public Procurement Administrative Review Board & 2 others Ex parte Kenya Power & Lighting Company (2019) eKLR* and argued that in the circumstances, the loan agreement between the Government of Kenya and *Agence Francaise de Development* is a bilateral agreement and the Respondent is an agent of the Republic of Kenya as it is the implementing entity of the project described in the loan agreement and the subject tender being part of the project described in the loan agreement and which was to be financed out of the proceeds of the funds extended by *Agence Francaise de Development* to the Republic of Kenya is a procurement under a bilateral agreement.

48. The Respondent submitted that the Invitation for Bids categorically stated that the procurement was to be undertaken using a Standard for Bids as specified in the Guidelines for the Procurement of AFD - Financed Contracts in Foreign Countries published in October 2019

(Procurement Regulations) and having submitted their bid pursuant to the Invitation for Bids, the Applicants were well aware of the effect of the ouster of the Act by the clauses thereto. The Respondent referred the Board to the holding in *PPARB Application No. 76 of 2022 Smart People Africa Limited v Tana Water Works, Development Agency & 2 Others* and *PPARB Application No. 88 of 2022 Earthview Management Limited v The Accounting Officer, Central Rift Valley Water Works Development Agency & 2 Others*.

49. On the issue of whether the Request for Review as filed is time barred, the Respondent referred to the provisions under Section 167(1) of the Act and submitted that the Procuring Entity's Chief Officer wrote to all tenderers informing them of the successful tenderers on 27th June 2024.

50. The Respondent further submitted that the Applicants filed the Request for Review on 17th July 2024 which was twenty (20) days after the notification of award and this was clearly outside the stipulated statutory period of 14 days hence time barred. The Respondent urged the Board to down its tools and strike out the instant Request for Review for want of jurisdiction.

51. With regard to the substantive issues raised in the instant Request for Review, the Respondent submitted that the Applicants bid was non-responsive since it omitted and did not respond to over 400 mandatory and technical requirements in the Financial Management, Project

Management, Human Resource and payroll, and Procurement Supply Chain and these requirements that were not met had been listed in the Respondent's Memorandum of Response.

52. The Respondent further submitted that the original bid document that was submitted by the Applicant was paginated and signed on every page and that the copy of the bid document that the Applicant attached to its review application is not what was submitted by the Applicant to Respondent in that they have inserted extra pages that were not in the original document that was considered. The Respondent indicated that it had provided the original bid document presented by the Applicant to the Board and that the action by the Applicant of submitting a copy of the bid document that was not originally submitted to the Respondent in the subject tender is sharp practice and as such, the Board ought to strike out the copy of the bid document attached to the instant Request for Review.

53. The Respondent submitted that in any event, the bid submitted by the Applicant breached material deviations, reservations, or omissions which if accepted would unfairly affect the competitive position of other bidders who presented substantially responsive bids.

54. The Respondent urged the Board to dismiss the instant Request for Review with costs.

Interested Party's submissions

55. In its submissions, the Interested Party relied on its Notice of Preliminary Objection dated 23rd July 2024, the Interested Party's Response to the Request for Review dated 23rd July 2024, Interested Party's Replying Affidavit sworn on 24th July 2024 by Stephen Ndiragu, its Director, Written Submissions dated 31st July 2024, and Supplementary Written Submissions dated 1st August 2024 filed before the Board in the instant Request for Review.

56. On whether the 1st and 2nd Applicants have locus to institute the instant Request for Review, it is the Interested Party's case that the Applicants lack locus on account of the fact that the two companies are distinctly separate entities recognized as juristic persons by virtue of the Companies Act and the legal principle in the case of *SALOMON & CO LTD v SALOMON [1897] A.C. 22 H.L*

57. The Interested Party argued that the instant Request for Review ought to have been filed with two separate Statements in Support of the Request for Review or proof of authority to show that Mr. Thomas Kerioh had been authorized by both companies to sign and file the Statement in Support of the Request for Review dated 16th July 2024. It further submitted that pleading authority to act on behalf of a party is not enough and evidence has to be adduced in the form of a resolution authorizing him to act on behalf of all parties.

58. The Interested Party submitted that it was common ground that no such authorization had been adduced as evidence and consequently, the instant Request for Review as filed is fatally defective and ought to be struck out. In support of its argument, the Interested Party relied on the holding by Justice Ngaah in *Republic v Public Procurement Administrative Review Board Ex parte ADK Technologies Limited in Consortium with Transnational Computer Technologies Limited; Principal Secretary National Treasury and Planning & 2 others (Interested Parties) [2021] eKLR*.
59. On whether the instant Request for Review as filed is time barred, the Interested Party submitted that the review having been filed on 17th July 2024 was filed outside the mandatory 14 days stipulated under Section 167(1) of the Act as the Notification of Intention to Award was communicated on 27th June 2024 and the standstill period lapsed on 12th July 2024 having been unlawfully extended to 16th July 2024 at midnight.
60. The Interested Party argued that even if the Respondent had power to extend the standstill period, the same lapsed on 16th July 2024 and the Request for Review having been filed on 17th July 2024 is time barred as the last day of filing the response was 12th July 2024 thus depriving the Board of jurisdiction to hear and determine the matter.
61. On the source of the Board's jurisdiction, the Interested Party referred to the holdings in *Samuel Kamau Macharia & Another vs. Kenya*

Commercial Bank Limited & others (2012) eKLR; Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1; Jamal Salim v Yusuf Abdulahi Abdi & another Civil Appeal No. 103 of 2016 [2018] eKLR; Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577; Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR; Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR, and Republic vs Public Procurement Administrative Review Board & 2 Others Ex-Parte Numerical Machining Complex Limited, (2016) eKLR.

62. In determining when time starts to run, the Interested Party submitted that pursuant to Section 167(1) of the Act, time starts to run from the date of notification of award or the date of occurrence of the alleged breach at any stage of the procurement process as was held in *Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR*. The Interested Party further submitted that pursuant to Regulation 203(2)(c) of Regulations 2020, an aggrieved party in a procurement process is entitled to institute review proceedings before the Board within fourteen (14) 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 PPAD Act; or (iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder and relied on the holding by the English Court of Appeal in *SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156* wherein while

applying the decision of the *European Court of Justice in Uniplex (UK) Ltd vs NHS Business Services Authority (2010) 2 CMLR 47* extensively discussed when time starts to run with respect to a breach in procurement proceedings.

63. The Interested Party submitted that in applying the test of discoverability, the issues raised by the Applicants having been discovered or ought to have been reasonably within the Applicant's knowledge on 27th June 2024 cannot be brought before the Board on 17th July 2024 which after lapse of the 14 statutory day period and after the stipulated standstill period lapsed on 12th and 16th July 2024.

64. The Interested Party further submitted that the Board has a registry which assesses filing fees and once the fees is paid, the document is stamped and deemed to have been duly filed on the day that the assessed filing fees is paid. According to the Interested Party, the Request for Review application having been sent via email on 16th July 2024 and assessed on 17th July 2024 and payment made thereafter was duly filed on 17th July 2024. It pressed on that if the Applicant intended to file the Request for Review on 16th July 2024 via email, it ought to have followed up to ensure that filing fees was assessed on the same day and paid on the same day. In support of its argument, reference was made on the decision by the Court of Appeal in *Arale v Independent Electoral and Boundaries Commission & 4 others (Election Petition Appeal E013 of 2023) [2023] KECA 1045 (KLR) (28 July 2023) (Judgment)*.

65. The Interested Party further submitted that the instant Request for Review does not meet the statutory criteria under Section 167(1) of the Act since it neither discloses nor pleads any loss or risk of suffering loss or damage due to the alleged breach of duty under the Act by the Procuring Entity. In support of its argument, the Interested Party referred the Board to the holding in *James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*.
66. The Interested Party urged the Board to uphold its Notice of Preliminary Objection dated 23rd July 2024 and the Respondent's Notice of Preliminary Objection dated 22nd July 2024.
67. On whether the Board lacks jurisdiction to entertain the instant Request for Review by dint of Section 4(2)(f) as read with Section 6(1) of the Act, the Interested Party submitted that the Board is a creation of the Act under Section 27(1) of the Act which clothes it with jurisdiction pursuant and/or subject to the provisions of sections 4, 5, 6, 28, 167, 168, 169, 170, 171, 172 and 173 thereof.
68. While relying in the holding in *Republic vs Public Procurement Administrative Review Board & 2 Others Ex-Parte Numerical Machining Complex Limited, (2016) eKLR*, the Interested Party submitted that where the law exhaustively provides for the jurisdiction or authority,

the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation.

69. The Interested Party submitted that clause 3 of the Invitation for Bids provided that bidding will be conducted through International Competitive Bidding (ICB) using a Standards for Bids as specified in the Guidelines for the Procurement of AFD- Financed Contracts in Foreign Countries published on October 2019 (Procurement Regulations) and it is further common ground that procurement of this nature made under a bilateral agreement between the Government of Kenya (GOK) and *Agence Francaise de Development (AFD)* a foreign agency are insulated from the application of the Act by dint of Section 4 (2) (f) as read together with Section 6(1) of the Act and as such, the procurement proceedings in the subject tender fell on all four corners of Section (4)(2)(f) of the Act and any further inquiries beyond this is ultra-vires.

70. In support of its argument, the Interested Party relied on the holding in *Judicial Review Application No. 181 of 2018 Republic vs. Public Procurement Administrative Review Board, AstonefieldSolesa Solar Kenya Ltd/ Clearwater Industries Ltd and ShenzenClou Electronics Ltd Ex Parte Kenya Power & Lighting Company (2019) eKLR* and *Republic vs Public Procurement Administrative Review Board & Another Ex parte: Athi Water Service Board & Another (2017) eKLR* and submitted that the choice of law applicable to the procurement proceedings in the subject tender was clearly stated in the Tender Document and the

Procurement of AFD- Financed Contracts in Foreign Countries published on October 2019 (Procurement Regulations).

71. On whether the Applicant submitted a partial bid that left out a total of 464 mandatory technical requirements in Financial Management module, Project Management module, Human Resource and payroll module and Procurement Supply Chain module as detailed at paragraph 17 of the Respondent's Memorandum of Response dated 22nd July 2024, the Interested Party submitted that the Applicant failed to comply with all the requirements provided in the tender document by submitting a partial bid as detailed at paragraph 17 in the Respondent's Memorandum of Response dated 22nd July 2024.
72. The Interested Party submitted that it is common ground that the tender document was countersigned in all the pages by a representative of the Applicants and that they have now cleverly added unpaginated insertion in the documents presented before the Board to cunningly claim they submitted it as the original tender document and mislead the Board as to the facts of the matter.
73. The Interested Party urged the Board to establish that there were glaring discrepancies in the Applicant's original tender documents and the documents that had cleverly been presented before the Board. It further submitted that as a general rule, procuring entities ought to only consider confirming, compliant and responsive tenders and that tenders should comply with all aspects of the invitation to tender and

meet any other requirements laid down by the procuring entity in its tender documents. The Interested Party pressed on that bidders should comply with tender conditions as a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. Reference was made to the holding in *Republic vs Public Procurement Administrative Review Board; Consortium of GBM Projects Limited and ERG InsaatTicaretVeSanayi A.S (interested party); National Irrigation Board Ex Parte [2020] eKLR*, *R vs PPARB & Ors Ex parte Roben Aberdare (K) Limited [2019]eKLR*, and *Republic vs. Public Procurement Administrative Review Board & 2 Others Ex-parte BABS Security Services Limited [2018] eKLR*

74. The Interested Party further referred the Board to Section 79 of the Act and submitted that the lowest evaluated responsive tenderer is determined by looking at its qualifications that meet the minimum eligibility and mandatory requirements in the Tender document and that no circumstances and factors outside the law, outside the criteria and requirements set out in the Tender Document or outside the constitution as suggested by the Applicants ought to be considered during the evaluation.

75. It reiterated that the Applicants failed to provide the information required in the Tender Document and as such, their bid cannot be said

to be responsive for any competitive evaluation and was accordingly rejected.

76. The Interested Party submitted that the Applicants' Request for Review is frivolous, vexatious and ought to be dismissed with costs and that the whole procurement process was conducted in accordance with the law.

BOARD'S DECISION

77. The Board has considered each of the parties' cases, documents, pleadings, oral and 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 the following sub-issues:

- i Whether the instant Request for Review was lodged with the Board within the statutory period of 14 days of notification of award or occurrence of breach in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter*

referred to as "Regulations 2020") to invoke the jurisdiction of the Board;

ii Whether the Applicants have locus standi before the Board;

iii Whether the subject procurement process meets the conditions set out in section 4(2)(f) of the Act read with Regulation 5 of Regulations, thus ousting the jurisdiction of this Board.

B. Whether the 2nd Respondent's Evaluation Committee evaluated the Applicant's tender in the subject tender in accordance with the provisions of the Tender Document read with Section 80 of the Act and Article 227(1) of the Constitution.

C. What orders should the Board grant in the circumstances?

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

78. 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.

79. 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."

80. 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."

81. 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."

82. 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."

83. 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 over-arching 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...."

84. 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.”

85. 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.

86. 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.”

87. 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.”***

88. 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.

89. 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.

90. Given the forgoing provisions of the Act, the Board is a creature of the Act and its jurisdiction flows from and is circumscribed under Section 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.

91. 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)

92. 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.

93. 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.

94. 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 lodged with the Board within the statutory period of 14 days of notification of award or occurrence of breach in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") to invoke the jurisdiction of the Board;***

95. The Respondent filed on 22nd July 2024 a Notice of Preliminary Objection of even date seeking for the instant Request for Review to be struck out for reasons that the Board lacks jurisdiction to entertain the same since it is time barred having been filed outside the statutory period of 14 days of notification of award contrary to Section 167(1) of the Act read with regulation 203(2)(c)(ii) of Regulations 2020. The Respondent submitted that the Applicants were notified of the outcome of evaluation of the subject tender and its bid disqualification on 27th June 2024 and by filing the instant Request for Review on 17th July 2024, it was time barred.

96. On its part, the Interested Party equally filed on 25th July 2024 a Notice of Preliminary Objection dated 23rd July 2024 where it objected to the hearing and determination of the instant Request for Review on the ground that the same is time barred pursuant to Section 167(1) of the Act. The Interested Party submitted that a notification of intention to award the subject tender was communicated on 27th June 2024 and that the instant Request for Review having been filed on 17th July 2024 was time barred. The Interested Party further submitted that a request for review is deemed to be duly filed once it is assessed and the assessed filing fees is paid and as such, despite the Applicant emailing the Request for Review to the Board on 16th July 2024, the application was assessed, paid for and stamped on 17th July 2024.

97. In response, the Applicants submitted that two notifications of award were issued by the Respondent on 27th June 2024 and on 9th July 2024 and in computing time within which the Request for Review ought to have been filed before the Board, time began running as from 9th July 2024 hence the Request for Review was filed within the statutory period of 14 days. The Applicants further submitted that the review application was sent for filing on 16th July 2024 to the Board's email since the 16th July 2024 was marred with violent Gen Z demonstrations and it was impossible for the Applicants' advocates on record to visit the Board's registry physically though the filing fees was assessed and payment made on 17th July 2024 and the instant Request for Review stamped on 17th July 2024.



98. Having considered parties' pleadings, submissions, and the confidential documents contained in the confidential file submitted by the Respondents 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?
99. We understand the Respondent's and Interested party's contention to be that, the Applicants ought to have filed the instant Request for Review within 14 days from 27th June 2024 when the letters of notification of intention to award the subject tender were dispatched to tenderers.
100. This Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches.
101. We are guided by the holding in **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR** where the High Court at paragraphs 65, 66 and 67 noted that to determine when time starts to run, such determination can only be made upon an examination of the

alleged breach and when the aggrieved tenderer had knowledge of the said breach and held:

66. The answer then to the question when time started to run in the present application can only be reached upon an examination of the breach that was alleged by the 2nd Interested Party in its Request for Review, and when the 2nd Interested Party had knowledge of the said breach. The said Request for Review was annexed as "Annexure CO4" to the 2nd Interested Party's replying affidavit. Paragraphs 2 to 4 of the said Request address the first breach that the 2nd Interested Party 's representative, one Charles Obon'go noted and notified the Chairman of the tender opening committee about at the tender opening, namely that the Applicant had not supplied the sample of 3m of the sleeve and mill certificate and had not been issue with a delivery note, and that the said Applicant sought to introduce the sample after the commencement of the tender opening.

67. It is not in dispute that the tender opening was on 10th November 2017 at 10.00am, which all the parties attest to in their various affidavits. It is therefore evident that for this particular breach the 2nd Interested Party had knowledge of the same and admits to notifying the 1st Interested Party's tender opening committee of the same on 10th November 2017. Therefore, time for filing a

review against this particular alleged breach started to run on 10th November 2017, and the Respondent had no jurisdiction to consider the alleged breach when it was included in the Request for Review filed on 21st February 2017, as the statutory period of filing for review of 14 days had long lapsed. Any decisions by the Respondent on the alleged breach were therefore ultra vires and null and void.

102. Turning to the circumstances in the instant Request for Review we note that it is not in contest that the Applicants did receive the letter of Notification of Intention to Award the subject tender dated 27th June 2024 and transmitted on 28th June 2024 wherein it was informed that its bid had been disqualified in the subject tender. This notification letter dated 27th June 2024 informed bidders, including the Applicants herein that the standstill period within which a bidder could lodge a procurement related complaint challenging the decision to award the subject tender would lapse on 12th July 2024.

103. We note that the Respondent proceeded to issue all bidders with another letter dated 9th July 2024 titled 'Extension of Standstill Period' which reads in part as follows:

'.....

In reference to the earlier Notification of Intention to Award the above tender dated 27th June 2024 issued by



Coast Water Works Development Agency to all bidders who participated in this tender. I would like to inform you all that the Agency has extended the standstill period with five (5) days from 12th July 2024 to 16th July 2024 and included the main reasons for bidders who were unsuccessful as per the attached Notification of Intention to Award.

.....”

104. Attached to the letter of 9th July 2024 is a letter titled Notification of Intention to Award dated 9th July 2024 which subsequently indicated the reasons why bidders who were considered unsuccessful in the subject tender were disqualified. The reasons given for disqualification of the Applicant's tender were that:

"- Bidder did not respond to requirements No. 3.4.1.20 - 3.4.1.239 in section 3.4.1 Financial Management

Bidder did not respond to requirements No. 3.4.2.1- 3.4.2.7 239 in section 3.4.2 Project Management Administration

-Bidder did not respond to requirements No. 3.4.3.1 - 3.4.3.53 in section 3.4.3 Human Resources Management & Payroll

-Bidder did not respond to requirements no. 3.4.4.17 – 3.4.4.204 in section 3.3.4 Procurement Supply chain management process requirements.”

105. Having scrutinized the letter of Notification of Intention to Award dated 27th June 2024, it is quite clear that the reasons for disqualification were not availed to the Applicants and they were only notified that their bid was not successful. The Applicants only came to know of the reasons of disqualification of their bid document on 9th July 2024 following issuance of the letter of Notification of Intention to Award dated 9th July 2024. In our considered view, the notification letter dated 9th July 2024 amended the contents of the initial letter of notification dated 27th June 2024 in that it indicated reasons why unsuccessful bidders in the subject tender, including the Applicants were disqualified, and these reasons were not issued at the first instance on 27th June 2024. This therefore means that as at 27th June 2024 the unsuccessful tenderers did not know the reasons why their bids were disqualified from the subject tender.

106. From the foregoing, the Applicants having been notified of the outcome of evaluation of the subject tender vide letters of 27th June 2024 and 9th July 2024 ought to have lodged the instant Request for Review by virtue of Regulation 203(2)(c)(ii) of Regulations 2020.

107. The question which now arises is which of the two notification letters dated 27th June 2024 and 9th July 2024 determines when time starts running for purposes of computation of the stipulated statutory period of 14 days within which an aggrieved party is required to file a request

for review pursuant to Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020.

108. We are cognizant of the High Court's judgement in **Application No. E073 of 2023 Republic v Public Procurement Administrative Review Board & Others Ex Parte Applicant Iansoft Technologies Limited [2023] eKLR** which was challenging the Board's decision in **PPARB Application No. 40 of 2023** where Hon. J. Chigiti held as follows:

".....

57. The Applicant submits that on the said 5th June 2023, it's Representatives attended the meeting at the 2nd Respondent's board room which began at 12 pm whereat it sought clarification as indicated in the its complaint letter dated 25th May 2023 whereat the evaluation committee responded that as far as they were concerned the process was above board. As regards the key issue of the mandatory ISO Certifications as provided under Clause 5 of the tender document, and Addendum 1 dated 13th April 2023 particularly on Technical Evaluation ISO Certifications and Qualifications of the Project Manager, the Applicant posed a question to the evaluation committee on whether they verified the mandatory ISO Certifications and the evaluation committee's general response was "they lacked capacity" to verify the mandatory ISO certifications.

58. It is in the aforesaid meeting that the Applicant further learnt that its score was 97 which was a higher mark as compared to 81 points which was awarded to the 3rd interested party based on the flawed evaluation process.

59. The English Court of Appeal in SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156 wherein while applying the decision of the European Court of Justice in Uniplex (UK) Ltd vs NHS Business Services Authority (2010) 2 CMLR 47 extensively discussed when time starts to run with respect to a breach in procurement proceedings as follows:

"".....In Uniplex, the Court of Justice decided to adopt a test of discoverability, not a test which would result in time running from the happening of an event of which the victim might not know. The paragraphs of the judgment in Uniplex which I wish to emphasize are paragraphs 30 and 31:

"30 However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.

31. It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings. " I accept that the question under reply by the Court of Justice only required the Court to decide whether the three-month period began with the date of the date of the infringement or on the date when the claimant knew or ought to have known of the infringement, but it is clear that in paragraphs 30 and 31 the Court of Justice moved to consider the degree of knowledge necessary to constitute knowledge for the purpose of starting the three-month period.

The conclusion in paragraph 31 that time only starts to run once the unsuccessful tenderer can "come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings" reflects a number of decisions that the Court of Justice must have taken with respect to the test of discoverability. The most obvious question that arises for consideration, given that the unsuccessful tenderer has such a small window of time in which to start proceedings and given

that the factual basis of a claim may be complex, is what happens if the information which the unsuccessful tenderer has is incomplete" It seems to me that in effect the Court of Justice resolves the problem of gaps in knowledge by treating the existence of an informed view as sufficient to bridge this gap. Once that is reached, there is no further threshold test in terms of prospects of success or indeed any other reason to escape the consequence of knowledge, such as lack of resources or failure to realize the true position in law, that can be taken into account. From this analysis it must follow that it is irrelevant that the unsuccessful tenderer's evidence is incomplete. The unsuccessful tenderer has the requisite knowledge once he has sufficient information to enable him to reach an informed view as to the matters stated in paragraph 31 of the judgment of the Court of Justice. Finally, the formulation provided by the Court of Justice, involving an informed view as to the appropriateness of bringing proceedings, may well mean that knowledge of some trivial breach not justifying the start of proceedings would not be enough..." (Emphasis Ours).

60. The Applicant has not furnished this court with any evidence of what transpired in the critical meeting that was held on 5th June 2023. No minutes or resolutions or a follow

up mail was furnished to the court to demonstrate that it is at this meeting that the Applicant came to learn of weighty issues that it is raising. All the Applicant has given the court as evidence is the letter dated 2nd June 2023 and the list of the officials who attended the meeting as annexures GR 7 and 8.

61. The Applicant has not proved the fact that it is at this meeting that it came to learn of the critical information that would have helped it to take the appropriate action in time.

62. The Applicants argument that the time to lodge a review with the Respondent started running on 5th June 2023 after it discovered critical information at the meeting at the 2nd Interested Party's board room cannot avail in the circumstances. Had the Applicant tendered cogent evidence to prove that it discovered the critical information on 5th June 2023, then this court would have returned a finding that time indeed started running then. The Applicant did not fulfil the principles as set out in the case of SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156. This argument must fail and I so find.

.....

68. The Exparte Applicant's decision to raise its concerns through the letter dated 25th May 2023 and to attend meetings as invited by the 2nd Interested Parties is not in any way illegal. From the reading of the letter sent to the 1st and 2nd



Interested Parties seeking corrective action of the alleged breaches alongside the submissions that it fronted before the board, it is very clear to me that the ex parte Applicant was seized of the necessary information which it would have used had it elected to in good time to pursue what it wanted under Section 167 (1) the Public Procurement and Asset Disposal Act. It opted not to.

69. It is my finding that the ex parte Applicant is misleading the Honourable Court that they did not have sufficient information on the alleged breaches to enable them to make an informed decision on whether to seek administrative review in time.

70. What the Applicant ought to have done which it failed to do as they engaged in meetings was to set a Section 167 (1) the Public Procurement and Asset Disposal Act alarm or a reminder" behind the scene that would have reminded it that:

"...it had to 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".

....."

109. The import of the above holding by the High Court is that it is not enough for a candidate or tenderer to learn that its tender was



unsuccessful to place it in an effective position to file an administrative review since such information on unsuccessfulness is insufficient to enable a candidate or tenderer establish whether there has been any breach in the tendering process. It is only once a candidate or tenderer has been informed of the reasons for its unsuccessfulness in a tendering process that it may come to an informed view as to whether there has been a breach in the tendering process requiring it to lodge an administrative review before the Board. Put differently, it is not sufficient to issue a candidate or tenderer with a notification informing it of being unsuccessful in a tendering process if such notification does not include sufficient and detailed reasons for its unsuccessfulness since it is only from the reasons issued that a candidate or tenderer has an informed view of whether or not to seek administrative review by the Board pursuant to Section 167 (1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020.

110. Further, 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 therefor 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"

111. 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"

112. 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 seeks 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.

113. Having established that the letter of Notification of Intention to Award dated 9th July 2024 enabled the Applicant to come to an informed view as to the reasons why it was determined unsuccessful in the subject tender, it is our considered opinion that the statutory timelines of approaching this Board only started running as at 10th July 2024 and lapsed on 23rd July 2024. We are also of the considered view that though the letter dated 9th July 2024 purported to extend the standstill period from 12th July 2024 to 16th July 2024, the 14 days commencing the standstill period ought to have lapsed on 23rd July 2024 and not on 16th July 2024 as indicated.

114. 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.”

115. In computing time when the Applicants should have sought administrative review before the Board with respect to challenging their unsuccessfulness in the subject tender and award of the subject tender to the Interested Party herein, the 9th July 2024 is excluded pursuant to Section 57(a) of IGPA being the day when the Applicants learnt of the reasons as to why they were determined unsuccessful in the subject tender as per the letter of Notification of Intention to Award dated 9th July 2024. This means, 14 days started running from 10th July 2024 and lapsed on 23rd July 2024. In essence, the Applicant had between 10th July 2024 and 23rd July 2024 to seek administrative

review before the Board with respect to its allegations of breach of duty by the Respondent in the procurement proceedings in the subject tender.

116. The Applicant having filed the instant Request for Review on 17th July 2024 was therefore within the stipulated timelines of fourteen (14) days prescribed under Section 167(1) of the Act read with Regulation 203 (2)(c)(ii) of Regulations 2020. **(Also see PPARB Application No. 63 of 2023 Philip Roger Mutungi T/A Emerging Business Technologies Limited v The Secretary/Chief Executive Teachers Service Commission & Another).**

117. In the circumstances, 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)(ii) of Regulations 2020. Accordingly, this ground of objection by the Respondent and Interested Party fails.

ii Whether the Applicants have locus standi before the Board;

118. The Interested Party in its Notice of Preliminary Objection dated 23rd July 2024 objected to hearing and determination of the instant Request for Review on the ground that the 1st and 2nd Applicant have no locus to institute the complaint herein jointly as they are separate legal entities. The Interested Party submitted that the Applicants ought

to have filed two separate Statements in Support of the Request for Review or proof of Authority to show that Mr. Thomas Kerioh is authorized by both companies to sign and file the Statement in Support of the instant Request for Review.

119. In response, the Applicant submitted that the Applicants herein submitted their bid document in the subject tender jointly in a joint partnership hence fall within the meaning of a tenderer under Section 167(1) read with Section 2 of the Act. The Applicants further submitted that they instructed Thomas Kerioh to sign the statement in support of the instant Request for Review as evidenced by paragraph 2 of the said statement where he indicates that he has authority from the Applicants to make and sign the Statement in Support of the Request for Review on their behalf.

120. The Respondent did not submit on this issue.

121. In the case of **Alfred Njau and Others Vs City Council of Nairobi (1982) KAR 229**, the High Court described locus standi as follows:

"the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".

122. The High Court in **Law Society of Kenya Vs Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000** held that:

"Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in a court of law".

123. From the above holdings, it is clear that *locus standi* is the right to appear and be heard in Court or other proceedings and literally means 'a place of standing'. Therefore, if a party is found to have no *locus standi*, then it means it cannot be heard whether or not it has a case worth listening to. It is evident that if this Board was to find that the Applicant has no *locus standi*, then it cannot be heard and on that point alone may dispose of the instant Request for Review at the preliminary stage without looking into its merit.

124. In addressing whether the Applicant has *locus standi* before that Board, we must first consider the import of Section 167(1) of the Act and in doing so, determine who is an applicant in administrative review proceedings lodged before the Board and whether there was authorization issued to the person or entity who instituted the instant Request for Review before the Board.

125. Section 167 (1) of the PPADA specifies that a request for review application may be lodged before the Board by either a candidate or tenderer within 14 days of notification of award or date of occurrence

of an alleged breach of duty at any stage of the procurement processor disposal process.

126. Section 2 of the PPADA defines a candidate and tenderer as:

"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity;"

"tenderer" means a person who submitted a tender pursuant to an invitation by a public entity;"

127. Section 170 of the Act provides for parties to a review. Section 170(a) of the PPADA provides:

"The parties to a review shall be-

(a) The person who requested the review;

....."

128. Further, the manner in which an aggrieved party seeks administrative review is prescribed under Regulation 203(2)(b) of Regulations 2020 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;"

129. This Board in its Decision 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 provisions of 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 stament in support of a request for review.

The Board studied the instant Request for Review and notes that the Applicant therein is identified as Dar Al Handasah Consultants (Shair and Partners) in joint venture with Kurrent Technologies Limited. This means, both members of the joint venture that is, Dar al-Handash Consultants (Shair and Partners) and Kurrent



Technologoes Limited must both be involved in the Request for Review and doing so, must both expressly authorize the filing of a review application before this Board, noting that they submitted a technical and financial tender in response to the subject tender jointly as a joint venture.

.....”

130. Additionally, this Board in **PPARB Application 18 of 2021 ADK Technologies Limited (in consortium with Transnational Computer Technologies Limited) V The Principal Secretary, the National Treasury and Planning & another and Kingsway Business Systems Limited (in consortium with Kobby Technologies Limited and Inplenion Eastern Africa Limited)** while striking out the same held that in the event of a tender submitted by a joint venture or consortium, members of a joint venture or consortium must expressly authorize the filing of the review. This decision was upheld by the High Court in **Judicial Review Case No. E027 of 2021 Republic v Public Procurement Administrative Review Board Ex parte ADK Technologies Limited in Consortium with Transnational Computer Technologies Limited; Principal Secretary National Treasury and Planning & 2 others (Interested Parties) [2021] eKLR** where Justice Ngaah held as follows:

”.....”

While ADK Technologies Limited and Transnational Technologies Limited could respond to the tender floated by the 2nd Interested party as a consortium, they can only sue together for a common cause but as separate and distinct entities. Subject to the terms of their agreement none of them can purport to act on behalf of the other without the other's authority or consent....."

131. Turning to the circumstances in the instant Request for Review, it has been admitted that the Applicants as tenderers submitted their bid in the subject tender as a joint partnership and in a joint venture. A Joint Venture Agreement to this effect has been annexed as an Exhibit at page 20 of the Applicants' annexure marked as "TK-2" being a copy of the Applicants' bid as submitted in the subject tender.

132. Being dissatisfied with the decision of the Procuring Entity on award of the subject tender, the Applicants resulted to lodge the Request for Review dated 16th July 2024 with the Board which pursuant to Regulation 203(2)(b) of Regulations 2020 is accompanied by a Statement in Support of Request for Review dated 16th July 2024 and signed by Thomas Kerioh who states at paragraph 1 of the said Statement as being the Managing Director of the 1st Applicant who is conversant with the matters pertaining the application thus competent to make the said Statement.

133. Further at paragraph 2 of the Applicants' Statement in Support of the Request for Review, Mr. Thomas Kerioh states that:

"I have authority from the Applicants herein to swear this affidavit on their behalf."

134. Notably, contrary to what Mr. Thomas Kerioh has stated, the Statement in Support of Request for Review dated 16th July 2024 does not take the form of an Affidavit. In addition, we have not had sight of any authority annexed by the Applicants authorizing Mr. Thomas Kerioh to institute administrative review proceedings challenging award of the subject tender on behalf of the joint venture partners before the Board nor to swear or make any statements in support of the Request for Review dated 16th July 2024.

135. To this end, we hereby find that the Board having not been furnished with any Authority or Resolution authorizing Mr. Thomas Kerioh to institute the proceedings herein on behalf of the 1st and 2nd Applicants as joint venture partners and to challenge the decision of the Respondent in the subject tender renders the instant Request for Review fatally defective for having been instituted by the Applicants without *locus standi* and contrary to Section 167(1) of the Act read with Regulation 203 (2)(b) of Regulations 2020. In saying so, we are guided by the holding by the Board in Application No. 56 of 2023 in **ENERCON ENERGY CONSULTANTS LIMITED Vs. NAIROBI CITY COUNTY GOVERNMENT** where the Board found as follows:

127. Turning to the circumstances in the instant Request for Review, it is not in contest that the Applicant as a tenderer submitted its tender in the subject tender in joint venture with Ms. Micropower Corporation. The Applicant, however, seems to be of the view that Micropower Corporation was not a necessary party to the proceedings before the Board and has not availed any evidence to support that the said Micropower Corporation authorized it to file the Request for Review on behalf of Micropower Corporation and Enercon Energy Consultants Limited, in joint venture.

128. In our considered view, the Request for Review was not properly filed before the Board noting that there is no evidence provided of authorization to file the Request for Review on behalf of the tenderer, Micropower Corporation and Enercon Energy Consultants Limited.

129. In the circumstances, we find and hold that the Request for Review as filed is fatally defective and is for striking out.

136. We therefore decline jurisdiction to entertain this matter in the absence of a competent request for review before the Board and

accordingly, proceed to down our tools at this juncture and shall not proceed to consider the other issues framed for determination.

What orders should the Board grant in the circumstances?

137. We have hereinbefore held that we have no jurisdiction to hear and determine the instant Request for Review. It therefore follows that the instant Request for review is struck out for want of jurisdiction.

FINAL ORDERS

138. 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 16th July 2024 and filed on 17th July 2024:

A. The Request for Review dated 16th July 2024 and filed on 17th July 2024 be and is hereby struck out for want of jurisdiction.

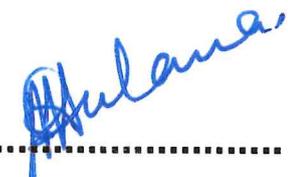
B. The Procuring Entity is hereby ordered to proceed with the procurement process with respect to Tender No. CWWDA/AFD/G1/2023 for Supply, Installation, Implementation & Support of an Integrated Web-Based Enterprise Resource Planning System (ERP), Electronic

**Document Management System (EDMS) and Computers
to its lawful and logical conclusion.**

**C. Each party shall bear its own costs in the Request for
Review.**

Dated at NAIROBI this 6th Day of August 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB

