

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 71/2024 OF 25TH JULY 2024

BETWEEN

LAVINGTON SECURITY LIMITED APPLICANT

AND

KENYA ROADS BOARD 1ST RESPONDENT

THE ACCOUNTING OFFICER, KENYA

ROADS BOARD 2ND RESPONDENT

VICKERS SECURITY 1ST INTERESTED PARTY

HOUNSLOW SECURITY LIMITED 2ND INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Roads Board in relation to Tender No. KRB/T/12/2023-2024 for Provision of Private Security Services at KRB Headquarters.

BOARD MEMBERS PRESENT

- | | | |
|-------------------------------------|---|-------------|
| 1. Mr. George Murugu, FCI Arb, I. P | - | Chairperson |
| 2. Eng. Lilian Ogombo | - | Member |
| 3. CPA Alexander Musau | - | Member |



IN ATTENDANCE

1. Mr. Philemon Kiprop - Holding Brief for Acting Board Secretary
2. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT

LAVINGTON SECURITY LIMITED

Mr. Sang

- Advocate, Chege & Sang Company Advocates

RESPONDENTS

KENYA ROADS BOARD & ACCOUNTING OFFICER, KENYA ROADS BOARD

Ms. Catherine Kassim

-Advocate, Kenya Roads Board

1ST INTERESTED PARTY VICKERS SECURITY

Mr. Yusuf

-Advocate, AY Advocates

2ND INTERESTED PARTY HOUNSLOW SECURITY LIMITED

Ms. Kitur

- Advocate, Hounslow Security Limited



BACKGROUND OF THE DECISION

The Tendering Process

1. The Kenya Roads Board, the 1st Respondent and Procuring Entity herein, invited eligible and qualified bidders registered by the Private Security Regulatory Authority (hereinafter referred to as "PSRA") to submit sealed tenders in response to Tender No. KRB/T/12/2023-2024 for Provision of Private Security Services at KRB Headquarters and regional offices for a period of 12 Months and a further extension of one year subject to satisfactory performance of contract and approved by KRB (hereinafter referred to as the "subject tender"). Tendering was conducted through open tender method and the invitation of the subject tender was on the Procuring Entity's website www.krb.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 14th June 2024 at 12:00 noon.

Submission of Tenders and Tender Opening

2. According to the Minutes of the subject tender's opening signed by members of the Tender Opening Committee on 14th June 2024 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 2nd 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 eight (8) tenders were submitted in response to the subject tender. The eight (8) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1.	Vigil Max Security
2.	Lelo Security Services
3.	Vickers Security
4.	Hounslow Security Ltd
5.	Lavington Security Ltd
6.	Babs Security Services Ltd
7.	Bingwa Security Company
8.	Canon Security Services K Ltd

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 2nd Respondent undertook evaluation of the eight (8) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 9th July 2024 (hereinafter referred to as the "Evaluation Report") in the following stages:



- i Preliminary Evaluation;
- ii Technical Examination;
- iii Financial Evaluation

Preliminary Evaluation

4. The Evaluation Committee was required to examine tenders at this stage as per the requirements of Clause A. Preliminary Requirements (Mandatory) of Section III – Evaluation and Qualification Criteria of the Tender Document. All bids were required to meet all the mandatory requirements to qualify for technical evaluation and the Procuring Entity was at liberty to conduct due diligence with the relevant institutions to confirm authenticity of the documents and information submitted.
5. At the end of evaluation at this stage five (5) tenders were determined non-responsive while three (3) tenders were determined responsive, including the Applicant's bid and the responsive tenders proceeded for further evaluation at the Technical Evaluation stage.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders as per the requirements under Clause B. Technical Evaluation of Section III-Evaluation and Qualification Criteria of the Tender Document. The cut off points for the technical evaluation was 75 marks and bidders who did not attain the said score would not proceed for further evaluation.



7. At the end of evaluation at this stage, all the three (3) bids attained the 75% pass mark and proceeded for further evaluation at the Financial Evaluation stage.

Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine bids using the criteria set out at Clause C. Financial Evaluation of Section III – Evaluation and Qualification Criteria of the Tender Document. Bids would be ranked and the bidder with the lowest price would be recommended for award.

9. At the end of evaluation at this stage, bidders were ranked considering the PSRA set minimum wage of 30,000 per guard per month as follows:

<i>Bidder No.</i>	<i>Bidder Name</i>	<i>TOTAL (KSHS)</i>	<i>BIDDER’S WAGE PER GUARD PER MONTH</i>	<i>PSRA Minimum salary (30,000)</i>
3.	<i>M/s Vickers Security</i>	<i>13,730,400.00</i>	<i>45,000.00</i>	<i>1</i>
4	<i>M/s Hounslow</i>	<i>6,348,000.00</i>	<i>21,500.00</i>	<i>3</i>
5.	<i>M/s Lavington Security Ltd</i>	<i>8,706,000.00</i>	<i>29,000.00</i>	<i>2</i>

10. Only the 1st Interested Party, M/s Vickers Security was found to be within the minimum wage as guided by PSRA.

Evaluation Committee's Recommendation

11. The Evaluation Committee recommended award of the subject tender to the 1st Interested Party, being the lowest evaluated bidder at a total cost of Kenya Shillings Thirteen Million Seven Hundred Thirty Thousand, four Hundred only (Kshs. 13,730,400.00) only inclusive of all applicable taxes for a period of one year.

Professional Opinion

12. Vide a Professional Opinion prepared by the Deputy Director, Supply Chain Management, Mr. Isaak Ibrahim, 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 to the 1st Interested Party.
13. Thereafter, the Professional Opinion was approved by the Director General, Mr. R. Mohamed, MBS, the 2nd Respondent herein.

Notification to Tenderers

14. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 11th July 2024.



REQUEST FOR REVIEW NO. 71 OF 2024

15. On 25th July 2024, Lavington Security Limited, the Applicant herein filed a Request for Review dated 25th July 2024 together with a Statement in Support of the Request for Review dated 25th July 2024 and signed by Raymond Koech, a manager at the Applicant's Company, (hereinafter referred to as the 'instant Request for Review') through Chege & Sang Advocates seeking the following orders from the Board in verbatim:

- a) Declaring that the Procuring Entity breached the provisions of the Public Procurement and Asset Disposal Act, 2015 and Article 47 and 227 of the Constitution.***

- b) The notification letter dated 11th July 2024 be quashed.***

- c) That the award and the entire procurement proceedings in TENDER NUMBER: KRB/T/12/2023-2024 be nullified in its entirety.***

- d) That the 1st and 2nd Respondents be directed to re-admit the Applicant's bid and carry out fresh evaluation of the bids submitted in accordance with the dictates of the Public Procurement and Assets Disposal Act and the Tender Document.***



***e) The Applicant be awarded the tender number
KRB/T/12/2023-2024.***

***f) Costs of the Request for Review be awarded to the
Applicant.***

16. In a Notification of Appeal and a letter dated 25th 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 25th July 2024.

17. On 30th July 2024, the Respondent filed through Catherine Kassim Advocate a 1st and 2nd Respondents' Memorandum of Response dated 30th July 2024 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.



18. *Vide* email dated 30th 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. *Vide* a Hearing Notice dated 2nd 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 7th August 2024 at 14.00 hrs, through the link availed in the said Hearing Notice.

20. On 7th August 2024, the 1st Interested Party filed through AY Advocates an Interested Party's Memorandum of Response dated 7th August 2024.

21. On 7th August 2024, the 2nd Interested Party filed a Response by Hounslow Security Limited dated 6th August 2024.

22. On 7th August 2024, the Applicant filed through its advocates a Supplementary Affidavit sworn by Raymond Koech on 6th August 2024, Written Submissions dated 6th August 2024 and a List of Authorities dated 6th August 2024.



23. At the hearing of the instant Request for Review on 7th August 2024, the Board read out the pleadings filed by parties in the matter. Counsel for the Respondents, Ms. Kassim indicated that she had not been served with the response by Hounslow Security Limited dated 6th August 2024 and that she would be raising a preliminary objection on the issue of *locus standi*. Counsel for the Applicant confirmed that he had been served with the response by Hounslow Security Limited dated 6th August 2024 while counsel for the 1st Interested Party indicated that he had not been served with the 2nd Interested Party's response dated 6th August 2024 and wished to look at the same before proceeding with the hearing.

24. Having considered parties' submissions, the Board directed the 2nd Interested Party to serve all the parties with its response to the instant Request for Review within one hour of close of the proceedings and parties to file their responses, if any, to the said 2nd Interested Party's Response by 10.00 a.m. on 8th August 2024. 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 Respondents to file and serve their preliminary objection and written submissions by 10.00 a.m. on 8th August 2024, (b) the Applicant, 1st Interested Party and 2nd Interested Party to file and serve its written submissions by 6.00 p.m. on 8th August 2024. 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.

25. Parties were also informed that the instant Request for Review having been filed on 25th July 2024 was due to expire on 15th August 2024 and that the Board would communicate its decision on or before the 15th August 2024 to all parties to the Request for Review via email.

26. On 7th August 2024, the Respondents filed a Notice of Preliminary Objection dated 7th August 2024.

27. On 8th August 2024, the 1st Interested Party filed Grounds of Opposition and an Affidavit in Support of the Grounds of Objections sworn by Yussuf Abdi Sheikh on 8th August 2024.

28. On 8th August 2024, the Respondents filed through their advocate Written Submissions dated 8th August 2024 together with a List of Authorities dated 7th August 2024.

PARTIES' SUBMISSIONS

Applicants' case

29. In its submissions, the Applicant relied on documents filed before the Board in the instant Request for Review.

30. The Applicant submitted that its bid was responsive to the provisions of the Tender Document and argued that the Respondents applied an

evaluation criterion that was not known by bidders and by stating grounds that were not in the Tender Document. The Applicant made reference to the holding in *Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/s AAKI Consultants Architects and Urban Designers (Interested Party) (2019) eKLR* on what a responsive tender is and further argued that it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders and that tender sought to comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents.

31. The Applicant submitted that a bidder's failure to comply with tender conditions would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness of some bidders were allowed to circumvent tender conditions as it is important for bidders to compete on equal footing.
32. The Applicant further submitted that bidders have a legitimate expectation that the procuring entity would comply with its own tender conditions and that requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.



33. The Applicant pointed out that Section 79 of the Act provides that a tender is responsive if it conforms to all the eligibility and other mandatory requirements provide in the Tender Document and that a responsive tender ought not to be affected by a minor deviation that does not materially depart from the requirements set out in the Tender Document or error or oversights that can be corrected without affecting the substance of the tender. In support of its argument, the Applicant relied on the Court of Appeal's decision in Civil Appeal No. E012 of 2024 [2024] KECA 184 (eKLR) Sinopec International Petroleum Service Corporation v Public Procurement Administrative Review Board & 3 others.

34. The Applicant submitted that the constitutional and legislative procurement framework entails prescripts that are legally binding and that fairness and lawfulness of a procurement process and the decision under review must be assessed in terms of the provisions of the Fair Administration Act.

35. The Applicant further submitted that the grounds stated by the Procuring Entity vide letter dated 11th July 2024 amounts to an irregularity and urged the Board to allow the instant Request for Review as prayed with costs.

Respondents' case

36. In their submissions, the Respondents relied on documents 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.

37. The Respondents by Notice of Preliminary Objection dated 7th August, 2024, raised an objection sighting that the Applicant's affidavit has been deponed by a stranger to the procurement proceedings, who had no authority to initiate the instant Request for Review. They made reference to page 167 of the Applicant's proposal where it submitted a CR12 form of the company which captures that Jonah Kiprotich and Pius Kiprop Chelimo are the Directors of Lavington Security.

38. The Respondents submitted that the Request for Review, Statement in Support of the Request for Review and Supporting Affidavit were signed by one Raymond Koech and there is no evidence on record indicating that the deponent had been granted authority to initiate the Request for Review and or depone any affidavit on behalf of Lavington Security and as such the deponent lacks locus standi to initiate the proceedings in the instant Request for Review. In support of their case, the Respondents referred the Board to the holding in *Public Procurement Administrative Review Board Application No. 08 of 2023: Toddy Civil Engineering Company Limited-Versus-Water Works Development Authority*, wherein the Board cited the case of *Assia Pharmaceuticals Versus Nairobi Veterinary Centre Ltd HCC No. 391 of 2000*.



39. The Respondents contend that lack of such authority is not merely a procedural or technical issue as it goes to the roots of the operations of a company and consequently, the sworn Statement in support of the Request for review is fatally defective and bad in law as the same was made contrary to Regulation 203(2)(b) of the Regulations 2020 for having been executed contrary to section 37(2) of the Company's Act.
40. The Respondents submitted that the instant Request for Review is defective for failing to meet the fundamental preconditions stipulated under Section 167(1) of the Act read with Regulation 203(1) and (2)(a) and (b) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") and is vague, general and suffers from lack of specificity. In support of their argument, the Respondents relied on the holding in *James Oyondi t/a Betoyo Contractors & another -versus- Elroba Enterprises Limited & 8 others [2019] Eklr and PPARB Application No. 65 of 2023 Phillip Rodger Mutungi T/a Emerging Business Technologies Limited Vs Teachers Service Commission and 2 Others*.
41. On whether the Request for Review is merited, the Respondents submitted that Legal Notice No. PSRA/005/2023 issued pursuant to Section 69 of the Private Security Regulation Act (No. 13 of 2016) set out the minimum monthly wages for all private security officers operating in Kenya. Further, that the said Legal Notice No. PSRA/005/2023 was challenged in court vide *Nairobi Employment and Labour Court Petition No. E011 of 2024: John Korir versus Private*



Security Regulatory Authority & 4 Others where the Court granted conservatory orders pending the hearing and final determination of the Petition which has since been withdrawn.

42. The Respondents submitted that the laws which subsist at the time and place of the making of terms of reference form part of it as if they were expressly referred to or incorporated into the terms. The Respondents further submitted that evaluation of the subject tender was done in strict adherence to the criterion set out in the Tender Document and all relevant laws and that the Applicant's allegations are out of place and geared towards granting it an unfair advantage thus defeating the principle of fair competition.

43. The Respondents contend that failure to meet the basic minimum monthly wages set out by the aforesaid Legal Notice cannot be wished away as deviation from the content of the Tender document by the Respondent as alleged in paragraph 1 of the Request for Review.

44. The Respondents urged the Board to dismiss the instant Request for Review with costs.

1st Interested Party's case

45. The 1st Interested Party averred that that instant Request for Review is frivolous, vexatious, scandalous and an abuse of the Board's time and ought to be dismissed in its entirety.



46. It averred that it has consistently met all the legal requirements to operate in the private security services industry, demonstrating a commitment to providing professional and reliable security services ensuring that it maintains high standards of service critical for both public and private sector clients. Further, that it complied with the Private Security Regulation Act and all other relevant regulations in submitting its bid document in the subject tender and as such, the Respondents decision as communicated vide letter dated 11th July 2024 to award it the subject tender was fair and based on its adherence to the tender requirements and the selection was through a competitive process which underscored its qualifications and legitimacy of the tender award.

47. It is the 1st Interested Party's case that the instant Request for Review fails to provide concrete evidence of any procedural or substantive flaws in the tendering process and that the Applicant's allegations are baseless and an attempt to undermine a legitimate and fair award of the subject tender.

2nd Interested Party's case

48. The 2nd Interested Party averred that it was a bidder in the subject tender and that it received a regret letter from the procuring entity notifying it that its quotation did not meet the minimum wage per guard as set out by the Private Security Regulatory Authority.



49. It indicated that it sought clarification on this new requirement that was not provided for in the Tender Document and that vide a letter dated 17th July 2024, the Procuring Entity informed it that this was a mandatory requirement.
50. The 2nd Interested Party contends that no addendum was ever issued to it to avail the new documents and it was of the view that this new requirement was an afterthought by the Procuring Entity since if it was a mandatory requirement, best procurement practices dictates that the same ought to have been expressly stated in the Tender Document to allow uniformity in evaluation of bids.
51. It is the 2nd Interested Party's case that the Evaluation Committee misdirected itself by using a criterion not known to bidders contrary to Article 227(1) of the Constitution and the only remedy available is for the Board to direct the Procuring Entity to comply with the provisions of the Tender Document in view of Section 173(b) and 80(1) & (2) of the Act.

BOARD'S DECISION

52. 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 instant Request for Review as filed is fatally defective and bad in law and the Board's jurisdiction divested by the absence of a competent Request for Review.

In determining the first issue, the Board will make a determination on whether the Statement in Support of the Request for Review sworn by Raymond Koech on 25th July 2024 offends Section 37(2) of the Company's Act, and if in the affirmative, whether the Applicant has *locus standi* before the Board in view of the provisions under Regulation 203(2)(b) of Regulations 2020

Depending on the outcome of the first issue;

B. Whether the Procuring Entity's Evaluation Committee introduced an extraneous evaluation criterion in evaluation of bids submitted in the subject tender in view of the provisions of the Tender Document read with Section 80 of the Act and Article 227(1) of the Constitution.

C. Whether the Applicant's tender submitted in the subject tender was disqualified by the Evaluation Committee in



accordance with the Tender Document read with Section 80 of the Act and Article 227(1) of the Constitution.

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

Whether the instant Request for Review as filed is fatally defective and bad in law that the Board's jurisdiction is divested by the absence of a competent Request for Review.

53. 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.

54. 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."

55. 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."

56. 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."

57. 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."

58. 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...."

59. 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."

60. 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.

61. 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."

62. 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."***

63. 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.

64. 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.*

65. 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.

66. 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) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

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

(c)

(i)

(ii)

(iii)

(d)

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

(4)



67. Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act is by way of (i) a request for review which is to be (ii) accompanied by such statements as the applicant considers necessary in support of its request. The request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

Whether the Statement in Support of the Request for Review sworn by Raymond Koech on 25th July 2024 offends Section 37(2) of the Company's Act, and if in the affirmative, whether the Applicant has locus standi before the Board in view of the provisions under Regulation 203(2)(b) of Regulations 2020

68. The Respondents contend at ground 1 of its Notice of Preliminary Objection dated 7th August 2024 that the Request for Review is incompetent, misconceived, bad in law in that the Applicant's affidavit has been deposed by a stranger to the procurement proceedings, who has no authority to initiate the instant Request for Review.

69. According to the Respondents, the CR 12 Form as submitted by the Applicant in its bid document captures Jonah Kiprotich and Pius Kiproch Chelimo as the directors of Lavington Security Ltd while the Request for Review dated 25th July 2024, Statement in Support of the Request



for Review sworn on 25th July 2024 and Supplementary Affidavit sworn on 6th August 2024 were signed and deponed by Raymond Koech.

70. The Respondents submitted that there is no evidence indicating that the said deponent, Raymond Koech, had been granted authority to initiate the Request for Review or depone any supporting documents attendant thereto on behalf of the Applicant and as such, lacks locus standi to initiate these proceedings. They further submitted that the sworn Statement in support of the Request for Review is fatally defective and bad in law for having been made contrary to Regulation 203(2)(b) of Regulations 2020 and having been executed contrary to Section 37(2) of the Company's Act.

71. The Applicant did not submit on this ground of objection.

72. Both the 1st and 2nd Interested Parties did not submit on this ground of objection.

73. In addressing whether the Applicant has *locus standi* before the 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.



74. 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.

75. 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;"

76. 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;

....."

77. 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;"



78. Turning to the circumstances in the instant Request for Review, it is not in contest that the Applicant as a tenderer submitted its bid in the subject tender. Being dissatisfied with the decision of the Procuring Entity as communicated on 11th July 2024, the Applicant filed the instant Request for Review dated 25th July 2024 and signed by Raymond Koech. The Request for Review is accompanied by a Statement in Support of the Request for Review which has also been sworn by Raymond Koech on 25th July 2024.

79. At paragraphs 1,2,3, 4 and 11 of the Statement in Support of the Request for Review, Raymond depones as follows:

" STATEMENT IN SUPPORT OF THE REQUEST FOR REVIEW

I, RAYMOND KOECH, of Post Office Box Number 76282-00508 Nairobi within the Republic of Kenya do hereby make oath and state as follows:

1. THAT I am a male adult of sound mind therefore I am competent to make this statement.

2. THAT I am a Manager with the Applicant Company with the Applicant's authority to swear this affidavit on its behalf.

3. THAT I am fully conversant with the facts of this matter therefore duly competent to swear this statement as the facts herein are within my knowledge.

4. THAT, I participated in the preparation of the tender document for TENDER NUMBER: KRB/T/12/2023-2024 and I



am thus privy, vast with the full facts and information regarding the above procurement process.

.....

11. THAT I swear this affidavit in support of the Request for Review and pray that the orders as set out in the Request for Review be granted as prayed.

.....”(emphasis supplied)

80. The Applicant also filed a Supplementary Affidavit sworn on 6th August 2024 by Raymond Koech who depones at paragraph 1 & 2 as follows:

"SUPPLEMENTARY AFFIDAVIT

I, RAYMOND KOECH, of Post Office Box Number 76282-00508 Nairbi within the Republic of Kenya do hereby make oath and state as follows:

1. THAT I am a male adult of sound mind therefore I am competent to make this statement.

2. THAT I am a Manager with the Applicant Company with the Applicant's authority to swear this affidavit on its behalf and having read the 1st and 2nd Respondents response do wish to further state as follows;

.....”

81. From the foregoing, the Board observes that Raymond Koech depones as being, (a) competent to swear both the Statement in Support of the Request for Review and the Supplementary Affidavit, (b) being a Manager at the Applicant's company, and (c) authorized to swear the



Statement in Support of the Request for Review and the Supplementary Affidavit on behalf of the Applicant.

82. We do however note that the Applicant has not presented before the Board any authority depicting that Raymond Koech authorized to swear the Statement in Support of the Request for Review and the Supplementary Affidavit on its behalf.

83. A close perusal of the Applicant's bid submitted in the subject tender, reveals that the Applicant submitted at page 161 of its bid document a Power of Attorney dated 12th June 2024 which reads as follows:

" **POWER OF ATTORNEY**
We LAVINGTON SECURITY LIMITED OF P.O. BOX 76283-00508 – NAIROBI do hereby constitute, appoint and authorize MR. PIUS K. CHELIMO, ID NO. 0252756 OF P.O.BOX 76283-00508 – NAIROBI who is presently employed with us and holding the position of MANAGING DIRECTOR as our attorney, to do in our name and on our behalf, all such acts, deeds and things necessary in connection with or incidental to our tender for the PROVISION OF SECURITY SERVICES – TENDER NO. KRB/T/12/2023-2024 including signing and submission of all documents and providing information responses to KENYA ROADS BOARD representing us in all matters before KENYA ROADS BOARD and generally dealing with KENYA ROADS BOARD in all matters in connection with our Tender for the said services.



We hereby agree to ratify all acts, deeds and things lawfully done by our said attorney pursuant to this POWER OF ATTORNEY and that all acts, deeds and things done by our aforesaid attorney shall and shall always be deemed to have been done by us.

.....”

84. According to the above Power of Attorney, the Applicant authorized one Pius K. Chelimo as its attorney to do in its name and on its behalf, all such acts, deeds and things necessary in connection with or incidental to its tender in the subject tender. Further, according to the said Power of Attorney, the Applicant would ratify all acts, deeds and things lawfully done by Pius K. Chelimo pursuant to the Power of Attorney and that all such acts, deeds and things would be deemed to have been done by the Applicant.

85. In view of the foregoing, the Board must now determine whether the Applicant has *locus standi* before the Board in view of the provisions under Regulation 203(2)(b) of Regulations 2020 and the Statement in Support of the Request for Review sworn by Raymond Koech on 25th July 2024.

86. This Board is cognizant of the holding in the case of **Law Society of Kenya Vs Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000**, where the High Court 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".

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

"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".

88. From the above cases, 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. In the case of **Quick Enterprises Ltd Vs Kenya Railways Corporation, Kisumu High Court Civil Case No.22 of 1999**, the High Court held that:

"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining



the facts from elsewhere apart from looking at the pleadings alone”.

89. Section 37(2) of the Company's Act referred to by the Respondents provides as follows:

"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."

90. Regulations 2020 do not provide a format for a Statement in Support of a Request for Review. Despite this, in ordinary practice, Applicant's file a request for review supported by a statement which is often made by a director or authorized representative of the Applicant. In this regard, the Statement of Support of the instant Request for Review was made in the form of an affidavit sworn by Raymond Koech yet a Power of Attorney submitted in the Applicant's bid document authorized Pius K. Chelimo as its attorney to do in its name and on its behalf, all such acts, deeds and things necessary in connection with or incidental to its tender in the subject tender. Nothing has been adduced by the Applicant to show that Raymond Koech was equally authorized to act on its behalf and institute the proceedings in the instant Request for Review.



91. This Board when faced with similar circumstances 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") held at pages 76 to 79 as follows:

"From the wording of the above Power of Attorney, the Board finds that the same was issued for the specific purpose of lawfully authorizing Edwin Wachira to be the true and lawful representative of the Applicant with regards to (a) signing and submission of tender documents; (b) to conduct contract negotiations; and (c) sign and execute contract on behalf of the Applicant. We note that even though the Applicant's Resolution dated 26th October 2022 indicated that Edwin Wachira was authorized to defend suits and sign any legal documents on behalf of the Applicant and such powers should be donated in a power of attorney, this was not specifically provided for in the Power of Attorney dated 28th October 2022.

As such, Edwin Wachira not being a director of the Applicant could not sign the Statement in Support as a director of the company in the presence of a witness who attests his signature and no two authorized signatories of the Applicant signed the Statement in Support as required under Section 37(2) of the Companies Act.



Further, Edwin Wachira did not have a power of attorney that authorizes him to institute a request for review with respect to the subject tender but to simply sign and submit tender documents, conduct contract negotiations, sign and execute contract.....

.....

It is therefore not enough for the Applicant to claim that Edwin Wachira was a duly authorized representative of the Applicant and that the Applicant had resolved to authorize Edwin Wachira to defend suits and sign legal documents on its behalf. We say so because the Applicant needed to prove that (a) Edwin Wachira was an authorized signatory of the Applicant pursuant to section 3 read with section 37 of the Companies Act; (b) Edwin Wachira was authorized vide a Power of Attorney to institute the instant Request for Review and the specific power to act on behalf of the Applicant during the proceedings before the Board in the instant Request for Review and ; (c) that it had passed a Resolution to institute the instant Request for Review and authorized the said Edwin Wachira to act on its behalf in the said Request for Review.



.....”

92. 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.

93. The circumstances in the instant Request for Review correlate to the Board’s findings in the Toddy case where it established that it is not enough for an Applicant to claim that a person making the Statement in Support of the Request for Review acting in the capacity of the Applicant’s representative is duly authorized but must prove to be an authorized signatory of the Applicant pursuant to section 37 of the Companies Act.

94. In view of the foregoing, we find that the Statement in Support of the Request for Review sworn by Raymond Koech on 25th July 2024 offends Section 37(2) of the Company’s Act and as such, the Applicant lacks locus standi before the Board in view of provisions under



Regulation 203(2)(b) of Regulations 2020. As such, the instant Request for Review as filed is fatally defective and bad in law and the Board's jurisdiction is divested by the absence of a competent Request for Review.

95. 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?

96. 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

97. 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 25th July 2024 and filed on even date.

A. The Request for Review dated 25th July 2024 and filed on even date 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. KRB/T/12/2023-2024 for Provision of Private Security Services at KRB Headquarters to its lawful and logical conclusion.

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

Dated at NAIROBI this 12th Day of August 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB

