

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 76/2024 OF 12<sup>TH</sup> AUGUST 2024**

**BETWEEN**

**IBKA TRADING COMPANY LIMITED.....APPLICANT**

**AND**

**KENYA WILDLIFE SERVICE.....RESPONDENT**

**AND**

**LYTANS LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**DEE CONSORTIUM LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**NUTRALANE LIMITED.....3<sup>RD</sup> INTERESTED PARTY**

**PROLAND HOLDINGS LIMITED.....4<sup>TH</sup> INTERESTED PARTY**

**KENYA FUNDI LIMITED.....5<sup>TH</sup> INTERESTED PARTY**

**BONGANI ENERGY KENYA.....6<sup>TH</sup> INTERESTED PARTY**

**QUATRIX LIMITED.....7<sup>TH</sup> INTERESTED PARTY**

**GAPS CONSTRUCTION &**

**ENGINEERING COMPANY LIMITED.....8<sup>TH</sup> INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Wildlife Service in respect of Tender No. KWS/ONT/BDM/95/2023-2024 for Leasing and Management of Tourism Sites in National Park.

**BOARD MEMBERS PRESENT**

1. Mr. George Murugu FC Arb - Chairperson
2. Eng. Lilian Ogombo - Member
3. Mr. Daniel Langat - Member



## **IN ATTENDANCE**

Ms. Sarah Ayoo - Secretariat

Mr. Anthony Simiyu - Secretariat

## **PRESENT BY INVITATION**

**APPLICANT** **IBKA TRADING COMPANY LIMITED**

Mr. Sang Advocate, Sang & Sang Advocates LLP

**RESPONDENT** **KENYA WILDLIFE SERVICE**

Ms. Feksi Advocate, Kenya Wildlife Service

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenya Wildlife Service, the Procuring Entity and also the Respondent herein, vide an advert in the MyGov Publication, PPIP Portal ([www.tenders.go.ke](http://www.tenders.go.ke)) and Kenya Wildlife Service website ([www.kws.go.ke](http://www.kws.go.ke)), invited interested suppliers to submit their bids in response to Tender No. KWS/ONT/BDM/95/2023-2024 for Leasing and Management of Tourism Sites in National Park (herein "the subject tender"). Tenderers were required to submit their sealed tenders before the tender closing date of Tuesday, 16<sup>th</sup> April 2024 at 11:30 a.m.

### **Addenda**

2. Subsequently, on various dates between 9<sup>th</sup> April 2024 and 8<sup>th</sup> May 2024, the Procuring Entity issued 3 addenda offering clarifications to various



inquiries that were made by different candidates who had expressed interest in participating in the tender. The tender closing date was also rescheduled on multiple times with the last date being set as 14<sup>th</sup> May 2024.

### **Submission of Tenders and Tender Opening**

3. According to the signed Tender Opening Register dated 14<sup>th</sup> May 2024, submitted under the Confidential File submitted by the Procuring Entity, the following Seventy-Seven (77) tenderers were recorded as having submitted in response to the subject tender by the tender submission deadline:

<b>#</b>	<b>Name of Tenderer</b>
1.	Zuhur Gas Limited
2.	Fahari Bahari Foods Limited
3.	Byte Properties Limited
4.	Normak Company Limited
5.	Palmtech Solutions Limited
6.	Sede Security Services
7.	Café Amka Limited
8.	Oliskai Lodge Limited
9.	Munir Sheikh Ahmed
10.	Weston Hotel Limited
11.	Steadmark Gardens & Recreation Centre

12.	Kenrail Realtors E.A. Limited
13.	Kasarani Sportsview Hotel Limited
14.	Pride Inn Hotels & Investments Limited
15.	Dalmar Limited
16.	Dee Consortium Limited
17.	Kamcan Properties Limited
18.	Flexgen Agencies Limited
19.	Smart People Africa Limited
20.	Navitogo Enterprises
21.	HH Water Drops Limited
22.	Kemluk Commercial Agencies Limited
23.	Safari Services East Africa Limited
24.	The Lazizi Premier
25.	Mombasa Enterprises Limited
26.	Global Management & Staffing E.A. Limited
27.	Construn Limited
28.	Vintage Africa Limited
29.	Gaps Construction & Engineering Company Limited
30.	Qatken Properties Limited
31.	Masai Mara Emaiyan Luxury Camp Limited

32.	Nanjala Limited
33.	Kifri Commercial Agencies Limited
34.	Ibka Trading Company Limited
35.	Bongani Energy Kenya Limited
36.	Solarena Company Limited
37.	Venture Africa Safaris Limited
38.	Mount Kenya Safari Club Limited
39.	Ashnil Hotels Limited
40.	Mogad Kenya Limited
41.	Kalepo Samburuland Kenya Limited
42.	Local Content Specialist 48 Limited
43.	Pride Inn Hotels Investments Limited
44.	Akahab Suppliers & Construction Company Limited
45.	Kids Lifeline Academy
46.	Reyspan Solutions Limited
47.	Kipabungi Limited
48.	Lytan Limited
49.	Blue Sky Energy Limited
50.	Stelunka Enterprises Limited
51.	Kenya Fundi Limited

52.	Pan Sudan Company Limited
53.	Shamco Africa Limited
54.	Mara Landmark Limited
55.	Kick Distributors Limited
56.	Googa Enterprises Limited
57.	The Arabian Quisine
58.	Proland Holdings Limited
59.	The Safari Series Limited
60.	Maverick Supplies & Management Limited
61.	Skylux Logistics Limited
62.	Naserian Mara Camp
63.	Quatrix Transport Meets Technology
64.	Sunworld Safaris
65.	Ankey Ventures Limited
66.	Wilderness Discovery Safaris
67.	Envires Consultants Limited
68.	Masai Olmakau Safaris Camp Limited
69.	Nairobi Tented Camp Limited
70.	Bosphorus Company Limited
71.	House of Procurement Limited

72.	Patmos Company Limited
73.	Roka Camps Limited
74.	Nutralane Limied
75.	The Governor Enterprises Limited
76.	NRG Restaurant Limited
77.	Hanamal Construction Limited

### **Evaluation of Tenders**

4. The Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received tenders in the following 3 stages as captured in the Evaluation Report
  - i. Preliminary Evaluation
  - ii. Technical Evaluation
  - iii. Financial Evaluation

### **Preliminary Evaluation**

5. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Clause 2. Preliminary examination for Determination of Responsiveness under Section III-Evaluation and Qualification Criteria at the pages 21 and 25 of the Tender Document .



6. The evaluation was to be on a Yes/No basis and tenders that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
  
7. The Evaluation Report bears out that the received tenders were from the outset separated in to groups according to the sites that tenderers had through their tenders expressed interest in before the start of the Preliminary Evaluation. At the end of the evaluation at this stage the results for the different sites were as follows:
  - i. Daraja la Mbao Site in Amboseli National Park attracted 13 tenders, out of which 9 were disqualified with only 4 tenders qualifying for further evaluation at the Technical Evaluation Stage.
  - ii. Fig Tree Site in Meru National Park attracted a single tender that satisfied all the requirements at this stage and qualified for further evaluation at the Technical Evaluation Stage.
  - iii. Patterson Site in Tsavo East National Park attracted 9 tenders, out of which 6 tenders were disqualified with only 3 tenders qualifying for further evaluation at the Technical Evaluation Stage.
  - iv. Kitembe Site in Nairobi National Park attracted 9 tenders, out of which 6 tenders were disqualified with only 3 tenders qualifying for further evaluation at the Technical Evaluation Stage.
  - v. Meru Mulika Site in Meru National Park attracted 3 tenders, out of which 1 tender was disqualified with only 2 tender qualifying for further evaluation at the Technical Evaluation stage.
  - vi. Tusk Camp at Aberdare National Park attracted 4 tenders, out of which 3 tenders were disqualified with only 1 tender qualifying for further evaluation at the Technical Evaluation Stage.

- vii. Kanjaro Site in Tsavo West National Park attracted a single tender, which was disqualified for failing to meet the requirements at this stage.
- viii. Formerly River Hippo Camp Site in Tsavo West National Park attracted 6 tenders, out of which 4 tenders were disqualified with only 2 tenders qualifying for further evaluation at the Technical Evaluation Stage.
- ix. Rangers Site in Nairobi National Park attracted 7 tenders, out of which 5 tenders were disqualified with only 2 qualifying for further evaluation at the Technical Evaluation Stage.
- x. Ndololo Site attracted 10 tenders, out of which 4 tenders were disqualified with only 6 tenders qualifying for further evaluation at the Technical Evaluation Stage.
- xi. Sebastian Site in Nairobi National Park attracted 13 tenders, out of which 8 tenders were disqualified with only 5 tenders qualifying for further evaluation at the Technical Evaluation Stage.
- xii. KWS Clubhouse attracted 8 tenders, out of which 6 tenders were disqualified with only 2 tenders qualifying for further evaluation at the Technical Evaluation Stage.
- xiii. Southern Bypass attracted 33 tenders, out of which 12 tenders were disqualified with 21 tenders including that of the Applicant qualifying for further evaluation at the Technical Evaluation Stage.

### **Technical Evaluation**

- 8. The Evaluation Committee was required at this stage to examine tenders successful at the Preliminary Stage using the criteria set out as Technical Evaluation Criteria (Ecolodges, Tented Camp, Restaurant and Open Use Sites) under Section III-Evaluation and Qualification Criteria at pages 21, 22, 23 and 24 of the Tender Document.

9. The evaluation was to be on the basis of the weighted requirements that individually carried various marks. Tenderers were required to garner at least 70 marks for them to qualify for further evaluation at the Financial Evaluation Stage.
  
10. At the end of the evaluation at this stage, the results of the process for each of the sites was as follows:
  - i. Daraja la mbao site in Amboseli National Park had 4 tenders, out of which 2 tenders were disqualified for failing to meet the 70 marks threshold with only 2 tenders qualifying for further evaluation at Financial Evaluation Stage.
  - ii. Fig Tree Site in Meru National Park had only 1 tender which met the 70 marks threshold qualifying for further evaluation at the Financial Evaluation Stage.
  - iii. Patterson Site in Tsavo East National Park had 3 tenders, out of which 2 tenders were disqualified for failing to meet the 70 marks threshold with only 1 tender qualifying for further evaluation at the Financial Evaluation Stage.
  - iv. Kitembe Site in Nairobi National Park had 3 tenders, out of which 1 tender was disqualified for failing to meet the 70 marks threshold with only 2 tenders qualifying for further evaluation at the Financial evaluation Stage.
  - v. Meru Mulika Site in Meru National Park had 2 tenders out of which 1 tender was disqualified for failing to meet the 70 marks threshold with only 1 tender qualifying for further evaluation at the Financial Evaluation Stage.

- vi. Tusk Camp at Aberdare National Park had 1 tender which was established as responsive and thus qualifying for further evaluation at the Financial Evaluation Stage.
- vii. Kanjaro Site in Tsavo West National Park did not have any tender at this stage since the only tenderer that bid for the site was disqualified at the Preliminary Evaluation Stage.
- viii. Formerly River Hippo Camp Site in Tsavo West National Park had 2 tenders out of which 1 tender was disqualified for failing to meet the 70 marks threshold with only 1 tender qualifying for further evaluation at the Financial Evaluation Stage.
- ix. Rangers Site in Nairobi National Park had 2 tenders, all of which qualified for further evaluation at the Financial Evaluation Stage.
- x. Ndololo Site had 6 tenders, out of which 4 tenders was disqualified for failing to meet the 70 marks threshold with only 2 tenders qualifying for further evaluation at the Financial Evaluation Stage.
- xi. Sebastian Site in Nairobi National Park had 5 tenders, out of which 2 tenders was disqualified for failing to meet the 70 marks threshold with only with only 3 tenders qualifying for further evaluation at the Financial Evaluation Stage.
- xii. KWS Clubhouse had 2 tenders was disqualified for failing to meet the 70 marks threshold with only 1 tender qualifying for further evaluation at the Financial Evaluation Stage.
- xiii. Southern Bypass had 21 tenders, out of which 9 tenders was disqualified for failing to meet the 70 marks threshold with only 12 tenders including that of the Applicant qualifying for further evaluation at the Financial Evaluation Stage.

## **Financial Evaluation**

11. The Evaluation Committee was required at this stage to examine tenders successful at the Technical Evaluation Stage using the criteria set out Financial Evaluation under Section III-Evaluation and Qualification Criteria at page 24 of the Tender Document.
12. The evaluation was to be on the basis of a comparison of the monthly leasing rates proposed by the tenderers in respect of the various sites across the National Parks. Tenderers were at liberty to indicate their rates in Kshs or USD or both. The successful tenderer of a particular site would be that offering the highest leasing rate for that facility.
13. At the end of the evaluation at this stage the results for each of the sites was as follows:
  - i. Daraja la Mbao Site in Amboseli National Park had Sunworld Safaris Limited as the tenderer offering the highest monthly rates of USD 12,000 or Kshs. 1,584,000.
  - ii. Fig Tree Site in Meru National Park had The Lazizi Premiere Limited, the only tenderer whose tender was evaluated at this stage as the tenderer offering the highest monthly rate of Kshs. 750,000 and annual rate of Kshs. 9,000,000
  - iii. Patterson Site in Tsavo East National Park had Naserian Mara Camp Kenya Limited, the only tenderer whose tender was evaluated at this stage, as the tenderer offering the highest monthly rate of 902,000 and annual rate of 10,824,000.00
  - iv. Kisembe Site in Nairobi National Park had Sunworld Safaris Limited as the tenderer offering the highest monthly rate of USD 12,000

- (Kshs 1,584,000) and annual rate of USD 144,000 (Kshs. 19,008,000)
- v. Meru Mulika Site in Meru National Park had Mount Kenya Safari Club Limited, the only tenderer whose tender was evaluated at this stage, as the tenderer offering the highest monthly rate of Kshs. 650,000 and annual rate of Kshs. 7,800,000
  - vi. Tusk Camp at Aberdare National Park had The Lazizi Premiere Limited, the only tenderer whose tender was evaluated at this stage, as the tenderer offering the highest monthly rate of Ksh. 1 Million and annual rate of Kshs. 12 Million.
  - vii. Kanjaro Site in Tsavo West National Park did not have any tender evaluated at this stage being that the only tender received in respect of this site was disqualified at the Preliminary Evaluation Stage.
  - viii. Formerly River Hippo Camp Site in Tsavo West National Park had Navitogo Enterprises, the only tenderer evaluated at this stage as the tenderer offering the highest tender at a monthly rate of Kshs. 715,000 and an annual rate of Kshs. 8,580,000.
  - ix. Rangers Site in Nairobi National Park had The Lazizi Premiere Limited as the tenderer offering the highest tender of a monthly rate of Kshs. 1,250,000 and annual rate of Kshs. 15,000,000.
  - x. Ndololo Site had Local Content Specialist Forty Eight Limited as the tenderer offering the highest tender of a monthly rate of Kshs. 950,000 and an annual rate of Kshs. 11,400,000.
  - xi. Sebastian Site in Nairobi National Park had Ankey Ventures Limited as the tenderer offering the highest tender of a monthly rate of Kshs. 350,000 and an annual rate of Kshs. 4,200,000.

- xii. KWS Clubhouse had Naserian Mara Camp Kenya Limited, the only tenderer evaluated at this stage as the tenderer offering the highest tender at a monthly rate of Kshs. 890,000 and an annual rate of Kshs. 106,680,000.
- xiii. Southern Bypass was awarded to the Interested Parties herein at various monthly rates that ranged from between Kshs 215,000 and 246,000 per acre per month.

### **Evaluation Committee's Recommendation**

- 14. The Evaluation Committee through an Evaluation Report dated 15<sup>th</sup> July 2024 forming part of the Confidential File, recommended the award of the sites under subject tender to various tenderers as below:
  - i. Daraja la Mbao Site in Amboseli National Park was recommended for award to Sunworld Safaris Limited at an annual rate of USD 144,000
  - ii. Fig Tree Site in Meru National Park was recommended for award to The Lazizi Premiere Limited at an annual rate of Kshs. 9,000,000
  - iii. Patterson Site in Tsavo East National Park: was recommended for award to Naserian Mara Camp Kenya Limited at an annual rate of Kshs. 10,824,000.00.
  - iv. Kitembe Site in Nairobi National Park was recommended for award to Sunworld Safaris Limited at an annual rate of USD 144,000
  - v. Meru Mulika Site in Meru National Park was recommended for award to Mount Kenya Safaris Limited at an annual rate of Kshs. 7,800,000
  - vi. Tusk Camp at Aberdare National Park was recommended for award to The Lazizi Premiere at an annual rate of Kshs. 12 Million.
  - vii. Kanjaro Site in Tsavo West National Park was recommendation for retender.

- viii. Formerly River Hippo Camp Site in Tsavo West National Park was recommended for award to Navitogo Enterprises at an annual rate of 8,580,000
- ix. Rangers Site in Nairobi National Park was recommended for award to The Lazizi Premiere at an annual rate of Kshs. 15 Million
- x. Sebastian Site in Nairobi National Park was recommended for award to Ankey Ventures Limited at an annual rate of Kshs. Kshs. 4.2 Million.
- xi. Southern Bypass was recommended to award to the Interested parties at their respective tender prices.

### **Professional Opinion**

- 15. In a Professional Opinion dated 16<sup>th</sup> July 2024 (hereinafter referred to as the "Professional Opinion") the Procuring Entity's Ag. Deputy Director-Supply Chain Management Ms. Leah Naisoi, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and recommended the award of the subject tender to the various tenderers as per the recommendations of the Evaluation Committee above.
- 16. Subsequently on the same day, 16<sup>th</sup> July 2024, the Accounting Officer, Dr. Erustus Kanga EBS, concurred with the Professional Opinion.

### **Notification to Tenderers**

- 17. Accordingly, the tenderers was notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 16<sup>th</sup> July 2024.



## **REQUEST FOR REVIEW**

18. On 12<sup>th</sup> August 2024, the Applicant through the firm of Sang & Sang Advocates LLP filed a Request for Review dated 9<sup>th</sup> August 2024 supported by a Statement dated 9<sup>th</sup> August 2024 by IK Hussain, the Applicant's Managing Director, seeking the following orders from the Board in verbatim:

- a) A declaration that the Procuring Entity was in breach of article 227 of the Constitution as the Procuring Entity did not consider the constitutional requirement of fairness, competitiveness, transparency and cost effectiveness in not awarding the tender to the Applicant who was the lowest bidder and instead awarded the tender to the Interested Parties herein who did not bid as joint venture, consortium or partnership;***
- b) A declaration that the Procuring Entity was in breach of Clause 39 of the Tender Document in not indicating in the Notification of Award, the proposed rent of the successful tenderer as mandatorily required under clause 39 of the tender document that was provided by the procuring entity herein;***
- c) A declaration that the Procuring Entity was in breach of Clause 11.2 of the Tender Document in awarding the Interested Parties herein the tender yet they did not bid as a joint venture, Consortium or Partnership;***
- d) An order cancelling and/or setting aside the award of the tender to the Interested Parties herein who were purportedly successful tenderers and to award the tender to the applicant who was the lowest bidder;***



***e) Awarding costs of the review to the Applicant;***

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

19. In a Notification of Appeal and a letter dated 12<sup>th</sup> August 2024, Mr. James Kilaka, the Ag. Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondent were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 12<sup>th</sup> August 2024.
20. On 20<sup>th</sup> August 2024, the Ag. Board Secretary sent a reminder to the Respondent drawing their attention to the statutory obligation to offer a response to the Request for Review and the consequences of non-compliance.
21. On 21<sup>st</sup> August 2024, the Respondent filed their Memorandum of Response and Notice of Preliminary Objection, both dated 16<sup>th</sup> August 2024 and through Ms. Ismene Feksi-Advocate. The Respondent equally forwarded to the Board the Confidential Documents under Section 67(3) of the Act
22. On 23<sup>rd</sup> August 2024, the Ag. Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request



for Review would be by online hearing on 27<sup>th</sup> August 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.

23. On 26<sup>th</sup> August 2024, the Applicant filed a Further Affidavit sworn on 26<sup>th</sup> August 2024 by IK Hussain.
24. On 27<sup>th</sup> August 2024 at 11:00 a.m., when the Board convened for the online hearing, only the Applicant's lawyer was present. The Board directed the Secretariat to reach out to the Respondent's lawyer to confirm whether they were keen on attending the scheduled hearing.
25. Counsel for the Respondent, Ms. Feksi joined the online hearing at around 11:15 a.m. and apologized for being late. She indicated that they had challenges with receiving of the email communication on the hearing as she did not get the link to the session in good time.
26. Before the Board could give any hearing directions, Counsel for the Applicant, Mr. Sang, brought it to the attention of the Board that on the evening of 26<sup>th</sup> August 2024, the Applicant filed a Further Affidavit by way of email and that he was yet to receive a stamped copy of the Further Affidavit for service upon the Respondent.
27. The Secretariat acknowledged receipt of the email attaching the Applicant's Further Affidavit . Accordingly, the Board directed the Secretariat to share a stamped copy of the Further Affidavit to both Mr. Sang and Ms. Feksi. The session was also adjourned to 11:30 a.m. to allow Counsel for the Respondent, Ms. Feksi, time to review the Further



Affidavit and confirm her readiness to proceed with the hearing as earlier scheduled.

28. When the Board reconvened at 11:30 a.m. Counsel for the Respondent, Ms. Feksi, indicated that she had read through the Further Affidavit and was ready to proceed with the hearing.
29. The Board then asked parties to elect whether they wished to proceed with a plenary hearing as already scheduled or in place thereof be allowed time to have the filed Request for Review and Notice of Preliminary Objection canvassed through Written Submissions. Both Counsel for the Applicant, Mr. Sang and Counsel for the Respondent, Ms. Feksi elected to have the matter canvassed by way of Written Submissions.
30. Accordingly, the Board gave the following directions:
  - i. The Applicant's Further Affidavit as sworn by IK Hussain was admitted as part of the record;
  - ii. In line with Regulation 209 of the Regulations 2020, the filed Notice of Preliminary Objection would be considered under the Request for Review
  - iii. The Applicant was to file their Written Submissions by 6:00 p.m. on 27<sup>th</sup> August 2024
  - iv. The Respondent was to file their Written Submissions by 1:00 p.m. on 28<sup>th</sup> August 2024.
  - v. The Board would render a Decision on both the Request for Review and Notice of Preliminary Objection on or before 2<sup>nd</sup> September 2024 by way of email to the parties.

31. Later on the same day, 27<sup>th</sup> August 2024, the Applicant filed their Written Submissions of even date.
32. On 28<sup>th</sup> August 2024, the On 27<sup>th</sup> August 2024, the Respondent filed their Written Submissions of even date.
33. Below is a summary of each party's case as can be discerned from their filed Written Submissions.

## **PARTIES SUBMISSIONS**

### **Applicant's Submissions**

34. The Applicant made an argument that the Board had jurisdiction over the instant Request for Review while making reference to Section 167(1) of the Act and Regulation 203(1) of the Regulations 2020.
35. An argument was made that an applicant can invoke the jurisdiction of the Board in the event of breach , before notification of intention to enter in to a contract is made, when the intention to make an award is made and after the notification to enter into a contract is made. According to the Applicant the 14 days begins to run from the date of knowledge of breach by the Applicant.
36. Relying on ***Republic v Public Procurement administrative Review Board & 2 Others Ex parte Kemotrade Investments Ltd [2018]eKLR*** the Applicant maintained that time of knowledge of the breach is crucial in the computation of the 14 days statutory timeline. It was argued that the instant Request for Review was filed after the

Applicant received the letter dated 29<sup>th</sup> July 2024 which was a response to the Applicant's letter of complaint.

37. The Applicant contended that in as much as the notification was sent bearing reasons as to why the Applicant was unsuccessful, the Applicant had no knowledge of the reasons as to why the Interested Parties were successful. Accordingly, that the 14 days statutory timeline for the filing of the instant Request for Review begun running on 29<sup>th</sup> July 2024 and lapsed on 12<sup>th</sup> August 2024, which also happens to be the date when the Request for Review was filed.
38. The Applicant contended that the award of the subject tender to the Interested Parties was in breach of the terms of the tender since the invitation to tender was for 35 acres as a whole and not fragments thereof.
39. The Applicant maintained that the Respondent in purporting to justify the award of the tender to the Interested Parties by fragmenting the 35 acres among the Interested Parties was in effect rewriting the terms of the Tender Document and introducing non-existent ambiguities to the Tender Document.
40. Further, that the Applicant was disqualified on account of quoting rent which was below the recommended rent yet the Tender Document did not provide such recommended rent. Accordingly, it was argued that this constituted lack of fairness in the tender process.



## **Respondents' Submissions**

41. The Respondent contended that the instant Request for Review was time-barred under Section 167(1) of the Act.
42. An argument was made that the Notification of Award was issued to the Applicant on 16<sup>th</sup> July 2024 and it was at this point that the statutory 14 days' time begun to run and not 29<sup>th</sup> July 2024 when the Applicant wrote its letter of complaint. It was contended that the complaint was responded to on the same day it was received on 29<sup>th</sup> July 2024, by which time the Applicant still had 1 day to invoke the Board's jurisdiction but failed to do so.
43. It was contended that Section 167(1) of the Act in setting the statutory timeline within which a Request for Review may be filed does not make room for time for correspondence between bidders and the Procuring Entity subsequent to the issuance of Notification.
44. The Respondent argued that the tender was for open use of a 35 acre vacant land and that the Tender Document contained investment guidelines which stipulated that successful tenderers would be awarded between 1 to 20 acres of the land. Further, that tenderers were not barred from bidding for various acreages provide that were within the 1-20 acres range.
45. It was contended that the Applicant tendered for the entire 35 acres and was disqualified for the reason that its proposed rent was lower than that of the bidders that were recommended for the award of the tender as was communication through the Notification to the Applicant.



46. The Respondent contended that the Tender Document was clear that only the highest bidder would be awarded up to 20 acres of the land but the Applicant proposed rent was less than that of the Interested Parties. Further, that the Respondent's letter dated 29<sup>th</sup> July 2024 sufficiently responded to all the inquiries made by the Applicant.
47. It was argued on behalf of the Respondent that the Applicant's tender was not responsive as it did not comply with the investment guidelines and was also not the highest evaluated tender. Further, that the Applicant would not suffer any loss from the procurement process.

### **BOARD'S DECISION**

48. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:
- I. ***Whether the instant Request for Review was filed within the statutory timelines stipulated under Section 167(1) of the Act and Regulation 203(1) of the Regulations 2020?***

Depending on the Board's finding on Issue (1) above:

- II. ***Whether the Applicant's tender was disqualified from the subject tender in accordance with the provisions of the Act, Regulations 2020 and the Tender Document?***
- III. ***Whether the Interested Parties herein were properly awarded the subject tender?***
- IV. ***What orders should the Board issue in the circumstance?***



**Whether the instant Request for Review was filed within the statutory timelines stipulated under Section 167(1) of the Act and Regulation 203(1) of the Regulations 2020?**

49. Subsequent to the filing of the instant Request for Review, on 21<sup>st</sup> August 2024, the Respondent filed a Notice of Preliminary Objection dated 16<sup>th</sup> August 2024 contending that the instant Request for Review was time-barred.
50. In their filed Written Submissions, the Respondent argued the Notification of Award was issued to the Applicant on 16<sup>th</sup> July 2024 and it was at this point that the statutory 14 days' time begun to run and not 29<sup>th</sup> July 2024 when the Applicant wrote its letter of complaint. It was contended that the complaint was responded to on the same day it was received on 29<sup>th</sup> July 2024, by which time the Applicant still had 1 day to invoke the Board's jurisdiction but failed to do so. According to the Applicant, Section 167(1) of the Act in setting the statutory timeline within which a Request for Review may be filed does not make room for time for correspondence between bidders and the Procuring Entity subsequent to the issuance of Notification.
51. In rejoinder, the Applicant contended that the Request for Review was timeously filed and thus the Board was clothed with the requisite jurisdiction over it.
52. The Applicant through their filed Written Submissions contended that in as much as the notification was sent bearing reasons as to why it was unsuccessful, the Applicant had no knowledge of the reasons as to why the Interested Parties were successful. Accordingly, that the 14 days

statutory timeline for the filing of the instant Request for Review begun running on 29<sup>th</sup> July 2024 and lapsed on 12<sup>th</sup> August 2024, which also happens to be the date when the Request for Review was filed.

53. This Board acknowledges the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

54. The Black's Law Dictionary, 8<sup>th</sup> 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. On its part, Halsbury's Laws of England (4<sup>th</sup> Ed.) Vol. 9 defines jurisdiction as:

***"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."***

56. The locus classicus case on the question of jurisdiction is the celebrated case of ***The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1*** where Nyarangi J.A. made the oft-cited dictum:

***"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 other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."***

57. In the case of ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR***, the Court of Appeal emphasized 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...."***

58. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

***"(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."***

59. Further, Section 28 of the Act provides for the functions of the Board as:

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

60. Further, a reading of section 167 of the Act denotes that the jurisdiction of the Board should be invoked within a specified timeline of 14 days:

***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.***

61. Regulation 203(2) (c) of the Regulations 2020 equally affirms the 14-days timeline in the following terms:

***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) 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***

62. Our interpretation of the above provisions is that an Applicant seeking the intervention of this Board in any procurement proceedings must file their request within the 14-day statutory timeline. Accordingly, Requests for Review made outside the 14 days would be time-barred and this Board would be divested of the jurisdiction to hear the same.

63. It is therefore clear from a reading of section 167(1) of the Act, Regulation 203(1)(2)(c) & 3 of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 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

in to 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 (3) instances namely (i) before notification of intention to enter in to a contract is made (ii) when notification of intention to enter into a contract has been made and (iii) after notification to enter into a contract has been made. The option available to an aggrieved candidate or tenderer in the aforementioned instances is determinant on when occurrence of breach complained took place and should be within 14 days of such breach.

64. It was not the intention of the legislature that where an alleged breach occurs before notification to enter in to contract is issued, the same is only complained after the notification to enter into a contract has been issued. We say so because there would be no need to provide 3 instances within which such Request for Review may be filed.
65. Section 167 of the Act and Regulation 203 of the 2020 Regulations 2020 identify the benchmark events for the running of time to be the date of notification of the award or the date of occurrence of the breach complained of.
66. Turning to the present case, the instant Request for Review challenges the evaluation process that culminated in its disqualification from the subject tender and its award to the Interested Parties. Essentially, the Applicant is challenging the award of the Southern Bypass Site of the subject tender to the Interested Parties. It would therefore follow that the



14 days statutory timeline under Section 167(1) of the Act was to start running upon the Applicant's knowledge that the site had been awarded to the Interested Parties.

67. The Board has looked at the Notification Letter dated 16<sup>th</sup> July 2024 that was sent to the Applicant and the same is herein reproduced for ease of reference:

***1. For the attention of Tenderer's Authorised Representative.***

***i) Name: ABDIWAHAB IBRAHIM KASSIM***

***ii) Address (details withheld)***

***2. Telephone: (details withheld)***

***3. Email address: (details withheld)***

***4. Date of transmission: 16<sup>th</sup> July 2024***

***5. This Notification is sent by : LEAH NAISOI LEPORE; Ag. DEPUTY DIRECTOR SUPPLY CHAIN MANAGEMENT.***

***6. Notification of Intention to Award***

***i) Employer: KENYA WILDLIFE SERVICE***

***ii) Project: LEASING AND MANAGEMENT OF TOURISM SITES IN NATIONAL PARKS-SOUTHERN BYPASS SITE***

***iii) Contract title: LEASING AND MANAGEMENT OF TOURISM SITES IN NATIONAL PARKS-SOUTHERN BYPASS SITE***

***iv) Country: KENYA***

***ITT No: KWS/ONT/BDM/95/2023-2024 This Notification of Intention to Award (Notification) notifies you of our decision to award the above contract. The transmission of this Notification begins the Standstill Period. During the Standstill Period, you may:***



**7. Request a debriefing in relation to the evaluation of your tender**

**Submit a Procurement-related complaint in relation to the decision to award the contract.**

**a) The Successful Tenderer as per the table below:**

<b>BIDDER NO</b>	<b>BIDDERS NAME</b>	<b>SITES</b>
<b>48</b>	<b>LYTANS LIMITED (Address details withheld)</b>	<b>SOUTHERN BYPASS SITE</b>
<b>16</b>	<b>DEE CONSORTIUM LIMITED ...</b>	<b>SOUTHERN BYPASS SITE</b>
<b>74</b>	<b>NUTRALANE LIMITED</b>	<b>SOUTHERN BYPASS SITE</b>
<b>58</b>	<b>PROLAND HOLDINGS LIMITED</b>	<b>SOUTHERN BYPASS SITE</b>
<b>51</b>	<b>KENYA FUNDI LIMITED</b>	<b>SOUTHERN BYPASS SITE</b>
<b>35</b>	<b>BONGANI ENERGY KENYA</b>	<b>SOUTHERN BYPASS SITE</b>
<b>63</b>	<b>QUATRIX LIMITED</b>	<b>SOUTHERN BYPASS SITE</b>
<b>29</b>	<b>GAPS CONSTRUCTION &amp; ENGINEERING COMPANY LIMITED</b>	<b>SOUTHERN BYPASS SITE</b>

<b>BIDDER NO</b>	<b>BIDDER NAME</b>	<b>MANDATORY</b>	<b>TECHNICAL</b>	<b>REASON FOR DISQUALIFICATION</b>
<b>34</b>	<b>IBKA TRADING COMPANY LIMITED</b>	<i>Evaluated</i>	<i>Evaluated</i>	<i>The proposed rent was lower than the recommended annual rent</i>

**8. How to request for debriefing**

**DEADLINE:** *The deadline to request a debriefing expires at midnight on 19<sup>th</sup> July 2024...*

**9. How to make a complaint**

**a) Period:** *Procurement-related Complaint challenging the decision to award shall be submitted by midnight, 30<sup>th</sup> July 2024.*

...

**c) At this point in the procurement process, you may submit a Procurement-related Complaint challenging the decision to award the contract. You do not need to have requested, or received, a debriefing before making this complaint. Your complaint must be submitted within the Standstill Period and received by us before the Standstill Period ends.**

...

**10 Standstill Period**

...

**On behalf of the Employer**

**Signed**

**Name: LEAH NAISOI LEPORE**

**Title/Position: Ag DD SCM**

**Telephone: (Details withheld)**



***Email: [hps@kws.go.ke](mailto:hps@kws.go.ke); [naisoi@kws.go.ke](mailto:naisoi@kws.go.ke)***

68. From the above Notification Letter sent through email on 16<sup>th</sup> July 2024, it is apparent that the Applicant was notified:

- i. That its tender was unsuccessful for the reason that its rent was lower than the recommended annual rent.
- ii. That the Interested Parties herein were the successful tenderers in respect of the Southern Bypass Site.
- iii. The Applicant was at liberty to seek a debrief by midnight on 19<sup>th</sup> July 2024.
- iv. The Applicant was at liberty to file a procurement-related dispute by midnight on 30<sup>th</sup> July 2024.
- v. Any procurement -related complaint need not be preceded by a request for a debrief.

69. The Applicant does not dispute the Respondent's allegation that the Notification Letter was sent to the Applicant on 16<sup>th</sup> July 2024 by E-Mail. The Board is of the considered view that 16<sup>th</sup> July 2024, being the date when the Notification Letter was sent to the Applicant by email is the day the Applicant first learnt or ought to have learnt that it was unsuccessful in the subject tender in which the Interested Parties had also emerged as the successful tenderers. It is that date that forms the benchmark for the 14-days statutory window. We say so because Our finding is based on this Board's long strand of Decisions to the effect that though Section 167 of the Act and Regulation 203 of the 2020 Regulations 2020 outlines multiple instances that could form the benchmark date from when the 14-days statutory window opens, the actual benchmark date for any given



candidate or tenderer is the date they first learnt of the breach being complained about.

70. Additionally, we are unable to follow the Applicant's argument that it made a complaint to the Procuring Entity on 29<sup>th</sup> July 2024 and that it is the response to this letter that informed the instant Request for Review. We say so because the contents of the Applicant's letter of complaint whose details are reproduced for ease of reference bears out the fact that the Applicant was well aware of the alleged breach being complained of in the current Request for Review:

***KENYA WILDLIFE SERVICE***

***P.O. BOX 40241-00100***

***NAIROBI***

***...***

***RE: COMPLAINT ON TENDER NO. KWS/ONT/BDM/95/2023-2024***

***The above matter refers***

***I am writing to make a complaint against the decision of the Kenya Wildlife Service dated the 16<sup>th</sup> day of July 2024 in the matter of Tender No. KWS/ONT?BDM/95/2023-2024 for Leasing and management of tourism sites in national parks-southern bypass.***

***I have reservations on the whole/part of the above mentioned decision on the following grounds, namely:***

***1. Article 227 of the Constitution of Kenya 2020 stipulates that public procurement be carried out in a system that is fair,***



*transparent, competitive and cost effective. This was not the case as other bidders had an upper hand in the tendering process.*

*2.The tendering process was marred with conflict of interest contrary to Section 66 of the Public Procurement and Asset Disposal Act. Bidders No. 48 and 63 share the same address.*

*3.Bidders No. 48 and 63 also had the same legal representative on the say of tender opening which is a blatant contravention of clause 3.3. sub clause c. of the tendering document.*

*4.Bidders No. 48, 63 and 29 submitted lesser pages i.e. 53, 67 and 24 respectively. The tendering document has a total of 76 pages.*

*5.KWS wants to award 8 bidder on one site of 35 acres along Southern Bypass and yet all the bidders were required to bid as a whole according to the tendering document clause 11.2.*

*How did the 8 bid?*

*6.The Public Procurement and Asset Disposal Act of 2025 requires that the total prices should be read out loud during the opening of the tendering process. This was not done as indicated in the minutes.*

*...*

*Yours faithfully,*

*For: IBKA TRADING CO. LTD*

*Signed*

*IK HUSSEIN*

*MANAGING DIRECTOR*



71. From the above, the letter further confirms the Applicant's knowledge of the fact that it was disqualified from the subject tender and that the Southern Bypass site was awarded to the Interested Parties, which information was made through the Notification Letter sent on 16<sup>th</sup> July 2024. It would therefore follow that the first time the Applicant knew or ought to have known of the outcome of the evaluation process was 16<sup>th</sup> July 2024 when it received the Notification Letter and not 29<sup>th</sup> July 2024 when it received a response to its letter of complaint. Accordingly, the Applicant cannot therefore seek to rely on any correspondence it made with the Procuring Entity post notification as a way of stalling the 14 days statutory timeline from running.

72. The above position is in line with this Board's decision in ***PPARB Application No. 40 of 2023; Iansoft Technologies limited v The Accounting Officer, National Cereals & Produce Board & anor*** wherein the Board pronounced itself thus:

***From the contents of the above complaint letter dated 25<sup>th</sup> May 2024, it is clear to the Board that upon receiving the notification letter dated 24<sup>th</sup> May 2023, the Applicant was aggrieved by the decision of the Respondents to award the subject tender to the Interested Party since it believed that the procurement process was unfair because, inter alia, the Evaluation Committee did not verify the mandatory ISO certifications for the Interested Party and had failed to identify any weaknesses or deficiencies in the Interested Party's proposal. As such it is our considered view that at the time of receipt of the alleged notification letter dated 24<sup>th</sup> May 2023, the Applicant was aware of the alleged breach of duty***



***by the Respondents complained of in its letter dated 25<sup>th</sup> May 2023 and this alleged breach did not come to the attention of the Applicant during the meeting held on 5<sup>th</sup> June 2023 considering that parties were holding that meeting to address complaints raise by the Applicant on the alleged breach of duty by the Respondents following notification of the outcome of evaluation of the subject tender 24<sup>th</sup> May 2023.***

73. The Board will now proceed to compute the timeline within which the instant Request for Review ought to have been filed before it. In computing the 14 days contemplated under the Act, we take guidance from section 57 of the Interpretation and General Provisions Act:

***"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”***

74. When computing time when the Applicant ought to have sought administrative review before the Board, 16<sup>th</sup> July 2024 is excluded as per section 57(a) of the IGPA being the day that the Applicant learnt or ought to have learnt of the occurrence of the alleged breach. This means time started to run on 17<sup>th</sup> July 2024 and lapsed on 30<sup>th</sup> July 2024. In essence, the Applicant had between 17<sup>th</sup> July 2024 and 30<sup>th</sup> July 2024 to seek administrative review before the Board. The instant Request for Review was filed on 12<sup>th</sup> August 2024 which was 27 days from the date of learning of the breach in question and therefore outside the statutory timelines. Consequently, this ground of the Respondent’s Notice of Preliminary Objection succeeds.

75. In view of the foregoing the Board finds that the Request for Review was not filed within the statutory timelines stipulated under Section 167(1) of the Act and Regulation 203(1) of the Regulations 2020 and thus time-barred. Accordingly, the Board is divested the jurisdiction to hear and determine the instant Request for Review.

**Whether the Applicant’s tender was disqualified from the subject tender in accordance with the provisions of the Act, Regulations 2020 and the Tender Document?**

76. In view of the Board's finding that it is divested of the jurisdiction to hear and determine the Request for Review, it shall not delve in to an analysis of this issue.

**Whether the Interested Parties herein were properly awarded the subject tender?**

77. In view of the Board's finding that it is divested of the jurisdiction to hear and determine the Request for Review, it shall not delve in to an analysis of this issue.

**What orders the Board should grant in the circumstances?**

78. The Board has found that the instant Request for Review is time-barred and thus it is divested the jurisdiction to hear the same.

79. The upshot of our finding is that the Request for Review dated 9<sup>th</sup> August 2024 in respect of Tender No. KWS/ONT/BDM/95/2023-2024 for Leasing and Management of Tourism Sites in National Park fails in the following specific terms:

**FINAL ORDERS**

80. 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 9<sup>th</sup> August 2024 :

- 1. The Respondent's Notice of Preliminary Objection dated 16<sup>th</sup> August 2024 be and is hereby upheld.**
- 2. The Request for Review dated 9<sup>th</sup> August 2024 be and is hereby struck out.**



3. The Respondent's Accounting Officer be and is hereby directed to proceed with Tender No. KWS/ONT/BDM/95/2023-2024 for Leasing and Management of Tourism Sites in National Park to its lawful and logical conclusion in accordance with the provisions of the Constitution of Kenya, 2010, Act, Regulations 2020 and the Tender Document.
4. Each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 2<sup>nd</sup> Day of September 2024.

  
.....  
**PANEL CHAIRPERSON**  
**PPARB**

  
.....  
**SECRETARY**  
**PPARB**

