REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 87/2024 OF 3RD SEPTEMBER 2024

BETWEEN

MIRAN INSURANCE BROKERS LIMITED ..... APPLICANT

AND

THE MANAGING DIRECTOR,
SOUTH NYANZA SUGAR COMPANY LIMITED ..... 1ST RESPONDENT

SOUTH NYANZA SUGAR COMPANY LIMITED ..... 2ND RESPONDENT

KENYA ALLIANCE INSURANCE
COMPANY LIMITED ..... INTERESTED PARTY

Review against the decision of the Managing Director, South Nyanza Sugar Company Limited in relation to Tender No. SNSC/427D/2024/2025 for Provision of General Insurance Services.

BOARD MEMBERS PRESENT

1. Mr. Jackson Awele - Panel Chairperson
2. Ms. Jessica M'mbetsa - Member
3. Mr. Daniel Langat - Member

IN ATTENDANCE

Mr. Philemon Kiprop - Holding Brief for Acting Board Secretary

PRESENT BY INVITATION

APPLICANT **MIRAN INSURANCE BROKERS LIMITED**

Mr. Kiprono	- Advocate, A.E Kiprono & Associates Advocates
RESPONDENTS	**THE MANAGING DIRECTOR, SOUTH NYANZA SUGAR COMPANY LIMITED & SOUTH NYANZA SUGAR COMPANY LIMITED**
Mr. Modi	- Advocate, Modi & Co. Advocates
INTERESTED PARTY	**KENYA ALLIANCE INSURANCE COMPANY LIMITED**
Mr. Owiti	- E. Owiti & Company Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. South Nyanza Sugar Company Limited, the Procuring Entity and 2nd Respondent herein, invited sealed tenders in response to Tender No. SNSC/427D/2024/2025 for Provision of General Insurance Services for a period of twelve months beginning 1st September 2024 (hereinafter referred to as the "subject tender"). The invitation was by way of an advertisement on 9th July 2024 on my Gov publication, the Procuring Entity's website www.sonysugar.co.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 initial tender submission deadline was on 26th July 2024 at 10:00 a.m. and vide Addendum dated 24th July 2024, the submission deadline was extended to 31st July 2024 at 10:00 a.m.

Submission of Tenders and Tender Opening

2. According to the Minutes of the subject tender's opening held on 31st July 2024 signed by members of the Tender Opening Committee (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 1st 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 nine (9) tenders were submitted in response to the subject tender. The nine (9) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	**Name**
1.	Britam Life Assurance
2.	Johncelle Brokers
3.	APA Life Assurance
4.	Kenyan Alliance Insurance Ltd

5.	Miran Insurance Brokers Ltd
6.	Madison General Insurance
7.	MAJ Insurance Brokers Ltd
8.	Imoth Insurance Brokers Ltd
9.	Occidental Insurance Ltd

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the nine (9) tenders as captured in an Evaluation Report for the subject tender dated 9th August 2024 and signed by members of the Evaluation Committee (hereinafter referred to as the "Evaluation Report") in the following stage:
   i Preliminary Evaluation;
   ii Technical Evaluation;
   iii Financial Evaluation

Preliminary Evaluation

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Clause a) Mandatory Requirements to be met by the Tenderer of Section III – Evaluation and Qualification Criteria at page 26 to 27 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for registration and prequalification of the subject tender.

5. At the end of evaluation at this stage eight (8) tenders were determined non-responsive, including the Applicant's tender, while one (1) tender, being the Interested Party's tender, was determined responsive and proceeded for evaluation at the Technical Evaluation stage.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to evaluate tenders using the criteria provided under Clause b) Technical Evaluation of Stage III – Evaluation and Qualification Criteria at page 27 to 28 of the Tender Document. Bidders were required to score 70% and above to proceed to Financial Evaluation.

7. At the end of evaluation at this stage, the Interested Party's tender were determined responsive having met the cut-off points and proceeded to the Financial Evaluation stage.

Financial Evaluation

8. The Evaluation Committee was required to examine and rank tenders and the bidder with the lowest evaluated price would be considered for award of the subject tender.

9. Following conclusion of evaluation of bids at this stage, the Evaluation Committee reported as follows with regard to the Interested Party's tender:

	The Kenyan Alliance Insurance Company Ltd
Amount quoted in Kshs	*56,905,699.00*

Evaluation Committee's Recommendation

10. The Evaluation Committee recommended award of the subject tender to the Interested Party, M/S The Kenyan Alliance Insurance Company Ltd, at their quoted price of Kenya Shillings Fifty-Six Million Nine Hundred and Five Thousand Six Hundred and Ninety-Nine Only (Kshs. 56,905,699.00)

Professional Opinion

11. In a Professional Opinion dated 12th August 2024 (hereinafter referred to as the "Professional Opinion"), the Ag. Head of Procurement, Mr. David Achola, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to the Interested Party.

12. Thereafter the Professional Opinion was approved by the Procuring Entity's Managing Director, and the 1st Respondent herein, Matine Dima on 12th August 2024.

Notification to Tenderers

13. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 12th August 2024.

REQUEST FOR REVIEW NO. 87 OF 2024

14. On 3rd September 2024, Miran Insurance Brokers Limited, the Applicant herein filed a Request for Review dated 3rd September 2024 together with an Affidavit in Support of Request for Review dated 3rd September 2024 and sworn by George Olola, its Director/Chief Executive Officer and an Authority to Swear Supporting Affidavit dated 3rd September 2024 (hereinafter referred to as 'the instant Request for Review No. 42 of 2024') through A.E Kiprono & Associates seeking the following orders from the Board:

    a) An order annulling and setting aside the award of the Tender to 'successful tenderer', if any.

    b) An order quashing the 1st Respondent's decision contained in the letter dated 12th August 2024 declaring the Applicant's bid unsuccessful.

    c) A declaration that the Respondents unfairly evaluated the Applicant's tender at the mandatory evaluation stage.

    d) An order directing the Respondents to re-instate and re-evaluate the Applicant's tender at the mandatory evaluation stage taking into consideration the Board's directions in this application.

e) An order awarding costs of the request for review to the Applicant.

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

15. In a Notification of Appeal and a letter dated 3rd September 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 3rd September 2024.

16. On 10th September 2024, the Respondents filed through Modi & Co. Advocates a Notice of Appointment of Advocates dated 9th September 2024, a Respondent's Response to the Request for Review sworn on 9th September 2024 by Moses Onyango Odhiambo together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

17. *Vide* email dated 12th September 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.

18. *Vide* a Hearing Notice dated 12th September 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 18th September 2024 at 2.30 p.m., through the link availed in the said Hearing Notice.

19. On 17th September 2024, the Interested Party filed through E. Owiti & Company Advocates a Notice of Appointment dated 17th September 2024, a Notice of Motion dated 17th September 2024 supported by the Affidavit of Linda Njenga sworn on 17th September 2024, Interested Party's Preliminary Objection dated 17th September 2024, Interested Party's Grounds of Opposition dated 17th September 2024, Written Submissions dated 17th September 2024 and a List and Bundle of Documents dated 17th September 2024.

20. On the same day of 17th September 2024, the Applicant filed a Further Affidavit in Support of the Request for Review sworn on 16th

September 2024 by George Olola, an Affidavit sworn on 16th September 2024 by Cynthia Achieng Onyango and Written Submissions dated 17th September 2024.

21. At the hearing of the instant Request for Review on 18th September 2024, the Board read out the pleadings filed by parties in the matter including the Notice of Motion application by the Interested Party requesting to be joined to the proceedings and for the Affidavit sworn by Linda Njega, the Interested Party's Legal Manager be deemed to be the Interested Party's additional response to the instant Request for Review. Both counsels for the Applicant, Mr. Kiprono, and the Respondents, Mr. Modi, indicated that they were not opposed to the Interested Party's Notice of Motion application as prayed.

22. When asked if parties were ready to proceed with the hearing, Mr. Modi indicated that he was not ready to proceed and made an application for the matter to be adjourned to enable him file a Supplementary Affidavit in response to issues raised in the Applicant's Further Affidavit filed on 17th September 2024 that had not been addressed in the Respondents' response to the instant Request for Review.

23. In response, Mr. Kiprono indicated that he was not opposed to the application for adjournment and sought corresponding leave to file supplementary submissions in response to the Interested Party's Preliminary Objection.

24. Having considered parties' submissions on the application for adjournment, the Board sought to know whether parties were agreeable to canvassing the instant Request for Review by way of filing exhaustive written submissions in the interest of time and there being no objection by parties, the Board directed that (a) the instant Request for Review would be canvassed by way of written submissions, (b) by consent of parties, the Interested Party's Notice of Motion application be allowed as prayed, (c) the Respondents be granted leave to file and serve their Supplementary Affidavit limited to responding to issues raised in the Further Affidavit filed by the Applicant together with their written submissions by 11.00 a.m. on 19th September 2024, (d) the Applicant be granted corresponding leave to file its supplementary submissions to the Interested Party's Preliminary Objection by close of business on 19th September 2024. Parties were cautioned to adhere to the strict timelines as specified in the Board's directions and that the instant Request for Review having been filed on 3rd September 2024 was due to expire on 24th September 2024 and that the Board would communicate its decision on or before 24th September 2024 to all parties to the Request for Review via email.

25. On 19th September 2024, the Respondents filed a Respondent's Supplementary Affidavit sworn by Moses Onyango Odhiambo on 18th September 2024, Written Submissions dated 19th September 2024 and List of Authorities dated 19th September 2024.

26. On 20th September 2024, the Applicant filed Written Submissions dated 19th September 2024 in opposition of the Interested Party's Preliminary Objection.

27. On 20th September 2024 the Respondents filed with the Board a letter dated 20th September 2024 enclosing the Original EMS Shipment Waybill No. EE110047699KE.

PARTIES' SUBMISSIONS

Applicant's Case:

Submissions in opposition of the Interested Party's Preliminary Objection dated 17th September 2024.

28. On whether the instant Request for Review as filed is time barred in view of the provisions under Section 167(1) of the Act, the Applicant contends that the letter of notification of intention to award the subject tender was not sent through registered post as alleged by the Interested Party but through EMS courier and that the date when the said notification was delivered to Postal Corporation of Kenya for delivery to the Applicant is in contention.

29. The Applicant further contends that contrary to the Respondent's allegation that the said notification letter was delivered to it on 13th August 2024, there is no document in support of this allegation and the Respondent's annexure SNSC III does not indicate when the parcel was delivered to the Applicant.

30. It referred the Board to the affidavit sworn on 16th September 2024 by Cynthia Achieng Onyango indicating that she received the parcel from EMS on 27th August 2024 and argued that this assertion on service remains unchallenged and uncontroverted and is enough evidence that the notification was received by the Applicant on 27th August 2024.

31. According to the Applicant, what is in contention is when the notification letter was dispatched to it by the Respondents and it pointed out that whereas the Respondent aver that the letter was dispatched on 13th August 2024, the documents in support of the dispatch of the parcel show the contrary as an examination of the EMS Waybill No. EE110047699KE annexed as Exhibit marked MIB 11 at page 268 of the Request for Review appear to show that the parcel was received by Postal Corporation of Kenya at Suna on 26th August 2024.

32. The Applicant submitted that it utilized Postal Corporation of Kenya's EMS's tracking system to establish when the parcel delivered under Waybill No. EE110047699KE was received by Postal Corporation of Kenya from the Respondents and that the tracking system shows that the Respondents delivered the parcel to the corporation on 26th August 2024 at 10:37 as evidenced by annexure MIB 18 at page 11 of the Further Affidavit being the tracking summary.

33. To further probe the issue, the Applicant submitted that it wrote to Postal Corporation of Kenya on 12th September 2024 seeking clarity on the dates when the parcel was posted by the Respondents and when the same was delivered to the Applicant but unfortunately at the time of filing its Further Affidavit, it had not received a response to its query.

34. It is the Applicant's case that on the face of it, documentary evidence before the Board is in support of receipt of the parcel by Postal Corporation of Kenya on 26th August 2024 which explains why the same was delivered to the Applicant on 27th August 2024 and further, circumstantial evidence was also in support of the same conclusion.

35. The Applicant contends that it is not a mere coincidence that the notification letter was dispatched a day after it sought for instructions to renew the existing covers from 1st September 2024 in addition to the 27th August 2024 being the 14th day from the 13th August 2024 when the notification letter was allegedly dispatched to it.

36. The Applicant submitted that pursuant to clause 42.2 of the Tender Document, the standstill period commenced on 27th August 2024 when it received the letter of notification and the 14 days' statutory period within which it was required to file the request for review lapsed on 12th September 2024.

37. The Applicant contends that the Interested Party erroneously relied on Regulation 3(a)(i) of the Kenya Information and Communication

(Postal and Courier) Regulations in its proposition that the notification letter is deemed to have been received by the Applicant on the day that the same was received for postage as the said provision provides for 3 possible scenarios of delivery to the addresses and in the instant case, the notification was not delivered into the Applicant's letter box or bag but to its office through EMS courier services and as such, the applicable provision is Regulation 3(a)(ii) of the Kenya Information and Communication (Postal and Courier) Regulations as read with Section 2(3) of the Kenya Information and Communications Act.

38. The Applicant reiterated that the Request for Review having been filed on 3rd September 2024 was filed within the statutory period of 14 days' stipulated under Section 167(1) of the Act and as such, this ground of objection fails.

39. On whether the instant Request for Review is incompetent because of the contract signed on 1st September 2024, the Applicant contends that for this ground of objection to succeed, the Interested Party must demonstrate to the Board that the contract signed on 1st September 2024 was signed in conformity with the provisions of the Act.

40. The Applicant submitted that the notification of intention to award the subject tender dated 12th August 2024 is null and void ab initio for being in contravention of Clause 41.1 of the Tender Document and Section 87(3) of the Act read with Regulation 82(3) of Regulations

2020 hence the contract dated 1st September 2024 is founded on a notification that is null and void and is itself null and void.

41. It went on to point out that Clause 41.1 of the Tender Document provides that the notification of intention to enter into a contract issued to all tenderers ought to contain at the bare minimum the name and address of the tenderer submitting the successful tender, the contract price of the successful bidder and reasons why the tender of the unsuccessful bidder was unsuccessful and from the notification letter dated 12th August 2024, the specific reasons on why the Applicant was unsuccessful were not indicated nor the name of the successful tenderer, its tender sum and reasons why it was considered successful.

42. The Applicant contends that the provisions of Section 87(3) of the Act read with Regulation 82 of Regulations 2020 are set out in mandatory terms and failure to comply denies the procurement process transparency and accountability and as such, no notification has been issued to date since the letter dated 12th August 2024 did not contain the details of the successful tenderer.

43. It is the Applicant's case that the contract dated 1st September 2024 was signed during the standstill period contrary to Clause 42 and 46.1 of the Tender Document read with Section 135(3) of the Act in view of the fact that the standstill period commenced on 28th August 2024 and lapsed on 12th September 2024.

44. The Applicant urged the Board to note from the contract between the Respondents and the Interested Party that the Interested Party received its letter of notification of intention to award on or before 23rd August 2024 and it is logistically odd that 2 parcels from the same institution destined for the same city/locality in Westlands can be delivered to the 2 recipients more than 4 days apart.

45. In view of the foregoing, the Applicant urged the Board to dismiss the Interested Party's Preliminary Objection with costs for lacking in merit.

Submissions in support of the instant Request for Review

46. By way of background, the Applicant submitted that vide contract dated 1st July 2023, it provided insurance brokerage services to the Procuring Entity for the provision of life insurance and general insurance for the period 1st July 2023 to 30th June 2024 and this contract was due for renewal for a further period of 1 year but was unilaterally terminated by the Procuring Entity despite a review where the Applicant's performance was rated as exemplary.

47. It further submitted that pursuant to a tender notice dated 28th May 2024, it participated in Tender Number SNSC/427B/2023/2024 for provision of general service which was terminated by the Respondents due to detection of material governance issues. Further, on 9th June 2024 the Procuring Entity retendered Tender Number SNSC/427D/2024/2025 for provision of General Insurance Services

and an issued an addendum on 25th July 2024 whereby it introduced a completely new tender document while extending the submission deadline to 31st July 2024.

48. The Applicant averred that it submitted its bid document offering to provide the service at the tender sum of Kshs. 45,058,755 but through a letter of notification of intention to award dated 12th August 2024 served upon it through EMS on 27th August 2024, it was informed that it was unsuccessful since its tender failed to meet the mandatory requirement by submitting a difference referenced tender document.

49. On whether its bid document was correctly declared non-responsive, the Applicant invited the Board to review the Respondents' decision against the evaluation criteria set out in the Tender Document and argued that the reason advanced for its disqualification is a general and vague reason that lacks clarity leading it to request for a debriefing vide letter dated 27th January 2024 which was not responded to up until 6th September 2024. It pointed out that it declined the invitation for debriefing since proceedings in the subject tender had been stayed by the Board vide the letter of Notification of Appeal dated 3rd September 2024 issued by the Ag. Board Secretary.

50. The Applicant submitted that the Respondent acceded to its request for a summary report on the evaluation of its bid document where it learnt that according to the Evaluation Committee, its bid was disqualified since the advertised tender was referenced number

SNSC/427D/24/25 yet the bidder provided an offer to tender reference number SNSC/427D/2023/2024 and this was also averred by the Respondents at paragraph 21 of their Replying Affidavit.

51. The Applicant further submitted that this assertion by the Respondents is supported by annexure SNSC II which by their own admission is the cover page of the Applicant's tender which it contests was not one of the documents that was to be evaluated.

52. Without prejudice to the foregoing, the Applicant contends that even if the said tender number on the cover page was to be evaluated, the error thereon is a minor non-conformity, omission or error since the key document to be evaluated is the offer made in the Form of Tender and Bid Security which indicated the correct tender number.

53. The Applicant further contends that in arriving at the decision to disqualify its bid document, the Evaluation Committee failed to correctly apply the evaluation criteria set out under Clause 30.1 and 35.1 of the Tender Document, Section 79(2)(b) and 80(2) of the Act read with Regulation 30(a) & (b) of Regulations 2020.

54. It is the Applicant's case that Clause 2 of Section III – Evaluation and Qualification Criteria stipulates the preliminary requirements that a tenderer ought to meet and there is no indication that the cover page would be evaluated by the Respondents and if the contents thereon were to be evaluated at the preliminary evaluation stage, nothing

would have been easier that for the 2nd Respondent to state so in its Tender Document.

55. The Applicant indicated that a procuring entity's determination of a tender's responsiveness is to be based on the contents of the tender itself without recourse to extrinsic evidence and referred the Board to the holding in *PPARB Application No. 30 of 2022 Pawa IT Solutions Ltd v ICT Authority & Another, Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies; Ex parte Meru University of Science & Technology 2019 eKLR, Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk (2020) eKLR.*

56. It argued that the only explanation why its tender failed at the preliminary evaluation stage was that because the evaluation of its tender was subjective, unfair, biased and done in bad faith and devoid of transparency and that the sequence of events before, during and after the tender award to the Interested Party is clear evidence that the Applicant had to fail by whatever means.

57. The Applicant urged the Board to allow the instant Request for Review as prayed with costs.

Respondents' case

58. By way of background, the Respondents submitted that the Procuring Entity floated during the FY 2023/2024 tenders for provision of life and general insurance referenced as SNSC/427A/2023/2024 and SNSC/427B/2023/2024 for award period 1st July 2024 to 30th June 2025 but the same were cancelled and a retendering done for the same services on or about 4th July 2024 through tender reference nos. SNSC/427C/2023 /2024 and SNSC/427D /2023/2024 for the award period 1st July 2024 to 30th June 2025. These tenders were open to all insurance service providers and were scheduled to close on 26th July 2024 but an addendum was issued that substantively changed the reference numbers to SNSC/427C/2024/ 2025 and SNSC/427D/2024/2025 while increasing the award period from one year to two years for the new period 1st September, 2024 to 31st August 2025.

59. They indicated that the addendum formed part of the Tender Document pursuant to Section 75(4) of the Act and was necessitated by clarifications sought by bidders who were notified of the same and obligated to apply through the updated reference numbers for their bids to be valid.

60. It is the Respondents case that vide letter dated 12th August 2024, the Applicant was notified that its bid was unsuccessful and the said notification letter was sent through EMS services of Postal Corporation of Kenya, posted on 13th August 2024 and a way bill receipt issued to the Respondents.

61. On whether the instant Request for Review as filed is time barred by dint of Section 167(1) of the Act, it is the Respondents submission that notification was done on 13th August 2024 when the letter of notification of award was posted to the successful bidder and the regret letters were sent to their counterparts as evidenced by the way bill reference no EE110047699KE from postal corporation of Kenya annexed and marked SNSC III in the Replying Affidavit of Moses Onyango Odhiambo sworn on 9th September, 2024.

62. The Respondents contend that the allegations by the Applicant that its letter was deliberately posted late by the Procuring Entity is made in bad faith in view of the fact that the Respondents have clearly demonstrated that the way bill receipt received from Postal Corporation of Kenya was duly stamped on 13th August 2024 and received and accepted on even date.

63. The Respondents further contend that if the corporation delayed in delivery of the said notification, they weren't privy to this as they had discharged their mandate of sending out notification letters vide registered post on 13th August 2024 and they are strangers to the way bill presented by the Applicant showing that it was dispatched on 23rd August 2024.

64. They pressed on that it is trite law that once a process is served by a registered post, the recipient is deemed to have received such service

on the day of the postage and referred the Board to the holding in *African Merchant Assurance Co. Ltd (Amaco) v Public Procurement Administrative Review Board; Madison General Insurance Kenya Ltd & 2 others (Interested Parties) [2020] eKLR* where the court held that the 14 days' standstill period for purposes of communication of the notification of awards in procurement processes starts to run from the time of sending the notification and not from the time of receipt of the notification.

65. The Respondents averred that the standstill period therefore lapsed on 28th August 2024 and the instant Request for Review having been filed on 3rd September 2024 was time bared and ought to be struck out.

66. On whether the jurisdiction of the Board has been ousted by dint of Section 167(4)(c) of the Act, the Respondents associated themselves with the submissions made by the Interested Party and submitted that they entered into a valid contract with the Interested Party on 1st September 2024 and the instant Request for Review was filed after the same had been executed thus divesting the Board of its jurisdiction.

67. On whether they had demonstrated valid reasons to reject the Applicant's bid document in the subject tender, the Respondents submitted that the Applicant participated in a completely strange bid as per the bid document it submitted in view of the fact that the cover

page of the bid document which guide procuring entities in identifying respective bids must reflect the right reference number to enable the entity proceed and interrogate the bids further.

68. The Respondents pointed the Board to annexure marked SNSC-II and argued that it was apparent that the Applicant submitted a bid referenced SNSC/427D/2023/2024 and having noted that the reference number of the subject tender, they did not interrogate the Applicant's bid further and it ended up being disqualified at the preliminary evaluation stage for this reason which was incurable.

69. They placed reliance on Section 79(1) of the Act and Clause 31 of the Tender Document citing that they validly rejected the Applicant's bid and were not obligated to open it in view of the High Court's holding in *Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR.*

70. On the issue of validity of the letters of notifications sent out to tenderers, the Respondents submitted that they complied with Section 87 of the Act as read with Regulation 82 of Regulations 2020 having posted the notification letters dated 12th August 2024 on 13th August 2024.

71. The Respondents contend that had the Applicant proceeded to Financial Evaluation, its bid document would have been considered responsive and the Respondents would have been obligated under

Section 82(2) of the Act to inform it of the successful bidder and reasons why it was considered successful.

72. They urged the Board to dismiss the instant Request for Review with costs.

Interested Party's case

73. On whether the instant Request for Review as filed is time barred, the Interested Party submitted that the same was incompetent for having been filed out of time.

74. It argued that it is common ground that the notification letter is dated 12th August 2024 and it was not in contest the same was sent through registered post on 13th August 2024.

75. It further argued that Section 167(1) of the Act requires a review to be filed within 14 days from the date of notification and as such, in computation of time, time started running on 14th August 2024 being one day after the notification was received for postage and the last day of filing the review was ought to have been on 28th August 2024 hence the instant Request for Review having been filed on 3rd September 2024 was 6 days late.

76. The Interested Party placed reliance on Regulation 3 of the Kenya Information and Communication (Postal and Courier Services) Regulations 2010 which provides the legal position that a document is

deemed to have been received by the recipient on the day that it is received for postage. Further reliance was placed on the holding in *PPARB Application No. 24 of 2023 ADCC International East Africa Limited v Accounting Officer National Housing Corporation and Others.*

77. On the issue of the instant Request for Review being incompetent on view of the executed contract, the Interested Party made reference to Section 167 (4)(c) of the Act read with Section 135 of the Act and reiterated that the instant Request for Review ought to be dismissed. It submitted that it has commenced performing the contract after having gone through a competitive and fair tendering process.

BOARD'S DECISION

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

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

In determining the first issue, the Board will make a finding on the following sub-issues:

i Whether the instant Request for Review was filed within the statutory period of 14 days in accordance with Section 167(1)

of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.

ii *Whether the contract dated 1st September 2024 between the Procuring Entity and the Interested Party was signed in accordance with Section 135(3) of the Act thus ousting the jurisdiction of the Board by dint of Section 167(4)(c) of the Act.*

Depending on the determination of the first issue;

b) Whether the 2nd Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document as read with provisions of the Constitution, the Act and Regulations 2020;

c) What orders should the Board grant in the circumstances?

As to whether the Board has jurisdiction to hear and determine the instant Request for Review:

79. The Respondents and Interested Party object to the instant Request for Review on grounds that (a) the instant Request for Review as filed is time barred in view of the letter of notification of award posted to the successful bidder and regret letters sent to unsuccessful bidders on 13th August 2024, and (b) the Board's jurisdiction to entertain the

instant Request for Review is ousted by section 167(4)(c) of the Act in view of the contract between the Procuring Entity and the Interested Party dated 1st September 2024.

80. In response, the Applicant submitted that the letter of notification of the outcome of its bid was sent through EMS courier and not registered post as alleged by the Respondent and was received on 27th August 2024 when the standstill period commenced hence the Request for Review as filed was within the prescribed timelines. It further submitted that the applicable provision in determining when the notification is deemed to have been delivered to it is Regulation 3(a)(ii) of the Kenya Information and Communication (Postal and Courier) Regulations and not Regulation 3 (a)(i) as submitted by the Interested Party.

81. The Applicant contends that for the Board's jurisdiction to be considered ousted under Section 167(4)(c) of the Act, the Respondents and Interested Party must demonstrate that the contract dated 1st September 2024 was signed in conformity to Section 135(3) of the Act and in view of the breach by the Procuring Entity of Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020, the said contract was null and void and ought to be quashed by the Board.

a) On whether the instant Request for Review was filed within the statutory period of 14 days in accordance with Section 167(1) of the Act read with Regulation

203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.

82. 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 doing anything concerning such a matter.

83. 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."***

84. 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."

85. 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."***

86. In **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...."

87. Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR** that a court or tribunal may raise the same Suo Motu before addressing its mind to the merits of the case. The court stated thus:

> ***"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."***

88. 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.

89. This Board's jurisdiction 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, <u>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,</u> or disposal process as in such manner as may be prescribed. *[Emphasis by the Board]*

(2) .....

(3) .....

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with Section 63 of this Act; and

(c) <u>where a contract is signed in accordance with section 135 of this Act.</u>

168. .....

169. .....

170. .....

171. .....

172. .....

172. Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

173. Powers of Review Board

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

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

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

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

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

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

90. Given the foregoing provisions of the Act, the Board is a creature of the Act and its jurisdiction flows from Section 28 and 167 (1) of the Act, limited under Section 167(4) of the Act and exercises its powers under Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before it. Put differently, if the Act does not apply, then the Board will not have jurisdiction where the Act does not apply because the Board is only established by the Act, its jurisdiction only flows from the Act and it can only exercise powers as granted under the Act.

91. It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

92. The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under 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 which prescribes the format of the request for review as follows:

> ***PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS***
>
> ***203. Request for a review***
>
> ***(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.***
>
> ***(2) The request referred to in paragraph (1) shall—***
>
> > ***(a) .....;***
> >
> > ***(b) .....;***
> >
> > ***(c) be made within fourteen days of —***
> >
> > > ***(i) the occurrence of the breach complained of, where the request is made before the making of an award;***
> > >
> > > ***(ii) the notification under section 87 of the Act; or***

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

(d) .....

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

(4) .....

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

87. Notification of intention to enter into a contract

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

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

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

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

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

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

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

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

96. Section 167 of the Act and Regulation 203 of the 2020 Regulations identifies the benchmark events for the running of time to be the date of notification of the award or date of occurrence of the breach complained of.

97. Having considered parties' pleadings and submissions on the Preliminary Objection, the issue that calls for determination by this Board is what were the circumstances in the instant case that determine the period when the Applicant ought to have approached the Board?

98. The Respondents and Interested Party contend that the letter of notification of the outcome of evaluation of the Applicant's bid in the subject tender was posted by the Respondents on 13th August 2024 as evidenced by the Original EMS Shipment Waybill No. EE110047699KE submitted to the Board by the 1st Respondent as part of the confidential documents in the subject tender. On the other hand, the Applicant contends that the said letter was received on 27th August 2024 as seen from paragraph 2 of its Affidavit sworn on 16th September 2024 by Cynthia Achieng Onyango, an employee of the Applicant which states:

"THAT I do recall the events of 27th August 2024. At around 9 am I was at the reception area when I received a parcel from EMS. I duly acknowledged receipt of the said parcel by affixing the Applicant's date stamp of 27th August 2024 and appended my signature on the EMS Shipment Waybill No. EE110047699KE which is attached herewith and marked as CAO."

99. According to the Applicant's Exhibit marked CAO being a copy of the EMS Shipment Waybill No. EE110047699KE, it is indicated that delivery to the Applicant was acknowledged on 27th August 2024 as stamped thereon and signed by Cynthia.

100. Further, the Applicant at paragraph 10 of its Further Affidavit sworn on 16th September 2024 by George Olola depones that it utilized the EMS's tracking system in order to establish when the parcel delivered under Waybill No. EE110047699KE was received by the Corporation from the Respondents as follows:

"THAT in view of the Respondents assertion that they had executed the contract on 1st September 2024, the Applicant utilized Postal Corporation of Kenya's EMS's tracking system in order to establish when the parcel delivered under Waybill No. EE110047699KE was received by the Corporation from the Respondents. The tracking system shows that the Respondent's delivered the parcel to the Corporation on 26th August 2024 at

10.37. Annexed and marked MIB 18 is the tracking summary."

101. The Board takes cognizance of Regulation 3 of the Kenya Information and Communications (Postal and Courier Services) Regulations, 2010 that speaks to service of documents using the postal office which provides as follows:

> ***Regulation 3 - Delivery and acceptance***
> ***(1) A postal article shall be considered —***
> ***(a) to have been delivered to the addressee —***
> ***(i) when it is delivered into a private letter box or bag of the addressee;***
> ***(ii) when it is left at the house, or office of the addressee as set out thereon, or with the employee, agent or any other person authorized to receive it; or***
> ***(iii) where the addressee is a guest or is a resident at a hotel, hostel or lodging, when it is left with the proprietor or manager of the hotel, hostel or lodging or with his agent; or***
> ***(b) to have been received by a postal licensee when it is deposited into a posting box or handed over to an employee or agent of a postal service operator authorized to receive it."***

102. In essence, service of postal articles is deemed to have been effected on the addressee (a) the moment the postal address receives the article being posted, or (b) the moment the postal address is left at the house, office, or with an employee/agent of the addressee, or (c) the moment the postal address is left with the proprietor/manager of a hotel, hostel, or lodging where the addressee is a guest. Additionally, the postal address shall be considered to have been received by a postal licensee when it is deposited into a posting box or handed over to an authorized employee or agent of a postal service operator.

103. A closer look at the Applicant's Exhibit marked CAO being a copy of the EMS Shipment Waybill No. EE110047699KE reveals that though the date and time of acceptance as handwritten thereon appear to read 26/8/24, the date of stamp affixed thereon reads 13.08.24 hence confirming averments by the Respondents that the same was posted on 13th August 2024 and the Applicant's exhibit portray an attempt to modify or alter the date and time of receipt of the parcel under dispatch.

104. In the premises, we find that the Respondents have on a balance of probabilities demonstrated how and when the notification letter was transmitted and when time starts running for purposes of Section 167(1) of the Act.

105. In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

> ***"57. Computation of time***
>
> ***In computing time for the purposes of a written law, unless the contrary intention appears—***
>
> ***(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
>
> ***(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
>
> ***(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***
>
> ***(d) where an act or proceeding is directed or allowed to be done or taken within any time not***

exceeding six days, excluded days shall not be reckoned in the computation of the time."

106. In computing time when the Applicant should have sought administrative review before the Board with respect to challenging the evaluation of its tender, fourteen days started running on 14th August 2024 and lapsed on 27th August 2024. The 13th August 2024 is excluded pursuant to Section 57(a) IGPA being the day when the letter of notification was posted. In essence, the Applicant had between 14th August 2024 and 27th August 2024 to seek administrative review before the Board.

107. The Applicant filed the Request for Review on 3rd September 2024 which was the 21st day after postage of the notification letter and outside the statutory period of 14 days prescribed under Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020. Accordingly, the Board is divested of jurisdiction to hear and determine the instant Request for Review. Consequently, this ground of Preliminary Objection succeeds.

b) ***As to whether the contract dated 1st September 2024 between the Procuring Entity and the Interested Party was signed in accordance with Section 135(3) of the Act thus ousting the jurisdiction of the Board by dint of Section 167(4)(c) of the Act.***

108. We have hereinabove established that under Section 167(4)(c) of the Act, this Board is divested of jurisdiction to entertain a review application in instances where a contract has already been signed. However, the Board is obligated to satisfy itself that the contract was signed in strict compliance with Section 135(3) of the Act for it to down its tools since the mere signing of a procurement contract does not automatically oust the jurisdiction of the Board.

109. Section 135 of the Act provides as follows:

"135. <u>Creation of procurement contracts</u>

(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

(3) <u>The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification</u>

provided that a contract shall be signed within the tender validity period.

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—

(a) Contract Agreement Form;

(b) Tender Form;

(c) price schedule or bills of quantities submitted by the tenderer;

(d) Schedule of Requirements;

(e) Technical Specifications;

(f) General Conditions of Contract;

(g) Special Conditions of Contract;

(h) Notification of Award.

(7) A person who contravenes the provisions of this section commits an offence."

110. The pre-conditions of signing a procurement contract under Section 135 are, *inter alia* ; (a) such a procurement contract must be in writing, (b) signed by an accounting officer or an officer authorized in writing by an accounting officer of a procuring entity and the successful tenderer and (c) a procurement contract must be signed within the tender validity period but not earlier than fourteen days have elapsed following the giving of a notification of award.

111. The High Court in **Judicial Review No. 589 of 2017 Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR** which was upheld by the Court of Appeal in **Civil Appeal No. 35 of 2018 Ederman Property Limited v Lordship Africa Limited & 2 others [2019] eKLR** stated as follows:

"In this case, the Review Board makes no reference to whether or not the contract allegedly signed was in accordance with section 135 of the Act. From the above cited case law, it is clear that the Review Board should have first determined whether the contract in question was signed in accordance with section 135 of the Act. This is so because the mere fact that a contract has been signed does not necessarily deprive the Respondent of the jurisdiction to entertain the request for review. In other words before the Review Board

makes a determination that it has no jurisdiction to entertain the request by virtue of section 167(4)(c) of the Act, it has the duty to investigate whether the contract in question was signed in accordance with section 135 of the Act and the failure to do so in my view will amount to improper deprivation of jurisdiction and in my further view, improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction.....

147. The respondent at the time of declining jurisdiction to entertain the request for review did not make any reference to or inquiry as to whether the subject contract was entered into in accordance with section 135 of the Act and therefore, in my humble view, the respondent acted in error by merely declining jurisdiction on account that the contract of procurement had already been signed between the procuring entity and the successful bidder."

112. In the same vein, while concurring with the above finding, the Court of Appeal in **Civil Appeal E1009 of 2023 [2024] KECA 79 eKLR Public Procurement Administrative Review Board v Four M Insurance Brokers Limited & 3 others** (hereinafter referred to as "the Four M Insurance Brokers Limited case") held as follows:

".....

44. The bone of contention between the parties on this issue is twofold. The first one is the tabulation of the

fourteen day period and the second one is the validity of the signed contract. On the fourteen-day period, it is evident that the Request for Review was not made within 14 days of the notification of award but rather on the occurrence of a breach, which the appellant submits was on 28th September 2023.

45. We are constrained to have a broader interpretation of the words "or date of occurrence of the alleged breach at any stage of the procurement process" as set out in section 167(1) of the Act. This provision in our view encompassed situations such as the appellant's where allegations of breach arise or become known after the lapse of time for notification of award. A narrow construction of the jurisdiction of the appellant will have untold ramifications in the sense that it will leave the litigants aggrieved with no obvious recourse.

46. Specifically with respect to procurement disputes, the question of how the date of occurrence of a breach is to be determined, was the subject of the persuasive decision by Elias JA of the English Court of Appeal in SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156 wherein while applying the decision of the European Court of Justice in Uniplex (UK) Ltd vs NHS Business Services Authority (2010) 2 CMLR 47

extensively discussed when time starts to run with respect to a breach in procurement proceedings as follows:

"……

The threshold therefore in determining the date of occurrence of a breach is the date of actual or constructive knowledge of the breach by an applicant. This indeed is one of the key reasons for the notification and standstill requirements in the award of tenders, so as to allow for informed and effective challenges to award decisions before the contracts are concluded.

47.The answer then to the question of the date of occurrence can only be answered with reference to the 2nd respondent's knowledge of the alleged breach, and it is our view that the learned Judge of the superior Court in this respect erred in finding that time should start running from 7th September 2023 when the 1st respondent was notified of the award, and ought to have considered the averments by the 2nd respondents that it only came to learn of the developments on 28th September 2023. We accordingly find that the time for filing the request for review under Section 167(1) of the Act started running a day after the 28th September 2023 when the record reflects that the 2nd respondent became aware of the breach, and that the Request for

Review was filed within the 14 days standstill period in consonance with Section 167(1) of the Act read with Regulation 203 (2) (c) (iii) of Regulations 2020. ***The appellant therefore had jurisdiction to hear and determine the Request for Review.***

48. On the second limb of jurisdiction relating to the existence of a signed contract, we note that the learned Judge of the superior Court held as follows on this issue:-
"......"

49. As already observed, the appellant's jurisdiction emanates from Section 167(1) of the Act. Section 167(4) provides matters that shall not be subject to the jurisdiction of the appellant and, Section 167(4) (c) of the Act specifically, ousts the appellant's jurisdiction where a contract is signed in accordance with Section 135 of the Act. Section 135 in this regard sets out various requirements to be met in the creation and signing of procurement contracts, and an ordinary and purposive interpretation of section 167(4) is that the appellant is required to inquire into whether a procurement contract has been signed in accordance with section 135 of the Act when deciding on whether it has jurisdiction to hear and determine a request for review filed before it in cases where a contract has already been signed, and its

jurisdiction is only ousted once this preliminary inquiry establishes that the provisions on creation of a procurement contract under Section 135 of the Act have been met, or where it makes an error as to the existence of this statutory precondition.

50.Indeed in the case of Ederman Property Limited v Lordship Africa Limited & 2 others [2019] eKLR, where a similar question arose as to whether the Appellant had properly declined jurisdiction in a case where a contract had been signed, this Court stated thus: -

.....

51. We adopt and agree with this reasoning. Put another way, section 164(7) implies a jurisdiction on the part of the appellant to entertain an application as to whether a contract is signed in accordance with Section 135, and is meant to address the obvious mischief of the signing of illegal procurement contracts so as to oust the jurisdiction of the appellant. The Learned Judge of the superior court therefore adopted a restrictive interpretation of the provisions of the Act and erred in not appreciating and considering the existence of the condition precedent to the ouster of the appellant's jurisdiction where a contract has been signed. Accordingly, it is our finding that the Learned Judge erred in law in holding that the appellant had no

jurisdiction solely on the basis that a procurement contract had been signed without checking on compliance with Section 135 of the Act."

113. In the Four M Insurance Brokers Limited case, the Court of Appeal while interpreting Section 167(1) of the Act on the tabulation of the 14 days period a review application ought to have been lodged with the Board, found that the threshold in determining the date of occurrence of a breach stipulated under Section 167(1) of the Act is the date of actual or constructive knowledge of the breach by an applicant and is one of the key reasons for the notification and standstill requirements in the award of tenders, so as to allow for informed and effective challenges to award decisions before the contracts are concluded. The Court of Appeal went ahead to quash the finding of the High Court that time started running upon notification of award and held that time started running when the 2nd Respondent in the appeal became aware of the breach complained of hence the Board had jurisdiction to entertain the review application.

114. However, for purposes of determining the standstill period within which a contract cannot be signed for purposes of section 135 of the Act, the Judgment by Justice Nyamweya in **High Court Judicial Review Application No. 115 of 2020 African Merchant Assurance Co. Ltd v The Public Procurement Administrative Review Board; Madison General Insurance Kenya Ltd & 2 others** held as follows

" 57. Section 135 of the Act provides that it is the giving of notification which is the trigger of time for purposes of entering into contract with a successful bidder, while under section 87 of the Act it is clear that it is the procuring entity that is required to give this notification. The Respondents relied on the date of receipt of the notification by the 1st and 3rd Interested Parties as the material act in determining the date when a contract is to be signed. The receipt of a notification by a bidder is however not a factor that is to be considered under section 135 of the Act with respect to when a contract is to be executed by a procuring entity, unlike in the case of filing for Requests for Review. The obvious mischief that was intended to be avoided by this distinction was the intentional delay that may be caused in entering into contracts by unsuccessful bidders.

58. The standstill time under section 135 of the Act therefore starts to run from the time of sending of the notification, and not the receipt of a notification. The Respondent, having applied an erroneous criterion, and having failed to interrogated and make a determination of the material factor as to when time started to run for the standstill time, thereby erroneously assumed jurisdiction to hear and determine the 1st and 3rd Interested Parties Request for Review. It therefore

follows that the decision made by the Respondent was unlawful for this reason."

115. The import of the above decision of Justice Nyamweya is that (a) the trigger for purposes of entering into a procurement contract with the successful bidder is the giving/issuance of notification by the procuring entity, (b) the date of receipt of a notification is NOT a factor to be considered under Section 135 of the Act with respect to when a contract is to be executed by a procuring entity unlike in the case of filing a request for review application, and (c) the standstill period under Section 135 of the Act starts running from the time of sending of the notification and not on receipt of the notification. (Emphasis ours)

116. In view of the above court findings, which the Board is bound to follow and our determination under the first sub-issue that the Respondents demonstrated that the date of service of the notification letter was on 13th August 2024, we note that the earliest that a contract could be lawfully executed in the subject tender was on or about the 28th August 2024 after lapse of the 14 days' standstill period. The contract dated 1st September 2024 was therefore signed 3 days after the lapse of the standstill period provided under Section 135(3) of the Act and is valid. Accordingly, the Board finds that it is divested of jurisdiction to entertain this matter by dint of Section 167(4)(c) of the Act and this ground of objection succeeds.

117. We therefore decline jurisdiction to entertain this matter and accordingly, we proceed to down our tools at this juncture and shall not proceed to consider the other issues framed for determination.

118. The upshot of our findings is that the instant Request for Review is struck out for want of jurisdiction.

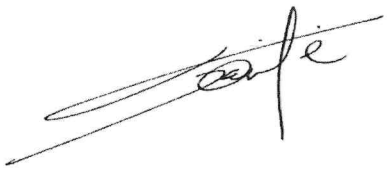
FINAL ORDERS

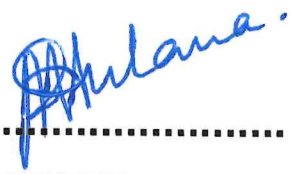
119. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 3rd September 2024 and filed on even date:

A. The Applicant's Request for Review dated 3rd September 2024 and filed on even date be and is hereby struck out for want of jurisdiction.

B. Given our findings herein, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 24th Day of September 2024.





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