

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 91/2024 OF 25<sup>TH</sup> SEPTEMBER 2024**

**BETWEEN**

**CHAKRA COMPANY LIMITED ..... APPLICANT**

**AND**

**BUKURA AGRICULTURAL COLLEGE ..... 1<sup>ST</sup> RESPONDENT**

**LINDUM SYSTEMS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer Bukura Agricultural College in relation to Tender No. BAC/TC/01/2024-2025 for Provision of Security Services.

**BOARD MEMBERS PRESENT**

- |                         |                     |
|-------------------------|---------------------|
| 1. Ms. Jessica M'mbetsa | - Panel Chairperson |
| 2. Mr. Stanslaus Kimani | - Member            |
| 3. Mr. Daniel Langat    | - Member            |

**IN ATTENDANCE**

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

## **PRESENT BY INVITATION**

### **APPLICANT**

### **CHAKRA COMPANY LIMITED**

Mr. Musa Aziz

- Advocate, Aziz & Associates

### **1<sup>ST</sup> RESPONDENT**

### **BUKURA AGRICULTURAL COLLEGE**

1. Mr. Paul Njogu

- Ag. Principal/CEO Bukura Agricultural College

2. Mr. Collins Muhando

- Ag. Manager Supply Chain Management

3. Mr. Gilbert Wafula Nyongesa - Director Bukura Agricultural College

### **2<sup>ND</sup> RESPONDENT**

### **LINDUM SYSTEMS LIMITED**

1. Ms. Desma Nungo

- Advocate, NOW Advocates LLP

2. Ms. Maina Elsa

- Advocate, NOW Advocates LLP

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Bukura Agricultural College, the Procuring Entity and 1<sup>st</sup> Respondent herein invited sealed bids in response to Tender No. BAC/TC/01/2024-2025 for Provision of Security Services for a period of one (1) year (hereinafter referred to as the "subject tender"). Tendering was conducted under open competitive method (National) and the invitation was by way of an advertisement on 1<sup>st</sup> April 2024 in the Star Newspaper and published on the Procuring Entity's website [www.bukuracollege.ac.ke](http://www.bukuracollege.ac.ke) and on the Public Procurement Information Portal (PPIP) website [www.tenders.go.ke](http://www.tenders.go.ke) where the blank tender document issued to tenderers

(hereinafter referred to as the 'Tender Document') was available for download. An Addendum Notice amending the Mandatory/Preliminary requirements was issued by the Principal/CEO of the Procuring Entity on 26<sup>th</sup> April 2024. The subject tender's submission deadline was on 3<sup>rd</sup> May 2024 at 10.00 a.m. (East Africa Time).

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

2. According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 3<sup>rd</sup> May 2024 which form part of confidential documents furnished to the Public Procurement Administrative Review Board by the 1<sup>st</sup> 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 seven (7) tenders were submitted in response to the tender. The tenders were opened in the presence of tenderers' representatives present, and were recorded as follows:

<b>Bidder No.</b>	<b>Name</b>
1.	Ironcrest Security Services Limited
2.	Silent Eye Securities Limited
3.	Newham Services International Limited
4.	Chakra Security Company Limited
5.	Lindum Systems Limited
6.	Hounslow Security Limited
7.	Papaton Security Services Limited

## **Evaluation of Tenders**

3. A Tender Evaluation Committee undertook evaluation of the seven (7) tenders as captured in the Tender Evaluation Report signed by members of the Evaluation Committee on 17<sup>th</sup> May 2024. The evaluation was done in the following stages:

- i Preliminary/Mandatory Evaluation;
- ii Technical Evaluation; and
- iii Financial Evaluation

### **Preliminary/Mandatory Evaluation**

4. The Evaluation Committee carried out a Preliminary/Mandatory Evaluation and examined tenders for responsiveness against the mandatory requirements set out in the Addendum Notice issued on 26<sup>th</sup> April 2024. Tenderers were required to meet all the mandatory requirements at this stage to proceed to Technical Evaluation.

5. At the end of evaluation, five (5) tenders were determined non-responsive, while two (2) tenders, being the Applicant's and 2<sup>nd</sup> Respondent's tenders were determined responsive. The responsive tenders proceeded to Technical Evaluation.

### **Technical Evaluation**

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set under Technical Evaluation of



Section III- Evaluation and Qualification Criteria at page 35 of the Tender Document. Tenders were required to attain a pass mark of 70% and above to proceed to Financial Evaluation.

7. At the end of evaluation at this stage, both the Applicant's and 2<sup>nd</sup> Respondent's tenders were determined responsive having scored above the pass mark of 70% and proceeded to Financial Evaluation.

### **Financial Evaluation**

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 36 of the Tender Document. Evaluation at this stage would involve comparison of prices among bidders. The bidder with the lowest evaluated price would be recommended for award of the subject tender for a period of one (1) year.
9. Upon completion of the Financial Evaluation, the price comparison was tabulated as follows:

<b>NO</b>	<b>BIDDERS NAME &amp; ADDRESS</b>	<b>BIDDERS COST</b>
<b>4</b>	<b>CHAKRA SECURITY COMPANY LIMITED P.O. BOX 3909-40100 KISUMU</b>	<b>KSH 13,200 PER GUARD PER MONTH</b>
<b>5</b>	<b>LINDUM SYSTEMS LIMITED P.O. BOX 1844-40100 KISUMU</b>	<b>KSH 12,900 PER GUARD PER MONTH</b>

10. The 2<sup>nd</sup> Respondent's tender was found to be the lowest evaluated price at its quoted price of Kenya Shillings Twelve Thousand Nine Hundred (Kshs. 12,900.00) per guard per month for a period of 1 (one) year and was recommended to proceed for due diligence before award of contract so as to ascertain its responsiveness.

### **Due Diligence**

11. According to the Due Diligence Report signed by members of the Evaluation Committee on 3<sup>rd</sup> June 2024, members checked and confirmed the 2<sup>nd</sup> Respondent's original documents, offices, operation departments, control room, surveillance and responsive vehicles and institutions where similar service were being offered as can be discerned from page 1 of 3 of the Due Diligence Report.
12. At the end of the due diligence exercise, the Evaluation Committee upheld its recommendation for award of the subject tender to the Applicant, being the lowest evaluated bidder at its tender price of Kenya Shillings Twelve Thousand Nine Hundred (Kshs. 12,900.00) per guard per month for a period of 1 (one) year.

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

13. The Evaluation Committee recommended award of the tender to the Applicant herein at its tender price of Kenya Shillings Twelve Thousand

Nine Hundred (Kshs. 12,900.00) per guard per month for a period of 1 (one) year being the most responsive and lowest evaluated tender.

### **Professional Opinion**

14. In a Professional Opinion, dated 3<sup>rd</sup> June 2024, the Head Supply Chain Management Unit, Mr. Collins Muhando reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the Evaluation Committee's recommendation to award the subject tender to the 2<sup>nd</sup> Respondent at its tender price of Kenya Shillings Twelve Thousand Nine Hundred (Kshs. 12,900.00) per guard per month for a period of 1 (one) year being the most responsive and lowest evaluated tender.

### **Notification to Tenderers**

15. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 3<sup>rd</sup> June 2024.

### **REQUEST FOR REVIEW NO. 91 OF 2024**

16. On 25<sup>th</sup> September 2024, Chakra Company Limited, the Applicant herein, filed a Request for Review dated 19<sup>th</sup> September 2024 together with a Supporting Affidavit sworn by Peter Omolo Osano, its Director on 19<sup>th</sup> September 2024 and a List of Documents dated 19<sup>th</sup> September 2024 (hereinafter referred to as "the instant Request for Review") through Aziz & Associates seeking the following orders from the Board:



- a) A declaration that the procuring entity breached the provisions of the Public Procurement and Asset Disposal Act, 2015 and Articles 47 and 227 of the Constitution of Kenya.***
- b) The notification letter and subsequent regret letter dated 3rd June 2024 be nullified.***
- c) That the award and the entire procurement proceedings in tender number BAC/TC/01/2024 be nullified in its entirety.***
- d) That subsequently, the respondent be ordered to re-evaluate the Applicant's bid in relation to the tender for the provision of security services and apply the criteria set out under the law as well as the tender documents and award the tender to a qualified bidder.***
- e) The Applicant be awarded costs.***

17. In a Notification of Appeal and a letter dated 25<sup>th</sup> September 2024, Mr. James Kilaka, the Acting Secretary of the Board notified the Procuring Entity of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to the said Procuring Entity 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 Procuring Entity was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 25<sup>th</sup> September 2024.

18. On 1<sup>st</sup> October 2024 the Procuring Entity filed through Mr. Collins Muhando, Ag. Manager Supply Chain, a 1<sup>st</sup> Respondent's Memorandum of Response dated 30<sup>th</sup> September 2024 together with confidential documents submitted pursuant to Section 67(3)(e) of the Act.
19. *Vide* email dated 1<sup>st</sup> October 2024, the Acting Board Secretary notified all tenderers in the subject tender, of the existence of the Request for Review while forwarding to them the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All tenderers were invited to submit to the Board any information and arguments concerning the tender within three (3) days.
20. *Vide* a Hearing Notice dated 3<sup>rd</sup> October 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 8<sup>th</sup> October 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
21. On 4<sup>th</sup> October 2024, the 2<sup>nd</sup> Respondent filed a Notice of Appointment of Advocates dated 3<sup>rd</sup> October 2024, a Notice of Preliminary Objection

dated 3<sup>rd</sup> October 2024, and a 2<sup>nd</sup> Respondent's Replying Affidavit sworn by Dennis Mbote Mumbi on 3<sup>rd</sup> October 2024.

22. On 4<sup>th</sup> October 2024, the Applicant through its advocates filed via email a Further Affidavit sworn on 4<sup>th</sup> October 2024 by Peter Omolo Osano.

23. On 7<sup>th</sup> October 2024, the 2<sup>nd</sup> Respondent filed through its advocates 2<sup>nd</sup> Respondent's Written Submissions dated 4<sup>th</sup> October 2024 and 2<sup>nd</sup> Respondent's List and Bundle of Authorities dated 4<sup>th</sup> October 2024.

24. At the hearing on 8<sup>th</sup> October 2024 at 11:00 a.m., the Board read out pleadings filed by parties in the instant Request for Review. Subsequently, parties were allocated time to highlight their respective cases and the Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **2<sup>nd</sup> Respondent's submissions on its Preliminary Objection**

25. In her submissions, counsel for the 2<sup>nd</sup> Respondent, Ms. Nungo, relied on the Notice of Preliminary Objection dated 3<sup>rd</sup> October 2024, grounds stated in paragraphs 15 to 17 of the 2<sup>nd</sup> Respondent's Replying Affidavit sworn on 3<sup>rd</sup> October 2024 by Dennis Mbote Mumbi, and paragraphs 9 to 42 of the 2<sup>nd</sup> Respondent's Written Submissions dated 4<sup>th</sup> October 2024.

26. Counsel submitted that the instant Request for Review is time barred having been filed contrary to Section 167(1) of the Act read with Regulation 203 of Regulations 2020. She referred the Board to the letter

of regret dated 3<sup>rd</sup> June 2024 and paragraph 16 of the 1<sup>st</sup> Respondent's Memorandum of Response which confirmed that all the notification letters in the subject tender were sent out at the same time on 4<sup>th</sup> June 2024 via post and the Applicant's letter was similarly dispatched to its postal address provided in its confidential business questionnaire and that this was not rebutted by the Applicant.

27. Counsel invited the Board to note that over 3 months had lapsed since the notification letter was issued and that the instant Request for Review was filed outside the 14 days' statutory period. In support of her argument, she relied on the holding in *PPARB Application No. 67 of 2023 Gardens and Wedding Centre Ltd v Accounting Officer, Ministry of Foreign and Diaspora Affairs & Others* and *PPARB Application No. 39 of 2022 Tsavo Oilfield Services Ltd v Accounting Officer Kengen Plc*.

28. Ms. Nungo submitted that the Applicant had conspicuously failed to claim and plead that it had suffered or risks suffering loss or damage due to the alleged breach of duty imposed on the 1<sup>st</sup> Respondent by the Act and Regulations 2020 contrary to Section 167(1) of the Act and as such, lacked locus standi to institute the instant Request for Review. She pointed out that this position has been underscored in numerous judicial decisions and referred the Board to the holding by the Court of Appeal in *James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 Others (2019) eKLR*.



29. Ms. Nungo further submitted that the Applicant had failed to join the accounting officer of the Procuring Entity as a party in the proceedings contrary to Section 170 (b) of the Act which makes it mandatory to join an accounting officer and failure to do so renders the request for review incompetent. In support of her argument, counsel referred the Board to the holding in *El Roba Enterprises Limited & 5 Others v James Oyondi t/a Betoyo Contractors & 5 Others (2018) eKLR* and *James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 Others (2019) eKLR*.
30. Counsel submitted that the Request for Review as filed was supported by a statement that had been put on record without authority contrary to Regulation 203 of Regulations 2020 and invited the Board to look at the affidavit of Peter Omolo and appreciate that there was no external authority to swear the same nor a resolution from the company being a legal entity. In support of her argument, she referred the Board to the holding in *Spire Bank Limited v Land Registrar & 2 others (2019) eKLR*.
31. She urged the Board to strike out the instant Request for Review for being fatally incompetent and for want of jurisdiction of the Board to hear and determine the same.

### **Applicant's Submissions**

32. In his submissions, Counsel for the Applicant, Mr. Aziz, submitted that the instant Request for Review had been filed within the stipulated statutory timeline of 14 days pursuant to Section 167(1) of the Act

*su*

*NA*



following receipt of the letter of notification of regret dated 3<sup>rd</sup> June 2024. He referred the Board to the Applicant's annexure marked POO-4 and submitted that the Applicant received an email on 12<sup>th</sup> September 2024 from the procurement office of the 1<sup>st</sup> Respondent forwarding the letter of regret dated 3<sup>rd</sup> June 2024 and that that had not been contested by any of the parties in the request for review. He further submitted that the 1<sup>st</sup> Respondent had not attached any certificate of postage in support of the allegation that the said letter had been posted in June.

33. In response to the objection raised regarding the instant Request for Review being fatally defective for being supported by a Supporting Affidavit sworn by Peter Omolo on 19<sup>th</sup> September 2024 without authority to swear the same on behalf of the Applicant, counsel referred the Board to a Board Resolution signed on 19<sup>th</sup> September 2024 by the Applicant's Director and filed as the last page in the Applicant's bundle of documents. He submitted that the mere fact that the said Board Resolution had not been annexed to the Applicant's Supporting Affidavit did not render the said Affidavit defective noting that the same had been duly filed and served upon all parties.

34. He urged the Board to dismiss the 2<sup>nd</sup> Respondent's Preliminary Objection.

35. On the substantive issues raised in the instant Request for Review, counsel relied on the Supporting Affidavit sworn on 19<sup>th</sup> September 2024 by Peter Omolo Osano.

36. It is the Applicant's case that award of the subject tender to the 2<sup>nd</sup> Respondent was irregular in view of the fact that the 2<sup>nd</sup> Respondent did not meet the minimum requirements for award of the subject tender as set out at pages 33 and 34 of the Tender Document in that (a) it did not have a valid tax compliance certificate at the time of tendering, (b) it failed to provide evidence of NSSF and NHIF registration and remittances for the last month as required, (c) it presented falsified membership certificates, and (d) it falsified its Workman's compensation Insurance (WIBA) cover for staff as at the time of tendering.

37. The Applicant contends that the 2<sup>nd</sup> Respondent is being investigated for use of falsified/irregularly acquired documents to bid and that it was before the Board in PPARB Application No. 85 of 2024 wherein the Respondent in Request for Review No. 85 of 2024 had conducted investigations and unearthed several irregularities. The Applicant further contends that documents presented to the Board in support of its claim were rightfully in its possession having been a bidder in the impugned tender in Request for Review No. 85 of 2024.

38. The Applicant prayed for the instant Request for Review to be allowed as prayed.

### **1<sup>st</sup> Respondent's submissions**

39. In his submissions, Mr. Njogu relied on the 1<sup>st</sup> Respondent's Memorandum of Response dated 30<sup>th</sup> September 2024 and filed on 1<sup>st</sup>

October 2024 together with confidential documents submitted to the Board pursuant to Section 67(3)(e) of the Act.

40. He submitted that the subject tender was advertised on 1<sup>st</sup> April 2024 and an addendum issued on 26<sup>th</sup> April 2024 with the submission deadline slated for 3<sup>rd</sup> May 2024 at 10.00 a.m. when the said tender was opened in the presence of bidder's and representatives present. He further submitted that from the tender opening register, a total of 7 bids were submitted and evaluated on 14<sup>th</sup> May 2024 and an Evaluation Report and Due Diligence Report prepared to this effect whereby the 2<sup>nd</sup> Respondent was recommended for award of the subject tender and approval made by the Procuring Entity's accounting officer on 3<sup>rd</sup> June 2024.
41. Mr. Njogu indicated that notification letters were prepared and sent out on 4<sup>th</sup> June 2024 to both the successful bidder and the unsuccessful bidders via post addresses bearing the respective bidders postal addresses as indicated in their confidential business questionnaires as evidenced by the recorded College Letter Release Register rubber stamped by the Postal courier services.
42. He submitted that the allegation that the 1<sup>st</sup> Respondent did not carry out due diligence was false pointing out that due diligence was carried out on the 2<sup>nd</sup> Respondent on 3<sup>rd</sup> June 2024 by members of the Evaluation Committee who visited the 2<sup>nd</sup> Respondent's office premises located in Kisumu City, Tom Mboya estate Kmet Road and a verification of the company's documents was carried out.



43. He further submitted it was not true that the 1<sup>st</sup> Respondent had deliberately withheld the Applicant's notification letter and indicated that all notification letters were dispatched on time and on the same date being 4<sup>th</sup> June 2024.

44. Mr. Njogu submitted that the Procuring Entity was not aware of the 2<sup>nd</sup> Respondent having fraudulently obtained documents as alleged by the Applicant noting that its tender price complied with the stipulated minimum wage and that the Procuring Entity had adhered to all provisions of the Act and would cooperate in the review proceedings before the Board.

## **2<sup>nd</sup> Respondent's submissions**

45. Ms. Nungo submitted that the recorded College Letter release register rubber stamped by the Postal Courier Services referred at paragraph 16 of the 1<sup>st</sup> Respondent's Memorandum of Response was enough proof and confirmation that posting of the notification letter was done on 4<sup>th</sup> June 2024.

46. She further submitted that the Board Resolution referred to by Mr. Aziz does not authorize the deponent of the Supporting Affidavit to make statements on behalf of the Applicant and that that had not been rebutted. She invited the Board to note that the 2 key points on jurisdiction being that the accounting officer had not been joined as a party pursuant to Section 170(b) of the Act and the fact that there was no pleading on suffering or risk of suffering loss and damage had not



been commented on which can be taken as an admission hence the instant Request for Review was bad in law for want of jurisdiction.

47. On the substantive issues raised in the instant Request for Review, Ms. Nungo relied on the 2<sup>nd</sup> Respondent's Replying Affidavit together with 2<sup>nd</sup> Respondent's Written Submissions at paragraphs 43 to 64. On the issue of whether the 2<sup>nd</sup> Respondent's bid satisfied and complied with mandatory requirements as set out in the Tender Document, counsel invited the Board to note that the initial burden of proof rests with the Applicant and had not been satisfied and those were mere allegations without evidence. She submitted that the initial burden of proof first rests with an applicant and it is only after it has been satisfied that the evidentiary burden shifts to the responding party.

48. In support of her argument, she referred to the provisions under Section 107, 108, 109 and 112 of the Evidence Act and the holding in *PPARB Application No. 19 of 2022 Madison General Insurance Kenya Limited v Lt Col. (RTD) B.N. Njiraini, The Accounting Officer (KEBS) and CIC Insurance Limited which was upheld by the Court of Appeal in Civil Appeal No. E270 of 2022 CIC General Insurance Limited v Madison General Insurance Kenya Limited & Others*.

49. Ms. Nungo pointed out that the annexures relied upon by the Applicant in support of its allegations relate to another tender and arose from different proceedings before the Board and not the subject tender before the Board. She further pointed out that the Applicant was making serious

allegations of fraud and irregularly obtained documents noting that the question of fraud is one where the burden of proof is of a higher standard and must be proven. She referred the Board to the *Court of Appeal decision in Orieny & another v National Bank of Kenya* and reiterated that there was no basis for the Applicant's allegations in view of the confirmation by the 1<sup>st</sup> Respondent that due diligence was conducted with a positive outcome on the qualifications of the 2<sup>nd</sup> Respondent.

50. Counsel reiterated that the notification letters to both the successful and unsuccessful bidders were dispatched on the same day on 4<sup>th</sup> June 2024 and submitted that Section 87(3) of the Act was complied with by the Procuring Entity. She pointed out that the procurement process was concluded back in June and it is important for the Board to note that on 12<sup>th</sup> September 2024 another third party, not before the Board and related to a different tender, made an inquiry with respect to particular documentation and it was on that date of 12<sup>th</sup> September 2024 that the Applicant wrote an email to the Procuring Entity asking for a copy of the notification letter so as to demonstrate that this was the date that they received their copy of the notification letter in the subject tender.

51. She urged the Board to strike out the Request for Review.

### **Applicant's Rejoinder**

52. In a rejoinder, Mr. Aziz submitted that the Applicant had filed on 4<sup>th</sup> October 2024 a Further Affidavit sworn on 4<sup>th</sup> October 2024 by Peter Omolo Osano that the Applicant would be relying on.

53. At this juncture, Ms. Nungo raised an objection to reference of the said Further Affidavit by the Applicant's counsel and submitted that at the beginning of the proceedings before the Board, parties were invited to confirm pleadings filed by all parties and that the Further Affidavit referred to by Mr. Aziz was not among the documents mentioned. She further submitted that the said Further Affidavit was not served upon the 2<sup>nd</sup> Respondent and she had not had a benefit of referring to the same.

54. On his part, Mr. Njogu submitted that the 1<sup>st</sup> Respondent was also not served with the Applicant's Further Affidavit.

55. Mr. Aziz proceeded to apologize to the Board and parties for concerns raised as to service of the Applicant's Further Affidavit.

### **CLARIFICATIONS**

56. When asked by the Board to substantiate the claim by the Applicant that it only came to learn of the outcome of evaluation of its tender on 12<sup>th</sup> September 2024, Mr. Aziz made reference to the email from the Procuring Entity dated 12<sup>th</sup> September 2024 annexed in the Applicant's bundle of documents and submitted that that was enough proof that the Applicant received its notification letter dated 3<sup>rd</sup> June 2024 on 12<sup>th</sup> September 2024.



57. On his part, Mr. Njogu submitted that the original copy of the Applicant's notification letter was dispatched on 4<sup>th</sup> June 2024 via the post address indicated in its confidential business questionnaire as evidenced by the recorded College Letter Release Register rubber stamped by the Postal courier services. He further submitted that it was only upon the Applicant's request on 12<sup>th</sup> September 2024 that they sent the copy retained in their file.
58. When asked to clarify whether the Applicant received the hard copy of the notification letter alleged to have been dispatched on 4<sup>th</sup> June 2024, Mr. Aziz submitted that the only receipt of the notification letter that was acknowledged by the Applicant was that of 12<sup>th</sup> September 2024.
59. When asked to confirm if the Applicant's postal address is functional, Mr. Aziz submitted that the Applicant had confirmed that its postal address was functional and that it never received the said notification letter.
60. Upon enquiry by the Board on why the Applicant only came to enquire of the outcome of evaluation of the subject tender in September 2024 yet it was aware of the timelines laid down in the Tender Document noting that tenders were opened in May, Mr. Aziz submitted that the cause of action arose upon receipt of the email of 12<sup>th</sup> September 2024 informing them of their disqualification. He further submitted that the 1<sup>st</sup> Respondent's Memorandum of Response had no annexures to prove the allegation made as to dispatch of the notification letters on 4<sup>th</sup> June 2024.



61. On her part, Ms. Nungo confirmed that the 2<sup>nd</sup> Respondent did not receive annexures to the 1<sup>st</sup> Respondent's Memorandum of Response and submitted that it is the nature and practice for procurement documents to be confidential and only submitted to the Board pursuant to Section 67(3)(e) of the Act.
62. On his part, Mr. Njogu submitted that the annexures were submitted to the Board as part of the confidential file served to the Board pursuant to Section 67(3)(e) of the Act.
63. When asked to confirm to the Board if a contract had been signed in the subject tender, Mr. Njogu submitted that the contract was yet to be signed.
64. At the conclusion of the hearing, the Board informed parties that the instant Request for Review having been filed on 25<sup>th</sup> September 2024 was due to expire on 16<sup>th</sup> October 2024 and that the Board would communicate its decision on or before 16<sup>th</sup> October 2024 to all parties to the Request for Review via email.

### **BOARD'S DECISION**

65. The Board has considered each of the parties' submissions and documents placed before it and find 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 shall make a determination on the following sub-issues:

- i Whether the instant Request for Review is fatally defective for failure to join the Procuring Entity's accounting officer pursuant to Section 170(b) as to divest the Board of its jurisdiction;

Depending on determination of sub-issue (i);

- ii Whether the Applicant has *locus standi* before the Board;

Depending on determination of sub-issue (ii);

- iii Whether the instant Request for Review was filed within the statutory period of 14 days of notification of award or occurrence of alleged breach by the Procuring Entity in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 as to invoke the jurisdiction of the Board.

Depending on the determination of the first issue.

**B. Whether the 1<sup>st</sup> Respondent's Evaluation Committee evaluated the Applicant's and 2<sup>nd</sup> Respondent's tenders submitted in the subject tender in accordance with Sections 66, 79, 80(2) and 83 of the Act as read with Article 227(1) of the Constitution.**

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

66. Before delving into the issues framed for determination, we note that during the Applicant's rejoinder, Mr. Aziz sought to rely on the Applicant's Further Affidavit sworn on 4<sup>th</sup> October 2024 by Peter Omolo Osano and filed on even date. However, Ms. Nungo raised an objection and indicated that the 2<sup>nd</sup> Respondent was never served with the Applicant's Further Affidavit. Mr. Njogu similarly confirmed that the 1<sup>st</sup> Respondent was not served with the Applicant's Further Affidavit

67. Having perused the Board's file, we note that the said Applicant's Further Affidavit was filed via email on 4<sup>th</sup> October 2024 and neither the 1<sup>st</sup> or 2<sup>nd</sup> Respondents were copied therein. Both Mr. Njogu for the 1<sup>st</sup> Respondent and Ms. Nungo for the 2<sup>nd</sup> Respondent submitted that they were not served with the Applicant's Further Affidavit and hadn't had the benefit of familiarizing themselves with the contents therein so as to sufficiently respond to the same in the instant Request for Review.



68. The Board further notes that despite affording all parties with an opportunity to confirm pleadings filed in the matter at the start of the hearing of the matter, Mr. Aziz made failed to call attention to filing of the Applicant's Further Affidavit on 4<sup>th</sup> October 2024 by Peter Omolo Osano and only made reference to it at the tail end of these proceedings during his rejoinder. Both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents confirmed to the Board that they were never served with the said Further Affidavit. In our considered view, pleadings hold immense significance as they are the bedrock upon which all the proceedings derive from and are the foundation of a party's case. They act as a roadmap for both parties and the Board throughout the review proceedings hence the reason why the Board begins its proceedings by asking parties to confirm their respective pleadings and exchange amongst themselves.

69. In the circumstances and balancing the same with the principles of natural justice of giving each party an opportunity to be heard as well as being fair to all the parties to these proceeding, the Board will not make reference to the Applicant's Further Affidavit sworn on 4<sup>th</sup> October 2024 by Peter Omolo Osano and filed on even date as the same was not served upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and they were both not afforded an opportunity to peruse and respond to the contents therein.

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

70. 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.

71. 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."***

72. 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."**

73. 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."***

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



***"Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based."***

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

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

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

***“whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter.”***

77. 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. The jurisdiction of this Board is provided for 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.

78. The 2<sup>nd</sup> Respondent in a Notice of Preliminary Objection dated 3<sup>rd</sup> October 2024 and filed on 4<sup>th</sup> October 2024 has challenged the Board’s jurisdiction to hear and determine the instant Request for Review as follows:

- i Whether the instant Request for Review is fatally defective for failure to join the Procuring Entity’s accounting officer pursuant to Section 170(b) as to divest the Board of its jurisdiction;***

79. The 2<sup>nd</sup> Respondent in opposition to the instant Request for Review filed on 4<sup>th</sup> October 2024 a Notice of Preliminary Objection dated 3<sup>rd</sup> October 2024 and contends at ground 1(c) that the instant Request for Review as drawn and filed before the Board is fatally defective and offends the provisions of section 170(b) of the Act as read with Section 167(1) of the Act for failing to join the accounting officer of the Procuring Entity as a party to the Request for Review.

80. Neither the Applicant nor the 1<sup>st</sup> Respondent addressed this ground of objection in their submissions before the Board.

81. We note that Section 167 (1) of the Act provides as follows:

***"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".***

82. Additionally, Section 170(d) of the Act provides for persons who **must** be parties to the administrative review referred to under Section 167(1) of the Act as follows:

***"170. The parties to a review shall be.***

***(a) the person who requested the review;***





- (b) the accounting officer of a Procuring Entity;***
- (c) the tenderer notified as successful by the Procuring Entity; and***
- (d) such other persons as the Review Board may determine."***  
***(Emphasis ours)***

83. In essence, an administrative review must comprise of (a) the candidate or tenderer requesting the review, (b) the accounting officer of a Procuring Entity, (c) the successful tenderer, and (d) such other persons as the Review Board may determine.

84. Notably, the provisions in Section 170 of the Act are set in mandatory terms. The Court of Appeal in **James Oyondi t/s Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR** (hereinafter referred to as "the James Oyondi case") held that pursuant to section 170 of the Act, the joinder of an accounting officer of a procuring entity to a request for review is mandatory and failure to do so renders a request for review fatally defective and rids the Board of jurisdiction to hear the same. The court held as follows:

***"It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings, the current statute which replaced it, the PPADA, requires that the accounting officer of the procuring entity, be the party. Like the learned Judge we are convinced that the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility***

*and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we think, is where the Board's importation of the law of agency floundered. When the procuring entity was the required party, it would be represented in the proceedings by its officers or agents since, being incorporeal, it would only appear through its agents, though it had to be named as a party. Under the PPADA however, there is no such leeway and the requirement is explicit and the language compulsive that it is the accounting officer who is to be a party to the review proceedings. We think that the arguments advanced in an attempt to wish away a rather elementary omission with jurisdictional and competency consequences, are wholly unpersuasive. When a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply.*

*We think, with respect, that the learned Judge was fully entitled to, and did address his mind correctly to the law when he followed the binding decision of the Supreme Court in NICHOLAS ARAP KORIR SALAT vs. IEBC [2014] eKLR when it stated, adopting with approval the judgment of Kiage, JA;*

*"I am not in the least persuaded that Article 159 and Oxygen principles which both command courts to seek*

***substantial justice in an efficient and proportionate and cost effective manner to eschew defeatist technicalities were ever meant to aid in overthrow [sic] of rules of procedure and create anarchical tree for all in administration of justice. This Court, indeed all Courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines are to serve the process of judicial adjudication and determine fair, just certain and even handed courts cannot aid in bending or circumventing of rules and a shifting of goal posts for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules."***

***We have no difficulty holding, on that score, that the proceedings before the Board were incompetent and a nullity, which the learned Judge properly quashed by way of certiorari."***

85. Based on the principle of *stare decisis*, this Board is bound by decisions of the superior courts in so far as identical or similar facts and similar legal issues are concerned and should strictly follow the decisions handed down by the superior courts. The circumstances in this instant Request for Review are similar to the facts in the ***James Oyondi case*** in that the Applicant herein failed to join the Accounting Officer of the Procuring Entity as provided under Section 170(b) of the Act rendering the Request for Review fatally defective.



86. In view of the foregoing, we find that the instant Request for Review is fatally defective for failing to join the Accounting Officer of the 1<sup>st</sup> Respondent as a party as mandated under Section 170(b) of the Act.

87. Accordingly, this ground of objection as raised in the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection dated 3<sup>rd</sup> October 2024 succeeds and the Board is divested of jurisdiction to hear and determine the instant Request for Review.

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

88. We have found that the instant Request for Review as filed is fatally defective for failing to join the Accounting Officer of the 1<sup>st</sup> Respondent as a party as mandated under Section 170(b) of the Act. Having found as such, the Board shall not delve into an analysis of the other issues framed for determination.

89. The upshot of the foregoing is that the Request for Review is for striking out and the Board makes the following orders:

**FINAL ORDERS**

90. 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 this Request for Review:

**A. Ground 1(c) of the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection dated 3<sup>rd</sup> October 2024 and filed on 4<sup>th</sup> October 2024 succeeds and is allowed.**

**B. The Request for Review dated 19<sup>th</sup> September 2024 and filed on 25<sup>th</sup> September 2024 be and is hereby struck out for being fatally and incurably defective.**

**C. The 1<sup>st</sup> Respondent is hereby directed to proceed with the procurement process in Tender No. BAC/TC/01/2024-2025 for Provision of Security Services to its logical conclusion in accordance with the provisions of the Tender Document, the Act and the Constitution.**

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

**Dated at NAIROBI this 16<sup>th</sup> Day of October 2024.**

**PANEL CHAIRPERSON**

**PPARB**

**SECRETARY**

**PPARB**