

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 95/2024 OF 2ND OCTOBER 2024

BETWEEN

TINESTA ENTERPRISES JV

PEESAM LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA AIRPORTS AUTHORITY 1ST RESPONDENT

KENYA AIRPORTS AUTHORITY 2ND RESPONDENT

Review against the decision of the Accounting Officer, Kenya Airports Authority in respect of Tender No. KAA/OT/WAP/0209/2023-2024 for Provision of Garbage Collection Services at Wilson Airport.

BOARD MEMBERS PRESENT

- | | | |
|-------------------------|---|--------------------------------|
| 1. Ms. Alice Oeri | - | Vice-Chairperson & Panel Chair |
| 2. Dr. Susan Mambo | - | Member |
| 3. Mr. Stanslaus Kimani | - | Member |

IN ATTENDANCE

- | | | |
|--------------------|---|-------------|
| Ms. Sarah Ayoo | - | Secretariat |
| Mr. Anthony Simiyu | - | Secretariat |

PRESENT BY INVITATION

APPLICANT **TINESTA ENTERPRISES JV PEESAM LIMITED**

Ms. Dorothy Jemator Advocate, Chepkuto Advocates

Mr. Obano Ondigi Advocate, Chepkuto Advocates

RESPONDENTS **ACCOUNTING OFFICER, KENYA AIRPORTS AUTHORITY**
KENYA AIRPORTS AUTHORITY

Mr. Chris Mulili Advocate, Kenya Airports Authority

Mr. David Ng'etich Advocate, Kenya Airports Authority

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Airports Authority, the Procuring Entity together with the 1st Respondent herein, vide an advert in the MyGov Publication and the PPIP Portal (www.tenders.go.ke) invited interested suppliers to electronically submit their bids in response to Tender No. KAA/OT/WAP/0209/2023-2024 for Provision of Garbage Collection Services at Wilson Airport through an Open Tender method. Participation in the tender was restricted to suppliers registered under the Youth Category of the AGPO Categories and the tender submission deadline was set as 2nd May 2024 at 11:00 a.m.

Submission of Bids and Tender Opening

2. According to the signed Tender Opening Minutes submitted under the Confidential File submitted by the Procuring Entity, the following three (3)

bidders were recorded as having submitted their bids in response to the subject tender by the tender submission deadline:

#	Name of Bidder
1.	Clean Edge hygiene Solutions Limited
2.	Green Leaf Services Limited
3.	Tinesta Enterprises JV Peesam Limited

Evaluation of Tenders

3. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received bids in the following 3 stages as captured in the Evaluation Report
 - i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Financial Evaluation

Preliminary Evaluation

4. At this stage of the evaluation, the submitted bids were to be examined using the criteria set out as Clause 2. Preliminary examination for Determination of Responsiveness under Section III-Evaluation and Qualification Criteria at the pages 30 to 31 of the Tender Document .

5. The evaluation was to be on a Responsive/Non Responsive basis and bids that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
6. At the end of the evaluation at this stage, 1 bid was disqualified with only 2 bids including that of the Applicant qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

7. The Evaluation Committee was required at this stage to examine bids successful at the Preliminary Stage using the criteria set out as Technical Evaluation under Section III-Evaluation under Section III Evaluation and Qualification Criteria at pages 32 to 33 of the Tender Document.
8. The evaluation was to be on a Responsive/Non Responsive basis and bids that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
9. At the end of the evaluation at this stage, all the 2 bids evaluated at this met the requirements at this stage and thus qualified for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

10. The Evaluation Committee was required at this stage to examine bids successful at the Technical Evaluation Stage using the criteria set out as Financial Evaluation under Section III-Evaluation and Qualification Criteria at page 33 of the Tender Document.

11. The evaluation was to be on the basis of a comparison of tender prices indicated in the bids at this stage. The successful bid would be that established as bearing the lowest evaluated price.
12. At the end of the evaluation at this stage, the Applicant's tender price of **Kenya Shillings Three Million, Six Hundred and Ninety, Five Hundred and Forty (Kshs. 3,690,540) inclusive of taxes per annum** was established as the lowest evaluated price

Evaluation Committee's 1st Recommendation

13. The Evaluation Report dated 23rd May 2024 indicates that Evaluation Committee recommended the award of the subject tender to the Applicant at its tendered price of **Kenya Shillings Three Million, Six Hundred and Ninety, Five Hundred and Forty (Kshs. 3,690,540) inclusive of taxes per annum.**

1st Professional Opinion

14. In a Professional Opinion dated 3rd June 2024 (hereinafter referred to as the " 1st Professional Opinion") the Procuring Entity's General Manager (Procurement and Logistics) , Mr. Vincent Korir reviewed the manner in which the subject procurement process was undertaken including the evaluation of bids and recommended the award of the subject tender to the Applicant as proposed by the Evaluation Committee.
15. Subsequently on the same day, 3rd June 2024, the Accounting Officer, Mr. Henry Ogoye, concurred with the Professional Opinion.

1st Notification to Bidders

16. Accordingly, the bidders were notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 3rd June 2024.

Debarment Application No. 5 of 2024

17. On 25th June 2024, a Request for Debarment was filed at the Public Procurement Regulatory Authority, against Peesam Limited, one of the Joint Venture Partners of the Applicant herein. On 20th August 2024, the Public Procurement Regulatory Authority delivered a decision debarring Peesam Limited from participating in public procurements processes for a period of up to 3 years. Subsequently, on 3rd September 2024 the High Court in ***Nairobi High Court Judicial Review Application No. E197 of 2024*** issued orders staying the debarment orders.

Evaluation Committee's 2nd Recommendation

18. From the Re-evaluation Report dated 29th August 2024, it would appear that subsequent to the debarment of Peesam Limited, the Evaluation Committee recommended the award of the subject tender to the second lowest evaluated bidder, Green Leaf Services Limited at its tendered price of **Kenya Shillings Five Million Five Hundred and Fifty-Four Thousand Nine Hundred and Fifty (Kshs. 5,554,950)** per annum inclusive of taxes.

2nd Professional Opinion

19. In a Professional Opinion dated 30th August 2024 (hereinafter referred to as the "2nd Professional Opinion") the Procuring Entity's General Manager (Procurement and Logistics) , Mr. Vincent Korir reviewed the manner in which the subject procurement process was undertaken including the

evaluation of bids and recommended the award of the subject tender to Green Leaf Services Limited as proposed by the Evaluation Committee.

20. Subsequently on the same day, 30th August 2024, the Accounting Officer, Mr. Henry Ogoye, concurred with the Professional Opinion.

2nd Notification to Bidders

21. Accordingly, the bidders were notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 30th August 2024.

REQUEST FOR REVIEW

22. On 2nd October 2024, the Applicant through the firm of Chepkuto Advocates filed a Request for Review dated 1st October 2024 supported by an affidavit sworn on 1st October 2024 by Samuel Mburu, the Applicant's Chief Executive Officer, seeking the following orders from the Board in verbatim:

- a) A declaration that the Procuring Entity breached the requirements under the Tender Document;*
- b) A declaration that the Procuring Entity breached the provisions of the Public Procurement and Asset Disposal Act, 2015;*
- c) A declaration that the Procuring Entity breached Article 47 (1) and 227(1) of the Constitution of Kenya, 2010;*
- d) An order do issue compelling the Procuring Entity to extend the tender validity period to ensure the continuation and completion of the evaluation process.*
- e) The Procuring Entity be compelled to enter into a contract with the Applicant herein pursuant to its notification letter*

***of intention to enter into contract dated 3^d June 2024
issued to the Applicant Peesam Limited;***

***f) The costs of this application be awarded to the Applicant
in any event.***

23. In a Notification of Appeal and a letter dated 2nd October 2024, Mr. James Kilaka, the Ag. Board Secretary of the Board notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said 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 said 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 2nd October 2024.
24. On 4th October 2024, the Respondents herein, through the Procuring Entity's General Manager (Procurement and Logistics) filed a Reply by the Procuring Entity dated 4th October 2024. The said Respondents equally forwarded to the Board the Confidential Documents under Section 67(3) of the Act.
25. On 9th October 2024, the Ag. Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 16th October 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.

26. On 11th October 2024, the Applicant filed a Supplementary Affidavit sworn on 9th October 2024 by Samuel Nganga, the Applicant's Chief Executive Officer.
27. On 14th October 2024 the Respondents filed Written Submissions dated 14th October 2024.
28. On 16th October 2024, the Applicant filed Written Submissions dated 14th October 2024.
29. On 16th October 2024 at 11:00 a.m., when the Board convened for the online hearing, all parties were present and represented by their respective Advocates. The Board read through a list of the documents filed in the matter and asked parties to confirm having filed and been served the said documents, to which Counsel responded in the affirmative.
30. However, before the Board could give hearing directions, Counsel for the Applicant, Mr. Ondigi indicated that he was holding brief for Ms. Jemator, who at the time was in transit and had requested for the matter to be adjourned to 12 noon on the same day. Counsel for the Respondents, Mr. Mulili had no objection to this request. Accordingly, the Board adjourned the session to 12 noon.
31. When the Board reconvened at 12 noon all parties were represented by their respective Advocates. Ms. Jemator was now present and she confirmed her readiness to proceed. The Board therefore gave the following directions on the order of address:

- i. The Applicant would start by arguing the Request for Review within 10 minutes.
- ii. The Respondents would then offer a response within 10 minutes;
- iii. The Applicant would then close by way of rejoinder in 3 minutes.

PARTIES SUBMISSIONS

Applicant's Submissions

32. Counsel for the Applicant, Ms. Jemator, submitted that on 3rd June 2024, the Applicant was issued with a Notification Letter indicating that it was the successful bidder in the subject tender and that it was required to confirm its acceptance as well as obtain a bank guarantee. She indicated that the Applicant confirmed the acceptance and obtained a bank guarantee and thereafter on 26th August 2024, the Procuring Entity issued it with a Service Level Agreement.
33. She contended that the Procuring Entity went silent on the execution of the procurement contract to the extent that the tender validity period lapsed on 5th September 2024 with no contract having been executed with the Applicant. Consequently, on 2nd October 2024, the Applicant brought the instant Request for Review only for the Respondents on 3rd October 2024 to serve upon it the Notification Letter dated 30th August 2024 indicating that the Applicant was disqualified from the subject tender on account of a debarment ruling made on 20th August 2024 by the Public Procurement Regulatory Authority.
34. Counsel argued that under Section 135(3) of the Act, a procurement contract was to be signed after 14 days of notification but before the lapse

of the tender validity period. Further, under Section 176(1)(c) the Procuring Entity is required to expeditiously award the tender. She argued that the Procuring Entity was deliberately stalling the signing of a procurement contract with the Applicant.

35. Reliance was placed on ***Public Service Superannuation Fund board of Trustees v CPF Financial Services Limited & 2 Others (Civil Appeal E510 of 2022)*** for the proposition that a rogue Procuring Entity cannot be allowed to hide under the law to sanitize its injurious conduct.
36. Counsel contended that the tender validity period lapsed on 5th September 2024 and thus the Procuring Entity unlawfully entered into a contract with the next lowest evaluated bidder as this was done outside the tender validity period.
37. Relying on ***Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others[2014]eKLR*** Counsel argued that following the receipt of the Notification letter of 3rd June 2024, the Applicant harboured a legitimate expectation that it would conclude a procurement contract with the Procuring Entity over the subject tender
38. Further reliance was placed on ***Republic v Public Procurement Administrative Review Board & another Woodex Technologies Limited (Ex parte Applicant) [2023]eKLR*** for the proposition that the lack of a proper notification to unsuccessful bidders is an affront to their right to a fair administrative action. Counsel argued that the Respondents in the present case only notified the Applicant of the award of the subject tender to the next lowest evaluated bidder on 3rd October

2024 after the filing of the instant Request for Review through a backdated letter dated 30th August 2024 .

39. Relying on ***Republic v Public Procurement Administrative Review Board Ex parte MIG International Ltd & 2 Others [2008]eKLR*** and Section 86 of the act, Ms. Jemator argued that the subject tender was to be awarded to the Applicant as the bidder who submitted the lowest evaluated bid.
40. The Applicant therefore urged the Board to quash the contract between the Procuring Entity and the next lowest evaluated bidder and compel the Procuring Entity to sign a procurement contract with the Applicant.

Respondents' Submissions

41. Counsel for the Respondents, Mr. Mulili submitted that the Procuring Entity had previously, on 3rd June 2024, issued a notification awarding the subject tender to the Applicant. However, on 25th June 2024 a Request for Debarment of Peesam Limited was filed before the Public Procurement Regulatory Board and which Board on 20th August 2024 found that the said company had in breach of Section 41(1)(d) of the Act provided false information in the form of forged payrolls. He submitted that the Regulatory Board proceeded to debar Peesam from participating in public procurement or asset disposal proceedings for a period of 3 years.
42. Mr. Mulili argued that this development led to the Procuring Entity on 30th August 2024 issuing Notification letters disqualifying the Applicant and awarding the subject tender to Green Leaf Services Limited, which bidder was the second lowest evaluated bidder in the tender.

43. Relying *on Civil Application No. 2 of 2011; Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others* and *PPARB Application No. 78 of 2024 Resqtec Zumro v The Managing Director, Kenya Airports Authority & another*, Counsel argued that the Board was divested the jurisdiction over the instant Request for Review as the same was time-barred.
44. It was Counsel's contention that the Request for Review was filed on 2nd October 2024 when the Regulatory Board's decision on debarment was made on 20th August 2024 and that the subsequent Notification Letter on its disqualification was dated 30th August 2024. He faulted the Applicant for moving the High Court in Judicial Review Application No. E197 of 2024 instead of invoking this Board's jurisdiction. Mr. Mulili contended that the filing of the instant Request for Review was therefore filed more than 14 days after the occurrence of the breach complained of and should be struck out.
45. Counsel argued that under Section 135(3) of the Act, the procurement contract was to be signed not earlier than 14 days after notification but within the tender validity period. Therefore the parties had until 5th September 2024 to sign the procurement contract.
46. Mr. Mulili contended that the High Court in Judicial Review application E197 of 2024 had issued stay orders ex parte and that the application was yet to be considered on its merits. According to Counsel, the Applicant seems to be in a hurry to circumvent the due process by seeking to enter in to a contract before the judicial review proceedings are determined.

47. He contended that the Applicant did not deny that it falsified payroll documents during the proceedings before the Regulatory Board and this was equally not contested in the proceedings before the High Court. Further that there was a high likelihood that the High Court would uphold the decision of the Regulatory Board. Accordingly Counsel sought for the Board to dismiss the Request for Review.

Applicant's Rejoinder

48. In a brief rejoinder, Counsel for the Applicant, Ms. Jemator, contended that time for filing the instant Request for Review started running on 3rd October 2024 when the Applicant received the Respondents' backdated Notification Letter of 30th August 2024. Further that no evidence was led to show that the Notification of 30th August 2024 was in fact sent on the same day.

49. She argued that the Applicant could only invoke the Board's jurisdiction after service of the Notification Letter but the said letter was only served after the filing of the instant Request for Review.

50. Counsel also refuted the suggestion by Mr. Mulili that the grant of leave to bring judicial review proceedings come with automatic stay of the decision forming the subject of challenge.

CLARIFICATIONS

51. The Board sought clarity from the Procuring Entity on the basis of the subsequent award of the subject tender to the 2nd lowest evaluated bidder. Counsel for the Applicant, Mr. Mulili, indicated that when the Applicant was debarred, under section 55 of the Act, the bidder became

ineligible to participate in the subject tender. Further that the High Court issued stay orders on 3rd September 2024 when the Respondents had already sent the subsequent Notification letters on 30th August 2024.

52. The Board asked the parties to address it on the date when they deemed a breach to have occurred as to give rise to a Request for Review before the Board. Counsel for the Applicant, Ms. Jemator contended that since the subsequent Notification Letter dated 30th August 2024 was served upon it on 3rd October 2024, this was the date that forms the benchmark of computing the statutory timeline under Section 167 of the Act. On his part Counsel for the Respondents, Mr. Mulili argued that the benchmark date was 30th August 2024 being that this was the date when the Notification letter was sent to the Applicant.
53. The Board asked the Respondent on the criteria it used to identify the second lowest evaluated bidder as the successful bidder upon disqualifying the Applicant. Counsel for the Respondents, Mr. Mulili argued that the law requires that once the lowest evaluated bidder is disqualified, the second lowest bidder becomes the successful bidder. Ms. Jemator discounted this and called on Mr. Mulili to pinpoint the specific provision of law for this proposition. According to Counsel for the Applicant, Ms. Jemator, the Procuring Entity should have terminated the subject tender under section 63 of the Act.
54. The Board asked the Respondents to confirm if there was evidence on the Confidential File confirming that the Notification Letter of 30th August 2024 was sent to the Applicant on the same day to which Counsel for the Applicant, Mr. Mulili responded in the affirmative.

55. The Board asked parties to comment on the implication of the stay orders by the High Court. Counsel for the Applicant, Ms. Jemator submitted that the effect of the stay orders was to restore the Applicant to its status before the debarment orders. Counsel for the Respondents, Mr. Mulili maintained that the Applicant remained ineligible to participate in the subject tender and that its falsification of documents was unchallenged both before the Regulatory Board and the High Court.
56. Counsel for the Respondents, Mr. Mulili indicated that the Board would better appreciate the matter if parties could agree to have the pleadings in the High Court shared with the Board through email by a party with the other party in copy. Counsel for the Applicant, Ms. Jemator confirmed that she was amenable to this.
57. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 2nd October 2024 had to be determined by 23rd October 2023. Therefore, the Board would communicate its decision on or before 23rd October 2024 to all parties via email. Parties were also requested to share their pleadings in the High Court matter for the Board's appreciation of the proceedings therein.

BOARD'S DECISION

58. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:
- I. ***Whether the Board has jurisdiction to hear and determine the instant Request for Review?***

In determining this issue, the Board will look into:

i. Whether the present Request for Review is time-barred?

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

II. *Whether the Respondents properly disqualified the Applicant from the subject tender on account of the Regulatory Board's debarment Ruling of 20th August 2024?*

III. *What orders should the Board issue in the circumstance?*

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

59. Following the filing of the present Request for Review, the Respondents filed a Reply by the Procurement Entity dated 4th October 2024, whose paragraph 4 acknowledged this Board's jurisdiction over the instant Request for Review. However, during the hearing the Respondents changed their position on the Board's jurisdiction. According to Counsel for the Respondents, Mr. Mulili, the Request for Review was time-barred as it related to events that happened on 20th August 2024 and 30th August 2024. On 20th August 2024 the Regulatory Board issued a decision debarring the Applicant from public procurement and asset disposal proceedings for a period of up to 3 years and that the Applicant was issued with a Notification Letter dated 30th August 2024 indicating that it had been disqualified from the subject tender on account of the debarment. The Respondents were therefore of the view that the filing of the Request for Review on 2nd October 2024 was outside time.
60. On the flip side, the Applicant maintained that this Board has jurisdiction over the instant Request for Review since the Notification Letter dated

30th August 2024 was served upon the Applicant on 3rd October 2024, a day after the filing of the present Request for Review. Counsel for the Applicant, Ms. Jemator, argued that the Respondents had not led any evidence to show that the Notification Letter dated 30th August 2024 was in fact sent on 30th August 2024.

61. Drawing from the above rival positions, the Board is invited to interrogate in to whether it has jurisdiction over the instant Request for Review.
62. For starters, this Board recognizes the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.
63. The 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."
64. On its part, Halsbury's Laws of England (4th Ed.) Vol. 9 defines jurisdiction as:

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

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

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

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

"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary

eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

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

"(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

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

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

69. Further, a reading of Section 167 of the Act denotes the jurisdiction of the Board in the following terms:

"167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date

of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

(2)...

(3)...

(4) ...

70. The Board shall now consider the merits of the alleged ground under the Preliminary Objection.

71. Whereas the 1st and 2nd Respondent contended that the Request for Review was time-barred under Section 167(1) of the Act, the Applicant contended that the Request for Review was timeously filed.

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

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

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

Request for a review

- 1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.**
- 2) The request referred to in paragraph (1) shall—**
- a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;**
 - b) be accompanied by such statements as the applicant considers necessary in support of its request;**
 - c) be made within fourteen days of —**
 - i. the occurrence of the breach complained of, where the request is made before the making of an award;**
 - ii. the notification under section 87 of the Act; or**
 - iii. the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder**

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

75. It is therefore clear from a reading of section 167(1) of the Act, Regulation 203(1)(2)(c) & 3 of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a Request for Review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having

taken place before an award is made (ii) notification of intention to enter in to a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three (3) instances namely (i) before notification of intention to enter in to a contract is made (ii) when notification of intention to enter into a contract has been made and (iii) after notification to enter into a contract has been made. The option available to an aggrieved candidate or tenderer in the aforementioned instances is determinant on when occurrence of breach complained took place and should be within 14 days of such breach.

76. It was not the intention of the legislature that where an alleged breach occurs before notification to enter in to contract is issued, the same is only complained after the notification to enter into a contract has been issued. We say so because there would be no need to provide 3 instances within which such Request for Review may be filed.
77. Section 167 of the Act and Regulation 203 of the 2020 Regulations 2020 identify the benchmark events for the running of time to be the date of notification of the award or the date of occurrence of the breach complained of.
78. Turning to the case at hand, the Respondents contend that the benchmark dates for the filing of the instant Request for Review was the decision of the debarment of the Applicant delivered on 20th August 2024 and the subsequent Notification of the Applicant's disqualification which

was communicated on 30th August 2024 through the Notification letter dated 30th August 2024.

79. According to the Respondents, they sent a Notification Letter dated 30th August 2024 to the Applicant on the same day. A copy of the letter is herein reproduced for ease of reference:

KAA/OT/WAP/0209/2023-2024

30th August, 2024

M/s Tinsta Enterprises Jv Peesam Limited

(address details withheld)

RE: RE-EVALUATION FOR PROVISION OF GARBAGE COLLECTIO SERVICES AT WILSON AIRPORT

(Eligibility is reserved for Duly Registered Youth Enterprises Only)

TENDER NO. KAA/OT/WAP/0209/2023-2024

We refer to your bid submitted on 2nd May 2024 on the above subject tender.

Following our letter of Notification to Enter into a Contract dated 3rd June 2024, We received a ruling dated 20th August 2024 stating that Peesam Limited has been debarred from participating in procurement proceedings in line with section 41 of the Public Procurement and Asset Disposal act, Revised Edition 2022 (2015).

Based on the foregoing, this is therefore to inform you that you have been disqualified from entering into contract for the subject tender.

Consequently, the bidder who has been determined to be the successful tenderer is M/s Green Leaf Serv. Ltd at their quoted bid price of Kenya Shillings Five Million Five Hundred and Fifty-Four Thousand, Nine Hundred and Fifty (Kshs. 5,554,950.00) only per annum inclusive of VAT being the second lowest evaluated bidder.

This letter of notification is issued in accordance with the Public Procurement and Asset Disposal Act, 2015

Signed

Vincent Korir

GM (PROCUREMENT & LOGISTICS)

For: AG MANGING DIRECTOR/CEO

80. The above letter which is dated 30th August 2024 brings to the attention of the Applicant that it had since been disqualified from being awarded the subject tender on account of the Regulatory Board's Ruling on its debarment on 20th August 2024. Whereas the Respondents contended that the above letter was served upon the Applicant on 30th August 2024, the Applicants argue that this letter was served upon it on 3rd October 2024 after filing of the Request for Review.
81. Counsel for the Respondents, Mr. Mulili during the clarification session informed the Board that it could verify from the Confidential File that the Notification Letters of 30th August 2024 was sent to the Applicant on the same day, 30th August 2024. The Board has keenly studied the Confidential File but has not spotted any email printout confirming the date and time when the Applicant was sent the Notification Letter.

82. The Board has equally studied the Applicant's Further Affidavit sworn by Samuel Nganga on 9th October 2024 and notes that the Applicant at paragraphs 12 and 13 of its affidavit contends that the Applicant learnt of the Letters of Notification of 30th August 2024 on 3rd October 2024:

12. The Respondent failed to notify the Applicant that its bid had been unsuccessful and in a rush to attempt to hide its illegal actions, the Respondent sent the Applicant a letter dated 30th August 2024 vide an email dated 3rd October 2024 addressed to the wrong bidder, M/s Clean Edge Hygiene Solutions Limited who is not the Applicant.

Annexed and marked SN-2 is a copy of the email attaching the letter dated 30th August 2024 addressed to M/s Clean Edge Hygiene Solutions Ltd.

13. The Respondent shortly after sent another letter addressed to the Applicant notifying it that it is disqualified from entering into a contract stating reasons that the Applicant had been disbarred from participating in procurement proceedings, this was after the Respondent was served with the Applicant's Request for Review that was filed on 2nd of October 2024.

Annexed and marked SN-3 is a copy of the email attaching letter dated 30th August 2024 addressed to M/s Tinsta Enterprises Jv Peesam Limited.

83. The Board has had a chance to look at Annexure SN-2 annexed to the Supplementary Affidavit of Samuel Nganga and the same is herein reproduced for ease of reference:

From: Agrapina Mbala <Agrapina.Mbala@kaa.go.ke>

Date: Thu, 3 Oct 2024, 13:33

***Subject: MS TINESTA ENTERPRISES JV PEESAM LTD
KAA/OT/WAP/0209/2023-2024 GARBAGE COLLECTION***

To: infotinesta.com <info@tinesta.com>

***Cc: Vincent Korir <Vincent.Korir@kaa.go.ke> Sharon Luvaga
<Sharon.Luvaga@kaa.go.ke>***

Greetings from Kenya Airports Authority,

Please find attached letter and note its contents.

If you have any queries do not hesitate to contact us.

Kindly acknowledge receipt.

84. Drawing from the above, and absent any evidence from the Respondents that the Letter of Notification dated 30th August 2024 was served upon the Applicant on the same day, the Board is inclined to believe that the Applicant's version on the date when it received the Notification Letter dated 30th August 2024 to be the correct one. Whereas the Respondents alluded to having served the Notification letter upon the Applicant on 30th August 2024, no evidence was led to support this allegation. On the other side, the Applicant led evidence with printouts indicating communication being made to it on 3rd October 2024, which version the Board finds more believable in the circumstance.

85. It would therefore follow that if the Applicant was to bring the Request for Review on account of the Notification dated 30th August 2024, time

would begin running on 3rd October 2024, which is the date it has been demonstrated in evidence to be the date that the notification letter was sent to the Applicant.

86. When computing time when the Applicant ought to have sought administrative review before the Board using the 3rd October 2024 date, the instant Request for Review would be timeously filed as it was filed on 2nd October 2024, a day before receipt of the Notification letter dated 30th August 2024. We cannot therefore adopt the Respondents' line of reasoning that the Request for Review was time-barred on account of the Notification Letter dated 30th August 2024.
87. Equally, we find it difficult to follow the Respondents argument that the bench mark of the statutory timeline under section 167 of the Act could be put as 20th August 2024 when the Regulatory Board made a decision debaring Peesam Limited, one of the Joint Venture Partners of the Applicant. We say so because the Debarment decision did not of itself constitute an procurement decision capable of challenge before this Board under Section 167 of the Act. Section. Section 42 of the Act spells out the High Court as the proper forum to challenge a decision arising from debarment proceedings by the Regulatory Board.
88. In view of the above analysis, Preliminary Objection as urged by the Respondents must fail. This Board therefore finds that it is clothed with the requisite jurisdiction to hear and determine the instant Request for Review which shall now be considered on its merits.

Whether the Respondents properly disqualified the Applicant from the subject tender on account of the Regulatory Board's debarment Ruling of 20th August 2024?

89. The Applicant brought the instant Request for Review seeking an extension of the tender validity period to allow it and the Procuring Entity conclude a procurement contract in respect of the subject tender. However, the Respondents challenged this Request for Review arguing that in the intervening period subsequent to issuance of the Notification Letters of 3rd June 2024, the Regulatory Board issued a Decision debarring Peesam Limited, a Joint Venture Partner of the Applicant for a period of 3 years.
90. Counsel for the Applicant, Ms. Jemator acknowledged that on 20th August 2024, the Regulatory Board did issue a debarment decision against Peesam Limited but pointed out that the decision was stayed by the High Court in Nairobi in Judicial Review Application E197 of 2024 on 3rd September 2024. She contended that the effect of the stay orders was to restore the Applicant to its original status prior to the issuance of the debarment decision by the Regulatory Board.
91. On the flip side, Counsel for the Respondents, Mr. Mulili contended that the Applicant was bound to be unsuccessful in the High Court proceedings in Judicial Review Application No. E197 of 2024 noting that it was not disputed that Peesam Limited had issued forged documents in the procurement processes that were considered before the Regulatory Board.

92. Drawing from the above this Board is invited to inquire into the disqualification of the Applicant from the subject tender on account of the debarment Decision by the Regulatory Board.
93. Section 41 of the Act makes an elaborate provision on the Regulatory Board's power to debar suppliers that are established to have misconducted themselves during public procurement and disposal proceedings in the following terms:

41. Debarment

(1) The Board shall debar a person from participating in procurement or asset disposal proceedings on the ground that the person—

(a) has committed an offence under this Act;

(b) has committed an offence relating to procurement under any other Act or Law of Kenya or any other jurisdiction;

(c) has breached a contract for a procurement by a public entity including poor performance;

(d) has, in procurement or asset disposal proceedings, given false information about his or her qualifications;

(e) has refused to enter into a written contract as required under section 135 of this Act;

(f) has breached a code of ethics issued by the Authority pursuant to section 181 of this Act or the code of ethics of the relevant profession regulated by an Act of Parliament;

(g) has defaulted on his or her tax obligations;

(h) is guilty of corrupt or fraudulent practices;

(i) is guilty of a serious violation of fair employment laws and practices; or

(j) is determined by the Review Board to have filed a request that is frivolous or vexatious or was made solely for the purpose of delaying the procurement proceeding or a performance of a contract.

(2) Without limiting the generality of subsection (1) the Board may debar a person from participating in any procurement process if that person—

(a) has breached the requirements of the tender securing declaration form in the tender documents; or

(b) has not performed according to professionally regulated procedures.

(3) The Authority, may also debar a person from participating in procurement or asset disposal proceedings—

(a) on the recommendation of a law enforcement organ with an investigative mandate;

(b) on grounds prescribed by the Authority in Regulations.

(4) A debarment under this section shall be for a specified period of time of not less than three years.

(5) The procedure for debarment shall be prescribed by Regulations.

94. On its part Section 42 of the Act provides for the process of challenging a Debarment decision in the following terms:

42. Judicial Review

A party to the department may seek Judicial Review from the decision of the Authority to the High Court within fourteen days after the decision is made.

95. The above provisions of the Act, amplify the position on the Regulatory Board's powers in respect of debarment processes as well the forum where any challenge against a debarment decision can be made. Under Section 42 of the Act, a supplier wishing to challenge a debarment decision is expected to file judicial review proceedings against the decision at the High Court.
96. Turning to the present case, on 3rd June 2024, the Procuring Entity notified the Applicant that its bid was the successful bid in the subject tender but prior to the conclusion of the procurement contract, on 20th August 2024, the Regulatory Board issued a decision debarring Peesam Limited from public procurement and asset disposal processes for a period of up to 3 years. The findings of the Regulatory Board read:

23. The Debarment Committee therefore finds that the Respondent committed the offences forming the subject of these proceedings contrary to the provisions of sections 41(1)(d) of the Act which provides that the Board shall debar a person from participating in procurement and asset disposal proceedings on the ground that the person has in procurement or asset disposal proceedings, given false information about his or her qualifications.

24. Therefore, and in accordance with the powers bestowed upon the Public Regulatory Board, the Respondent Peesam Limited is hereby debarred for the minimum period of three (3) years in line with section 41(4) of the Act with effect from the date of this decision.

97. From the above findings it is clear that the Regulatory Board intended that the debarment of Peesam Limited was to be effective on 20th August 2024 when the decision was made.
98. The Board has sighted the stay order issued by the High Court in Judicial Review Application E197 of 2024:

A...

B...

C. THAT the Applicant is hereby granted LEAVE to apply for orders of certiorari to call the decision of the 1st respondent, 20th of August 2024 into this Honourable Court for purposes of it being quashed, and by the same order the decision subsequently be quashed.

D. THAT the Applicant is hereby granted LEAVE to apply for order of prohibition directed at the 1st respondent to restrain it from taking any step or action and further, from publishing the details of the Applicant and the corresponding period of debarment pursuant to the 1st Respondent's letter dated 20th August 2024.

E. THAT the Applicant is hereby granted LEAVE to apply for orders of prohibition restraining it from forwarding the details of the Applicant to the Cabinet Secretary for gazettelement

F...

G. THAT the LEAVE granted pursuant to ORDERS (C), (D), (E) above do operate as stay of the Respondent's decision dated 20th August 2024 and any adverse actions as against the Applicant Company by the 1st Respondent..

99. From the above, paragraph G of the order by the High Court indicated that the grant of leave to Peesam Limited to file judicial review proceedings was to operate as a stay of the Regulatory Board's decision of 20th August 2024 as well as any adverse actions against Peesam Limited by the Regulatory Board.
100. In the Board's view the stay orders as issued by the High Court was meant to suspend the finding of the Regulatory Board on Peesam Limited's debarment status until such time that the Court would make a decision on whether the finding was properly arrived at. Being that the matter is still under active consideration by the High Court in Judicial Review Application No. E197 of 2024, this Board shall restrain itself from making any pronouncements on the merits of those proceedings, save to make the observation that there are in place stay orders against the decision of the Regulatory Board.
101. We are therefore persuaded that the effect of the stay orders was to return Peesam and by extension the Applicant herein the eligibility status it held prior to the debarment decision by the Regulatory Board. Accordingly all rights that accrued to the Applicant prior to the debarment decision against Peesam Limited remain in force with the result that the Applicant remains eligible to conclude the procurement contract in respect of the subject tender. Therefore, the Procuring Entity in the instant case could not purport to disqualify the Applicant on account of the debarment decision as this Decision was effectively suspended until the High Court gave further directions.

102. In view of the foregoing analysis, we find that the Respondents did not properly disqualify the Applicant from the subject tender on account of the Regulatory Board's debarment Ruling of 20th August 2024.
103. The Board is alive to the Court of Appeal finding in ***Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others (Civil Appeal E510 of 2022) [2022] KECA 982 (KLR) (9 September 2022) (Judgment)*** where the appellate court affirmed this Board's power to extend the tender validity period for good reason even in instances where a request for such extension comes after the period has lapsed:

42. The 2nd respondent (the Board) is an independent quasi-judicial creature of statute, and its broad powers are set out in sections 28 and 173 of the PPAD Act. It has power to give directions to accounting officers of procuring entities with respect to anything to be done or redone in procurement or disposal proceedings. In our view, its power may even include power to extend validity of a tender in situations where an accounting officer for no good reason fails to adhere to statutory timelines or disobeys the Board's directions so as to frustrate tenderers or bidders, even if the stated tender validity period has expired. This is akin to the power exercised by the High Court or this Court to extend time to appeal in appropriate circumstances, notwithstanding that the stipulated time for instituting such appeal may have already expired.

See also Kenya Ports Authority & another v Rhombus Construction Company Limited & 2 others [2021] eKLR; CIVIL APPEAL NO. E011 OF 2021

104. In the present case the Applicant was first issued with a Notification Letter on 3rd June 2024 and the Respondents other than advert to the debarment of Peesam Limited, did not offer an explanation for the delay in concluding the procurement contract with the Applicant. The Board therefore finds the delay occasioned in the circumstance is one that is to be remedied through the extension of the tender validity period to allow for the conclusion of the procurement contract.

What orders the Board should grant in the circumstances?

105. The Board has found that it has jurisdiction over the instant Request for Review.

106. The Board has equally found that the that Respondents did not properly disqualify the Applicant from the subject tender on account of the Regulatory Board's debarment Ruling of 20th August 2024.

107. The upshot of our finding is that the Request for Review dated 1st October 2024 in respect of Tender No. KAA/OT/WAP/0209/2023-2024 for Provision of Garbage Collection Services at Wilson Airport succeeds in the following specific terms:

FINAL ORDERS

108. 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 1st October 2024:

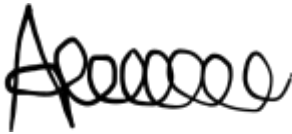
- 1. The Respondents' Notice of Preliminary Objection raised under its Written Submissions dated 14th October 2024 be and is hereby dismissed.**
- 2. The Letter of Notification of Award dated 30th August 2024 and addressed to Green Leaf Services Limited as the successful bidder in respect of Tender No. KAA/OT/WAP/0209/2023-2024 for Provision of Garbage Collection Services at Wilson Airport be and is hereby cancelled and set aside;**
- 3. The Letter of Notification of Award dated 30th August 2024 and addressed to the unsuccessful bidders in respect of Tender No. KAA/OT/WAP/0209/2023-2024 for Provision of Garbage Collection Services at Wilson Airport be and are hereby cancelled and set aside;**
- 4. The Evaluation Committee's Re-evaluation Report dated 29th August 2024 in respect of Tender No. KAA/OT/WAP/0209/2023-2024 for Provision of Garbage Collection Services at Wilson Airport be and is hereby set aside;**
- 5. The Professional Opinion dated 30th August 2024 in respect of Tender No. KAA/OT/WAP/0209/2023-2024 for Provision of Garbage Collection Services at Wilson Airport be and is hereby set aside;**
- 6. The 1st Respondent be and is hereby directed to oversee the conclusion of a procurement contract with the Applicant in**

respect of Tender No. KAA/OT/WAP/0209/2023-2024 for Provision of Garbage Collection Services at Wilson Airport within 21 days from the date of this Decision.

7. The tender validity period in respect of Tender No. KAA/OT/WAP/0209/2023-2024 for Provision of Garbage Collection Services at Wilson Airport be and is hereby extended for 90 days from 5th September 2024.

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

Dated at NAIROBI, this 23rd Day of October 2024.



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PANEL CHAIRPERSON

SECRETARY

PPARB

PPARB