

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 96/2024 OF 4<sup>TH</sup> OCTOBER 2024**

**BETWEEN**

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

**AND**

**THE ACCOUNTING OFFICER,**

**MUHORONI SUGAR COMPANY LIMITED.....RESPONDENT**

**CANON SECURITY SERVICES (K) LIMITED.....INTERESTED PARTY**

Review against the decision of the Joint Receiver, Muhoroni Sugar Company (In Receivership) in respect of Tender No. MUSCO/SEC. T/008/2024 for Provision of Security Services for a Period of One Year.

**BOARD MEMBERS PRESENT**

- |                         |   |                   |
|-------------------------|---|-------------------|
| 1. Ms. Jessica M'mbetsa | - | Panel Chairperson |
| 2. CPA Alexander Musau  | - | Member            |
| 3. Dr. Susan Mambo      | - | Member            |

**IN ATTENDANCE**

- |                     |   |             |
|---------------------|---|-------------|
| Mr. James Kilaka    | - | Secretariat |
| Mr. Philemon Kiprop | - | Secretariat |
| Mr. Anthony Simiyu  | - | Secretariat |

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## **PRESENT BY INVITATION**

### **APPLICANT**

**CHAKRA COMPANY LIMITED**

Mr. Omondi

Advocate, Aziz & Associates Advocates

### **RESPONDENT**

**MUHORONI SUGAR COMPANY (IN RECEIVERSHIP)**

Mr. Bundotich

Advocate, Kale Maina & Bundotich Advocates  
LLP

### **INTERESTED PARTY**

**CANNON SECURITY SERVICES (K) LIMITED**

Ms. Maina

Advocate, NOW Advocates LLP

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Muhoroni Sugar Company (In Receivership), the Procuring Entity together with the 1<sup>st</sup> Respondent herein, vide an advert on the Procuring Entity's website ([www.musco.co.ke](http://www.musco.co.ke)), notice Boards and government notice boards in Muhoroni, invited interested suppliers to submit their bids in response to Tender No. MUSCO/SEC.T/008/2024 for the Provision of Security Services for a Period of One Year (herein "the subject tender") through the Open Tender method. The tender had a tender closing date of Friday, 30<sup>th</sup> August 2024 at 12:00 noon.

### **Submission of Bids and Tender Opening**

2. According to the signed Tender Opening Minutes dated 30<sup>th</sup> August 2024, submitted under the Confidential File submitted by the Procuring Entity,

the following fifteen (15) bidders were recorded as having submitted their bids in response to the subject tender by the tender submission deadline:

| #   | Name of Bidder          |
|-----|-------------------------|
| 1.  | Glosec Security         |
| 2.  | Allied Button Security  |
| 3.  | Master Found Security   |
| 4.  | Sentinel Security       |
| 5.  | Ultra-World Security    |
| 6.  | Lindum Security Systems |
| 7.  | Chakra Security         |
| 8.  | Vigilmax Security       |
| 9.  | Canon Security          |
| 10. | All Tarms Security      |
| 11. | Action Rift Security    |
| 12. | Davian Security         |
| 13. | Pride Kings Security    |
| 14. | Hipora Security         |
| 15. | Pawn Security           |

### **Evaluation of Tenders**

3. The 1<sup>st</sup> 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 at Clause 2. Preliminary examination for Determination of Responsiveness under Section III-Evaluation and Qualification Criteria at the pages 29 to 30 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, 10 bids including that of the Applicant were were disqualified with only 5 bids including that of the Interested Party 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 b) Technical Scores (TS) under Section III-Evaluation under Section III

Evaluation and Qualification Criteria at pages 31 to 32 of the Tender Document.

8. The evaluation was to be against 20 requirements which individually carried a weighted score that cumulatively added up to 100 marks. A bid was required to garner a minimum of 70 marks at this stage in order to qualify for further evaluation at the next stage.
9. At the end of the evaluation at this stage, all the 5 bids evaluated at this Stage met the 70 marks threshold 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 C: Financial Evaluation for the Technically Qualified Bidders Financial Evaluation under Section III-Evaluation and Qualification Criteria at page 32 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 Interested Party's tender price of **Kenya Shillings One Million, Three Hundred and Twenty-Six Thousand (Kshs. 1,326,000) per month** was established as the lowest evaluated price

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

13. The Evaluation Committee recommended the award of the subject tender to the 3<sup>rd</sup> Respondent at its tendered price of **Kenya Shillings One Million, Three Hundred and Twenty-Six Thousand (Kshs. 1,326,000)** per month.

### **Professional Opinion**

14. In a Professional Opinion dated 12<sup>th</sup> September 2024 (hereinafter referred to as the "Professional Opinion") the Procuring Entity's Procurement Manager , Mr. James Orori 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 3<sup>rd</sup> Respondent as proposed by the Evaluation Committee.
15. Subsequently, the Joint Receiver Manager, Mr. Harun Kirui concurred with the Professional Opinion.

### **Notification to Tenderers**

16. Accordingly, the tenderers were notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 16<sup>th</sup> September 2024 as well as 24<sup>th</sup> September 2024.

### **REQUEST FOR REVIEW**

17. On 4<sup>th</sup> October 2024, the Applicant through the firm of Cheboi Ouma & Associates Advocates filed a Request for Review dated 4<sup>th</sup> October 2024 supported by an affidavit sworn on 4<sup>th</sup> October 2024 by Peter Omolo Osano, a Director at the Applicant seeking the following orders from the Board in verbatim:



- a) A declaration that the procuring entity breached the provisions of the Public Procurement and Asset Disposal Act and Articles 47 and 227 of the Constitution of Kenya;***
- b) The notification letter and subsequent regret letter dated 24<sup>th</sup> September 2024 be nullified;***
- c) That the award and entire procurement proceedings in tender number MUSCO/SEC. T/008/2024 for Provision of Security Services 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 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.***

18. In a Notification of Appeal and a letter dated 4<sup>th</sup> October 2024, Mr. James Kilaka, the Ag. Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondent were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 4<sup>th</sup> October 2024.
19. On 7<sup>th</sup> October 2024, the Applicant filed an Amended Request for Review dated 4<sup>th</sup> October 2024.

20. On 9<sup>th</sup> 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 16<sup>th</sup> October 2024 at 2:30 p.m. through the link availed in the said Hearing Notice.
21. On 11<sup>th</sup> October 2024, the Respondent filed their Memorandum of Response dated 11<sup>th</sup> October 2024 together with a Supporting Affidavit sworn on 11<sup>th</sup> October 2024 by James Orori, the Procuring Entity's Head of Procurement. The said Respondent equally forwarded to the Board the Confidential Documents under Section 67(3) of the Act.
22. On 15<sup>th</sup> October 2024, the Interested Party herein, through the firm of NOW Advocates LLP filed a Notice of Appointment of Advocates and Notice of Preliminary Objection dated 11<sup>th</sup> October 2024 together with a Replying affidavit sworn on 11<sup>th</sup> October 2024 by Peter Irungu, a Director at the Interested Party.
23. When the Board convened on 16<sup>th</sup> October 2024 at 2:30 p.m. all parties were being represented by their respective Advocates. The Board read through the documents filed in the matter and asked parties to confirm whether each of the documents had been served upon them, and all Advocates present confirmed being in receipt of the documents.
24. The Board equally sought confirmation on whether they were ready to proceed with the hearing as earlier scheduled. All the Advocates present confirmed their readiness to proceed with Counsel for the Respondent, Mr. Bundotich proposing that the matter be canvassed by way of Written



Submissions noting that in a related case, PPARB Application No. 93 of 2024, the Board had given directions for the Request for Review to be canvassed by way of Written Submissions. Counsel for the Applicant and Interested Party, Mr. Omondi and Ms. Maina respectively, indicated their preference for an oral hearing.

25. The Board briefly retreated for deliberation and returned with the following directions:
  - i. The Request for Review would be heard orally on 23<sup>rd</sup> October 2024 at 9:00 a.m.
  - ii. The Applicant to file their Written Submissions by 18<sup>th</sup> October 2024 at 9:00 a.m.
  - iii. The Respondent and Interested Party to file their Written Submissions by close of business on 21<sup>st</sup> October 2024.
  - iv. The Applicant to file any further Submissions by 22<sup>nd</sup> October 2024 at noon.
26. On 18<sup>th</sup> October 2024, the Applicant filed its Written Submissions of even date.
27. On 22<sup>nd</sup> October 2024 the Respondent filed Written Submissions dated 22<sup>nd</sup> October 2024.
28. On the same day, 22<sup>nd</sup> October 2024, the Interested Party filed Written Submissions dated 21<sup>st</sup> October 2024.
29. When the Board reconvened for the hearing on 23<sup>rd</sup> October 2024 at 9:00 a.m. parties were represented by their various Advocate.



## **PARTIES SUBMISSIONS**

### **Applicant's Submissions**

30. Counsel for the Applicant Mr. Omondi submitted that the Interested Party's Notice of Preliminary Objection was for striking out as it offended Regulation 209(1) of the Regulations 2020. He argued that under Regulation 209 any Preliminary Objection was to be filed within 3 days from receipt of the hearing notice and that in the present case the Preliminary Objection had to be filed by 14<sup>th</sup> October 2024, noting that the hearing notice was sent on 9<sup>th</sup> October 2024.
31. Counsel argued that though 10<sup>th</sup> October 2024 was a public holiday, it did not stop the running of the time under Regulation 209. He therefore sought for the Preliminary Objection to be struck out.
32. On the merits of the Preliminary Objection, Mr. Omondi submitted that Peter Omolo Osano had authority to sign the Statement accompanying the Request for Review and that a resolution for the bringing of the instant Request for Review was attached. According to Counsel the act of filing included signing of the relevant statements. He equally argued that the Applicant had attached a CR12 Form indicating that the said Peter Omolo Osano was the sole director at the Applicant and thus in Counsel's view the Applicant had filed a competent Request for Review in compliance with Section 167(1) and 170 of the Act and Regulation 203 of the Regulations 2020.

33. Turning to the merits of the Request for Review, Mr. Omondi argued that under Section 86 of the Act, a successful bidder is one offering the lowest evaluated price. It was his contention that from the list of bidders and their respective tender prices attached as Exhibit P007, the Interested Party did not have the lowest tender price.
34. Further that whereas Section 87 of the Act and Regulation 82 of the Regulations 2020, require the Procuring Entity to indicate in the Notification Letters to unsuccessful bidders, the specific reasons for disqualification as well as the identity of the successful bidders, this information was not communicated to the Applicant in the Notification Letter dated 16<sup>th</sup> September 2024. Mr. Omondi maintained that the said letter was sent to the Applicant on 25<sup>th</sup> September 2024.
35. Mr. Omondi argued that the Applicant had suffered loss flowing from the conduct of the subject tender since it had involved employees who it purposed to deploy for the assignment under a legitimate expectation of emerging as the successful bidder.
36. Counsel pointed out that it was the Interested Party who had alleged that the Applicant's bid was unresponsive for non-compliance with mandatory requirements in the subject tender. He maintained that the Applicant's bid was responsive and thus the Applicant was under a legitimate expectation that it would emerge the successful bidder.
37. He further placed reliance on ***Republic v Attorney General & another Ex parte Waswa & 2 Others [2015]eKLR*** and ***Council of Civil***



***Service Unions v Minister for the Civil Service*** for the proposition that the Applicant was wrongfully disqualified from the subject tender.

### **Respondent's Submissions**

38. Counsel for the Respondent, Mr. Bundotich submitted that Section 86 of the Act relates to evaluation of tenders and there was no evidence tendered that the Evaluation Committee failed to evaluate and compare the non-responsive tenders.
39. It was his submission that the Applicant's bid was rightfully disqualified as non-responsive at preliminary evaluation stage for failure to submit all the mandatory documents.
40. Mr. Bundotich argued that as per Section 87 (3) of the Act, when a person submitting the successful tender is notified under Section 1, the Accounting Officer of the Procuring Entity shall notify in writing all other persons submitting the tender that their tenders were not successful disclosing the successful tenderer as appropriate and reasons. He contended that the Respondent had demonstrated that they duly notified the successful bidder and the non-responsive bidders including the Applicant on the outcome of the tender vide letters dated 16th September, 2024 and 24th September, 2024. Further that from the letters, it was evident that the Applicant's bid was disqualified at preliminary tender evaluation stage for failure to submit the mandatory documents. Additionally, that any anomaly that was present in the Notification Letter dated 16th September, 2024 was cured through the letter dated 24th September, 2024.

41. Mr. Bundotich argued that the Request for Review was time-barred as it was filed on 4th October, 2024, five (5) days after the expiry of the mandatory fourteen (14) days duration set out under the law.
42. It was also argued that the Applicant had not laid any evidence whatsoever to demonstrate that the Respondent did not appoint an Evaluation Committee.
43. Mr. Bundotich argued that Applicant's bid having been disqualified at the preliminary evaluation stage, no prejudice could have been occasioned to it as its bid was not subjected to the technical and financial evaluation stages.

#### **Interested Party's Submissions**

44. Counsel for the Interested Party, Ms. Maina while relying on ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989) 1, Phoenix of E.A Assurance Company Limited versus S. M. Thiga t/a Newspaper Service [2019] eKLR and Samuel Kamau Macharia & anothe v Kenya Commercial Bank Limited & 2 others [2012] eKLR*** submitted that jurisdiction is everything and the Board had to satisfy itself that it was clothed with the jurisdiction to hear and determine the present Request for Review.
45. Ms. Maina submitted that the Interested Party's Preliminary Objection dated 11<sup>th</sup> October 2024 was timeously filed within the timelines under Regulation 209 of the Regulations 2020. Relying on ***PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Ltd Vs. Chief Executive Officer, Lake Victoria North Water Works Development Agency and Lake Victoria North Water Works***

**Development Agency** Ms. Maina argued that the 3 days contemplated under Regulation 209 were to be counted from the date of receipt of the hearing notice. Further that in the present case 10<sup>th</sup> October 2024, 12<sup>th</sup> October 2024 and 13<sup>th</sup> October 2024 were excluded in the computation of time under Section 57(b) and (d) of the Interpretation and General Provisions Act as the first day constituted a public holiday and the 2 other dates fell on a weekend. She therefore contended that the Preliminary Objection was timeously filed on 15<sup>th</sup> October 2024.

46. Ms. Maina contended that under Regulation 203(1)(2)(b) of the Procurement Regulations, it is a requirement couched in mandatory terms for a request for review to be accompanied by such statements as an Applicant considers necessary in support of its request. She argued that a perusal of the Statement by Peter Omolo Osano does not show that he was authorized to swear the Supporting Statement on behalf of the Applicant and to bind the Applicant. Counsel relied upon the Court of Appeal decision in ***Spire Bank Limited v Land Registrar & 2 others [2019] eKLR*** and ***PPARB Application No.56 of 2024 Spic 'N' Span Cleaning Services Limited vs The Accounting Officer, Kenya Development Corporation Limited, Kenya Development Corporation Limited and Another*** for the proposition that it is important for company to pass a resolution for the institution of a suit.
47. Counsel argued that the absence of a resolution authorizing Peter Omolo Osano to sign the Statement left the Statement in support of the Request for Review fatally defective. She argued that the position was not saved by the fact that the Applicant had Peter Omolo as the sole director,

pointing out that a company under law was separate and distinct from its shareholders and directors.

48. On the merits of the Request for Review, Ms. Maina argued that the Applicant was duly notified by the Respondent of its unsuccessful bid via a letter dated 16<sup>th</sup> September 2024 which the Respondent demonstrated were sent to the unsuccessful bidders, including the Applicant, on 16<sup>th</sup> September, 2024. According to Counsel, the Applicant was notified of the reasons for its unsuccessful bid and was aware of the successful bidder as it had joined the Interested Party to the present proceedings. Therefore the Applicant did not suffer any prejudice.
49. She contended that the Applicant could not claim that there was a breach of Section 86 of the Act since its bid was disqualified at the Preliminary Stage for non-compliance with Mandatory Requirements 26 and 27 of the Tender Document and thus did not qualify for evaluation at the Financial Evaluation Stage.
50. Counsel further urged that though the Applicant had attached documents to the Request for Review, the same could have been sneaked in at this stage in an attempt to demonstrate compliance when they did not constitute part of the Applicant's original bid. Further that even the attached annexure POO-6, which is allegedly the Certificate of Independent Tender Determination Form (MR 27) presented in the Applicant's bid, was not duly filled because the Applicant failed to check one the sub clauses that is, clause/ paragraph 5 as was mandatorily required in the form. She argued that this alone was enough for the



evaluation committee of the Procuring entity to eliminate the Applicant from further evaluation.

51. Relying on ***PPARB Decision No.106 of 2021; Spring Engineering Group vs Accounting Officer, Sports Kenya and 2 Ors ; Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR ; Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR*** Counsel argued that mandatory requirements could not be waived. Further that the Applicant had not adduced evidence of being compliant with the requirements for which they had been notified of having failed to comply with.
52. Ms. Maina contended the Applicant was incapable of suffering loss and damage with respect to the subject tender, for the reason that its bid was disqualified at the Preliminary Evaluation Stage. Further that from Clause 11.1 of Section I-Instructions to Tenderers at page 13 of the Tender Document, bidders well informed that they would bear all costs associated with the preparation and submission of their respective bids and that the Procuring Entity would not be responsible or liable for those costs, regardless of the conduct or outcome of the tendering process. She contended further that tendering in the subject tender was competitive and that there was no guarantee that the Applicant would emerge the successful bidder upon submitting its bid.

## **Applicant's rejoinder**

53. In his brief rejoinder, Counsel for the Applicant, Mr. Omondi reiterated that the Request for Review was timeously filed.
54. Mr. Omondi contended that the Applicant's bid met the mandatory requirements under the Tender Document and did not deviate from the said requirements.

## **CLARIFICATIONS**

55. The Board asked the Applicant to clarify whether its Request for Review was supported by a proper Statement, to which Counsel for the Applicant, Mr. Omondi responded in the affirmative. He indicated that the statement was signed by the Applicant's sole Director.
56. The Board asked the Respondent to confirm whether their notification Letters disclosed the successful bidder. Counsel for the Respondent, Mr. Bundotich admitted that this was not disclosed but the same was curable.
57. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 4<sup>th</sup> October 2024 had to be determined by 25<sup>th</sup> October 2024. Therefore, the Board would communicate its decision on or before 25<sup>th</sup> October 2024 to all parties via email.

## **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?**
- ii. **Whether the present Request for Review offends Regulation 203 of the Regulations 2020?**

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

II. ***Whether the Evaluation Committee's disqualification of the Applicant from the subject tender was in compliance with the provisions of the Constitution, Act, Regulations 2020 and the Tender Document?***

III. ***Whether the Respondent issued Notification Letters that complied with Sections 87 and Regulation 82 of the Regulations 2020?***

IV. ***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 Interested Party fronted a challenge to the Board's jurisdiction over the present Request for Review through a Preliminary Objection dated 11<sup>th</sup> October 2024. The Interested Party contends that the Board lacks jurisdiction as the filed Request for Review is supported by a fatally defective Statement in breach of Regulation 203(2)(b) of the Regulations 2020. The

Respondent equally urged under paragraph 2 of their Memorandum of Response that the Request for Review is time-barred.

60. 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.

61. The Black's Law Dictionary, 8<sup>th</sup> Edition, defines jurisdiction as:

***"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."***

62. On its part, Halsbury's Laws of England (4<sup>th</sup> Ed.) Vol. 9 defines jurisdiction as:

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

63. 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."***

64. 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...."***

65. 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."***

66. 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."***

67. 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) ...***

68. The Board shall now consider the separate grounds under the Preliminary Objections in turn:



## **Time-barred proceedings**

69. Whereas the 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.

70. 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.***

71. 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***

72. 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.

73. 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 of took place and should be within 14 days of such breach.

74. 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 of 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.
75. 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.
76. Turning to the case at hand, the gravamen of the Applicant's Request for Review is that the procurement process has been devoid of transparency as the Notification Letter dated 24<sup>th</sup> September 2024 omits details on the identity of the successful bidder. It would therefore follow that the benchmark date for purposes of these proceedings would be the date when the Applicant received the said letter.
77. Whereas the Applicant contends that it received the Notification Letter on 25<sup>th</sup> September 2024, the Respondent argues that it dispatched to the Applicant the Notification Letters dated 16<sup>th</sup> September 2024 and 24<sup>th</sup> September 2024 on 16<sup>th</sup> September 2024 and 24<sup>th</sup> September 2024 respectively.



78. The Applicant through the affidavit sworn on 4<sup>th</sup> October 2024 by Peter Omolo Osano in support of the Amended Request for Review depones that the Applicant received the Notification Letter of 24<sup>th</sup> September 2024 on 25<sup>th</sup> September 2024. Paragraphs 4 to 6 of the affidavit by Peter Omolo Osano reads:

- 4. That on 25<sup>th</sup> September 2024 at 5:00 pm, I received an email from one Carolyn Oruko of email address Carolyn.oruko@muhoronisugar.go.ke communicating that my firm was unsuccessful. (Attached and marked POO-3 is a copy of the email and letter dated 25<sup>th</sup> September 2024 (sic)**
- 5. That the said email address did not originate from the official email address of the accounting officer of the procuring entity. (attached and marked POO-4 is a copy of the invitation to tender document)**
- 6. That the said letter allegedly referred to an earlier letter "on the above" which letter was not served upon us making the letter referred in paragraph 4 above the 1<sup>st</sup> point of communication from the procuring entity that our company's bid was not successful.**

79. Annexure PO03 to the affidavit of Peter Omolo Osano is the Notification Letter dated 24<sup>th</sup> September 2024 together with an email printout of the email Mr. Peter Omolo Osano alluded to have sent to the Applicant a copy of the Notification. The email printout is hereinafter reproduced for ease of reference:

***From: Carolyn.oruko@muhoronisugar.go.ke***

***Date: Wed, 25 Sept 2024, 17:00***



***Subject: TENDER FOR SECURITY***

***To: chakracompanylimited <address details withheld>***

***Greetings***

***Attached for you (sic) information.***

***Regards,***

***Carolyn.***

***One Attachment***

80. From the above, it is apparent that the Applicant maintained that it was only served upon receipt of the Notification Letter dated 24<sup>th</sup> September 2024 by way of email on 25<sup>th</sup> September 2024 at 5:00 p.m. An email printout of the service of the Notification Letter has equally been attached. The Applicant further contends that it was never served upon it the Notification Letter of 16<sup>th</sup> September 2024, which paragraph 6 of the affidavit of Peter Omolo Osano refers to as "other letter".
81. Flowing from the above allegations in the affidavit in support of the Amended Request for Review, logic would dictate that if the Respondent disputed the Applicant's account on the service of the Notification Letters dated 16<sup>th</sup> September 2024 and 24<sup>th</sup> September 2024, they would lead evidence demonstrating their version of events. In the present case, the Respondent should have led evidence showing that they in fact served the Notification Letters of 16<sup>th</sup> September 2024 and 24<sup>th</sup> September 2024 on 16<sup>th</sup> September 2024 and 24<sup>th</sup> September 2024 respectively.



82. Unfortunately, the Respondent did not lead any evidence to contradict the Applicant's account beyond an averment in the affidavit of James Ororo in support of the Memorandum of Response. The said James Ororo at Paragraph 7 of his affidavit depones as follows:

***7. THAT I wish to state that the bidders were notified vide letter dated 16<sup>th</sup> September 2024 on the outcome of the tender process and more so their respective bids. I refer to Exhibit "JO-1" which are the true copies of the notification.***

***8. THAT vide letters dated 24<sup>th</sup> September, 2024 the Respondent likewise notified all the bidders the reasons why their bids were non-responsive. I refer to the letters which I have tendered as "Exhibit "JO-2"***

83. The Board has verified from Exhibits JO-1 and JO-2 that they constitute the letters dated 16<sup>th</sup> September 2024 and 24<sup>th</sup> September 2024. However, the Respondent has not tendered any evidence of the date when the said letters were sent to the Applicant.

84. Flowing from the above, the Board finds that the Applicant's account that they were only served with the Notification Letter of 24<sup>th</sup> September 2024 and that this was done on 25<sup>th</sup> September 2024, believable. Accordingly, 25<sup>th</sup> September, 2024 being the date when the Applicant first learnt of their disqualification from the subject tender as the benchmark date for the filing of the instant Request for Review.

85. The Board will now proceed to compute the timeline within which the instant Request for Review ought to have been filed before it using the 25<sup>th</sup> September 2024 date. In computing the 14 days contemplated under

su  
NA

the Act, we take guidance from section 57 of the Interpretation and General Provisions Act:

**"57. Computation of time**

***In computing time for the purposes of a written law, unless the contrary intention appears—***

***(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***

***(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***

***(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***

***(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time"***

86. When computing time when the Applicant ought to have sought administrative review before the Board using the 25<sup>th</sup> September 2024 date, 25<sup>th</sup> September 2024 is excluded as per section 57(a) of the IGPA being the day that the Applicant learnt of the occurrence of the alleged breach. This means that time started to run on 26<sup>th</sup> September 2024 and

lapsed on 9<sup>th</sup> October 2024. In essence, the Applicant had between 25<sup>th</sup> September 2024 and 9<sup>th</sup> October 2024 to seek administrative review before the Board. The instant Request for Review was filed on 7<sup>th</sup> October 2024 which was 2 days before the lapse of the statutory timeline under section 167 of the Act. Accordingly the instant Request for Review was timeously filed and thus the Respondent's Preliminary Objection must fail.

### **Unsupported Request for Review.**

87. The Interested Party assailed the Request for Review as being supported by a fatally defective Statement in breach of Regulation 203 of the Regulations 2020. It was contended that in the present case, the maker of the statement, Peter Omolo Osano failed to demonstrate that he had authority to make the statement on behalf of the Applicant and thus the statement was fatally defective, leaving the Request for Review unsupported.
88. On its part, the Applicant maintained that the present Request for Review was supported by a Statement. The Applicant equally challenged the competency of the Preliminary Objection arguing that it was filed outside the statutory timeline under Regulation 209 of the Regulations 2020.
89. From the above rival positions, the Board is invited to interrogate the competency of the Preliminary Objection as filed and depending on the Board's finding on this, determine the competency of the Request for Review as well.
90. Regulation 209 of the Regulations 2020 provides for the filing of Preliminary Objections in the following terms:

**209. Preliminary objections**

**(1) A party notified under regulation 206 may file a preliminary objection to the hearing of the request for review to the Secretary of the Review Board within three days from the date of notification.**

**(2) ...**

**(3) ...**

**(4) ...**

**(5) The fees chargeable for filing a preliminary objection shall be as set out in the Fifteenth Schedule of these Regulations.**

91. On the other hand Regulation 206 of the Regulations 2020 reads as follows:

**206. Notice of Hearing**

**(1) The Review Board Secretary shall give reasonable notice of the date fixed for hearing to all parties to the review.**

**(2) The notice referred to in paragraph (1) shall be in the format set out in the Sixteenth Schedule of these Regulations.**

92. From Regulations 206 and 209 above, it is apparent that a party intending to file a Preliminary Objection in respect of proceedings before the Board should do so within 3 days of receipt of the hearing notice. It would therefore follow that any Preliminary Objection filed outside 3 days of receipt of a hearing notice would be time-barred.

93. Turning to the present case the Ag. Board Secretary first sent the Hearing Notice on 9<sup>th</sup> October 2024. It would therefore follow that a party

intending to file a Preliminary Objection had 3 days from 9<sup>th</sup> October 2024 to do so.

94. In computing the 3 days contemplated under Regulation 209, we take guidance from Section 57 of the Interpretation and General Provisions Act:

***"57. Computation of time***

***In computing time for the purposes of a written law, unless the contrary intention appears—***

***(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***

***(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***

***(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***

***(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time"***

95. Computing the 3 days timeline with guidance from section 57 above leads this Board to agree with the Interested Party that the 3 days were set to expire on 15<sup>th</sup> October 2024:

- i. Section 57 b of the IGPA finds application as to exclude 12<sup>th</sup> and 13<sup>th</sup> October 2024 from the computation being that these days fell on Saturday and Sunday which are officially non-working days.
- ii. Section 57d of the IGPA finds application as to exclude 12<sup>th</sup> and 13<sup>th</sup> October 2024 from the computation of 3 days being that the timeline under Regulation 209 is less than 6 days.

96. The Board therefore finds that the Interested Party's Notice of Preliminary Objection dated 11<sup>th</sup> October 2024 was timeously filed. Accordingly, we shall now address the merits of the said Preliminary Objection through which the Interested Party challenges the competency of the Request for Review. According to the Interested Party, the Statement in support of the Amended Request for Review was fatally defective as it does not state whether its maker was duly authorized to make it.

97. Regulation 203(2) (c) of the Regulations 2020 affirms that a Request for Review must be accompanied by a statement 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;***

98. From Regulation 203(2)(b) above, a Request for Review must be accompanied by a Statement and thus a Request for Review that is unaccompanied by Statement would qualify as defective.
99. Turning to the instant case, the Applicant filed an Amended Request for Review dated 4<sup>th</sup> October 2024 supported by a Statement by Peter Omolo Osano dated 4<sup>th</sup> October 2024.
100. Paragraph 1 of the Statement by Peter Omolo Osano reads:  
***1. I am the Director of the Applicant and fully conversant with the fact that herein hence competent to make this statement. (attached and marked POO1a and b is a copy of the CR12)***
101. Annexure POO-1a and POO-1b are Certificate of Incorporation and CR12 Forms for the Applicant. The CR12 Form shows that the said Peter Omolo Osano is the sole shareholder and sole director at the Applicant.
102. The Applicant equally annexed to the Amended Request for Review a Company resolution which authorized the commencement of proceedings before the Board as well as appointed the law firm of Aziz & Associates to appear before the Board on behalf of the Applicant. The Applicant's resolution is herein reproduced for ease of reference:

**Board resolution**

***We Chakra Company Limited by a resolution made on this 4<sup>th</sup> day of October 2024 have resolved as follows:***

***a)To file a review under the public procurement administrative review board in respect to Tender No. MUSCO/SEC. T/ 008/24 for provision of security services.***

***b)To have the firm of AZIZ & ASSOCIATES to represent us in the said proceedings.***

103. Superior Courts in this country, have over time pronounced themselves on challenges that are fronted over authorization of the commencement of legal proceedings on behalf of corporate entities.

104. In ***Spire Bank Limited v Land Registrar & 2 Others [2019] eKLR*** the Court of Appeal faulted the Environment and Land Court for striking out a suit for want of attaching a resolution for filing the claim. The appellate court was of the view it was sufficient for one to indicate that they had the authority to institute the claim and that matters touching on the authority to sue could not be properly raised through a Preliminary Objection:

***As such for a preliminary objection to be successful it must be based on a pure point of law, and further, it cannot be a requirement of its foundation that evidence be produced in its support. In other words the objection does not lie if the objector requires to demonstrate that a party is unauthorized or if in response a resolution or other document under seal requires to be produced as proof of its existence. This effectively defeats the principles behind a preliminary objection, in which case, it ought not to succeed.***



...

**Indeed, the pleadings do not show that the respondent was concerned with whether or not the Corporation Secretary had the necessary authority to institute the suit, and the court was not told that she was an imposter who brought the proceedings on behalf of the appellant. And no evidence was produced before the court in support of this contestation. It is evident that the preliminary objection was not for the purposes of genuinely ascertaining whether the suit was brought with the appellant's authority; its intent and purpose was to bring the appellant's suit to a screeching halt on a mere procedural technicality which is contrary to the tenor behind Article 159 of the Constitution.**

**Whether or not an officer is authorized to institute the proceedings is a matter of evidence, which requires to be canvassed before the court. In concluding that Ms. Musembi was unauthorized to bring the proceedings on behalf of the appellant because there was no document produced under seal showing that she was authorized, we find that the learned judge misdirected himself. The learned judge ought to have ordered that such authorization be produced before the commencement of the trial.**

105. From the above decision of the Court of Appeal, which is binding on this Board, it is apparent that:
- i. A party cannot successfully plead a preliminary objection on account of lack of authority to bring an action as this does not constitute a pure point of law;



- ii. A party alleging that a suit has been commenced without authority bears the burden of leading evidence to show that in fact no such authority exists.
- iii. Decision making bodies are bound to call for the filing of any authorization where the authority to commence a suit is in dispute and not just to strike out a suit that is the subject of challenge.

106. Taking guidance from the above decision of the Court of Appeal, the Board finds the Statement by Peter Omolo Osano in support of the Request for Review to be competent as the Interested Party did not adduce any evidence to show that the said Peter Omolo Osano was not authorized to sign the Statement. Further, the question of the authorization of the said Peter Omolo Osano to sign the Statement does not constitute a pure point of law as it can only be ascertained through an evaluation of evidence. Accordingly, the Interested Party's Preliminary Objection equally fails.

107. In view of the foregoing the Board finds that it has jurisdiction over the present Request for Review, which shall then be considered on its merits.

**Whether the Evaluation Committee's disqualification of the Applicant from the subject tender was in compliance with the provisions of the Constitution, Act, Regulations 2020 and the Tender Document?**

108. The Applicant took issue with the evaluation process that ultimately culminated in the disqualification of its bid in the subject tender. Counsel for the Applicant, Mr. Omondi contended that the Applicant submitted as



part of their bid copies of the signed and stamped declaration and commitment to the code of ethics as well as a signed and stamped certificate of independent tender determination form annexed to the affidavit of Peter Omolo Osano. According to Counsel, the Applicant was therefore erroneously disqualified from the subject tender on the allegation of not submitting the documents when the same were supplied.

109. On the flip side the Respondent and Interested Party maintained that the Applicant was properly disqualified at the Preliminary evaluation stage for failing to meet mandatory requirements. They also argued that having been disqualified at the Preliminary Stage, the Applicant could not purport to suggest that its bid was the lowest evaluated bid when the said bid never qualified for evaluation at the Financial Evaluation Stage. Specifically, Counsel for the Respondent, Mr. Bundotich submitted that Applicant did not submit the documents annexed as annexure POO-5 and POO-6 as part of its bid.
110. Counsel for the Interested Party, Ms. Maina, equally invited the Board to verify from the Applicant's original bid if the said documents were part of the Applicant's bid. She indicated that the Applicant could have possibly introduced the documents at this stage of the proceedings when the same were not supplied as part of the Applicant's original bid.
111. Flowing from the above different positions, the Board is invited to interrogate the evaluation process leading to the disqualification of the Applicant from the subject tender.

112. For starters, Sections 86 and 127 offer guidance on how successful bids in any public tender are to be ascertained. Section 86 reads as follows:

**"86. Successful tender**

**(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—**

**(a) the tender with the lowest evaluated price;**

**(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;**

**(c) the tender with the lowest evaluated total cost of ownership; or**

**(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges: Provided that the provisions of this subsection shall not apply to section 141 of this Act.**

**(2) For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score."**

113. On its part Section 127 provides as follows:

**"127. Successful proposal**

***The successful proposal shall be the responsive proposal with the highest score determined by an accounting officer in accordance with procedure and criteria set out under section 86 of this Act."***

114. From the foregoing it would follow that the successful bid is the one established to have satisfied any of the requirements under Section 86 above. In the instant case, the Tender Document indicated that the successful bid would be that established from bids evaluated at the Financial Evaluation Stage as offering the lowest tender price. However for a bid to get to the Financial Evaluation Stage, it had to meet the requirements prescribed at the Preliminary and Technical Evaluation Stages.

115. Section 80 of the Act is instructive that the Procuring Entity's Evaluation Committee should approach the evaluation process in adherence to the criteria set out in the Tender Document:

**"80. Evaluation of tenders**

***(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.***

***(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the***

***relevant professional associations regarding regulation of fees chargeable for services rendered.”***

116. On its part, Section 79 of the Act offers clarity on the responsiveness of tenders in the following terms:

***“79. Responsiveness of tenders***

***(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.***

***(2) A responsive tender shall not be affected by—***

- a) minor deviations that do not materially depart from the requirements set out in the tender documents; or***
- b) errors or oversights that can be corrected without affecting the substance of the tender.***

***(3) A deviation described in subsection (2)(a) shall—***

- a) be quantified to the extent possible; and***
- b) be taken into account in the evaluation and comparison of tenders.”***

117. The dictum of the High Court in ***Republic v Public Procurement Administrative Review Board & 2 others Ex parte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 of 2018*** further illuminates on what constitutes responsiveness of a bid under Section 79 of the Act. In the case, the court while considering a judicial review application against a decision of this Board pronounced itself thus:

***“19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be***



regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects

**of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.”**

118. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.

119. Turning to the subject tender, the Applicant was disqualified from the subject tender at the Preliminary Evaluation Stage on what was indicated in the Notification Letter dated 24<sup>th</sup> September 2024 as:

- i. Missing signed and stamped declaration and commitment to the code of ethics.
- ii. Missing certified duly signed and stamped certificate of independent tender determination form



120. The Board has keenly studied the blank Tender Document and noted these requirements are at page 36 of the Tender Document. The said requirements as contained in the Tender Document are hereinafter reproduced for ease of reference:

***a)Mandatory Requirements (MR)***

***The following requirements must be met by the tenderer***

| <b><i>No.</i></b>       | <b><i>Mandatory Requirements</i></b>   | <b><i>Responsive/<br/>Nonresponsive</i></b> |
|-------------------------|--|---|
| <b><i>MR<br/>26</i></b> | <b><i>Certified, <u>duly filled, signed and stamped</u> Declaration and Commitment to The Code of Ethics</i></b>     |   |
| <b><i>MR<br/>27</i></b> | <b><i>Certified, <u>duly filled, signed and stamped</u> Certificate of Independent Tender Determination form</i></b> |   |

***At this stage, tenderer's submission will either be responsive or non-responsive. The non-responsive submissions will be eliminated from the entire evaluation process and will not be considered further.***

121. The Board shall now interrogate the Applicant's compliance with the above requirements in turn:

## Compliance with Mandatory Requirement No. 26

122. Flowing from the above it would follow that a bid can only be said to be responsive to Mandatory Requirement No. 26 if it contains a certified, duly filled, signed and stamped Declaration and Commitment to the Code of Ethics. Conversely, a bid that does not contain a certified, duly filled, signed and stamped Declaration and Commitment to the Code of Ethics would be deemed non-responsive. Additionally, any bid that fails to meet this Mandatory Requirement would be eliminated from further evaluation from the subject tender.
123. The Board has keenly studied the Applicant's original bid forming part of the Confidential Documents and makes the following observations:
- i. The Applicant attached a Declaration and Commitment to the Code of Ethics at page 0000059 of its original bid.
  - ii. The Applicant attached another Declaration and Commitment to the Code of Ethics at page 0000443 of its original bid. . This is the same document appearing as **annexure POO-5** annexed to the affidavit of Peter Omolo Osano sworn on 4<sup>th</sup> October 2024 in support of the Request for Review.
  - iii. The Declaration and Commitment to the Code of Ethics at page 0000059 of the Applicant's original bid is signed, duly filled and stamped but not certified.
  - iv. The Declaration and Commitment to the Code of Ethics at page 0000443 of the Applicant's original bid is signed, duly filled and stamped. This document equally bears a certification stamp that is not countersigned.

124. Flowing from the above, it is apparent that the Applicant submitted 2 sets of its Declaration and Commitment to the Code of Ethics, one of which bore a certification stamp but the other did not.

125. Mandatory Requirement No. 26 called for submission of a certified, duly filled, signed and stamped Declaration and Commitment to the Code of Ethics. In the Board's view the Applicant's bid was not responsive to Requirement No. 26 noting that its submitted Declaration and Commitment to the Code of Ethics was not properly certified despite this being a mandatory requirement under the evaluation criteria in the Tender Document. We say certification was not properly done in view of the fact that the certification stamp appearing on the document is not countersigned and thus it is impossible to tell the person who was vouching for accuracy of the document. For this proposition we draw guidance from the Blacks' Law Dictionary (4<sup>th</sup> Edition) definition of the word certified:

**"CERTIFY. To testify in writing; to make known or establish as a fact. Smith v. Smith, Ind.App., 110 N.E. 1013, 1014. To vouch for a thing in writing. State ex inf. Carnahan ex rel. Webb v. Jones, 266 Mo. 191, 181 S.W. 50, 52. To give a certificate, or to make a declaration about a writing. Ainsa v. Mercantile Trust Co. of San Francisco, 174 Cal. 504, 163 P. 898, 901. To warrant. Ettman v. Federal Life Ins. Co., D.C.Mo., 48 F. Supp. 578, 580."**

126. Drawing from the above definition, any form of certification has to have a person vouching for the accuracy of the document being presented as certified. In the present case, though the certification stamp on the Declaration and Commitment to the Code of Ethics has a line for the

person doing the certification to sign, there is no signature appended on the said space. Consequently the Board finds that the Applicant did not submit a responsive Declaration and Commitment to the Code of Ethics.

127. The Tender Document designated that non-compliance with any mandatory requirement at the Preliminary Evaluation Stage would lead to disqualification of a bid. In the instant case, the Applicant's bid was non responsive to Mandatory Requirement No. 26 and therefore was properly disqualified. We find no reason to fault the Evaluation Committee for disqualification on this account.

### **Compliance with Mandatory Requirement No. 27**

128. From the Tender Document a bid can only be said to be responsive to Mandatory Requirement No. 27 if it contains a certified, duly filled, signed and stamped Certificate of Independent Tender Determination Form. Conversely, a bid that does not contain a certified, duly filled, signed and stamped Certificate of Independent Tender Determination Form would be deemed non-responsive. Additionally, any bid that fails to meet this Mandatory Requirement would be eliminated from further evaluation from the subject tender.

129. Clause 5 of the Certificate of Independent Tender Determination equally required bidders to check one of the options under the clause:

...

***5.The Tenderer discloses that (check one of the following as applicable)***



*a)The Tenderer arrived at the Tender independently from and without consultation communication agreement or arrangement with any competitor.*

*b)the Tenderer has entered in to consultations, communications, agreements or arrangements with one or more competitors regarding this request for tenders, and the Tenderer discloses, in the attached document(s) complete details thereof, including the names of the competitors and the nature of and reason for such consultations, communications, agreements or arrangements.*

130. The Board has keenly studied the Applicant's original bid forming part of the Confidential Documents and makes the following observations:
- i. The Applicant attached a Certificate of Independent Tender Determination Form at page 0000056 of its original bid.
  - ii. The Applicant attached another Certificate of Independent Tender Determination Form at page 00000445 of its original bid. This is the same document appearing as **annexure POO-6** annexed to the affidavit of Peter Omolo Osano sworn on 4<sup>th</sup> October 2024 in support of the Request for Review.
  - iii. The Certificate of Independent Tender Determination Form at page 0000056 of its original bid was signed and stamped but is not indicated as having been certified.
  - iv. The Certificate of Independent Tender Determination Form at page 0000445 of its original bid was signed and stamped. The Certificate bears a certification stamp but the same is not countersigned.

- v. Both Certificate of Independent Tender Determination Forms at pages 0000056 and 0000445, were not duly filled as the Applicant did not check any of the options under clause 5 in both documents.

131. Flowing from the above, the Board finds that the Applicant's bid was unresponsive to Requirement No. 27 noting that its submitted Certificate of Independent Tender Determination Forms were not duly filled. The Applicant failed to check any of the 2 options provided for under clause 5 of the Certificate of Independent Tender Determination Forms. The Tender Document designated that non-compliance with any mandatory requirement at the Preliminary Evaluation Stage would lead to disqualification of a bid. In the instant case, the Applicant's bid was non responsive to Mandatory Requirement No. 27 and therefore was properly disqualified. The Form attached by the Applicant cannot also be said to be duly certified when the same is not countersigned by the person expected to vouch for its accuracy. We therefore find no reason to fault the Evaluation Committee for disqualification on this account.

132. In view of the foregoing analysis, the Board finds that the Evaluation Committee's disqualification of the Applicant from the subject tender was in compliance with the provisions of the Constitution, Act, Regulations 2020 and the Tender Document.

**Whether the Respondent issued Notification Letters that complied with Sections 87 and Regulation 82 of the Regulations 2020?**

133. The Applicant assailed the Notification Letters dated 16<sup>th</sup> September 2024 that it received from the Respondent. The Applicant argued that it



was not informed of the reason why its bid was unsuccessful as well as the identity of the successful bidder.

134. On their part, the Respondent maintained that they notified the bidders of the outcome of the subject tender vide letters dated 16<sup>th</sup> September 2024 and 24<sup>th</sup> September 2024. Additionally, that the shortcomings of the letter dated 16<sup>th</sup> September 2024 were cured by the letter of 24<sup>th</sup> September 2024.
135. The Interested Party contended that from the Applicant's filed documents, it was clear that the Applicant knew the reasons why its bid was unsuccessful as well as the identity of successful bidder. It argued that the Applicant had admitted receipt of the letters dated 16<sup>th</sup> September 2024 and 24<sup>th</sup> September 2024 and therefore was not prejudiced.
136. From the above rival positions, the Board is invited to interrogate whether the Notification Letters issued by the Respondent complied with the provisions of the Act and the Regulations 2020.
137. For starters, Section 87 of the Act provides as follows:
- 87. Notification of intention to enter into a contract***  
***(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.***



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

***(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.***

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

138. From Section 87(3) above, the Accounting Officer is mandated to communicate to both the successful and unsuccessful candidates in any tender at the same time. In respect of the unsuccessful tenderers, the Accounting Officer is mandated to disclose the identity of the successful tenderer as well as the reasons as why the unsuccessful tenderer ended up unsuccessful.

139. Regulation 82 of the Regulations 2020 further reinforces that the reasons given to the unsuccessful tenderers should relate to their specific tenders:

***82. Notification of intention to enter into a contract***

***(1) The notification to the unsuccessful bidder under section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.***

***(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.***

**(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86(1) of the Act.**

140. Article 227(1) of the Constitution of Kenya, 2010 espouses the principles of fairness, equitableness, transparency and accountability in public procurement processes. It would therefore stand to logic that Procuring Entities are under an obligation to communicate to stakeholders in public procurement processes, in clear terms, the reasons for their procurement decisions. In the instant case, the Procuring Entity is under an obligation at the point of communicating to unsuccessful tenderers, to offer clarity on the reasons why a particular tenderer's tender was found unresponsive.

141. In ***PPARB Application No. 12 of 2023; Royal Taste Kitchen v CEO, National Social Security Fund & Anor*** this Board pronounced itself on the import of Section 87 of the Act and Regulation 82 as follows:

***"In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful***



**in line with section 87(1) of the Act and at what price the successful tenderer was awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance as they speak to transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.**

142. From the above it is apparent that Procuring Entities are under an obligation to conduct their procurement processes with utmost transparency in their processes and decision making. Both the Act and Regulations 2020 require them to disclose to the unsuccessful bidders the reasons for their bid being unsuccessful as well as the identity of the successful bidder. Further disclosure should be made on the tender price of the successful bidder and the reason why they were considered the successful bidder.

143. Turning to the present case, the Board has sighted the letters of 16<sup>th</sup> September 2024 and 24<sup>th</sup> September 2024 and the same are herein reproduced for ease of reference:

***16<sup>th</sup> September 2024***

***CHAKRA SECURITY SERVICES***

***(ADDRESS DETAILS WITHHELD)***

***Dear Sir,***

***RE: TENDER FOR PROVISION OF SECURITY SERVICES***



***We wish to take this opportunity to thank you very much for having participated in the above tender.***

***Further to that, we wish to inform you that your firms bid was unsuccessful.***

***We thank you in [sic] showing interest to do business with us.***

***We wish you success in our future advertised tenders.***

***Thank you***

***Yours faithfully,***

***For and on behalf of:***

***MUHORONI SUGAR COMPANY LTD (IN RECEIVERSHIP)***

***Signed***

***JAMES ORORI***

***HEAD OF PROCUREMENT***

***Signed***

***VITALIS ODUOR***

***GENERAL MANAGER (Ag)***

144. The above letter of 16<sup>th</sup> February 2024 which it's not apparent whether it was served upon the Applicant, communicates that the Applicant's bid was unsuccessful. However, this letter does not disclose the reasons as to why the Applicant's bid was unsuccessful, the identity of the successful bidder, the successful bidder's tender price and the reason why the successful bidder's bid was established as the successful bid as required under Section 87 and Regulation 82 of the Regulations 2020.

145. The Board has also spotted the related letter dated 24<sup>th</sup> September 2024 which reads:

***24<sup>th</sup> September 2024***

***CHAKRA SECURITY SERVICES***

***(Address details withheld)***



*Dear Sir,*

**RE: TENDER FOR PROVISION OF SECURITY SERVICES**

*The above subject refers.*

*Following our earlier letter on the above, we wish to highlight the areas that made your firm unsuccessful.*

*Please be informed that your firm's bid did not manage to pass the mandatory stage. In your firm's bid, the following documentations we [sic] missing, thus*

- 1. Signed and stamped declaration and commitment to the code of ethics*
- 2. Certified duly signed and stamped certificate of independent tender determination form*

*We thank you for showing interest to do business with us and we still look forward to a possibility in [sic] working together in future.*

*Yours faithfully,*

*For & on behalf of:*

**MUHORONI SUGAR COMPANY LTD (IN RECEIVERSHIP)**

*Signed*

**JAMES ORORI**

**HEAD OF PROCUREMENT**

*Signed*

**VITALIS ODUOR**

**GENERAL MANAGER (Ag)**

146. The above letter of 24<sup>th</sup> August 2024 communicates to the Applicant the reasons as to why its bid was established as unsuccessful. However, the letter fails to disclose (i) the identity of the successful bidder, (ii) the successful bidder's tender price and (iii) the reason why the successful bidder's bid was established as the successful bid as required under Section 87 of the Act and Regulation 82 of the Regulations 2020.

147. It also became apparent in the proceedings before the Board that the Procuring Entity in the subject tender failed to send the Notification Letters to the bidders at the same time as required under law. We wish to remind the Respondent herein that both Section 87(3) of the Act and Regulation 82(1) of the Act require that Notification Letters are sent to both the successful and successful bidders **at the same time**.

148. From the foregoing it would follow that both the Notification letters dated 16<sup>th</sup> September 2024 and 24<sup>th</sup> September 2024 fell short in terms of the information contemplated under the Act and Regulations.

149. In view of the foregoing analysis, the Board finds that the Respondent issued Notification Letters that did NOT comply with Section 87 of the Act and Regulation 82 of the Regulations 2020.

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

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

151. The Board has equally found that the Respondent evaluated the bids received in response to the subject tender in compliance with the provisions of the Constitution, Act, Regulations 2020 and the Tender Document

152. The Board has equally found that the Respondent issued Notification Letters that did NOT comply with Section 87 of the Act and Regulation 82 of the Regulations 2020.



153. Before concluding this Decision, the Board wishes to acknowledge that the subject tender was also the subject of consideration before it in PPARB Application No. 93 of 2024; Davian Security Limited v Joint Receiver, Muhoroni Sugar Company (In Receivership). In its Decision in the related Request for Review, which was delivered on 22<sup>nd</sup> October 2024, the Board at Order No. 5 directed that fresh Notification Letters be issued in the subject tender within 15 days from 22<sup>nd</sup> October 2024. Noting that the present Request for Review follows a similar fate as that in PPARB Application No. 93 of 2024, the fresh Notification Letters should be issued within 12 days from the date of this letter to account for the time that has already lapsed since the delivery of the Decision in the related Request for Review.

154. The upshot of our finding is that the Request for Review dated 4<sup>th</sup> October 2024 in respect of Tender No. MUSCO/SEC. T/008/2024 for Provision of Security Services for a Period of One Year partially succeeds in the following specific terms:

### **FINAL ORDERS**

155. 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 4<sup>th</sup> October 2024:

- 1. The Respondent's Notice of Preliminary Objection raised under paragraph 2 of the Memorandum of Response dated 11<sup>th</sup> October 2024 be and is hereby dismissed.**
- 2. The Interested Party's Notice of Preliminary Objection dated 11<sup>th</sup> October 2024 be and is hereby dismissed.**

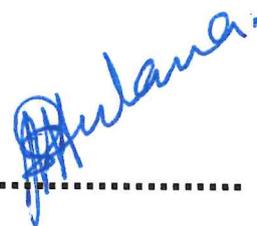
3. The Letter of Notification of Award dated 16<sup>th</sup> September 2024 and addressed to the Interested Party as the successful bidder in respect of Tender No. MUSCO/SEC. T/008/2024 for Provision of Security Services for a Period of One Year be and is hereby cancelled and set aside;
4. The Letters of Notification of Award dated 16<sup>th</sup> September 2024 and 24<sup>th</sup> September 2024 addressed to the Applicant and the other unsuccessful bidders in respect of Tender No. MUSCO/SEC. T/008/2024 for Provision of Security Services for a Period of One Year be and are hereby cancelled set aside;
5. The Respondent be and is hereby directed to issue fresh Notification Letters in respect of Tender No. MUSCO/SEC. T/008/2024 for Provision of Security Services for a Period of One Year within the next 12 days in compliance with Section 87 of the Act and Regulation 82 of the Regulations 2020 having regard to the Board's findings in this Decision
6. Each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 25<sup>th</sup> Day of October 2024.



**CHAIRPERSON**

**PPARB**



**SECRETARY**

**PPARB**



