

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 103/2024 OF 14TH OCTOBER 2024

BETWEEN

AUTO DRIVE LIMITED APPLICANT

AND

PUBLIC PROCUREMENT REGULATORY AUTHORITY. RESPONDENT

Review against the decision of the Accounting Officer, Public Procurement Regulatory Authority in relation to Tender No. PPRA/OT/06/2023-2024 for Proposed Procurement of Office Premises.

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb, I.P - Chairperson
2. Ms. Alice Oeri - Vice Chairperson
3. Ms. Jessica M'mbetsa - Member

IN ATTENDANCE

1. Ms. James Kilaka - Acting Board Secretary
2. Ms. Evelyn Weru - Secretariat



PRESENT BY INVITATION

APPLICANT

AUTO DRIVE LIMITED

1. Mr. George Kamau - Advocate, Waruhiu K'owade & Ng'ang'a
2. Mr. John Gaita Mahinda - Managing Director, Auto Drive Limited

RESPONDENT PUBLIC PROCUREMENT REGULATORY AUTHORITY

1. Mr. Raphael N'galatu - Advocate, Public Procurement Regulatory Authority
2. Ms. Monica Mungai - Ag. Head of Procurement, Public Procurement Regulatory Authority
3. Mr. Charles Waithaka - Principal Supply Chain Management Officer, Public Procurement Regulatory Authority

BACKGROUND OF THE DECISION

The Tendering Process

1. Public Procurement Regulatory Authority, the Procuring Entity herein invited sealed bids in response to Tender No. PPRA/OT/06/2023-2024 for Proposed Procurement of Office Premises (hereinafter referred to as the "subject tender"). Tendering was conducted under open competitive method (National) and the invitation was by way of an advertisement on 14th June 2024 published on the Procuring Entity's website www.ppra.go.ke and on the Public Procurement Information Portal (PPIP) website www.tenders.go.ke where the blank tender document issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. The subject tender's initial submission deadline



was on 28th June 2024 at 11.00 a.m. which was later extended to 3rd July 2024 at 11.00 a.m.

Submission of Tenders and Tender Opening

2. According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 3rd July 2024 which form part of confidential documents furnished to the Public Procurement Administrative Review Board by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of six (6) tenders were submitted in response to the tender. The tenders were opened in the presence of tenderers' representatives present, and were recorded as follows:

Bidder No.	Name
1.	Amina Hussein Hajj
2.	Narabadaben Amichand Raichand Shah
3.	Auto Drive Limited
4.	Silvia Kathambi Muriiti
5.	Ahmed Abdullahi Mohamed
6.	Nikelan Ratilal Shah



Evaluation of Tenders

3. A Tender Evaluation Committee undertook evaluation of the six (6) tenders as captured in the Tender Evaluation Report signed by members of the Evaluation Committee on 26th September 2024. The evaluation was done in the following stages:

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

Preliminary Evaluation

4. The Evaluation Committee carried out a Preliminary Evaluation and examined tenders for responsiveness against the Preliminary Evaluation requirements set out under Section III-Evaluation and Qualification Criteria at page 23 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to Technical Evaluation.

5. At the end of evaluation, two (2) tenders were determined non-responsive, while four (4) tenders were determined responsive and proceeded to Technical Evaluation.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set under Clause a. Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at



pages 24 to 25 of the Tender Document. Tenders were required to meet all the technical requirements to proceed to Financial Evaluation. The Evaluation Committee carried out a site visit for physical verification of bidder's proposed premises and viewing of the original title documents.

7. At the end of evaluation, two (2) tenders were determined non-responsive including the Applicant's tender, while two (2) tenders were determined responsive and proceeded to Technical Evaluation.

Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Financial Evaluation Requirements/Criteria of Section III- Evaluation and Qualification Criteria at page 25 to 26 of the Tender Document.

9. Upon completion of the Financial Evaluation, the Evaluation Committee found as follows:

Lot 1: Nakuru

Description of Property	B6
	Cost of the Office premises (inclusive of ALL TAXES)
<i>Office Space</i>	<i>53,000,000</i>
<i>Current rate of annual service charge for the entire space where applicable (for bidders quoting for</i>	<i>-</i>



<i>commercial buildings)</i>	
GRAND TOTAL	53,000,000

Lot 2: Nyeri

Description of Property	B2 Cost of the Office premises (inclusive of ALL TAXES)
<i>Office Space</i>	39,750,000
<i>Current rate of annual service charge for the entire space where applicable (for bidders quoting for commercial buildings)</i>	-
GRAND TOTAL	39,750,000

Due Diligence

10. The Evaluation Committee proceeded to carry out due diligence on the lowest evaluated bids for each region as set out under the Due Diligence criteria of Section III- Evaluation and Qualification Criteria at page 26 of the Tender Document and found as follows:

"....."

S/No	Item sought for due diligence	Response from the valuation report (copy in the file)



1.	Nyeri	<p>a) Owner: Narabadaben Amichand Raichand Shah</p> <p>b) Encumbrance: Free from any encumbrances</p> <p>c) Land rates/rent: No outstanding land rates/rents</p> <p>d) Valuation: The property was valued and the current value is as stated below:</p> <p>The State Department of Housing valued the lease hold interest on title No. Nyeri Block 3/122 free from encumbrances as follows:</p> <ul style="list-style-type: none"> • Value of the land: Kenya Shillings 35,000,000 • Cost of improvement: Kenya Shillings 12,800,000 <p>Total current market value : 47,800,000.00</p>
2.	Nakuru	<p>a) Owner: Niketan Ratilal Shah</p> <p>b) Encumbrance: Free from any encumbrances</p>



		<p>c) Land rates/rent: No outstanding land rates/rents</p> <p>d) Valuation: The property was valued and the current value is as stated below:</p> <p>The State Department of Housing valued the lease hold interest on title No. Nakuru Municipal Block 20/12 free from encumbrances as follows:</p> <ul style="list-style-type: none"> • Value of the land: Kenya Shillings 30,000,000 • Cost of improvement: Kenya Shillings 20,000,000 <p>Total current market value : 50,000,000.00</p>
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Committee's Observation

- a. The Valuers from the State Department of Lands gave the property a current market value for Nyeri Property of Kshs. 47,800,000.00 against the quoted amount of total Kenya Shillings 39,750,000.00***



- b. Valuers from the State Department of Lands gave the property a current market value for Nakuru Property of Kshs. 50,000,000.00 against the quoted amount of total Kenya Shillings 53,000,000.00. The committee noted that there was need to engage the seller to review the selling price to be within the valuation amount.***
- c. The committee mandated the Secretary to write to the seller on the matter. The Committee Secretary, wrote to the supplier to consider giving the best price based on the valuation report. The supplier responded through a letter dated 21st September, 2024 agreeing to give a discount and offer the property for sale at the Ministry of Lands valuation of Ksh. 50,000,000.00 (copy in the file)."***

Evaluation Committee's Recommendation

11. The Evaluation Committee recommended award of the subject tender to be made to the lowest evaluated bidder per lot for the responsive regions subject to the said bidder submitting an approval from the respective County Government for change of use from residential to commercial as follows:



Lot 1:Nakuru

Description of Property	M/s Niketan Ratilal Shah
	Cost of the Office premises (inclusive of ALL TAXES)
Office Space	50,000,000
Current rate of annual service charge for the entire space where applicable (for bidders quoting for commercial buildings)	N/A
Subject to the bidder facilitating the change of user from County Government	
GRAND TOTAL	50,000,000

Lot 2:Nyeri

Description of Property	M/s Narabadaben Amichand Raichand Shah
	Cost of the Office premises (inclusive of ALL TAXES)
Office Space	39,750,000
Current rate of annual service charge for the entire space where applicable (for bidders quoting for commercial buildings)	N/A
Subject to the bidder facilitating the change of user from County Government	
GRAND TOTAL	39,750,000



Professional Opinion

12. In a Professional Opinion, dated 26th September 2024, the Acting Head of Procurement, Ms. Monica Mungai reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the Evaluation Committee's recommendation on award of the subject tender.
13. Thereafter, the Professional Opinion was approved by the Director General of the Procuring Entity, Mr. Patrick Wanjuki on 26th September 2024.

Notification to Tenderers

14. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 30th September 2024.

REQUEST FOR REVIEW NO. 103 OF 2024

15. On 14th October 2024, Auto Drive Limited, the Applicant herein, filed a Request for Review dated 14th October 2024 together with a Statement in Support of the Review Application signed by Gaita John Mahinda, its Director (hereinafter referred to as "the instant Request for Review") through Waruhiu K'Owade & Ng'ang'a Advocates seeking the following orders from the Board:



a) The Award Committee's decisions be reversed and the awards be nullified forthwith.

b) The Tenders be evaluated afresh on both the Technical and Financial proposals and fresh awards be made in strict compliance with the Tender documents, the Act and the Regulations therein.

c) The Tender be awarded to the Applicant

d) Costs be awarded to the Applicant.

16. In a Notification of Appeal and a letter dated 14th October 2024, Mr. James Kilaka, the Acting Secretary of the Board notified the Procuring Entity of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to the said Procuring Entity a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Procuring Entity was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 14th October 2024.

17. On 18th October 2024 the Procuring Entity filed through Mr. Raphael M. Ngalatu Advocate, a Notice of Appointment dated 18th October 2024, a Respondent's Notice of Preliminary Objection dated 18th October 2024, a Replying Affidavit sworn by Monica Mungai on 18th October 2024, an



Authority to Act dated 18th October 2024 together with confidential documents submitted pursuant to Section 67(3)(e) of the Act.

18. *Vide* email dated 18th October 2024, the Acting Board Secretary notified all tenderers in the subject tender, of the existence of the Request for Review while forwarding to them the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers were invited to submit to the Board any information and arguments concerning the tender within three (3) days.
19. *Vide* a Hearing Notice dated 18th October 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 24th October 2024 at 3:00 p.m. through the link availed in the said Hearing Notice.
20. When the matter first came up for hearing on 24th October 2024 at 3:00 p.m., the Board read out pleadings filed by parties in the instant Request for Review. Mr. Kamau, counsel for the Applicant, sought leave to file a further affidavit so as to respond to issues raised by the Respondent in the Replying Affidavit sworn by Monica Mungai on 18th October 2024 and the Notice of Preliminary Objection dated 18th October 2024. On his part, Mr. Ngalatu indicated that he was ready to proceed with the hearing.
21. Having considered parties' submissions, the Board directed (a) the Applicant be granted leave to file and serve a further affidavit together with its written submissions by 5.00 p.m. on 25th October 2024, (b) the



Respondent to file and serve its written submissions by 9.00 a.m. on 28th October 2024, (c) that the matter would proceed for hearing on 29th October 2024 at 3.00 p.m. Parties were cautioned to adhere to the strict timelines as specified in the Board's directions and that any pleading filed outside the stipulated timelines would be struck out since the Board would rely strictly on the documentation filed before it in rendering its decision.

22. On 25th October 2024, the Applicant filed through its advocates a Further Affidavit sworn by Gaita John Mahinda on 25th October 2024, Written Submissions dated 25th October 2024 and a List of Authorities dated 25th October 2024.

23. On 28th October 2024, the Respondent filed through its advocate Written Submissions dated 28th October 2024 and a List of Authorities of the Respondent dated 28th October 2024.

24. At the hearing on 29th October 2024 at 3.00 p.m., the Board read out pleadings filed by parties in the instant Request for Review. Subsequently, parties were allocated time to highlight their respective cases and the Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Respondent's submissions on its Notice of Preliminary Objection

25. Mr. Ngalatu submitted that the Respondent's Notice of Preliminary Objection was premised on three grounds, being that:



- (a) the Board lacks the jurisdiction to hear and determine the Request for Review as filed since the Applicant has not claimed to suffer or to risk suffering any loss or damage for breach of duty imposed on the Respondent contrary to the provisions of Section 167 (1) of the Act.
- (b) the Board lacks the jurisdiction to hear and determine the Application as filed herein since the Applicant has not joined the Accounting Officer of the Respondent and the tenderer notified as Successful by the Respondent as parties to the suit contrary to the provisions of Section 170 of the Act.
- (c) that the Request for Review as filed is defective *ab initio* for want of *locus standi* at the instinct of the Applicant.

26. Counsel submitted that prior to initiating a request for review, one must demonstrate loss suffered or likely to be suffered as a result of the decision of the procuring entity and that the rationale behind that requirement must have been well thought out by the drafters of the Act so as to avoid vexatious applications and preserve the otherwise precious time of the Board. In rebuttal of the Applicant's submissions that the fact that a request for review has been filed means that the person has suffered or is likely to suffer loss, he referred the Board to provisions under Section 167(1) of the Act and argued that if that was the intention of the law makers, then nothing would have prevented the drafters of the Act from doing away with such a critical provision.



27. He argued that for a tenderer to file a request for review before the Board, it ought to at the very least claim in its pleadings that it has suffered or is at the risk of suffering loss or damage due to breach of duty imposed on a procuring entity by the Act or Regulations 2020 pursuant to Section 167(1) of the Act. In support of his argument he referred the Board to its holding in *PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited Vs. Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another*.
28. Mr. Ngalatu submitted that by failing to enjoin the Accounting Officer of the Respondent as well as the successful bidder to this suit, the Applicant denied key parties to the tender in question, being the successful bidder and the accounting officer of the Respondent, a chance to make representation and be heard by the Board. He pointed out that the resultant effect of this is that the Board would proceed to hear the application and issue orders which could be adverse to the two aforementioned parties without having afforded them a chance to make their representation before the Board in utter breach of the rules of natural justice and a fair hearing.
29. Counsel further submitted that the instant Request for Review as filed was defective *ab initio* for want of *locus standi* since whereas the Request for Review application does not indicate the details of the person signing it off on behalf of the Applicant, the Statement in Support of the Request for Review is signed off by one Gaita John Mahinda without any authority or resolution from the Applicant company to demonstrate that he has



been authorized by the Applicant to initiate the instant Request for Review on its behalf.

30. He pointed out that the same way the Applicant annexed a letter of Authority dated 25th October, 2024 authorizing Gaita John Mahinda to execute the Applicant's Further Affidavit of even date, the Applicant would have sought authority to initiate the instant Request for Review. He called the Board to examine the aforementioned Letter of Authority and establish that it was defective since (a) whereas there is a provision for the name of the director to sign the letter, the letter is not indicative of the director who signed it on behalf of the company despite the company having two directors, (b) whereas the letter indicates that the company has executed the authority under seal, the same is neither sealed nor stamped by the Applicant, and (c) whereas the letter indicates that it has been executed in witness, the same has not been witnessed upon execution as is required under the Companies Act for documents executed by one director.

31. Counsel pressed on that the aforementioned Letter of Authority cannot be said to have any probative value before the Board having not been executed in conformity with the provisions of section 37 of the Companies Act, 2015 and it ought to be expunged from record. He argued that even if the said letter is found to have been properly executed, it cannot be deemed as having authorized the deponent to initiate the instant Request for Review for the reasons that whereas the Request for Review was filed on 14th October, 2024, the disputed letter of authority was issued on 25th



October, 2024. In support of his argument, counsel referred the Board to the holding by the Court of Appeal in *The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989] eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989* which underscores the centrality of the principle of jurisdiction.

32. He urged the Board to allow the Respondent's Notice of Preliminary Objection as prayed.

Applicant's Submissions and response to the Respondent's Notice of Preliminary Objection

33. In response to the objections raised by the Respondent, Mr. Kamau submitted that the Applicant had not offended the provisions of Section 167(1) of the Act whether in form or in the intention of the drafters of the Act.

34. He further submitted that the mere presentation of the instant Request for Review before the Board was enough proof that the Applicant was prejudiced by the actions of the Procuring Entity and pointed to paragraph 7 of the Request for Review. He argued that it is beyond peradventure that any bidder to a tender has the legitimate expectation that they would be awarded the tender if they have met the outlined requirements.

35. He pointed out that the failure by the Respondent to adhere to the tender requirements caused an obvious prejudice/injustice to the Applicant and that it was the Respondent's breach of duty that had



informed the reasons for filing the instant Request for Review and the prayers sought therein.

36. On whether the instant Request for Review as filed offends the provisions of Section 170 of the Act, counsel submitted that that provision does not out rightly impose an obligation on the Applicant as intimated by the Respondent.

37. He further submitted that drawing from Section 168 of the Act, the Board's Secretariat upon filing of a review application notifies the accounting officer of a procuring entity as was done in the instant case and that it is therefore an expectation and common practice of this Board that the procuring entity would notify other bidders regardless of whether they were successful or not. He indicated that the Respondent having been served with the Notification of Appeal would then notify any other bidder of the same.

38. Counsel pointed out that pursuant to Section 170(d) of the Act, it is the mandate of the Review Board to join any other party to the review as it may determine or deem fit.

39. On whether the person signing the instant Request for Review application on behalf of the Applicant has authority to do so, counsel submitted that it was worth noting that the person representing the Applicant therein had been described as a managing director of the Applicant company and as per the copy of CR12 dated 11th October 2024



forming part of the Applicant's bundle of documents, it was quite clear that the managing director is a shareholder, holding one ordinary share out of the total two shares in the Applicant company. Mr. Kamau submitted that the contention raised that the director was not the authorized agent in the subject tender falls on wayside noting that the issue at hand and proceedings before the court were raised after the procurement process was over and it therefore follows that any agency agreement would be purged after the procurement process.

40. Counsel made reference to provisions under Section 34 of the Companies Act and argued that there was no document or evidence placed before the Board by the Respondent indicating that the said director did not have authority or acted in bad faith and in any case, that issue did not go to the core dispute preferred in the instant Request for Review.

41. He urged the Board to dismiss the Respondent's Preliminary Objection.

42. On the substantive issues raised in the instant Request for Review as to whether the Procuring Entity used a different evaluation criteria other than the one provided in the Tender Document, Mr. Kamau pointed out that the preliminary evaluation requirements as provided at page 24 and 25 of the Tender Document required a confirmation on the availability of a sectional title deed, applicable for spaces in commercial property.

43. He submitted that that criterion did not require the Applicant to attach a copy of the sectional title as the parties were yet to agree on the size or



portion required by the Procuring Entity and that Section 3(b) of the Building Set up only required a confirmation that the Applicant had more than 2,500 square feet and as such, the process of providing a sectional title would only follow once an agreement was reached on the size required by the Procuring Entity.

44. He argued that there was no document provided by the Respondent as proof of the same having been agreed upon noting that the Applicant had a 7 storey building. He further argued that the Respondent sought to introduce Section 43 of the Sectional Properties Act whose requirements surpass the requirements in the Tender Document.

45. Counsel submitted that Section 80(2) of the Act provides the procedure to be used while evaluating a tender and that the success or failure of a particular participant ought to be premised on the requirements of the subject tender.

46. He urged the Board to allow the instant Request for Review as prayed.

Respondent's submissions and rejoinder to its Notice of Preliminary Objection

47. In a rejoinder to its preliminary objection, Mr. Ngalatu submitted that the Applicant was expected to specifically plead loss in the Request for Review. He further indicated that the Respondent was not disputing the fact that Mr. John Gaita Mahinda is the director of the Applicant company and what was in dispute was that he had not been authorized to initiate



the Request for Review application in view of Section 37(2) of the Companies Act on how documents ought to be executed.

48. On the issues raised in the substantive Request for Review, counsel submitted that the evaluation exercise of the subject tender was conducted in strict adherence to the evaluation criteria provided in the Tender Document. He further submitted that the Applicant's tender was disqualified at the Technical Evaluation stage for failure to have a title deed for the premises on sale and therefore it could not proceed for financial evaluation.
49. Mr. Ngalatu pointed out that was a technical requirement for bidders to attach a copy of the title deed for the premises being sold as provided for in technical requirement number 3 (a) at page 25 of the Tender Document and that it was a clear provision at page 25 of the Tender Document that all the technical requirements were mandatory and failure to meet any would automatically disqualify the bidder.
50. Counsel submitted that the premises being offered by the Applicant therein were located on the 1st floor of a three storey building in Nyeri town which had a mother title but the Applicant did not have a sectional title for the premises being offered for sale. He indicated that in lieu of that, the Applicant could not be said to have met the technical requirement since the Respondent was not purchasing the entire building but a section of it being the 1st Floor of the building for which the Applicant did not have a sectional title.



51. It is the Respondent's case that before making a recommendation for award, the Evaluation Committee carried out site visits on the bidders who had passed the mandatory stage and upon visiting the Applicant's premises, the Evaluation Committee established that:

- a. the space being offered was located in a commercial building known as Nyeri Business Centre, Plot No. L.R No. II/360 Nyeri,
- b. the road leading towards the entrance of the building had an operating garage,
- c. the office space being sold out was on the first floor of a 3 storey building,
- d. the building was sitting on a land with one title deed which was already charged to Co-operative Bank,
- e. the sectional title for the space on sale was not available during the site visit, and
- f. the Applicant had not commenced the process of seeking approval for sale of sections of the property as is required under the Sectional Properties Act and these laid out requirements were not likely to be met within the tender validity timelines.

52. Counsel submitted that the Applicant was notified of its unsuccessfulness in accordance with the provisions of Section 87(3) of the Act as read with Regulation 82 of Regulations 2020 which require an accounting officer to inform an unsuccessful bidder of the reasons why



its tender failed. He pointed out that the Applicant in the notification letter issued to it was informed of what the law provides in regard to titles under the Sectional Properties Act and that that action cannot be equated to changing the evaluation criteria.

53. Mr. Ngalatu further submitted that the fact remained that the Applicant did not have a title for the property on sale, a fact which continues to subsist given that it did not annex any sectional title for the subject property to the instant Request for Review. Counsel pointed to a letter dated 29th July, 2024 from Strudelta Africa Ltd which was annexed to the Applicant's Further Affidavit indicating that the processing of the sectional titles had commenced and the process would take approximately 4 weeks and argued that the aforementioned four weeks lapsed on or about 28th August, 2024 yet two months down the line, the Applicant had not obtained that critical document of ownership.

54. Counsel urged the Board to note that the subject tender had a validity period of 120 days with effect from 14th June 2024 and that as at the tender validity expiry period date of 13th October 2024, the Applicant had not obtained the disputed title deed which in essence meant that the subject tender would have died a natural death without parties entering into a contract.

55. Mr. Ngalatu submitted that the instant Request for Review was frivolous, vexatious, unmerited, a waste of the Board's time and was only calculated at frustrating the procurement process in the subject tender.



56. He urged the Board to dismiss the Request for Review with costs.

CLARIFICATIONS

57. When asked by the Board to expound on his understanding of Section 170 of the Act and whose responsibility it is to join parties to a review application before the Board, Mr. Kamau submitted that Section 170 of the Act does not allocate an obligation on any party and only sets out the parties who are supposed to be part of the review application. He proceeded to refer the Board to provisions of Section 168 of the Act and indicated that upon receipt of a review application, the Board's Secretariat is required to notify the accounting officer of a procuring entity and that the procuring entity being aware of bidders who participated in a tender is required to notify the said bidders of the review application and reasons why procurement proceedings have been suspended.

58. On whether that was expressly provided for in the Act, counsel submitted that Section 170(d) of the Act allows a procuring entity to notify and join any other party it deems fit and this was a provision that the Board could utilise since it would be very difficult for an Applicant to particularly know the bidders in a tender and it cannot be presumed that a party had an obligation to bring all parties to attend the review.

59. On the issue of pleading loss and damage, Mr. Kamau submitted that filing of the instant Request for Review in its entirety is an element of dissatisfaction of the Applicant coupled with the question of what was the



legitimate expectation of a bidder who expected to be successful in the subject tender. He confirmed that he was submitting on legitimate expectation as a legal concept and not necessarily as a matter pleaded in the pleadings in the instant Request for Review. He further confirmed that the question of legitimate expectation is a matter of proof and if the Board was to find that the evaluation process was not conducted in accordance with the tender requirements, then all tenderers and not just the Applicant's legitimate expectation would have been breached.

60. When asked to confirm if the Applicant was issued with a notification letter informing it of the successful bidder in the subject tender, counsel confirmed that the Applicant was notified on 30th September 2024.

61. Upon enquiry by the Board on whether provision of the sectional title was a mandatory requirement and if the same was provided by the Applicant in its bid document, Mr. Kamau submitted that the requirement as laid out in the Tender Document on the building set up was that there should be availability of a sectional title deed applicable for spaces in commercial properties. He indicated that the question of the sectional title is based on proportions and the only other requirement that a bidder could accompany this with was provided as requirement B which provided that the approximate area that should be required is 2500 square feet.

62. He referred to provisions pointed out by the Board at page 8 and 9 of the Tender Document read together with Clause 3(a) & (b) at page 25 of the Tender Document and submitted that what was floated in the subject



tender was for any property of more than 2500 square feet but in the current case, the Applicant had a seven (7) storey building to offer and that there had been no contest as to the ownership of the said building.

63. He further submitted that before a party could produce a sectional title deed, it had to first agree with the Procuring entity on amount of square feet and as such, the sectional title would be premised upon this agreement since the bidder might have 7000 square feet while the procuring entity only requires 3000 square feet. He reiterated that a sectional title could only be prepared once parties agreed on the amount of square feet needed.

64. Mr. Kamau pointed out that the subject tender ought to have been carried out in stages such that once an agreement had been reached on the amount of space required, a sectional title could then be prepared on the assumption that a person could take up a certain amount of space.

65. On his part, Mr. Ngalatu submitted that the Procuring Entity was looking to purchase a building with space over and above 2500 square feet with a ready title, be it a stand alone title or a sectional title which was expected to be ready and available. He indicated that the subject tender's validity period was for 120 days only and that that requirement being clearly laid out in the Tender Document meant that there was no leeway for bidders to sub-divide the specific property needed by the Procuring Entity in view of the fact that one of the completion documents ought to have be a title deed for the specific area. He indicated that the Applicant



did not submit any title, further that during the site visit, the title was not availed and that none had been availed to date.

66. As to whether the Respondent had provided evidence on Mr. John Gaita Mahinda lacking authority to sign the instant Request for Review application on behalf of the Applicant, Mr. Ngalatu submitted that from page 28 of the Applicant's bid document, the person indicated as being duly authorized to sign the bid document on behalf of the Applicant was one Peter Ndegwa and not Mr. John Gaita and that it was a genuine expectation that Mr. Peter Ndegwa would initiate the request for review.

67. At the conclusion of the hearing, the Board informed parties that the instant Request for Review having been filed on 14th October 2024 was due to expire on 4th November 2024 and that the Board would communicate its decision on or before 4th November 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

68. The Board has considered each of the parties' submissions and documents placed before it and finds the following issues call for determination.

A. Whether the Board has jurisdiction to hear and determine the instant Request for Review;

In determining the first issue, the Board shall make a determination on the following sub-issues:



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

Depending on the determination of sub-issue (i);

- ii Whether the instant Request for Review as filed is fatally defective for failure to join the successful bidder as a party pursuant to Section 170(c) of the Act as to divest the Board of its jurisdiction;

Depending on determination of sub-issue (ii);

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

Depending on the determination of the first issue.

B. Whether the Respondent's Evaluation Committee in disqualifying the Applicant's tender acted in breach of the provisions of the Tender Document, Section 80(2) of the Act as read with Article 227(1) of the Constitution.

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



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

69. It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter.

70. 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."

71. The celebrated Court of Appeal decision in **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989] eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no



power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

72. The Supreme Court added its voice on the source of jurisdiction of a court or other decision making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."



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

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

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

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



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

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

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

76. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

77. This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides:

"(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."

78. Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

"(1) The functions of the Review Board shall be—



(a) reviewing, hearing and determining tendering and asset disposal disputes; and
(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.”

79. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

80. The jurisdiction of this Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for Powers of the Board.

81. The Respondent herein in a Notice of Preliminary Objection dated 18th October 2024 and filed on even date has challenged the Board’s jurisdiction to hear and determine the instant Request for Review as follows:

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



82. The Respondent in opposition to the instant Request for Review contends at grounds 6 and 7 of its Notice of Preliminary Objection dated 18th October 2024 that the instant Request for Review as drawn and filed by the Applicant before the Board is fatally defective and offends the provisions of section 170(b) of the Act as read with Section 167(1) of the Act for failing to join the accounting officer of the Procuring Entity as a party to the Request for Review.

83. Mr. Ngalatu submitted that by failing to join the Procuring Entity's accounting officer as a party to the instant Request for Review, the Applicant denied the accounting officer a chance to make representations and be heard by the Board in utter breach of the rules of natural justice and the right to a fair hearing.

84. In response, Mr. Kamau submitted that section 170 of the Act only sets out the parties who are required to be part of the review application and does not out rightly impose an obligation on the Applicant as intimated by the Respondent. He further submitted that pursuant to Section 168 of the Act, the Board Secretariat notifies the accounting officer of the procuring entity of the filing of a request for review application and that Section 170(d) of the Act issues a mandate to the Board to join any other party as it may determine.

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

"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss



or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed”.

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

“170. The parties to a review shall be.

(a) the person who requested the review;

(b) the accounting officer of a Procuring Entity;

(c) the tenderer notified as successful by the Procuring Entity; and

(d) such other persons as the Review Board may determine.”
(Emphasis ours)

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

88. Notably, the provisions in Section 170 of the Act are **set in mandatory terms**. The Court of Appeal in **James Oyondi t/s Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR**



(hereinafter referred to as "the James Oyondi case") held that pursuant to section 170 of the Act, the joinder of an accounting officer of a procuring entity to a request for review is mandatory and failure to do so renders a request for review fatally defective and rids the Board of jurisdiction to hear the same. The court held as follows:

"It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings, the current statute which replaced it, the PPADA, requires that the accounting officer of the procuring entity, be the party. Like the learned Judge we are convinced that the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we think, is where the Board's importation of the law of agency floundered. When the procuring entity was the required party, it would be represented in the proceedings by its officers or agents since, being incorporeal, it would only appear through its agents, though it had to be named as a party. Under the PPADA however, there is no such leeway and the requirement is explicit and the language compulsive that it is the accounting officer who is to be a party to the review proceedings. We think that the arguments advanced in an attempt to wish away a rather elementary omission with jurisdictional and competency consequences, are wholly unpersuasive. When a statute



directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply.

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

"I am not in the least persuaded that Article 159 and Oxygen principles which both command courts to seek substantial justice in an efficient and proportionate and cost effective manner to eschew defeatist technicalities were ever meant to aid in overthrow [sic] of rules of procedure and create anarchical tree for all in administration of justice. This Court, indeed all Courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines are to serve the process of judicial adjudication and determine fair, just certain and even [sic] handed courts cannot aid in bending or circumventing of rules and a shifting of goal posts for while it may seem to aid [sic] one side, it unfairly harms the innocent party who strives to abide by the rules."



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

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

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

91. Accordingly, this ground of objection as raised in the Respondent's Notice of Preliminary Objection dated 18th October 2024 succeeds and the Board is divested of jurisdiction to hear and determine the instant Request for Review.



What orders the Board should grant in the circumstances?

92. We have found that the instant Request for Review as filed is fatally defective for failing to join the accounting officer of the Respondent as a party as mandated under Section 170(b) of the Act. Having found as such, the Board shall not delve into an analysis of the other issues framed for determination.

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

FINAL ORDERS

94. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in this Request for Review:

A. Ground 6 and 7 of the Respondent's Notice of Preliminary Objection dated 18th October 2024 and filed on even date succeeds and is allowed.

B. The Request for Review dated 14th October 2024 and filed on even date be and is hereby struck out for being fatally and incurably defective.


C. The Respondent is hereby directed to proceed with the procurement process in Tender No. PPRA/OT/06/2023-2024




for Proposed Procurement of Office Premises to its logical conclusion in accordance with the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution.

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

Dated at NAIROBI this 4th Day of November 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB



