

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 107/2024 OF 17TH OCTOBER 2024

BETWEEN

ALMARAI DAIRY LIMITED APPLICANT

AND

**MINISTRY OF EAST AFRICAN COMMUNITY,
THE ASALs AND REGIONAL DEVELOPMENT, THE STATE
DEPARTMENT FOR THE ASALs AND
REGIONAL DEVELOPMENT 1ST RESPONDENT**

**THE PRINCIPAL SECRETARY,
MINISTRY OF EAST AFRICAN COMMUNITY,
THE ASALs AND REGIONAL DEVELOPMENT, THE STATE
DEPARTMENT FOR THE ASALs AND
REGIONAL DEVELOPMENT 2ND RESPONDENT**

TAWAKAL TRADING COMPANY LIMITED 3RD RESPONDENT

**GADANO GENERAL TRADING COMPANY
LIMITED 4TH RESPONDENT**

KYEVALUKI SERVICES LIMITED 5TH RESPONDENT

PONTY PRIDD HOLDINGS LIMITED 6TH RESPONDENT

HABIBANI ENTERPRISES LIMITED 7TH RESPONDENT

WILBURS ENTERPRISES 8TH RESPONDENT

AMANI TRANSPORTER 9TH RESPONDENT



IBREIN BUSINESS LIMITED 10TH RESPONDENT
AUJAN INDUSTRIES LIMITED 11TH RESPONDENT
DUBAI MATTRESSES 12TH RESPONDENT
WAJIR VEGETABLES 13TH RESPONDENT
TANAD TRANSPORTERS LIMITED 14TH RESPONDENT

Review against the decision of the Principal Secretary, Ministry of East African Community, the ASALs and Regional Development, the State Department for the ASALs and Regional Development in relation to Tender No. SDARD/OT/16/2023-2024 for Provision of Transport Services for Relief Food and Non-Food Items.

BOARD MEMBERS PRESENT

- 1. Mr. George Murugu, FCI Arb, I.P - Panel Chairperson
- 2. QS Hussein Were - Member
- 3. Mr. Joshua Kiptoo - Member

IN ATTENDANCE

Mr. James Kilaka - Acting Board Secretary

PRESENT BY INVITATION

APPLICANT

ALMARAI DAIRY LIMITED

- 1. Mr. Havi – Lead Counsel - Advocate, Havi & Company Advocates
- 2. Mr. Wanjohi - Advocate, Isaac W & Associates Advocates



1ST& 2ND RESPONDENT

**MINISTRY OF EAST AFRICAN
COMMUNITY, THE ASALS AND
REGIONAL DEVELOPMENT, THE
STATE DEPARTMENT FOR THE
ASALS AND REGIONAL
DEVELOPMENT & THE PRINCIPAL
SECRETARY MINISTRY OF EAST
AFRICAN COMMUNITY, THE ASALS
AND REGIONAL DEVELOPMENT,
THE STATE DEPARTMENT FOR THE
ASALS AND REGIONAL
DEVELOPMENT**

Ms. Caroline Nyaga

- Advocate

3RD RESPONDENT

**TAWAKAL TRADING COMPANY
LIMITED**

Mr. Ouma

- SOW Advocates LLP

4TH RESPONDENT

**GADANO GENERAL TRADING
COMPANY LIMITED**

Mr. Adana

- Wetangula, Adan & Company
Advocates

5TH TO 14TH RESPONDENTS

No Appearance



BACKGROUND OF THE DECISION

The Tendering Process

1. State Department for ASALs and Regional Development (SDARD), the Procuring Entity and 1st Respondent herein, invited sealed tenders, through the 2nd Respondent, in response to Tender No. SDARD/OT/16/2023-2024 for Provision of Transport Services for Relief Food and Non-Food Items (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 25th June 2024 and published on the Procuring Entity's website www.asalrd.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 submission deadline was on 10th July 2024 at 10.30 a.m.

Submission of Tenders and Tender Opening

2. According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 10th July 2024 which form part of confidential documents furnished to the Public Procurement Administrative Review Board by the 2nd 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 thirty-three (33) 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.	<u>Name</u>
1	Habibani Enterprises Ltd
2	Zessco East Africa Ltd
3	Ephewa Enterprises
4	EASA Enterprises Ltd
5	Amani Transporters & Logistics Ltd
6	Gadano Gen Trading Co.
7	Ibrein Company
8	Mbachaa Logistics Ltd
9	Wajir Vegetable Supplies Ltd
10	Almashar Kenya Ltd
11	Rahoy Gen Supplies
12	Tanad Transporters Ltd
13	Almarai Dairy Ltd
14	Mecca Trading Ltd
15	Redsea Trading Co. Ltd
16	Banco Construction Ltd
17	Kyevaluki Services Ltd
18	Didashe Holdings Ltd
19	Raasamaalka Co. Ltd
20	Procel Transport Ltd
21	Ainushamsi Hauliers Ltd
22	Aujan Industries Ltd

23	Kabon Transporters Ltd
24	Dubai Matress Ltd
25	Tawakal Trading Co.
26	Mzima Africa Travel Ltd
27	Difan Logistics Kenya Ltd
28.	Pisonaz International Ltd
29.	Ponty Pridd Holdings Ltd
30.	Wilburs Enterprises
31.	Al Haleem (K) Ltd
32.	Al Habib Enterprises Ltd
33.	Elcon Investments Ltd

Evaluation of Tenders

3. A Tender Evaluation Committee undertook evaluation of the thirty-three (33) tenders as captured in the Tender Evaluation Report for the subject tender dated 1st August 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 was required to carry out a Preliminary Evaluation and examine tenders for responsiveness against the criteria set out under Section A: Preliminary Evaluation of Section III-Evaluation

and Qualification Criteria 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, fifteen (15) tenders were determined non-responsive, while eighteen (18) tenders, including the Applicant's tender, were determined responsive. The responsive tenders proceeded to Technical Evaluation.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set under Section B - Technical Evaluation of Section III-Evaluation and Qualification Criteria of the Tender Document. Only bidders who were successful at the technical stage would proceed to Financial Evaluation.
7. At the end of evaluation at this stage, four (4) tenders were determined non-responsive while fourteen (14) tenders, including the Applicant's tender, were found responsive and proceeded to Financial Evaluation.

Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to evaluate tenders using the criteria set out under Section C – Financial Evaluation Stage of Section III-Evaluation and Qualification Criteria of the



Tender Document. The lowest responsive evaluated bidder would be recommended for award of the subject tender.

9. The Evaluation Committee found as follows:

PRICE SCHEDULE FOR THE SERVICES

Bid N/o	Bidder Name	Price per Kilometer – Paved (KSHS)	Price per Kilometer – Non-Paved (KSHS)	Any Other Incidental Cost (Kshs)	Total Amount Quoted (Kshs)
01	Habiban Enterprises Limited	19.30	22.20	7.50	49.00
02	Zessco East Africa Limited	350	450	0	800
05	Amani Transporters	19.765	22.85	8.5	51.11
06	Gadano General Trading company Limited	17	18	0	35
07	Ibrein Business Limited	19.60	22.80	8.90	51.30
09	Wajir supplies Limited	19.65	22.85	8.95	51.45
12	Tanad Transporters Limited	19.80	22.60	8.80	51.20
13	Almarai Dairy limited	19.20	22.20	8.50	49.90
17	Kyevaluki Services Limited	17.00	19.00	0	36
22	Aujan Industries Limited	19.70	22.70	9	51.40
24	Dubai Mattresses	19.70	22.70	9.00	51.40
25	Tawakal Trading company limited	16.00	16.50	0	32.50

29	Ponty Pridd Holdings Limited	18.00	19.50	0	37.50
30	Wilburs Enterprises	19.58	22.9	8.7	51.18

Bidder 2, quoted Kshs 350.00 for paved and 450.00 for non- paved. This prices too high is not recommended for award.

Minute No. 4: Quoted Prices comparison

Bid N/o	Bidder Name	Price per Kilometer – Paved (KSHS)	Price per Kilometer – Non-Paved (KSHS)	Any Other Incidental Cost (Kshs)	Total Amount Quoted (Kshs)
01	Habiban Enterprises Limited	19.30	22.20	7.50	49.00
05	Amani Transporters	19.765	22.85	8.5	51.11
06	Gadano General Trading Company Limited	17.00	18.00	0	35
07	Ibrein Business Limited	19.60	22.80	8.90	51.30
09	Wajir supplies Limited	19.65	22.85	8.95	51.45
12	Tanad Transporters Limited	19.80	22.60	8.80	51.20
13	Almarai Dairy limited	19.20	22.20	8.50	49.90
17	Kyevaluki Services Limited	17	19	0	36
22	Aujan Industries Limited	19.70	22.70	9	51.40
24	Dubai Mattresses	19.70	22.70	9.00	51.40
25	Tawakal Trading Company	16.00	16.50	0	32.50

29	Ponty Pridd Holdings Limited	18	19.5	0	37.5
30	Wilburs Enterprises	19.58	22.90	8.7	51.18

The Thirteen (13) Bidders qualified for financial Evaluation, which the final stage.

Minute No. 5: Observation

The Evaluation Committee observed that the under listed Thirteen (13) bidders were responsive to the preliminary, technical and financial criteria.

Bidder No.	Bidder Name and address	Paved per KM/Kshs	Unpaved per KM/Kshs	Incidental cost Kshs
25	Tawakal Trading Company	16.00	16.50	0
06	Gadano General trading company limited	17.00	18.00	0
17	Kyevaluki Services Limited	17.00	19.00	0
29	Ponty Pridd Holdings limited	18.00	19.60	0
01	Habibani Enterprises Limited	19.30	22.20	7.50
13	Almarai Dairy Limited	19.765	22.85	8.50
30	Wilburs Enterprises	19.60	22.80	8.70
5	Amani Transporter	19.65	22.85	8.50
7	Ibrein Business Limited	19.80	22.60	8.90
22	Aujan Industries Limited	19.20	22.20	9.00
24	Dubai Mattresses	19.70	22.70	9.00
9	Wajir Vegetables	19.70	22.70	8.95
12	Tanad Transporters Limited	19.58	22.60	8.80



Evaluation Committee's Recommendation

10. The Evaluation Committee recommended award of the subject tender to all qualified bidders at an average price which was computed from the qualified firms which had quoted incidental prices by averaging their quoted prices as follows:

- a) Paved per Kilometer Kshs. 19.580
- b) Un-paved per Kilometer Kshs. 22.644

Professional Opinion

11. In a Professional Opinion, dated 1st August 2024, Mr. Kigen Kieti reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the Evaluation Committee's recommendation to award the subject tender as follows:

<i>Bidder No.</i>	<i>Bidder Name and address</i>	<i>Paved per KM/Kshs</i>	<i>Unpaved per KM/Kshs</i>
<i>25</i>	<i>Tawakal Trading Company</i>	<i>19.580</i>	<i>22.644</i>
<i>06</i>	<i>Gadano General trading company limited</i>	<i>19.580</i>	<i>22.644</i>
<i>17</i>	<i>Kyevaluki Services Limited</i>	<i>19.580</i>	<i>22.644</i>
<i>29</i>	<i>Ponty Pridd Holdings limited</i>	<i>19.580</i>	<i>22.644</i>
<i>01</i>	<i>Habibani Enterprises Limited</i>	<i>19.580</i>	<i>22.644</i>
<i>13</i>	<i>Almarai Dairy Limited</i>	<i>19.580</i>	<i>22.644</i>
<i>30</i>	<i>Wilburs Enterprises</i>	<i>19.580</i>	<i>22.644</i>
<i>5</i>	<i>Amani Transporter</i>	<i>19.580</i>	<i>22.644</i>
<i>7</i>	<i>Ibrein Business Limited</i>	<i>19.580</i>	<i>22.644</i>
<i>22</i>	<i>Aujan Industries Limited</i>	<i>19.580</i>	<i>22.644</i>
<i>24</i>	<i>Dubai Mattresses</i>	<i>19.580</i>	<i>22.644</i>
<i>9</i>	<i>Wajir Vegetables</i>	<i>19.580</i>	<i>22.644</i>

12	<i>Tanad Transporters Limited</i>	19.580	22.644
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12. The Professional Opinion was approved on 1st August 2024.

Notification to Tenderers

13. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 1st August 2024.

REQUEST FOR REVIEW NO. 107 OF 2024

14. On 17th October 2024, Almarai Dairy Limited, the Applicant herein, filed a Request for Review dated 14th October 2024 together with a Statement in Support of the Request for Review signed by Abdulrahman Musa Said, its Director on 14th October 2024 (hereinafter referred to as "the instant Request for Review") through Isaac W & Associates Advocates seeking the following orders from the Board:

a) The time for lodging of the review against the tender process and award of the contract for provision of transport services for relief food and non-food items, SDARD/OT/016/2023-2024 be and is hereby extended to include up to and until the date of the making of this order.

b) The request for review of the tender process and award of the contract for provision of transport services for relief



food and non-food items, SDARD/OT/016/2023-2024 be and is hereby deemed to have been lodged in time.

c) The award by the 1st and 2nd Respondents of the contract for the provision of transport services for relief food and non-food items, SDARD/OT/016/2023-2024 to the 3^d and 4th Respondents be and is hereby nullified.

d) The contracts dated 28th August, 2024 signed between the 1st and 2nd Respondents on one hand and the 3^d and 4th Respondents on the other hand be and are hereby declared null and void ab initio and cancelled.

e) The 1st to 4th Respondents be and are hereby directed to pay the Applicant the costs of this review.

15. In a Notification of Appeal and a letter dated 17th 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 17th October 2024.

16. On 18th October 2024, the 3rd Respondent filed through SOW Advocates LLP a Notice of Appointment of Advocates dated 17th October 2024 and a Preliminary Objection dated 17th October 2024.

17. On 23rd October 2024 the 1 & 2nd Respondents filed through Caroline Nyaga Advocate a Notice of Appointment dated 22nd October 2024, a Notice of Preliminary Objection dated 2nd October 2024, a 1st and 2nd Respondents Memorandum of Response dated 22nd October 2024, a Replying Affidavit sworn by Kigen Kieti on 22nd October 2024 together with confidential documents submitted pursuant to Section 67(3)(e) of the Act.

18. *Vide* email dated 23rd 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. On 23rd October 2024, the 4th Respondent filed through Wetangula, Adan & Company Advocates a Notice of Appointment of Advocates dated 22nd



October 2024 and a Notice of Preliminary Objection dated 22nd October 2024.

20. *Vide* a Hearing Notice dated 25th October 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 31st October 2024 at 10:30 a.m. through the link availed in the said Hearing Notice.
21. On 30th October 2024, the Applicant filed through its advocate Applicant's List of Authorities dated 30th October 2024.
22. When the matter first came up for hearing on 31st October 2024 at 10:30 a.m., the Board read out pleadings filed by parties in the instant Request for Review. Counsel for the 4th Respondent, Mr. Adano, informed the Board that he had not been served with the complete set of the Request for Review application and made an application for adjournment to enable the 4th Respondent file its Replying Affidavit to the Request for Review. Similarly, Counsel for the 3rd Respondent, Mr. Ouma indicated that he had not been served with the Request for Review application and that he came to learn of the matter while filing a response in a related matter. Counsels for the Applicant, 1st & 2nd Respondent and 3rd Respondent indicated that though they were ready to proceed, they were not opposed to the adjournment being granted and prayed for an early date so as to save on judicial time.



23. Subsequently, the Board having confirmed that parties were amenable to filing written submissions directed (a) the Applicant to serve the 3rd and 4th Respondents with the complete set of the Request for Review application by 1.00 p.m. on 31st October 2024, (b) the 3rd and 4th Respondents be granted leave to file and serve their replying affidavit or any other rejoinder to the instant Request for Review by 6.00 p.m. on 31st October 2024, (c) the Applicant to file a further affidavit in response to the 3rd and 4th Respondent's responses, if need be, together with its comprehensive submissions by 2.00 p.m. on 1st November 2024, (d) the 1st, 2nd, 3rd and 4th Respondents to file and serve their comprehensive submissions by 6.00 p.m. on 1st November 2024, (e) parties to file a return of service and that the matter would proceed for hearing on Monday, 4th November 2024 at 2.00 p.m.
24. On 31st October 2024, the 4th Respondent filed through its advocates a Replying Affidavit sworn by Bishar Mohamed on 31st October 2024.
25. On 1st November 2024, the Applicant filed through its advocates Written Submissions dated 1st November 2024 and a List and Bundle of Authorities dated 1st November 2024.
26. On 1st November 2024, the 1st and 2nd Respondents filed through their advocate Written Submissions dated 1st November 2024 together with several Authorities.

27. On 4th November 2024 the Applicant filed through its advocate two (2) Affidavits of Service sworn by Isaac Wanjohi on 31st October 2024.
28. On 4th November 2024, the 3rd Respondent filed Written Submissions dated 1st November 2024.
29. On 4th November 2024, the 4th Respondent filed Written Submissions dated 1st November 2024.
30. At the hearing of the instant Request for Review on 4th November 2024 at 2.00 p.m. the Board read out pleadings filed by parties in the matter and directed that the hearing of the preliminary objections by the 1st, 2nd, 3rd, and 4th Respondents would be heard as part of the substantive instant Request for Review. This was in accordance with Regulation 209 (4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which also allows the Board to deliver one decision having considered the preliminary objections as part of the substantive instant Request for Review.
31. Accordingly, the Board allocated time for parties to highlight their respective cases and the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submissions

32. The Applicant submitted that the ultimate relief sought in the instant Request for Review is the invalidation and nullification of the subject tender and contract for the provisions of transport services for relief food and non-food items, SDARD/OT/016/2023-2024, to the 3rd and 4th Respondents. Further, that the adjunct relief sought is the extension of time for lodging the instant Request for Review in respect to the subject tender and the award of the contract in respect thereto to the 3rd & 4th Respondents.
33. The Applicant asserts that the tender process and award of the contracts to the 3rd and 4th Respondents was a sham and a fraud and accused the 1st, 2nd, 3rd & 4th Respondents of contravening Articles 10(2) (c) and 201 of the Constitution of Kenya together with Part VII of the Act. It referred the Board to particulars of contravention and fraud as elaborated at paragraphs 14(a) to (g) of the Request for Review.
34. It is the Applicant's case that the Board has jurisdiction to hear and determine the instant Request for Review and referred to provisions under Section 167(1) of the Act. It averred that the issuance of the regret and acceptance letters by the 1st and 2nd Respondents on the 1st August 2024 was a fact that was deliberately concealed to the rest of the 33 bidders including the Applicant. It further averred that the question of when a party would be deemed to have known of the breach for purposes of computation of time is a question of fact and not law. While referring



to the holding in *Mukhisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696*, the Applicant contends that the issue of time of discovery in this case does not qualify for consideration as a preliminary objection since the fact of when the breach occurred has to be ascertained and the preliminary objection must fail on this account.

35. On the question of extension of time, Mr. Havi submitted that an express request for extension of time has been made based on three grounds namely (a) that the award of the contract to the 3rd and 4th Respondents being unlawful, null and void, ab initio cannot be insulated by the plea of limitation, (b) that the 3rd & 4th Respondents were sued in *Civil Application No. 100 of 2024* but compromised the Applicant and promised its withdrawal and it is instructive to note that, the Advocate for the 3rd Respondent took over conduct of the said review from Havi & Company Advocates and withdrew the same, and (c) that the Applicant learnt of the letter of rejection and acceptance to the 3rd & 4th Respondents upon being served with Request for Review in Civil Application No. 100 of 2024, and not earlier. Counsel pointed out that the Applicant came to learn of issuance of notification of award to the 3rd and 4th Respondents upon being served with the review Application No. 100 of 2024 and before then, it could not have been aware of this fact and as a preparatory process to the substantive request, it sought for extension of time to lodge the review.

36. In support of his argument, counsel referred the Board to several extracts of *Limitation Periods, 7th Edition* as an authority that a

respondent who has concealed fraud cannot rely upon his plea of limitations. Further, counsel referred to the holding in *Republic Vs Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others Ex Parte Mwaulu & 8 others (2004) eKLR*; *Kariobangi South Civil Servants Welfare Association Vs Dickson D.M Mwangi & Others (2012) eKLR* ; *Republic Vs Kenya Revenue Authority & Another (2018) eKLR* ; *Republic Vs General Manager Moi International Airport & Another (2014) eKLR* ; *Republic Vs Public Procurement Administrative Review Board ex-parte Industrial & Commercial Development Corporation (2018) eKLR*, and submitted that the principles enumerated are not limited to extensions sought before the High Court and apply to the Board by virtue of Article 159(1) of the Constitution.

37. Counsel submitted that the power to extend time is effectuated by Section 59 of the Interpretations & General Provisions Act, Cap 2 of the Laws of Kenya and urged the Board to extend time and deem the Request for Review as having been lodged on time.

38. Counsel assailed the tender process and award of contract to the 3rd and 4th Respondents for flouting Articles 10(2) and 201 of the Constitution arguing that the procurement process offends the requirements of good governance, integrity, transparency and accountability.

39. He submitted that there is no credible explanation or justification given for the manifestly fraudulent manner in which the 1st & 2nd Respondents issued rejection and acceptance letters to the 3rd & 4th Respondents and



concealed that action to the 33 bidders including the Applicant. Counsel further submitted that a contravention of the Constitution in respect to a procurement invalidates the process and ensuing contract and relied on the holding in *Blueseas Shopping Mall Ltd Vs City Council of Nairobi & 3 Others (2015) eKLR* and *Parliamentary Service Commission Vs The Public Procurement Administrative Review Board & Another (2021) eKLR*.

40. Mr. Havi urged the Board to allow the Request for Review as prayed.

1st & 2nd Respondents submissions

41. Counsel for the 1st and 2nd Respondents, Ms. Nyaga, submitted that the 1st and 2nd Respondent's lodged a Notice of Preliminary Objection premised on the grounds that (a) the Request for Review has been lodged out of time contrary to Section 167(1) of the Act, (b) the Board lacks jurisdiction to entertain the instant Request for Review pursuant to Section 167(4) of the Act, (c) the Applicant is in breach or an accessory to the breach of Section 67 of the Act, (d) the instant Request for Review is for striking out in so far as it relies on confidential documents and information obtained contrary to Section 67(5) and 176(1)(f) of the Act, (e) the instant Request for Review as filed is fatally defective and void in law and ought to be struck out with costs.

42. She referred the Board to the holding in *Mukhisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696* and argued that the issues raised by the 1st and 2nd Respondents are likely to dispose of the instant Request for Review as the points of law raised are on ouster of the Board's jurisdiction.



43. Ms. Nyaga referred the Board to provisions under Section 167(1) and 173 of the Act and the holding in *Isaak Aliaza vs Samuel Kisiavuki (2021) eKLR* ; *Owners of the Motor Vessel "Lilian" vs Caltex Oil Kenya Limited (1989) KLR 1*; *Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others (2013) eKLR* ; and *Samuel Kamau Macharia and Another vs Kenya Commercial Bank Ltd and 2 others (2012) EKLR* and argued that the Applicant was indolent and the instant Request for Review having been filed on 17th October 2024 was out of time. She further argued that the procurement process was completed and the contract awards have already been signed, including by the Applicant herein, thereby ousting the jurisdiction of the Board to entertain the matter in view of Section 167(4) of the Act.

44. On whether the Applicant is in breach of confidentiality provisions, counsel submitted that the Applicant was in breach of Sections 67(1), (5) and 176 of the Act and argued that disclosure of information to a party seeking review ought to only be in summary form and in the instant case, the Applicant did not seek any information officially from the Procuring entity and information relied on must have been illegally obtained making it in contempt of confidentiality provisions. She urged the Board to proceed to debar and prohibit the Applicant from working for a government entity for a period of ten (10) years, in accordance with Section 67(5) of PPADA. In support of her argument, she referred the Board to the legal maxim *ex turpi causa non oritur actio* which is to the



effect that a claimant may not pursue a cause of action if it arises from his own illegal act.

45. Counsel submitted that the Applicant was a vexatious litigant and urged the Board to uphold the 1st and 2nd Respondents' Notice of Preliminary Objection and strike out the instant Request for Review with costs.

3rd Respondent's submissions

46. Counsel for the 3rd Respondent, Mr. Ouma, submitted that the 3rd Respondent opposed the instant Request for Review by way of a Notice of Preliminary Objection dated 17th October 2024 premised on the grounds that (a) the Request for Review has been lodged out of time contrary to Section 167(1) of the Act, (b) the Board lacks jurisdiction to entertain the instant Request for Review pursuant to Section 167(4) of the Act since a contract had been signed in accordance with Section 135 of the Act, (c) the instant Request for Review as filed is contrary to CAP 412C Laws of Kenya, is fatally defective and void and ought to be struck out with costs.

47. Counsel submitted that Section 167(1) of the Act is predicated on two limbs namely (a) a candidate or tenderer making a request for review must make a claim to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by the Act or the Regulations, and (b) that the request for review is to be made within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process.



48. Counsel submitted that from the Applicant's pleadings, no claim for loss or risk of any loss has been made and that the Applicant had forgotten about award of the subject tender since from its submissions, it claims to have only learnt of the results when Application No. 100 of 2024 was filed and thereafter withdrawn. In support of his argument, counsel referred to the holding in *James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others* and *Republic v Public Procurement Administrative Review Board & 2 others; M Document Solutions Limited (Interested Party); Mal-Mart Enterprises Limited (Exparte) (Application E072 of 2024) [2024] KEHC 9582 (KLR) (Judicial Review) (2 August 2024) (Judgment) Neutral citation: [2024] KEHC 9582 (KLR)*.

49. On the issue of request for extension of time, Mr. Ouma referred to the Court of Appeal holding in *Mosonik v Mariandany (Civil Application E032 of 2023) [2024] KECA 264 (KLR) (8 March 2024) (Ruling)* and submitted that such a request being a discretionary one must be made by a party that is honest. He indicated that the Applicant being amongst the successful bidders must have executed a contract for the subject award and was at the very least was aware of the date of award, of 1st August 2024, hence ought to have lodged its complaint within 14 days from 1st August 2024.

50. While relying on the holding in *Bi-Mach Engineers Limited v James Kahoro Mwangi [2011] eKLR* counsel submitted that there can be no complaint for concealment, as none exists but fundamentally, it is



inapplicable as all tenderers have a duty to follow up on the tender process, and as such the claim by the Applicant must be rejected.

51. He pointed out that it is an undisputed fact that a contract had been signed in accordance with Section 135 of the Act and as such, the Board's jurisdiction to entertain the matter was ousted by virtue of Section 167(4)(c) of the Act.

52. Counsel submitted that while no explanation has been proffered by the Applicant on how it obtained the Professional Opinion annexed to the Request for Review, it offers insight and it is clear that the Applicant's bid was responsive and it was recommended to receive an award. He further submitted that the process by which the Applicant was awarded the subject tender and signed a contract thereto is the same process that it now refers to as surreptitious, offensive to good governance, integrity, transparency, and accountability, which is a classic case of 'speaking from both sides of the mouth' and an attempt to delay and or interfere with a procurement process that has concluded, for ulterior motive, against the spirit of Cap 412C.

53. He urged the Board to strike out the instant Request for Review with costs.

4th Respondent's submissions

54. Counsel for the 4th Respondent, Mr. Adana, concurred with submissions made by Ms. Nyaga and Mr. Ouma and submitted that in view of Section

167(1) of the Act, there was nothing in the Request for Review Application that states that the Applicant had suffered or risks suffering loss or risk noting that it is a successful tenderer in the subject tender. He submitted that the Applicant is not a proper party as envisaged under Section 167(1) of the Act for the reason that it has not claimed to have suffered loss or damage.

55. Mr. Adana while referring to the provisions set out in Section 167(4) of the Act and the holding in *PPARB Application No. 87 of 2024 Miran Insurance Brokers Ltd v The Managing Director South Nyanza Sugar Co. Ltd & Another* argued that the Applicant had not satisfied any of the preconditions set out under Section 167(1) and (4)(c) of the Act and had failed to properly invoke the jurisdiction of the Board. He pointed out that the contract in the subject tender was signed on 29th August 2024 in compliance with Section 135 of the Act and the Request for Review as filed was out of time.

56. As to the Applicant's averment that it came to learn of the breach complained of when Application 100 of 2024 was filed and later withdrawn, Mr. Adana submitted that from a brief review of the Request for Review, no such statement has been made and this ought to be expunged.

57. He pointed out that the Applicant is a beneficiary of the tendering process which was properly conducted in view of the advertisement and evaluation of bids and the error commissioned by the 1st and 2nd



Respondents pertaining to erroneous issuance of the notification letters was explained. He referred the Board to the holding in *Republic v Institute of Certified Public Secretaries of Kenya ex parte Mundia Njeru Geteria (2010) eKLR* and argued that the Applicant should not be allowed to approbate and reprobate at the same time since if the tender process was good for the Applicant it cannot now be bad for the 4th Respondent.

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

Applicant's Rejoinder

59. In a rejoinder, Mr. Havi submitted that Article 159 of the Constitution bestows judicial authority on courts and tribunals and that the Applicant had elaborated case law where a nullity is a nullity and nothing can be put on it and expect it to stand. He reiterated that the procurement process as far as it benefited the 3rd and 4th Respondents is a nullity notwithstanding the effect that the Applicant had a contract.

60. On averments made by Mr. Ouma that the Applicant had not pleaded or demonstrated loss or injury suffered, counsel submitted that a violation of the Constitution and statute is an injury and this in itself coupled with the demonstrated fact of perceived and real fraud is sufficient for injury for purposes of the law.

61. Mr. Havi submitted that the Applicant is a proper party to the extent that it participated in the procurement process and has locus standi to espouse the instant Request for Review.



62. He urged the Board to allow the instant Request for Review.

CLARIFICATIONS

63. When asked to clarify if the Applicant had signed a contract with the Procuring entity and when the said contract was signed, Mr. Havi confirmed that the Applicant was one of the successful bidders and that it signed a contract on the 29th August 2024.

64. When asked to clarify how many bidders were successful in the subject tender and how many had signed a contract with the Procuring Entity, Ms. Nyaga submitted that there were 13 successful bidders including the Applicant and all had signed a contract with the Procuring Entity.

65. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 17th October 2024 was due to expire on 7th November 2024 and that the Board would communicate its decision on or before 7th November 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

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

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

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

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

Depending on the determination of the first sub-issue;

- ii Whether the contracts dated 29th August 2024 between the Procuring Entity and the successful tenderers were signed in accordance with Section 135(3) of the Act thus ousting the jurisdiction of the Board by dint of Section 167(4)(c) of the Act.***

Depending on the determination of the second sub-issue;

- iii Whether the failure of the Applicant to plead that it had suffered loss or was at risk of suffering loss as a consequence of a breach of a duty imposed on the 1st and 2nd Respondents divest the Board of its jurisdiction.***



Depending on the determination of the third sub-issue;

iv Whether the Applicant based the instant Request for Review on confidential information thus rendering it fatally defective and incompetent as to divest the Board of its jurisdiction.

B. Whether the Procuring Entity's in award of the subject tender to the 3rd and 4th Respondents committed an illegality and breached Articles 10(2), 201 and 227 of the Constitution and provisions of the Act and Regulations 2020.

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

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

67. 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.

68. 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."

69. 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."

70. 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."

71. 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."

72. 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...."

73. 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."

74. 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.

75. 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.”

76. 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.”

77. 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.

78. The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, 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) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;



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

(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]

168.

169.

170.

171.

172.

172. Dismissal of frivolous appeals

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

173. Powers of Review Board

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

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

- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***
- (e) order termination of the procurement process and commencement of a new procurement process.***

79. Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before the Board.

80. It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, requires any person invoking the jurisdiction of the board to satisfy the following (i) must either be a candidate or a tenderer (within the meaning of Section 2 of the Act) (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020 (iii) must seek administrative review by the Board within fourteen (14) days of notification of award or date of occurrence of alleged breach of duty

imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

81. The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

203. Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a) 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.

(d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.

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

(4) The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.

82. Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act to be by way of (i) a request for review which is to be (ii) accompanied by such statements as the applicant considers necessary in support of its request. The request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

83. A reading of Section 167(1) of the Act read with Regulation 203(1), (2) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 requires for one to invoke the jurisdiction of the Board, they must either be (i) a candidate or tenderer (within the meaning of Section 2 of the Act); (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020; (iii) must seek administrative review by the Board within fourteen (14) days of (a) occurrence of breach complained of,

having taken place before an award is made, (b) notification under Section 87 of the Act; or (c) occurrence of breach complained of, having taken place after making of an award to the successful tenderer (iv) by way of a request for review which is accompanied by (v) such statements as the applicant considers necessary in support of its request.

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

87. Notification of intention to enter into a contract

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

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

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

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

85. It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 requires for one to invoke the jurisdiction of the Board, they must either be (i) a candidate or tenderer (within the meaning of Section 2 of the Act); (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020; (iii) must seek administrative review by the Board within fourteen (14) days of (a) occurrence of breach complained of, having taken place before an award is made, (b) notification of intention to enter into a contract having been issued; or (c) occurrence of breach complained of, having taken place after making of an award to the successful tenderer (iv) by way of a request for review which is accompanied by (v) such statements as the applicant considers necessary in support of its request.

86. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued, the same is only complained of after notification to enter into a contract has been issued. We say so because there would be no need to



provide the three instances within which a Request for Review may be filed.

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

87. The 1st, 2nd, 3rd, and 4th Respondents in their respective Preliminary Objections sought for the instant Request for Review to be struck out on the ground that the Board lacks jurisdiction to entertain the same since it is time barred having been filed outside the statutory period of 14 days stipulated under Section 167(1) of the Act.

88. On its part, the Applicant submitted that the issue of time of discovery of the breach in this case does not qualify for consideration as a preliminary objection since the fact of when the breach occurred has to be ascertained. The Applicant made an express request for extension of time on the grounds that (a) the award of contract in the subject tender to the 3rd and 4th Respondents being unlawful and null ab initio cannot be insulated by the plea of limitation, (b) the 3rd and 4th Respondents were sued in Application No. 100 of 2024 but compromised the Applicant and promised its withdrawal, and (c) the Applicant learnt of the letter of

rejection and acceptance to the 3rd and 4th Respondents upon being served with Request for Review Application No. 100 of 2024 and not earlier.

89. The Board is cognizant of the parameters of consideration of a preliminary objection as set out by the Court of Appeal in the case of **Mukhisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696**. At page 700 Law JA stated:

"A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

90. At page 701 Sir Charles Newbold, P added:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion..."



91. In **Attorney General of Tanzania v African Network for Animal Welfare (ANAW) EACJ Appeal No. 3 of 2011**, the Appellate Division of the East African Court of Justice held that:

"a preliminary objection could only be properly taken where what was involved was a pure point of law but that that where there was any clash of facts, the production of evidence and assessment of testimony, it should not be treated as a preliminary point. Rather, it becomes a substantive adjudication of the litigation on merits with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross examined and a finding of fact made by the Court."

92. In essence, a valid preliminary objection should, if successful, dispose of the suit. For a preliminary objection to succeed, (a) it ought to raise a pure point of law, (b) it is argued on the assumption that all the facts pleaded by the other side are correct, and (c) it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

93. Having established that one of the preconditions for a valid preliminary objection is based on the assumption that the facts pleaded are correct and unopposed by the rival party. It is our considered view that the circumstances and events mentioned in the instant Request for Review and dates on which these events were communicated and discovered leading to the Applicant's allegation of breach of duty by the 1st, 2nd and

3rd Respondents has not been contested by either of the Respondents or the Applicant in their respective pleadings as to render the Preliminary Objections improper.

94. The 1st, 2nd, 3rd and 4th Respondents base their preliminary objection, *inter alia*, on Section 167(1) of the Act which touches on the conditions that an aggrieved candidate or tenderer must satisfy in order to invoke the jurisdiction of this Board amongst them approaching the Board within 14 days from the date of notification of the award or the date of occurrence of an alleged breach of duty by a procuring entity in the procurement process.

95. Having considered parties' pleadings, submissions, and the confidential documents contained in the confidential file submitted by the 2nd Respondent to the Board pursuant to section 67(3)(e) of the Act, the issue that calls for determination by this Board is what were the circumstances in the instant Request for Review that determine the period when the Applicant ought to have approached the Board?

96. We note that the breach complained of by the Applicant is the conduct and decision of the 1st and 2nd Respondents in awarding the subject tender to the 3rd and 4th Respondents on 1st August 2024. The Applicant confirmed that it was similarly notified of having been successful in the subject tender vide Notification of Award letter dated 1st August 2024 and subsequently signed a contract on the 29th August 2024. During the online hearing, counsel for the Applicant, Mr. Havi, submitted that the



procurement process as far as it benefited the 3rd and 4th Respondents is a nullity notwithstanding the effect that the Applicant had a contract. He further sought for extension of time for lodging of the instant Request for Review and for the instant Request for Review to be deemed as having been lodged in time.

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

57. Computation of time

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

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding***



shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

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

98. In computing time when the Applicant ought to have filed a request for review, the date of occurrence of breach complained of by the Applicant was on 1st August 2024. This means that statutory period of 14 days stipulated under Section 167(1) of the Act started running from 2nd August 2024 and lapsed on 15th August 2024. The Applicant filed the instant Request for Review on 17th October 2024 which was the 63rd day from the date of occurrence of breach complained of thus failing to legally invoke the jurisdiction of this Board pursuant to Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020.

99. Alternately, even if the Board were to consider when the applicant received the Notification of award dated the 1st of August 2024 as the effective date for purposes of computation of time which the Board notes was on 5th August 2024, it means that the statutory period of 14 days stipulated under Section 167(1) of the Act would have legally lapsed on 19th August 2024. The Applicant filed the instant Request for Review on 17th October 2024 which was the 58th day from the date of notification



of occurrence of breach complained of thus failing to legally invoke the jurisdiction of this Board pursuant to Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020.

100. In addressing the question of whether this Board has jurisdiction to extend time within which a candidate or tenderer can lodge a request for review, we are minded that the timelines provided under Section 167(1) of the Act as read with Regulation 203(2)(c) are set in statute and so is the Board's jurisdiction under Part XV – Administrative Review of Procurement and Disposal Proceedings of the Act. In saying so, we are guided by the holding in **Aprim Consultants v. Parliamentary Service Commission & Another, CA. No. E039 of 2021** ("the Aprim case") where the Court of Appeal stated that

"A perusal of section 175 of the Act reveals Parliament's unmistakable intention to constrict the time taken for the filing, hearing and determination of public procurement disputes in keeping with the Act's avowed intent and object of expeditious resolution of those disputes.

Parliament was thus fully engaged and intentional in setting the timelines in the Section. But it did not stop there. In one of the rarer instances where all discretion is totally shut out, Parliament expressly enacted a consequence to follow default or failure to file or to decide within the prescribed times: the decision of the Board would crystallize and invested with finality. Our reading of the Act is that the High Court was

under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time-bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended, the jurisdiction also ended. Thus, any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law.”

101. The Court of Appeal in its finding took cognizance of the intention of Parliament to constrict time taken for filing, hearing and determination of public procurement disputes for expeditious resolution of such disputes. It further found that the inconvenience or difficulty of compliance will never be an excuse for a court to go against the clear language of Parliament. The most a court can do is point out the difficulties created by such requirements and timelines and perhaps make proposals for reform, but as long as the law remains etched, in plain language, it is the province of the courts to interpret and give effect to its express language. To step out of time is to step out of jurisdiction and any act or decision outside jurisdiction is, by application of first principles, a nullity.

102. Notably, the Aprim case was one of the selected cases that was highlighted as an illustration of how courts are constantly driving evolution in jurisprudence in the **State of Judiciary and Administration of Justice Annual Report Financial Year 2021/22 Gazette Notice No. 13547 dated 4th November 2022**. The reasoning the Aprim case has been adopted in several cases such as the



holding in **The Consortium of TSK Electronica Y Electricidad S.A. & Ansaldoenergia v. PPARB & 3 Others, CA. No. E012 of 2022** (“the TSK Electronica case”) and in **ADK Technologies Ltd in Consortium with Computer Technologies Ltd v Public Procurement Administrative Review Board & 4 others (Civil Appeal E598 of 2021) [2022]**.

103. In view of the foregoing, the Board lacks jurisdiction to hear and determine the instant Request for Review and thus downs its tools at this point. The effect of our finding is that we will therefore not address the other issues framed for determination.

What orders should the Board grant in the circumstances?

104. We have established that the Board lacks jurisdiction to hear and determine the instant Request for Review since it is time barred. In these circumstances, the logical consequence is for striking out the instant Request for Review for want of jurisdiction.

FINAL ORDERS

105. 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. The instant Request for Review dated 14th October 2024 and filed on 17th October 2024 with respect to Tender No.



SDARD/OT/16/2023-2024 for Provision of Transport Services for Relief Food and Non-Food Items be and is hereby struck out for want of jurisdiction.

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

Dated at NAIROBI this 7th Day of November 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB



