

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 128/2024 OF 24TH DECEMBER 2024

BETWEEN

PARAMAX CLEANING SERVICES LIMITED.....APPLICANT

AND

**THE ACCOUNTING OFFICER, KENYATTA
INTERNATIONAL CONVENTION CENTRE.....1ST RESPONDENT**

**KENYATTA
INTERNATIONAL CONVENTION CENTRE.....2ND RESPONDENT**

AND

SPIC & SPAN CLEANING SERVICES LIMITED __ INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenyatta International Convention Centre in respect of Tender No. KICC/05/2024-2026 for Provision of Cleaning and Garbage Collection Services.

BOARD MEMBERS PRESENT

Mr. George Murugu FCI Arb. & IP - Chairperson

Ms. Alice Oeri - Vice-Chairperson-

Mr. Daniel Langat - Member



IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT

PARAMAX CLEANING SERVICES LIMITED

Mr. Pembere

Advocate, Paramax Cleaning Services Limited

RESPONDENTS

THE ACCOUNTING OFFICER, KENYATTA INTERNATIONAL CONVENTION CENTRE & KENYATTA INTERNATIONAL CONVENTION CENTRE

Mr. Limo

Advocate, Kihara & Wyne Advocates

INTERESTED PARTY

SPIC & SPAN CLEANING SERVICES LIMITED

Nicholas Mwendwa

Director, Spic N Span

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenyatta International Convention Centre, the Procuring Entity together with the 1st Respondent, vide an advert in the Public Procurement



Information Portal website (www.tenders.go.ke) and Procuring Entity's website (www.kicc.co.ke) invited interested bidders registered under the AGPO (Youth Category) to submit their bids in response to Tender No. KICC/05/2024-2026 for Provision of Cleaning and Garbage Collection Services. The bid submission deadline was set as 14th November 2024 at 10:30 a.m.

Addendum

2. Vide Addendum No.1, the Procuring Entity clarified that the subject tender was not restricted to the AGPO (Youths Category) but instead open to AGPO (Youth, Women and PWDs Categories). This Addendum retained the 14th November 2024 bid submission deadline, specifically, 14th November 2024 at 10:30 a.m.

Submission of Bids and Tender Opening

3. According to the Tender Opening Minutes dated 14th November 2024 under the Confidential File submitted by the Procuring Entity, the following eleven (11) bidders were recorded as having submitted their bids in response to the subject tender by the tender submission deadline.

#	Bidder
1.	Kenma Homecare Services
2.	Diamond Sparkle
3.	Kamtix Company Limited
4.	Brooklun Cleaning Services Limited
5.	Bi-son Hygiene Limited



6.	Paramax Cleaning Services Limited
7.	Falhad Cleaning Services Limited
8.	Peesam Limited
9.	Spic & Span Cleaning Services Limited
10.	Spin Africa Cleaning Services Limited
11.	Harvest Facility Management Group

Evaluation of Bids

4. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the submitted bids in the following 4 stages in the subject tender as captured in the Evaluation Report
- i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Detailed Technical
 - iv. Financial Evaluation

Preliminary Evaluation

5. The submitted bids were to be examined using the criteria set out as clause 2 Preliminary examination for Determination of Responsiveness under Section III-Evaluation and Qualification Criteria at pages 25 to 29 of the blank Tender Document.

6. The evaluation was to be on a Meet/Not Meet basis and any bid that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
7. At the end of the evaluation at this stage, 8 of the submitted bids were found unresponsive to the mandatory requirements and thus disqualified from further evaluation. Only 3 bids, which included that of the Applicant and the Interested Party, were responsive to the mandatory requirements and thus qualified for further evaluation.

Technical Evaluation

8. The bids successful at the Preliminary Evaluation Stage were to be examined using the criteria set out as Technical Evaluation Criteria under Section III-Evaluation and Qualification Criteria at pages 30 to 31 of the blank Tender Document.
9. The evaluation was to be on a Meet/Not Meet basis and any bid that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
10. At the end of the evaluation at this stage, all the 3 bids evaluated at this stage were found responsive to the mandatory requirements and thus qualified for further evaluation.



Detailed Technical Evaluation

11. The bids successful at the Technical Evaluation Stage were to be examined using the criteria set out as Detailed Technical Examination under Section III-Evaluation and Qualification Criteria at page 32 of the blank Tender Document.
12. The evaluation was to be on the basis of an analysis of Schedule of Unit Rate and Technical Schedule and bids were to be awarded marks on the basis of a deviation with the Procuring Entity's budget in respect of the subject tender. The maximum awardable marks at this stage were 30 marks and any bid that failed to garner the said 30 marks in full would be disqualified from further evaluation.
13. At the end of the evaluation at this stage, 1 bid failed to garner the 30 marks threshold and was thus disqualified with the 2 other bids i.e. that of the Applicant and Interested Party qualifying for further evaluation.

Financial Evaluation

14. At this stage of the evaluation, the bids successful at the Detailed Technical Evaluation Stage were to be examined using the criteria set out as Financial Evaluation at page 32 of the blank Tender Document.
15. Bids were to be evaluated to verify that their tender prices met the minimum basic salary, made provision for applicable insurance covers, overhead costs and a reasonable profit margin. The successful bid would



be that which in addition to meeting the foregoing was also the lowest evaluated bid at this stage of evaluation.

16. At the end of the evaluation at this stage, the Interested Party's bid was established as the responsive bid that was also offering the lowest tender price at **Kenya Shillings Thirty-Three Million, Four Hundred and Forty Thousand and One Shilling (Kshs. 33,440,001.00)** per annum inclusive of all taxes.

Evaluation Committee's Recommendation

17. The Evaluation Committee vide its Evaluation Report dated 9th December 2024 recommended the award of the subject tender to the Interested Party at its tender price of **Kenya Shillings Thirty-Three Million, Four Hundred and Forty Thousand and One Shilling (Kshs. 33,440,001.00)** per annum inclusive of all taxes.

Professional Opinion

18. In a Professional Opinion dated 11th December 2024 (hereinafter referred to as the "the Professional Opinion") the Procuring Entity's Ag. Supply Chain Manager, Mr. Felix Matasio, reviewed the manner in which the subject procurement process was undertaken and recommended the award of the subject tender as per the Evaluation Committee's Report.
19. The Professional Opinion was subsequently approved by the 1st Respondent, on the same day.



Notification to the bidders

20. Accordingly, the bidders were notified of the outcome of the evaluation process in the subject tender vide letters dated 11th December 2024.

REQUEST FOR REVIEW

21. On 24th December 2024, the Applicant herein through Danson Pembere-Advocate filed a Request for Review of even date supported by an affidavit sworn on 23rd December 2024 by Duke Machongo Omori, the Applicant's Managing Director, seeking the following orders:

- a) ***An order declaring that the Accounting Officer of the Procuring Entity's decision to award the Interested Party for the Tender Number: KICC/05/2024-2026, for the Provision of Cleaning and Garbage Collection Services, is null and void.***
- b) ***An order cancelling and setting aside the letter referenced KICC/12/34/VOL.10 dated 11th December 2024, notifying the Applicant that its bid was unsuccessful for the Tender Number: KICC/05/2024-2026, for the Provision of Cleaning and Garbage Collection Services.***
- c) ***An order declaring that the Applicant's bid was responsive in accordance with Section 79 of the Public Procurement and Asset Disposal Act, 2015 and therefore the lowest evaluated bidder qualified for the award of Tender Number: KICC/05/2024-2026, for the Provision of Cleaning and Garbage Collection Services.***



- d) *In the alternative, and without prejudice to prayer (c), An order compelling the Accounting Officer to direct the evaluation committee for this particular tender to carry out a fresh evaluation exercise in order to arrive at a decision that complies with the law.***
- e) *An order for award of cost to the Applicant.***

22. In a Notification of Appeal and a letter dated 24th December 2024, Mr. James Kilaka, the Ag. Board Secretary of the Board notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 24th December 2024.
23. On 27th December 2024, the Respondents through a letter of even date sought an extension to file their response by 7th January 2025 while contending that they had only seen the Request for Review on 27th December 2024 despite the email having been sent on 24th December 2024.



24. On 30th December 2024, the Ag. Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 8th January 2025 at 11:00 a.m. through the link availed in the said Hearing Notice.
25. By 2nd January 2025, the Respondents were yet to submit their response to the Request for Review and the 5 day's timeline extended to them for that purpose had since lapsed. Accordingly, on the same day, 2nd January 2025, the Ag. Board Secretary, through a letter of even date reminded the Respondents of their statutory obligation to file their response to the Request for Review and the consequences of non-compliance.
26. On 3rd January 2025, the Respondents filed a Preliminary Objection dated 2nd January 2025 together with a Replying Affidavit sworn on 2nd January 2025 by James Mbugua Mwaura, the Procuring Entity's Accounting Officer. They equally forwarded to the Board the Confidential Documents under Section 67(3) the Act.
27. Vide letters dated 3rd January 2025, the Acting Board Secretary notified all bidders in the subject tender via email, of the existence of the subject Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenders in the subject tender were invited to submit to the Board any information and arguments about the subject tender within 3 days from 3rd January 2025.



28. On 6th January 2025, the Applicant filed a Replying Affidavit sworn on the same day by Duke Machongo Omori, the Applicant's Managing Director.
29. On 8th January 2025, the Respondents filed Written Submissions dated 6th January 2025.
30. On 8th January 2025 at 11:00 a.m., when the Board convened for the scheduled hearing parties were represented by their Advocates. Accordingly, the Board read through the documents filed in the matter and sought parties' confirmation that the documents had been served upon them to which they confirmed in the affirmative.
31. The Board observed that the Respondents had filed a Preliminary Objection in the matter and that the Objection would be heard as part of the substantive Request for Review pursuant to Regulation 209(4) of the Regulations 2020. Accordingly, the Board gave the following hearing directions:
 - i. The Applicant would have 10 minutes to address both the Request for Review and the Preliminary Objection.
 - ii. The Respondents would have 10 minutes to equally address both the Request for Review and the Preliminary Objection.
 - iii. Lastly the Applicant would close by a rejoinder in a minute.
32. Counsel for the Applicant, Mr. Pembere, highlighted that the Respondents had served upon them an initial Preliminary Objection which indicated an



erroneous Procuring Entity i.e. Nairobi City County and not Kenyatta International Convention Centre and that it is this Objection that they had offered a response to. Further, that the Respondents served upon the Applicant a second Preliminary Objection that purported to correct this error.

33. The Board noted that it only had sight of 1 Preliminary Objection and thus invited the Respondents to address it on whether they filed multiple Preliminary Objections.
34. Counsel for the Respondents, Mr. Limo indicated that the Applicant had an opportunity to glance at both Preliminary Objections and thus should be ready to address the same. He further argued that the obtaining situation remained that the affidavit in support of the Request for Review was defective.
35. Counsel for the Applicant, Mr. Pembere, argued that he had only seen the Preliminary Objection on the morning of the hearing and the Applicant would need more time to address this.
36. At this stage of the proceedings the Board retreated to consider the arising issue of the 2 Preliminary Objections and returned the following observations:
 - i. On 3rd January 2025 the Respondents sent to the Board via email a Preliminary Objection dated 2nd January 2025 bearing "Nairobi City



County” as the Respondent in the title section of the document. This email was copied to the Applicant’s advocate’s email address. However, the Respondents did not pay the filing fees for this document with the consequence that it never made it to the Board’s file and record.

- ii. Shortly after the initial email, the Respondents sent another email attaching a Preliminary Objection dated 2nd January 2025 bearing “Kenyatta International Convention Centre” as the Respondent in the title section of the document. The Respondents went ahead and paid filing fees in the sum of Kshs. 5,000 for this document, which eventually filed in the Board’s file.

37. In view of the developments, the Board asked the parties to confirm if they were agreeable to granting the Applicant more time to respond to the Preliminary Objection and also for the Request for Review to be canvassed by way of Written Submissions in place of plenary session as previously scheduled noting the brevity of time constraining the rescheduling of another hearing. Counsel for the Applicant, Mr. Pembere and Counsel for the Respondents, Mr. Limo, acceded to both requests as presented by the Board.

38. Accordingly, the Board gave the following directions:

- i. The Applicant would have until 9th January 2025 at 9:00 a.m. to file its submissions on the Request for Review and Preliminary Objection.



- ii. The Respondents were at liberty to file any Further Written Submissions with respect to the Preliminary Objection by 9th January 2025 at 2:00 p.m.
 - iii. Parties were cautioned against late filings.
39. At the conclusion of the session, the Board notified the parties that the instant Request for Review having been filed on 24th December 2024 had to be determined by 14th January 2025. Therefore, the Board would communicate its decision on or before 14th January 2025 to all parties via email.
40. On 9th January 2025 the Applicants filed Written Submissions of even date.
41. Later on the same day, 9th January 2025, the Respondents filed Further Written Submissions of even date.
42. Below is a summary of the parties' cases as presented through their filed Written submissions:

PARTIES SUBMISSIONS

Applicant's Submissions

43. The Applicant took the view that the Respondents' Preliminary Objection was both time-barred under Regulation 209 of the Regulations and also unmerited. It argued that the Preliminary Objection was filed on 3rd



January 2025 which was outside the 3 days' timeline contemplated under Regulation 209 of the Regulations 2020 noting that the Request for Review was filed and served on 24th December 2024.

44. Further that though Section 167 of the Act as read with Regulation 203(2)(b) require a Request for Review to be accompanied by a Statement, the law leaves it open for an Applicant to determine the form and substance of the statement. Relying on Article 159 of the Constitution of Kenya, 2010 and Regulation 218 of the Regulations 2020, the Applicant invited the Board to administer justice without undue regard to procedural technicalities. Additionally, that the Respondents had not been prejudiced by any shortcomings in the affidavit as they had sufficiently responded to the Request for Review.
45. It was submitted that the case of ***Mary Wanjiru Kanyua v Muchai Ng'ang'a [2004]eKLR*** was distinguishable from the present case as it was determined pre-2010 before the promulgation of the Constitution of Kenya, 2010
46. On the merits of the Request for Review, the Applicant faulted the Procuring Entity for breaching Section 79 and 86 of the Act for awarding the subject tender to the Interested Party, when the said bidder failed to meet Mandatory Requirement No. 20 on submission of a NEMA letter of No Objection. It was submitted that the Respondents had admitted the Interested Party's non-compliance with this requirement in their response



where they indicate that they waived this requirement. According to the Applicant such a waiver gave a competitive advantage to the Interested Party and this prejudiced the Applicant.

47. Relying on ***Republic v Public Procurement Administrative Review Board, Principal Secretary, Ministry of Defence & Akamai Creative Limited; Ex parte Central Kenya Fresh Merchants Limited [2018] KEHC 1203*** and ***Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk [2020] eKLR*** for the submission that a waiver is permissible in limited cases where no competitive advantage would result.
48. On the criterion at the Detailed Technical Evaluation, the Applicant argued that the Interested Party's bid ought to have been scored 25 marks as its bid price of Kshs. 33,440,001.00 was in the deviation range of 5-9.9% which according to the Tender Document attracted 25 marks, which was below the threshold marks at the detailed Technical Evaluation Stage.
49. An argument was made that the Respondents breached Section 83 of the Act as well as the Applicant's legitimate expectation when it subjected the Applicant to due diligence but neither awarded it the subject tender nor disclosed to it the outcome of the due diligence.



50. Reliance was placed on the case of ***Consortium of H.Young & Co. (E.A. Limited & Yantai Jereh Petroleum Equipment and Technologies Company Limited v Public Procurement Administrative Review Board & 2 Others [2017]eKLR*** for the argument that due diligence serves to verify the qualifications of the lowest evaluated bidder.
51. Relying on ***PPARB Application No. 82 of 2022, Swiftmark Services v County Government of Kericho, Department of Health***, the Applicant argued that it was entitled to the specific reasons its bid was disqualified noting that since it made to the due diligence stage, it anticipated an award of the subject tender. Therefore, the Applicant urged the Board to allow the Request for Review.

Respondents' Submissions

52. The Respondents questioned the competency of the affidavit filed in support of the Request for Review while highlighting that Section 5 of the Oaths and Statutory Declarations Act required an affidavit to be sworn before a Commissioner for Oaths, a judge or a notary public.
53. Relying on Order 19 Rule 3 of the Civil Procedure Rules 2010 and the Interpretation and General Provisions Act, the Respondents argued the absence of commissioning on an affidavit renders the affidavit technically noncompliant with procedural requirements.



54. The Respondents relied on the decisions in ***Mary Wanjiru Kanyua v Muchai Ng'ang'a [2004]eKLR; Mary Gathoni & another v Frida Ariri Otololo & another [2020]eKLR; CMC Motors Group Limited v Bengeria Arap Korir trading as Marben School & Elizabeth Academy School (Commercial Civil Case 43 of 2010)*** and ***Re MWO (Minor) [2021]eKLR*** for the proposition that a defective affidavit should be struck out.
55. On the merits of the Request for Review, the Respondents contend that the Applicant's bid was not the lowest evaluated bid. They argued that the Financial Evaluation yielded that the Applicant's tender price of Kshs. 33,441,765 per annum got 25 marks upon calculation of its deviation. This was against the Interested Party's tender price of Kshs. 33,440,001 per annum that got 30 marks upon calculation of its deviation. The Respondents put the Applicant to strict proof in respect of any error in the calculation of the deviation from the budget. They further argued that they are under no obligation to disclose its procurement budget to bidders.
56. The Respondents while referring to Annexure DM5, in the Applicant's Request for Review argued that the same constituted the Interested Party's Letter of No Objection from NEMA and thus the bidder was responsive to the requirement under the Tender Document.



BOARD'S DECISION

57. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

I. ***Whether the Board has jurisdiction over the present Request for Review?***

In determining this issue, the Board will consider whether there is a competent Request for Review in view of the Respondents' contention that the Affidavit in Support of the Request for Review is defective;

Depending on the finding on the first issue:

II. ***Whether the Applicant's bid was properly disqualified from the subject tender in accordance with the provisions of the Act and the Tender Document?***

III. ***Whether the subject tender was awarded to the Interested Party in accordance with the provisions of the Act and the Tender Document?***

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

Whether the Board has jurisdiction over the present Request for Review?

58. On 3rd January 2025, the Respondents filed a Preliminary Objection dated 2nd January 2024 challenging the competency of the Request for Review



arguing that it was supported by a fatally defective affidavit. According to the Respondents, the Applicant's Affidavit in support of the Request for Review was not properly commissioned in breach of Section 5 of the Oaths and Statutory Declarations Act.

59. On the Applicant's part, it was of the view that the Respondents' Preliminary Objection was both time-barred as it was filed outside the 3 days' timeline contemplated under Regulation 209 of Regulations 2020. The Applicant equally sought refuge under Article 159 of the Constitution of Kenya, 2010 and Regulation 218 of Regulations 2020, urging the Board to overlook any procedural technicalities that could have arisen.
60. The foregoing rival arguments raise a jurisdictional question which this Board is invited to determine as a preliminary issue in line with the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.
61. 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."

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

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

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

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



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

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

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

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

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

***The functions of the Review Board shall be—
reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function***



conferred to the Review Board by this Act, Regulations or any other written law.”

67. The Board is therefore invited to interrogate the Respondents’ contention that the Request for Review is supported by a defective affidavit. However, before delving in to this, we wish to first address the Applicant’s contention that the Respondents’ Preliminary Objection is time-barred under Regulation 209. According to the Applicant, Regulation 209 requires that Preliminary Objections are filed within 3 days of the notification under Regulation 206 and that since the present Preliminary Objection was filed on 3rd January 2025, the same was time-barred.

68. Regulation 209 of Regulations 2020 reads:

209. Preliminary objections

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

(2) A preliminary objection filed under paragraph (1) shall set out the grounds upon which it is based on and shall be served to the applicant at least one day before the hearing.

(3) The applicant may file a reply to the preliminary objection before the time of the hearing of the request.



(4) The Review Board may hear the preliminary objection either separately or as part of the substantive request for review and give a separate or one decision.

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

69. Further, Regulation 206 of Regulations 2020 reads:

206. Notice of Hearing

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

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

70. From the foregoing Regulations, it is clear that a party intending to file a Preliminary Objection should do so within 3 days of the notification under Regulation 206 of Regulations 2020. Further, the notification contemplated under Regulation 206 of Regulations 2020 is the Hearing Notice. Therefore, a party keen on filing a Preliminary Objection before the Board should do so within 3 days of receipt of the Hearing Notice.

71. Turning to the present case, on 30th December 2024, the Ag. Board Secretary, sent out to the parties a Hearing Notice of even date notifying parties that the hearing of the present Request for Review would be by online hearing on 8th January 2025 at 11:00 a.m. through the link availed in the said Hearing Notice. 30th December 2024, being the date when the



Hearing Notice was sent to the parties and therefore forms the benchmark date from when the 3 days contemplated under Regulation 209 of Regulations 2020 is to be computed.

72. The Board will now proceed to compute the timeline within which the Respondents' Preliminary Objection ought to have been filed before it. In computing the 3 days contemplated under the Act, we draw guidance from Section 57 of the Interpretation and General Provisions Act:

"57. Computation of time

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

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

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

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is



done or taken on the next day afterwards, not being an excluded day;

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

73. When computing time when the Applicant ought to have sought administrative review before the Board, 30th December 2024 is excluded as per section 57(a) of the IGPA being the day that it was the day that the hearing notice was sent to the parties. Typically, the 3 days would run from 30th December 2024 to 2nd January 2025. However, Section 57(b) and (d) of the Interpretation and General Provisions Act excludes Sundays, public holidays and non-official working days in the computation of time where the time being computed is 6 days and below with the result that 1st January 2025, which was a public holiday (New Year) is excluded from the computation leaving 3rd as the last day for any party to file a Preliminary Objection to the present Request for Review.

74. In essence, the Applicant had between 30th December 2024 and 3rd January 2025 to file a Preliminary Objection in the present Request for Review. The Respondents filed their Preliminary Objection dated 2nd January 2025 on 3rd January 2025, which was the deadline date for presenting the Preliminary Objection under Regulation 209(1) of



Regulations 2020. Consequently, the Applicant's allegation that the Respondents' Preliminary Objection is time-barred is without merit.

75. The Board is will now proceed to interrogate the Respondents' Preliminary Objection which asserts that the Request for Review is supported by a fatally defective affidavit.

76. Section 167 of the Act grants room to bidders or candidates dissatisfied with a public procurement process to bring tender-related disputes before this Board by way of a Request for Review in the following terms:

167. Request for a review

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

77. Regulation 203 of Regulations 2020 speaks to the Request for Review contemplated under Section 167(1) of the Act in the following terms:



Request for a review

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

78. From the above, it is clear that under Regulation 203(2)(b) of Regulations 2020, a Request for Review before this Board must be accompanied by a statement that the Applicant considers necessary. Whereas Regulation 203(1) of the Regulation 2020 stipulates the format of the Request for Review, the Regulations 2020 are silent on the form that the statement is to take. Therefore, an Applicant before the Board



has a free hand in selecting the format that their statement is to take. However, whichever format that a party selects the attendant rules in respect of that format apply. Commonly, Applicants before the Board have been presenting statements in the form of witness statements and affidavits. Accordingly, where a statement is presented in the form of a witness statement, laws on witness statements apply. Equally, where a statement is presented in the form of an affidavit, Order 19 of the Civil Procedure Rules, 2010, the Oaths and Statutory Declarations Act and the laws touching affidavits apply. In the present case the Applicant elected to present a statement in the form of an affidavit and thus laws touching on affidavits are applicable and ought to be complied with.

79. The Respondents argue that the affidavit sworn in support of the Request for Review is fatally defective for being in breach of Section 5(1) of the Oaths and Statutory Declarations Act. The said section reads:

5. Particulars to be stated in jurat or attestation clause
Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

80. Rule 10 of the Oaths and Statutory Declaration Rules reads:

10. The forms of jurat and of identification of exhibits shall be those set out in the Third Schedule.



81. On its part the Third Schedule Outlines the jurat section as follows:

FORM OF JURAT

Sworn

Declared

Before me this day of, 20 ...

.....

Commissioner for Oaths

82. Superior Courts in this country have variously pronounced themselves on the import of Section 5 of the Oaths and Statutory Declarations Act as well as the Third schedule of the Oaths and Statutory Declarations Rules:

83. In ***Peter Nyaga Muvake v Joseph Mutunga (Civil Application 86 of 2015) [2015] KECA 475 (KLR) (Civ) (31 July 2015) (Ruling)*** the Court of Appeal in considering an application for stay of execution whose affidavit was not dated, spoke to the import of the Third Schedule of the Oaths and Statutory Declarations Rules in the following terms:

18. The Third Schedule shows that the jurat must show the date and the place of oath or affirmation taken, and the name and signature of the commissioner for oaths.

84. In ***Pharmacy and Poisons Board & another; Mwiti & 21 others (Respondent) (Civil Appeal E144 of 2021) [2021] KECA 97 (KLR) (22 October 2021) (Ruling)*** the Court of Appeal considered an



application supported by an affidavit that was not signed by the deponent. The appellate court dismissed the application for being supported by a fatally defective affidavit:

Notwithstanding the foregoing, it would be remiss of us not to comment on, albeit obiter, to set the law straight on this and other issues that emerge from the application before us. With regard to the unsigned supporting affidavit, the unmarked and unsealed annexures, it would suffice to observe that such an affidavit is fatally defective and of no value to the applicants' Motion.

See also ***Juma v Ingudi (Environment & Land Case 78'B' of 2019) [2023] KEELC 21821 (KLR) (23 November 2023) (Ruling)***

85. In ***Mugendi Karigi & Company Advocates & another v Doric Industries Limited & another (Miscellaneous Application E764 of 2021 & Civil Cause 3285 of 2016 (Consolidated)) [2024] KEHC 3517 (KLR) (Commercial and Tax) (21 March 2024) (Ruling)*** the High Court considered an objection where an affidavit was purportedly sworn before a Commissioner for Oaths who signed on space next to the deponent's signature but failed to put his stamp next to his signature. The Court found the affidavit to be incurably defective as it was not possible in the circumstance to tell the identity of the Commissioner for Oaths before whom the affidavit was deponed:



15. In this case, the supporting affidavit was sworn by Francis Ngigi Jason on 18th February 2022 and was signed by him. However, a commissioner of oaths stamp is not present alongside the deponent's signature instead only a signature of the alleged commissioner for oaths was appended thereto.

16. As there is no commissioner of oaths stamp, the name and identity of the commissioner of oaths is unknown. It cannot be verified that the signature appended to the affidavit was by a qualified Commissioner for Oaths.

17. I find that the affidavit was not properly commissioned as required under the Oaths and Statutory Declarations Act, it is therefore defective. Without proper commissioning of the affidavit, it is not a sworn statement and there is no oath. Accordingly, it is struck out.

86. In ***Mary Gathoni & another v Frida Ariri Otolu & another [2020] eKLR*** the High Court considered an application supported by an affidavit whose jurat section indicated that it was deponed in Machakos but the Commissioner's stamp read Nairobi. In finding the affidavits as defective, the court suggested that it was probable that the Commissioner's stamp was just affixed to the affidavit:

6. ... The affidavit is shown as having been sworn at Machakos in the presence of Leah Mbutia, Commissioner for Oaths, on 13th October 2003 but whose stamp reads Nairobi. If the



affidavit was sworn at Machakos, it should have been before a Commissioner for Oaths in Machakos and the stamp should show likewise. The only conclusion one can reach on looking at this affidavit is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is, therefore, fatally defective as it was not sworn in the presence of a Commissioner for Oaths. It is likely that the stamp was just affixed. This court should have no alternative but strike off the replying affidavit as it is not properly commissioned and that the application would stand unopposed.

87. Drawing from the above holdings, it is apparent to the Board that:
- i. The Third Schedule of the Oaths and Statutory Declaration Rules contemplate that the jurat section of an affidavit must bear the date and place of oath as well as the name and signature of the Commissioner for Oaths.
 - ii. An affidavit that is not signed by the deponent is fatally defective.
 - iii. An affidavit that bears the signature of a Commissioner for Oaths but omits the name of such Commissioner is equally fatally defective.
 - iv. The courts frown upon the practice of litigants affixing Commissioner for Oaths stamps on affidavits when in fact they have not appeared before such Commissioners.



88. Turning to the case at hand, the Board has keenly studied the jurat section of the affidavit sworn on 23rd December 2024 by Duke Machongo Omori in support of the Request for Review and the same is herein reproduced for completeness of the record

Sworn at NAIROBI by the said }
DUKE MACHONGO OMORI }
This 23rd Day of DECEMBER, 2024 } Signed by the deponent

Before me }
 }
 }
COMMISSIONER FOR OATHS }
 }

**STAMPED: LARRY AYITI
MULOMI ADVOCATE &
COMMISSIONER FOR
OATHS**

89. The Board has observed that:
- i. The affidavit indicates that it was deponed at Nairobi on 23rd December 2024.
 - ii. The affidavit bears the signature of the deponent.
 - iii. The affidavit bears a Commissioner for Oaths stamp with the name "Larry Ayiti Mulomi". However, there is no signature appended next to, below or above the said stamp to signify that the Commissioner for Oaths signed the affidavit.



90. It is therefore apparent that the affidavit filed in support of the Request for Review is does NOT bear the signature of the Commissioner for Oaths who is represented as having commissioned it. Consequently, guided by the authorities adverted to above and which authorities are binding on this Board by virtue of the doctrine of *stare decisis*, we find that the affidavit on 23rd December 2024 by Duke Machongo Omori in support of the Request for Review is fatally defective with the result that the same is struck out. The natural consequence that follows is that the Request for Review remains unsupported and is equally for striking out as it then fails to meet the requirement of Regulation 203(2)(b) which requires all Requests for Review before the Board to be supported by a statement.
91. We acknowledge the Applicant's plea under Article 159 of the Constitution of Kenya, 2010 and Regulation 218 of the Regulations 2020 for the Board to overlook the shortcomings in its affidavit in support of the Request for Review but guided by the decisions adverted to above, this Board remains bound by those decisions and thus cannot depart from them. A fatally defective affidavit is incapable of being cured and thus suffers the fate of being struck out. The Board further wishes to point out that Article 159 of the Constitution of Kenya, 2010 is not a panacea shortcomings such as the presentation of fatally defective affidavits.
92. In view of the foregoing, the Board lacks jurisdiction over the present Request for Review as it is unsupported by a Statement contemplated under Regulation 203(2)(b) of Regulations 2020.



Whether the Applicant's bid was properly disqualified from the subject tender in accordance with the provisions of the Act and the Tender Document?

93. In view of the finding on the first issue above, that the Board lacks jurisdiction over the present Request for Review, we shall not delve in to an analysis of this issue as previously framed for determination.

Whether the subject tender was awarded to the Interested Party tender in accordance with the provisions of the Act and the Tender Document?

94. In view of the finding on the first issue above, that the Board lacks jurisdiction over the present Request for Review, we shall not delve in to an analysis of this issue as previously framed for determination.

What orders the Board should grant in the circumstances?

95. The Board has found it lacks jurisdiction over the present Request for Review in view of the fact that the same is incompetent as it is unsupported by a Statement contemplated under Regulation 203(2)(b) of Regulations 2020.
96. The upshot of our finding is that the Request for Review dated 24th December 2024 in respect of Tender No. KICC/05/2024-2026 for Provision of Cleaning and Garbage Collection Services fails in the following specific terms:



FINAL ORDERS

97. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2025, the Board makes the following orders in the Request for Review dated 24th December 2024:

A. The 2nd Respondent’s Preliminary Objection dated 2nd January 2025 be and is hereby upheld;


B. The Request for Review dated 24th December 2024 be and is hereby struck out;

C. The 1st Respondent be and is hereby directed to oversee the proceedings in Tender No. KICC/05/2024-2026 for Provision of Cleaning and Garbage Collection Services to their logical and lawful conclusion.

D. Each party shall bear its own costs.

Dated at NAIROBI, this 14th day of January 2025.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB

