

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 1/2025 OF 3<sup>RD</sup> JANUARY 2025**

**BETWEEN**

**KLENOX GENERAL MERCHANT LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**PARLIAMENTARY SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**PARLIAMENTARY SERVICE COMMISSION..... 2<sup>ND</sup> RESPONDENT**

**DANA CLEAN CARE SERVICES LTD ..... INTERESTED PARTY**

Review against the decision of the Accounting Officer Parliamentary Joint Services in relation to Tender No. PJS/018/2024-2025 for Lot 1: Provision of Shampooing Services at Bunge Tower and Lot 2: Provision of Shampooing Services at Other Parliament Buildings

**BOARD MEMBERS PRESENT**

1. Mr. George Murugu, FCI Arb, I.P - Chairperson
2. Ms. Alice Oeri - Vice Chairperson
3. Mr. Daniel Langat - Member
4. Mr. Robert Chelagat - Member



## **IN ATTENDANCE**

1. Mr. Philemon Kiprop - Holding brief for Acting Board Secretary
2. Ms. Evelyn Weru - Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT**

### **KLENOX GENERAL MERCHANT LIMITED**

1. Mr. Duncan Kiprono - Advocate, CK Advocates
2. Mr. Sang Collins - Advocate, CK Advocates

### **1<sup>ST</sup> & 2<sup>ND</sup> RESPONDENT**

### **THE ACCOUNTING OFFICER, PARLIAMENTARY SERVICE COMMISSION & PARLIAMENTARY SERVICE COMMISSION**

Mr. Huka Abudho Mamo - Advocate, Parliamentary Joint Services

### **INTERESTED PARTY**

### **DANA CLEAN CARE SERVICES LTD**

Ms. Desma Nungo - Advocate, NOW Advocates LLP

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Parliamentary Joint Services, the Procuring Entity, invited sealed tenders in response to Tender No. PJS/018/2024-2025 for Lot 1: Provision of



Shampooing Services at Bunge Tower and Lot 1: Provision of Shampooing Services at Other Parliament Buildings (hereinafter referred to as “the subject tender”). The invitation was by way of an advertisement on 12<sup>th</sup> November 2024 published on the Daily Nation and Standard Newspapers, the Procuring Entity’s website [www.parliament.go.ke](http://www.parliament.go.ke) and the Public Procurement Information Portal [www.tenders.go.ke](http://www.tenders.go.ke) where the blank tender document for the subject tender issued to tenderers by the Procuring Entity (hereinafter referred to as the Tender Document’) was available for download. The subject tender’s submission deadline was on 29<sup>th</sup> November 2024 at 11.00 a.m.

### **Addendum**

2. The Procuring Entity issued an Addendum on 21<sup>st</sup> November 2024 notifying eligible bidders that the price schedule for the subject tender had been revised and the revised Tender Document was available for download on the Procuring Entity’s website and the Public Procurement Information Portal.

### **Submission of Tenders and Tender Opening**

3. According to the Tender Opening Minutes signed by members of the Tender Opening Committee and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the ‘Board’ pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the ‘Act’), ten (10) bidders submitted bids in the subject tender as follows:



<b>Bid No.</b>	<b>Name Of The Firm</b>
1.	Super-Broom Services Ltd
2.	Hever The Company Ltd
3.	Spin Africa Ltd
4.	Village Mastars Ltd
5.	Klenox General Merchant Ltd
6.	Haldan Ltd
7.	My-Spectrum Asset Management Kenya Ltd
8.	Pewin Dry Cleaners and Launderers Ltd
9.	Dana Clean Care Services Ltd
10.	Liga Holdings Ltd

### **Evaluation of Tenders**

4. A Tender Evaluation Committee undertook evaluation of the submitted bids as captured in a Tender Evaluation Report dated 6<sup>th</sup> December 2024 for the subject tender in the following stages:
- i Preliminary Evaluation
  - ii Technical Evaluation
  - iii Financial Evaluation

### **Preliminary Evaluation**

5. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage One: Preliminary/Mandatory Examination For Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 24 to 25 of

the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.

6. At the end of evaluation at this stage, seven (7) tenders were determined non-responsive, while three (3) tenders were determined responsive and proceeded to Technical Evaluation

### **Technical Evaluation**

7. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage Two: Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 25 to 29 of the Tender Document. Tenderers were required to score a pass mark of 75 marks and above at this stage to proceed for Financial Evaluation
8. At the end of evaluation at this stage, the three (3) tenders under evaluation at this stage were determined responsive and proceeded to Financial Evaluation.

### **Financial Evaluation**

9. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage Three: Financial Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 29 of the Tender Document. Tenders were required to have a duly filled Form of Tender and Price Schedule and were ranked as follows:



## Lot 1

Service No	Description of Services	Unit	Delivery Date	Quantity and physical unit	Bidder 5		Bidder 9		Bidder 10	
					Unit price	Total Price per Service	Unit price	Total Price Per Service	Unit price	Total Price Per Service
1.	Carpets	Square feet	On need basis	1	17	17	14	14	19.50	19.50
2.	7-Seater Sofa Set	Set	On need basis	1	350	350	75	75	390.00	390.00
3.	5-Seater Sofa Set	Set	On need basis	1	330	330	50	50	390.00	390.00
4.	3-Seater Sofa Set	Set	On need basis	1	300	300	50	50	390.00	390.00
5.	2-Seater Sofa Set	Set	On need basis	1	250	250	50	50	390.00	390.00
6.	1-Seater Sofa Set	Set	On need basis	1	200	200	50	50	300.00	300.00
7.	Chairs - Executive High Back rest leather	Pcs	On need basis	1	180	180	40	40	200.00	200.00
8.	Chair - Executive High back rest	Pcs	On need basis	1	130	130	40	40	200.00	200.00

	<i>fabric/velvet</i>									
<b>9.</b>	<b><i>Chairs – Executive with arm rest leather</i></b>	<b><i>Pcs</i></b>	<b><i>On need basis</i></b>	<b><i>1</i></b>	<b><i>180</i></b>	<b><i>180</i></b>	<b><i>40</i></b>	<b><i>40</i></b>	<b><i>200.00</i></b>	<b><i>200.00</i></b>
<b>10.</b>	<b><i>Chairs – Executive with arm rest fabric/velvet</i></b>	<b><i>Pcs</i></b>	<b><i>On need basis</i></b>	<b><i>1</i></b>	<b><i>130</i></b>	<b><i>130</i></b>	<b><i>40</i></b>	<b><i>40</i></b>	<b><i>200.00</i></b>	<b><i>200.00</i></b>
<b>11.</b>	<b><i>Visitors Chairs leather</i></b>	<b><i>Pcs</i></b>	<b><i>On need basis</i></b>	<b><i>1</i></b>	<b><i>90</i></b>	<b><i>90</i></b>	<b><i>35</i></b>	<b><i>35</i></b>	<b><i>150.00</i></b>	<b><i>150.00</i></b>
<b>12.</b>	<b><i>Visitors Chairs fabric/velvet</i></b>	<b><i>Pcs</i></b>	<b><i>On need basis</i></b>	<b><i>1</i></b>	<b><i>90</i></b>	<b><i>90</i></b>	<b><i>25</i></b>	<b><i>25</i></b>	<b><i>110.00</i></b>	<b><i>110.00</i></b>
<b>13.</b>	<b><i>Secretarial &amp; Bistro Chairs</i></b>	<b><i>Pcs</i></b>	<b><i>On need basis</i></b>	<b><i>1</i></b>	<b><i>90</i></b>	<b><i>90</i></b>	<b><i>20</i></b>	<b><i>20</i></b>	<b><i>100.00</i></b>	<b><i>100.00</i></b>

## Lot 2

					<b><i>Bidder 5</i></b>		<b><i>Bidder 9</i></b>		<b><i>Bidder 10</i></b>	
<b><i>Service N<sup>o</sup></i></b>	<b><i>Description of Services</i></b>	<b><i>Unit</i></b>	<b><i>Delivery Date</i></b>	<b><i>Quantity and physical unit</i></b>	<b><i>Unit price</i></b>	<b><i>Total Price per Service</i></b>	<b><i>Unit price</i></b>	<b><i>Total Price Per Service</i></b>	<b><i>Unit price</i></b>	<b><i>Total Price Per Service</i></b>
<b><i>1.</i></b>	<b><i>Carpets</i></b>	<b><i>Square feet</i></b>	<b><i>On need basis</i></b>	<b><i>1</i></b>	<b><i>17</i></b>	<b><i>17</i></b>	<b><i>15</i></b>	<b><i>15</i></b>	<b><i>19.50</i></b>	<b><i>19.50</i></b>

2.	<b>7-Seater Sofa Set</b>	<b>Set</b>	<b>On need basis</b>	<b>1</b>	<b>350</b>	<b>350</b>	<b>75</b>	<b>75</b>	<b>390.0 0</b>	<b>390.0 0</b>
3.	<b>5-Seater Sofa Set</b>	<b>Set</b>	<b>On need basis</b>	<b>1</b>	<b>330</b>	<b>330</b>	<b>75</b>	<b>75</b>	<b>390.0 0</b>	<b>390.0 0</b>
4.	<b>3-Seater Sofa Set</b>	<b>Set</b>	<b>On need basis</b>	<b>1</b>	<b>300</b>	<b>300</b>	<b>50</b>	<b>50</b>	<b>390.0 0</b>	<b>390.0 0</b>
5.	<b>2-Seater Sofa Set</b>	<b>Set</b>	<b>On need basis</b>	<b>1</b>	<b>250</b>	<b>250</b>	<b>50</b>	<b>50</b>	<b>390.0 0</b>	<b>390.0 0</b>
6.	<b>1- Seater Sofa Set</b>	<b>Set</b>	<b>On need basis</b>	<b>1</b>	<b>200</b>	<b>200</b>	<b>50</b>	<b>50</b>	<b>300.0 0</b>	<b>300.0 0</b>
7.	<b>Chairs – Executive High Back rest leather</b>	<b>Pcs</b>	<b>On need basis</b>	<b>1</b>	<b>180</b>	<b>180</b>	<b>45</b>	<b>45</b>	<b>200.0 0</b>	<b>200.0 0</b>
8.	<b>Chair – Executive High back rest fabric/velv et</b>	<b>Pcs</b>	<b>On need basis</b>	<b>1</b>	<b>130</b>	<b>130</b>	<b>45</b>	<b>45</b>	<b>200.0 0</b>	<b>200.0 0</b>
9.	<b>Chairs – Executive with arm rest leather</b>	<b>Pcs</b>	<b>On need basis</b>	<b>1</b>	<b>180</b>	<b>180</b>	<b>45</b>	<b>45</b>	<b>200.0 0</b>	<b>200.0 0</b>
10.	<b>Chairs – Executive with arm rest</b>	<b>Pcs</b>	<b>On need basis</b>	<b>1</b>	<b>130</b>	<b>130</b>	<b>45</b>	<b>45</b>	<b>200.0 0</b>	<b>200.0 0</b>



	<i>fabric/velvet</i>									
<b>11.</b>	<b>Visitors Chairs leather</b>	<b>Pcs</b>	<b>On need basis</b>	<b>1</b>	<b>90</b>	<b>90</b>	<b>35</b>	<b>35</b>	<b>150.00</b>	<b>150.00</b>
<b>12.</b>	<b>Visitors Chairs fabric/velvet</b>	<b>Pcs</b>	<b>On need basis</b>	<b>1</b>	<b>90</b>	<b>90</b>	<b>35</b>	<b>35</b>	<b>110.00</b>	<b>110.00</b>
<b>13.</b>	<b>Secretarial &amp; Bistro Chairs</b>	<b>Pcs</b>	<b>On need basis</b>	<b>1</b>	<b>90</b>	<b>90</b>	<b>20</b>	<b>20</b>	<b>100.00</b>	<b>100.00</b>

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

10. The Evaluation Committee recommended award of the subject tender to M/s Dana Clean Care Services Ltd, the Interested Party herein, being the lowest evaluated bidder as per the price schedules, inclusive of all taxes for a period of two years. It further recommended that the bidder be subjected to due diligence before award.

### **First Professional Opinion**

11. In a Professional Opinion dated 13<sup>th</sup> December 2024 (hereinafter referred to as "the First Professional Opinion"), the Chief Procurement Officer, PJS Mr. Keith Kisinguh reviewed the manner in which the procurement process in the subject tender was undertaken including evaluation of tenders and recommended that the Evaluation Committee conducts due diligence before recommendation of the award of the subject tender.

12. The First Professional Opinion was approved as recommended on 13<sup>th</sup> December 2024 by the Accounting Officer/Director General, Parliamentary Joint Services.

**Due Diligence**

13. According to the Due Diligence Report signed by members of the Evaluation Committee on 20<sup>th</sup> December 2024, and which Due Diligence Report was furnished to the Board pursuant to Section 67(3)(e) of the Act, the Evaluation Committee wrote confidential letters to two different procuring entities to ascertain similar contracts undertaken by M/s Dana Clean Care Services Ltd and having satisfied itself that similar contracts were undertaken successfully, recommended award of the subject tender to the Interested Party herein as per the price schedules, inclusive of all taxes for a period of two years.

**Second Professional Opinion**

14. In a Professional Opinion dated 23<sup>rd</sup> December 2024 (hereinafter referred to as “the Second Professional Opinion”), the Chief Procurement Officer, PJS Mr. Keith Kisinguh reviewed the manner in which the procurement process in the subject tender was undertaken including evaluation of tenders and concurred with the Evaluation Committee’s recommendation to award the subject tender to M/s Dana Clean Care Services Ltd, being the lowest evaluated bidder as per the price schedules, inclusive of all taxes for a period of two years.



15. The Second Professional Opinion was approved as recommended on 23<sup>rd</sup> December 2024 by the Accounting Officer/Director General, Parliamentary Joint Services.

### **Notification to Tenderers**

16. Tenderers were notified of the outcome of evaluation of the subject tender *vide* letters dated 23<sup>rd</sup> December 2024.

### **REQUEST FOR REVIEW NO. 1 OF 2025**

17. On 3<sup>rd</sup> January 2025, Klenox General Merchant Limited, the Applicant herein, filed a Request for Review dated 2<sup>nd</sup> January 2025 together with an Applicants Statement in Support of the Request for Review sworn by Kellen Njoki Nyaga on 20<sup>th</sup> December 2024 through DRO Ngala and Partners Advocates seeking the following orders from the Board:

- a. ***The decision of the procuring entity as communicated in the letter Ref No. PJS/PROC/018/2024-2025/(5) dated 23<sup>rd</sup> December, 2024 Notification of intention to Award directing the Dana Clean Care Services Ltd of P O Box 38222 00100 Nairobi as the successful bidder be set aside for reasons that:-***
  - i. ***The procuring entity has acted in contravention of item No. 6 and ITT 21.1 that is failing to attach and to submit two bids security, one for each lot.***



***Consequently, the Form of Tender was wrongly filled, making it invalid.***

- ii. In reference to Tender Opening Minutes, out of the 10 companies which bided, only two qualified for reasons that only the two had attached two bid securities for each lot.***
  - iii. That in reference to evaluation results by the tender committee, only three companies qualified up to financial level. And further out of the three, only one company, KLENOX GENERAL MERCHANT LTD had attached two bid securities as per the tender instructions and or requirements.***
  - iv. The winning company was awarded the two lots, yet they only attached one bid security, clearly against the mandatory provisions of the bid.***
  - v. The procuring entity has breached mandatory requirement they went ahead and subjected bidder Dana Clean Care Services Ltd to technical and financial evaluation stage despite not meeting the mandatory requirement and finally declared the as successful tenderer.***
- b. The respondents be ordered to pay the costs of and incidental to these proceedings.***



***c. Any other or further relief as the board may find appropriate to grant.***

18. In a Notification of Appeal and a letter dated 3<sup>rd</sup> January 2025, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to them a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 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 3<sup>rd</sup> January 2025.

19. On 7<sup>th</sup> January 2025, Mr. Keith Kisingu, Chief Procurement Officer filed, on behalf of the Director General/Accounting Officer, Parliamentary Joint Services, a Memorandum of Response dated 7<sup>th</sup> January 2025 together with the confidential documents concerning the subject tender in line with Section 67(3)(e) of the Act.

20. *Vide* letters dated 8<sup>th</sup> January 2025, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit



to the Board any information and arguments concerning the tender within three (3) days.

21. *Vide* a Hearing Notice dated 10<sup>th</sup> January 2025, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 15<sup>th</sup> January 2025 at 11:00 a.m. through the link availed in the said Hearing Notice.

22. On 13<sup>th</sup> January 2025, the Interested Party filed through NOW Advocates LLP a Notice of Appointment of Advocates dated 13<sup>th</sup> January 2025, a Notice of Preliminary Objection dated 13<sup>th</sup> January 2025 and an Interested Party's Replying Affidavit sworn by Nancy Jebet Naburuki on 13<sup>th</sup> January 2025.

23. On 13<sup>th</sup> January 2025, the Applicant through its advocates DRO Ngala and Partners Advocates sent to the Board's email an Amended Request for Review amended on 13<sup>th</sup> January 2025.

24. On 14<sup>th</sup> January 2025, the Procuring Entity filed Written Submissions dated 14<sup>th</sup> January 2025.

25. On 15<sup>th</sup> January 2025 at around 9.30 a.m., the Applicant filed through CK Advocates a Notice of Change of Advocates dated 15<sup>th</sup> January 2025.

26. At around 9:46 a.m. on 15<sup>th</sup> January 2025, the Applicant through Mr. Duncan Kiprono Advocate for CK Advocates sent an email to the Board



enclosing a Notice of Change of Advocates while seeking for an adjournment of the hearing slated on 15<sup>th</sup> January 2025 at 11.00 a.m.

27. At around 10.00 a.m. on 15<sup>th</sup> January 2025, the Interested Party filed Written Submissions dated 15<sup>th</sup> January 2025 and an Interested Party's List and Bundle of Authorities dated 15<sup>th</sup> January 2025.

28. When the matter came up for hearing at 11.00 a.m. on 15<sup>th</sup> January 2025, the Board read out the pleadings filed by parties in the matter and asked Mr. Kiprono for the Applicant to address it on the contents of his email sent earlier on at 09:46 a.m.

29. Mr. Kiprono submitted that the Applicant had a few hours ago walked into his offices and instructed his firm to take over the matter since her previous advocates had not been cooperative. He indicated that upon perusal of documents filed in the matter, he noted that both the Respondents and Interested Parties had filed responses and written submissions and sought for leave to file a further response and written submissions on behalf of the Applicant before proceeding with hearing of the instant Request for Review. Counsel further sought for more time to acquaint himself with the matter considering he had just come on record and that it would only be just and fair if his prayers were granted.

30. In response, Mr. Mumo submitted that he had no objection to the request for adjournment to the extent of allowing the Applicant's counsel be granted more time to acquaint himself with the matter. He indicated that



he was however opposed to the Applicant being granted leave to file any further responses and pleadings including amendment of the Request for Review, Statement in Support and written submissions in view of the strict timelines stipulated under the Act, Regulations 2020 and the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. He further indicated that the Applicant had ample time to change advocates and file a rejoinder to the response file by the Procuring Entity and was thus not coming before the Board with clean hands.

31. On her part, Ms. Nungo submitted that she was ready to proceed with the hearing and that the Applicant's request did not seem genuine given that it had ample time to put its house in order being aware of the scheduled hearing. Though she was not conceding to the application for adjournment, she left it for the Board to exercise its discretion in considering the Applicant's request. She sought for the Board to consider that pleadings in the matter had closed and that any directions to be issued ought to consider the all parties right to a fair hearing without prejudice to any party. Counsel indicated that her client was desirous of being granted an opportunity to highlight its submissions should the Board be inclined to grant the adjournment sought by the Applicant and urged the Board to grant her request.

32. In a brief rejoinder, Mr. Kiprono submitted that pursuant to the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, the Applicant was within time to file its rejoinders to the Procuring Entity and Interested Party's pleadings in view of the fact that the Interested Party had filed its





pleadings on 13<sup>th</sup> January 2024 and the Applicant had a right to respond to the same and to also choose a legal representation of its choice in the instant proceedings. He further submitted that no party would be prejudiced should the Board grant his request and it would be in the best interest of all parties that they be given a chance to a fair hearing.

33. The Board having considered the Applicant's application for adjournment and the period when various pleadings were filed by respective parties in the matter, directed (a) that the application for adjournment be allowed and hearing of the matter be deferred to Monday, 20<sup>th</sup> January 2025 at 2.00 p.m., (b) the Applicant be granted leave to file and serve its rejoinder to the Interested Party Notice of Preliminary Objection and Replying Affidavit together with its comprehensive written submissions including any authorities by 6.00 p.m. on 16<sup>th</sup> January 2025, (c) the Respondents and Interested Party be granted leave to file and serve supplementary submissions and any authorities by 6.00 p.m. on 17<sup>th</sup> January 2025.

34. Parties were cautioned to adhere to the strict timelines as specified in the Board's directions. The Board further clarified to parties that the Amended Request for Review had only been sent by the Applicant's previous advocates on email and was shared with parties by the said advocates and also by the Board Secretariat via email as received.

35. On 16<sup>th</sup> January 2025, the Applicant filed through its advocates an Applicant's Reply to the Interested Party's Notice of Preliminary Objection dated 13<sup>th</sup> January 2025 and the Replying Affidavit Sworn on even date,



sworn on 16<sup>th</sup> December 2025 by Kellen Njoki Nyaga, Written Submissions dated 16<sup>th</sup> January 2025 and an Applicant's List & Digest of Authorities dated 16<sup>th</sup> January 2025.

36. On 17<sup>th</sup> January 2025, the Procuring Entity filed the Procuring Entity's Supplementary Submissions dated 17<sup>th</sup> January 2025.

37. On the same day of 17<sup>th</sup> January 2025, the Interested Party filed Interested Party's Supplementary Written Submissions dated 17<sup>th</sup> January 2025 and Interested Party's Supplementary List and Bundle of Authorities dated 17<sup>th</sup> January 2025.

38. At the hearing on 20<sup>th</sup> January 2025 at 2.00 p.m., the Board read out the pleadings filed by parties in the matter and allocated time for parties to highlight their respective cases.

39. Prior to commencing his submissions, Mr. Sang for the Applicant sought for leave to amend the date indicated in the Applicant's Reply to the Interested Party's Notice of Preliminary Objection and Replying Affidavit sworn by Kellen Njoki Nyaga to read 16<sup>th</sup> January 2025 instead of 16<sup>th</sup> December 2025 as indicated and attributed this to an inadvertent mistake. There being no objection to the application for amendment by Mr. Sang, the Board directed that by consent of parties, the Applicant's Reply to the Interested Party's Notice of Preliminary Objection and Replying Affidavit sworn by Kellen Njoki Nyaga be amended to reflect the correct date of 16<sup>th</sup> January 2025.



40. Thus the instant Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Applicant's submissions**

41. In his submissions, Mr. Sang for the Applicant relied on the documents filed by the Applicant before the Board in the instant Request for Review.

42. In his opening statement, Mr. Sang submitted that blunders will continue to be made from time to time and that parties should never suffer penalties of having their cases not heard on merit. He further submitted that a blunder on a point of law can be a mistake and that the door of justice is not closed as a result of such a mistake commissioned by a lawyer of experience who ought to know better.

43. Mr. Sang argued that despite the instant Request for Review having been filed on 3<sup>rd</sup> January 2025 and the response by the Procuring Entity filed on 7<sup>th</sup> January 2025, there was no affidavit of service on record to show and ascertain the day that the Procuring Entity served their response to the instant Request for Review upon the Applicant. Similarly, he argued that there was no affidavit on record to show the day that the Interested Party served its responses to the instant Request for Review upon the Applicant. Counsel submitted that in view of the holding by the Supreme Court in *Nicholus v Attorney General & 7 Others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgement)* relied



upon by the Interested Party, the Board ought to ascertain when the aforementioned responses were served upon the Applicant so as to determine whether or not the Applicant amended its Request for Review upon learning of the Preliminary Objections raised by the Respondents and Interested party.

44. Mr. Kiprono taking over from Mr. Sang submitted that the Applicant amended its Request for Review prior to having any knowledge of the existence of the Preliminary Objections by the Respondents and Interested Party. In support of his argument, he referred the Board to the holding by the Court of Appeal in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited (2013) eKLR* and the holding in *Institute For Social Accountability & another v Parliament of Kenya & 3 Others (2014) eKLR* outlining the principles in amendment of pleadings.

45. Counsel submitted that the instant Request for Review had been amended and the correct parties rightly sued and as such, the Board ought to hear and determine the matter on merits so that none of the parties is prejudiced due to mistake commissioned by an advocate.

46. It is the Applicant's case that the amendments to the Request for Review dated 13<sup>th</sup> January 2025 typically renders the preliminary objection in paragraph 1(c) of the Interested Party's Notice of Preliminary Objection invalid and meaningless as it was undisputed that the Amended Request for Review was received by the Board's Secretariat on 13<sup>th</sup> January 2025 and this was so admitted by the Board on 15<sup>th</sup> January 2025 when the



matter first came up for hearing and there was no need for the Board to carry out a judicial inquiry as to whether this position is factually correct or incorrect.

47. The Applicant, while referring to Section 8 of the Civil Procedure Rules 2010 and the holding in *PPARB Application No. 9 of 2023 Asal Frontiers Ltd v The Accounting Officer, Kenya National Highway Authority & 2 Others*, reiterated that the Board had in the past allowed amendments of pleadings prior to the close of pleadings without the need for leave and that neither the Act or Regulations 2020 specify specific rules or timelines for amendments. While relying on provisions under Section 58 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya, the Applicant submitted that the Amended Request for Review was filed with the Board's Secretariat by its previous Advocate before close of pleadings and without unreasonable delay and the amendments are presumed to have been accepted for lack of return by the Secretariat without unreasonable delay coupled with demonstrated service of the Amended Request for Review upon the Interested Party and the Respondents and no objection was recorded.

48. The Applicant pressed on that the Preliminary Objections by the Procuring Entity and the Interested Party do not raise pure points of law and that the Board is required to examine the conflicting facts as presented by parties so as to establish the correct position which renders the objections as improper. In support of this argument, the Applicant referred to the holding in *Mukisa Biscuits v West End (1969) EA 696* and



*Republic v Public Procurement Administrative Review Board; Nairobi City County & Erdermann Property Limited (Interested Parties); Ex parte Lordship Africa Limited (2020) eKLR.*

49. Without prejudice to the foregoing and in response to paragraph 1(a) of the Interested Party's Preliminary Objection alleging that the instant Request for Review was defective for being supported by a Statement In Support sworn by Kellen Nyaga who had no authority to swear such statement on behalf of the Applicant, Mr. Kiprono referred the Board to Section 37(2)(b) of the Companies Act and submitted that a document is validly executed by a company if it is signed on behalf of the company by a director of the company in the presence of a witness who attests the signature. He pointed out that the statement by Ms. Kellen Nyaga is valid having been signed before a commissioner of oaths and was compliant with provisions under Regulation 203 (2)(b) of Regulations 2020.

50. The Applicant averred that Ms. Kellen Nyaga was its only director and did not require a separate letter of authority to sue on behalf of the Applicant since her role as a director inherently gave her authority to act on the Applicant's behalf, including initiating legal action. It further averred that the documents submitted to the Procuring Entity which had been submitted to the Board reveal that Ms. Kellen Nyaga is a single director and shareholder and require no authorization to commence these administrative proceedings for and on behalf of the Applicant. She contended that her Statement of 13<sup>th</sup> January 2025 in support of the Amended Request for Review suffices in the instant proceedings.



51. In response to paragraph 1(b) of the Interested Party's Preliminary Objection alleging that the instant Request for Review was defective for failure to plead and/or demonstrate in the Request for Review the specific duty imposed on the Procuring Entity by the Act and Regulations 2020 that has been breached resulting to the Applicant allegedly suffering prejudice and enormous financial loss, Mr. Kiprono referred the Board to paragraph 5 of the Amended Request for Review and submitted that the Applicant had pleaded that the Procuring Entity was in breach of provisions of Article 227 of the Constitution. He further submitted that from the Applicant's Written Submissions, it had demonstrated how the Procuring Entity had violated the provisions of the Act, Regulations 2020 and the Constitution with regard to the subject tender.

52. On the substantive issues, Mr. Kiprono referred the Board to provisions under Article 227 of the Constitution and Sections 58 and 70 of the Act and submitted that the Procuring Entity is required to procure goods and services in a system that is fair, transparent and competitive while providing sufficient information to bidders.

53. He pointed out that Clause 6 of the Invitation to Tender, as outlined at page ii of the Tender Document, is expressed in unequivocally mandatory terms and required tenders to be accompanied by a tender Security of Kenya Shillings Five Hundred Thousand (Kshs. 500,000) Only per lot valid for 217 days from the date of tender opening, in form of a bank guarantee from a reputable bank recognized by the Central Bank of Kenya payable to Procuring Entity.



54. He further pointed out that Section II - Tender Data Sheet explicitly provided that in the event of any conflict, the provisions within this section shall take precedence and that ITT 21.1 of Section II - Tender Data Sheet outlined at page 21 and 22 of the Tender Document that if a Tender Security shall be required per lot, the amount and currency of the Tender Security shall be Ksh. 500,000.00.

55. He submitted that under Section III- Evaluation and Qualification of the Tender Document, the Procuring Entity was required to examine all tender and ensure that they had complied with the stipulated mandatory requirements and that notably, the Respondents and the Interested Party had, albeit indirectly, effectively admitted to evaluating and passing the Interested Party's bid despite the Interested Party having submitted only one tender security instead of the required two and as such, this admission constitutes a clear violation of the mandatory requirements under the Tender Document and the Act.

56. Counsel submitted that mandatory requirements are not optional and that any bidder who fails to meet the same ought to be automatically disqualified from the procurement process. In support of his argument, he referred the Board to the provisions under Section 79 and 80(2) of the Act and the holding in *Republic v Public Procurement Administrative Review Board Ex-parte Meru University of Science & Technology; M/S AAKI Consultants Architects and Urban Designers (Interested Party) [2019] eKLR, Republic v Public Procurement Administrative Review Board;*





*Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR and Republic v Public Procurement Administrative Review Board & 2 others Ex parte BABS Security Services Limited [2018] eKLR.*

57. Counsel submitted that the Procuring Entity ought not to have awarded the subject tender to the Interested Party and in view of Section 173 of the Act, the Applicant had established a basis for the interference of the Procuring Entity's decision.

58. Counsel urged the Board to allow the instant Request for Review as amended with costs as prayed.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions**

59. In his submissions, Mr. Mamo relied on the documents filed before the Board on behalf of Parliamentary Joint Services, the Procuring Entity, in the instant Request for Review.

60. Mr. Mamo pointed out that the Procuring Entity served its response upon the Applicant's previous advocates on record on 7<sup>th</sup> January 2025 and the same was duly received and stamped and as such, the allegation of non-service was a non-issue, ought not to have been raised through the back door, and the Board ought to disregard the same.

61. Counsel referred the Board to Circular No. 02/2020 dated 24<sup>th</sup> March 2020 and submitted that the Applicant's response and Written



Submissions filed pursuant to the Board's Directions of 15<sup>th</sup> January 2025 are out of time and ought to be struck out to ensure compliance with the contents of the aforementioned circular. On the issue of the Amended Request for Review, he submitted that it did not bear the official stamp of the Board and according to Circular No. 02/2020 dated 24<sup>th</sup> March 2020, for a document to be deemed as being duly filed, it ought to bear the stamp of the Board. He further submitted that he requested the Board on 15<sup>th</sup> January 2025 to be served with a copy of the duly filed Amended Request for Review bearing the official receipt stamp but none was availed.

62. Counsel submitted that in the event the Board deems the Amended Request for Review as having been duly filed, the Procuring Entity was opposed to the same for the reason that it was filed 21 days after issuance of the letter of notification of intention to award the subject tender. In saying so, he pointed out that by filing the Amended Request for Review, the Applicant had departed from its earlier request for review application and was adopting the Amended Request for Review which according to the Act, ought to be filed within 14 days from the date of receipt of the notification of intention to award.

63. Mr. Mamo pointed out that the Amended Request for Review as filed is incompetent and ought to be dismissed in view of the fact that it was also unfair to both the Procuring Entity and the Interested Party to file their responses and for the Applicant to then file an amended request for



review on an issue that was live before the Board in an attempt to defeat the preliminary objections raised.

64. On whether the preliminary objections raised by the Procuring Entity were proper and on pure points of law, counsel referred the Board to the holding in *Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) E.A 696 (cited in Ahmed Noorani & another v Rajendra Ratilal Sanghani [2020] eKLR)* and submitted that the failure to sue the right mandatory party to the Request for Review is a point of law as stipulated under Section 170(b) of the Act. He argued that the instant Request for Review ought to be struck out on for failure to sue the right mandatory party, i.e. accounting officer of the procuring entity (Parliamentary Joint Services) since this issue goes to the root of the review application and affects the jurisdiction of the Board to hear and determine the matter. Counsel while referring to the holding by the High Court in *Misc Civil Application No. 52 of 2018: R vs Public Procurement Administrative Review Board Ex-Parte Britam Life Assurance Company and Another (2018) eKLR* pointed out that the use of the word 'shall' under Section 170 of the Act imports a formal command or mandate and cannot be said to be permissive but rather mandatory.

65. It is the Procuring Entity's case that its Director General received a Notification of Appeal and a copy of the Request for Review both addressed to the Accounting Officer, Parliamentary Service Commission and Parliamentary Service Commission yet the Director General Parliamentary Joint Services and Accounting Officer, Parliamentary



Service Commission are not one and the same for purpose of the procurement and review proceedings herein.

66. Counsel submitted that the Parliamentary Service Commission is a constitutional commission established under Article 127 of the Constitution and that the Commission has been empowered by the Constitution and Parliamentary Service Act to constitute offices and as such, there are established three services being the National Assembly Services, the Senate Services and the Joint Services.

67. He pointed out that pursuant to the provisions of Section 2 of the Public Finance Management Act, each service has its own distinct accounting officer who are the Clerk of the National Assembly, Clerk of the Senate and Director General, Parliamentary Joint Services and that while each of these services are under the ambit of the Commission, they are distinct procuring entities as envisioned under the Act carrying out distinct procurement and asset disposal activities based on their own procurement plans. He further pointed out that the Parliamentary Service Commission is a vote on its own and a separate accounting officer and it is therefore, a distinct procuring entity with respect to the impugned subject tender.

68. In support of his argument, he referred the Board to the holding by the Supreme Court of Nigeria in *Goodwill and Trust Investment Ltd and Another v Will and Bush Ltd*, the decisions by the High Court of Kenya and the Court of Appeal in *El Roba Enterprises Limited & 5 others v James*



*Oyondi t/a Betoyo Contractors 5 others [2018] eKLR & James Oyondi t/a Betoyo Contractors & another v El Roba Enterprises Limited & 8 others [2019] eKLR as regards Section 170(b) of the Act, the holding by Justice Thande in Judicial Review No. 21 of 2019, Republic v Public Procurement Administrative Review Board v Kenya Ports Authority & Another ex parte Jalaram Industrial Suppliers Limited (2019) eKLR and PPARB Application No. 111/2020.*

69. While referring to the case of *Zephir Holdings Limited v Mimosa Plantations Limited, Jeremiah Matagaro & Ezekiel Misango Mutisya [2014] KEHC 1981 (KLR)*, counsel submitted that a party does not become a party to a suit until there is an order of joinder upon its application or suo moto by the court. He indicated that the Director General of the Procuring Entity has not applied to be a party to the instant Request for Review and neither has the Board made any suo moto orders as to join him as a party to the instant proceedings so as to clothe it with jurisdiction to hear and determine the matter.
70. He further submitted that failure to join the accounting officer of the Procuring Entity to the instant Request for Review is fatal and not a mere procedural technicality that can be cured by an amendment.
71. On the substantive issues raised on whether the Procuring Entity in awarding the Interested Party carried out the procurement process in the subject tender in accordance with the provisions of the Act and the Tender Document, Mr. Mamo submitted that the procurement



proceedings and the award of tender to the Interested Party was beyond reproach as it was done in strict compliance with requirements of the Tender Document and the law.

72. He argued that the Applicant had misconstrued the provisions of the Tender Document and arrived at an erroneous conclusion in an attempt to unfairly subvert the tendering process. He made reference to Section 79 and 80(2) of the Act and the holdings in *Miscellaneous Civil Application No. 85 of 20 of 2018 Republic Vs Public Procurement Administrative Review Board Ex Parte Meru University of Science and Technology; M/s Aaki Consultants Architects and Urban Designers (Interested Party) 2019* eKLR and *PPARB Application No. 115 of 2020 BOC PLC Vs Kenyatta National Hospital* on what is to be considered as a responsive tender and that ITT 31.1 and 31.2 stipulated that responsiveness would be based on the contents of the tender itself without material deviation, reservation or omission.

73. Counsel pointed out that ITT 6.2 provided that the invitation to tender notice issued by the procuring entity is not part of the tender documents and that this was the holding by the Board in *PPARB Application No. 148 of 2020 Riverbank Solutions Limited & Sporto Limited and The Accounting Officer, County Government of Nakuru (Respondents) And Dynamic Financial IT Research Consulting (Interested Party)*. He argued that the only reference to the tender security is provided at Paragraph 6 of the Invitation to Tender Notice, under Section II – Tender Data Sheet of the Tender Document which did not specify that the tender security was



required per lot and under mandatory Requirement No. 7 under Section III- Evaluation and Qualification Criteria of the Tender Document which did not stipulate that bidders ought to submit the tender security per lot.

74. Mr. Mamo submitted that has the Evaluation Committee disqualified bidders who did not submit a tender security of Kshs 500,000/- per lot at the mandatory evaluation stage, they would have acted in contravention of the provisions of the Tender Document and the Act by introducing an extraneous requirement that was not part of the evaluation criteria at the mandatory/preliminary stage. He further submitted that out of the 10 bidders who responded to the subject tender, 8 bidders provided only one tender security inferring that their interpretation of this requirement was that they were required to submit only one tender security. In saying so, he referred the Board to the holding in *PPARB Applications No. 145/2020, 146/2020 & 147/2020*.

75. Counsel submitted that the Applicant was only disqualified at the Financial Evaluation stage on the basis that the Interested Party was the lowest evaluated and there was therefore, no undue advantage granted to the Interested Party at the expense of the Applicant in complying with the mandatory requirements as required by the Tender Document. He further submitted that the Applicant has failed to plead and disclose with precision how the Procuring Entity breached duties imposed on it by the Act or Regulations 2020 and how it has suffered or risks suffering, loss or damage due to the Procuring Entity's non-compliance with the law.



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

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

77. In her submissions, Ms. Nungo for the Interested Party relied on the documents filed by the Interested Party before the Board in the instant Request for Review.

78. Ms. Nungo urged the Board to note from the records of the instant Request for Review, that after the Interested Party had filed, and the Board had served the Applicant with the Interested Party's Notice of Preliminary Objection at 17:17hrs on 13<sup>th</sup> January 2025, the Applicant, in an attempt to defeat the Interested Party's Preliminary Objection, served the Interested Party with an amended Request for Review (amended on 13<sup>th</sup> January 2025) at 19:39hrs on 13<sup>th</sup> January 2025. Counsel submitted that there is no doubt that the amendment was intended to cure the jurisdictional issue that was raised. She pointed out that it is the practice of the Board that service is by way of email from the Board to parties or amongst parties and that it is not proper to allow an amendment of pleadings if it prejudices the legal rights or interests of other parties or introduces new issues.

79. Counsel submitted that the Interested Party objects to the said Amended Request for Review as the same is fatally defective and incompetent as it offends the mandatory provisions of Section 167(1) of the Act in that the nature of the amendment equated the Amended Request for Review to a fresh/new request for review that introduced a new party and has been





filed out of the mandatory stipulated timeline of 14 days of notification of award rendering it fatally and incurably defective and for dismissal with costs.

80. She referred the Board to Section 57(a) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya and argued that the 14 days within which the Applicant ought to have filed the Request for Review started running on the 24<sup>th</sup> December 2024 and lapsed on the 6<sup>th</sup> January 2025. Counsel submitted that the Amended Request for Review is time barred and the Applicant is therefore estopped from seeking review of the decision of the Accounting Officer of the Procuring Entity as contained in the Letter of Regret dated 23<sup>rd</sup> December 2024. In support of her argument, she referred the Board to the holding in *PPARB Application No.17 of 2020 Afra Holdings Limited and The Accounting Officer, Export Processing Zone Authority, Property Dynamics Limited and Erdemann Property Limited and Nicholus v Attorney General & 7 Others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgement) (hereinafter referred to as "the Nicholus case")*.

81. Counsel submitted that the Applicant contrary to Section 167(1) of the Act failed to plead or demonstrate in its request for review application the specific duty that is impose on the Procuring Entity that has been breached thus resulting in the Applicant allegedly suffering loss or damage. She invited the Board to carefully peruse the Request for Review and the Statement in Support filed by the Applicant and pointed out that



it is evident that the Applicant conspicuously failed to plead and / or demonstrate with specificity the breach of duty imposed on the Procuring Entity by the Act or Regulations 2020 and as such, the Applicant has no legitimate grievance with respect to the subject tender because it has not pleaded and / or demonstrate with specificity the breach of duty imposed on the Procuring Entity by the Act or Regulations 2020.

82. It is the Interested Party's case that a threshold requirement for a candidate or tenderer to have standing to institute a request for review before the Board is to plead and/or demonstrate the breach of duty imposed on a procuring entity by the Act or Regulations 2020 and that by failing to meet this threshold, a candidate or tenderer lacks the locus standi to institute a request for review before the Board. Ms. Nungo submitted that the Applicant only mentioned in overall Article 227 of the Act and as such, there is no foundation for their claim of breach in the matter even with the opportunity granted by the Board to file a response to the Interested Party's Replying Affidavit. In support of her argument, she referred the Board to the holding *El Roba Enterprises Limited & 5 others v James Oyondi t/a Betooyo Contractors 5 others [2018] eKLR*.

83. On the issue of whether the Applicant failed to accompany its Request for Review with such statements as it considers necessary in support of its request for review, counsel submitted that Regulation 203(1)(2)(b) of Regulations 2020 requires in mandatory terms for a request for review to be accompanied by such statements as an applicant considers necessary in support of its request. She further submitted that from the Applicant's



Statement in Support of the Request for Review, the deponent, Kellen Njoki Nyaga, conspicuously failed to adduce as evidence a company resolution confirming that she has authority to swear/sign the Statement in Support when instituting the Request for Review on behalf of the Applicant rendering it fatally defective, bad in law and in breach of Regulation 203(2)(b) of Regulations 2020. In support of her argument, she referred the Board to the holding by the Court of Appeal in *Spire Bank Limited v Land Registrar & 2 others [2019] eKLR*.

84. Counsel argued that even if the Applicant had a sole director, this did not mean that it ought not to include the company resolution since the company and its director are two distinct entities in law as was held in *Salmon v Salmon & Co. Ltd UKHL 1, AC 22*.

85. With regard to the objection pertaining to defectiveness of the Request for Review drawn and filed before the Board on 3<sup>rd</sup> January 2025 for failure to join the accounting officer of the Procuring Entity as a party to the Request for Review in contravention to Section 170(b) of the Act as read with Regulation 203(1) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020, counsel submitted that the Interested Party filed its Notice of Preliminary Objection and responses to the Instant Request for Review on 13<sup>th</sup> January 2025 which was served upon all parties at 5:17 p.m. She further submitted that she saw an email from the Applicant's previous advocates sent to parties and the Board on 13<sup>th</sup> January 2025 at 7:39 p.m. sharing the Amended Request for Review which was also shared by the Board via email on 16<sup>th</sup> January 2025 at



10:22 a.m. Ms. Nungo in support of the Procuring Entity's submissions indicated that as far as the Interested Party is concerned and in view of the provision of Circular No. 02/2020 dated 24<sup>th</sup> March 2020, the Amended Request for Review was not duly filed having not been acknowledged and stamped by the Board Secretary and as such, there is no Amended Request for Review on record.

86. On the substantive issues raised in the instant Request for Review, Ms. Nungo submitted that the Applicant did not demonstrate or substantiate its claim regarding non-compliance by the Interested Party with the requirements in the Tender Document. She pointed out that is a well-established rule of evidence that whosoever asserts a fact is under an obligation to prove it in order to succeed and that it is only after the Applicant has discharged its burden of proof, that the evidential burden shifts to the Interested Party to show, if called upon to do so, that there is sufficient evidence that it satisfied all the requirements of the subject tender as provided in the Tender Document.

87. In support of her argument, she referred to the holding in *PPARB Application No.19 of 2022 Madison General Insurance Kenya Limited v Lt Col. (RTD) B. N. Njiraini, The Accounting Officer (KEBS) and CIC Insurance Limited* which was upheld by the Court of Appeal in *Civil Appeal No. E270 of 2022 CIC General Insurance Limited v Madison General Insurance Kenya Limited, Public Procurement Administrative Review, LT. Col. (RTD) B. N. Njiraini, The Accounting Officer (KEBS)* and the holding



by the Supreme Court in *Petition No.12 of 2019 Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR*.

88. Counsel submitted that the accounting officer of the Procuring Entity did not breach any provisions of the law or the Tender Document when it awarded the subject tender to the Interested Party.

89. Without prejudice to the foregoing and in the alternative, it is the Interested Party's case that the Applicant's allegations border on information and/or documentation that is illegally in the possession of the Applicant since the same is confidential in nature pursuant to Section 67 of the Act and as such, the Applicant cannot benefit from an illegality and is estopped from making such allegations against the Interested Party.

90. She urged the Board to dismiss the instant Request for Review for lacking in merit with costs.

### **Applicant's Rejoinder**

91. In a rejoinder, Mr. Sang submitted that the Procuring Entity's and the Interested Party's Preliminary Objections are time barred having been filed outside the 3 days stipulated under Regulation 209 of Regulations 2020. At this juncture, Mr. Mamo interjected and raised an objection to submission by counsel arguing that he ought not to be allowed to raise new issues in his rejoinder which were not part of the Applicant's pleadings and submissions.



92. Mr. Sang proceeded to submit that it was not in contest that the Amended Request for Review was filed and acknowledged as received by the Board and Parties and failure by the Board to stamp the same ought not to be visited against the Applicant.

93. He further submitted that the amendment by the Applicant of the Request for Review application was before close of pleadings and in line with the Civil Procedure Rules and that no leave was required by the Board in filing the same. Counsel submitted that pursuant to Article 25 of the Constitution, the right to a fair hearing is unlimited and as such the Board ought to balance the scales of justice in light of the technicalities experienced in the matter.

94. He urged the Board to grant the prayers sought in the instant Request for Review.

### **CLARIFICATIONS**

95. When asked to clarify if the Applicant was contesting service of the Procuring Entity's and Interested Party's responses to the instant Request for Review, Mr. Sang submitted that the main reason as to why he raised the issue of filing of the affidavit of service was for purposes of computation of time so as to ascertain when service upon the Applicant was effected and if the Preliminary Objections were raised within the stipulated statutory timelines while establishing if the Board ought to consider the applicability of the holding by the Supreme Court in the Nicholus case that was relied upon by the Interested Party. He further



confirmed that the Amended Request for Review was filed on 13<sup>th</sup> January 2025.

96. As to whether the Applicant made a realization that the Form of Tender as provided in the Tender Document was invalid as alleged and proceeded with filling out the same without seeking a clarification as provided under the Tender Document, Mr. Sang submitted that the Applicant's case is in regard to failure by the Procuring Entity to evaluate the Interested Party's tender in line with the provisions stipulated in the Tender Document.

97. When asked to clarify to the Board how the Applicant came to learn that the Interested Party had only submitted one tender security as alleged in the subject tender, Mr. Kiprono submitted that during tender opening, bidders present get to learn of what other bidders have submitted and the Applicant's allegation does not mean that it was in breach of Section 67 of the Act. He referred to the contents in the form of tender that are read out and submitted that if the Interested Party provide one bid bond, it meant that the same was defective in view of the fact that there were two lots in the subject tender.

98. When asked to confirm to the Board which document the Board ought to treat as the primary legal and effective request for review before it in view of the Request for Review filed on 3<sup>rd</sup> January 2025 and the Amended Request for Review filed on 13<sup>th</sup> January 2025 and upon which the Board ought to make its final orders, Mr. Sang indicated that the



Amended Request for Review ought to be treated as the primary pleading in the matter.

99. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 3<sup>rd</sup> January 2025 was due to expire on 24<sup>th</sup> January 2025 and that the Board would communicate its decision to all parties to the Request for Review via email.

### **BOARD'S DECISION**

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

**A. Whether the Preliminary Objections as raised by the Respondents and the Interested Party are on pure points of law and proper and if the same have been raised within the stipulated statutory timelines provided under Regulation 209 of Regulations 2020.**

Depending on the determination of Issue A;

**B. Whether the Board has jurisdiction to hear and determine the instant Request for Review as amended;**

In determining the second issue, the Board shall make a determination on:





**i Whether the Amended Request for Review which was amended on 13<sup>th</sup> January 2025 was lodged with the Board outside the stipulated statutory period of 14 days from the date of notification of award contrary to Section 167(1) of the Act as read with Regulation 203(2)(c)(ii) of Regulations 2020 thus ousting the jurisdiction of the Board.**

**ii Whether the Request for Review dated 2<sup>nd</sup> January 2025 and filed on 3<sup>rd</sup> January 2025 is fatally defective for failure to join the Procuring Entity's Accounting Officer as a party to the Request for Review contrary to Section 170(b) of the Act as to divest the Board of its jurisdiction.**

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

**iii Whether the Applicant has locus standi before the Board.**

Depending on the determination of Issue B;

**C. Whether the Procuring Entity in award of the subject tender to the Interested Party acted contrary to the provisions of the Tender Document as read with the Constitution, the Act, and Regulations 2020.**

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

**Whether the Preliminary Objections as raised by the Respondents and the Interested Party are on pure points of law and proper and if the same have been raised within the stipulated statutory timelines provided under Regulation 209 of Regulations 2020.**

101. The Procuring Entity at paragraphs 1 to 4 of its Memorandum of Response dated 7<sup>th</sup> January 2025 and filed on even date raised a preliminary objection seeking for the Request for Review dated 2<sup>nd</sup> January 2025 and filed on 3<sup>rd</sup> January 2025 to be struck out for being materially defective and contrary to Section 170 of the Act due to failure by the Applicant to join the correct procuring entity and its accounting officer to the instant Request for Review application.

102. In his submissions, Mr. Mamo pointed out that the Tender Document was explicit that the procuring entity in the subject tender was the Parliamentary Joint Services which is a distinct procuring entity from the Parliamentary Service Commission and carries out distinct procurement and asset disposal activities based on its own procurement plans. He submitted that the Request for Review dated 2<sup>nd</sup> January 2025 and filed on 3<sup>rd</sup> January 2025 is fatally defective having joined the Accounting Officer Parliamentary Service Commission and Parliamentary Service Commission as Respondents and instead of the Accounting Officer Parliamentary Joint Services and Parliamentary Joint Services as parties as stipulated under Section 170 of the Act.



103. According to the Procuring Entity's Supplementary Submissions, Mr. Mamo submitted that the Applicants' Amended Request for Review is improperly before the Board and is time barred having been filed outside the 14 days' statutory period provided under Section 167(1) of the Act.

104. On its part, the Interested Party filed on 13<sup>th</sup> January 2025 a Notice of Preliminary Objection raising three grounds of objection to the effect that the Request for Review dated 2<sup>nd</sup> January 2025 and filed on 3<sup>rd</sup> January 2-25 is fatally defective as it offends the provisions of Section 167(1) and 170(b) of the Act as read with Regulations 203(1), (2)(b), and the Fourteenth Schedule of Regulations 2020 for failure to (a) join the accounting officer of the Procuring Entity as a party to the Request for Review, (b) failure to plead/and or demonstrate the specific duty imposed on the Procuring Entity that has been breached resulting to the Applicant allegedly suffering prejudice and enormous financial loss, and (c) have the Request for Review as filed supported by a competent Statement in Support of the Review.

105. According to the Interested Party's Supplementary Submissions, Ms. Nungo submitted that the Applicant in an attempt to defeat the third limb of the Interested Party's Preliminary Objection introduced amendments to the Request for Review filed on 3<sup>rd</sup> January 2025 by filing an Amended Request for Review on 13<sup>th</sup> January 2025 which is a clear admission that it had not joined the Accounting Officer of the Procuring Entity and there is therefore no dispute on the facts pleaded. She further submitted that the Amended Request for Review filed on 13<sup>th</sup> January 2025 is a



new/fresh request for review application filed outside the period of 14 days from the date of notification of award contrary to Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020.

106. In response, the Applicant through Mr. Sang and Mr. Kiprono submitted that the Preliminary Objections by the Procuring Entity and the Interested Party were not proper preliminary objections within the meaning of a preliminary objection provided for in the case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited (1969) EA* since it would require the Board to interrogate the evidence provided before it and the conflicting facts as presented by parties. They further submitted that the objections were time barred having been raised outside the statutory timelines stipulated under Regulation 209 of Regulations 2020 and ought to be struck out.

107. Having carefully considered parties' pleadings and submissions herein, the Board is called upon to determine if the Preliminary Objections raised by both the Procuring Entity and the Interested Party in the instant Request for Review as amended are proper and based on pure points of law and if the same were raised within the stipulated statutory timelines provided under Regulation 209 of Regulations 2020.

108. There is no doubt that the parameters of a preliminary objection are well settled. A preliminary objection must only raise issues of law. The principles that this Board is urged to apply in determining the merits or otherwise of the Preliminary Objections by the Procuring Entity and the



Interested Party were set out by the Court of Appeal in the case of **Mukisa Biscuit 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."***

109. At page 701 Sir Charles Newbold, P added that:

***"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..."***

110. 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.



111. The Board is cognizant of the holding by Justice J. B. Ojwang in the case of **Oraro v Mbaja (2005) eKLR** where he held that:

***"I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point."***

112. This position was cited with approval by Justice Makau in **Petition No. 194 of 2019, The Clerk, Nairobi City County Assembly v. The Speaker, Nairobi City County Assembly & Another; Orange Democratic Party & 4 others (Interested Parties) [2019] eKLR** where the Judge held that:

***"After careful consideration of the Notice of the Preliminary Objection, pleadings, and the rival submissions, it is clear that ground 2 and 3 of the PO are overtaken by events because they relate to the petitioner's Notice of Motion that was disposed of by consent of the parties on 30.10.2019. On the other hand, ground 4 of the PO raises a factual question that***



**requires evidence to prove and as such it does not stand within the four walls of a valid PO. The foregoing view is fortified by Oraro v. Mbaja [2005] eKLR...**

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

***"a preliminary objection could only be properly taken where what was involved was a pure point of law but 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"***

114. From the foregoing, there is no doubt that a preliminary objection ought to be based on a pure point of law and not on factual questions that require evidence to prove the grounds raised in the objection.

115. Turning to the circumstances in the instant Request for Review, the Board notes that the objections by both the Procuring Entity and the Interested Party are premised on breach by the Applicant of Sections 167(1) and 170(b) of the Act as read with Regulations 203(1), (2)(b), and the Fourteenth Schedule of Regulations 2020.



116. We note that these objections as raised are based purely on points of law which emerge from clear implications of pleadings filed by the Applicant and basically touch on the competency of the Request for Review as filed by the Applicant. The Board would therefore not be required to inquire into any evidence as presented in the parties' pleadings or to investigate facts so as to make a determination on whether the instant Request for Review as amended by the Applicant is competent so as to invoke the jurisdiction of the Board to hear and determine the same.

117. In the circumstances, we find that the Procuring Entity's Preliminary Objection as raised in its Memorandum of Response dated 7<sup>th</sup> January 2025 and filed on even and the Interested Party's Notice of Preliminary Objection dated 13<sup>th</sup> January 2025 and filed on even date are based on pure points of law and are proper preliminary objections in law.

118. As to whether the Preliminary Objections raised by both the Procuring Entity and the Interested Party are time barred, we note that Regulation 209(1) of Regulations 2020 provides as follows:

***"Preliminary Objection  
(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."***

119. Regulation 206 of Regulations 2020 referred to above provides that:

***"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.”***

120. In essence, Regulation 206 and 209(1) of Regulations 2020 provides that any party notified by the Board Secretary of a date fixed for hearing of a request for review may file a preliminary objection to the hearing of the request for review within three days from the date of being notified by the Board Secretary of the date fixed to hear the request for review. As such, any preliminary objection filed by any of the parties to a request for review ought to be filed within three (3) days from the date such party is notified of the date fixed for hearing of the request for review by the Board Secretary and not three days from the date of notification of filing of the request for review contemplated under Regulation 205(1) and (5) of Regulation 2020.

121. Having carefully studied the Board’s records, we note that the Board Secretary notified parties on 10<sup>th</sup> January 2025 vide Hearing Notice dated 10<sup>th</sup> January 2025 that the instant Request for Review was scheduled to be heard virtually on 15<sup>th</sup> January 2025. The Preliminary Objection by the Procuring Entity was filed on 7<sup>th</sup> January 2025 which was eight (8) days before the Procuring Entity was notified by the Board’s Secretary of the scheduled hearing date while the Interested Party’s Notice of Preliminary was filed on 13<sup>th</sup> January 2025 which was one (1) day after parties were notified of the scheduled hearing date. In saying so, we are guided by the provisions of Section 57 of the Interpretation and General Provisions Act (hereinafter referred to as “the IGPA”) which provides for



computation of time 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.***



122. In computing time when the Interested Party ought to have filed its Notice of Preliminary Objection, the 10<sup>th</sup> January 2025 is excluded pursuant to Section 57(a) of the IGPA being the day that the Interested Party was duly served with the Hearing Notice. As such the three (3) days ought to have started running from 11<sup>th</sup> January 2025 and lapsed on 13<sup>th</sup> January 2025. However, in view of the fact that Section 57(c) and (d) of the IGPA specifies the circumstances under which excluded days shall not be reckoned in computation of time, we note that 11<sup>th</sup> January 2025 being a Saturday and an official non-working day and 12<sup>th</sup> January 2025 being a Sunday and an unofficial working ought not to be reckoned in computation of time. As such, the 3 days stipulated under Regulation 209(1) of Regulations 2020 ought to have started running on 13<sup>th</sup> January 2025 and lapsed on 15<sup>th</sup> January 2025. The Interested Party's Notice of Preliminary Objection as filed was within the stipulated statutory period of three (3) days as provided under Regulation 209(1) of Regulations 2020.

123. In the circumstances, the Board finds that both the Procuring Entity's and the Interested Party's Preliminary Objections were filed within the required statutory period and are thus properly before the Board.

**Whether the Board has jurisdiction to hear and determine the instant Request for Review as amended;**

124. 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 taking any further steps in the matter.

125. 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."***

126. 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.**

127. 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."***

128. 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."***

129. The Court of Appeal in **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, 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 overarching 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...."***



130. 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."***

131. 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.

132. 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."***

133. 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."***



134. 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.

135. The jurisdiction of the Board is provided for and also limited under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for 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. [Emphasis by the Board]***

***(2) .....***

***(3) .....***





.....  
**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.***

136. 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.



137. 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.

138. 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.***

139. 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.



140. 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.

141. 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.***

142. 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 as 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.

143. 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. The Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches. This was the holding by this Board in **PPARB Application No. 87 of 2022 Nectar Produce (K) Limited v Accounting Officer, Kenya Airports Authority & others** and in **PPARB Application No. 97 of 2022 Peesam Limited v The Accounting Officer, Kenya Airports Authority & Others**.

144. The Board is also guided by the holding in **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR** where the High Court at paragraphs 65, 66 and 67 noted that to determine when time starts to run, such determination can only be made upon an examination of the alleged breach and when the aggrieved tenderer had knowledge of the said breach and held:

***66. The answer then to the question when time started to run in the present application can only be reached upon an***



***examination of the breach that was alleged by the 2<sup>nd</sup> Interested Party in its Request for Review, and when the 2<sup>nd</sup> Interested Party had knowledge of the said breach. ...***

***67. ... Therefore, time for filing a review against this particular alleged breach started to run on 10<sup>th</sup> November 2017, and the Respondent had no jurisdiction to consider the alleged breach when it was included in the Request for Review filed on 21<sup>st</sup> February 2017, as the statutory period of filing for review of 14 days had long lapsed. Any decisions by the Respondent on the alleged breach were therefore ultra vires and null and void.”***

145. The Board now turns to look at the three limbs of the preliminary objections raised in the instant Request for Review as amended.

**i . As to whether the Amended Request for Review which was amended on 13<sup>th</sup> January 2025 was lodged with the Board outside the stipulated statutory period of 14 days from the date of notification of award contrary to Section 167(1) of the Act as read with Regulation 203(2)(c)(ii) of Regulations 2020 thus ousting the jurisdiction of the Board.**



146. During the hearing, Mr. Sang for the Applicant submitted that the Amended Request for Review amended on 13<sup>th</sup> January 2025 ought to be treated by the Board as the Applicant's primary pleading upon which the Board should make its final orders in these proceedings.

147. Both the Procuring Entity and the Interested Party sought for the Amended Request for Review to be struck out on the grounds, inter alia, that the Amended Request for Review amounts to a fresh/new request for review and having been filed against new parties not included in the Request for Review dated 2<sup>nd</sup> January 2025 and filed on 3<sup>rd</sup> January 2025, it is time barred and contrary to the provisions of Section 167(1) of the Act read with Regulation 203 (2)(c)(ii) of Regulations 2020. They further argued that the amendment by the Applicant was an attempt to defeat their preliminary objections and defence as it was clearly prompted by the Procuring Entity's and the Interested Party's Preliminary Objections. Ms. Nungo for the Interested Party submitted that the Amended Request for Review was served upon the Interested Party and the Procuring Entity on 13<sup>th</sup> January at 19:39hrs, after the Applicant had been served with the Interested Party's Preliminary Objection on 13<sup>th</sup> January 2025 at 17:17 hrs.

148. The Applicant on its part urged the Board to note that neither the Procuring Entity nor the Interested Party had filed any Affidavit of Service so as to prove when the Applicant was served with their respective pleadings and to determine whether or not the Applicant amended the Request for Review filed on 3<sup>rd</sup> January 2024 upon learning of the





Preliminary Objections raised by the Procuring Entity and Interested Party. The Applicant submitted that the Amended Request for Review is properly on record in view of provisions under Section 58 of the IGPA and Section 8 of the Civil Procedure Act.

149. It is not in dispute that the Applicant was notified of the outcome of evaluation of the subject tender by the Accounting Officer of the Procuring Entity on 23<sup>rd</sup> December 2024. This forms the benchmark date for purposes of determining when an aggrieved candidate or tenderer ought to have sought administrative review in the subject tender.

150. There is no doubt that the Applicant was prompted to file with the Board on 3<sup>rd</sup> January 2025 a Request for Review dated 2<sup>nd</sup> January 2025 through DRO Ngala and Partners Advocates (hereinafter referred to as "the Applicant's Previous Advocates on Record") following receipt of its notification letter as seen from the contents at grounds 4, 5, and 6 and the prayers sought in the Request for Review dated 2<sup>nd</sup> January 2025 filed on 3<sup>rd</sup> January 2025.

151. From the Board's records, we note that the Applicant's Previous Advocates on Record sent to the Board via email on 13<sup>th</sup> January 2025 at 19:39 hrs. an Amended Request for Review amended at Nairobi on 13<sup>th</sup> January 2025 and accompanied by an Applicant's Statement in Support of the Request for Review sworn by Kellen Njoki Nyaga on 13<sup>th</sup> January 2025. In the same email, both the Procuring Entity and the Interested Party were served with this Amended Request for Review. We also note



that the Board's Secretary on 16<sup>th</sup> January 2025 at 10:22 a.m. shared the Amended Request for Review with advocates for the Procuring Entity, the Interested Party and CK Advocates, the Applicant's new advocates who had come on record having filed a Notice of Change of Advocates dated 15<sup>th</sup> January 2025. It is therefore undeniable that the Amended Request for Review was received and shared with parties herein.

152. From the contents of the Amended Request for Review, we note that the Applicant, *inter alia*, (a) amended the names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent from the Accounting Officer, Parliamentary Service Commission and Parliamentary Service Commission to read the Director General/Accounting Officer Parliamentary Joint Services and Parliamentary Joint Services, and (b) amended the date of the Amended Request for Review Application to read 13<sup>th</sup> January 2025. It is evident that the cause of action between different parties, that is, the parties in the Amended Request for Review filed on 13<sup>th</sup> January 2025 is different from that of the parties in the Request for Review filed on 3<sup>rd</sup> January 2025. In this regard, the Board is of the considered view that the Amended Request for Review filed on 13<sup>th</sup> January 2025 amounted to a new request for review application and the Board must determine when the alleged breach of duty occurred for the 14 days' statutory timelines to start running.

153. We note that the claim by the Applicant in the Amended Request for Review did not change and the Applicant still claimed to have been aggrieved by the decision of the Accounting Officer of the Procuring Entity



as communicated on 23<sup>rd</sup> December 2024 in awarding the subject tender to the Interested Party. This is evidenced by the contents at grounds 4, 5, and 6 and prayers sought in the Amended Request for Review filed on 13<sup>th</sup> January 2025. As such, the Applicant being aggrieved by the outcome of the evaluation of the subject tender as notified on 23<sup>rd</sup> December 2024 ought to have challenged the same within the statutory period of 14 days stipulated under Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020.

154. In computing time when the Applicant should have sought administrative review before the Board, we are guided by Section 57 of the IGPA aforementioned and note that the 23<sup>rd</sup> December 2024 is excluded pursuant to Section 57(a) of IGPA being the date when the Applicant learnt of the occurrence of the alleged breach complained of. This means that the 14 days' statutory period started running on 24<sup>th</sup> December 2024 and lapsed on 6<sup>th</sup> January 2025. In essence, the Applicant had between the 24<sup>th</sup> December 2024 and 6<sup>th</sup> January 2025 to seek administrative review before the Board with respect to the decision of the Procuring Entity in the subject tender.

155. However, the Applicant opted to challenge the said decision of the Accounting Officer of the Procuring Entity to award the subject tender to the Interested Party *vide* the Amended Request for Review filed on 13<sup>th</sup> January 2025 which was the 21<sup>st</sup> day from the date of receipt of its notification of regret letter dated 23<sup>rd</sup> December 2024.



156. In the circumstances, the Board finds that the Amended Request for Review filed on 13<sup>th</sup> January 2025 was filed outside the statutory period of 14 days stipulated under Section 167(1) of the Act as read with Regulation 203(2)(c)(ii) of Regulations 2020. The Board therefore lacks jurisdiction to entertain the substantive issues raised in the Amended Request for Review filed on 13<sup>th</sup> January 2025.

157. Accordingly, this ground of objection succeeds.

158. Noting that the Amended Request for Review filed on 13<sup>th</sup> January 2025, which the Board has found to have been filed out of time, was necessitated by the failure of the Applicant to join as parties to the request for review application the Accounting Officer of the Procuring Entity and the Procuring Entity that floated the subject tender, we deem it necessary to address the second limb of the second issue framed for determination.

**ii As to whether the Request for Review dated 2<sup>nd</sup> January 2025 and filed on 3<sup>rd</sup> January 2025 is fatally defective for failure to join the Procuring Entity's Accounting Officer as a party to the Request for Review contrary to Section 170(b) of the Act as to divest the Board of its jurisdiction**

159. The Board is cognizant of the provisions under Section 170 of the Act which provides for persons who must be parties to an administrative review as follows:

***"170. The parties to a review shall be.***



- (a) the person who requested the review;*
- (b) the accounting officer of a Procuring Entity;*
- (c) the tenderer notified as successful by the Procuring Entity; and*
- (d) such other persons as the Review Board may determine.”*  
*(Emphasis ours)*

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

161. Notably, the provisions in Section 170 of the Act are **set in mandatory terms**. The Court of Appeal in **James Oyondi t/s Betooyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR** (hereinafter referred to as “the James Oyondi case”) held that pursuant to section 170 of the Act, the joinder of an accounting officer of a procuring entity to a request for review is mandatory and failure to do so renders a request for review fatally defective and rids the Board of jurisdiction to hear the same. The court held as follows:

***“It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings, the current statute which replaced it, the PPADA, requires that the accounting officer of the procuring entity, be the party. Like the learned Judge we are convinced that the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility***



***and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we think, is where the Board's importation of the law of agency floundered. When the procuring entity was the required party, it would be represented in the proceedings by its officers or agents since, being incorporeal, it would only appear through its agents, though it had to be named as a party. Under the PPADA however, there is no such leeway and the requirement is explicit and the language compulsive that it is the accounting officer who is to be a party to the review proceedings. We think that the arguments advanced in an attempt to wish away a rather elementary omission with jurisdictional and competency consequences, are wholly unpersuasive. When a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply.***

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

***"I am not in the least persuaded that Article 159 and Oxygen principles which both command courts to seek***



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

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

162. Based on the principle of *stare decisis*, this Board is bound by decisions of the superior courts in so far as identical or similar facts and similar legal issues are concerned and should strictly follow the decisions handed down by the superior courts. The legal issues in the Request for Review dated 2<sup>nd</sup> January 2025 and filed on 3<sup>rd</sup> January 2025 by the Applicant are quite similar to those in the James Oyondi case in that the Applicant herein failed to join the Accounting Officer of the Procuring Entity as provided under Section 170(b) of the Act rendering the Request for



Review fatally defective. Instead, the Applicant lodged its request for review application against the Accounting Officer, Parliamentary Service Commission and Parliamentary Service Commission as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively. This is despite the fact that ITT 1.1 of Section II – Tender Data Sheet (TDS) at page 21 of the Tender Document explicitly provided that:

***"The Procuring Entity is: Parliamentary Joint Services"***

163. Additionally, Clause 1 of the Invitation to Tender at page ii of the Tender Document provided the name of the Procuring Entity as follows:

***"The Parliamentary Joint Services invites sealed tenders for the Provision of Shampooing Services at Bunge Tower and Other Parliament Buildings."***

164. In view of the foregoing, we find that the Request for Review dated 2<sup>nd</sup> January 2025 and filed on 3<sup>rd</sup> January 2025 was fatally and incurably defective for failure to join the Procuring Entity's Accounting Officer as a party to the Request for Review contrary to Section 170(b) of the Act and the Board would be divested of jurisdiction to hear and determine the same. The Board has similarly held as such in **PPARB Application No. 103 of 2024 Auto Drive Limited v Public Procurement Regulatory Authority; PPARB Application No. 91 of 2024 Chakra Company Limited v Bukura Agricultural College & another; and PPARB Application No. 39 of 2023 Total Energies Marketing Kenya v Kenya Railways Corporation & others.**





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

165. We have established that the Amended Request for Review filed on 13<sup>th</sup> January 2025 was filed outside the statutory period of 14 days stipulated under Section 167(1) of the Act as read with Regulation 203(2)(c)(ii) of Regulations 2020 and it therefore lacks jurisdiction to entertain the substantive issues raised in the Amended Request for Review filed on 13<sup>th</sup> January 2025.

166. We have also established that the Request for Review dated 2<sup>nd</sup> January 2025 and filed on 3<sup>rd</sup> January 2025 was fatally and incurably defective for failure to join the Procuring Entity's Accounting Officer as a party to the Request for Review contrary to Section 170(b) of the Act

167. This Board takes cognizance of the fact that it can only act in a matter where there is a competent request for review filed before it in accordance with the Act and Regulations 2020. The High Court in **Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR**, held that:

***"99. The Respondent's wide powers under section 173 of the Act can only be invoked if there is a competent Request for Review before it. Invoking powers under section 173 where there is no competent Request for Review or where the Request for Review is filed outside the period prescribed under the law is a grave illegality and a ground for this court***



***to invoke its Judicial Review Powers. As earlier stated, the act prescribes very rigid time frames and since the substance of the Notification was clear, the Interested Party knew at that point in time that its bid had been rejected.***

168. The upshot of our findings is that the Request for Review filed on the 3<sup>rd</sup> of January, 2025 and Amended Request for Review filed on 13<sup>th</sup> January 2025 is for striking out.

### **FINAL ORDERS**

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

**A. The Procuring Entity's and the Interested Party's preliminary objections as pertains the Amended Request for Review filed on 13<sup>th</sup> January 2025 being time barred be and are hereby upheld.**

**B. The Procuring Entity's and the Interested Party's preliminary objections as pertains the Request for Review dated 2<sup>nd</sup> January 2025 and filed on 3<sup>rd</sup> January 2025 being fatally and incurably defective for failure to join the Procuring Entity's Accounting Officer as a party be and are hereby upheld.**




**C. The Amended Request for Review dated 13<sup>th</sup> January 2025 and filed on even date with respect to Tender No. PJS/018/2024-2025 for Lot 1: Provision of Shampooing Services at Bunge Tower and Lot 2: Provision of Shampooing Services at Other Parliament Buildings be and is hereby struck out for want of jurisdiction.**

**D. The Request for Review dated 2<sup>nd</sup> January 2025 and filed on 3<sup>rd</sup> January 2025 be and is hereby struck out for being fatally and incurably defective.**

**E. The 1<sup>st</sup> Respondent is be and is hereby directed to proceed with Tender No. PJS/018/2024-2025 for Lot 1: Provision of Shampooing Services at Bunge Tower and Lot 2: Provision of Shampooing Services at Other Parliament Buildings to its logical and lawful conclusion taking into consideration the Board's findings in this Decision.**

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

**Dated at NAIROBI this 24<sup>th</sup> Day of January 2025.**

  
.....  
**CHAIRPERSON**  
**PPARB**

  
.....  
**SECRETARY**  
**PPARB**

