

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 5/2025 OF 27TH JANUARY 2025

BETWEEN

AMAZON TRANSPORTERS LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

KENYA NATIONAL BUREAU OF STATISTICS.....1ST RESPONDENT

KENYA NATIONAL BUREAU OF STATISTICS.....2ND RESPONDENT

JENNYGO ENTERPRISES LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya National Bureau of Statistics in respect of Tender No. KNBS/ONT/30/2023-2024 for Provision of Car Hire Services on As and When Required (AWR) Basis.

BOARD MEMBERS PRESENT

Mr. George Murugu FCI Arb & IP Chairperson & Panel Chair

Mr. Joshua Kiptoo Member

Mr. Stanslaus Kimani Member

IN ATTENDANCE

Ms. Sarah Ayoo Secretariat

Mr. Anthony Simiyu Secretariat



PRESENT BY INVITATION

APPLICANT

AMAZON TRANSPORTERS LIMITED

Ms. Desma Nungo

Advocate, NOW Advocates LLP

Ms. Elsa Maina

Advocate, NOW Advocates LLP

RESPONDENTS

ACCOUNTING OFFICER, KENYA NATIONAL BUREAU OF STATISTICS KENYA NATIONAL BUREAU OF STATISTICS

Mr. Nduhiu

Advocate, Kenya National Bureau of Statistics

INTERESTED PARTY

JENNYGO ENTERPRISES LIMITED

Mr. Justus Omollo

Advocate, Sigano & Omollo Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya National Bureau of Statistics (the Procuring Entity), together with the 1st Respondent herein, invited interested suppliers to submit their bids in response to Tender No. KNBS/ONT/30/2023-2024 for Provision of Car Hire Services on As and When Required (AWR) Basis. It was an open (national) tender and bidders were allowed to participate in any of the 4 Lots in the subject tender with the tender submission deadline being set as 2nd July 2024 at 10:00 a.m.



Submission of Bids and Tender Opening

2. According to the Tender Opening Minutes dated 2nd July 2024 under the Confidential File submitted by the Procuring Entity, the following nine (9) bidders were recorded as having submitted their bids in response to the subject tender by the tender submission deadline.

#	Bidder
1.	Stunner Rentals Kenya Limited
2.	Alhamdu Enterprises
3.	Jennygo Enterprises Limited
4.	GAP Explorer Limited
5.	Spiral Africa
6.	Alhamduu Enterprises
7.	Kylios Merchants Ltd
8.	Mara Jabal Tours & Consultancy
9.	Amazon Transporters Limited

Evaluation of Bids

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



iii. Technical Capability Evaluation

iv. Financial Evaluation

Preliminary Evaluation

4. At this stage of the evaluation, the submitted bids were to be examined using the criteria set out as Clause 2. Preliminary examination for Determination of Responsiveness under Section III- Evaluation and Qualification Criteria at pages 25 to 26 of the blank Tender Document.
5. The evaluation was to be on a Yes/No basis and any bid that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
6. The Evaluation Report dated 9th December 2024 (herein **Evaluation Report**) shows that at the end of the evaluation at this stage, 6 of the submitted bids, including that of the Applicant were found unresponsive to the mandatory requirements and thus disqualified from further evaluation. Only 3 bids, which included that of the Interested Party were responsive to the mandatory requirements and thus qualified for further evaluation.

Mandatory Technical Evaluation

7. At this stage of the evaluation, the bids successful at the Preliminary Evaluation Stage were to be examined using the criteria set out as Stage



II: Part A: Mandatory Technical Specifications Evaluation Criteria under Section III- Evaluation and Qualification Criteria at pages 26 to 33 of the blank Tender Document.

8. Each Lot had its specified requirements and bids were to be evaluated against requirements under the Lot they had been submitted. In order for a bid to qualify for further evaluation, they had to meet all the requirements under the Lot they had been submitted. Any bid that failed to meet any requirement would be disqualified from further evaluation.
9. Under Lot 1: Light Duty, Utility Passenger Vehicle (Station Wagon/Sedan)4x2, 1200-2000cc, 5-7 Seater Petrol, of the 3 bids evaluated at this stage, only the Interested Party's bid was responsive. The rest of the bids evaluated under this stage were unresponsive and thus disqualified from further evaluation.
10. Under Lot 2: Medium Duty, Utility Passenger Vehicle, 4x4, LWB, 2000-2900cc, 7-8 Seater, Diesel, of the 3 bids evaluated at this stage, only the Applicant's bid was responsive. The rest of the bids evaluated under this stage were unresponsive and thus disqualified from further evaluation.
11. Under Lot 3: Special Duty, Utility Passenger Caravan Vehicle, 4x4, LWB, 2900cc, 9-Seater Diesel there were only 2 bids evaluated at this stage. At the end of the evaluation the Interested Party's bid was established as



the only successful bid. The only other bid evaluated at this stage was disqualified from further evaluation.

12. Under Lot 4: Medium Duty, Utility Passenger Vehicle, 4x4, LWB, 2000-2900cc, 7-8 Seater Petrol there were only 2 bids evaluated at this stage. At the end of the evaluation the Interested Party' bid was established as the only successful bid. The only other bid that was evaluated at this stage was disqualified from further evaluation.

Evaluation Technical Capability Evaluation

13. At this stage of the evaluation, the bids successful at the preceding Evaluation Stage were to be examined using the criteria set out as Stage II:- Part B: Technical Capability Evaluation Criteria under Section III- Evaluation and Qualification Criteria at pages 34 to 35 of the blank Tender Document.
14. Bids were to be evaluated against 9 requirements that carried a cumulative score of 100 marks. In order for a bid to qualify for further evaluation, they had to garner at least 85 marks. Any bid that failed to garner the 85 marks threshold would be disqualified from further evaluation.
15. The only bid that qualified for evaluation at this stage was that of the Interested Party and it was scored 99 marks, surpassing the 85 marks threshold and was thus qualified for further evaluation.



Financial Evaluation

16. At this stage of the evaluation, the bids successful at the preceding Technical Evaluation Stage were to be examined using the criteria set out as clause 3 Tender Evaluation (ITT 35) at page 35 of the blank Tender Document.
17. Bids were to be evaluated through a comparison of their tender prices and the successful bid would be that offering the lowest tender price per Lot. Being that the Interested Party's bid was the only bid that qualified for evaluation at the Financial Evaluation Stage, its bid was established to be the lowest evaluated bid in respect of all the 4 Lots under the subject tender with the following tender prices per day:
 - i. Lot 1: Kshs. 12,000
 - ii. Lot 2: Kshs. 16,400
 - iii. Lot 3: Kshs. 17,960
 - iv. Lot 4 Kshs. 16,400

Evaluation Committee's Recommendation

18. The Evaluation Committee vide its 1st Evaluation Report dated 15th July 2024 recommended the award of the subject tender to the Interested Party at its tendered price for the respective Lots.

Professional Opinion

19. In a Professional Opinion 22nd July 2024 (hereinafter referred to as the "the 1st Professional Opinion") the Procuring Entity's Senior Manager,



Supply Chain Management,, Mr. Charles Muinde, reviewed the manner in which the subject procurement process was undertaken and recommended the award of the subject tender to the Interested Party as per the Evaluation Committee's Report.

20. The Professional Opinion was subsequently approved by the Respondent, Mr. Albert Kigen on the same day, 22nd July 2024.

1 Notification to the bidders

21. All the bidders in the subject tender were notified of the outcome of the evaluation exercise vide letters dated 22nd July 2024. The letters indicate that the subject tender had been awarded to the Interested Party.

Signing of Contract

22. On 14th August 2024 the Procuring Entity and the Interested Party signed a contract in respect of the subject tender.

Complaint at the Public Procurement Regulatory Authority

23. Vide a letter dated 1st August 2024, the Applicant lodged a complaint with the Public Procurement Regulatory Authority, taking issue with evaluation process that culminated in its disqualification from the subject tender. The Authority,directed the Respondents to review its procurement process which once again culminated with the Interested Party as the successful bidder in the subject tender. The Authority then directed the Respondents



to proceed with the tender to its logical conclusion and relay this to the bidders who took part in the subject tender.

2nd Notification to the bidders

24. All the bidders in the subject tender were notified of the outcome of the review exercise vide letters dated 13th January 2025. The letters reiterated that the subject tender had been awarded to the Interested Party.

REQUEST FOR REVIEW

25. On 27th January 2025, the Applicant herein through the firm NOW Advocates LLP filed a Request for Review dated 27th January 2025 supported by an Statement dated 27th January 2025 by Feisal Mohamed Abdi, a Director at the Applicant, seeking the following orders:

a) The 1st Respondent furnishes the Applicant with a summary of the proceedings of the opening of bids, evaluation and comparison of the bids, due diligence report (if any) including the evaluation criteria used in evaluating bids in Tender No: KNBS/ONT/30/2023-2024 for Provision of Car Hire Services on as and when Required (AWR) Basis forthwith in accordance with Section 67(4) read with Section 68(2)(d)(iii) of the Public Procurement and Asset Disposal Act, Cap 412C;

b) The 1st Respondent's decision awarding Tender No: KNBS/ONT/30/2023-2024 for Provision of Car Hire



- Services on as and when Required (AWR) Basis to the Interested Party be annulled and set aside;***
- c) The 1st Respondent's letter of Notification on Intention to award dated 13th January 2025 notifying the Interested Party of its successfulness in Tender No: KNBS/ONT/30/2023-2024 for Provision of Car Hire Services on as and when Required (AWR) Basis, if any, be annulled and set aside;***
- d) The 1st Respondent's letter of Notification on Intention to award dated 13th January 2025 notifying the Applicant that it had not been successful in Tender No: KNBS/ONT/30/2023-2024 for Provision of Car Hire Services on as and when Required (AWR) Basis be annulled and set aside;***
- e) Any procurement contract with respect to Tender No: KNBS/ONT/30/2023-2024 for Provision of Car Hire Services on as and when Required (AWR) Basis that the Respondents may have entered into with the Interested Party in breach of Section 135(3) read with Sections 167(1) and 168 of the Public Procurement and Asset Disposal Act, Cap 412C and Regulation 203(2)(c)(ii) of the Public Procurement and Asset Disposal Regulations 2020, be nullified and set aside;***
- f) The 1st Respondent be directed to extend the tender validity period of Tender No: KNBS/ONT/30/2023-2024***



for Provision of Car Hire Services on as and when Required (AWR) Basis for a period of 105 days from 4th November 2024;

g) The Respondents be directed to award Tender No: KNBS/ONT/30/2023-2024 for Provision of Car Hire Services on as and when Required (AWR) Basis to the Applicant as the bidder who submitted the bid with the lowest evaluated price per lot.

h) In the alternative, the Public Procurement Administrative Review Board be pleased to review all records of the procurement proceedings related to Tender No: KNBS/ONT/30/2023-2024 for Provision of Car Hire Services on as and when Required (AWR) Basis and in exercise of its discretion, to direct the Respondents to redo or correct anything within the entire procurement proceedings found not to have been done in compliance with the law, including conducting post-qualification evaluation/due diligence on the Interested Party to determine whether the Interested Party was qualified to be awarded Tender No: KNBS/ONT/30/2023-2024 for Provision of Car Hire Services on as and when Required (AWR) Basis in accordance with Sections 55 and 86 of the Public Procurement and Asset Disposal act, Cap 412C;

i) The Respondents be compelled to pay the Applicant the costs arising and incidental to this Request for Review;



j) The Public Procurement Administrative Review Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

26. In a Notification of Appeal and a letter dated 27th January 2025, Mr. James Kilaka, the Ag. Board Secretary of the Board notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 27th January 2025.
27. On 28th January 2025, the Applicant filed a Further Statement of even date by Feisal Mohamed Abdi.
28. On 30th January 2025, the Respondents through Linda Olweny-Advocate, filed a Notice of Appointment of Advocates and a Notice of Preliminary Objection, both dated 30th January 2025.
29. On the same day, 30th January 2025, the Interested Party filed a Notice of Appointment of Advocates and a Notice of Preliminary Objection, both



dated 30th January 2025, through the firm of Sigano & Omollo Advocates LLP.

30. On 3rd February 2025, the Respondents filed a Memorandum of Response of even date.
31. On 6th February 2025, the Interested Party filed a Replying Affidavit sworn in 5th February 2025 by Mohamed Amin Osman, the Interested Party's Managing Director.
32. Still on 6th February 2025, the Applicant filed a Further Supplementary Statement of even date by Feisal Mohamed Abdi.
33. On the same day, 6th February 2025, the Ag. Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 11th February 2025 at 11:00 a.m. through the link availed in the said Hearing Notice
34. On 10th February 2025, the Applicant filed a Further Supplementary Statement dated 7th February 2025.
35. On the same day, 10th February 2025, Al-Hamdu Enterprises Limited, a bidder in the subject tender submitted a letter indicating that the bidder was not challenging the outcome of the subject tender.



36. On 11th February 2025, the Respondents filed Written Submissions and Bundle of Authorities, both dated 10th February 2025.
37. On the same day, 11th February 2025, the Applicant filed a Bundle of Authorities of even date.
38. Still on 11th February 2025, the Interested Party filed their Bundle of Authorities of even date.
39. When the Board convened for hearing on 11th February 2025 at 11:00 a.m. parties were represented by their various Advocates. The Board read through the documents filed in the matter and sought parties' confirmation that the documents had been served upon them to which they confirmed in the affirmative.
40. The Board noted that since the Respondent had filed Preliminary Objection, this would be considered as part of the Request for Review pursuant to Regulation 209(4) of the Regulations 2020. Accordingly, the Board gave the following directions on the order of address:
 - i. The Applicant would start by addressing the Board on both the Preliminary Objection and the Request for Review within 13 minutes.
 - ii. Thereafter Respondents would then argue the Preliminary Objection and the Request for Review within 13 minutes;



- iii. The Interested Party would then argue the Preliminary Objection and the Request for Review within 13 minutes
- iv. Lastly, the Applicant would close by way of rejoinder in a minute.

41. Below is a summary of parties submissions before the Board

PARTIES SUBMISSIONS

Applicant's Submissions on both the Request for Review and the Preliminary Objections on record

- 42. Counsel for the Applicant, Ms. Nungo, indicated that the Applicant was relying on its filed documents in the matter. According to Counsel, the Interested Party submitted false and inaccurate information in the form of an NSSF Compliance Certificate in breach of Section 55(5) and 66(3) of the Act as well as clauses 18.8 and 18.9 under the Tender Document. She therefore, urged that the Interested Party was an ineligible bidder and could not therefore enter into a procurement contract under the subject tender.
- 43. Counsel pointed the Board to Annexure FNA 14, a letter said to be from NSSF confirming that the Interested Party paid its NSSF contribution on 2nd December 2024, the Interested Party did not hold a Certificate of Compliance as at 2nd July 2024 and that the Interested Party's Certificate of Compliance presented in the subject tender was not valid as it was not from NSSF. Ms. Nungo indicated that the said letter was a response to an



inquiry on the status of the Interested Party's NSFF Certificate of Compliance.

44. Relying on ***PPARB Application No. 19 of 2022; Madison General Insurance Kenya Limited v Lt Col. (Rtd) B Njiriani , The Accounting Officer KEBS and CIC Limited; Civil Appeal No. E270 of 2022; CIC General Insurance Limited v Madison Insurance Kenya Limited, Public Procurement Administrative Review Board, Ltd Col (Rtd) B.N. Njiriani, The Accounting Officer KEBS; Supreme Court Petition No. 12 of 2019; Samon Gwer & Others v Kenya Medical Research Institute***, Counsel argued that the Interested Party had not led any evidence to discount the accuracy of the letter. Further that the letter in question was signed on behalf of the Managing Trustee of NSSF, who pursuant to Section 7 of the Access to Information Act is an information officer.
45. Counsel argued that the award to the Interested Party was in breach of Sections 79, 80 and 86 of the Act as the bidder did not meet the requirements under the Tender Document.
46. She further contended that the Award dated to the interested party was done in breach of Sections 87 and 88 of the Act as the Notification Letters dated 14th January, 2025 were issued after the expiry of the tender validity period which lapsed on 4th November 2024. Additionally, that the



notification letters did not state the reasons why the Interested Party's bid was successful.

47. According to Counsel, the Applicant's bid met all the requirements under the subject tender and ought to have been the successful bid.
48. Turning to the Preliminary Objections, Ms. Nungo argued that the Board's jurisdiction could only be ousted where a contract had been concluded in accordance with Section 135 of the Act. For this reliance was made on ***PPARB Application No. 77 of 2023 Sedgwick Kenya Insurance Brokers Limited v Managing Director, Kenya Pipeline Company Limited, Kenya Pipeline Company Limited and Four M Insurance Brokers Limited; Civil Appeal No. E009 of 2023; Public Procurement Administrative Review Board v Four M Insurance Brokers Limited, Sedgwick Kenya Insurance Brokers Limited, The Managing Director, Kenya Pipeline Company Limited and Kenya Pipeline Company Limited; Judicial Review No. E589 of 2017*** ***Judicial Review No. E589 of 2017; Lordship Africa Limited v Public Procurement Administrative Review Board & 2 Others [2018]eKLR; Civil Appeal No. 35 of 2028 Ederman Property Limited v Lordship Africa Limited & 2 Others [2019]eKLR;***. She therefore invited the Board to interrogate whether the said provision was observed arguing that the Interested Party submitted false documents and thus the purported contract could not qualify as one under section 135 of the Act.



49. Counsel refuted the suggestion that the Request for Review was time-barred pointing out that the Respondents issued fresh Notification Letters which triggered a new cause of action. The fresh notifications were in respect of a complaint by the Applicant to the Public Procurement Regulatory Authority which culminated in a re-evaluation of bids. Counsel argued that the said Notification Letter indicated on their face that there was a standstill period of 14 days within which procurement related complaints would be filed. Counsel argued that the Applicant having received the fresh Notification Letters on 15th January 2025, the Applicant had until 29th January 2025. Therefore, the present Request for Review was timeously filed noting that it was filed on 27th January 2025.
50. Ms. Nungo equally refuted the suggestion that the Request for Review should not have been signed by the Applicant's lawyers arguing that a Request for Review is a mode of instituting an actin which can be signed off by lawyers acting for a party.
51. She argued that the provisions of the Oaths and Statutory Declarations Act were inapplicable to the present matter noting that it was a statement. For this reliance was made on PPARB Application No. 116 of 2019 Bare Wings Company Limited v Accounting Officer, Kenya Pipeline Company Limited.



52. Relying on ***Republic v Public Procurement Administrative Review Board; Lake Victoria North Water Works Development Agency & another (Interested Parties) ; Toddy Civil Engineering Company Limited (Ex parte Applicant) [2023]KEHC 3699(KLR)*** Counsel urged us to extend the tender validity period in the subject tender

Respondents' Submission on both the Request for Review and the Preliminary Objection

53. Counsel for the Respondents, Mr. Nduhiu, indicated that the Respondents would be placing reliance on their filed documents. He argued that the 1st Respondent and the Interested Party had entered in to a valid contract in accordance with Section 135 of the Act as this was done after the lapse of the standstill period.
54. Mr. Nduhiu submitted that the Request for Review was time-barred under Section 167(1) of the Act. It was contended that all bidders were issued with notification letters on 22nd July 2024 and a procurement contract signed on 14th August 2024 only for the Applicant to lodge the present Request for Review on 27th January 2025. He argued that following the conclusion of a procurement contract, the Board was divested the jurisdiction over the present Request for Review under Section 167(4)(c) of the Act.



55. It was argued that though the Applicant was at all times represented by Counsel, it ignored the statutory timelines for lodging a Request for Review and instead complained to the Procuring Entity and later to the Public Procurement Regulatory Authority.
56. Reliance was made on ***Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & another , Ethics and Anti-Corruption Commission v Stephen Sanga Barwah t/a Mediscope Agencies & 20 Others [2018]eKLR; County Government of Migori v INB IT Consulting limited [2019]eKLR; 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***; for the proposition that jurisdiction cannot be exercised where proceedings are time-barred. He argued that there was no new cause of action that arose.
57. On the merits of the Request for Review, Counsel argued that the Procuring Entity wrote a letter to NSSF inquiring on the authenticity of the Interested Party's NSSF Compliance Certificate and NSSF confirmed the Certificate as authentic.

Interested Party's Submissions on both the Request for Review and Preliminary Objection

58. Counsel for the Interested Party, Mr. Omollo, indicated that the Interested Party would be placing reliance on its filed documents.



59. He argued that the Applicant made an admission through paragraph 5 of its Further Supplementary Statement that it made an inquiry on the status of the Interested Party's NSSF Compliance Certificate.
60. Relying on ***Application No. 4 of 2015; Apex Communication v Ministry of Health*** argued that under section 167(1) time must be reckoned using the doctrine of discoverability. He argued that the Applicant harbored suspicion on the Interested Party's qualifications but elected to move the Public Procurement Regulatory Authority and not this Board.
61. Mr. Omollo contended that as at 7th January 2025 the Applicant wrote a letter to the Respondents raising the same issues that appear in the Request for Review confirming that the Applicant have all along been aware of the grounds they have raised in the present proceedings
62. Counsel argued that the Applicant slept on its right to invoke the jurisdiction of the Board and now that a procurement contract had been signed, the Board's jurisdiction was ousted. For this reliance was placed on ***Republic v Public Procurement Administrative Review Board & 2 Others Ex parte Kemotrade Investment Limited [2028]eKLR and Application No. 48 of 2021; Fahmyasin Company Limited v The Accounting Officer, Kenya Urban Roads Authority & another***



63. He argued that the only criteria for checking whether the contract was validly signed was whether the parties to the contract were the Procuring Entity and the successful bidder as well as whether the contract was signed after the stand still period.
64. Mr. Omollo further argued that the letters issued by the Respondents were issued under the directions of the Director General of the Public Procurement Regulatory Authority under Section 39 of the Act. Therefore according to him any challenge emanating therefrom should have been by way of a judicial review and not through the present proceedings. He argued that the Applicant invoked Section 35 of the Act and thus any challenge thereafter should be by way of judicial review.
65. Counsel argued that the Applicant's statement was defective for being witnessed by Advocate from the Applicant's lawyer's office. He argued that at the time of service the document was described as an affidavit but was not commissioned by a Commissioner for Oaths.
66. On the merits of the Request for Review, Counsel indicated that the Procuring Entity inquired from NSSF on the Interested Party's NSSF Certificate of Compliance and the document was confirmed as authentic. He further pointed out that the Applicant's letter purporting to contradict this was signed by a marketing officer and not a compliance officer.



67. Counsel further warned that it would appear the Applicant accessed confidential information under the veil of access to information

Applicant's Rejoinder

68. In a brief rejoinder, Counsel for the Applicant, Ms. Nungo reiterated that the Board had the requisite jurisdiction to hear the Request for Review. She urged the Board to investigate whether the contract was signed in accordance with Section 135 of the Act, noting that the Interested Party was an ineligible bidder.

69. She argued that there was evidence that there was a re-evaluation process and the Notification Letters confirmed that there was a 14 days stand still period. Therefore, there was a fresh cause of action.

70. Counsel denied any irregular access to Confidential information.

CLARIFICATIONS

71. The Board called on the parties to address it on the tender validity period in respect of the subject tender:

- i. Counsel for the Applicant, Ms. Nungo indicated that the Notification Letters were issued outside the tender validity period and thus invalid. Further that the Board has power to extend the tender validity period.
- ii. Counsel for the Respondent, Mr. Nduhiu submitted that a significant time of the tender validity period run out in the course of



correspondence between the Respondents and the Public Procurement Regulatory Authority on the Applicant's complaint. He however maintained that the tender validity period had not run out.

- iii. Counsel for the Interested Party, Mr. Omollo argued that the tender validity period had expired sometime in November 2024, by which time a contract had been signed. He argued that the Board could only extend the tender validity period if the request was made before such expiry, and not after.

72. The Board asked the Applicant whether it agreed with the recommendation of the Public Procurement Regulatory Authority. Counsel for the Applicant, Ms. Nungo confirmed that the Applicant did not agree with the re-evaluation outcome.

73. The Board invited parties to address the Board on the possible legal basis for the Respondents' re-evaluation of the tenders;

- i. Counsel for the Respondents, Mr. Nduhiu mentioned Section 9 of the Act and highlighted that the re-evaluation was for purposes of transparency and accountability.
- ii. Counsel for the Applicant, Ms. Nungo submitted that the Director General of the Public Procurement Regulatory Authority has power under Sections 35 and 39 to direct a Procuring Entity to take remedial action in instances of a breach on the part of the Procuring Entity.



74. The Board asked parties whether there was a prescribed format for the issuance of an NSSF Compliance Certificate and whether there was a designated officer to confirm the authenticity of the issued certificates:
- i. Counsel for the Respondent Mr. Nduhiu argued that they received a confirmation from the Branch Manager where the Interested Party is domiciled confirming that the Compliance Certificate was authentic.
 - ii. Counsel for the Applicant, Ms. Nungo, submitted it's the difference in the formats of the Certificates held by the Applicant and the Interested Party that prompted an inquiry on the authenticity of the Interested Party's Certificate. According to Counsel though there is no prescribed format for the Certificate, there ought to have been some uniformity since the documents were said to be issued by the same institution. Further that though the law does not designate an officer to verify the authenticity of the Certificates, official communication should emanate from the head of NSSF i.e. The Managing Trustee and that the Applicant's letter was signed off on behalf of the Managing Trustee.
75. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 27th January 2025 had to be determined by 17th February 2025. Therefore, the Board would communicate its decision on or before 17th February 2025 to all parties via email.



BOARD'S DECISION

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

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

In determining this issue, the Board will consider:

- i. Whether the present Request for review is time-barred under Section 167(1) of the Act?
- ii. Whether the Board's jurisdiction is divested under Section 167(4)(c)
- iii. Whether the Board's jurisdiction over the present Request for Review is ousted under Section 39 of the Act?

Depending on the finding on the first issue:

- II. ***Whether the Evaluation Committee properly evaluated the bids in the subject tender in accordance with the provisions of the Act and the Tender Document?***
- III. ***Whether the circumstances obtaining in the procurement process in the subject tender warrant an extension of the tender validity period?***
- IV. ***What orders should the Board issue in the circumstance?***



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

77. Following the service of the Request for Review upon the parties, the Respondents and the Interested Party separately filed Notices of Preliminary Objection both dated 30th January 2024. The parties took issue with the Board's jurisdiction on 4 principle grounds :
- i. The Request for Review is time-barred under section 167(1) of the Act
 - ii. The Board's jurisdiction is divested under Section 167(4)(c) of the Act
 - iii. The Request for Review is not signed by the Applicant in accordance with Regulation 203 of the Regulations 2020
 - iv. The Request for Review is supported by a defective Statement
78. The Respondents' and Interested Party's Preliminary Objection raise jurisdictional questions which this Board is invited to determine as a preliminary issue in line with the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.
79. 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."

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

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

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

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



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

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

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

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

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

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



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

85. The Board shall now separately interrogate the 4 grounds featuring in the Notices of Preliminary Objection dated 30th January 2025:

i. Whether the present Request for review is time-barred under Section 167(1) of the Act?

86. Both the Respondents and the Interested Party took the position that the present Request for Review was time-barred under Section 167(1) of the Act. Counsel for the Respondents, Mr. Nduhiu submitted that the Request for Review was time-barred under Section 167(1) of the Act. It was contended that all bidders were issued with notification letters on 22nd July 2024 and a procurement contract signed on 14th August 2024 only for the Applicant to lodge the present Request for Review on 27th January 2025. It was argued that though the Applicant was at all times represented by Counsel, it ignored the statutory timelines for lodging a Request for Review and instead complained to the Procuring Entity and later to the Public Procurement Regulatory Authority.

87. Counsel for the Interested Party, Mr. Omollo argued that under section 167(1) time must be reckoned using the doctrine of discoverability. He argued that the Applicant harbored suspicion on the Interested Party's qualifications but elected to move the Public Procurement Regulatory Authority and not this Board. Further that as at 7th January 2025 the



Applicant wrote a letter to the Respondents raising the same issues that appear in the Request for Review confirming that the Applicant have all along been aware of the grounds they have raised in the present proceedings.

88. In contrast, the Applicant contended that the Request for Review was timeously filed. Counsel for the Applicant, Ms. Nungo, refuted the suggestion that the Request for Review was time-barred pointing out that the Respondents issued fresh Notification Letters which triggered a new cause of action. Further that Notification Letters of 14th January 2025 which were received on 15th January 2025 indicated on their face that there was a standstill period of 14 days within which procurement- related complaints would be filed.
89. The Board is therefore invited to ascertain at this stage whether the present Request for Review is time-barred.
90. For starters, a reading of Section 167 of the Act denotes that the jurisdiction of the Board should be invoked within a specified timeline of 14 days:

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative



review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

91. Regulation 203(2) (c) of the Regulations 2020 equally affirms the 14-days timeline in the following terms:

Request for a review

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

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

a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

b) be accompanied by such statements as the applicant considers necessary in support of its request;

c) be made within fourteen days of —

i. the occurrence of the breach complained of, where the request is made before the making of an award;

ii. the notification under section 87 of the Act; or

iii. the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder



92. Our interpretation of the above provisions is that an Applicant seeking the intervention of this Board in any procurement proceedings must file their request within the 14-day statutory timeline. Accordingly, Requests for Review made outside the 14 days would be time-barred and this Board would be divested of the jurisdiction to hear the same.
93. It is therefore clear from a reading of section 167(1) of the Act, Regulation 203(1)(2)(c) & 3 of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a Request for Review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made (ii) notification of intention to enter in to a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three (3) instances namely (i) before notification of intention to enter in to a contract is made (ii) when notification of intention to enter into a contract has been made and (iii) after notification to enter into a contract has been made. The option available to an aggrieved candidate or tenderer in the aforementioned instances is determinant on when occurrence of breach complained took place and should be within 14 days of such breach.




94. **It was not the intention of the legislature that where an alleged breach occurs before Notification of Award is issued, the same is only complained of after the Notification of Award has been issued. We say so because there would be no need to provide 3 instances within which such Request for Review may be filed.**
95. Section 167 of the Act and Regulation 203 of the Regulations 2020 identify the benchmark events for the running of time to be the date of notification of the award or the date of occurrence of the breach complained of.
96. In ***Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR*** the High Court offered guidance on when time begins to run in the following terms:

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 2nd Interested Party in its Request for Review, and when the 2nd Interested Party had knowledge of the said breach.

97. From the foregoing, in computing time under Section 167 of the Act, consideration should be made to the breach complained of in the Request for Review and the time when an Applicant learnt of the said breach.



98. Turning to the present case, the gravamen of the Applicant's Request for Review, as can be discerned from the grounds outlined therein, is that the Interested Party submitted a false and inaccurate NSSF Compliance Certificate.
99. In order to accurately understand the present proceedings there is need to provide context:
- i. On 22nd July 2024, the Respondents issued Notification Letters to all bidders, including the Applicant, indicating that the Interested Party was the successful bidder in the subject tender;
 - ii. On 25th July 2025, the Applicant wrote letter to the Respondents asking them to review the evaluation process that culminated in the its disqualification of its bid and award of the subject tender to the Interested Party.
 - iii. On 30th July 2024 the Respondents wrote a letter to the Applicant offering a debrief on the reasons why its bid was unsuccessful in the subject tender.
 - iv. On 1st August 2024, the Applicant once again requested the Respondents to review its decision. On the same day, the Applicant equally filed a complaint against the Respondents at the Public Procurement Regulatory Authority.
 - v. The Public Procurement Regulatory Authority invoked section 9(h),34 and 35 of the Act and in its letter dated the 28th of August 2024, citing the above jurisdictional sections while referring to the Applicants complaint letters dated 1st and 2nd August, 2024,



engaged the Respondents in respect of the complaint and asked the Respondents to review the procurement process. Following the directions for reviewing the process, the Respondents re-evaluated the bids and still came to the finding that the Interested Party's bid was still the successful bid. This finding was reported to the Authority which then directed the Respondents to relay the same information to the bidders in the subject tender in the Authority's letter dated 2nd January 2025. This information was relayed to bidders in the form of Notification letters dated 14th January 2025.

100. Below is an excerpt of the letter dated 28th August 2024 by the Director General to the Respondents:

***REF: COMPLAINT ON TENDER NO. KNBS/ONT30/2023-2024
FOR PROVISION OF CAR HIRE SERVICES ON " AS AND WHEN
REQUIRED BBASIS:***

***We are in receipt of letters of complaint from M/s Amazon
transporters limited dated 1st and 2nd August 2024, on the
above matter***

The complainant alleges:

- 1.***
- 2.***



3.They have also established that the successful firm did not have a valid NSSF Compliance Certificate which was under the technical capability evaluation criteria No. 89e) and that their tender sum had an arithmetic error which was not taken into consideration during the evaluation process.

4.

101. From the above, it is apparent that the Applicant as at 1st August 2024 was aware of the Interested Party's NSSF Compliance Status, as to relay this information in the form of a complaint to the Public Procurement Regulatory Authority. If the Applicant had no idea of the Interested Party's NSSF Compliance Status, they would not have made this a complaint to the Authority.

102. A keen study of the Request for Review equally yields that the crux of the Applicant's challenge of the award of the subject tender to the Interested Party was on account of the Interested Party's alleged NSSF Compliance status.

103. It is clear to the Board, that as at 1st August 2024, the fact of the alleged lack of a valid NSSF certificate with respect to the interested party was available to the applicant. Absent evidence of an earlier date when this information was available to the Applicant, the Board finds 1st August 2024 as the benchmark date from which the 14-day statutory window should run for challenging the award of the subject tender to the Interested Party. This position is based on this Board's long strand of



Decisions to the effect that **though Section 167 of the Act and Regulation 203 of the Regulations 2020 outline multiple instances that could form the benchmark date from when the 14-days statutory window opens, the actual benchmark date for any given candidate or bidder is the date they first learnt of the breach being complained about.** Accordingly, the question of knowledge of the breach being complained of is central towards identifying the benchmark date.

104. The Board will now proceed to compute the timeline within which the present Request for Review ought to have been filed before it. In computing the 14 days contemplated under the Act, we take guidance from section 57 of the Interpretation and General Provisions Act:

"57. Computation of time

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

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

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



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

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

105. When computing time when the Applicant ought to have sought administrative review before the Board, 1st August 2024 is excluded as per section 57(a) of the IGPA being the day that the Applicant learnt of the occurrence of the alleged breach. This means time started to run on 1st August, 2024 and lapsed on 15th August 2024. In essence, the Applicant had between 1st August 2024 and 15th August 2024 to seek administrative review before the Board per Regulation 203(2)(c)(iii). That notwithstanding, even assuming that on its initial request for review of the evaluation dated the 25th of July, 2024 addressed to the 1st respondent is the date upon which the applicant received the Notification dated 22nd July 2024, and discovery of the breach complained of was on the 1st of August 2024 as analysed hereinabove, then computation of time within which the applicant was to lodge a Request for Review would have run between the 25th July 2024 to the 8th of August 2024, being 14 days



period per section 167(1) and regulation 203(2)(c)(ii) which the applicant also failed to do. The Request for Review was filed on 27th January 2025 which was close to 6 months from the date the Applicant knew of the Interested Party's alleged NSSF Compliance status.

106. Counsel for the Applicant, Ms. Nungo suggested that the 14 days statutory begun to run from 15th January 2025, being the date when the Applicant received a notification letter indicating that the Interested Party was the successful bidder in the subject tender. The Board finds great difficulty in adopting this suggestion for a number of reasons:

- i. The evidence on record shows that the Applicant was aware of the Interested Party's alleged NSSF Compliance Status as at 1st August 2024. This knowledge is manifest in the fact that the same was relayed by the Applicant in its complaint to the Public Procurement Regulatory Authority. In keeping with the principle that the Board's jurisdiction should be invoked at the earliest, nothing stopped the Applicant from invoking this Board's time-bound jurisdiction as at 1st August 2024 when it was making its complaint to the Authority.
- ii. Allowing the Applicant's argument would defeat the very purpose of Section 167(1) of the Act and Regulation 203 which require that procurement decisions are challenged before the Board in a timeous fashion. Whereas Section 167 of the Act and Regulation 203 of the Regulations 2020 require that Requests for Review are filed within 14 days, unscrupulous Applicants who find



themselves time-barred would always file complaints with the Authority with the goal of subsequently filing a Request for Review within 14 days of a Procuring Entity communicating the outcome of the complaint made to the Authority. This practice must be shunned.

107. Consequently, the Board finds that the present Request for Review was time-barred. Therefore, this ground of Preliminary Objections succeeds.

Whether the Board's jurisdiction is divested under Section 167(4)(c)?

108. Both the Respondents and the Interested Party contended that under Section 167(4)(c) the Board's jurisdiction in the present Request for Review was divested in view of the fact that a procurement contract had been concluded in the matter.
109. Counsel for the Respondents, Mr. Nduhiu submitted that the Request for Review was time-barred under Section 167(1) of the Act. It was contended that all bidders were issued with notification letters on 22nd July 2024 and a procurement contract signed on 14th August 2024 only for the Applicant to lodge the present Request for Review on 27th January 2025. He argued that following the conclusion of a procurement contract, the Board was divested the jurisdiction over the present Request for Review under Section 167(4)(c) of the Act.



110. Counsel for the Interested Party, Mr. Omollo, argued that the Applicant slept on its right to invoke the jurisdiction of the Board and now that a procurement contract had been signed, the Board's jurisdiction was ousted. According to Counsel the only criteria for checking whether the contract was validly signed was to verify whether the parties to the contract were the Procuring Entity and the successful bidder as well as whether the contract was signed after the stand still period.
111. On the flip side, the Applicant took the position that there was no contract that had been concluded in accordance with Section 135 of the Act. Counsel for the Applicant, Ms. Nungo invited the Board to interrogate the matter pointing out that the Interested Party was ineligible to take part in the subject tender and thus could not possibly emerge as the successful bidder.
112. The Board is therefore invited to consider whether its jurisdiction is ousted under Section 167(4)(c), which section reads:

167. Request for a review

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



procurement process, or disposal process as in such manner as may be prescribed.

(2)

(3)

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

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

(c) where a contract is signed in accordance with section 135 of this Act.

113. Section 167 of the Act above, extends an opportunity to candidates and bidders disgruntled with a public tender process to approach the Board for redress. However, subsection (4) of the Section divests the Board jurisdiction on a myriad of subject matters including where a contract has been signed in accordance with section 135 of the Act.

114. On its part Section 135 of the Act reads as follows:

135. Creation of procurement contracts

(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in



writing by the accounting officer of the procuring entity and the successful tenderer.

(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—

(a) Contract Agreement Form;

(b) Tender Form;

(c) price schedule or bills of quantities submitted by the tenderer;



(d) Schedule of Requirements;

(e) Technical Specifications;

(f) General Conditions of Contract;

(g) Special Conditions of Contract;

(h) Notification of Award.

(7) A person who contravenes the provisions of this section commits an offence.

115. From the above, it is apparent that:

- i. A procurement contract should be between the Procuring Entity and the successful bidder;
- ii. A procurement contract can only be validly entered into after the standstill period but during the tender validity period of a given tender.
- iii. Contractual obligations between a bidder and the Procuring Entity only arise when a procurement contract has been signed.
- iv. A procurement contract can only be entered into after an award has been made.

116. Superior courts have previously pronounced themselves on the import of Section 167(4)(c):

117. In ***Public Procurement Administrative Board v Four M Insurance Brokers Limited & 3 others (Civil Appeal E1009 of 2023) [2024]***



KECA 79 (KLR) (9 February 2024) (Judgment) the Court of Appeal decreed that the Board had jurisdiction to interrogate whether a procurement contract had been signed in accordance with Section 135 of the Act whenever a jurisdictional challenge under section 167(4)(c) of the Act was raised:

50. Indeed in the case of Ederman Property Limited v Lordship Africa Limited & 2 others [2019] eKLR, where a similar question arose as to whether the Appellant had properly declined jurisdiction in a case where a contract had been signed, this Court stated thus: -

" ...The learned Judge who heard the motion identified as an important question the determination of whether the 2nd respondent committed an error of law when it declined jurisdiction to entertain the application for review because a contract had already been entered into and the application was filed outside fourteen (14) days.....

The review body is not allowed to consider a review where a contract has been signed in accordance with Section 135 of the Act. The learned Judge considered the manner in which the 2nd respondent on receiving the request for review had entertained it where it found that it had no jurisdiction to entertain the request for review in the face of a contract that had been signed between the appellant and the 3rd respondent. The Judge reviewed a number of decisions on the



issue of jurisdiction which the 2nd respondent had found it lacked.

The Judge distinguished the provisions of Section 167(4) (c) of the Act and Section 135 of the Act. Section 135 states that a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity of the successful tenderer. Section 135(3) provides that.....

Having reviewed the provisions of the said Sections 135 and 167 of the Act, the Judge found at paragraph 73 of the judgment that:

"In this case, the review board makes no reference to whether or not the contract allegedly signed was in accordance with Section 135 of the Act. From the above cited case law, it is clear that the review board should have first determined whether the contract in question was signed in accordance with Section 135 of the Act. This is so because the mere fact that a contract has been signed does not necessarily deprive the respondent of the jurisdiction to entertain the request for review. In other words, before the review board makes a determination that it has no jurisdiction to entertain the request by virtue of sect 167 (4) (c) of the Act, it has the duty to investigate whether the contract in question was signed in



accordance with Section 135 of the Act and the failure to do so in my view would amount to improper deprivation of jurisdiction; in my further view improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction”....

We fully agree with the conclusion reached by the Judge in this respect. It was the duty of the 2nd respondent to satisfy itself that the 3rd respondent had followed the law on procurement and rules of natural justice in awarding the tender to the appellant and finding that the 1st respondent’s tender bid was unsuccessful...”

51. We adopt and agree with this reasoning. Put another way, section 164(7) implies a jurisdiction on the part of the appellant to entertain an application as to whether a contract is signed in accordance with Article 135, and is meant to address the obvious mischief of the signing of illegal procurement contracts so as to oust the jurisdiction of the appellant. The Learned Judge of the superior Court therefore adopted a restrictive interpretation of the provisions of Section 167(4) (c) of the Act and erred in not appreciating and considering the existence of the condition- precedent to the ouster of the appellant’s jurisdiction where a contract has been signed. Accordingly, it is our finding that that the Learned Judge erred in law in holding that the appellant had



no jurisdiction solely on the basis that a procurement contract had been signed without checking on compliance with Section 135 of the Act.

118. From the above, it is apparent that this Board is under an obligation to first interrogate whether a procuring contract has been signed in accordance with section 135 of the Act as to establish whether its jurisdiction has been ousted.
119. Turning to the present case, the Board has studied the Confidential File and observed that:
- i. The Respondents issued Notification Letters dated 22nd July 2024 showing that the Interested Party herein was the successful bidder in the subject tender.
 - ii. There is a signed procurement contract dated 14th August 2024 between the Procuring Entity and the Interested Party herein.
 - iii. The date of the contract is 22 days after the Notification of award was prepared. This implies that the contract was concluded more than 14 days after the Notification Letters were issued. There was also no order or directions from this Board or any authority suspending the conclusion of the procurement contract during the intervening period.
 - iv. The date of the contract falls within the tender validity period. Page 22 of the Tender Document shows that the subject tender had a tender validity period of 126 days from 2nd July 2024. The tender



validity period for the subject tender run out on 5th November 2024, by which date the procurement contract had been entered into.

120. From the above, the Board finds nothing irregular with the conclusion of the procurement contract dated 14th August 2024 between the Interested Party and the Procuring Entity. Accordingly, the procurement contract was regularly concluded with the result that the Board is divested jurisdiction. This ground appearing in both the Respondents and Interested Party's Preliminary Objections succeeds.

Whether the Board's jurisdiction over the present Request for Review is ousted under Section 39 of the Act?

121. Counsel for the Interested Party, Mr. Omollo, equally contended that the Board was divested the jurisdiction to hear the instant Request for Review arguing that it emanates from proceedings before the Public Procurement Regulatory Authority, which under section 39 of the Act are challenged by way of judicial review to the High Court.
122. The Board is therefore called upon to determine whether it is clothed with the requisite jurisdiction over the matter in view of Section 39 of the Act:
123. Sections 35 to 39 of the Act enumerates that the Authority can investigate into a complaint in a procurement related dispute and also outlines the manner of challenging a decision arrived at by the Authority:



35. Investigations

(1) The Authority, may undertake investigations, at any reasonable time, by among other things examining the records and accounts of the procuring entity and contractor, supplier or consultant relating to the procurement or disposal proceeding or contract with respect to a procurement or disposal with respect to a State organ or public entity for the purpose of determining whether there has been

(2) An investigation under sub-section (1) may be initiated by the Authority or on request in writing by a public institution or any other person.

(3) Investigation shall be conducted by an investigator appointed for the purpose by the Authority.

36. Powers of investigators

(1) For the purpose of carrying out an investigation of procurement or asset disposal proceedings an investigator has the following powers—

(a) with prior notification to the procuring entity, the investigator shall have access to all relevant premises, books, records, returns, reports and other documents of the procuring entity or a person who participated in the procurement or asset disposal proceedings, including electronic documents;



(b) the investigator may remove or make copies of any documents the investigator has access to under paragraph (a);

(c) where an investigator removes a document from the premises, the investigator shall certify a copy of the document to be left with the procuring entity; and

(d) the investigator may require any of the following to provide explanations, information and assistance—

(i) an employee or officer of the procuring entity; or

(ii) an employee or officer of a person who participated in the procurement or asset disposal proceedings.

(2) In addition to the powers under subsection (1), an investigator shall have such other powers as may be prescribed by Regulations.

(3) The powers of an investigator are subject to such conditions and limitations as may be prescribed by regulations.

37. Report of investigation

After completing his or her investigation, an investigator shall prepare and submit a report to the Authority.

38. Order by the Director-General

(1) If, after considering the report of an investigator, the Director-General is satisfied that there has been a breach of this Act, the Regulations or any directions of the Authority, the



Director-General may, by order, do any one or more of the following—

(a) direct the procuring entity to take such actions as are necessary to rectify the contravention;

(b) terminate the procurement or asset disposal proceedings;

(c) prepare and submit a summary of the investigator's findings and recommendations to the relevant authorities for action; or

(d) require the procuring entity to transfer procuring responsibilities of the subject procurement to another procuring entity.

(2) Before making an order under subsection (1), the Director-General shall give the following persons an opportunity to make representations—

(a) the procuring entity; and

(b) any other person whose legal rights the Director-General believes

may be adversely affected by the order.

39. Request for a Judicial review


The procuring entity and any other person who was entitled to be given an opportunity to make representations under section 38 (2) may request for Judicial Review against an order of the Director-General to the High Court within fourteen days after the order is made.



124. From the above, it is apparent that:

- i. The Public Procurement Regulatory Authority has power to conduct investigations in to the procurement process of a Procuring Entity.
- ii. The Authority has power to request a Procuring Entity to furnish its procurement records to aid the investigations.
- iii. Upon completion of the investigations the Director General of the Authority has power to issue directions on the remedial action to be taken, if any.
- iv. Any person challenging the decision of the Director General of the Authority has 14 days to move the High Court by way of judicial review proceedings.

125. Turning to the present case, the Applicant filed a complaint to the Public Procurement Regulatory Authority on 1st August 2024. The Authority commenced its investigations which were concluded with no fault being found on the award of the subject tender to the Interested Party. The Applicant appears aggrieved by this finding but instead of moving the High Court moved this Board by way of the present proceedings. The decision forming the basis of the Request for Review having its genesis in the complaint before the Authority can only be resolved at the High Court by way of judicial review proceedings. This Board does not supervise the Authority's exercise of its investigative powers and therefore is not the appropriate forum to hear the Applicant's grievance. Accordingly, the Boards jurisdiction is ousted under Section 39 of the Act.



Whether the Evaluation Committee properly evaluated the bids in the subject tender in accordance with the provisions of the Act and the Tender Document?

126. Noting the Board's finding on Issue (I) above, that it is divested the jurisdiction over the present Request for Review, this issue will not be analyzed.

Whether the circumstances obtaining in the procurement process in the subject tender warrant an extension of the tender validity period?

127. Noting the Board's finding on Issue (I) above, that it is divested the jurisdiction over the present Request for Review, this issue will not be analyzed.

What orders the Board should grant in the circumstances?

128. The Board has found that it is divested jurisdiction over the present Request for Review.
129. The upshot of our finding is that the Request for Review dated 27th January 2025 in respect of Tender No. KNBS/ONT/30/2023-2024 for Provision of Car Hire Services on As and When Required (AWR) Basis fails in the following specific terms:

FINAL ORDERS

130. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2025, the Board makes the following orders in the Request for Review dated 27th January, 2025:



- 1. The Respondents' Notice of Preliminary Objection dated 30th January 2025 be and is hereby upheld;**
- 2. Grounds 1, 2 and 6 of the Interested Party's Notice of Preliminary Objection dated 30th January 2025 be and are hereby upheld.**
- 3. The Request for Review dated 27th January 2025 be and is hereby struck out.**
- 4. The 1st Respondent be and is hereby directed to oversee the procurement proceedings in respect of Tender No. KNBS/ONT/30/2023-2024 for Provision of Car Hire Services on As and When Required (AWR) Basis to their logical and lawful conclusion;**
- 5. Each party shall bear its own costs.**

Dated at NAIROBI, this 17th day of February 2025.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB