

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 6/2025 OF 28<sup>TH</sup> JANUARY 2025**

**BETWEEN**

**AWELO INVESTMENTS LIMITED ..... APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**UGENYA TECHNICAL & VOCATIONAL COLLEGE ..... RESPONDENT**

**MIJOSH ENTERPRISES LIMITED ..... INTERESTED PARTY**

Review against the decision of the Accounting Officer Ugenya Technical & Vocational College in relation to Tender No. UTVC/PRJ/01/2024/2025 for Proposed Tuition Block for Ugenya Technical and Vocational Training College

**BOARD MEMBERS PRESENT**

- |                      |                                  |
|----------------------|----------------------------------|
| 1. Ms. Alice Oeri    | - Vice-Chairperson & Panel Chair |
| 2. QS Hussein Were   | - Member                         |
| 3. Mr. Daniel Langat | - Member                         |

**IN ATTENDANCE**

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

## **PRESENT BY INVITATION**

### **APPLICANT**

### **AWELO INVESTMENTS LIMITED**

1. Mr. Collins Osumba - Advocate, WSM Advocates LLP
2. Mr. Samora Marshel - Advocate, WSM Advocates LLP

### **RESPONDENT**

### **UGENYA TECHNICAL & VOCATIONAL COLLEGE**

1. Mr. Brian Otieno - Advocate, Sagana, Biriq & Muganda Adv. LLP
2. Mr. Innocent Muganda - Advocate, Sagana, Biriq & Muganda Adv. LLP
3. Ms. Faith Kinyua - Advocate, Sagana, Biriq & Muganda Adv. LLP

### **INTERESTED PARTY**

### **MIJOSH ENTERPRISES LIMITED**

Mr. Tom Ogola - Advocate, Togolaw & Co. Advocates

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Ugenya Technical & Vocational College, the Procuring Entity herein, invited sealed tenders in response to Tender No. UTVC/PRJ/01/2024/2025 for Proposed Tuition Block for Ugenya Technical and Vocational Training College (hereinafter referred to as "the subject tender"). The invitation was by way of an advertisement on 23<sup>rd</sup> December 2024 published on the Procuring Entity's website [www.utvc.ac.ke](http://www.utvc.ac.ke) and the Public Procurement Information Portal [www.tenders.go.ke](http://www.tenders.go.ke) where the blank tender document (hereinafter

referred to as the Tender Document') was available for download. The tender submission deadline was on 7<sup>th</sup> January 2025 at 12.00 noon.

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

2. 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'), eight (8) bidders submitted bids in the subject tender as follows:

<b>Bid No.</b>	<b>Name Of The Firm</b>
1.	Fatom Building Contractors
2.	Pawa Villas Limited
3.	Rizdave Concepts
4.	Wambayi & Sons Building Contractors Ltd
5.	Excellium Holdings Limited
6.	Mijosh Enterprises
7.	Awelo Investments Limited
8.	Stoa Investments Company

### **Evaluation of Tenders**

3. A Tender Evaluation Committee undertook evaluation of the submitted bids as captured in a Tender Evaluation Report dated 15<sup>th</sup> January 2025 for the subject tender in the following stages:

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

### **Preliminary Evaluation**

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Evaluation Criteria Preliminary Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document. Tenders were required to meet all the mandatory requirements at this stage.

5. Six (6) tenders were determined non-responsive including the Applicant's tender, while two (2) tenders were determined responsive and proceeded to Technical Evaluation.

### **Technical Evaluation**

6. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Technical Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document. Tenders were required to attain the pass mark of 70% at this stage.

7. One (1) tender was determined non-responsive while one (1) tender was determined responsive and proceeded to Financial Evaluation.

### **Financial Evaluation**

8. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Financial Evaluation of Section III – Evaluation and Qualification Criteria of the Tender Document. Award of the subject tender would be to the lowest evaluated substantially responsive bidder and the amount indicated in the form of tender would be used for comparison.

9. The Evaluation Committee noted that M/s Mijosh Enterprises Ltd was the only responsive bidder at this stage having quoted Kshs. 7,671,420.00, inclusive of VAT, and was based on the M & E PC Sums as per the Engineer's estimates.

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

10. The Evaluation Committee recommended award of the subject tender to M/s Mijosh Enterprises Ltd, being the responsive bidder at its tender price of Kenya Shillings Seven Million Six Hundred and Seventy-One Thousand Four Hundred and Twenty (Kshs. 7,671,420.00) Only inclusive of VAT.

### **Professional Opinion**

11. In a Professional Opinion dated 15<sup>th</sup> January 2025, the Procurement Officer, Ms. Bethsheba Oyuga concurred with the Evaluation Committee's

recommendation to award the subject tender to M/s Mijosh Enterprises Ltd, at its tender price of Kenya Shillings Seven Million Six Hundred and Seventy-One Thousand Four Hundred and Twenty (Kshs. 7,671,420.00) Only, inclusive of VAT.

### **Notification to Tenderers**

12. Tenderers were notified of the outcome of evaluation *vide* letters dated 16<sup>th</sup> January 2025.

### **REQUEST FOR REVIEW NO. 6 OF 2025**

13. On 28<sup>th</sup> January 2025, Awelo Investments Limited, the Applicant herein, filed a Request for Review dated 28<sup>th</sup> January 2025 together with a Supporting Affidavit sworn by Erish Awino through WSM Advocates LLP seeking the following orders from the Board:

***a) THAT the Respondent's letter Ref: UTVC/RL/PRJ/01/2024/2025 dated 16<sup>th</sup> January, 2025 notifying the Applicant that its bid was non-responsive for want of a verifiable Tax Compliance Certificate the Tender be set aside in its entirety.***

***b) THAT upon grant of prayer (1) above, the Honourable Review Board be pleased to order that the Applicant's bid had complied with the Preliminary Evaluation Criteria and direct the Respondent to evaluate the Applicant's bid to its logical conclusion.***

***c) THAT the Honourable Review Board be pleased to make such other or further orders at it may deem just, expedient, and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***

***d) THAT the Respondents be compelled to pay to the Applicant the costs arising from and incidental to this Request for Review.***

14. In a Notification of Appeal and a letter dated 28<sup>th</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 the said Procuring Entity 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 28<sup>th</sup> January 2025.

15. On 3<sup>rd</sup> February 2025, the Respondent filed through Sagana, Biriq & Muganda Advocates LLP a Memorandum of Appearance dated 3<sup>rd</sup> February 2025, a Notice of Preliminary Objection dated 3<sup>rd</sup> February 2025, a Replying Affidavit sworn on 3<sup>rd</sup> February 2025 by Elizabeth A.O. Okullu

together with the confidential documents concerning the subject tender in line with Section 67(3)(e) of the Act.

16. *Vide* letter dated 3<sup>rd</sup> February 2025, the Acting Board Secretary notified all tenderers in the subject tenders 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 were invited to submit to the Board any information and arguments concerning the tender within three (3) days.
17. *Vide* a Hearing Notice dated 7<sup>th</sup> February 2025, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 11<sup>th</sup> February 2025 at 2:00 p.m. through the link availed in the said Hearing Notice.
18. On 4<sup>th</sup> February 2025, the Applicant filed through its advocates a Certificate of Urgency dated 4<sup>th</sup> February 2025, a Notice of Motion dated 4<sup>th</sup> February 2025 accompanied by a Supporting Affidavit sworn on 4<sup>th</sup> February 2025 by Erish Awino, a Further Affidavit sworn by Erish Awino on 4<sup>th</sup> February 2025 and Applicant's Written Submissions dated 4<sup>th</sup> February 2025 on the Preliminary Objection dated 3<sup>rd</sup> February 2025.
19. On 5<sup>th</sup> February 2025, the Interested Party filed through its advocates a Notice of Appointment of Advocates dated 5<sup>th</sup> February 2025 together with the Interested Party's Replying Affidavit sworn on 5<sup>th</sup> February 2025 by Joash Jacob Otieno Okwiri.



20. On 5<sup>th</sup> February 2025, Stoa Investments Company filed via email a letter dated 5<sup>th</sup> February 2025.

21. On 11<sup>th</sup> February 2025, the Respondent filed Written Submissions dated 10<sup>th</sup> February 2025 together with a List and Bundle of Authorities dated 10<sup>th</sup> February 2025.

22. When the matter first came up for hearing on 11<sup>th</sup> February 2025 at 2.00 p.m., Mr. Ogola, for the Interested Party sought for an adjournment on the ground that he had not been notified on the hearing date having not been served with the Hearing Notice and as such, was not ready to proceed with the hearing. The Board having confirmed that Mr. Ogola was not served with the Hearing Notice pertaining to the instant Request for Review and there being no objection to the prayer for adjournment proceeded to allow the adjournment and directed (a) parties to file and serve their respective written submissions by 9.00 a.m. on 12<sup>th</sup> February 2025, and (b) that the matter would proceed for hearing on 12<sup>th</sup> February 2025 at 3.00 p.m.

23. The Applicant filed on 12<sup>th</sup> February 2025 Written Submissions dated 12<sup>th</sup> February 2025 on the Request for Review dated 28<sup>th</sup> January 2025 together with a List and Bundle of Authorities dated 12<sup>th</sup> February 2025.

24. The Interested Party filed on 12<sup>th</sup> February 2025 Written Submissions dated 11<sup>th</sup> February 2025 together with a List of Authorities dated 12<sup>th</sup> February 2025.

25. The Respondents filed on 12<sup>th</sup> February 2025 a Supplementary List and Bundle of Authorities dated 11<sup>th</sup> February 2025.
26. At the hearing on 12<sup>th</sup> February 2025 at 3.00 p.m., the Board read out the pleadings filed by parties in the matter and directed that the hearing of the Notice of Preliminary Objection by the Respondent would be heard as part of the substantive instant Request for Review. This is in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of a substantive request for review and deliver one decision.
27. Parties were allocated time to highlight their respective cases and the instant Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Respondent's submission on its Preliminary Objection**

28. Mr. Otieno submitted that the instant Request for Review as filed was fatally defective for the reason that it failed to enjoin the Interested Party as party in the proceedings contrary to Section 170(c) of the Act. Counsel argued that joining the Interested Party is not optional but a mandatory requirement stipulated in statute and in support of his argument, he referred the Board to the holding by the Court of Appeal in *James Oyondi t/a Betooyo Contractors & another v Elroba Enterprises Limited & 8 others*

*[2019] eKLR* and the Supreme Court in *Nicholas Arap Korir Salat vs. IEBC [2014] eKLR*.

29. Counsel further submitted that the Applicant failed to specifically plead any loss or damage that it would suffer by virtue of being disqualified in the subject tender. He pointed out that failure to plead loss and damage renders a request for review as fatally defective and the Board is divested of jurisdiction to hear and determine the same. In support of his argument, counsel made reference to the holding in *Judicial Review Application No. E072 of 2024* which cited the holding by the Court of Appeal in *James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*.

30. As to whether the defects highlighted hereinabove were curable, Mr. Otieno submitted that attempts by the Applicant to regularize its Request for Review were futile since the Board in light of Section 173 of the Act does not have power to issue orders for amendment where there is no competent Request for Review before it as was held in *Republic v Public Procurement Administrative Review Board and another Meru University of Science & Technology (Interested Party) (Exparte) (Application No. 85 of 2018)*.

### **Applicant's Response to the Respondent's Preliminary Objection and Submissions on the Request for Review**

31. In response to the Respondent's Preliminary Objection, Mr. Osumba submitted that Section 87(3) of the Act requires a procuring entity to

notify in writing the successful bidder of its intention to enter into a contract while simultaneously notifying in writing the unsuccessful bidders and disclosing the successful bidder as appropriate and reasons thereof. Counsel indicted that the Applicant was notified *vide* letter dated 16<sup>th</sup> January 2025 that its bid was unsuccessful though the said letter did not disclose the name of the successful bidder. He pointed out that this disclosure was only made on 28<sup>th</sup> January 2025 by which time the instant Request for Review had been filed.

32. Counsel argued that the Applicant ought not to be punished for a mistake or omission by the Respondent and that in allowing the objection by the Respondent would be tantamount to allowing it to take advantage or benefit from its own wrongdoing. In support of his argument, counsel referred to the holding in *Abu Chiaba Mohammed v Mohammed Bwana Bakari & 2 Others (2005) eKLR*.

33. He pointed out that the Board in its holding in *PPARB Application No. 102 of 2024 Keller Kustoms Kenya Limited vs. Kenya Ports Authority; Sainaj Holding Ltd (Interested Party)* considered the issue of joinder or no joinder of a successful bidder where it found that in exceptional cases where the procuring entity has sent out notification letter without disclosing the successful bidder, it is permissible for a request for review to be held as competent notwithstanding the fact that the successful bidder has not been named as a party in the request for review.

34. Counsel submitted that the requirement under Section 170(c) of the Act is aimed at ensuring that a challenge of an award is not determined without the participation of the successful bidder yet in the instant case, the successful bidder has had an opportunity to participate in the proceedings and it has therefore suffered no prejudice.

35. With regard to the second ground of objection raised by the Respondent, Mr. Osumba referred to the case of *Mukisa Biscuits v West End (1969) EA 696* and submitted that a preliminary objection ought to be on a point of law which has been specifically pleaded and nowhere in the grounds of the Respondent's Notice of Preliminary Objection dated 3<sup>rd</sup> February 2025 nor in the Replying Affidavit had it raised the issue of failure by the Applicant to plead having suffered loss and damage.

36. On the substantive issues raised in the Request for Review, counsel submitted that Section 80(2) of the Act provides that evaluation and comparison of bids is to be done using the procedures and criteria provided in the tender document. He pointed out that the Tender Document in the subject tender made a requirement for a tax compliance certificate which is verifiable but did not give the specific criteria for determining this verifiability. He argued that the reasonable presumption was that any document was to be verified from the issuing authority or using the criteria provided by the issuing authority as was held by the Board in *Asal Frontiers Limited vs. the Accounting Officer, Kenya National Highways Authority & Another; Aridlands Communications Limited (Interested Party) Application No. 9 of 2023*.

37. Counsel indicated that the tax compliance certificate submitted by the Applicant in the subject tender had a disclaimer at the foot of it that indicated that one may confirm validity of the certificate on the iTax Portal by using the TCC Checker. While referring the Board to the Applicant's annexure marked as Exhibit E03, counsel submitted that on 28<sup>th</sup> January 2025, the Applicant sought to confirm the validity of its Tax Compliance Certificate using the method availed by Kenya Revenue Authority following which the verification exercise confirmed that its Tax Compliance Certificate was valid and was due to expire on 14<sup>th</sup> November 2025 meaning that the Tax Compliance Certificate was not only valid but verifiable.

38. Mr. Osumba urged the Board to note that despite the Respondents averments that verification of the Applicant's Tax Compliance Certificate was done, no evidence had been placed on record to that effect and it was not clear from the Respondent's Replying Affidavit if any evidence had been availed to the Board. Counsel drew the Board's attention to the provisions of Section 112 of the Evidence Act and pointed out that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. In support of his argument, he relied on the holding by the High Court in *Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another (2005) E.A. 334*.

39. At this juncture, Mr. Samora submitted that the Request for Review as filed was in line with Section 167(1) of the Act and that the objection by the Respondent alleging that the Applicant had failed to plead the loss and damage suffered was trial by ambush as the same had not been pleaded in its Notice of Preliminary Objection. Counsel further submitted that the issue of loss and damage suffered had been expressly pleaded at paragraph 14 of the Applicant's Supporting Affidavit sworn by Erish Awino on 28<sup>th</sup> January 2025 accompanying the Request for Review. He argued that the Applicant had clearly pleaded the issue of suffering loss and damage which is attributable to the acts of the Respondent.

40. With regard to the Applicant's Tax Compliance Certificate as submitted in its bid document in the subject tender, counsel submitted that Section 79 of the Act provides that a tender is responsive if it conforms to all the eligibility and other mandatory requirements stipulated in the Tender Document. He reiterated that the Applicant's bid was responsive and that the due diligence exercise that was allegedly done ought to have been after the evaluation process.

41. He urged the Board to allow the instant Request for Review with costs as prayed.

### **Respondent's rejoinder to its Preliminary Objection and Submission on the Request for Review**

42. In a rejoinder, Ms. Kinyua submitted that jurisdiction flows from either the Act or legislation and that the Board can only exercise jurisdiction conferred by a written law. She pointed out that the Notice of Motion application by the Applicant was an afterthought and was filed after the Respondent had raised its Preliminary Objection and as such, the Board ought not to sanctify an incompetent Request for Review. She further pointed out that the Applicant was notified of the successful bidder on 28<sup>th</sup> January 2025 and had until 6<sup>th</sup> February 2025 to file the request for review application. She argued that nothing prevented the Applicant from withdrawing the instant Request for Review upon being notified on the 28<sup>th</sup> January 2025 so as to amend and include the successful bidder in the Request for Review.

43. On the substantive issues raised in the Request for Review, Ms. Kinyua referred the Board to the confidential documents submitted pursuant to Section 67(3)(e) of the Act which detailed the evaluation process of the subject tender and submitted that the Board cannot substitute the process of verifying whether the bid documents as submitted comply with the requirements and procedure stipulated in the Tender Document. She pointed out that the Applicant's verification of the Tax Compliance Certificate on 28<sup>th</sup> January 2025 was done outside the tender validity period and ought to have been done prior to expiry of the said period.

44. With regard to the principle of responsiveness of tenders, counsel referred the Board to the holding in *Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies*



*(Interested Party) Ex parte Meru University of Science & Technology (2019) eKLR* and submitted that a bid only qualifies as being responsive if it meets all the requirements set out in the Tender Document and the fact that the Applicant's Tax Compliance Certificate was non verifiable at the preliminary evaluation stage during the set out timelines is a clear indication that it was not a responsive bidder. In support of her argument she referred to the holding in *JGH Marine A/S Western Marine Shipyard Ltd (JV) v Public Procurement Administrative Review Board & 2 others [2019] eKLR* and pointed out that the court emphasized that public procurement procedures must be strictly adhere to the governing legal framework.

45. Counsel submitted that a mandatory requirement could not be waived or classified as a minor deviation as this would be a violation of the guiding principles provided under Article 227(1) of the Constitution. She argued that failure to verify the Applicant's Tax Compliance Certificate was a matter beyond the Respondent's control and that the Board does not possess the jurisdiction to substitute its own verification mechanism in place of that of the Kenya Revenue Authority, which is the legally designated entity mandated to conduct tax compliance verification. Further, that any attempt to do so would amount to an unlawful usurpation of statutory authority and a contravention of the procurement framework.

46. At this juncture, Mr. Otieno submitted that according to the Tender Evaluation Minutes and the Professional Opinion that was rendered

pursuant to Section 84 of the Act, the Procuring Entity established that the Applicant's Tax Compliance Certificate was unverifiable. He reiterated that the tax compliance certificate ought to have been verified during evaluation and that the Board ought to note that the Applicant's exhibit marked E03 was obtained on 28<sup>th</sup> January 2025 which was post the evaluation period.

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

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

48. In his submissions, Mr. Ogola associated himself with the submissions made by the Respondent and relied on documents filed before the Board by the Interested Party.

49. Counsel indicated that the Respondent's Preliminary Objection was proper in law and compliant with the criteria set out in the case of *Mukisa Biscuits v West End (1969) EA 696*. He submitted that the Request for Review as filed is defective and ought to be struck out for failure to join the Interested Party as provided under Section 170(c) of the Act.

50. As to responsiveness of the Applicant's tender, counsel submitted that the Applicant's Tax Compliance Certificate was not verifiable at the time of the tender's evaluation as was determined by the Procuring Entity's Evaluation Committee. He pointed out that a bidder was unresponsive if it failed to conform to the mandatory requirements provided in the Tender Document and referred the Board to the holding in *Republic v The Public*

*Procurement and Administrative Review Board & 2 others Ex parte Tuv Austria Turk Judicial Review Application No. 60 of 2020.*

51. Counsel submitted that failure by the Applicant to comply with a mandatory requirement meant that it could not proceed to the next stage of evaluation and as such, the request for review is unmerited and ought to be dismissed with cost. He further submitted that the Interested Party complied with all requirements provided in the Tender Document and was rightfully awarded the subject tender.

**Applicant's Rejoinder**

52. In a rejoinder, Mr. Osumba urged the Board to note that the Tax Compliance Certificate that was submitted in its bid document was Certificate Number KRAKSM1443271224 which was the same as that provided in its Exhibit E03.

53. He argued that per the requirements in the Tender Document, a bidder was only required to provide a valid tax compliance certificate and there was no requirement for a bidder to produce evidence of verifiability of the same since this was a responsibility of the Procuring Entity.

54. Counsel submitted that the tax compliance certificate checker result that was provided as Exhibit E03 was simply produced so that the Applicant can satisfy the burden of proof placed upon it by Section 107 of the Evidence Act which stipulates that he who alleges must prove.

55. He further submitted that the provisions under Section 167(1) of the Act ought to be read together with Section 87(3) of the Act and that the Applicant ought to have been simultaneously notified of the successful bidder on 16<sup>th</sup> January 2025 when the Interested Party was being notified that it was the successful bidder. He pointed out that both the letters sent on 16<sup>th</sup> January 2025 and 28<sup>th</sup> January 2025 failed to meet the threshold set out in Section 87(3) of the Act.

56. Mr. Samora proceeded to reiterate the findings by the Board in *PPARB Application No. 9 of 2023 Asal Frontiers Limited vs. the Accounting Officer, Kenya National Highways Authority & Another; Aridlands Communications Limited (Interested Party)* and urged the Board to grant the prayers sought in the Request for Review.

### **CLARIFICATIONS**

57. When asked to clarify when the Applicant received its notification letter, Mr. Osumba submitted that the notification letter dated 16<sup>th</sup> January 2025 was received by the Applicant via email on 22<sup>nd</sup> January 2025 as averred at paragraph 6 of the Applicant's Supporting Affidavit though it did not disclose the successful tenderer which led it to write to the Procuring Entity seeking for information on the same. He further submitted that the Applicant came to learn of the successful bidder on 28<sup>th</sup> January 2025 having been notified of the same vide letter dated 28<sup>th</sup> January 2025 which was also sent via email correspondence. Counsel reiterated that the 14 days' statutory period within which the Applicant was required to file a request for review was lapsing on 28<sup>th</sup> January 2024 and it was only

after filing the review that it received the letter notifying it of the successful bidder in the subject tender.

58. As to whether the Applicant submitted a tax compliance certificate in its bid document in response to the subject tender, Mr. Samora confirmed that the Applicant submitted a valid and verifiable tax compliance certificate which was even certified as a true copy of the original.

59. When asked to confirm to the Board what the Applicant's tender sum was as submitted in its bid document, Mr. Samora indicated that the Applicant's tender sum was Kshs. 7,368,679.60.

60. When asked to clarify to the Board the specific section of the Tender Document that contained the requirement for provision of the tax compliance certificate, Mr. Muganda referred the Board to Requirement No. 3 of the Evaluation Criteria Preliminary Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document and submitted that a bidder was required to attach a valid tax compliance certificate (verifiable). He further submitted that the tax compliance certificate was required to be verifiable within the tender validity period and the Procuring Entity was required to confirm that the tax compliance certificate was valid at the time it was evaluating bids submitted in the subject tender. Counsel pointed out that the 3 independent evaluators could not verify the Applicant's Tax Compliance Certificate submitted in its bid document and this verification was conducted on the KRA portal

though this information/result was not attached or provided as part of the confidential documents since it was part of the evaluation process.

61. On whether the Applicant was compliant with the requirement for provision of a tax compliance certificate, counsel submitted that during the evaluation period, the Applicant's tax compliance certificate was found not to be verifiable. He further submitted that at the point of notification, the burden shifted to the Applicant to write to KRA to confirm that its tax compliance certificate was verifiable during the tender validity period.

62. As to what the next course of action on the part of the Procuring Entity if the Applicant had written at that point in time and found that the tax compliance certificate was verifiable, Mr. Muganda submitted that they would have sought a confirmation as the tender process was still valid even at the point of sending out letters of notification.

63. When asked to confirm to the Board the mode of notification that was adopted by the Respondent, when the Applicant was notified of the outcome of the subject tender and if the Respondent disclosed the name of the successful bidder when notifying the Applicant, Mr. Muganda submitted that the Respondent dispatched formal letters advanced via email to bidders and that one letter sent to all bidders was dated 16<sup>th</sup> January 2025 though it was not compliant to Section 87(3) of the Act. He indicated that this was subsequently corrected by the letter dated 28<sup>th</sup> January 2025 which was only sent to the Applicant as a clarification and

notified it of the successful bidder. He argued that this did not prejudice the Applicant in any way and was within the 14 days' statutory period of filing a request for review since from the 16<sup>th</sup> January 2025, time would have lapsed on 30<sup>th</sup> January 2025.

64. As to whether other bidders were notified of the successful bidder, Mr. Muganda confirmed that no letters were subsequently issued to other bidders and that clarifications would only be issued to a party seeking the same.

65. On whether the Respondent conducted due diligence at any time in the evaluation process on the successful bidder or any of the bidders in the subject tender and if this was a requirement under the Tender Document, Mr. Muganda submitted that this was not a requirement of the Tender Document and no due diligence was conducted on any of the bidders.

66. Mr. Muganda submitted that the official estimate of the works in the subject tender was Kshs. 9,437,279/- and that the Bill of quantities forms part of the confidential documents submitted to the Board.

67. On whether the Interested Party was prejudiced in any way for having not been joined as a party in the request for review at the first instance, Mr. Ogola submitted that there is prejudice suffered by the Interested Party since when the matter came up for the first time, it had to be rearranged so that the Interested Party could be part of the proceedings.

68. When asked to clarify if the Tender Document provided that the Tax Compliance Certificate was supposed to be verifiable at the time of evaluation, Mr. Ogola aligned himself with submissions made by Mr. Muganda.
69. When asked to confirm to the Board what the Interested Party's tender sum was as submitted in its bid document, he indicated that the tender sum was Kshs. 7,671,420.
70. As to whether the Interested Party was subjected to due diligence post tender evaluation, Mr. Ogola submitted that the tender being county based, due diligence was done at the preliminary evaluation stage whereby the Procuring Entity went to the Interested Party's physical offices to confirm its existence, its location and documentation. He however could not specifically identify the persons who carried out the due diligence exercise.
71. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 28<sup>th</sup> January 2025 was due to expire on 18<sup>th</sup> February 2025 and that the Board would communicate its decision to all parties to the Request for Review via email.

## **BOARD'S DECISION**



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

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

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

- i Whether the Applicant has locus standi before the Board.*
- ii Whether the instant Request for Review is fatally defective as a result of the Applicant's failure to join the successful bidder as a party pursuant to Section 170(c) of the Act thus divesting the Board of its jurisdiction.*

Depending on the determination of Issue A;

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

*C. Whether the Respondent in notifying bidders of the outcome of evaluation of the subject tender met the threshold required in Section 87(3) of the Act as read with Regulation 82 of Regulations 2020.*

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

**As to whether the Board has jurisdiction to hear and determine the instant Request for Review.**

73. 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 inquire into it before doing anything concerning such a matter.

74. 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."***

75. 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."***

76. 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.”***

77. 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.

78. 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.”***

79. 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.”***

80. 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.

81. The jurisdiction of this Board is provided for under Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board. Further, Sections 172 and 173 of the Act provide for Powers of the Board. Section 167 (1) of the Act provides that:

***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]***

82. The Respondent herein has challenged the Board's jurisdiction to hear and determine the instant Request for Review as follows:

***i As to whether the Applicant has locus standi before the Board.***

83. During the hearing, Mr. Otieno argued that the Request for Review as filed was fatally defective for want of locus standi since the Applicant

failed to specifically plead any loss and damage that it will suffer by virtue of being disqualified in the subject tender thus divesting the Board of its jurisdiction. He relied on the holding in *Mombasa Civil Appeal No. 131 of 2018 James Oyondi t/a Betoyo Contractors & Another vs Elroba Enterprises Ltd & Another (2019) eKLR* (hereinafter referred to as “the James Oyondi case”) in support of its argument.

84. In response, Mr. Osumba for the Applicant submitted that a preliminary objection ought to be on a point of law and that this ground of objection had neither been pleaded or raised in the Respondent’s Notice of Preliminary Objection or the Respondent’s Replying Affidavit. He further submitted that (a) the Applicant in its pleadings had pleaded loss suffered as a result of the actions of the Respondents, (b) it had met the full threshold of Section 167(1) of the Act, and (c) it had requisite *locus standi* to institute the present proceedings.

85. The Interested Party aligned itself with submissions made by the Respondent with respect to this ground of objection.

86. The Board is cognizant of the holding in the James Oyondi case where the Court of Appeal was called upon to render itself in an appeal challenging the decision of the High Court which held that the Board ought to have ruled that the Appellants had no *locus standi* before it as they had not demonstrated that they had suffered loss or were likely to suffer loss. The Court of Appeal held as follows:

**"That ought to dispose of this appeal but on the second issue as well, the learned Judge cannot be faulted. It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;**

**"(1) subject to the provisions of this part, a candidate or a tender, 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."**

**It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. Were that the case, the Board would be inundated by an avalanche of frivolous review**

**applications. There is sound reason why only candidates or tenderers who have legitimate grievances may approach the Board. In the present case, it is common ground that the appellants were eliminated at the very preliminary stages of the procurement process, having failed to make it even to the evaluation stage. They therefore were, with respect, the kind of busy bodies that section 167(1) was designed of keep out. The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge.**

[Emphasis]

87. In essence, the Court of Appeal held that in seeking an administrative review before the Board, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage due to the breach of a duty imposed on a procuring entity by the Act or Regulations 2020.

88. This Board, differently constituted, in **PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another** (“the Toddy case”) was faced with a similar issue as the one raised in the instant Request for Review and held at pages 60 to 65 as follows:



***"In the James Oyondi case, the applicant never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by Kenya Ports Authority which the Court of Appeal held is a threshold requirement for any who would file a review before the Board in terms of Section 167(1) of the Act. The Court of Appeal held that it seemed plain that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at risk of suffering loss or damage for it is not every candidate or tenderer who has a right to file for administrative review. The Court of Appeal further held that the Board ought to have ruled that the Applicant in the request for review had no locus, and that the learned Judge at the High was right to reverse the Board's decision for failing to do so. The Court of Appeal concluded on by holding that they had no difficulty upholding the learned high court judge.***

***We understand this to mean that for a tenderer to file a request for review application before the Board, it must at the very least claim in its pleadings that it has suffered or is at the risk of suffering loss or damage due to breach of duty imposed on a procuring entity by the Act or Regulations 2020 pursuant to section 167 (1) of the Act.***

***In essence, administrative review by the Board is sought by a candidate or a tenderer who claims to have suffered or is at risk of suffering loss or damage and such loss or damage emanates from the breach of a duty imposed on a procuring entity by the Act or Regulations 2020.***

***Having carefully studied the instant Request for Review, we note that the same is premised on alleged breach by the Respondents of section 87(3) of the Act read with Regulation 82(2), (3), of Regulations 2020, breach of section 3(e) and (h) of the Act, breach of section 86(1) of the Act, breach of sections 53(1) and 44(1) of the Act and breach of Article 227(1) of the Constitution. However, the Applicant fails to plead or claim that it is likely to suffer or has suffered loss or damage due to the alleged breach of duty imposed on the 2<sup>nd</sup> Respondent by the Act or Regulations 2020.***

***We are therefore called upon to determine whether the Applicant lacks locus standi in the instant request for Review for its failure to plead that as a result of the Respondents' breach of duty, it suffered or risked suffering loss and damage.***

***The Board is cognizant of the holding in the case of Law Society of Kenya Vs Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000, where the High Court held that:***

***"Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in a court of law".***

***Further in the case of Alfred Njau and Others Vs City Council of Nairobi (1982) KAR 229, the High Court described locus standi as:***

***"the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".***

***From the above cases, it is clear that locus standi is the right to appear and be heard in Court or other proceedings and literally means 'a place of standing'. Therefore, if a party is found to have no locus standi, then it means it cannot be heard whether or not it has a case worth listening to.***

***It is evident that if this Board was to find that the Applicant has no locus standi, then it cannot be heard and on that point alone may dispose of the Request for***

**Review at the preliminary stage without looking into its merit. In the case of Quick Enterprises Ltd Vs Kenya Railways Corporation, Kisumu High Court Civil Case No.22 of 1999, the High Court held that:**

**"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone".**

***This Board is cognizant of the need for a court to exercise its discretion with utmost care when faced with an application to strike out pleadings for being defective as striking out pleadings is a draconian action which may have the consequence of slamming the door of justice on the face of one party without according it an opportunity to be heard. This was the position held by Madan JA (as he then was) in DT Dobie & Co (K) Ltd V Muchina, [1982] KLR, where the Court of Appeal expressed itself as follows:***

***"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal***

***with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way ... no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward ....***

***The Board is also cognizant that the power to strike out a pleading is a discretionary one as held in Crescent Construction Co Ltd V Delphis Bank Limited, [2007] eKLR, where the Court of Appeal stated as follows:***

***"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when***

*the case purportedly brought against him is a non-starter.”*

**Guided by the holding in the above cases, and in view of the Court of Appeal’s holding in the James Oyondi case, the Applicant would have at the very least sought leave to amend its Request for Review (in good time) to incorporate its pleadings and claim/plead having suffered or likely to have suffered loss or damage due to breach of duty imposed on the 2<sup>nd</sup> Respondent by the Act and Regulations 2020 in line with the provisions of section 167(1) of the Act.**

**In view of the foregoing, our hands are tied as we are bound by the Court of Appeal’s holding in the James Oyondi case and we have no option but to hold that the Applicant lacks the standing to seek an administrative review by the Board for failure to claim/plead that it has suffered or risks suffering loss or damage due to breach of duty imposed on the 2<sup>nd</sup> Respondent by the Act and Regulations 2020. Accordingly, the Applicant lacks the locus standi to seek administrative review before the Board for failure to claim that it has suffered or risks suffering, loss or damage due to breach of a duty imposed on the 2<sup>nd</sup> Respondent by the Act or the Regulations.**

**Consequently, this ground of objection by the Respondents succeeds."**

89. From the Toddy case, the Board found that it was bound by the Court of Appeal holding in the James Oyondi case and held that the Applicant lacked *locus standi* to seek administrative review before it for failure to claim or plead that it has suffered or risks suffering loss or damage due to breach of a duty imposed on the procuring entity by the Act or Regulations 2020.

90. Turning to the circumstances in the instant Request for Review, we note that the Applicant pleaded at paragraph 14 of its Supporting Affidavit sworn by Erish Awino on 28<sup>th</sup> January 2025 in support of the Request for Review as follows:

***"THAT it is therefore apparent that the Respondent breached its statutory duties and as result of which the Applicant has suffered and/or risk suffering loss and damage which is wholly attributable to the Respondent."***

91. From the above, it is clear to the Board that the Applicant specifically pleaded that it has suffered and/or risks suffering loss and damage as a result of the Respondent's breach of its statutory duties.

92. In the circumstances, we find and hold that the Applicant has the *locus standi* to seek an administrative review by the Board in the subject tender. Accordingly, this ground of opposition fails.

***ii As to whether the instant Request for Review is fatally defective as a result of the Applicant's failure to join the successful bidder as a party pursuant to Section 170(c) of the Act thus divesting the Board of its jurisdiction.***

93. The Respondent contends in its Notice of Preliminary Objection that the instant Request for Review as filed is fatally defective for failure by the Applicant to join the successful bidder as a party pursuant to Section 170(c) of the Act thus divesting the Board of its jurisdiction to hear and determine the matter.

94. In response, the Applicant submitted that it was notified that its tender was not successful *vide* a letter dated 16<sup>th</sup> January 2025 received on 22<sup>nd</sup> January 2025 and that the said notification letter simply indicated the reason for its disqualification and did not disclose the successful bidder and the reasons thereof contrary to Section 87(3) of the Act. The Applicant further submitted that it proceeded to seek clarifications in respect to the successful bidder *inter alia vide* letters dated 23<sup>rd</sup> January 2025 and 24<sup>th</sup> January 2025 and this information was only availed on 28<sup>th</sup> January 2025 by which time it had already lodged its request for review application before the Board.



95. The Interested Party aligned itself with submissions made by the Respondent with respect to this ground of objection.

96. It is not in contest that the Applicant was not notified of the successful bidder and reasons thereof *vide* the letter dated 16<sup>th</sup> January 2025. During the hearing, we note that the Respondent conceded to the fact that its letter of 16<sup>th</sup> January 2025 did not meet the threshold provisions stipulated in Section 87(3) of the Act and it argued that this omission was rectified when it issued the Applicant with the letter dated 28<sup>th</sup> January 2025 where it disclosed the successful bidder and reasons thereof.

97. The question that the Board is invited to determine is whether the Applicant's failure to include the successful bidder in the subject tender as party to the Request for Review renders it defective.

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

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

***(a) the person who requested the review;***

***(b) the accounting officer of a Procuring Entity;***

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

***(d) such other persons as the Review Board may determine."***

***(Emphasis ours)***

99. 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.

100. The Board notes that the mischief that Section 170(c) of the Act intends to cure is to avoid instances where a Request for Review is heard and determined by the Board in the absence of a successful bidder who was neither joined as a party to the Request for Review nor notified of the filing and hearing thereof. Later on, the successful bidder comes to learn of the decision of the Board which may have adversely affected the award made to it. In such an instance, the failure by an aggrieved Applicant to join a successful bidder, or the failure to notify the successful bidder of the hearing interferes with the successful bidder's right to a fair hearing, which is a principle of natural justice provided under Article 50 of the Constitution as follows:

***"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."***

101. Further, Article 47 of the Constitution provides for fair administrative action and Article 47(1) provides that:

***"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."***

102. Turning to the circumstances in the instant Request for Review, the Board notes that as at the time of lodging the Request for Review, the Respondent had not disclosed the name of the successful bidder and reasons thereof. It was only *vide* the Respondent's letter of 28<sup>th</sup> January 2025 addressed only to the Applicant that it came to learn of the details pertaining to the successful bidder in the subject tender.

103. Despite not having notified the Applicant on who the successful bidder in the subject tender was, the Respondent on 3<sup>rd</sup> February 2025 resorted to raise a preliminary objection on the ground that the Request for Review as filed is fatally defective for failure to join the successful bidder. The Applicant subsequently filed on 4<sup>th</sup> February 2025 a Notice of Motion Application seeking leave to amend the Request of Review lodged on 28<sup>th</sup> January 2025 so as to join the successful bidder as an interested party in the instant proceedings.

104. We also note that when the Respondent submitted to the Board the confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act, the Acting Board Secretary, Mr. Kilaka, notified all tenderers in the subject tender via letter dated 3<sup>rd</sup> February 2025, advanced 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. Further, all tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the tender within three (3) days from the date of notification on 3<sup>rd</sup> February 2025.

105. This Board in its decision in **PPARB Application No. 102 of 2024 Keller Kustoms Kenya Limited vs. Kenya Ports Authority** addressed the issue of joinder of parties as provided under Section 170 of the Act and stated as follows at paragraph 85 and 86 of its Decision with regard to joinder of the successful bidder:

***85. Flowing from above we hold that the parties listed under Section 170 of the Act should as far as is possible be made parties to a Request for Review lest the Request for Review be established as incompetent.***

***86. We say as far as is possible because the Board is also mindful of the fact that there are instances when it may not be possible for an Applicant to indicate the successful bidder as a party to a Request for Review. These include instances when a procurement process has been terminated and there is therefore no successful bidder and in instances where the Procuring Entity has sent a Notification Letter which does not disclose the identity of the successful bidder. In such exceptional cases, it is permissible for a Request for Review***

**to be held as competent notwithstanding the fact that the successful bidder has not been named as a party in the Request for Review. In such instances the Board may pursuant to Section 170(c) of the Act cure the non-joinder using the information supplied to it under Section 63(1) (e) of the Act. Conversely, every candidate or tenderer in a procurement process is presumed to know that every Procuring Entity has an Accounting Officer and that he/she can be joined to proceedings as such.**

106. In view of the above holding, we note that the successful bidder's right to a fair hearing under Article 50 and the right to fair administrative action under Article 47 of the Constitution has not been affected in the instant Request for Review in view of the fact that:

- a) The successful bidder was notified by the Acting Board Secretary of the existence of the instant Request of Review and invited to submit to the Board any information and arguments concerning the subject tender within three (3) days from the date of notification of 3<sup>rd</sup> February 2025.
- b) The purpose of Section 170(c) of the Act has been achieved as evidenced by the successful bidder's participation in the Request for Review through filing of its pleadings i.e. the Notice of Appointment of Advocates dated 5<sup>th</sup> February 2025 and filed on even date, the Interested Party's Replying Affidavit sworn on 5<sup>th</sup> February 2025 by Joash Jacob Otieno and filed on even date, the Interested Party's Written Submissions dated 11<sup>th</sup> February 2025 and filed on 12<sup>th</sup>

February 2025 and List of Authorities dated 12<sup>th</sup> February 2025 filed on even date.

- c) No prejudice has been occasioned on the successful bidder as it has participated in the proceedings before the Board in the instant Request for Review.

107. We have on numerous occasions noted that the decision of the Court of Appeal in the James Oyondi case (which is binding on this Board) was emphatic that the parties under Section 170 of the Act are expressed to be parties in mandatory terms. However, we wish to point out that the circumstances in the instant Request for Review are distinguishable from the facts in the James Oyondi case in that the Applicant herein failed to join the successful bidder as provided under Section 170(c) of the Act while in the James Oyondi case, the Applicant therein 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.

108. In view of the foregoing, we find that the Applicant's failure to join the successful bidder to this Request for Review does not make the review application fatally incompetent in this instance where the Applicant was not aware of who the successful bidder was at the time of lodging the review application with the Board and where the successful bidder has actively participated in these review proceedings, thereby exercising its right to a fair hearing under Article 47 and 50 of the Constitution.

109. Accordingly, this ground of objection fails.

110. In totality, the Board has jurisdiction to hear and determine the instant Request for Review and now proceeds to address the substantive issues framed for determination in the Request for Review.

**As to whether the Procuring Entity's Evaluation Committee in disqualifying the Applicant's tender acted in breach of the provisions of the Tender Document, Section 80(2) of the Act as read with Article 227(1) of the Constitution.**

111. The Applicant contends that Procuring Entity breached the provisions of Section 79(1) and 80(2) of the Act when it disqualified its tender at the Preliminary Evaluation stage on the basis that its Tax Compliance Certificate as attached in its bid document could not be verified yet the said Tax Compliance Certificate as submitted was valid and verifiable via the KRA – Tax Compliance Checker and confirmed that it had fulfilled its tax obligations pursuant to Section 55(1)(f) of the Act.

112. The Respondent submitted that three (3) independent evaluators of the Procuring Entity's Evaluation Committee conducted the requisite verification of the Applicant's Tax Compliance Certificate through the KRA portal and were unable to authenticate the said certificate and consequently, the Applicant's bid was deemed non-responsive due to non-compliance with a mandatory requirement that was expressly stipulated in the Tender Document.

113. The Interested Party aligned itself with the submissions of the Respondent and submitted that the Applicant’s Tax Compliance Certificate was not verifiable at the time of the subject tender’s evaluation as was determined by the Procuring Entity’s Evaluation Committee. It pointed out that the Applicant’s bid was unresponsive for failure to conform to the mandatory requirements provided in the Tender Document.

114. The Board is alive to the objective of public procurement which is to provide quality goods and services in a system that implements the principles stated in Article 227 of the Constitution which provides as follows:

Article 227 - Procurement of public goods and services:

**(1) "When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.**

**(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –**

**a) .....d)"**



115. The legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity, as follows:

Section 80 - Evaluation of tender:

**(1)** "....."

**(2)** ***The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, .....***

**(3)** ***.....;***"

116. Section 80(2) of the Act is clear on the requirement for the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. The Board’s interpretation of a system that is fair is one that considers equal treatment of all tenders against criteria of evaluation known by all tenderers having been well laid out in the tender document.

117. Having perused the Applicant’s letter of Notification dated 16<sup>th</sup> January 2025, it is noted that the reason for disqualification of its bid was laid out as follows:

***"The Tax Compliance Certificate attached could not be verified, hence termed as invalid."***

118. The Board has carefully studied the Tender Document and notes that the criteria for evaluation of the subject tender was set out in Section III- Evaluation and Qualification Criteria of the Tender Document. Mandatory requirements were provided for under Evaluation Criteria Preliminary Evaluation where Mandatory Requirement No. 3 provided as follows:

<b>No</b>	<b>Requirement</b>	<b>Responsive or Non-Responsive</b>
....	.....	.....
<b>3</b>	<b>Attach a valid Tax Compliance Certificate (verifiable)</b>	.....
.....	.....	.....

119. It is clear that a bidder was required to submit a valid Tax Compliance Certificate that was to be verified with the issuing authority.

120. A perusal of the Evaluation Report that was submitted to the Board pursuant to Section 67(3)(e) of the Act reveals as follows:

- 5. TB07 – M/s Awelo Investments Limited**
- a. The Tax Compliance Certificate attached could not be verified, hence termed as invalid.**

121. The Applicant in its Supporting Affidavit sworn by Erish Awino on 28<sup>th</sup> January 2025 deponed at paragraphs 7 to 10 as follows:

**7. THAT the Tax Compliance Certificate submitted by the Applicant was obtained from the Kenya Revenue Authority on 15<sup>th</sup> November, 2024 and is valid up to 14<sup>th</sup> November, 2025.**

***(Annexed hereto and marked "EO-2" is a copy of the said Tax Compliance Certificate.)***

***8. THAT the said Tax Compliance Certificate is instructive that its validity can be confirmed on the KRA i-Tax portal using the TCC Checker and if the Respondent had cared to do so, it could have ascertained that the Tax Compliance Certificate is valid.***

***9. THAT since the Tender Document was silent on the mode, method and or parameters of verification of the Tax Compliance Certificate, the expectation of the Applicant and indeed other bidders was that the validity of the Tax Compliance Certificate would be confirmed from the issuing authority to wit, Kenya Revenue Authority using the TCC Checker.***

***10. THAT on 28<sup>th</sup> January, 2025, I undertook confirmation of the validity of the Applicant's Tax Compliance Certificate via the TCC Checker on the i-Tax portal and the results thereto confirmed that the Certificate was valid. (Annexed hereto and marked "EO-3" is a copy of the KRA TCC Checker Result)***

122. In essence, the Applicant argued that its Tax Compliance Certificate as submitted in its bid document was obtained from KRA on 15<sup>th</sup> November 2024 and its validity could be confirmed from the KRA i-Tax portal using the TCC Checker as evidenced by the KRA TCC Checker Result of the said certificate confirmed on 28<sup>th</sup> January 2025 marked as Exhibit EO-3.

123. On its part, the Respondent objected to the Applicant's Exhibit EO-3 and argued that this was obtained after the tender validity period and

that the verification conducted by the Evaluation Committee during the preliminary evaluation of the subject tender revealed that the Applicant's Tax Compliance Certificate could not be verified and authenticated through the KRA Portal.

124. Having carefully perused the confidential documents submitted by the Respondent to the Board pursuant to Section 67(3)(e) of the Act, the Board notes that the Respondent did not avail any evidence in support of the verification exercise that was supposedly undertaken by the Evaluation Committee in authenticating the Applicant's Tax Compliance Certificate so as to prove that it was unable to authenticate the said certificate.

125. The Board notes that the verification exercise was undertaken at the Preliminary Evaluation stage yet the requirement under Mandatory Requirement No. 3 was for a bidder to submit a valid Tax Compliance Certificate that was verifiable. In our considered view, such verification ought to have been carried out with the issuing authority during due diligence /post-qualification envisioned under Section 83 of the Act as read with Regulation 80 of Regulations 2020.

126. Section 83 of the Act is instructive on conduct of due diligence and provides as follows:

***"83. Post-qualification***

***(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct***

***due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.***

***(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***

***(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—***

***(a) initial each page of the report; and***

***(b) append his or her signature as well as their full name and designation.”***

127. Further Regulation 80 of the 2020 Regulations provides as follows:

***"80. Post-qualification***

***(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.***

***(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—***

***(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or***

***(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method.”***

128. In **PPARB Application No. 158/ 2020 On the Mark Security Limited V The Accounting Officer, Kenya Revenue Authority and Another**, the Board established that a due diligence exercise is a fundamental element of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.

129. The Board notes that an evaluation committee of a procuring entity has the discretion to conduct or not to conduct post-qualification evaluation or a due diligence exercise to confirm and verify the qualifications of a tenderer who submitted the lowest evaluated responsive tender to be awarded a contract. This is so stated because a reading of Section 83 of

the Act makes reference to the word 'may' which implies discretion as opposed to the word 'shall' that would otherwise make conduct of the exercise an obligation.

130. In the Board's considered view where a tender document has not provided for post qualification evaluation or due diligence exercise, then a procuring entity is not under an obligation to conduct a due diligence exercise or a post qualification evaluation.

131. In the instant Request for Review, the Board notes that the Tender Document provided at page 61 under Financial Evaluation that:

***"A due Diligence shall be conducted where necessary."***

132. By the Respondent's and Interested Party's own admission, due diligence was conducted at the Preliminary Evaluation stage and not as the last stage after evaluation and recommendation of award of the subject tender by the Evaluation Committee. This action is contrary to the clear provisions of the Act which stipulate that due diligence is conducted on the lowest evaluated bidder being the successful bidder recommended for award of tender.

133. In the Board's considered view, the due diligence conducted by the Evaluation Committee at the Preliminary evaluation stage was an anomalous and improper. We say so because it was not reported on by the Evaluation Committee by way of a due diligence report and was

conducted contrary to the provisions under Section 83 of the Act as read with Regulation 80 of Regulations 2020. The Applicant having submitted a valid Tax Compliance Certificate ought to have progressed for further evaluation at the Technical Evaluation stage and verification of its bid ought to have been carried out if it emerged as the successful bidder as part of due diligence/post qualification in line with Section 83 of the Act as read with Regulation 80 of Regulations 2020.

134. In the circumstances, we find that the Procuring Entity's Evaluation Committee, in disqualifying the Applicant's tender, acted contrary to the provisions of the Tender Document, Section 80(2) of the Act as read with Article 227(1) of the Constitution.

135. Accordingly, this ground of review succeeds and is allowed

**As to whether the Respondent in notifying bidders of the outcome of evaluation of the subject tender met the threshold required in Section 87(3) of the Act as read with Regulation 82 of Regulations 2020.**

136. Section 87 of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and provides as follows:

***"(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."***

137. Section 87 recognizes that notification of the outcome of evaluation of a tender is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation ought to be done simultaneously to the successful tenderer(s) and the unsuccessful tenderer(s). A disclosure of who is evaluated as the successful tenderer is made to the unsuccessful tenderer with reasons thereof in the same notification of the outcome of evaluation.

138. The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

- (1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.***
- (2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.***
- (3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act.”***

139. In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes that an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act

and at what price is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

140. In **Judicial Review Miscellaneous Application No. 531 of 2015, Republic v Public Procurement Administrative Review Board & 2 others ExParte Akamai Creative Limited** (hereinafter referred to as “the Akamai Case”) the High Court held as follows:

***"In my view, Article 47 of the Constitution requires that parties to an administrative proceeding be furnished with the decision and the reasons thereof within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly, where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid"***

141. From the above case, the Board observes that the High Court was basically expounding on one of the rules of natural justice as provided for in Article 47 of the Constitution which require that a procuring entity to

promptly notify tenderers of the outcome of evaluation to afford an unsuccessful tenderer the opportunity to challenge such reasons if need be. Further, the Act does not require that an unsuccessful tenderer to seek clarification in order for the accounting officer to provide it with the outcome of evaluation or reasons leading to its disqualification in a tendering process.

142. Turning to the circumstances in the instant Request for Review, the Board notes that all bidders were notified of the outcome of evaluation of the subject tender vide letters dated 16<sup>th</sup> January 2025. During the hearing, the Board established that this letter of notification of 16<sup>th</sup> January 2025 did not disclose the name of the successful bidder or reasons for its successfulness. The Applicant sought clarification from the Respondent prompting the letter of 28<sup>th</sup> January 2025 which was only issued to the Applicant with the exception of other bidders.

143. As such, the attempt by the Respondent to cure the anomaly in the notification letter dated 16<sup>th</sup> January 2025 by issuance of the letter dated 28<sup>th</sup> January 2025 wherein it disclosed the details pertaining to the successful bidder only to the Applicant does not qualify as a notification letter pursuant to Section 87 of the Act as read with Regulation 82(3) of Regulations 2020 since the fact remains that all bidders in the subject tender with the exception of the Applicant were not notified of the successful bidder, why it was successful and at what price it was awarded the tender.

144. In the circumstances, the Respondent's letters of notification dated 16<sup>th</sup> January 2025 issued to the Applicant and all other bidders in the subject tender and the letter of 28<sup>th</sup> January 2025 issued only to the Applicant failed to meet the threshold required under Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

145. Accordingly, this ground of review succeeds and is allowed.

**As to what orders the Board should grant in the circumstances**

146. The Board has found that it has jurisdiction to hear and determine the instant Request for Review.

147. It is the Board's further finding that the Procuring Entity's Evaluation Committee acted in breach of the provisions of Section 80(2) of the Act as read with Article 227(1) of the Constitution in disqualifying the Applicant's tender and that the Applicant was qualified to progress to the Technical stage of evaluation in the subject tender having determined that the Applicant was successful at the Preliminary Evaluation stage.

148. The Board has also established that the Respondent's letters of notification dated 16<sup>th</sup> January 2025 issued to the Applicant and all other bidders in the subject tender and the letter of 28<sup>th</sup> January 2025 issued

only to the Applicant failed to meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

149. The upshot of the findings is that the instant Request for Review succeeds in the following terms:

### **FINAL ORDERS**

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

**A. The purported Notification Letter dated 28<sup>th</sup> January 2025 addressed to the Applicant with respect to Tender No. UTVC/PRJ/01/2024/2025 for Proposed Tuition Block for Ugenya Technical and Vocational Training College be and is hereby nullified and set aside.**

**B. The Notification Letters dated 16<sup>th</sup> January 2025 addressed to the Interested Party, the Applicant and other unsuccessful bidders with respect to Tender No. UTVC/PRJ/01/2024/2025 for Proposed Tuition Block for Ugenya Technical and Vocational Training College be and are hereby nullified and set aside.**

**C. The Respondent is hereby ordered to direct the Procuring Entity's Evaluation Committee to re-admit the Applicant's tender back into procurement process and to re-evaluate its tender from the Technical Evaluation stage taking into consideration the Board's findings in this Request for Review.**

**D. Further to Order C above, the Respondent is directed to proceed with the procurement process of the subject tender to its logical conclusion, including the making of an award, within 21 days from the date of this decision.**

**E. In view of the fact that the procurement process is not complete, each party shall bear its own costs in the Request for Review.**

**Dated at NAIROBI this 18<sup>th</sup> Day of February 2025.**

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**PANEL CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**