

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 9/2025 OF 31<sup>ST</sup> JANUARY 2025**

**BETWEEN**

**SKEL SOLUTIONS LIMITED ..... APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**KWALE COUNTY ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**

**KWALE COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer Kwale County Assembly in relation to Tender No. CAK-1698743/2024/25 for Invitation for Expression of Interest on Installation, Testing and Commissioning of Solar PV System and Construction of Parking Shade at County Assembly Building Complex

**BOARD MEMBERS PRESENT**

- |                         |                     |
|-------------------------|---------------------|
| 1. Ms. Jessica M'mbetsa | - Panel Chairperson |
| 2. Mr. Robert Chelagat  | - Member            |
| 3. Eng. Lilian Ogombo   | - Member            |

**IN ATTENDANCE**

1. Mr. Philemon Kiprop - Holding brief for Acting Board Secretary

2. Ms. Evelyn Weru - Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT**

### **SKEL SOLUTIONS LIMITED**

Ms. Lagat

- Advocate, Mandala & Company Advocates

### **RESPONDENTS**

### **THE ACCOUNTING OFFICER, KWALE COUNTY ASSEMBLY & KWALE COUNTY ASSEMBLY**

Ms. Fatima Kingi

- Advocate, Kwale County Assembly

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kwale County Assembly, the Procuring Entity and 2<sup>nd</sup> Respondent herein, invited sealed tenders in response to Tender No. CAK-1698743/2024/25 for Invitation for Expression of Interest on Installation, Testing and Commissioning of Solar PV System and Construction of Parking Shade at County Assembly Building Complex (hereinafter referred to as "the subject tender"). Tendering was conducted under open competitive (national) method and the invitation was by way of an advertisement on 31<sup>st</sup> December 2024 published on the Daily Nation and the Standard Newspapers, the Procuring Entity's website [www.kwaleassembly.go.ke](http://www.kwaleassembly.go.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 10<sup>th</sup> January 2025 at 10.00 a.m. East African Time and completed tenders were to be delivered electronically via [www.supplier.treasury.go.ke](http://www.supplier.treasury.go.ke)

### **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'), five (5) bidders submitted bids in the subject tender as follows:

| <b>Bid No.</b> | <b>Name Of The Firm</b>                |
|----------------|----------------------------------------|
| 1.             | Kim Engineering Limited                |
| 2.             | Mwangaza Electronics Company Limited   |
| 3.             | Skel Solutions Limited                 |
| 4.             | Ultra Power System Limited             |
| 5.             | Micha Engineering Construction Limited |

### **Evaluation of Tenders**

3. A Tender Evaluation Committee undertook evaluation of the submitted bids as captured in a Tender Evaluation Report dated 20<sup>th</sup> January 2025 for the subject tender in the following stages:

- i Mandatory /Preliminary Requirements
- ii Technical Requirements/Specification
- iii Detailed Technical Proposal Requirements
- iv Demonstration of the Proposed Product/Solution/System
- v Financial Proposal

### **Mandatory /Preliminary Requirements**

4. At the Mandatory/ Preliminary Requirements stage, the Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 1: Preliminary/Basic Mandatory Requirements of the Tender Document. Tenders were required to meet all the mandatory requirements at this stage. At the end of evaluation at this stage, three (3) tenders were rendered non-responsive while two (2) tenders were found responsive and progressed to Technical Evaluation.

### **Technical Requirements/Specification**

5. At the Technical Requirements/ Specifications stage, the Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 2: Technical Specifications/Requirements of the Tender Document. Two (2) tenders by M/s Micha Engineering Construction Limited and M/s Ultra Power Systems Limited were progressed for further evaluation at the Detailed Technical Proposal Requirements.

### **Detailed Technical Proposal Requirements**

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 3: Detailed Technical Proposal Requirements of the Tender Document. Bidders were required to score 70% and above to progress for further evaluation. At the end of evaluation at this stage, one tender was found non-responsive while one tender for M/s Micha Engineering Construction Limited was found responsive having scored 79% and progressed for further evaluation.

### **Demonstration of the Proposed Product/Solution/System**

7. At this stage of evaluation, the Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 4: Demonstration/Presentation of the Proposed System of the Tender Document. Bidders that scored the set pass mark of 70 points and above would be invited to demonstrate their proposed solution, system and offer to the Procuring Entity. A bidder was required to score 6 marks and above at this stage so as to be considered as technically responsive and to progress to Financial Evaluation.

### **Financial Proposal**

8. At this stage, the Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 4: Financial Proposal Evaluation of the Tender Document. Only the financial proposals for the technically responsive firms would be opened and the Procuring Entity would only invite the technically responsive firms to witness the opening of the financial bids. The Evaluation Committee was then

required to scrutinize documents submitted and recommend the technically responsive and lowest evaluated cost bidder for award of the subject tender.

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

9. The Evaluation Committee examined proposals received and unanimously recommended that the subject tender be considered non-responsive and be re-advertised because the shortlist failed to meet the threshold set out in Section 121(3) of the Act. According to the Evaluation Report, only the tender by M/s Micha Engineering Construction Limited made it to the shortlist.

### **Professional Opinion**

10. In a Professional Opinion dated 20<sup>th</sup> January 2025, the Deputy Supply Chain Management, Mr. John Genya Kalu concurred with the Evaluation Committee's recommendation to re-advertise the subject tender for the reason that it did not meet the threshold as per Section 121(3) of the Act.

### **Notification to Tenderers**

11. Tenderers were notified of the outcome of evaluation *vide* letters dated 21<sup>st</sup> January 2025.

### **REQUEST FOR REVIEW NO. 9 OF 2025**

12. On 31<sup>st</sup> January 2025, Skel Solutions Limited, the Applicant herein, filed a Request for Review dated 29<sup>th</sup> January 2025 together with an

Applicant's Statement in Support of the Request for Review sworn by George Kibe Nduati through Mandala & Co. Advocates seeking the following orders from the Board:

- A. A Declaration that the Procuring entity has breached the provisions of Articles 10,27,227 of the Constitution of Kenya and the procurement laws.***
- B. The decision of the Procuring entity as communicated to the Applicant via an e-mail message dated 20th January, 2025 indicating that the Applicant has not been shortlisted and will no longer be included in further evaluation and awarding phases of Tender Number CAK/1698743/2024/2025 be set aside and/or annulled.***
- C. This Honourable Board do issue an Order directing the Procuring entity to re-do the procurement process including the Applicant as having been shortlisted and included in further evaluation and awarding phases of the Tender Number CAK/1698743/2024/2025.***
- D. The Procuring entity be directed to forthwith halt the procurement process pending hearing and determination of this Request for Review.***
- E. The Respondent be ordered to pay costs of and incidental to these proceedings.***
- F. Any other or further reliefs and/or orders as this Honourable Board may deem fit and just to grant in the circumstances.***

13. In a Notification of Appeal and a letter dated 31<sup>st</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 31<sup>st</sup> January 2025.
14. On 7<sup>th</sup> February 2025, the Respondents filed through Fatuma Kingi Advocates a Notice of Preliminary Objection dated 12<sup>th</sup> February 2025, a Memorandum of Response dated 7<sup>th</sup> February 2025 together with the confidential documents concerning the subject tender in line with Section 67(3)(e) of the Act.
15. *Vide* letter dated 11<sup>th</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.

16. *Vide* a Hearing Notice dated 13<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 17<sup>th</sup> February 2025 at 11:00 a.m. through the link availed in the said Hearing Notice.
17. On 14<sup>th</sup> February 2025, the Applicant filed through its advocates an Applicant's Supplementary Affidavit sworn on 13<sup>th</sup> February 2025 by George Kibe Nduati.
18. At the hearing on 17<sup>th</sup> February 2025 at 11.00 a.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 Respondents 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.
19. Parties were allocated time to highlight their respective cases and the instant Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Respondents' submission on their Preliminary Objection**

20. On the first ground of the Respondent's Preliminary Objection, Ms. Kingi submitted that the Applicant could not agitate the instant Request for Review without the formal authority of its joint partner, Brulyn

Technology & Green Energy Solution Ltd having participated in the subject tender as a joint partner and as such, the instant Request for Review as filed is not proper pursuant to Section 167(1) of the Act thus divesting the Board of its jurisdiction.

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

21. In response to the Respondents' Preliminary Objection, Ms. Lagat referred the Board to the Joint Venture Agreement at pages 6 to 11 of the Applicant's Bundle of Documents and submitted that pursuant to the said agreement, parties agreed to carry out business under the name of Skel Solutions Limited while providing for their legal address and it was therefore clear who was supposed to agitate any action on behalf of the said joint venture. She further pointed the Board to an Authority to Sue dated 29<sup>th</sup> January 2025. marked as Exhibit GKN1 and attached to the Applicant's Supplementary Affidavit.

22. Counsel argued that the Request for Review as filed was proper and in line with the provisions of Section 167(1) of the Act noting that the Applicant was notified of the outcome of evaluation of the subject tender via email on 20<sup>th</sup> January 2025 and filed the review application within the 14 days' statutory period on 31<sup>st</sup> January 2025. She urged the Board to dismiss the Respondents' Preliminary Objection.

23. On the substantive issues raised in the instant Request for Review, counsel submitted that the Applicant submitted its bid in the subject tender electronically as instructed and attached all the required mandatory documents. She further submitted that the Applicant received an email on 20<sup>th</sup> January 2025 which only indicated that it would no longer be included in the evaluation and award of the subject tender which prompted it to request for reasons for its disqualification and lodge the instant Request for Review since the inquiry was not responded to.

24. She submitted that the Applicant avers that it had met all the mandatory requirements and ought to have progressed for further evaluation. She further submitted that the decision to terminate the subject tender without giving proper reasons in addition to not giving the Applicant reasons why its tender was rendered non-responsive was contrary to the provisions of the Act and the Constitution.

25. Counsel argued that Section 121 of the Act as relied upon by the Respondents, as communicated in the notification letter that was issued after the review had been lodged with the Board, being the basis of why the subject tender was terminated did not specifically apply to the subject tender as floated by the Procuring Entity in view of the fact that the provisions relied on are only applicable to Consultancies as provided under Part X of Section 115 and 116 of the Act.

26. It is the Applicant's case that the re-advertisement done by the Respondents as evidenced by the Applicant's Exhibit marked GKN2 is

premature and ought to be quashed since the re-advertisement ought to have been made 21 days after issuance of a formal letter giving valid reasons why the Applicant was rendered non-responsive. Further, that the re-advertisement failed to take into account suspension of all proceedings relating to the subject tender following filing of the instant Request for Review.

27. Ms. Lagat urged the Board to allow the instant Request for Review with costs as prayed.

### **Respondents' rejoinder to their Preliminary Objection and Submissions on the Request for Review**

28. Ms. Kingi submitted that the Procuring Entity invited Expressions of Interest in response to the subject tender which was advertised in accordance with Section 98 of the Act following which on the scheduled tender submission deadline of 10<sup>th</sup> January 2025, 5 bids received through the Integrated Financial Management System (IFMIS) were opened in line with Section 77 and 78 of the Act. She indicated that a pre-site visit was conducted on 8<sup>th</sup> January 2025 and certificates issued to bidders who attended the same.

29. Counsel submitted that evaluation of the subject tender was conducted in compliance with Section 80 of the Act and that the Evaluation Committee executed its work as per Section 121(1) of the Act. She further submitted that the Applicant received an immediate system generated

updated from IFMIS and that the official communication from the 1<sup>st</sup> Respondent would have been dispatched once the accounting officer had reviewed the Evaluation Report.

30. Ms. Kingi submitted that the Evaluation Committee having examined proposals received took into consideration provisions of Section 121 of the Act and found that the subject tender ought to be considered as non-responsive because the shortlist failed to meet the threshold as set out under Section 121(3) of the Act which requires that where less than six (6) proposals have been received, a minimum of three (3) ought to be shortlisted.

31. Counsel pointed out that IFMIS is a real time System and that at the time the Applicant sent the email for inquiry and filed the instant Request for Review, the accounting officer had not received the Evaluation Report and what the Applicant received was an automated message from IFMIS system notifying it that it had not qualified to proceed to the next level. She indicated that what was to follow later on was the written communication from the accounting officer explaining the reasons why the Applicant was not successful and could not proceed to the next level of evaluation.

32. She submitted that the Respondents did not contravene any provisions of the Constitution and that the procurement process in the subject tender was fair, equitable, transparent, within the tender validity period

and notifications issued met the threshold stipulated under Section 87 of the Act.

33. Ms. Kingi submitted that Head of Procurement in rendering his professional opinion recommended for re-advertisement of the subject tender since it failed to meet the stipulated threshold under Section 121 of the Act.

34. Counsel urged the Board to dismiss the instant Request for Review with costs.

### **Applicant's Rejoinder**

35. In a rejoinder, Ms. Lagat submitted that pursuant to Section 167(1) of the Act, the Applicant had 14 days within which it was required to lodge a review with the Board upon being notified of the outcome of evaluation of its tender regardless of the averments by the Respondents that they had not yet received the Evaluation Report so as to communicate to bidders on the outcome of evaluation of the subject tender.

36. With regard to reliance on provisions of Section 121 of the Act by the Respondents in rendering the subject tender as non-responsive, Ms. Lagat argued that the subject tender was an open tender and that Section 122 of the Act does not apply to the subject tender given that it applies to tenders that are intellectual or predominantly advisory in nature.

37. She submitted that the Respondents breached the orders of the Board by re-advertising the subject tender when the review had already been filed with the Board and proceedings stood suspended. She urged the Board to grant the prayers sought in the instant Request for Review as prayed.

### **CLARIFICATIONS**

38. When asked to clarify if the Applicant was notified of the reasons why its bid was unsuccessful, Ms. Kingi submitted that by the time the Applicant received the first notification from IFMIS informing them of disqualification of their bid which led to filing of the instant Request for Review, the accounting officer had not received the Evaluation Report and had not sent the notification letter disclosing the reasons why the Applicant's bid was disqualified. She further submitted that an email was later on sent on 5<sup>th</sup> February 2025 to the Applicant enclosing the letter dated 21<sup>st</sup> January 2025 responding to the queries raised with regard to disqualification of its tender.

39. Counsel clarified that the Re-Advertisement was done on 30<sup>th</sup> January 2025 before the Respondents received the advance email on the notification of appeal on 31<sup>st</sup> January 2025 and hard copies on 4<sup>th</sup> February 2025 and all proceedings were suspended in compliance with the Act.

40. On her part, Ms. Lagat submitted that the Respondents notification letter did not indicate the specific reasons why the Applicant's bid was

disqualified and that the response referred to indicated that the reason why the tender was rendered non-responsive was failure of the shortlisting to meet the threshold stipulated under Section 121 of the Act and this overlooked the fact that this was not the default provision to be relied upon in the subject tender. She further submitted that no specific reason was communicated on why the Applicant's tender was disqualified.

41. When asked to clarify on what the choice of procurement method was, Ms. Kingi submitted that it was an Expression of Interest.
42. On her part, Ms. Lagat submitted that this was an open tender. She further submitted that Part X of the Act provides for procurement of professional services which are predominantly advisory or intellectual in nature and the procurement in the subject tender was not advisory or intellectual in nature and that this was the reason why the Applicant maintained the position that the subject tender was an open tender. She clarified further that that informed their submission that the method of procurement was not a request for proposal as indicated and that Section 121 of the Act was therefore not applicable.
43. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 31<sup>st</sup> January 2025 was due to expire on 21<sup>st</sup> February 2025 and that the Board would communicate its decision to all parties to the Request for Review via email before then.

## **BOARD'S DECISION**

44. 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 has been instituted in accordance with Section 167(1) of the Act.

Depending on the determination of Issue A;

*B. Whether the procurement process in the subject tender adhered to the provisions of the Act, Regulations 2020 as read with Article 227(1) of the Constitution.*

*C. 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.**

45. 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.

46. 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."***

47. 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.**"

48. 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."***

49. 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.

50. 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."***

51. 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."***

52. 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.

53. The jurisdiction of the Board is provided for and also limited under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

**PART XV — ADMINISTRATIVE REVIEW OF  
PROCUREMENT AND DISPOSAL PROCEEDINGS**

**167. Request for a review**

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

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

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

***.....***

**173. Powers of Review Board**

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

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

***(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***

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

54. Given the forgoing provisions of the Act, the Board is a creature of the Act and its jurisdiction flows from and is circumscribed under Section 28 and 167 of the Act. It therefore follows, that an applicant who seeks to invoke the jurisdiction of the Board must do so within the four corners of the aforesaid provisions. Section 167(1) of the Act allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

55. Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specifically under Regulation 203 of Regulations 2020 read with the Fourteenth Schedule of Regulations 2020 prescribes the format of the request for review as follows:

***PART XV – ADMINISTRATIVE REVIEW OF  
PROCUREMENT AND DISPOSAL PROCEEDINGS***

**203. Request for a review**

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

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

**(a) .....**

**(b) .....**

**(c) be made within fourteen days of —**

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

**(ii) the notification under section 87 of the Act; or**

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

**(d) .....**

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

**(4) .....**

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

***87. Notification of intention to enter into a contract***

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

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

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

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

57. A reading of the above provisions shows 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 into 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 instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made.

58. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued, the same is only complained of after notification to enter into a contract has been issued. We say so because there would be no need to provide under Regulation 203 (2)(c) of Regulations 2020 the three instances within which a Request for Review may be filed.

59. 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 instant Request for Review has been instituted in accordance with Section 167(1) of the Act.***

60. The Respondents contend at ground 2 of the Notice of Preliminary Objection dated 12<sup>th</sup> February 2025 that pursuant to Section 167(1) of the Act, the instant Request for Review is not properly filed thus ousting the Board's jurisdiction to hear and determine the same. Ms. Kingi for the Respondents submitted that the Applicant was notified through IFMIS that its bid had been disqualified and would not progress for further evaluation and by this time, the 1<sup>st</sup> Respondent had not yet received the Evaluation Report so as to notify bidders of the outcome of evaluation of the subject tender. She further submitted that the Applicant filed the instant Request for Review before the 1<sup>st</sup> Respondent issued it with the notification letter disclosing reasons why its bid was disqualified but nevertheless, the clarifications sought by the Applicant were sufficiently responded to.

61. We understand the Respondents' contention to be that the Applicant ought to have waited for the 1<sup>st</sup> Respondent to notify it on the outcome of evaluation of the subject tender before lodging the instant Request for Review with the Board. However, the Applicant chose to rely on the IFMIS notification to institute the instant proceedings contrary to Section 167(1) of the Act.

62. We note that the Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to

challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches.

63. Both the Applicant and Respondent confirmed to the Board that an email notification was sent to the Applicant through the IFMIS system on 20<sup>th</sup> January 2025 notifying it that its tender had been disqualified without issuing reasons why it had been rendered non-responsive and would not progress for further evaluation. It was this email that prompted the Applicant on 24<sup>th</sup> January 2025 to request the Respondents to furnish it with reasons why its bid was rendered non-responsive. Unfortunately, it was not until 5<sup>th</sup> February 2025 that the Respondents responded via email whereby they enclosed the notification letter dated 21<sup>st</sup> January 2025 which informed the Applicant that the subject tender had been considered as non-responsive since the shortlisting failed to meet the threshold stipulated under Section 121 of the Act.

64. From the above turn of events, the Board has no doubt that the Procuring Entity as a user of IFMIS in carrying out its procurements is well versed with the auto-generated information and responses that are transmitted to bidders who have participated in tenders floated using this e-procurement system. As such, there is a high likelihood of a bidder to feel aggrieved by a response disclosing that its tender has been disqualified yet no explanation has been given as to what informed such a decision.

65. In such an instance, where the bidder results to make follow up inquiries on the auto-generated response received, prompt action ought to have been taken by the Procuring Entity in responding and informing the bidder that the evaluation process was yet to be completed and that notification letters as envisioned under Section 87 of the Act would be issued in due course.
66. In any event, such information ought to be issued at the point of invitation to tender where the e-procurement system in use by the Procuring Entity is known to render such auto generated responses in the course of the procurement process so that bidders are aware of what to expect in the course of evaluation and notification of the outcome of evaluation of a tender.
67. Turning to the circumstances in the instant Request for Review, it is unsurprising that the Applicant resulted to instituting the instant proceedings since it felt aggrieved by (a) its bid being disqualified as notified by IFMIS, (b) not receiving reasons why its bid was disqualified and (c) not receiving a response on its inquiry from the Procuring Entity on why its tender was disqualified. As such it is only logical to conclude that the Applicant being weary that it had received a notification that its bid had been disqualified, therefore aware of an alleged breach by the procuring entity, which would in turn trigger the 14 days' statutory timeline to start running regardless of the fact that the 1<sup>st</sup> Respondent had not issued it with a notification letter in line with Section 87 of the Act, resulted to filing this Request for Review

68. We have hereinabove established that pursuant to Regulation 203(2)(c)(i) of Regulations 2020, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of occurrence of breach complained of, having taken place before an award is made.

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

***57. Computation of time***

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

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

***considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***  
***(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.***

70. In computing time when the Applicant ought to have sought redress before the Board, 20<sup>th</sup> January 2025 is excluded pursuant to Section 57(a) of IGPA, being the day on which the Applicant learnt of occurrence of the breach of duty complained of in the instant Request for Review. This means that 14 days started running from 21<sup>st</sup> January 2025 and lapsed on 4<sup>th</sup> February 2025. In essence, the Applicant had between the 21<sup>st</sup> January 2025 and 4<sup>th</sup> February 2025 to seek administrative review before the Board with respect to challenging the contents of the IFMIS notification. This Request for Review having been filed on 31<sup>st</sup> January, 2025 was indeed filed within the 14days' statutory timeline anticipated under Section 167(1) of the Act as read with Regulation 203(2)(c)(i).

71. In the circumstances, we find and hold that the instant Request for Review was filed within the statutory timeline of 14 days prescribed under Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020. Accordingly, this ground of objection by the Respondents fails.

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

72. The Respondents objected to the hearing and determination of the instant Request for Review by the Board on the ground that the Applicant ought not to agitate its cause without a formal authority of its Joint Partner, Brulyn Technology & Green Energy Solution Ltd. Ms. Kingi submitted that the Applicant submitted its bid in the subject tender in a joint venture with its partner Brulyn Technology & Green Energy Solution Ltd who was also required to agitate the instant suit with the Applicant or authorize the Applicant to institute the same.

73. In response, the Applicant submitted that according to the Joint Venture Agreement submitted in its bid document, it was clear that the joint venture formed between it and Brulyn Technology & Green Energy Solution Ltd would carry out business under the name Skel Solutions Limited and that pursuant to the Authority to Sue dated 29<sup>th</sup> January 2025 and marked as Exhibit GKN1, the Applicant was duly authorized to institute the instant Request for Review.

74. Having carefully considered parties' pleadings and submissions, the question that the Board is called to answer is whether the Applicant has *locus standi* before the Board.

75. We are cognizant of the holding by the High Court in **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".***

76. 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".***

77. 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 that 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 that point alone may dispose of the instant 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”.***

78. We are 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 ...."**

79. In addressing whether the Applicant has *locus standi* before this Board, we must first consider the import of Section 167(1) of the Act and in doing so, determine who an applicant is in administrative review proceedings lodged before the Board and whether there was authorization issued to the person or entity who instituted the instant Request for Review before the Board.

80. Section 167 (1) of the PPADA specifies that a request for review application may be lodged before the Board by either a candidate or tenderer within 14 days of notification of award or date of occurrence of an alleged breach of duty at any stage of the procurement or disposal process.

81. Section 2 of the PPADA defines a candidate and tenderer as:

***"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity;"***

***"tenderer" means a person who submitted a tender pursuant to an invitation by a public entity;"***

82. Section 170 of the Act provides for parties to a review. Section 170(a) of the PPADA provides:

***"The parties to a review shall be-***  
***(a) The person who requested the review;***  
***....."***

83. Further, the manner in which an aggrieved party seeks administrative review is prescribed under Regulation 203(2)(b) of Regulations 2020 as follows:

***"(2) The request referred to in paragraph (1) shall-***  
***(a).....***  
***(b) be accompanied by such statements as the applicant considers necessary in support of its request;"***

84. This Board in its Decision in **PPARB No. 34 of 2022 Dar Al-Handasah Consultants (Shair and Partners) in joint venture with Kurrent Technologoes Limited v Accounting Officer Kenya Pipeline Company Limited & another** held as follows with regard to the provisions of Regulation 203 (2)(b) of Regulations 2020:

***".....***  
***It is the Board's view that the use of the word 'necessary' in Regulation 203 (2)(b) of Regulations 2020 does not imply that an applicant has the discretion to decide whether a request for review should or should not be accompanied by a statement in support. It rather***

***denotes that an applicant has the discretion to determine the contents of the statement it ought to file in support of a request for review application. This is in light of the fact that a statement in support of a request for review application provides the evidence necessary to support the grounds as raised in a request for review and ought to be sworn and signed by an individual authorized to issue the said statement and possessed of the facts or the information that is deponed in the said statement in support of a request for review.***

***The Board studied the instant Request for Review and notes that the Applicant therein is identified as Dar Al Handasah Consultants (Shair and Partners) in joint venture with Kurrent Technologies Limited. This means, both members of the joint venture that is, Dar al-Handash Consultants (Shair and Partners) and Kurrent Technologoes Limited must both be involved in the Request for Review and by doing so, must both expressly authorize the filing of a review application before this Board, noting that they submitted a technical and financial tender in response to the subject tender jointly as a joint venture.***

***.....”***

85. Additionally, this Board in **PPARB Application 18 of 2021 ADK Technologies Limited (in consortium with Transnational Computer Technologies Limited) V The Principal Secretary, the National Treasury and Planning & another and Kingsway Business Systems Limited (in consortium with Kobby Technologies Limited and Inplenion Eastern Africa Limited)** while striking out the same held that in the event of a tender submitted by a joint venture or consortium, members of a joint venture or consortium must expressly authorize the filing of the review. This decision was upheld by the High Court in **Judicial Review Case No. E027 of 2021 Republic v Public Procurement Administrative Review Board Ex parte ADK Technologies Limited in Consortium with Transnational Computer Technologies Limited; Principal Secretary National Treasury and Planning & 2 others (Interested Parties) [2021] eKLR** where Justice Ngaah held as follows:

".....  
***While ADK Technologies Limited and Transnational Technologies Limited could respond to the tender floated by the 2<sup>nd</sup> Interested party as a consortium, they can only sue together for a common cause but as separate and distinct entities. Subject to the terms of their agreement none of them can purport to act on behalf of the other without the other's authority or consent....."***

86. Turning to the circumstances in the instant Request for Review, it is not in contest that the Applicant as a tenderer submitted its tender in the

subject tender in joint venture with Brulyn Technology & Green Energy Solution Ltd. A perusal of the first page of the instant Request for Review reveals that the Request for Review is filed by Skel Solutions Limited, as the Applicant, who is requesting the Board to review the decision of the Respondents in the subject tender.

87. At paragraph 1 of the Applicant's Supplementary Affidavit, the Applicant states as follows:

***"THAT I am a male adult of sound mind, the Director of the Applicant Company herein duly authorized by the Applicant to swear on its behalf and on behalf of the Joint Partner BRULYN TECHNOLOGY & GREEN ENERGY SOLUTION LTD as per the attached copy of Authority to sue document dated on 29<sup>th</sup> January 2025 marked as GKN1."***

88. From the contents of the Authority to Sue dated 29<sup>th</sup> January produced as Applicant's Exhibit GKN1, Brulyn Technology & Green Energy Solution Ltd authorizes the Applicant to sue and swear all affidavits in relation to the subject tender on behalf of the joint venture partners.

89. In establishing whether failure by the Applicant to initially file the authorization to lodge the instant Request for Review renders the Request for Review as fatally defective and incompetent, we are guided by the holding by the High Court in **Republic v Registrar General & 13 Ors (2005) eKLR** where Justice Kimaru held:

***"... that the legal position was that such a resolution of the Board Directors of a company may be filed at any time before the suit is fixed for hearing."***

90. We are also cognizant of the provisions of **Article 159(2)(d)** of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities.

91. In the circumstances, we find that the Authority to Sue dated 29<sup>th</sup> January 2025 is enough proof of express authorization by the Applicant's joint venture partners, Brulyn Technology & Green Energy Solution Ltd, for the Applicant to institute the proceedings herein, as a tenderer, challenging the decision of the Respondents in the subject tender.

92. As such, the Board finds that the Applicant is a recognized party before the Board under Section 167(1) of the Act read with Section 170 of the Act and has *locus standi* to bring the instant review before the Board. Accordingly, this ground of objection by the Respondents fails.

93. 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 procurement process in the subject tender adhered to the provisions of the Act, Regulations 2020 as read with Article 227(1) of the Constitution.**

94. By way of background, the Procuring Entity invited sealed expressions of interest for the proposals in response to Tender No. CAK-1698743/2024/25 for Invitation for Expression of Interest on Installation, Testing and Commissioning of Solar PV System and Construction of Parking Shade at County Assembly Building Complex. According to Clause 2 of the Invitation to Tender at Section 1(A) Expression of Interest of the Tender Document, tendering would be conducted under open competitive method (National) using the standard tender document and tendering was open to all qualified and interested tenderers. Tenderers were required to submit their tenders to the Procuring Entity electronically via [www.supplier.treasury.go.ke](http://www.supplier.treasury.go.ke) prior to the tender submission deadline on 10<sup>th</sup> January 2025 at 10:00 a.m.

95. The Applicant submitted that the invitation for expression of interest as advertised was described as an open tender and it proceeded to submit its bid document which adhered to all mandatory requirements. It further submitted that it received an email notification on 20<sup>th</sup> January 2025 informing it that its bid had not been shortlisted and would no longer be included in further evaluation which prompted it to send an email to the Procuring Entity on 24<sup>th</sup> January 2025 requesting to be furnished with reasons that informed the decision to disqualify its bid document.

96. It is the Applicant's case that the Respondents breached the provisions of the Act and the Constitution by failing to disclose the reason why its bid was disqualified from the subject tender and for relying on provisions under Section 121 of the Act which it considered as a non-existent ground to terminate the subject tender. The Applicant opined that that was an open tender and as such provisions under part X of the Act were inapplicable since they provided for procurement of professional services which are predominantly advisory or intellectual in nature and the procurement in the subject tender was neither advisory nor intellectual in nature; making it an open tender and not a request for proposal.
97. Further, the Applicant faulted the Respondents for re-advertising the subject tender yet the instant Request for Review had been lodged with the Board.
98. In response, the Respondents contend that the procurement process in the subject tender adhered to the provisions of the Act. During the hearing, Ms. Kingi submitted that by the time the Applicant received the first notification from IFMIS informing them of disqualification of their bid which led to filing of the instant Request for Review, the accounting officer had not received the Evaluation Report and had not sent the notification letter disclosing the reasons why the Applicant's bid was disqualified. She further submitted that an email was sent later on 5<sup>th</sup> February 2025 to the Applicant enclosing the letter dated 21<sup>st</sup> January 2025 responding to the queries raised with regard to disqualification of its tender.

99. Counsel submitted that Section 121 of the Act was applicable in the subject tender since the choice of procurement method was an expression of interest and that the reason for termination was valid since the shortlisting failed to meet the threshold set out in Section 121 (3) of the Act.

100. Counsel further submitted that re-advertisement was done on 30<sup>th</sup> January 2025 before the Respondents received the Board Secretary's advance email pertaining to the notification of appeal on 31<sup>st</sup> January 2025.

101. 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)”

102. The legislation contemplated in Article 227(2) of the Constitution is the Act. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information and provides as follows:

***“(1) An accounting officer of a procuring entity shall use a standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.***

***“(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications.”***

103. Further Section 60(1) provides as follows:

***“(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.”***

104. In the same vein, section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

***"(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders."***

105. Turning to the instant Request for Review, we note that the Applicant took the position that the method of tendering in the subject tender was open tendering and not a request for proposal which meant that Section 121 of the Act was inapplicable while the Respondents were of the position that the tender as advertised was by way of expression of interest and that Section 121 of the Act was applicable in evaluation and award of the same

106. Part IX of the Act provides for methods of procurement of goods, works and services. Section 91 of the Act provides for the choice of procurement procedure as follows:

***91. Choice of procurement procedure***

***(1) Open tendering shall be the preferred procurement method for procurement of goods, works and services.***

***(2) The procuring entity may use an alternative procurement procedure only if that procedure is allowed and satisfies the conditions under this Act for use of that method.***

***(3) Despite sub-sections (1) and (2) open tendering shall be adopted for procurement of goods, works and services for the threshold prescribed in the respective national and county Regulations.***

107. In essence, the preferred method of tendering is the open tendering method though a procuring entity may use an alternative procurement procedure only if that procedure is allowed and satisfies the conditions set under the Act.

108. Section 116 of the Act is instructive on when procurement by way of request for proposals may be used as follows:

***116. When request for proposals may be used***

***(1) An accounting officer of a procuring entity may use a request for proposals for a procurement if—***

***(a) the procurement is of services or a combination of goods and services; and***

***(b) the services to be procured are advisory or otherwise of a predominately intellectual nature.***

***(2) Subject to any prescribed restrictions, a procuring entity may use a request for proposals in combination with other methods of procurement under this Act.***

109. In essence, an accounting officer may use the request for proposal tendering method where a procurement is for services or a combination of goods and services and subject to any prescribed restrictions, a procuring entity may use the request for proposal tendering method with other methods of procurement provided for under the Act.

110. Request for proposal inviting expression of interest is provided for under Section 118 of the Act as follows:

***118. Request for proposal inviting expression of interest***

***(1) The accounting officer of a procuring entity may—***

***(a) request for proposal through advertisement;***

***(b) invite expression of interests or utilize the register provided for under section 57 of this Act.***

***(2) The accounting officer of a procuring entity shall invite proposals from only the persons who have been shortlisted as qualified to submit their tenders within a period as prescribed.***

111. Section 119(2) of the Act provides for the requirements to be set out in the notice inviting expressions of interest as follows:

***(2) The notice inviting expressions of interest shall set out the following—***

***(a) the name and address of the procuring entity;***

***(b) a brief description of the consultancy services being procured and, if applicable, the goods being procured;***

***(c) eligibility and the qualifications necessary to be invited to submit a proposal; and***

***(d) an explanation of where and when expressions of interest shall be submitted.***

112. Having carefully perused the confidential documents submitted by the Respondents pursuant to Section 67(3)(e) of the Act with regard to the subject tender, we note that:

- a) The Tender Notice that was advertised by the Procuring Entity set out *inter alia*, a brief description of the goods/services being procured being Provision of Invitation for Expression of Interest on Installation, Testing and Commissioning of a Solar PV System and Construction of Parking Shade at County Assembly Building Complex. This indicates that the procurement was for a combination of goods and services which required professional services which would both be intellectual and/or advisory in nature.
- b) Clause 1 of Section 1(A) – Expression of Interest of the Tender Document provided that the Procuring entity had set aside funds in its budget towards the cost of the subject consulting services.
- c) Clause 3 of Section 1(A) – Expression of Interest of the Tender Document provided that the subject tender was an expression of interest and an open tender to all consulting firms.
- d) Clause 6 of Section 1(A) – Expression of Interest of the Tender Document provided that a firm would be selected using the

Least Cost Selection (LCS) method which is one of the consultant selection methods identified under Section 124 of the Act and in the Standard Request for Proposals document prepared by the Public Procurement Regulatory Authority for use by procuring entities for procurement of consulting services from firms using the consultant selection methods.

113. In view of the foregoing, it is the Board's considered view that the Procuring Entity used the request for proposal inviting expression of interest tendering method in combination with the open tendering method with regard to the consulting firms that the subject tender was addressed to if qualified and interested in participating in the same

114. This therefore begs the question, what method of evaluation should the Procuring Entity have applied in evaluation of the subject tender?

115. We note that 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. Further, Section 121 of the Act specifically provides for evaluation and shortlisting of request for proposals as follows:

***121. Evaluation and shortlisting***

***(1) The evaluation committee shall, in writing, record the results of its evaluation of applications for expression of interest using the evaluation criteria in the expression of interest notice and documents and shall state which candidates were found to be qualified and the reasons why any candidates were not qualified.***

***(2) The evaluation and comparison shall be done using the procedures and criteria set out in the expression of interest documents and shall, in the case of expression of interest for professional services, have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.***

**(3) Subject to total proposals received, a minimum of six proposals shall be shortlisted, but where less than six proposals have been received, a minimum of three proposals shall be shortlisted.**

***(4) The record of results prepared under subsection (1) shall be submitted to the accounting officer for review and approval.***

***(5) Notwithstanding provisions of subsection (3), where a repeat process fails to yield the requisite numbers of qualified candidates, the procuring entity shall proceed with the subject procurement and make a report to the Authority.***

118. In essence,

- a) The Evaluation Committee is required to record the results of its evaluation of applications for expression of interest using the criteria provided in the tender document identifying the candidates found to be qualified and reasons why any candidate was not qualified. This record shall be submitted to the accounting officer for review and approval.
- b) A minimum of 6 proposals shall be shortlisted and where less than 6 proposals are received, a minimum of 3 shall be shortlisted.

- c) Where a repeat process fails to yield requisite numbers of qualified candidates, the procuring entity shall proceed with the procurement and make a report to the Public Procurement Regulatory Authority.

119. Turning to the circumstances in the instant Request for Review, we note from the Tender Opening Minutes that only 5 tenders were received in response to the subject tender. According to the Evaluation Report submitted to the Board, we note that the Evaluation Committee proceeded with evaluation of the 5 tenders in accordance with the stages of evaluation provided under Section 22.1 of the Tender Document being (a) Mandatory /Preliminary Requirements, (b) Technical Requirements/Specification, (c) Detailed Technical Proposal Requirements, (d) Demonstration of the Proposed Product/Solution/System, and (e) Financial Proposal.

120. Following the Detailed Technical Proposal Requirements evaluation stage, only 1 bidder out of the 5 bidders had met the pass mark score of 70%. Subsequently, the Evaluation Committee recommended for the subject tender to be considered as non-responsive and to be re-advertised since the shortlist failed to meet the threshold under Section 121(3) of the Act which dictates that where less than 6 proposals are received, a minimum of 3 ought to be shortlisted. Subsequently, a Professional Opinion was given on 20<sup>th</sup> January 2025 by the Director Supply Chain Management concurring with the recommendation by the

Evaluation Committee to re-advertise the subject tender for failing to meet the threshold stipulated under Section 121(3) of the Act.

121. Having established that the choice of procurement method in the subject tender was by request for proposal inviting expression of interest which was open to all qualified and interested consulting firms, the Procuring Entity was required to adhere to provisions under Section 121 of the Act in its evaluation and shortlisting of the submitted expression of interests in the subject tender. It was therefore required to shortlist a minimum of three proposals pursuant to Section 121(3) of the Act since only five (5) proposals were received.

122. To this end, we find that the evaluation and shortlisting conducted by the Procuring Entity adhered to the provisions of Section 121 of the Act and the evaluation committee was justified in recommending the subject tender be re-advertised, since the shortlisting failed to meet the threshold set out in Section 121(3) of the Act.

123. We note that the Professional Opinion issued on 20<sup>th</sup> January 2025 by the Director Supply Chain Management was approved by the 1<sup>st</sup> Respondent leading to issuance of the Re-Advertisement Notice by the Procuring Entity on 30<sup>th</sup> January 2025.

124. However, this Re-Advertisement by the Procuring Entity on 30<sup>th</sup> January 2025 was carried out before tenderers were notified in writing by the 1<sup>st</sup>

Respondent of the outcome of evaluation of the subject tender and reasons why their tenders were rendered non-responsive.

125. Section 122(2) of the Act requires an accounting officer of a procuring entity to simultaneously notify in writing each of the tenderers of the results of the expression of interest.

126. We have hereinbefore established that the Procuring Entity used an e-procurement system in the procurement process in the subject tender and that the Applicant received on 20<sup>th</sup> January 2025 an auto-generated notice informing it that its bid had been disqualified. Having carefully perused the confidential documents submitted to the Board pursuant to Section 67(3)(e) of the Act, we note that though Ms. Kingi submitted that the 1<sup>st</sup> Respondent had not received the Evaluation Report dated 20<sup>th</sup> January 2025 for review, the Professional Opinion by the Director Supply Chain Management which concurred with the Evaluation Committee's Report was issued on 20<sup>th</sup> January 2025.

127. Further, the Notification letters that were sent out by the Respondents via email on 5<sup>th</sup> February 2025 are dated 21<sup>st</sup> January 2025, which was 1 day after the Applicant received the auto-generated notification from IFMIS upon disqualification of its bid. We fail to understand why the Respondent failed to promptly notify in writing each of the tenderers of the results of their expression of interest in the subject tender as stipulated under Section 122(2) of the Act noting that (a) bidders had already been prompted on the status of their bids by the IFMIS system,

(b) the Evaluation Report was ready having been signed on 20<sup>th</sup> January 2025 by members of the Evaluation Committee and (c) the Professional Opinion was equally ready having been issued on 20<sup>th</sup> January 2025 by the Director Supply Chain Management for approval by the 1<sup>st</sup> Respondent.

128. We further fail to understand why the Respondents proceeded to send out emails on 5<sup>th</sup> February 2025 accompanied with the notification letters dated 21<sup>st</sup> January 2025 yet they were aware of the existence of the instant Request for Review having being served by the Board Secretary with the Notification of Appeal notifying them of the Request for Review and suspension of all procurement proceedings in the subject tender.

129. Section 168 of the Act provides for suspension of procurement proceedings as follows:

***"168. Notification of review and suspension of proceedings  
Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed."***

130. In **PPARB Application No. 13 of 2021 Five Blocks Enterprises Limited v Managing Director KEBS & Another** the Board pronounced as follows:

***"...upon filing of a request for review application, an automatic stay of proceedings takes effect which suspends all procurement proceedings and prevents any further steps from being taken in the tender in question. Further, procurement proceedings shall resume at the point they were, when the stay comes to an end, once the request for review has been heard and determined by the Board."***

131. The Notification letters dated 21<sup>st</sup> January 2025 transmitted via email of 5<sup>th</sup> January 2025 by the Respondents were therefore issued to bidders during the suspension of procurement proceedings pursuant to section 168 of the Act. Any action taken by the Respondents in furtherance of the procurement proceedings before the instant Request for Review has been heard and the Board renders its decision is null and void.

132. This was explained by the Honourable Justice Nyamweya in **Judicial Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR** as follows:

***"...Section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner***

***as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound. 53. Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point ....”***

133. In this regard therefore, the transmission of the Notification Letters dated 21<sup>st</sup> January, 2025 to the bidders via email, during the suspension of these proceedings by the Respondents was a flagrant breach of Section 168 of the Act and a regrettable action on the part of the Respondents which, this Board takes great exception of.

134. This Board finds further that the notification of bidders that the Expression of Interest was considered non-responsive because the shortlisting failed to meet the threshold set out in Section 121 (3) of the Act through the transmission of Notification letters dated 21<sup>st</sup> January 2025 via email on 5<sup>th</sup> February 2025 after filing of the instant Request for Review on 31<sup>st</sup> January 2025 and which filing stayed any further steps from being taken with respect to the subject procurement process as from 1<sup>st</sup> February 2025 was also a flagrant breach of section 168 of the Act and therefore null and void.

135. It is the Board’s considered view that once the instant Request for Review has been heard and determined, the Respondents ought to

proceed and issue valid letters of notification of the outcome of evaluation of the subject tender in line with Section 122 (2) as read with Section 87 of the Act. This is in view of the fact that the notification letters dated 21<sup>st</sup> January 2025 ought to have been transmitted on the said 21<sup>st</sup> January 2025.

136. We note that with regard to the reasons why the Applicant's tender was found non-responsive, the Applicant submitted before the Board that it is not aware of the reasons why its bid was disqualified in the subject tender.

137. In a manner similar to Section 122 (2) of the Act, Section 87 of the Act is instructive on how notification of the outcome of evaluation ought to 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.”***

138. 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.

139. 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.”**

140. 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.

141. 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.

142. 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"***

143. 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 **requires 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.**

144. In essence, the Applicant did not have to seek clarifications from the Respondents so as to be notified of the outcome of evaluation of the subject tender. In the circumstances, we also find that the Respondents failed to meet the threshold required under Sections 122 (2) and 87 of the Act read with Regulation 82(3) of Regulations 2020 in notifying bidders of the results of the subject tender.

145. In view of the foregoing, it is clear to the Board that the Respondents failed to adhere to Sections 87, 122(2), and 168 of the Act read with Regulation 82 of Regulations 2020 and Article 227(1) of the Constitution in the procurement proceedings in the subject tender.

**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. Section 173 of the Act donates wide discretionary powers to the Board and provides as follows:

***"173. Powers of Review Board***

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

***(a) annul anything the accounting officer of a procuring entity has done in the procurement***

***proceedings, including annulling the procurement or disposal proceedings in their entirety;***

***(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***

***(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***

***(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***

***(e) order termination of the procurement process and commencement of a new procurement process.”***

148. This Board is called to safeguard, promote and protect the rule of law and ensure the integrity of procurement proceedings by public entities in upholding the national values and principles espoused in Article 10, 201, 227(1) of the Constitution.

149. Having established that the Procuring Entity failed to adhere to Sections 87, 122(2), and 168 of the Act read with Regulation 82 of Regulations 2020 and Article 227(1) of the Constitution in the procurement proceedings in the subject tender, the most appropriate order in the

circumstances is to order the 1<sup>st</sup> Respondent to issue notification letters to all bidders of the outcome of the evaluation of their tenders in accordance with the provisions of the Tender Document, the Act and the Constitution while taking into consideration the findings of the Board in this matter.

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

### **FINAL ORDERS**

151. 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 Letters dated 21<sup>st</sup> January 2025 transmitted via email on 5<sup>th</sup> February 2025 to bidders in the subject tender including the Applicant with respect to Tender No. CAK-1698743/2024/25 for Invitation for Expression of Interest on Installation, Testing and Commissioning of Solar PV System and Construction of Parking Shade at County Assembly Building Complex be and are hereby nullified and set aside.**

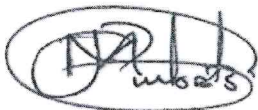
**B. The 1<sup>st</sup> Respondent is hereby ordered to issue Letters of notification of the outcome of evaluation of tenders with**

respect to Tender No. CAK-1698743/2024/25 for Invitation for Expression of Interest on Installation, Testing and Commissioning of Solar PV System and Construction of Parking Shade at County Assembly Building Complex in accordance with the provisions of the Act, the Constitution and Regulations 2020 within 5 days of this decision while taking into consideration the Board’s findings herein.

C. Further to Order B above, the Respondents are at liberty to proceed and procure the provision of Invitation for Expression of Interest on Installation, Testing and Commissioning of Solar PV System and Construction of Parking Shade at County Assembly Building Complex taking into consideration the provisions of the Act and the Constitution.

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

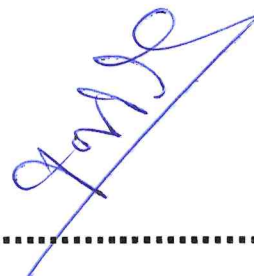
Dated at NAIROBI this 21<sup>st</sup> Day of February 2025.



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**PANEL CHAIRPERSON**

**PPARB**



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**SECRETARY**

**PPARB**