

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 10/2025 OF 4TH FEBRUARY 2025

BETWEEN

ZERAKU CONSTRUCTION COMPANY LIMITED APPLICANT

AND

DIRECTOR GENERAL,

KENYA WILDLIFE SERVICE 1ST RESPONDENT

KENYA WILDLIFE SERVICE 2ND RESPONDENT

Review against the decision of the Accounting Officer Kenya Wildlife Service in relation to Tender No. KWS/ONT/RMLF/143/2023-2024 for Routine Maintenance of Mtito Andei – Salaita Road (E693) in Tsavo West National Park.

BOARD MEMBERS PRESENT

- | | |
|------------------------|----------------------------------|
| 1. Ms. Alice Oeri | - Vice Chairperson & Panel Chair |
| 2. QS Hussein Were | - Member |
| 3. Mr. Robert Chelagat | - Member |
| 4. Mr. Joshua Kiptoo | - Member |

IN ATTENDANCE

- | | |
|--------------------|--|
| 1. Ms. Sarah Ayoo | - Holding brief for Acting Board Secretary |
| 2. Ms. Evelyn Weru | - Secretariat |

PRESENT BY INVITATION

APPLICANT ZERAKU CONSTRUCTION COMPANY LIMITED

1. Mr. Sisule Musungu - Advocate, Sisule & Associates LLP
2. Mr. Andrew Mwango - Advocate, Sisule & Associates LLP
3. Ms. Laurell Ochieng - Advocate, Sisule & Associates LLP

RESPONDENT DIRECTOR GENERAL, KENYA WILDLIFE SERVICE & KENYA WILDLIFE SERVICE

Mr. Derrick Karinga - Advocate, Kenya Wildlife Service

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Wildlife Service the Procuring Entity and 2nd Respondent herein invited sealed tenders in response to Tender No. KWS/ONT/RMLF/143/2023-2024 for Routine Maintenance of Mtito Andei – Salaita Road (E693) in Tsavo West National Park (hereinafter referred to as “the subject tender”). The invitation was by way of an advertisement on My Gov Publication on 27th August 2024, on the Procuring Entity’s website www.kws.go.ke and the Public Procurement Information Portal www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers by the Procuring Entity (hereinafter referred

to as the Tender Document') was available for download. The initial subject tender's submission deadline was scheduled on 16th September 2024 at 10.00 a.m. which was later on extended to 23rd September 2024 at 10.00 a.m.

Addenda

2. The Procuring Entity issued five (5) Addenda which clarified and amended various provisions of the Tender Document while extending the tender submission deadline to 23rd September 2024 at 10.00 a.m. as provided in the Revised Schedule of Road Tenders FY 2023-2024 attached to Addendum No. 5 dated 13th September 2024.

Submission of Tenders and Tender Opening

3. According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 23rd September 2024 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'), nine (9) bidders submitted bids in the subject tender as follows:

Bid No.	Name Of The Firm
1.	Ventura Ventures and Enterprises Limited
2.	Freemark Traders Company Limited

3.	Daima Contractors Limited
4.	Guba Investment Limited
5.	Almic Investment Limited
6.	Zeraku Construction Company Limited
7.	Chekon Contractors Limited
8.	Borderland Systems Company Limited
9.	Navitas Construction Limited

Evaluation of Tenders

4. A Tender Evaluation Committee undertook evaluation of the submitted bids as captured in a Tender Evaluation Report dated 14th January 2025 for the subject tender in the following stages:
- i Preliminary Evaluation
 - ii Technical Evaluation
 - iii Financial Evaluation

Preliminary Evaluation

5. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Preliminary Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 28 to 30 of the Tender Document. Tenders were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.

6. At the end of evaluation at this stage, seven (7) tenders were determined non-responsive, while two (2) tenders, amongst them being the Applicant's tender, were determined responsive and proceeded to Technical Evaluation.

Technical Evaluation

7. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 31 to 37 of the Tender Document. The Technical Evaluation comprised of two stages namely:

(a) Part A – Assessment of financial capacity, past experience and equipment - Bidders were required to meet the stipulated requirements at this stage so as to progress for further evaluation. At the end of evaluation at this stage, one (1) tender, being the Applicant's tender, was determined non-responsive while one (1) tender was found to be responsive and progressed for further technical evaluation under Part B of the Technical Evaluation Criteria.

(b) Part B – Contractor's Key personnel and work methodology – Bidders were required to attain the set minimum required pass mark of 80% at this stage to proceed for Financial Evaluation.

8. At the end of evaluation at Part B of the Technical Evaluation Criteria one (1) tender by M/s Freemark Traders Company Limited was determined

responsive having met the required pass mark and proceeded to Financial Evaluation.

Financial Evaluation

9. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 37 of the Tender Document. Award of the subject tender would be to the lowest evaluated bidder who would be subjected to Financial Evaluation which included but was not limited to sensitivity and credibility analysis of the rates to detect abnormally low bids or abnormally high bids or unbalanced tenders or front loaded bids.
10. The Evaluation Committee proceeded to verify the tender price by M/s Freemark Traders Company Limited which was determined to be correct without any multiplication or computation errors.

Evaluation Committee's Recommendation

11. The Evaluation Committee recommended award of the subject tender to M/s Freemark Traders Company Limited, being the lowest responsive evaluated bidder at its tender price of Kenya Shillings Thirty Million Five Hundred and Thirty-Seven Thousand Five Hundred and Eighty Only (Kshs. 30,537,580.00) inclusive of all taxes.

Due Diligence

12. The Procuring Entity was required to carry out due diligence on the bidder's documentation as detailed under Schedule 2 – Schedule of Basic Materials and Derivation of Unit Cost.
13. According to the Evaluation Report, the Evaluation Committee carried out due diligence as provided under Section 83 of the Act as read with Regulation 80 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") by subjecting M/s Freemark Traders Company Limited, the lowest responsive evaluated bidder, to post qualification/due diligence on statutory documents and the establishing the rate analysis of the said bidder.

Professional Opinion

14. In a Professional Opinion dated 15th December 2024 (hereinafter referred to as "the Professional Opinion"), the SAD Supply Chain Management, Ms. Leah Naisoi (signed on 15th January 2025) reviewed the manner in which the procurement process in the subject tender was undertaken including evaluation of tenders and recommendation of award and concurred with the Evaluation Committee's recommendation to award the subject tender to M/s Freemark Traders Company Limited, being the lowest responsive evaluated bidder, at its tender price of Kenya Shillings Thirty Million Five Hundred and Thirty-Seven Thousand Five Hundred and Eighty Only (Kshs. 30,537,580.00) inclusive of all taxes.

15. The Professional Opinion was approved as recommended by the 1st Respondent, Prof. Erustus Kanga, PhD, EBS on 16th January 2025.

Extension of Tender Validity Period

16. *Vide* letter dated 16th January 2025, bidders were notified that the subject tender's validity period had been extended for an additional 30 days effective from 27th January 2025 to allow the Procuring Entity to finalize the Procurement Process.

REQUEST FOR REVIEW NO. 10 OF 2025

17. On 4th February 2025, Zeraku Construction Company Limited, the Applicant herein, filed a Request for Review dated 4th February 2025 together with a Supporting Affidavit sworn on 4th February 2025 by Zephaniah Kurgat through Sisule & Associates seeking the following orders from the Board:

- a) ***THAT the Procuring Entity is mandated and/ or directed to immediately notify the Applicant in writing of the outcome of the tender proceedings in Tender No. KWS/ONT/RMLF/143/2023-2024- ROUTINE MAINTENANCE OF MTITO ANDEI- SALAITA ROAD (E693) IN TSAVO WEST NATIONAL PARK, including disclosing any successful tenderer, and reasons as to why the Applicant's bid has been deemed unresponsive, and in any case, within***

three (3) Business Days of the decision of the Public Procurement Administrative Review Board ;

- b) THAT where the Procuring Entity's actions exceed the omission to notify candidates in the subject procurement proceedings, and involve substantial disregard of the basic procurement rules in the evaluation of the submitted bids, an Order terminating the procurement process and commencement of a new procurement process which abides by the safeguards put in place by the Constitution of Kenya, 2010, the Public Procurement and Asset Disposal Act, 2015, and other attendant laws and regulations, do issue;***
- c) THAT owing to the conduct of the Procuring Entity, costs of the present proceedings be awarded to the Applicant, including the deposit or assessed fees for lodging the Request for Review, as well as appropriate legal fees as assessed by the Public Procurement Administrative Review Board.***

18. In a Notification of Appeal and a letter dated 4th February 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 24th 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 4th February 2025.

19. On 12th February 2025, the Respondent filed through Derrick Karinga Advocate a Notice of Appointment dated 12th February 2025, a Notice of Preliminary Objection dated 12th February 2025, and a 1st & 2nd Respondents' Memorandum of Response to Request for Review dated 12th February 2025 together with the confidential documents concerning the subject tender in line with Section 67(3)(e) of the Act.

20. *Vide* letter dated 13th 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 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the tender within three (3) days.

21. *Vide* a Hearing Notice dated 13th February 2025, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the

instant Request for Review slated for 18th February 2025 at 11:00 a.m. through the link availed in the said Hearing Notice.

22. *Vide* email dated 17th February 2025, the Applicant, through its advocates, filed and served upon the Respondents a Notice to Produce dated 17th February 2025.

23. On 18th February 2025, the Applicant filed Written Submissions dated 18th February 2025 together with a List and Bundle of Authorities dated 18th February 2025.

24. On 19th February 2025, the Applicant filed through its advocates an Affidavit of Service sworn by Duncan Wafula Oduor on 19th February 2025.

25. When the matter first came up for hearing on 18th February 2025 at 11.00 a.m., Mr. Karinga for the Respondents prayed for an adjournment of the hearing by one and a half hours indicating that he had just received the Hearing Notice and link to join the virtual hearing at around 11:25 a.m. and was scheduled to proceed with a hearing at Hola Law Courts at 11:30 a.m. On his part, Mr. Mwango indicated that he was not substantively objecting to the request by Mr. Karinga, and that he had noted that amongst the notification emails sent out by the Board advising on the hearing, the email addresses provided by Mr. Karinga in his Notice of Appointment were not listed. He further indicated that should the Board

be inclined to adjourn; directions be issued for the matter proceed at 3.00 p.m. since he also had a prior engagement at 2.00 p.m.

26. Having considered parties' submissions, the Board allowed the application for adjournment and directed (a) the Respondents to file and serve its Written Submissions, (b) that the matter would proceed for hearing on 19th February 2025 at 2.30 p.m. and (c) both the Secretariat and Mr. Mwango to serve the Respondents with the Hearing Notice capturing the Board's directions.

27. *Via* email dated 18th February 2025, the Board notified parties that the matter was slated to proceed for hearing on 19th February 2025 at 2.30 p.m. and the Respondents were at liberty to file and serve their Written Submissions by 10.00 a.m.

28. At the hearing on 19th February 2025 at 2.30 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 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.

29. Mr. Sisule for the Applicant informed the Board that the Applicant had issued a Notice to Produce the purported intention to enter into a contract which was served upon the Respondents and an affidavit of service filed to this effect. Counsel submitted that this was not a confidential document and if the same is issued, the Applicant could address all its issues in one application as opposed to litigating in piecemeal. He further submitted that he had requested for the notification on two occasions before filing the instant Request for Review and proceeded to formally request for the same by filing the Notice to Produce. On his part, Mr. Karinga submitted that the gist of the matter pertained to service of the notification and the issue would come up as parties prosecute their respective cases.

30. The Board directed parties to proceed with the hearing and prosecute their respective cases which would include submissions on the issue of service of the notification of intention to enter into a contract and no prejudice would be occasioned on the Applicant as the issue of notification would be addressed in the course of the hearing.

31. 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

32. In his submissions, Mr. Karinga relied on the Notice of Preliminary Objection dated 12th February 2025 and submitted that the Board lacks

jurisdiction to entertain the instant Request for Review as the same is time barred having been filed contrary to Section 167(1) of the Act.

33. Counsel further submitted that the notification of intention to award the subject tender was transmitted to both the unsuccessful bidders, including the Applicant herein, and to the successful bidder on 15th January 2025 and that the instant Request for Review having been filed on 4th February 2025 after 20 days had lapsed was outside the 14 days' statutory period stipulated in Section 167(1) of the Act.

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

34. In his submissions, Mr. Mwango relied on the documents filed before the Board on behalf of the Applicant and submitted that the Respondents' Preliminary Objection lacks merit. He pointed out that service of the notification of award is in dispute given that the Applicant is of the position that service of the said notification is either defective or did not take place. He argued that the stand still period under Section 167(1) of the Act cannot accrue noting that the Applicant first requested for the notification letter on 30th January 2025 via email and later on through the Notice to Produce.

35. Counsel indicated that the Applicant had requested for the certificate of postage evidencing postage of the notification letter by the Respondents but the same was not availed which sustains the position that either postage was defective or not done at all.

36. Mr. Mwango urged the Board to interrogate when service by registered post is deemed effective and argued that allegation by the Respondents that the notification letter was posted on 15th January 2025 ought not to be taken to mean that service by registered post was effective on the said date for purposes of computation of time. He submitted that if indeed the Respondent served the notification letter upon the Applicant through registered post, the Board ought to allow reasonable time before such service is deemed effective and pointed out that in the ordinary course of postage, it would have been received within 7 days. In support of his argument, he referred the Board to the holding by the High Court in *Ali mohamed Haji Suleman Body Builders Ltd v Jivraj & another* [1989] KEHC 68 (KLR).

37. As to whether the Applicant was served with the notification of intention to award the subject tender, Mr. Mwango referred the Board to the provisions under Section 87 (3) and 126(4) of the Act, Article 35 of the Constitution and the holding in *Republic vs. Public Procurement Administrative Review Board; Palona Enterprises & General Supplies Limited* (2016) eKLR . He submitted that the Respondents failed/omitted to notify the Applicant of the assessment that its tender was not successful and reasons why it was deemed unsuccessful. He further submitted that the notification was not a confidential document and no prejudice would be suffered by the Procuring Entity if it had availed the same to the Applicant.

38. He reiterated that the Respondents had failed to produce any evidence of service of the notification letters that were allegedly sent to all bidders on 15th January 2025 and drew the Board's attention to provisions under Section 109 of the Evidence Act and the holding by the High Court in *Michael Gitere & Another vs Kenya Commercial Bank Limited (2018) eKLR*; *Republic vs. Public Procurement Administrative Review Board & 2 Others Ex parte Team Engineering Spa [2014] eKLR*; *Republic v Procurement Administrative Review Board & another; Wodex Technologies Ltd (Exparte Applicant); Tana Solutions Limited (Interested Party) (Judicial Review Miscellaneous Application E104 of 2023) [2023] KEHC 24930 (KLR) (Judicial Review) (7 November 2023) (Judgment) and Republic vs. Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex parte Kenya Ports Authority & Another (2021) eKLR*.

39. Counsel submitted that the Respondents had not discharged its burden of proof and urged the Board to direct the Procuring Entity to notify the Applicant in writing of the outcome of the procurement process in the subject tender.

40. He 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

41. In his submissions, Mr. Karinga relied on the documents filed before the Board on behalf of the Respondents in the instant Request for Review.

42. Mr. Karinga submitted that upon evaluation of tenders in the subject tender and arrival at a successful bidder, the 1st Respondent issued a notification of intention to award as stipulated under Section 87 of the Act whereby both the successful and unsuccessful bidders were simultaneously notified of the outcome of evaluation of their tenders including details pertaining to the successful tenderer and reasons thereof.

43. Counsel further submitted that the notification dated 15th January 2025 informing the Applicant that its tender was unsuccessful was transmitted to the address provided by the Applicant in its Confidential Business Questionnaire under care of Rabby Chepchirchir of P.O. Box 8624-30100 Eldoret and that this was done using the same mode of communication and on the same day that the successful bidder was also notified. He indicated that through this notification letter, the Applicant was issued with reasons why its tender was unsuccessful in line with Regulation 82(2) of Regulations 2020.

44. Counsel submitted that in support of the postage of the said notification, the Respondents submitted as part of the confidential documents a

certificate of postage as well as a statement from Postal Corporation of Kenya where the Applicant's authorized representative appears at entry No. 333. He indicated that the Respondents received the instant Request for Review before they could respond to the request for the notification on 30th January 2025 and opted to canvass the issue and respond through the proceedings before the Board.

45. It is the Respondents' case that the Applicant was aware of the 14 days' standstill period within which it was required to seek a review and that its request for information was sent to the Respondents outside the stipulated standstill period.

46. Counsel submitted that the Respondents complied with the guiding principles stipulated under Section 87 of the Act as read with Regulation 82 of the Act and that they observed the provisions of Article 47 and 227(1) of the Constitution throughout the procurement process in the subject tender.

47. Mr. Karinga urged the Board to dismiss the instant Request for Review with costs.

Applicant's Rejoinder

48. In a rejoinder, Mr. Mwango submitted that the Applicant is not privy to the confidential documents referred to by Mr. Karinga and was not served with the same despite its request for production. He submitted that the

certificate of postage and notification letters are not confidential in nature and nothing prevented the Respondents from availing the same to the Applicant for its perusal and inspection before prosecuting its case.

49. He reiterated that the instant Request for Review is merited and urged the Board to grant the prayers sought with costs to the Applicant.

CLARIFICATIONS

50. When asked to confirm the official postal addresses of the Applicant for purposes of the subject tender and its tender sum, Mr. Mwango submitted that the postal address submitted by the Applicant is P.O. Box 8624-30100 Eldoret and that its tender sum was Kshs. 24,705,076.80. He further indicated that the Applicant availed its email address in its bid document and at the tender opening being zerakultd@gmail.com

51. As to whether the postal address that the Respondents used in serving the Applicant with its notification letter on 15th January 2025 was the address provided in the Confidential Business Questionnaire provided by the Applicant, Mr. Karinga answered in the affirmative and submitted that the postal address as provided by the Applicant in the Confidential Business Questionnaire was P.O. Box 8624-30100 Eldoret.

52. Mr. Karinga reiterated that the same mode of communication was used in notifying bidders of the outcome of evaluation of the subject tender and this was through registered post which was dispatched on the same

date. On why the Respondents did not use email addresses availed by the bidders, he pointed out that a total of 1052 letters were sent out and as a matter of caution and to avoid human error in typing the email addresses of more than 1000 bidders, the Respondents so it fit to use registered post.

53. When asked to clarify the number of days that the notification letters were estimated to take to reach the recipients, Mr. Karinga estimated that this would take around 3 days while Mr. Mwango urged the Board to note that the address availed by the Applicant is in Eldoret and this would take approximately 14 days given the volume of letters and sorting process. On his part, Mr. Sisule submitted that guidance has been given by the High Court and it would take approximately 7 days.

54. On whether the successful bidder responded its acceptance on receipt of the notification of award by way of registered post, Mr. Karinga indicated that he was not aware on the mode of communication that the acceptance by the successful bidder was transmitted.

55. When asked to expound on the contents of the notification letter that was sent to the Applicant, and if the same disclosed the reasons why the Applicant was rendered unresponsive, the successful bidder, reasons thereof and amount at which it was awarded the subject tender, Mr. Karinga confirmed that the notification of intention to award disclosed the successful bidder was Freemark Traders Co. Limited at its tender price of

Kshs. 30,537,580.00 all taxes inclusive. He indicated that the reason why the Applicant's bid was unsuccessful was that the line of credit attached in its bid document from Rafiki Micro Finance did not properly reference the subject tender in question as the reference indicated was different from the one in the subject tender. Mr. Karinga further submitted that the estimated budget for the subject tender was Kshs. 34,240,545.00

56. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 4th February 2025 was due to expire on 25th February 2025 and that the Board would communicate its decision to all parties to the Request for Review via email.

BOARD'S DECISION

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

B. Whether the Respondent met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020 with regard to notification of intention to enter into a contract in the subject tender.

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.

58. 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.

59. 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."

60. 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."

61. 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.”

62. 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.

63. 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.”

64. 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.”***

65. 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.

66. 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.

67. 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.

68. 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)

69. 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.

70. 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.

71. 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.

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

As to whether the instant Request for Review has been instituted in accordance with Section 167(1) of the Act.

73. The Respondents contend at ground 1 of the Notice of Preliminary Objection dated 12th February 2025 that the instant Request for Review is time barred having been filed contrary to Section 167(1) of the Act thus ousting the Board's jurisdiction to hear and determine the same.

74. Mr. Karinga submitted that the letters of notification of intention to award the subject tender were transmitted to both the unsuccessful bidders, including the Applicant herein, and to the successful bidder on 15th January 2025 and as such, an aggrieved party ought to have approached the Board within the stipulated 14 days' statutory timelines time started stipulated in Section 167(1) of the Act. He further submitted that the

instant Request for Review was filed after 20 days had lapsed from the date of notification and ought to be struck out.

75. In opposition to the Respondents' Preliminary Objection, Mr. Mwango submitted that the gist of the Applicant's Request for Review lies on the question of service of the letter of notification of intention to award the subject tender. Counsel pointed out that the issue of service is in dispute noting that the Applicant is of the position that service of the notification letters by the Respondents was either defective or did not take place.

76. This Board is cognizant of the holding in **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** which set out the parameters of a preliminary objection. At page 700 Law JA stated:

"A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

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

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually

on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”

78. In essence, a valid preliminary objection should, if successful, dispose of the suit. For a preliminary objection to succeed, (a) it ought to raise a pure point of law, (b) it is argued on the assumption that all the facts pleaded by the other side are correct, and (c) it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Put differently, a preliminary objection must only raise issues of law.

79. Justice J. B. Ojwang in the case of **Oraro v Mbaja (2005) eKLR** held that:

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

needs to investigate facts, a matter cannot be raised as a preliminary point.”

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

“a preliminary objection could only be properly taken where what was involved was a pure point of law but that where there was any clash of facts, the production of evidence and assessment of testimony it should not be treated as a preliminary point. Rather, it becomes a substantive adjudication of the litigation on merits with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross examined and a finding of fact made by the Court”

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

82. Turning to the circumstances in the instant Request for Review, it is clear to the Board that the issue of service of the letters of notification of Intention to award the subject tender dated 15th January 2025 is in dispute. In as much as the objection by the Respondents is premised on

the alleged breach by the Applicant of Section 167(1) of the Act, the question of whether the Applicant was notified of the outcome of evaluation of the subject tender via registered post on the said 15th January 2025 is an issue that would require the Board to inquire into evidence presented by parties and investigate facts so as to make a determination of whether the Applicant was indeed served with the notification letter via registered post as alleged by the Respondents and the same received within time for it to be held against the 14 days statutory period.

83. In the circumstances, we find that the Respondents' Notice of Preliminary Objection dated 12th February 2025 and filed on even date is not based on pure points of law and is therefore not a proper preliminary objection as to oust the jurisdiction of the Board.

84. Accordingly, this ground of objection fails.

As to whether the Respondent met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020 with regard to notification of intention to enter into a contract in the subject tender.

85. We understand the Applicant's case on this issue to be that the Respondent failed to issue it with a notification of intention to enter into a contract in the subject tender contrary to Section 87 of the Act as read

with Regulation 82 of Regulations 2020. It is the Applicant's case that this omission by the Respondent goes against provisions under Article 35, 47 and 227(1) of the Constitution.

86. We understand the Respondents' case on this issue to be that it issued letters of notification of intention to enter into a contract in the subject tender in compliance with Section 87 of the Act as read with Regulation 82 of Regulations 2020. It is the Respondents' case that they simultaneously dispatched via registered post notification letters dated 15th January 2025 to both the successful bidder and the unsuccessful bidders, including the Applicant herein. Further, that the address used in dispatching the Applicant's notification letter was the same address provided by the Applicant in its Confidential Business Questionnaire and that the Applicant was issued with reasons why its tender was unsuccessful.

87. 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)”

88. The legislation contemplated in Article 227(2) of the Constitution is the Act. 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:

“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."

89. Section 87 of the Act 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.

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

"82. Notification of intention to enter into a contract

(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.”

91. In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes 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.

92. 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"

93. 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 (2) of the Constitution which provides:

"If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"

94. In essence, the rules of natural justice as provided for in Article 47 of the Constitution require that a procuring entity promptly notifies 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.

95. Turning to the circumstances in the instant Request for Review, we note that in an attempt to substantiate its claim that the Applicant was served with a notification of intention to enter into contract dated 15th January 2025, Mr. Karinga referred the Board to the confidential bundle of documents submitted by the 1st Respondent pursuant to Section 67(3)(e) of the Act with regard to evidence of service to the Applicant by way of registered post being a Report from Postal Corporation of Kenya on Unclosed Bulk Items Details dated 30th January 2025 with the sender being the Procuring Entity. This report indicates that it is in regard to Batch Number: 38906 where 1052 letters were dispatched to various recipients. Counsel pointed out that the Applicant's details are captured as recipient No. 333.

96. However, the Board notes that there is no evidence as to whether (a) part of these letters that were allegedly dispatched were to the bidders in the subject tender and (b) were in the nature of notification letters envisioned under Section 87 of the Act as read with Regulation 82 of

Regulations 2020. Further, contrary to Mr. Kariga's submission that the notification letters were posted on 15th January 2025, the Report from Postal Corporation of Kenya is dated 30th January 2025 with the User/Operator indicated as Leah Hure.

97. The Board observes that though the Respondents availed photocopies of notification letters dated 15th January 2025 addressed to various bidders, including the Applicant as part of the confidential bundle of documents, it did not proffer any evidence in the form of a dispatch register or a certificate of postage so as to back the assertion that the Applicant was notified on the outcome of evaluation of the subject tender as provided under Section 87 of the Act as read with Regulation 82 of Regulations 2020. In the absence of such evidence, it is reasonable to conclude that the Applicant was not notified of the outcome of evaluation of the subject tender as pleaded.

98. In the circumstances, we find that the Respondent failed to meet the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020 with regard to notification of intention to enter into a contract in the subject tender.

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

99. Having established that the Respondent failed to meet the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020 with regard to notification of intention to enter into a contract in the

subject tender, the Board deems it just and fit to nullify the Letters of Notification dated 15th January 2025 to enable all tenderers be notified of the outcome of their tenders in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020.

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

FINAL ORDERS

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

A. The Respondents' Notice of Preliminary Objection dated 12th February 2025 and filed on even date be and is hereby dismissed.

B. The Notification Letters dated 15th January 2025 addressed to the successful bidder, the Applicant and other unsuccessful bidders with respect to Tender No. KWS/ONT/RMLF/143/2023-2024 for Routine Maintenance of Mtito Andei – Salaita Road (E693) in Tsavo West National Park be and are hereby nullified and set aside.

C. The 1st Respondent is hereby directed to issue Notification of Intention to Enter into a Contract in Tender No. KWS/ONT/RMLF/143/2023-2024 for Routine Maintenance of Mtito Andei – Salaita Road (E693) in Tsavo West National Park in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 within twenty- one (21) days from the date hereof taking into consideration the Board’s findings herein.

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

Dated at NAIROBI this 25th Day of February 2025.



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PANEL CHAIRPERSON

PPARB



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SECRETARY

PPARB