

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 13/2025 OF 6TH FEBRUARY 2025

BETWEEN

CAXON DIS AND WORKS LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA WILDLIFE SERVICE RESPONDENT

Review against the decision of the Accounting Officer Kenya Wildlife Service in relation to Tender No. KWS/ONT/RMLF/144/2023-2024 for Routine Maintenance of Kitani-Maktau-Jipe Road (UNCL_TWNP_2) in Tsavo West National Park.

BOARD MEMBERS PRESENT

- | | |
|-----------------------|---------------------|
| 1. Mr. Jackson Awele | - Panel Chairperson |
| 2. Mr. Daniel Langat | - Member |
| 3. Eng. Lilian Ogombo | - Member |

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT CAXON DIS AND WORKS LIMITED

Mr. Odhiambo h/b for Mr. Baraza - Advocate, Walekhwa & Associates Advocates

RESPONDENT THE ACCOUNTING OFFICER, KENYA WILDLIFE SERVICE

Mr. Derrick Karinga - Advocate, Kenya Wildlife Service

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Wildlife Service (hereinafter referred to as "the Procuring Entity") invited sealed tenders in response to Tender No. KWS/ONT/RMLF/144/2023-2024 for Routine Maintenance of Kitani-Maktau-Jipe Road (UNCL_TWNP_2) 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 17th September 2024 at 10.00 a.m. which was later on extended to 24th 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 24th September 2024 at 10.00 a.m. as provided in the Revised Schedule of Road Tenders FY 2023-2024.

Submission of Tenders and Tender Opening

3. According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 24th 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'), fourteen (14) bidders submitted bids in the subject tender as follows:

Bid No.	Name Of The Firm
1.	Shuriye Contactors Ltd
2.	Abmo Links Limited
3.	Mutindi General Contractors
4.	Cantam Investments Limited
5.	Maash General Suppliers Ltd
6.	Shix Ltd
7.	Jikmir Enterprises Limited

8.	Gajesh Enterprises Ltd
9.	Antco Investments Ltd
10.	Skylim Solutions Ltd
11.	Parkton Ventures Ltd
12.	Hogla Construction Company Ltd
13.	Colossus Investments Ltd
14.	Caxon Dis & Works Ltd

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, ten (10) tenders were determined non-responsive, while four (4) 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, three (3) tenders, including 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 Antco Investments 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 Antco Investments 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 Antco Investments Limited, being the lowest responsive evaluated bidder at its tender price of Kenya Shillings Twenty-Six Million Three Hundred and Sixty-Seven Thousand Nine Hundred and Seven and Thirty-Eight Cents Only (Kshs. 26,367,907.38) 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 Antco Investments 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 Antco Investments Limited, being the lowest responsive evaluated bidder, at its tender price of Kenya Shillings Twenty-Six Million Three Hundred and Sixty-Seven Thousand Nine Hundred and Seven and Thirty-Eight Cents Only (Kshs. 26,367,907.38) 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

PPARB No.13 /2025

27th February 2025

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. 13 OF 2025

17. On 6th February 2025, Caxon Dis and Works Limited, the Applicant herein, filed a Request for Review dated 4th February 2025 together with a Statement in Support for Request for Review sworn on 4th February 2025 by Antony Kipyego Kosgei through Walekhwa & Associates Advocates seeking the following orders from the Board:

- a) The Procuring Entity's decision on non-issuance of a notice of intention to award was irregular, illegal and unconstitutional hence null and void ab initio.***
- b) The Procuring Entity be compelled to issue a legally compliant notice of intention to award to the Applicant herein within such time as the board deems fit.***
- c) A declaration that the respondent's decision on non-issuance of the notice of intention to award in Tender No. KWS/ONT/RMLF/144/2023-2024 of September 2024 violates the provisions of Articles 10 and 27 of the Constitution of Kenya 2010.***
- d) The board does allow the parties to interrogate the substantive reasoning of the respondent upon provision of notice of intention to award and if it deems fit proceed***

to issue such orders including but not limited to an order to award the tender aforesaid to the Applicant herein.

e) General and special damages flowing from the breaches aforesaid.

f) Costs of this review be borne by the Respondent.

18. In a Notification of Appeal and a letter dated 6th 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 6th February 2025.

19. On 10th February 2025, the Respondent filed through Derrick Karinga Advocate a Notice of Appointment dated 7th February 2025, a Notice of Preliminary Objection dated 7th February 2025, and a Memorandum of Response to Request for Review dated 7th 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 14th 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 18th February 2025, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 21st February 2025 at 11:00 a.m. through the link availed in the said Hearing Notice.
22. At the hearing on 21st February 2025 the Board read out the pleadings filed by parties in the matter and directed that the hearing of the Notice of Preliminary Objection by the Respondent would be heard as part of the substantive instant Request for Review. This is in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of a substantive request for review and deliver one decision.
23. Parties were allocated time to highlight their respective cases and the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

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

24. In his submissions, Mr. Odhiambo relied on the documents filed before the Board on behalf of the Applicant and submitted that the Respondents' Preliminary Objection lacks merit.
25. Mr. Odhiambo submitted that the instant Request for Review was filed within the stipulated statutory timelines provided under Section 167(1) of the Act. He pointed out that the Applicant has not been served with the notification of intention to award and as such, time can only start to run upon service of the same.
26. Counsel indicated that the Applicant demanded for issuance of the notification letter on 23rd January 2025 and only received a response from the Respondent on 3rd February 2025 informing it that the notification had allegedly been dispatched and as such, any computation of time ought to commence on 3rd February 2025. He pointed out that a finding of non-service automatically extinguishes the Respondent's Preliminary Objection and urged the Board to dismiss the same.
27. On the issue of notification, counsel submitted that the Applicant was not served with a notice of intention to award the subject tender contrary to Section 87 of the Act as read with Regulation 82 of Regulations 2020. He further submitted that the Respondent has an obligation that is

mandatory in nature to notify both successful and unsuccessful bidders of the intention to award the subject tender.

28. Counsel argued that failure to serve the Applicant with the notification letter was a violation of Article 10 and 227 of the Constitution and that this omission offends the doctrine of legitimate expectation implied under Section 87 of the Act.

29. He argued that the burden falls upon the Respondent to prove that it served the Applicant with the notification letter and in the circumstances, the issue of service is a factual issue that the Respondent is required to prove by evidence. He further argued that in the absence of such evidence, the Board ought to make a presumption in the favour of the Applicant. Further, that if service was indeed effected, nothing would be easier on the Respondents part than providing the postal address that service was done, information pertaining to the day and time of address and the certificate of postage to demonstrate that service.

30. In support of his argument, counsel referred the Board to the holding in R v Public Procurement Administrative Review Board & Another where the court categorically stated that to prove that service was effected, evidence must be adduced in support of such an allegation.

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

Respondent's submission on its Preliminary Objection and the Request for Review

32. In his submissions, Mr. Karinga relied on the documents filed before the Board on behalf of the Respondents in the instant Request for Review.
33. With regard to the Respondent's Notice of Preliminary Objection dated 7th February 2025, Mr. Karinga 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.
34. Counsel further submitted that the notification of intention to award the subject tender was transmitted via registered post 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 6th February 2025 after 22 days had lapsed was outside the 14 days' statutory period stipulated in Section 167(1) of the Act.
35. Mr. Karinga submitted that upon evaluation of tenders in the subject tender and arrival at a successful bidder, the 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.

36. 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 Bethwel Kipngetich of P.O. Box 7887-00100 Nairobi 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.
37. 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. 854.
38. 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.

39. 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.

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

Applicant's Rejoinder

41. In a rejoinder, Mr. Odhiambo submitted that the issue of service is a factual issue that should specifically be shown in evidence.

42. 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

43. When asked to confirm the official postal addresses of the Applicant for purposes of the subject tender and its tender sum, Mr. Odhiambo submitted that the postal address submitted by the Applicant is P.O. Box 7887-00100 Nairobi.

44. 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 7887-00100 Nairobi.

45. 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 as evidenced by the Certificate of Postage and Statement by Postal Corporation of Kenya in the confidential file.

46. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 6th February 2025 was due to expire on 27th February 2025 and that the Board would communicate its decision to all parties to the Request for Review via email.

BOARD'S DECISION

47. 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.

48. 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.

49. 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."

50. 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."

51. 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."

52. 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.

53. 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."

54. 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.”

55. 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.

56. 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.

57. 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.

58. 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)

59. 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.

60. 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.

61. 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.

62. 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.

63. The Respondents contend at ground 1 of the Notice of Preliminary Objection dated 7th 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.

64. 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 22 days had lapsed from the date of notification and ought to be struck out.

65. In response, Mr. Odhiambo 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 and the same is a factual issue that should specifically be shown in evidence.

66. 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."

67. 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..."

68. 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.

69. 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.”

70. 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”

71. 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.

72. 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 Respondent 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 if 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.

73. In the circumstances, we find that the Respondent's Notice of Preliminary Objection dated 7th February 2025 and filed on 10th February 2025 is not based on pure points of law and is therefore not a proper preliminary objection as to oust the jurisdiction of the Board.

74. 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.

75. 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 10 and 227(1) of the Constitution and the doctrine of legitimate expectation.

76. We understand the Respondent's 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. The Respondent contends that it 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.

77. 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)”

78. 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."

79. 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.

80. 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.”**

81. 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.

82. 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"

83. 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"

84. 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.

85. 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 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 1025 letters were dispatched to various recipients. Counsel pointed out that the Applicant's details are captured as recipient No. 854.

86. 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 and the Payment receipt annexed thereto is stamped on 23rd January 2025.

87. 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 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.

88. 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?

89. 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.

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

FINAL ORDERS

91. 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:

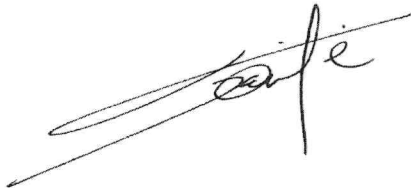
A. The Respondent's Notice of Preliminary Objection dated 7th February 2025 and filed on 10th February 2025 be and is hereby dismissed.

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/144/2023-2024 for Routine Maintenance of Kitani-Maktau-Jipe Road (UNCL_TWNP_2) in Tsavo West National Park be and are hereby nullified and set aside.

C. The Respondent is hereby directed to issue Notification of Intention to Enter into a Contract in Tender No. KWS/ONT/RMLF/144/2023-2024 for Routine Maintenance of Kitani-Maktau-Jipe Road (UNCL_TWNP_2) in Tsavo West National Park in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 within three (3) 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 27th Day of February 2025.



.....
PANEL CHAIRPERSON

PPARB

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SECRETARY

PPARB