

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 19/2025 OF 25<sup>TH</sup> FEBRUARY 2025**

**BETWEEN**

**WANJOHI MUTONYI CONSULT LTD ..... APPLICANT**

**AND**

**THE DIRECTOR GENERAL**

**KENYA CIVIL AVIATION AUTHORITY ..... RESPONDENT**

Review against the decision of the Director General, Kenya Civil Aviation Authority in relation to Request for Proposal (RFP) Tender No. KCAA/010/2024-2025 for Provision of Consultancy Services for Design, Preparation of Bidding Document and Construction Supervision of a Water Treatment and Reticulation System at the East African School of Aviation, Embakasi.

**BOARD MEMBERS PRESENT**

- |                        |   |                   |
|------------------------|---|-------------------|
| 1. Mr. Jackson Awele   | - | Panel Chairperson |
| 2. CPA Alexander Musau | - | Member            |
| 3. Mr. Daniel Langat   | - | Member            |

**IN ATTENDANCE**

- |                        |                                     |
|------------------------|-------------------------------------|
| 1. Mr. Philemon Kiprop | - Holding brief for Board Secretary |
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- |                     |               |
|---------------------|---------------|
| 2. Ms. Evelyn Weru  | - Secretariat |
| 3. Mr. Ericson Nani | - Secretariat |

## **PRESENT BY INVITATION**

### **APPLICANT**

### **WANJOHI MUTONYI CONSULT LTD**

- |                            |                                                |
|----------------------------|------------------------------------------------|
| 1. Eng. Isaiah Mutonyi -   | Managing Director, Wanjohi Mutonyi Consult Ltd |
| 2. Eng. Patrick Githinji - | Wanjohi Mutonyi Consult Ltd                    |
| 3. Eng. David Muruthi -    | Wanjohi Mutonyi Consult Ltd                    |

### **RESPONDENTS**

### **THE DIRECTOR GENERAL**

### **KENYA CIVIL AVIATION AUTHORITY**

- |                        |                                    |
|------------------------|------------------------------------|
| 1. Mr. George O Mogaka | - Corporation Secretary & Advocate |
| 2. Ms. Alice Kandira   | - Procurement Officer              |

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenya Civil Aviation Authority (hereinafter referred to as "the Procuring Entity") invited sealed tenders in response to Request for Proposal (RFP) Tender No. KCAA/010/2024-2025 for Provision of Consultancy Services for Design, Preparation of Bidding Document and Construction Supervision of a Water Treatment and Reticulation System at the East

African School of Aviation, Embakasi (hereinafter referred to as the "subject tender") by way of open tender method. The invitation was by way of an advertisement on 22<sup>nd</sup> October 2024 in My Gov Publication, the Procuring Entity's website [www.kcaa.or.ke](http://www.kcaa.or.ke) and on the Public Procurement Information Portal (PPIP) [www.tenders.go.ke](http://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.

2. The initial tender submission deadline was scheduled on 7<sup>th</sup> November 2024 and following issuance of Addendum dated 1<sup>st</sup> November 2024 (hereinafter referred to as "Addendum No. 1"), it was extended to 12<sup>th</sup> November 2024 at 11:00 a.m. Bidders were to submit their proposals comprising of (a) 1<sup>st</sup> Inner Envelope with the Technical Proposal, and (b) 2<sup>nd</sup> Inner Envelope with the Financial Proposal.

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

3. According to the Minutes of the subject tender's opening signed by members of the Tender Opening Committee on 12<sup>th</sup> November 2024 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of eight (8) tenders were submitted in response to the subject tender. The said eight (8)

tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

<b>No.</b>	<b>Name of Tenderer</b>
1.	Gath Consulting Engineers JV Losai Management Limited
2.	Ecosite Development Consultants Limited
3.	Design Master Plan Limited
4.	Interconsult Engineers Limited JV B & L Engineering Services Ltd
5.	Wanjohi Mutonyi Consulting Limited
6.	Finix Consulting Limited JV University of Nairobi Enterprises Services Ltd (UNES)
7.	Bosco Engineering Consultants Ltd
8.	Norken International Limited

### **Evaluation of Tenders**

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of the eight (8) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 4<sup>th</sup> February 2025 (hereinafter referred to as the "Evaluation Report") (which Evaluation Report was furnished to the Board by the Respondent pursuant to Section 67(3)(e) of the Act), in the following stages:

- i Preliminary Evaluation;
- ii Technical Evaluation; and
- iii Financial Evaluation.

### **Preliminary Evaluation**

5. The Evaluation Committee was required to carry out a preliminary evaluation of tenders in the subject tender using the criteria provided under Table DS1: Eligibility and Mandatory Evaluation Criteria of Section 2 (B). Data Sheet at page 26 of 127 to 27 of 127 of the Tender Document and Addendum No.1. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the Technical Evaluation stage.
6. At the end of evaluation at this stage, five (5) tenders were determined non-responsive while three (3) tenders including the Applicant's tender were determined responsive and proceeded for evaluation at the Technical Evaluation stage.

### **Technical Evaluation**

7. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Table DS2: Technical Evaluation Criteria of Section 2 (B). Data Sheet at page 28 of 127 to 29 of 127 of the Tender Document and Addendum No.1. Tenders were required to attain a technical pass mark of 80% so as to proceed to the financial opening stage.

8. At the end of evaluation at this stage, all three (3) bidders who had progressed for evaluation at this stage were found to be responsive including the Applicant's tender and thus proceeded for evaluation at the Financial Evaluation stage.

## **Financial Evaluation**

9. Financial Proposals were opened on Friday, 13<sup>th</sup> December 2024 and read out as follows:

***Table 9: Financial proposal bid amount as read out during opening of Financial Proposals – Form FIN1***

<b><i>Bidder's Ref. No.</i></b>	<b><i>Bidder's Name</i></b>	<b><i>Financial Proposal Bid Amount</i></b>
<b><i>Bidder B.1</i></b>	<b><i>Gath Consulting Engineers JV Losai Management Limited</i></b>	<b><i>Kshs. 8,491,780.00</i></b>
<b><i>Bidder B.4</i></b>	<b><i>Interconsult Engineers Ltd JV B&amp;L Engineering Services Ltd</i></b>	<b><i>Kshs. 8,650,700.00</i></b>
<b><i>Bidder B.5</i></b>	<b><i>Wanjohi Mutonyi Consulting Limited</i></b>	<b><i>Kshs. 4,535,600.00</i></b>

10. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Section 2 (B). Data Sheet of the Tender Document. The bidders weighted technical score would be combined with the financial score so as to achieve the highest ranked bidder as provided in the Quality and Cost Based Selection (QCBS) Method.

11. The Evaluation Committee proceeded to evaluate the Financial Proposals of the responsive bidders at this stage based on a reflection

of timeframes being the total time input in person per month for each bidder for both Phase I and II as per the breakdown of remuneration (Form FIN.3) and found as follows:

**Table 10: Total Time Input In Person per Month for both Phase I and Phase II as per the Breakdown of Remuneration (Form FIN.3)**

<b><i>Bidder's Ref. No.</i></b>	<b><i>Bidder's Name</i></b>	<b><i>Total Time Input In Person/Month</i></b>
<b><i>Bidder B.1</i></b>	<b><i>Gath Consulting Engineers JV Losai Management Limited</i></b>	<b><i>20.29</i></b>
<b><i>Bidder B.4</i></b>	<b><i>Interconsult Engineers Ltd JV B&amp;L Engineering Services Ltd</i></b>	<b><i>25.50</i></b>
<b><i>Bidder B.5</i></b>	<b><i>Wanjohi Mutonyi Consulting Limited</i></b>	<b><i>8.25</i></b>

12. Based on the above, it was found that Bidder 1 and 4 were responsive having met the minimum Total Time Input In Person Per Month and that the Applicant's bid was non-responsive as can be discerned at page 11 of 19 to 12 of 19 of the Evaluation Report.

13. The Evaluation Committee proceeded to combine and rank Bidder 1 and Bidder 4 weighted financial proposal scores and weighted technical scores as follows:

**Table 12. Weighted Financial Score for the firms that passed the Technical Evaluation and costed for the minimum months required.**

<b><i>Bidder Ref. No</i></b>	<b><i>Name of Firm</i></b>	<b><i>Total Bid Price as read out in KES</i></b>	<b><i>Weighted Financial Score (Sf = 100 x Fm/F)</i></b>
<b><i>B.1</i></b>	<b><i>Gath Consulting Engineers JV Losai Management Limited</i></b>	<b><i>8,491,780.00</i></b>	<b><i>20.00</i></b>

<b>B.4</b>	<b>Interconsult Engineers Ltd JV B&amp;L Engineering Services Ltd</b>	<b>8,650,700.00</b>	<b>19.63</b>
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**The Financial Score was calculated using the following formula as provided in the Data Sheet;**

**$Sf = 100 \times Fm / F$ , in which "Sf" is the financial score, "Fm" is the lowest price, and "F" the price of the proposal under consideration.**

.....

**Table 13: Combined Score (Technical & Financial) and Ranking**

<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>6</b>	<b>7</b>	<b>8</b>
<b>Bidder No.</b>	<b>Name of qualified firm that submitted a financial Proposal</b>	<b>Overall Technical Marks of the firm</b>	<b>Total contract Price as read out in KES (Table 12)</b>	<b>Weighted Technical score of the firm</b>	<b>Weighted Financial Score of the firm</b>	<b>Combined score of the firm (Col. 5 + Col 6)</b>	<b>Ranking</b>
<b>Bidder No. 1</b>	<b>Gath Consulting Engineers JV Losai Management Limited</b>	<b>96%</b>	<b>8,491,780.00</b>	<b>76.80</b>	<b>20.00</b>	<b>96.8</b>	<b>2</b>
<b>Bidder No. 4</b>	<b>Interconsult Engineers Ltd JV B&amp;L Engineering Services Ltd</b>	<b>98%</b>	<b>8,650,700.00</b>	<b>78.40</b>	<b>19.63</b>	<b>98.03</b>	<b>1</b>

## **Negotiations**

14. The Evaluation Committee proceeded to hold a negotiation meeting with with M/s. Interconsult Engineers Ltd JV B&L Engineering Services Ltd on Thursday, 9<sup>th</sup> January, 2025 at 1400hours, being the highest ranked evaluated bidder as can be discerned from the Negotiation Meeting Minutes attached to the Evaluation Report at page 14 of 19 to 16 of 19 of the Evaluation Report.

## **Post Qualification/ Due Diligence**



15. The Evaluation Committee having conducted due diligence to the highest ranked bidder in the combined scores, M/s. Interconsult Engineers Ltd JV B&L Engineering Services Ltd, so as to confirm the details as submitted its bid as can be discerned at page 16 of 19 to 18 of 19 of the Evaluation Report was convinced that the said bidder was competent and has capacity to deliver the project if awarded the subject tender.

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

16. The Evaluation Committee recommended the award of the subject tender to M/s. Interconsult Engineers Ltd JV B&L Engineering Services Ltd at its total bid price of Kenya Shillings Eight Million Six Hundred and Fifty Thousand Seven Hundred Only (Kshs. 8,650,700.00) inclusive of all applicable taxes and levies being the highest ranked bidder in the combined scores.

### **Professional Opinion**

17. In a Professional Opinion dated 6<sup>th</sup> February 2025 (hereinafter referred to as the "Professional Opinion"), the Manager Procurement reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to M/s. Interconsult Engineers Ltd JV B&L Engineering Services Ltd at its total bid price of Kenya Shillings Eight Million Six Hundred and Fifty Thousand Seven Hundred Only (Kshs.

8,650,700.00) inclusive of all applicable taxes and levies being the highest ranked bidder in the combined scores.

18. Thereafter, the Professional Opinion was approved on 11<sup>th</sup> February 2025 by the Respondent. The duly approved Professional Opinion was furnished to the Board by the Respondent as part of confidential documents pursuant to Section 67(3)(e) of the Act.

### **Notification to Tenderers**

19. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award Contract dated 11<sup>th</sup> February 2025.

### **REQUEST FOR REVIEW NO. 19 OF 2025**

20. On 25<sup>th</sup> February 2025, Wanjohi Mutonyi Consult Ltd, the Applicant herein, filed a Request for Review dated 24<sup>th</sup> February 2025 together annexures enclosed therein (hereinafter referred to as "the instant Request for Review) seeking the following orders:

- a) The Respondent's decision notifying the Applicant of intention to award to M/s Interconsult Engineers Ltd JV B&L Engineering Services Ltd by way of the letter dated the 11<sup>th</sup> February 2025 be hereby set aside and nullified;***
- b) Consequent to the nullification and setting aside of the letter dated 11<sup>th</sup> Feb 2025, The Respondent be ordered***

***and directed to proceed with either with contract negotiation which stalled on 24<sup>th</sup> May 2024, or with respect to bids submitted on 12<sup>th</sup> November 2024, ranking and award the Contract to the Applicant herein.***

***c) The Respondent be and is hereby ordered to pay the costs of and incidental to these proceedings; and***

***d) Such other or further relief or reliefs as this board shall deem just and expedient.***

21. In a Notification of Appeal and a letter dated 25<sup>th</sup> February 2025, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to them a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent was requested to submit a response to the instant Request for Review together with confidential documents concerning the subject tender within five (5) days from the date of the Notification of Appeal and letter dated 25<sup>th</sup> February 2025.

22. Vide letter dated 6<sup>th</sup> March 2025, the Respondent requested for extension of the allocated response period and submitted confidential

documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

23. Vide a Hearing Notice dated 7<sup>th</sup> March 2025, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 12<sup>th</sup> March 2025 at 2:00p.m., through a link availed in the said Hearing Notice.

24. On 10<sup>th</sup> March 2025, the Respondent filed through Mr. George O Mogaka, Corporation Secretary, a Respondents' Memorandum of Response to Request for Review dated 10<sup>th</sup> March 2025.

25. On 11<sup>th</sup> March 2025, the Acting Board Secretary notified all bidders in the subject tender via email, of the existence of the instant Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All bidders in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days.

26. On 12<sup>th</sup> March 2025, the Respondent filed a Preliminary Objection dated 11<sup>th</sup> March 2025.

27. On the same day of 12<sup>th</sup> March 2025, the Applicant filed an Applicant's Response No. 1 dated 12<sup>th</sup> March 2025.

28. During the hearing on 12<sup>th</sup> March 2025 at 2.00 p.m., the Board allocated parties time to highlight their respective cases and directed that the hearing of the Preliminary Objection by the Respondent would be heard as part of the substantive Request for Review. This was 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. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

29. In response to the Respondent's Preliminary Objection, Eng. Muruthi submitted that parties to the review are provided under Section 170 of the Act and that pursuant to Regulation 205(5) of Regulations 2020, the Board Secretary is tasked with notifying all other parties to the review upon receipt of a memorandum of response from the procuring entity.

30. He pointed out that the Applicant has no legal representation and as such, in view of provisions of Regulation 203(1)(b) of Regulations 2020, separate statements were not found to be necessary. Further, that the Applicant had pointed out at paragraph 3.1 (a) of the Request for Review that the Respondent erred in proceeding to rank other bidders to its exclusion while in fair evaluation/determination, it

expected to be awarded the subject tender and invited to contract negotiations.

31. On the substantive issues in the instant Request for Review, Eng. Muruthi indicated that on 16<sup>th</sup> April 2024, the Respondent vide a letter referenced KCAA/CONF/1010/3/VOL.58 (120) and annexed as exhibit marked "WMCL-2" invited the Applicant among other 6 firms to submit proposals for Request for Proposal (RFP) No. KCAA030/2023-2024 for the Design, Preparation of the Bidding Document, and Construction Supervision Of A Water Treatment And Reticulation System At The East African School Of Aviation Embakasi, Nairobi. That subsequently, the Applicant submitted its proposal in two envelopes (technical & financial) and received an invitation letter referenced KCAA/CONF/1010/3/VOL.58 (157) dated 23<sup>rd</sup> May 2024 to attend the opening of financial proposals on 24<sup>th</sup> May 2024.

32. He submitted that at the opening, the Applicant observed that at a technical score of 82.5%, it was the only firm that had surpassed the minimum technical score of 80% and was the only bidder invited for financial opening.

33. He indicated that after opening of the Applicant's proposal, the Respondent initiated a forum for negotiations on the Applicant's financial bid and that arising from the Respondent's indication that it had budgetary constraints, the discussions drifted to analysis of the nature and scope of works. That from the Respondent's description of

its understanding and expectation, the Applicant formed the view that the scope of the site surveys, inspection and analysis to determine the need to repair and replace the water distribution pipes was not as large as the Applicant had envisaged.

34. Eng. Muruthi submitted that the negotiation meeting ended with an understanding that it would be resumed after the Respondent reviewed its budget. He further submitted that pursuant to Section 2(a). Instructions to Consultants (ITC), Clause 37 (Conclusion of Negotiations), Sub-Clause 37.2, the Applicant expected that the Respondent would reconvene the negotiation meeting whereby it would state its budget with a view to giving the Applicant the opportunity to work within the said budget. In this regard, he sought for the Respondent to convene the negotiation meeting so that the contract negotiation phase could be concluded.

35. As an alternative, Eng. Muruthi submitted that the Applicant believe that its bid was at the top in ranking and ought to have been awarded the subject tender out of the bids submitted pursuant to the advertisement in the local daily in October 2024 and Tender Document marked as exhibits "WMCL-4" and "WMCL-5".

36. He submitted that though apprehensive, the Applicant submitted its proposal in two envelopes and noted that the RFP was the same one as the one issued on 16<sup>th</sup> April 2024. He pointed out that the method of selection was Quality and Cost-Based Selection in accordance with

Section 124(1) of the Act and that the selection and contract award process was subject to the guidelines set out in the Tender Document.

37. Eng. Muruthi submitted that the Applicant was one of the 3 bidders invited to participate at the tender opening of financial proposals on 13<sup>th</sup> December 2024 and at the said session, the technical scores of the three bidders were read out. He pointed out that Clause 30.1 of the Instruction to Consultants (ITC) Section 2B (Data Sheet) provided guidance on the ranking of consultants and that the Applicant at Clause 2.7 of the Request for Review had computed the Financial Score using the provided QCBS formula against the prices of the 3 bidders as read out at the financial proposal opening.

38. He indicated that the Applicant's offer of Kshs. 4,535,600 being the lowest price attracted a score of 20% and based on the availed evaluation criteria, the Applicant had the highest combined score of 92.80% for the technical and financial bids and was the highest ranked bidder hence ought to have been notified and invited for contract negotiation as stipulated under ITC Clause 30.1 (Combined Quality Cost Evaluation).

39. Eng. Muruthi submitted that the Respondent acted contrary to the spirit and intention of the Act and Regulations 2020 in awarding the subject tender to M/s Interconsult Engineers Ltd JV B&L Engineering Services Ltd who ranked second as notified vide letter dated 11<sup>th</sup>



February 2025 and that despite requesting for a debrief with the Respondent, none has taken place to date.

40. Eng. Muruthi submitted that as per the Tender Document, while the various professionals are identified, their time inputs was left up to the bidders and as such, the Tender Document did not stipulate minimums or otherwise for professional time inputs. He further submitted that the Applicant made its determination and provided such time inputs in the Financial Proposal as it considered fit for the assignment.

41. He indicated that the nature and scope of the professional services save provision of water to 3320 persons lead to wide or narrow subjective interpretation resulting in part time inputs and that this is demonstrated by the dotted/broken lines in the Staff Time Schedule chart. He further indicated that the Applicant provided his financial cost with clear understanding that the financial proposal represents how bidder payments shall be made for executing the services required for the assignment.

42. Eng. Muruthi submitted that from the notification letter, it would seem that the Respondent did not give due consideration to ITC Clause 25.1 which guides how the Respondent should address any items considered necessary in the delivery of Consultancy Services which are missed in the Financial Proposal. He reiterated that the Applicant's price as quoted in its Financial Proposal is sufficient to carry out the assignment in the subject tender.

43. He argued that the Respondent's decision to make a determination outside the provisions of the Tender Document not only contravenes the Act, Regulations 30 and 32 of Regulations 2020 but also greatly prejudices the Applicant by failing, if in doubt, to pursue avenues provided for in the RFP for obtaining such price confirmation/clarification from the Applicant.

44. He submitted that the Applicant is aggrieved by the Respondent's decision for the following reasons:

a) Under the provisions, ITC Clause 30.1, the Respondent erred to proceed to invite proposals which its contract negotiation for the bids invited on 14<sup>th</sup> April 2024 had not been concluded. Alternatively, with respect to bids submitted on 12<sup>th</sup> November 2024, the Respondent erred in ranking another bidder first while it is the Applicant in fair evaluation/determination who expected to be awarded and invited for Contract Negotiations.

b) With the bids invited on October 2024, the Respondent flouted the provisions of the ITC Clause 25.1 which provides clear guidance and states how to address the issues raised in the Respondent's letter of notification to award dated 11<sup>th</sup> February 2025. The ITC clearly guides that activities and items described in the Technical Proposal but not priced in the financial proposal shall be assumed to be included in the prices of other activities or items.

- c) The Respondent proceeded to act with prejudice to make erroneous assumptions without (if necessary) pursuing avenues for clarification which are stipulated in the ITC through either contract negotiations or written clarifications.
- d) The Applicant is capable, willing and has undertaken similar magnitude projects at the comparable costs as indicated in the technical proposal (firm's references).
- e) The Applicant maintains that it has the capacity to proceed with implementation of the contract as it is financially capable of meeting the contract requirements and potential.

45. He urged the Board to allow the instant Request for Review as prayed.

### **Respondents' submissions**

46. Counsel for the Respondent, Mr. Mogaka relied on the documents filed by the Respondent before the Board. With regard to the grounds raised in the Respondent's Preliminary Objection, Mr. Mogaka urged the Board to strike out the instant Request for Review and proceeded to submit that the Applicant has no right of audience and cannot be heard by the Board since it did not enjoin the successful tenderer in the instant Request for Review as provided under Section 170 (c) of the Act. Further, that pursuant to Regulation 203(2)(b) of Regulations 2020, the Applicant is required to accompany its Request for Review application with a sworn statement and did not provide the same.

Additionally, that the Applicant in its Request for Review did not plead or claim for loss and damage occasioned by the Respondent as provided under Section 167 of the Act.

47. On the substantive issues raised in the instant Request for Review, Mr. Mogaka pointed out that the Board ought to note that the Applicant was seeking for orders that (a) the Respondent convene a meeting to conclude negotiations out of the previous procurement process and (b) that it was the top ranked bidder and ought to be awarded the tender advertised in October 2024. He further pointed out that the Applicant at Clause 2.2 of the Request for Review had admitted that the RFP issued on 16<sup>th</sup> April 2024 was the same one issued in November 2024.
48. He submitted that the item being procured in the subject tender was provided for in the Procuring Entity's budget and the Procurement Plan for the year 2024-2025 which provided that the process would commence through open tender done in October 2024. He indicated that there was a pre-bid meeting on 31<sup>st</sup> October 2024 and the tender was opened on 12<sup>th</sup> November 2024. He proceeded to give a brief background of the evaluation process of the subject tender and pointed out that at upon opening of the Financial Proposals of responsive bidders, including the Applicant's tender, at this stage, the Evaluation Committee checked for arithmetic errors and confirmed the terms of reference per the provisions in the Tender Document.

49. Council submitted that upon close scrutiny, the Evaluation Committee observed that Bidder No. 1 and Bidder No. 4 met the minimum total inputs in person per month and observed from the Applicant's tender that the Technical Proposal indicated that it will input 34 staff man-months inclusive of the Defect Liability Period (DLP) to execute the whole project as per their proposed methodology but in its Financial Proposal (Form FIN.3 – Breakdown of Remuneration) it only costed for 8.25 months cumulatively with a breakdown of 2.5 months for Phase I – Design and 5.75 months for Phase II – Construction Supervision.

50. Further, that from the breakdown of remuneration provided by the Applicant, there was a requirement for clerk of works expected to be on site throughout the construction stage and this had been costed for only 4 months as opposed to the Applicant's proposed methodology of 12 months. As for the requirement for a Civil/Structural engineer who would be integral in Phase II, he indicated that this was not costed for in the Applicant's Financial Proposal. He indicated that the Applicant did not cost the Financial Proposal in reference to the methodology proposed in the Technical Proposal which was considered to be a material deficiency and that the Procuring entity found that the Applicant's FIN – 3A did not meet the instructions provided in the RFP and as such, created a technical disconnect between the technical and financial proposal. That in essence, this implies that the Applicant would only invest in the consultancy the time that has been costed for which it would eventually compromise provision of the services required as stated in the terms of reference.

51. From the foregoing, he submitted that the Applicant was not evaluated further since it did not meet the minimum evaluation requirements. Counsel submitted that the Evaluation Committee proceeded to weight the financial scores of the other 2 responsive bidders and a recommendation was arrived at to award the subject tender to the successful bidder.

52. As to the orders sought by the Applicant, Counsel submitted that the first advertisement was done in the last financial year and was terminated in accordance with the Act and participation of the Applicant in the current tender meant that it was aware of the termination and if it had any issue with the previous process, it ought to have challenged the same within the prescribed timelines.

53. He prayed for the Board to dismiss the instant Request for Review with costs.

### **Applicant's Rejoinder**

54. In a rejoinder, Eng. Muruthi submitted that in the second RFP, there was a requirement for a mandatory site visit as part of the pre-bid conference and that this provided a very clear clarification of scope that was not available in the previous tender hence there was no act of mischief on the part of the Applicant as it just followed the due process in terms of clarifying the scope.

55. He indicated that based on what the Applicant found on the site visit, the market rates and experience on similar works undertaken, it became clear that the scope of works was much lighter than envisaged and that it roughly estimated the works to cost a maximum of Kshs. 45 Million which is consistent with its fee estimate of Kshs. 4,535,600.00 based on the Engineer's scale of fees.

56. He indicated that all the items in the methodology and technical proposal were fully included for, based on the projected billable inputs by the Applicant and that the methodology and work plan was concluded in the technical evaluation. He reiterated that all the key experts including the civil/structural engineer, clerk of works were catered for and that the inputs at the supervision stage would be covered within the Applicant's fees.

57. With regard to allegations by the Respondent that the Applicant's bid was checked for arithmetic errors and conformance to the terms of reference, Eng. Muruthi submitted that the Respondent was introducing evaluation processes and criteria that was outside what was provided for in the RFP noting that correction of errors was provided for under ITC 25.1 and 25.3 and as such, the Respondent deviated to new post submission criteria.

58. He reiterated while referencing to Section 5, Terms of Reference Clause 9(b) of the Tender Document that the minimum time input per person per month was not provided anywhere in the RFP and that it

only specified contract periods/durations making this a post submission criteria introduced by the Procuring Entity. Further, that Section 124 (5) of the Act was clear that even where the expert duration is provided, it is still the responsibility of the consultant to provide final estimates. He stated that the Applicant adhered to the provisions of the Act and provided its estimates.

59. Eng. Muruthi submitted that a lot of the submission by the Respondent pertains to items that were closed during the Technical Evaluation stage and that the Applicant was considered responsive having scored 91% and that to bring this items at the Financial Evaluation stage without following the due process provided under Section 25.1 was veering outside both the Tender Document and the Act and injured the Applicant by denying it a fair process.

60. As to submissions by the Respondent that the Applicant believed that the subject tender had a budgetary limit of Kshs. 5,000,000.00 and as such squeezed its quotation within that margin which borders on prior information, Eng. Muruthi submitted that this was false and that the Applicant arrived at its quotation based on the scope of works and that the Kshs. 5,000,000.00 was mentioned in the RFP pre-qualification criteria which was available to all bidders.

61. While making reference to the previous tender, Eng. Muruthi submitted that by the time the Applicant received the RFP concerning the subject tender, it had not received any communication from the



Respondent pertaining termination of the previous tender and that this obscured communication channel did not provide it with an opportunity for the Applicant to seek redress.

62. He urged the Board to allow the Request for Review as prayed.

### **Clarifications**

63. When asked to clarify the requirements which the Applicant did not comply with at the Financial Evaluation stage, Mr. Mogaka submitted that the Respondent's understanding was that the Financial Proposal would entail costing of what the Applicant had indicated as part of its Technical Proposal and as such, if it provided for certain man-months and specialities, then this was required to be seen in its costing and this was what was missing in its Financial Proposal. He further submitted that this evaluation criterion was provided for in the Tender Document.

64. At this juncture, Ms. Kandira submitted that the Terms of Reference provided that some specializations were supposed to be provided and posted under financials which was not provided by the Applicant.

65. The Board sought clarification from the Respondent on the particular clause relied upon to reach the conclusion as regards the minimum time input and the minimum months in evaluating the proposals at the Financial Evaluation stage, Ms. Kadiru submitted that the Terms of Reference had given a number of competencies such as the project

manager as the team leader, the water supplier distribution the network engineer, the civil structural engineer, a hydrogeologist, project engineer, and plaque of works such that there would be staff months and this was to be considered in the Financial Proposal which the Applicant failed to cost for all these competencies leading to its disqualification from further evaluation.

66. She reiterated that the Respondent had highlighted all the competencies required in its Terms of Reference there being the issue of staff months whereby the Procuring Entity guided all participating consultants by indicating that the consultant shall provide adequate staff in terms of expertise, time and location as well as equipment in order to complete the activities required under the scope of services and to complete the project in terms of time, cost and quality. Further that the consultant was required to ensure that the consultancy service is fully staffed with the key and non-key personnel and as such, the Respondent had given an indication of all the competencies which all the participating consultants were supposed to cost.

67. As to whether Bidder No. 1 and 4 met all the terms of evaluation criteria at the Financial Evaluation stage, Ms. Kadira confirmed that they met all the requirements of the Financial Evaluation criteria having costed for the aforementioned competencies.

68. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 25<sup>th</sup> February

2025 was due to expire on 17<sup>th</sup> March 2025 (*meant to be on 18<sup>th</sup> March 2025*) and that the Board would communicate its decision on or before the due date to all parties to the Request for Review via email.

## **BOARD'S DECISION**

69. The Board has considered each of the parties' submissions and documents placed before it and find 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 will make a determination on the following sub-issues:

- i Whether the Applicant has *locus standi* before the Board;

Depending on determination of sub-issue (i);

- ii Whether the instant Request for Review as filed is fatally defective for failure to join the successful bidder as a party pursuant to Section 170(c) of the Act as to divest the Board of its jurisdiction;

Depending on determination of sub-issue (ii);

- iii Whether the instant Request for Review was filed contrary to Regulation 203(2)(b) of Regulations 2020 thus defective.

Depending on the determination of the first issue;

**B. Whether Evaluation Committee acted unfairly and in breach of the provisions of the Tender Document, the Act and Article 227(1) of the Constitution by disqualifying the Applicant's tender at the Financial Evaluation stage;**

**C. What orders should the Board grant in the circumstances.**

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

70. This Board is mindful of the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

71. 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.”***

72. The *locus classicus* case on the question of jurisdiction is 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** which underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, made the oft-cited dictum:

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

73. 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."***

74. In the persuasive authority from the Supreme Court of Nigeria in the case of **State v Onagoruwa [1992] 2 NWLR 221 – 33 at 57 – 59** the Supreme Court held:

***"Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based."***

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

***"(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."***

76. Further, the functions of the Board are provided under Section 28 of the Act 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."***

77. 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.

78. The jurisdiction of this Board is provided for 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 Powers of the Board.

79. In opposing the instant Request for Review, the Respondent raised in its Preliminary Objection dated 11<sup>th</sup> March 2025 grounds of opposition seeking for the instant Request for Review to be struck out for reason that the Applicant (a) has no right of audience and cannot be heard by the Board since it did not enjoin the tenderer notified as successful by the procuring entity as provided under Section 170 of the Act, (b) failed to accompany the Request for Review application with a sworn statement as provided under Regulation 203(2)(b) of Regulations 2020, and (c) failed to plead or claim in its Request for Review for losses and damages occasioned by the Respondent as provided under Section 167 of the Act.

80. In response to the Respondent's Preliminary Objection, the Applicant submitted that pursuant to Regulation 205(5) of Regulations 2020, the Board Secretary is tasked with notifying all other parties of existence of the review application upon receipt of a memorandum of response from the procuring entity. Further, it contended that it had no legal representation and as such, in view of provisions of Regulation 203(1)(b) of Regulations 2020, separate statements were not found to be necessary. Further, the Applicant pointed the Board to Paragraph 3.1 (a) of the Request for Review and submitted that the Respondent erred in proceeding to rank other bidders to its exclusion at the Financial Evaluation stage while in fair evaluation/determination, it



expected to be invited to contract negotiations and awarded the subject tender.

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

81. The Respondent herein objected to the hearing of the instant Request for Review by the Board at ground 3 of its Preliminary Objection dated 11<sup>th</sup> March 2025 on what we understand to be failure by the Applicant to plead or claim for losses and damages occasioned by the Respondent as provided under Section 167 of the Act.

82. Section 167 of the Act provides as follows:

***167. Request for a review***

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

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

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

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

83. In essence, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167(1) of the Act and must (a) either a candidate or a tenderer (within the meaning of Section 2 of the Act), (b) claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020, and (c) seek administrative review by the Board within fourteen (14) days of notification of award or 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 under Regulation 203 of Regulations 2020.

84. Superior courts have on several occasions pronounced themselves in the issue of pleading loss and damage under Section 167(1) of the Act. This Board is cognizant of the holding in **Mombasa Civil Appeal No. 131 of 2018 James Ayodi t/a Betoyo Contractors & Another vs Elroba Enterprises Ltd & Another (2019) eKLR** (hereinafter referred to as “the James Oyondi case”) where the Court of Appeal was called upon to render itself in an appeal challenging the decision of the High Court which held that the Board ought to have ruled that the Appellants had no *locus standi* before it as they had not demonstrated that they had suffered loss or were likely to suffer loss. The Court of Appeal held as follows:

**" ..... It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or**

**damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;....**

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

**.....The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge.[Emphasis]**

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

86. Turning to the instant Request for Review, the issue that calls for determination by this Board is whether the Applicant, from its pleadings in the instant Request for Review, has at the very least claimed that it has suffered or risks suffering loss or damage due to

the breach of duty imposed on the Procuring Entity by the Act or Regulations 2020 to enable it establish that it has *locus standi* before the Board.

87. The High Court in **Alfred Njau and Others v City Council of Nairobi (1982) KAR 229** described *locus standi* as:

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

88. Further, in **Law Society of Kenya v Commissioner of Lands & Others Nakuru High Court Civil Case No. 464 of 2000**, the High Court held that:

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

89. The import of the above holdings is that *locus standi* is the right to appear and be heard in Court or other proceedings and literally means 'a place of standing.' As such, if a party is found to have no *locus standi*, it then means that it cannot be heard whether or not it has a case worth listening to and this point alone may dispose of the Request for Review preliminarily without looking into its merit.

90. We note that Mr. Muruthi in response to the objection that the Applicant failed to plead loss and damage in its Request for Review pointed the Board to Paragraph 3.1 (a) of the Request for Review and submitted that the Respondent erred in proceeding to rank other bidders to its exclusion at the Financial Evaluation stage while in fair evaluation/determination, it expected to be invited to contract negotiations and awarded the subject tender. He argued that the instant Request for Review as filed complied with the provisions of the Act and ought to be heard on merit.

91. Paragraph 3.1(a) of the Request for Review referred to by Mr. Muruthi reads:

***3.1 Thus in summary, the Applicant is aggrieved by the Respondent's decision for the following reasons:-***

***a) Under the provisions, ITC Clause 30.1, The Respondent erred to proceed to invite proposals which its contract negotiation for the bids invited on 14<sup>th</sup> April 2024 had not been concluded. Alternatively, with respect to bids submitted on 12<sup>th</sup> November 2024, the Respondent erred in ranking another bidder first while it is the Applicant in fair evaluation/determination who expects to be awarded and invited for Contract Negotiations."***

92. From the above, it is clear to the Board that the Applicant failed to expressly plead having suffered or risks suffering loss and damage. A

further scrutiny of the Applicant's Request for Review dated 24<sup>th</sup> February 2025 and Applicant's Response No. 1 dated 12<sup>th</sup> March 2025 reveals that the Applicant's averments do not constitute a claim/pleading of having suffered or risk suffering loss and damage under Section 167(1) of the Act flowing from the allegations of the Procuring Entity's breach of statutory duty.

93. This Board in **PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another** (hereinafter referred to as "the Toddy case") was faced with a similar issue as the one herein and being guided by the holding in the James Oyondi case, held at pages 60 to 65 of its Decision as follows:

***"In the James Oyondi case, the applicant never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by Kenya Ports Authority which the Court of Appeal held is a threshold requirement for any who would file a review before the Board in terms of Section 167(1) of the Act. The Court of Appeal held that it seemed plain that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at risk of suffering loss or damage for it is not every candidate or tenderer who has a right to file for administrative review. The Court of Appeal further held that the Board ought to have ruled that the Applicant in the***

**request for review had no locus, and that the learned Judge at the High was right to reverse the Board's decision for failing to do so. The Court of Appeal concluded on by holding that they had no difficulty upholding the learned high court judge.**

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

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

.....

**Guided by the holding in the above cases, and in view of the Court of Appeal's holding in the James Oyondi case, the Applicant would have at the very least sought leave to amend its Request for Review (in good time) to incorporate its pleadings and claim/plead having suffered or likely to have suffered loss or damage due to breach of duty imposed on the**

**2<sup>nd</sup> Respondent by the Act and Regulations 2020 in line with the provisions of section 167(1) of the Act.**

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

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

94. From the Toddy case (which was upheld by the Court of Appeal in its judgment delivered on 19<sup>th</sup> June 2023 in *Civil Appeal No. E295 of 2023 consolidated with Civil Appeal No. E296 of 2023 Lake Victoria North Water Works Development Agency v Toddy Civil Engineering Company Limited & others*), the Board found that it was bound by the Court of Appeal holding in the James Oyondi case and held that the Applicant lacked *locus standi* to seek administrative review before it for failure



to claim or plead in its Request for Review that it has suffered or risks suffering loss or damage due to breach of a duty imposed on the procuring entity by the Act or Regulations 2020.

95. Similarly, in **PPARB Application No. 52 of 2023 Space Contractors & Suppliers Investment Limited v Accounting Officer, Kenya Ports Authority & Others**, (hereinafter referred to as “the Space Contractors case”) the Board found at paragraph 170 of its Decision dated 21<sup>st</sup> August 2023 as follows:

***"170. In the circumstances, we find no reason to depart from this Board's holding in the Toddy case and the holding by the Court of Appeal in the James Oyondi case and hereby find and hold that the Applicant lacks the standing to seek an administrative review by the Board for failure to claim or plead that it has suffered or risks suffering loss or damage due to breach of duty imposed on the 2nd Respondent by the Act and Regulations 2020. Consequently, the Applicant lacks the locus standi to seek administrative review before the Board for its failure to plead that it has suffered or risks suffering, loss or damage due to breach of a duty imposed on the 2<sup>nd</sup> Respondent by the Act or the Regulations.*"**

96. The Board's Decision in the Space Contractor's case was upheld by the Court of Appeal in its judgement delivered at Mombasa on 27<sup>th</sup> November 2023 in **Civil Appeal No. E169 of 2023 Space**

**Contractors & Suppliers Investment Limited v Public Procurement Administrative Review Board & Others** which held at paragraph 61 as follows:

***".....In our view, the answer to Mr Gikandi's submission is to be found in section 167(1), which requires that the person seeking administrative review by way of a Request for Review be a candidate or a tenderer who ought to claim that it has suffered, or was at the risk of suffering, loss or damage due to the breach of a duty imposed on a procuring entity by the Act or the Regulations. Therefore, it does not suffice to alleged breach. One must go ahead and plead that it has suffered or risk suffering loss or damage as a result of the breach. In our considered view, it is not enough to simply contend that some of those awarded the tender were not qualified as the appellant contended here. The appellant ought to have pleaded what loss, if any, it suffered or risked suffering as a result thereof. It failed to do so."***

97. In view of the foregoing, we are constrained to make a finding that the Applicant lacks the standing to seek administrative review before the Board for its failure to plead in the instant Request for Review that it has suffered or risks suffering, loss or damage due to breach of a duty imposed on the Respondent by the Act or the Regulations in line with Section 167(1) of the Act.

98. Consequently, ground 3 of the Respondent's Preliminary Objection succeeds.

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

99. Section 170 of the Act provides for persons who must be parties to an administrative review lodged with the Board pursuant to Section 167 (1) of the Act as follows:

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

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

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

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

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

100. In essence, provisions under Section 170 of the Act are set in mandatory terms and provide that an administrative review must comprise of (a) the candidate or tenderer requesting the review, (b) the accounting officer of a Procuring Entity, (c) the successful tenderer, and (d) such other persons as the Review Board may determine.

101. Turning to the instant Request for Review, it is not in contest that the Applicant was notified of the successful bidder by the Procuring entity vide the Notification of Intention to Award Contract dated 11<sup>th</sup> February 2025. As such, at the time of filing the instant Request for Review, the Applicant was aware of the successful bidder in the subject tender.

102. We note that Mr. Muruthi, in response to the objection that the Applicant has no audience and cannot be heard by the Board due to failure to enjoin the tenderer notified as successful by the procuring entity as envisaged under Section 170 of the Act, submitted that the Board Secretary is tasked with notifying all other parties of existence of the review application pursuant to Regulation 205(5) of Regulations 2020 upon receipt of a memorandum of response from the procuring entity. We understand the Applicant's contention to be that by virtue of the successful tenderer being notified of existence of the request for review by the Board Secretary, no prejudice is occasioned upon it by failure to be enjoined as a party to the review application since in any case, it has been made aware of the proceedings by the Board.

103. Failure to include the successful tenderer as a party to a request for review application lodged with the Board has been the subject of litigation in numerous cases before this Board and the superior courts. For instance, the Court of Appeal in the James Oyondi case referred to hereinabove had occasion to also pronounce itself on a question regarding parties to an administrative review under Section 170 of the

Act and held that failure to include an accounting officer of a procuring entity and the successful tenderer rendered a request for review incompetent:

***".....when a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply...."***

104. This Board in the Toddy case was also faced with a similar issue of joinder of the successful tenderer pursuant to Section 170 (c) of the Act and held at page 48 to 51 of its Decision that:

***"....."***

***In Petition No. 37 & 49 of 2017 (Consolidated), Kenya Medical Laboratory Technicians and Technologists Board & 6 others v 11 Attorney General & 4 others [2017] eKLR, the court defined the term "Interested Party" as:***

***"a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation"***

***Tenderers who participate in the tendering process have an identifiable stake or legal interest or duty in administrative proceedings before the Board because they might be directly or indirectly affected by the outcome of a request for review and are normally joined***

**as interested parties to a request for review. Where a tenderer was notified to have been successful by the procuring entity it is imperative pursuant to section 170 (c) of the Act for it to be joined as a party to the request for review and it is normally joined as an Interested Party though its role is limited to either supporting the Applicant's case or the Respondent's case. It is our considered view that the rationale behind section 170 (c) of the Act is to give successful tenderers (and all other tenderers who may join the proceedings as interested parties) the right to be heard in line with the laws of natural justice and pursuant to Article 50 of the Constitution since a claim in the request for review and a decision of the Board may adversely affect them.**

***Turning to the instant Request for Review, we note that the Interested Party was not joined as a party to the instant Request for Review. However, the Interested Party having been notified by the Board's Secretary of the filing of the instant Request for Review on 6<sup>th</sup> February 2023, proceeded to join the proceedings by appointing the firm of Gerivia Advocates LLP to act for it in the instant Request for Review through the Notice of Appointment dated 9<sup>th</sup> February 2023 and filed its Replying Affidavit sworn by its director, Zakariya Sharif Abdullahi on 9<sup>th</sup> February 2023 together with a Notice of***

***Preliminary Objection by the Interested Party dated 9<sup>th</sup> February 2023 in opposition to the hearing and determination of the instant Request for Review. As such, the Interested Party had an opportunity to participate in the instant proceedings by filing its pleadings, attending the online hearing on 16<sup>th</sup> February 2023 and advancing its arguments in opposition of the instant Request for Review through its Counsel, Ms. Sylvia Waiganjo, hence suffered no prejudice because of failure by the Applicant to join it as a party at the time of filing the instant Request for Review.***

.....

***Consequently, the Board finds that the Request for Review as filed by the Applicant is not fatally defective for failure by the Applicant to join the successful tenderer as a party as provided in Section 170 (c) of the Act because no prejudice was occasioned on the Interested Party since the Interested Party was able to fully participate in the instant proceedings before the Board.***

105. In distinguishing the facts in the Toddy case with the instant Request for Review, we note that in the Toddy case, despite the successful tenderer having not been joined as a party as provided under Section 170(c) of the Act, all tenderers were notified of the existence of the review by the Board Secretary on 6<sup>th</sup> February 2023

and further served with a Hearing Notice on 10<sup>th</sup> February 2023 before the review was heard on 16<sup>th</sup> February 2023 and the successful tenderer proceeded to join the proceedings before the matter proceeded for hearing. As such, the successful tenderer had an opportunity to participate by filing its pleadings, attending the online hearing, advancing its arguments and hence suffered no prejudice because of failure by the Applicant to join it as a party at the time of lodging its request for review.

106. This is in contrast to the circumstances in the instant Request for Review in that though the Board Secretary notified all tenderers on 7<sup>th</sup> March 2025 of the slated hearing of 12<sup>th</sup> March 2025 and existence of the review application via email of 11<sup>th</sup> March 2025, the successful tender in the subject tender did not proceed to join these proceedings by either filing its pleadings and advancing its arguments or attending the online hearing on 12<sup>th</sup> March 2025.

107. We note that in **PPARB Application No. 6 of 2025 Awelo Investments Limited v The Accounting Officer, Uganda Technical & Vocational College & Another** the Board while addressing a similar issue held at paragraph 100 to 101, 106 and 108 of its Decision as follows:

".....

***100. The Board notes that the mischief that Section 170(c) of the Act intends to cure is to avoid instances where a Request for Review is heard and determined by***



***the Board in the absence of a successful bidder who was neither joined as a party to the Request for Review nor notified of the filing and hearing thereof. Later on, the successful bidder comes to learn of the decision of the Board which may have adversely affected the award made to it. In such an instance, the failure by an aggrieved Applicant to join a successful bidder, or the failure to notify the successful bidder of the hearing interferes with the successful bidder's right to a fair hearing, which is a principle of natural justice provided under Article 50 of the Constitution as follows:***

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

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

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

***.....***

***106. In view of the above holding, we note that the successful bidder's right to a fair hearing under Article***

***50 and the right to fair administrative action under Article 47 of the Constitution has not been affected in the instant Request for Review in view of the fact that:***

- a) The successful bidder was notified by the Acting Board Secretary of the existence of the instant Request of Review and invited to submit to the Board any information and arguments concerning the subject tender within three (3) days from the date of notification of 3<sup>rd</sup> February 2025.***
- b) The purpose of Section 170(c) of the Act has been achieved as evidenced by the successful bidder's participation in the Request for Review through filing of its pleadings i.e. the Notice of Appointment of Advocates dated 5<sup>th</sup> February 2025 and filed on even date, the Interested Party's Replying Affidavit sworn on 5<sup>th</sup> February 2025 by Joash Jacob Otieno and filed on even date, the Interested Party's Written Submissions dated 11<sup>th</sup> February 2025 and filed on 12<sup>th</sup> February 2025 and List of Authorities dated 12<sup>th</sup> February 2025 filed on even date.***
- c) No prejudice has been occasioned on the successful bidder as it has participated in the***

***proceedings before the Board in the instant Request for Review.***

.....

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

108. Further, in **PPARB Application No. 102 of 2024 Keller Kustoms Kenya Limited vs. Kenya Ports Authority**, the Board stated as follows as pertains joinder of parties under Section 170 of the Act:

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

***86. We say as far as is possible because the Board is also mindful of the fact that there are instances when it may not be possible for an Applicant to indicate the successful***

**bidder as a party to a Request for Review. These include instances when a procurement process has been terminated and there is therefore no successful bidder and in instances where the Procuring Entity has sent a Notification Letter which does not disclose the identity of the successful bidder. In such exceptional cases, it is permissible for a Request for Review to be held as competent notwithstanding the fact that the successful bidder has not been named as a party in the Request for Review. In such instances the Board may pursuant to Section 170(c) of the Act cure the non-joinder using the information supplied to it under Section 63(1) (e) of the Act. ....**

109. In view of the foregoing, it is our considered view that the Applicant, having been notified and being made aware of the successful tenderer, ought to have joined the successful tenderer as a party to the instant Request for Review so as to achieve the intended purpose of section 170(c) of the Act. It is not enough to allege that the successful bidder was notified by the Acting Board Secretary of the existence of the instant Request for review noting its absence and lack of participation in these proceedings. There is a high likelihood that the successful bidder may allege that it was not afforded an opportunity to be heard having not been joined as party to the instant Request for Review in view of Section 170(c) of the Act given that its identity had been

disclosed and was known by the Applicant and as such, nothing prevented it from joining it as party to the Request for Review.

110. In the circumstances, we find that the Applicant's failure to join the successful bidder to this Request for Review renders it fatally defective and thus divests the Board of its jurisdiction.

111. Consequently, ground 1 of the Respondent's Preliminary Objection succeeds.

112. In view of the findings under sub-issue (i) and (ii) of the first issue, the Board lacks jurisdiction to hear and determine the instant Request for Review.

### **What orders should the Board grant in the circumstances?**

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

114. The upshot of our finding is that the Request for Review dated 24<sup>th</sup> February 2025 and filed on 25<sup>th</sup> February 2025 in respect of Request for Proposal (RFP) Tender No. KCAA/010/2024-2025 for Provision of Consultancy Services for Design, Preparation of Bidding Document and Construction Supervision of a Water Treatment and Reticulation System at the East African School of Aviation, Embakasi fails in the following specific terms:

## **FINAL ORDERS**

115. In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders in this Request for Review:

- 1. Grounds 1 and 3 of the Respondent's Preliminary Objection dated 11<sup>th</sup> March 2025 be and are hereby upheld.**
- 2. The Request for Review dated 24<sup>th</sup> February 2025 and filed on 25<sup>th</sup> February 2025 be and is hereby struck out for want of jurisdiction.**
- 3. Given our findings herein, each party shall bear its own costs in the Request for Review**

**Dated at NAIROBI, this 17<sup>th</sup> Day of March 2025.**



.....  
**PANEL CHAIRPERSON**  
**PPARB**



.....  
**SECRETARY**  
**PPARB**