

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 39/2025 OF 4TH APRIL 2025

BETWEEN

SAMUEL MBUGUA MUHORO

T/A PRIME GRADE ENTERPRISES APPLICANT

AND

THE DIRECTOR

KENYA FORESTRY SERVICES RESPONDENT

Review against the decision of the Procuring Entity, Kenya Forestry Services, in relation to Tender No. KFS/DISP/80/2024-2025 for Sale of Forest Plantation in Nyandarua County.

BOARD MEMBERS PRESENT

- | | |
|-------------------------|---------------------|
| 1. Mrs. Njeri Onyango | - Panel Chairperson |
| 2. Mr. Daniel Langat | - Member |
| 3. Ms. Jessica M'mbetsa | - Member |

IN ATTENDANCE

- | | |
|--------------------------|--------------------------------------------|
| 1. Ms. Sarah Ayoo | - Holding brief for Acting Board Secretary |
| 2. Ms. Christabel Kaunda | - Secretariat |

PRESENT BY INVITATION

PPARB Decision 39/2025:
25th April, 2025

APPLICANT**SAMUEL MBUGUA MUHORO****T/A PRIME GRADE ENTERPRISES**

1. Mr. Nicholas Ongeru

Advocate, Gicheha Kamau & Co. Advocates

2. Mr. Samuel Muhoro

Proprietor, Prime Grade Enterprises

RESPONDENTS**THE DIRECTOR,****KENYA FORESTRY SERVICES**

1.Mr. Patrick Lutta

Advocate, Lutta & Company Advocates

2.Mr. Sylvester Omondi

Advocate, Lutta & Company Advocates

3.Ms. Ruth Kerubo

Legal Officer, Kenya Forestry Services

4.Mr. Fredrick Ojwang'

Inventory Officer, Kenya Forestry Services

5.Mr. John Mburu

Procuring Officer, Kenya Forestry Services

BACKGROUND OF THE DECISION**The Tendering Process**

1. Kenya Forestry Services (hereinafter referred to as "the Procuring Entity") invited eligible tenderers to submit tenders in response to Tender No. KFS/DISP/80/2024-2025 for Sale of Forest Plantation in Nyandarua County (hereinafter referred to as the "subject tender") using an open national method of tendering and by way of an advertisement placed on the Procuring Entity's website (www.kenyaforestservices.org) on 15th March 2025 with a submission deadline of 3rd April 2025, on or before 11.00 a.m.

Tender Submission Deadline and Tender Opening

2. According to the Tender Opening Committee, four (4) tenderers participated in response to the subject tender within the tender submission deadline of 3rd April 2025.
3. The said four (4) tenderers, excluding the Applicant herein who did not participate in the tender, were recorded in the opening minutes for the subject tender dated 3rd April 2025 (hereinafter referred to as "Tender Opening Minutes") as follows:

Bid No	Name of Bidder
1.	Timshark Investments Limited
2.	Eddie Supplier Agencies
3.	Prime Timber Yard Limited
4.	United Sawmills Flyover Limited

REQUEST FOR REVIEW

6. Dissatisfied with a part of the terms of the subject tender's Tender Document, the Applicant herein, on 4th April 2025 filed a Request for Review dated 4th April 2025 together with a Statement in Support of the Request for Review of even date sworn by Samuel Mbugua Muhoro, its Proprietor, through the firm of Ms/ Gicheha Kamau & Co. Advocates, seeking the following orders:

a) Annul and or quash the decision of the procuring entity in tender BID NO. KFS/DISP/80/2024-2025 dated MARCH

2025 restricting the eligible bidders in the Medium scale category to those within Nyandarua County only.

b) Annul and or quash the decision of the procuring entity in tender BID NO. KFS/DISP/80/2024-2025 dated MARCH 2025 restricting the eligible bidders in the Medium scale category and locking out those in the small and large scale categories.

c) Condemn the respondent to pay the costs of this request for review to the applicant.

d) Such other orders the Honourable board may deem just and expedient.

7. In a Notification of Appeal and a letter dated 4th April 2025, Mr. James Kilaka, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board"), notified the Respondent of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondents 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.

8. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 4th April 2025.
9. In opposition to the Request for Review, the Respondents herein on 11th April 2025 filed their Memorandum of Response thereto which Victor Kobia for the Respondent's Chief Conservator of Forests swore.
10. The Acting Board Secretary thereafter issued a Hearing Notice dated 23rd April 2025 inviting the parties herein and all bidders by extension to the virtual hearing of the matter scheduled for Wednesday, 23rd April 2025 at 1400hrs.
11. The Respondent, through their counsel on record, Messrs. Lutta & Company Advocates who entered appearance on 22ⁿ April 2025, filed a Notice of Preliminary Objection dated 22nd April 2025.
12. When the Board convened for the hearing on 23rd April 2025 at 3.00PM, parties confirmed that they were in receipt of all documents filed pertaining to the instant Request for Review Application. The Board then gave directions with respect to determination of the matter to the effect that it would listen and determine both the Application and the Notice of Preliminary Objection simultaneously. The Board thereafter allocated time to the parties for counsel to make brief oral submissions in support of their respective cases.

13. Parties were also informed that the instant Request for Review having been filed on 4th April 2025 was due to expire on 25th April 2025 and that the Board would communicate its decision on or before 25th April 2025 to all parties via email to their respective last known email addresses.

PARTIES SUBMISSIONS

Applicant's Submissions

14. Counsel for the Applicant, Mr. Onger, began his submissions by adopting a portion his oral submissions that had been made in Application 40 of 2025, which submissions revolved around the issue of discrimination on the part of the Procuring Entity unjustifiably excluding some categories of parties from participating in the subject tender.
15. Counsel's brief submission in response to the first ground raised in the Respondent's Notice of Preliminary Objection was that the Applicant had Licences, which Licence dated 3rd December 2024 Counsel made reference to as the document marked 'SMM-1' annexed to the Statement in Support of the Request for Review dated 4th April 2025.
16. Counsel then submitted in response to the second ground of lapse of time as raised in the Notice of Preliminary Objection that the tender document had a blank date, being March 2025. Counsel further submitted that there was no specific date on the said tender document indicating when the subject tender was issued.

17. Counsel thus urged the Board to find the same as a serious anomaly on the part of the Respondent Procuring Entity as the essence of a specific date on a tender document was to assist candidates or tenderers comply with the requirements of the law, thus the absence of a specific date was to be considered a serious anomaly.
18. Counsel further submitted that nevertheless, the Applicant obtained the blank tender document from the portal on 26th March 2025 and thereafter filed the instant Request for Review Application on 4th April 2025, within the 14 days as required by law.
19. Counsel in urging the Board to dismiss the Respondent's Notice of Preliminary Objection further pointed out in the Respondent's Memorandum of Response that whereas the said subject tender was advertised on the portal on 18th March 2025 and forwarded to county offices, no evidence had been presented before this Honourable Board to that effect.
20. Counsel then submitted on the Applicant's Application that the subject tender only provided that bidding be made by medium scale investors in Nyandarua County, excluding large and small scale investors, without giving valid reason as required by the Fair Administrative Act. Counsel further submitted that the Applicant was thus locked out and felt discriminated against given he was a part of Nyandarua County.

21. Counsel further submitted that during the period of the subject tender, the Respondent Procuring Entity issued other tenders with similar restrictions in Nyandarua County. Counsel further submitted that the Applicant had also adduced evidence of other tenders within the said period, issued by the Respondent Procuring Entity and which did not contain such restrictions.
22. Counsel then submitted that it was a requirement by law for the Procuring Entity to give reasons for actions taken that restricted the rights of the public, including the candidates and the tenderers, for which the Procuring Entity had failed to do, as it had not provided such explanation.
23. Counsel thus urged the Board in granting the orders sought in the Application to find that the said process did not meet the threshold to ensure competitiveness and equality.

Respondent's Submissions

24. Counsel for the Respondent, Mr. Lutta, began his submissions by asserting that instant Application was opposed. Counsel then began addressing himself on the Notice of Preliminary Objection of 22nd April 2025 on the issue of *locus standi* by stating that because the Applicant had not participated in the subject tender, he had no way of demonstrating that he had been affected as such.

25. Counsel thereafter placed reliance on this Board's decision in ***PPARB Application No. 9 of 2018 (Integrity Concern International and National Irrigation Board)*** as well as ***Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 others [2017] eKLR*** in the Respondent's List of Authorities of 22nd April 2025.
26. Counsel Mr. Lutta submitted on the issue of whether the suit was time barred by first clarifying that the proper date of uploading of the tender document was 15th March 2025 and not 18th March 2025 as per paragraph 2 of the Respondent's Memorandum of Response dated 11th April 2025.
27. Counsel then submitted that in view of the said clarification, 14 days from 15th March 2025 means that the period would have lapsed on 29th March 2025 thus the instant Application, being filed on 4th April 2025, had been filed out of time.
28. Counsel further submitted that the situation would have been different had the Applicant sought clarification from the Procuring Entity and thereafter filed an Appeal if dissatisfied with the response given at which point he would have been within time to file the same, which did not happen thus the instant Application was ripe for being struck off.
29. Counsel then submitted that the provisions of the Act refer to when the breach occurred, in which the same would have first occurred when the tender was uploaded. Counsel pointed out that the Applicant's counsel

had been attempting to mislead the Board on the date of uploading of the document as at paragraph 5 of the Statement Supporting the Request for Review, the Applicant clearly stated that the subject tender's Tender Document was uploaded on 15th March 2025.

30. Counsel Mr. Lutta pointed out that Counsel Mr. Onger's assertions had thus been factually incorrect in so far as the time period and the blank tender document stating March 2025 as a starting date was discernable from the turn of events pertaining to the subject tender.
31. Counsel Mr. Lutta further submitted that the Applicant had changed the substance of their case by pointing out to the Board that counsel for the Applicant had attempted to introduce new documents, that is, tender documents relating to other tenders which had no bearing or relation to the subject tender. Counsel submitted that the same amounted to trial by ambush as the Respondent had only learned of the same during the hearing and was in no position to make a response on the same on the new grounds being introduced thereto.
32. Counsel in referring the Board to Section 2 Clause 1.1 of the subject tender's blank tender documents on all categories of eligible bidders submitted that there were instructions to eligible bidders thus nothing stopped the Applicant from writing to the Procuring Entity in seeking clarification on the restriction and thereafter seeking an expansion of the same *vide* an addendum to the blank tender document.

33. Counsel also submitted in referring the Board to the Licence availed by the Applicant, that the same restricted the Applicant to a specific geographical area, being Kiambu County. Counsel further submitted that the Applicant never raised an issue with the said Licence restriction but instead elected to file suit on the basis thereof, being a case with respect to the subject tender for Nyandarua County.
34. Counsel then urged the Board to consider the question of why the Applicant never opted to operate, set-up shop and apply for a Licence in Nyandarua County so that he could participate, similar to the situation in other counties for which he had Licences to operate in.
35. Counsel then submitted, in adopting his sentiments in Application No. 40 of 2025, that localization was necessary as it offered a boost to the local economies in the respective counties.
36. Counsel thereafter on the issue of unconstitutionality submitted that had a situation arisen where the Applicant had won a tender in Kiambu which region he had a Licence to, that nothing prevented someone from Nyandarua County from filing an Application challenging the same, hence the need for restrictions with regard to the geographical area of the subject forest, which restriction was not an issue as it led rise to categorization as per different categories.

37. Counsel further submitted that even within the said categories, there was still competition and that those persons in a given category would still need to compete amongst themselves. Counsel further submitted that some procurement roles were also reserved for locals thus all interests needed to be taken care of.
38. Counsel thus urged the Board to find that Applications filed in bad faith such as the instant Application were only meant to frustrate the tender process and were mischievously used by parties such as the Applicant who had failed to participate in the original submission have a way to participate thus the instant Application was ripe for striking off based on the Notice of Preliminary Objection of 22nd April 2022 but also because that it lacked merit. Counsel urged that the same also be struck out with costs to the Respondent to discourage busybodies from unnecessarily taking up the time of the Board and Procuring Entities.

APPLICANT'S REJOINDER

54. In rejoinder thereto, counsel for the Applicant in adopting sentiments submitted in Application 40 of 2025 to the effect that the Fair Administrative Act required the Respondent Procuring Entity to give reasons for restrictions and not wait for letters from the public or interested tenderers on the same.

55. Counsel further submitted that in any event, the Applicant as well as other interested bidders were registered with the Respondent, which had their contact details and furthermore, that the Respondent's portal had been available for it to give reasons for the restriction so as to avoid abuse as was in the instant matter.
56. Counsel therefore submitted that there was no justification for restriction of bidders thus urged the Board to repeal the same and grant the orders as sought.

CLARIFICATIONS

57. The Board sought clarification from counsel for the Respondent Mr. Lutta with regard to submissions made with regard to categorizations and the different categories such as women and youth, whether there were any disposal plans that the Procuring Entity had in mind such that the afore-stated examples of categories were catered for at the point of floating the tender.
58. In response thereto, Mr. Mburu for the Respondent responded by stating that normally the Procuring Entity has a disposal plan dependent on the maturity date of the materials which would run alongside the normal scheduled plan.

BOARD'S DECISION

59. The Board has considered each of the parties' cases, documents, pleadings, oral submissions, authorities together with confidential documents submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act and finds the issues that arise for determination are:

i. Whether the Respondent's Notice of Preliminary Objection dated 22nd April 2022 is merited in the circumstances.

In determining whether the Respondent's Notice of Preliminary Objection is merited in the circumstances, the Board will analyze two issues namely;

a. Whether the Applicant lacks the locus standi to commence the instant Request for Review proceedings;

In determining the first issue, the Board shall address itself on whom/which entity the Act determines has *locus standi* as described in the provisions of Section 2 of the Act with respect to proceedings under Section 167 of the Act.

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

In determining the second issue, the Board will make a determination on whether the Request for Review as filed was lodged within the statutory period of 14 days stipulated under Section 167(1) of the Act.

Depending on the determination of issues (i) hereinabove,

ii. Whether the Procuring Entity was correct in creating a reservation for bidders in the subject tender's Blank Tender Document

iii. What orders the Board should grant in the circumstance

The Board will now proceed to address the issues framed for determination as follows:

Whether the Respondent's Notice of Preliminary Objection dated 22nd April 2025 is merited in the circumstances

60. The Board notes that further to the Respondent filing its Memorandum of Response dated 22nd April 2025, it contemporaneously filed a Notice of Preliminary Objection (hereinafter "Preliminary Objection") and List of Authorities all of even date.

61. The Respondent's Preliminary Objection, in seeking that the Applicant's Application for Review be struck out, raises the two (2) grounds reproduced hereunder, which the Board shall address itself on:

a. The Applicant lacks locus standi to commence these proceedings not having participated in the tender process;

b. The Board lacks jurisdiction to entertain this review application on grounds that the same have been commenced outside the 14-day window.

62. Black's Law Dictionary, *11th Edition* defines a Preliminary Objection as follows:

"...an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary. An objection to the court's jurisdiction is an example of a Preliminary Objection."

63. The celebrated case of ***Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696*** further contextualized what constituted a preliminary objection when their Lordships therein observed as follows:

"----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 a contract giving rise to the suit to refer the dispute to arbitration."

64. In the same case Sir Charles Newbold, P. stated:

"a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop".

65. The Board is cognizant of the foregoing position and aligns itself with it. It is therefore imperative that the Board determines the Respondent's Preliminary Objection at the onset as outcome of the same may be of significant consequence to the Applicant's instant Request for Review Application.

66. Turning to the first ground of the Preliminary Objection, the Board understands the Respondent's case on the same in a nutshell to be that the Applicant lacks *locus standi* to initiate the suit they never participated in the subject tender of their own volition thus they stood to suffer no harm in a process they took no part of.

67. The Board however understands the Applicant's case to be that the Applicant accessed the blank tender document from the Respondent Procuring Entity's website on 26th March 2024 and upon being dissatisfied with the eligibility criteria proposed therein, to wit, reservation of the

subject tender to licenced medium scale operators within Nyandarua County, filed the instant Application on 4th April 2025 challenging the same.

68. The Board further understands the Applicant's case to be that in any event, the Respondent Procuring Entity ought to have addressed itself on the same giving justifiable reason for the reservations in line with the provisions of the Fair Administrative Act by way of issuing an addendum to the subject tender's blank tender document, issuing communication on its website portal or issuing the same communication directly to parties as it held a register of all Licenced operators within the County.

69. The Applicant also annexed a Licence issued to it by the Respondent Procuring Entity dated 3rd December 2024 in further support. However, the Board shall address itself on the relevance of the same at a different section of its decision.

70. *Locus standi* is defined in Black's Law Dictionary, 9th Edition (page 1026) as "***the right to bring an action or to be heard in a given forum***", meaning having the legal standing or capacity to initiate and or participate in legal proceedings. Essentially, *locus standi* grants a party the right to have their case heard and determined by a court of competent jurisdiction.

71. The Board further aligns itself with the position held by the trial court in ***Gichuhi & 2 others v Data Protection Commissioner; Mathenge***

& another (Interested Parties) (Judicial Review E028 of 2023) [2023] KEHC 17321 (KLR) at paragraphs 30-34 of its decision as follows:

"30. The issue of locus standi raises a point of law that touches on the capacity to institute this suit, and it should be resolved at the earliest opportunity. Locus standi is defined in Black's Law Dictionary, 9th Edition (page 1026) as "the right to bring an action or to be heard in a given forum".

31. In the case of Mumo Matemu v Trusted Society of Human Rights Alliances & 5 others (2014)eKLR, where the Court held that; "It is proper to note that the evaluation of locus ought to be based upon the constitutional consideration of capacity (articles 3, 22 and 258, the nature of the suit and the enforceability of the orders sought. These considerations inform the enforcement mechanisms and coherent clarity of the following inquiries. Who will the orders be enforced against? Who bears the costs of litigation if at all? Who represent the parties in court?"

32. In the case of Law Society of Kenya v Commissioner of Lands & Others, Nakuru High Court Civil Case No 464 of 2000, the 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 court of law".

33. Further in the case of Alfred Njau & others v City Council of Nairobi (1982) KAR 229, the court also held that; - "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".

34. It is therefore evident that locus standi is the right to appear and be heard in court or other proceedings. Therefore if a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this court was to find that the applicant has no locus standi, then the applicant cannot be heard and that point alone may dispose of the suit."

72. From the foregoing, the Board surmises that *locus standi* is a right to be heard before a court of competent jurisdiction where one is of sufficient interest and that where one has no *locus standi*, then they have no right of audience before the said court and that point alone is sufficient to dispose of the suit.

73. Turning to the instant matter at hand, the Applicant herein filed the instant Request for Review Application dated 4th April 2025 pursuant to the provisions of Section 167 of the Act 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

74. The Board therefore notes the operative words from Section 167 of the Act to be ***"a candidate"*** or ***"a tenderer"*** who ***"claims to have suffered"*** or ***"risks suffering"*** loss or damage may approach the Board seeking reliefs from it in exercise of powers conferred to it by the provisions of Section 173 of the Act.

75. The Board must therefore qualify who ***"a candidate"*** or ***"a tenderer"*** are for purposes of determining whether the Applicant falls under either category to warrant them having *locus standi* to initiate the instant Application for Review.

76. Section 2 of the Act defines a ***"candidate"*** to mean a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity. Section 2 of the Act also defines a

"tenderer" to mean a person who submitted a tender pursuant to an invitation by a public entity.

77. The Board notes it is not in contention that the Applicant never participated in the subject tender by submitting its tender bid to the same. However, the Board also notes that it is also not in contention that at some point in time, dates differing as per rival submissions made by parties at the hearing, that the Applicant visited the Respondent's website portal, interacted with the subject tender's blank tender document and upon realizing dissatisfaction with a portion thereof, filed the instant Application.

78. By virtue of the fact that the Applicant obtained a copy of the blank tender document from the Respondent's website and interacted with the same prior to lodging the instant Request for Review Application, the Board has no other alternative than finding that the Applicant fits the description of a **"candidate"** in line with the provisions of Section 2 of the Act. The Board notes that the Applicant availed to the Board a copy of the Blank Tender Document that it had downloaded from the Applicant's website, which the Board notes is exact to what is contained in the Confidential Documents.

79. Consequently, the Board finds that the Applicant, as a candidate, had *locus standi* to initiate the instant Application, thus the first ground of the Respondent's Preliminary Objection falls in that regard.

80. With respect to the second ground raised in the Respondent's Preliminary Objection, it is the Respondent's position that the Board lacks jurisdiction to entertain this review application on grounds that the same have been commenced outside the 14-day window.
81. The Board further understands the Respondent's case to be that according to its computation, because by the Applicant's own admission the Respondent advertised the subject tender on its website on 15th March 2025, that the breach occurred at the point of uploading of the tender document. Therefore, according to the Respondent, time on the 14 day window period as stipulated by law started running on 15th March 2025 thus the final date for filing of the same ought to have been on or before 29th March 2025 thus by the Applicant filing the same on 4th April 2025, were outside the statutory timelines provided.
82. The Board however understands the Applicant's case to be that whereas the Respondent Procuring Entity uploaded the subject tender's blank tender document on its website portal, they only downloaded the same on 26th March 2025 before filing the instant Request for Review Application on 4th April 2025 thus contend that they were within the statutory timelines as provided by Section 167 of the Act.
83. It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction and when a question 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.

84. 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."

85. The *locus classicus* case on the question of jurisdiction is the celebrated case of **The Owners of the Motor Vessel "Lillians" -v- Caltex Oil Kenya Ltd (1989) KLR 1** where Nyarangi J.A. held:

"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 other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

86. The Supreme Court in the case of **Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020) [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment)** stated that:

“On our part, and this is trite law, jurisdiction is everything as it denotes the authority or power to hear and determine judicial disputes. It was this court’s finding in In R v Karisa Chengo [2017] eKLR, that jurisdiction is that which grants a court authority to decide matters by holding;

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

87. The Board notes that it is a creature of statute by virtue of the provisions of Section 27(1) of the Act with Section 28 of the Act delineating its functions to be *inter alia* reviewing, hearing and determining tendering and asset disposal disputes.
88. The Jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific at Section 167 of the Act, already reproduced herein, which provides for what can and cannot be subject to review of procurement proceedings before the Board.
89. It therefore behooves the Board to address question(s) of its jurisdiction to listen to and determine an Application before it at the first instance as determination of the same may be of fatal consequence to the said Application.
90. Turning to the situation at hand, the Board infers that the bone of contention with respect to jurisdiction lies with computation of the statutory 14-day period with rival submissions made by parties herein differing on the start and end date of the same.
91. Whereas it is the Respondent's contention that if at all there was a breach with respect to the subject tender's blank tender documents, then the breach arose at the point of uploading the said document on the Respondent's website portal, which it asserts was done on 15th March 2025.

92. Contrarily, it is the Applicant's assertion that they only became aware of the contents of the subject tender's blank tender document, specifically Clause 1.1 at Section II of the same upon downloading the said tender document on 26th March 2025 at which point they filed the instant Application on 4th April 2025 before the Board.
93. In considering rival submissions made by parties, the Board is persuaded by the Applicant's position that it, being a candidate, only got to be aware of the contents of the subject tender's blank tender document on 26th March 2025 and being aggrieved by a portion of the same, sought relief before the Board *vide* the instant Application on 4th April 2025, well within the confines of the stipulated timelines.
94. The Board also notes that insofar as the Applicant claims that they accessed the blank tender document on 26th March 2025 thus only interacted with it on the said date, the Respondent has not proffered any evidence in the contrary to the Applicant's position. Whereas the Respondent in its response says the tender document was uploaded to its Website on 15th March, 2025 no evidence on this aspect was provided by the Respondent. A perusal of the Confidential Documents provided by the Respondent also did not shed light on this
95. Further, the Board did make a check on the Respondent's Website to see find out if it could ascertain the dates of uploading this document, but such search did not yield any answer. It is the Board's position that the onus to prove the date of uploading and when the Applicant interacted

with the document fell on the Respondent. Also, it is the Board's further view, that the operative date is the date the Applicant learnt of the breach. It is therefore imperative that there be ascertainable evidence of the date the Respondent is indeed interacted with it, it is not always the case that the date of uploading the document is necessarily the same date the Applicant saw it, downloaded it and interacted with it, such as to come into knowledge of the breach. Inevitably, the only available evidence on the date of actual knowledge of the breach by the Respondent, is the date stated by the Respondent as the date it downloaded the document.

96. The Board thus finds that the only date viable for purposes of computing the statutory 14 day period as contemplated in the Act is 26th March 2025, when the Applicant became aware of the breach and not 15th March 2025 as asserted by the Respondent.

97. The Board therefore finds that the Applicant filed the instant Application within the statutory 14-day period as envisaged by the Act as the same was filed on the 9th day of discovering the breach by the Respondent thus the second ground of the Respondent's Preliminary Objection fails in that regard.

98. Consequently, the Board thus finds that the Respondent's Preliminary Objection dated 22nd April 2025 falls on both grounds adduced and it has jurisdiction to hear the matter.

Whether the Procuring Entity was correct in creating a reservation for bidders in the subject tender's Blank Tender Document

99. Having found the Respondent's Preliminary Objection of 22nd April 2022 lacking in merit and therefore dismissing the same, the Board shall now address itself on the Applicant's Request for Review Application of 4th April 2025.
100. From the respective pleadings filed by parties and rival submissions made on the hearing date of the matter, the Board construes that the major contention of the instant Application to be whether Respondent Procuring Entity was correct in creating a reservation for bidders in its Instruction to Tenderers at Clause 1.1 of Section II – Tender Data Sheet of the blank Tender Document.
101. The Board understands the Applicant's case, succinctly, to be that the Respondent's actions were discriminatory towards it in that it, without good reason, unfairly reserved the subject tender for medium scale operators in Nyandarua County, which action precluded it from participating therein.
102. It was the Applicant's case that the Respondent had failed to provide a reasonable and justifiable reason for the said reservation in line with the relevant provisions of the Fair Administrative Act thus the said

reservation was a contravention of the provisions of the Constitution of Kenya, 2010 and all other relevant statute thereto.

103. It was the Applicant's further case that in any event, the Respondent had registered them thus did not understand why the Respondent would not expand the scope of the subject tender to allow it to apply and participate therein as a licenced operator.

104. On its part, it was the Respondent's case that reservation in this instance was a common tendering practice that was intended to *inter alia* boost local economies by ensuring that a portion of works to be executed was to be carried out by locals.

105. It was also the Respondent's case that, owing to the nature of the works stipulated in the tender document, it called for consideration of bidders who operated within close proximity to where the works would be carried out and further, that the same situation was replicated county to county where need for the same arose.

106. In its justification of the reservation, it was the Respondent's case that whereas it had in the recent past made reservations for large and small-scale operators within Nyandarua County, it had not done the same for medium scale operators thus such reservation was necessary in the interest of fairness.

107. It was also the Respondent's further case that in any event, where the tenders called for reservation exclusively for various categories of

individuals/entities, that the tendering process therein was still competitive and subjected to the relevant provisions of the Act therein.

108. On the aspect of the licences, it was the Respondent's assertion that the Licence produced by the Applicant and dated 3rd December 2024 restricted their operations as small scale operator in Kiambu County thus it would have been prudent for the Applicant to seek the necessary Licence within Nyandarua County if at all they wanted to be considered.

109. The impugned Sections of the subject tender's blank Tender Document, being Clause 1.1 of Section II – Tender Data Sheet and Section III – Schedule of Items and Prices are reproduced hereunder for ease of reference:

110. Clause 1.1 of Section II - Tender Data Sheet of the blank Tender Document reads as follows:

<i>Ref. ITT</i>	<i>Particular of Appendix to Instructions to Tenderers</i>
<i>1.1</i>	<i>a) Eligible tenderers are KFS Forest Industry Investors registered under timber in 2024 but limited to materials reserved for respective categories as indicated in this tender document.</i> <i>b) Some materials are exclusively reserved for bidders located in the County and therefore bidders</i>

	<p><i>located outside the County are not eligible to bid for such materials.</i></p> <p><i>c) Registered Forest Industry Investors located outside the County are eligible to bid for forest materials indicated as "open" in all counties but within their category of registration.</i></p> <p><i>d) Bidders registered under the category of "Large" are eligible to bid for materials reserved for Large category across all counties</i></p>
--	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

111. Section III – Schedule of Items and Prices of the subject tender’s blank Tender Document reads as follows:

SECTION III – SCHEDULE OF ITEMS AND PRICES

1. The tenderer shall complete the tender by preparing and completing the table below, indicating the sub-compartment/portions tendered for and the prices offered and striking out those not tendered for. The tenderer will complete the Bidders Price column and sign as indicated below. Bidders are allowed to bid per portion.

Below to be bid by Medium scale forest industry investors within Nyandarua County”

112. From the foregoing, the Board makes an inference that the subject tender created reservations for specified categories of entities or individuals eligible to participate thereon

113. Section 157 of the Act on participation of candidates in preference and reservations holds as follows:

"1. Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations.

2. Subject to subsection (8), the Cabinet Secretary shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and asset disposal.

3. The preferences and reservations referred to in subsection (2) shall—

- a. be non-discriminatory in respect of the targeted groups;***
- b. allow competition amongst the eligible persons; and***
- c. be monitored and evaluated by the Authority.***

4. For the purpose of protecting and ensuring the advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination, reservations, preferences and shall apply to—

- a. candidates such as disadvantaged groups;*
- b. micro, small and medium enterprises;*
- c. works, services and goods, or any combination thereof;*
- d. identified regions; and*
- e. such other categories as may be prescribed.*

5. An accounting officer of a procuring entity shall, when processing procurement, reserve a prescribed percentage of its procurement budget, which shall not be less than thirty per cent, to the disadvantaged group and comply with the provisions of this Act and the regulations in respect of preferences and reservations.

6. To qualify for a specific preference or reservation, a candidate shall provide evidence of eligibility as prescribed.

7. The Authority shall maintain an up-to-date register of contractors in works, goods and services, or any combination thereof, in order to be cognizant at all times of the workload and performance record.

8. In applying the preferences and reservations under this section—

- a. exclusive preferences shall be given to citizens of Kenya where—*

- i. the funding is 100% from the national government or county government or a Kenyan body; and*
- ii. the amounts are below the prescribed threshold;*
- iii. the prescribed threshold for exclusive preference shall be above five hundred million shillings;*
- b. a prescribed margin of preference shall be given—*
 - i. in the evaluation of tenders to candidates offering goods manufactured, assembled, mined, extracted or grown in Kenya;*
 - or*
 - ii. works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.*

9. For the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender.

10. Despite subsection (2) or any other provisions of this Act, every procuring entity shall ensure that at least thirty percent of its procurement value in every financial year is allocated to the youth, women and persons with disability.

11. Every procuring entity shall ensure that all money paid out to an enterprise owned by youth, women or persons with disability is paid into an account where the mandatory signatory is a youth, woman or a person with disability.

12. The procuring entities at the national and county level shall make a report after every six months to the Authority.

***13. A report under subsection (12) shall—
a. certify compliance with the provisions of this section; and
b. provide data disaggregated to indicate the number of youth, women and persons with disability whose goods and services have been procured by the procuring entity.***

14. The Authority shall make a report to Parliament after every six months for consideration by the relevant committee responsible for equalization of opportunities for youth, women and persons with disability, which report shall contain details of the procuring entities and how they have complied with the provisions of this section.

15. The Cabinet Secretary shall prescribe the preferences that shall facilitate the attainment of the quota specified in subsection (10) in order for the State to achieve the objectives of Articles 55 and 227(2) of the Constitution.

16. The preferences referred to in subsection (15) shall—
a. be prescribed within ninety days after commencement of this Act;
b. be subject to such conditions as the Cabinet Secretary may specify therein but such conditions shall not pose any unnecessary impediment to the youth from participating in public procurement.

17. The National Treasury shall operationalize a preference and reservations secretariat to be responsible for the implementation of the preferences and reservations under this Act which shall be responsible for—
a. registration, prequalification and certification of the persons, categories of persons or groups as provided for in under Part XII;
b. training and capacity building of the above target groups;
c. providing technical and advisory assistance to procuring entities in the implementation of the preferences and reservations under this Act; and
d. monitoring and evaluating the implementation of the preferences and reservations under this Act.

18. The National Treasury shall provide adequate staff and resources for the operations of the secretariat.

114. From the foregoing, the Board notes that further to the provisions of Section 157 of the Act, in consideration of economic and social development factors and for the purpose of protecting and ensuring the advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination that it is necessary to create reservations and preferences for tendering.

115. In that regard, whereas the Board notes that the Respondent did not adduce any evidence to support its assertion that it was necessary to make reservations for medium scale forest industry investors within Nyandarua County on the basis that it had previously made reservations for large and small scale forest industry investors, it is satisfied with the rationale invoked by the Respondent in creating the reservation for medium scale forest investors.

116. Separately, the Board finds fault in the conduct of the Applicant in professing ignorance of the fact that reservations exist in the public tendering space by virtue of the Licence they produced in support of the Application and reproduced hereunder:

**" Kenya Forest Services,
Kenya Forest Services Hqs,
Karura, off Kiambu Road,
P.O. Box 30513 - 00100,
Nairobi,**

REF No: KFS/DISP/01/2024-2025 (1173)

Date: 3rd December 2024

***DIRECTOR,
PRIME GRADE ENTERPRISES,
P.O. BOX 1214- 00217 - Limuru,
Tel: 0722638214.***

REGISTRATION NOTIFICATION

Tender No: KFS/DISP/01/2024-2025

***Tender Name: E-Registration of Forest Industry Investors
(Timber, Plywood, Treated Transmission Poles, and Fuelwood)
for the 2024/2025-2025/2026 Financial Years***

***This is to inform you that your application for registration as a
Forest Industry Investor in the TIMBER business was
successful.***

***Your business has been registered in the SMALL SCALE
category in KIAMBU County. You will be invited to bid for
Forest Plantation Materials during the 2024/2025-2025/2026
Financial Years.***

***A.L. Lemarkoko, EBS, 'ndc, (k),
Chief Conservator of Forests
JM/jnm"***

117. From the foregoing, it is evident that the Applicant was aware of the fact that the Respondent Procuring Entity was in the practice of categorization and reservations with respect to public procurement and asset disposal apparently on a County to County basis.

118. Furthermore, it was the Respondent's case, which position was not controverted by the Applicant, that the Applicant had been aware of the restrictions imposed on it with respect to tendering within Kiambu County in regard to this Category, and Muranga County for a different Category, and had never raised an objection on the same nor sought relief from the Board thereon.

119. It was thus the Respondent's case that the Applicant could not then raise the issue of the Licence with respect to registration issued for small-scale forest investor in Kiambu County for a medium scale forest investor in Nyandarua County.

120. The Board is therefore convinced that the Applicant is guilty of approbating and reprobating their actions as a matter of convenience on their side. The Court in ***Republic v Institute Of Certified Public Secretaries Of Kenya Ex-Parte Mundia Njeru Geteria [2010] eKLR*** had the following to state when considering the doctrine of approbation and reprobation:

"...It is obvious that Mundia is approbating and reprobating which is an unacceptable conduct. Such conduct was considered in EVANS V BARTLAM (1937) 2 ALL ER 649 at page 652 where Lord Russel of Killowen said;

"The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man,

having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit.”

Again in BANQUE DE MOSCOU V KINDERSLEY (1950) 2 ALL EER 549 Sir Evershed said of such conduct;

"This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish Lawyers (frame it) approbating and reprobating or, in the more homely English phrase, blowing hot and cold.”

121. It thus follows that in view of the foregoing, in adducing a Licence issued to it dated 3rd December 2024, that the Applicant was no stranger to the Respondent's public procurement tendering practice of categorization and reservation, both of which the Board also deems necessary for purposes of allowing *inter alia* people of the said locality an opportunity to engage with the Procuring Entity.

122. Consequently, the Applicant cannot therefore raise what it deems an unfavorable instance of reservation and categorization against it as a shield when it so suits it.

123. The upshot of the foregoing is that the Procuring Entity was correct in creating a reservation for select and categorized bidders in the subject tender's blank Tender Document for the reasons advanced by it.

124. Consequently, the Applicant's instant Request for Review fails in that regard.

What orders should the Board grant in the circumstances?

125. The Board finds that Respondent's Notice of Preliminary Objection dated 22nd April 2025 lacks merit and the same is dismissed.

126. The Board also finds that the Procuring Entity was correct in creating a reservation for bidders in the subject tender's Blank Tender Document

127. The upshot of this finding is that the instant Request for Review fails in its entirety and in terms of the final following orders:

FINAL ORDERS

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

1. The Respondent's Notice of Preliminary Objection dated 22nd April 2025 lacks merit and the same is dismissed;

2. The Applicant's Request for Review dated 4th April 2025, concerning Tender No. KFS/DISP/80/2024-2025, Sale of

Forest Plantation in Nyandarua County be and is hereby dismissed ;

3. The Respondent is hereby directed to proceed with and conclude the tender proceedings concerning Tender No. KFS/DISP/80/2024-2025 for Sale of Forest Plantation in Nyandarua County to its logical conclusion within the tender validity period;

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

Dated at NAIROBI, this 25th day of April 2025.



.....
PANEL CHAIRPERSON
PPARB



.....
SECRETARY
PPARB