

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 120/2020 OF 20<sup>TH</sup> AUGUST 2020**

**BETWEEN**

**DAVID M. MEREKA T/A**

**MEREKA & COMPANY ADVOCATES.....APPLICANT**

**AND**

**INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....RESPONDENT**

Review against the decision of the Independent Electoral and Boundaries Commission with respect to Tender No. IEBC/PRQ/01/2019-2020 for Pre-Qualification for Provision of Legal Services.

**BOARD MEMBERS**

- |                            |                  |
|----------------------------|------------------|
| 1. Arch. Steven Oundo, OGW | -Member Chairing |
| 2. Ms. Phyllis Chepkemboi  | -Member          |
| 3. Dr. Joseph Gitari       | -Member          |

**IN ATTENDANCE**

- |                        |                              |
|------------------------|------------------------------|
| 1. Mr. Philemon Kiprop | -Holding brief for Secretary |
|------------------------|------------------------------|

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

The Independent Electoral Commission (hereinafter referred to as “the Procuring Entity”) advertised Tender No. IEBC/PRQ/01/2019-2020 for Pre-Qualification for Provision of Legal Services (hereinafter referred to as “the subject tender”), in the Daily Nation Newspaper, Public Procurement Information Portal (PPIP) and the Procuring Entity’s website.

### **Bid Submission Deadline and Opening of bids**

A total of one hundred and seventy-five (175) firms/bidders submitted pre-qualification bid documents and the same were opened on 12<sup>th</sup> May 2020 in the presence of bidders and their representatives who chose to attend.

### **Evaluation of Bids**

The Evaluation Committee was appointed vide a memo dated 6<sup>th</sup> May 2020 and conducted evaluation of bids in the following two stages: -

- Preliminary Evaluation Stage;
- Technical Evaluation Stage.

#### **1. Preliminary Evaluation Stage**

At this stage of evaluation, bids were checked for responsiveness and completeness to determine whether they conform to all the eligibility

and mandatory requirements as stipulated in the prequalification document as shown in the table below:

No	Requirements
1.	Submission of one original and one copy of the Pre-Qualification application duly paginated and signed/initialed on every page.
2.	Duly completed and signed pre-qualification submission form.
3.	Duly completed and signed confidential pre-qualification business questionnaire.
4.	Firm profile, providing the following information: <ul style="list-style-type: none"> <li>• Period during which the law firm has been in operation (Waived from Mandatory Requirement}</li> <li>• Number of partners and their standing in the bar in respect of disciplinary issues</li> <li>• Number of associates and their disciplinary standing in the bar in respect of disciplinary issues</li> <li>• Number of paralegal staff</li> <li>• Number of support staff</li> <li>• Type of cases handled by the firm.</li> </ul>
5.	A Copy of Certificate of Registration of Practice.
6.	Copies of admission certificates and current practicing certificates of the proprietor, partners and associates
7.	Reference letters on client letterheads from five (5) major clients that the bidders are currently representing, and details of contact persons.
8.	Valid Tax Compliance Certificate.
9.	Submission of audited accounts for the last three (3) years
10.	Letter of good standing of the firm detailing all the Advocates in the firm from the Law Society of Kenya.
11.	Must Show Proof of Valid Indemnity Cover which shall be: <ul style="list-style-type: none"> <li>a) Denomination in Kenya Shillings or in other freely convertible Currency.</li> <li>b) Issued by an insurance Company located in Kenya and registered by Insurance Regulatory Authority</li> <li>c) Valid at closing date of Tender</li> <li>d) Be updated and valid at all times for period of engagement and rendering of services to the Commission</li> </ul>

No	Requirements
12.	A Duly Signed Declaration not to engage in corruption made pursuant to section 62 of the Public Procurement and Asset Disposal Act, 2015 indicating that the firm or any of its partners, associates and/or employees will not engage in any corrupt or fraudulent practice and declaration that the firm or any of its partners, associates and/or employees are not debarred from participating in Procurement Proceedings.

Upon completion of preliminary evaluation, one hundred and eight (108) bids were found to be non-responsive to the preliminary requirements hence did not qualify for Technical Evaluation.

Sixty-seven (67) bidders were found to be responsive and were recommended to proceed for Technical Evaluation.

## 2. Technical Evaluation

At this stage of evaluation, bid documents were assessed in order to determine whether the firms were technically qualified by applying the technical evaluation criteria as indicated in the Pre-qualification document as follows: -

- a) Value of professional indemnity cover
- b) Capacity of the firm (Attach CVs of key personnel proposed for administration and execution of legal briefs).
- c) Briefs handled (indicate nature of briefs handled)
  - i. Employment and Labour Laws Act;
  - ii. Complex Constitutional Litigation;
  - iii. Administrative Law/Judicial Review

- iv. Civil Litigation
  - v. Procurement and Disposal Law related briefs
- d) Provide Reference Letters from six (6) clients for whom similar services are offered

Upon conclusion of Technical Evaluation, Bidder No. 36, 108, 119 and 153 failed to meet the minimum required score of 75%. However, sixty-three (63) bidders were found to be technically responsive by attaining the required minimum scores of 75% and were recommended for pre-qualification.

**Summary of the Evaluation Results: -**

<b>Total No. of responded bidders</b>	<b>Bids that failed at the Preliminary Evaluation stage</b>	<b>Bids that failed at the technical Evaluation stage</b>	<b>Technically qualified bids after technical evaluation</b>
175	108	4	63

**The Evaluation Committee’s Recommendation**

In view of the evaluation process, the Evaluation Committee recommended that the sixty-three (63) bidders found to be technically responsive to be considered for pre-qualification in line with the criteria outlined in the pre-qualification document.

## **Professional Opinion**

The Deputy Director, Supply Chain Management concurred with the recommendation made by the Evaluation Committee which was duly approved by the Accounting Officer on 8<sup>th</sup> June 2020.

## **REQUEST FOR REVIEW NO. 111 OF 2020**

M/s Zephaniah K. Yego & Harris A. Aginga T/A Z.K. Yego Law Offices, acting in person, lodged a Request for Review dated 29<sup>th</sup> July 2020 and filed on 30<sup>th</sup> July 2020 together with a Statement sworn and filed on even date. M/s Zephania K. Yego & Harris A. Aginga t/a Z.K. Yego Law Offices further filed a Supplementary Affidavit dated 14<sup>th</sup> August 2020 and filed on 17<sup>th</sup> August 2020.

On 18<sup>th</sup> August 2020, M/s Zephaniah K. Yego & Harris A. Aginga T/A Z.K. Yego Law Office filed a Notice of Motion Application together with a Supporting Affidavit both dated 17<sup>th</sup> August 2020 and further filed an Amended Request for Review Application dated 29<sup>th</sup> July 2020 on even date.

In response, the Procuring Entity, acting in person, lodged a Letter of Response to the Request for Review dated and filed on 4<sup>th</sup> August 2020.

M/s MKJ Advocates LLP, acting in person, lodged a Supporting Affidavit dated and filed on 14<sup>th</sup> August 2020.

M/s Morara Apiemi & Nyangito Advocates, acting in person, lodged a Response to the Request for Review dated and filed on 14<sup>th</sup> August 2020.

M/s CM Advocates LLP, acting in person, lodged a Notice of Preliminary Objection dated and filed on 14<sup>th</sup> August 2020.

M/s B.J. Sawe & Company Advocates, acting in person, lodged a letter in response to the Request for Review dated and filed on 14<sup>th</sup> August 2020.

M/s James Ngochi Ngugi T/a Ngugi and Company Advocates, acting in person, lodged a Response to the Request for Review dated and filed on 17<sup>th</sup> August 2020.

M/s Zephaniah K. Yego & Harris A. Aginga T/A Z.K. Yego Law Offices sought for the following orders: -

- i. An order that the decision of the Respondent dated 25<sup>th</sup> June 2020 declaring the Applicant's bid as unsuccessful be set aside and substituted with an order declaring the said bid as successful;***
- ii. An order that the Applicant be pre-qualified for provision of legal services to the Respondent for the period ending June 2023;***
- iii. An order for costs of the review;***

***iv. Such other orders the Review Board may deem fit to issue.***

The Board having considered parties' cases and the documents filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act ordered as follows in its decision dated 19<sup>th</sup> August 2020:

- 1. The Amended Request for Review filed by the Applicant on 18<sup>th</sup> August 2020 with respect to Tender No. IEBC/PRQ/01/2019-2020 for Pre-Qualification for Provision of Legal Services be and is hereby struck out.**
  
- 2. The Request for Review filed by the Applicant on 30<sup>th</sup> July 2020 with respect to Tender No. IEBC/PRQ/01/2019-2020 for Pre-Qualification for Provision of Legal Services be and is hereby struck out.**
  
- 3. Each party shall bear its own costs in the Request for Review.**

**REQUEST FOR REVIEW NO. 116 OF 2020**

M/s Kennedy Odhiambo Owiti, David Otieno Njer and Jude Thadeus Ragot t/a Owiti Otieno & Ragot Advocates, acting in person, lodged a Request for Review dated 13<sup>th</sup> August 2020 and filed on 14<sup>th</sup> August



2020 together with a Statement dated 13<sup>th</sup> August 2020 and filed on 14<sup>th</sup> August 2020.

In response, the Procuring Entity, acting in person, lodged a Letter of Response to the Request for Review dated 17<sup>th</sup> August 2020 and filed on 18<sup>th</sup> August 2020.

M/s Prof. Tom Ojienda & Associates, acting in person, lodged an Interested Party's Response to the Request for Review dated and filed on 21<sup>st</sup> August 2020.

M/s Magee Law LLP, acting in person, lodged a Response to the Request for Review in form of a letter dated and filed on 20<sup>th</sup> August 2020

M/s Muchai Lumatete Walubengo, acting in person, lodged a Statement in Support of the Request for Review dated and filed on 21<sup>st</sup> August 2020.

M/s Kennedy Odhiambo Owiti, David Otieno Njer and Jude Thadeus Ragot t/a Owiti Otieno & Ragot Advocates sought for the following orders therein: -

- i. An order that the decision of the Respondent dated 25<sup>th</sup> June 2020 declaring the Applicant's bid as unsuccessful be set aside and substituted with an order declaring the said bid as successful;***

- ii. An order that the Applicant be pre-qualified for provision of legal services to the Respondent for the period ending June 2023;*
- iii. An order for costs of the review;*
- iv. Such other orders the Review Board may deem fit to issue.*

The Board having considered parties' cases and the documents filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act ordered as follows in its decision dated 3<sup>rd</sup> September 2020:

- 1. The Request for Review filed on 14<sup>th</sup> August 2020 with respect to Tender No. IEBC/PRQ/01/2019-2020 for Pre-Qualification for Provision of Legal Services be and is hereby dismissed.**
  
- 2. Each party shall bear its own costs in the Request for Review.**

### **REQUEST FOR REVIEW NO. 120 OF 2020**

M/s David Mukii Mereka t/a Mereka & Company Advocates (hereinafter referred to as "the Applicant"), acting in person, lodged a Request for Review dated 19<sup>th</sup> August 2020 and filed on 20<sup>th</sup> August 2020 (hereinafter referred to as "the Request for Review") together with a

Statement dated 19<sup>th</sup> August 2020 and filed on 20<sup>th</sup> August 2020 (hereinafter referred to as "the Applicant's Statement").

In response, the Procuring Entity, acting in person, lodged a Letter of Response to the Request for Review dated 31<sup>st</sup> August 2020 and filed on 7<sup>th</sup> September 2020 (hereinafter referred to as "the Procuring Entity's Response").

The Applicant sought for the following orders in the Request for Review:

-

- i. An order admitting the application out of time and consider the prayers sought without undue regard to procedural technicalities;***
- ii. An order setting aside the decision of the Respondent dated 25<sup>th</sup> June 2020 declaring the Applicant's bid as unsuccessful and substituting it with an order declaring the said bid as successful;***
- iii. An order that the Applicant be prequalified for provision of legal services to the Respondent for the period ending June 2023;***
- iv. An order for costs of the review***
- v. Such other orders the Review Board may deem fit to issue.***

On 16<sup>th</sup> March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website ([www.ppra.go.ke](http://www.ppra.go.ke)) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24<sup>th</sup> March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions.

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act").

The Request for Review was filed on 20<sup>th</sup> August 2020 and the Procuring Entity was served with the Request for Review Application on 24<sup>th</sup> August 2020.

The Procuring Entity filed its response to the Request for Review on 7<sup>th</sup> August 2020. Subsequently thereafter, the Board notified the one hundred and seventy-five (175) bidders who participated in the subject tender, including the sixty-three (63) successful bidders who qualified for pre-qualification under the subject tender of the Request for Review Application via email on 8<sup>th</sup> September 2020.

The Applicant and the Procuring Entity did not file any written submissions.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act").

The issues that arise for determination are as follows: -

- I. Whether the Request for Review filed by the Applicant on 20<sup>th</sup> August 2020 was lodged outside the statutory period under section 167 (1) of the Act thus ousting the jurisdiction of this Board;**

*Depending on the determination of the first issue: -*

- II. Whether the Procuring Entity evaluated the Applicant's bid at Preliminary Evaluation Stage in accordance with**

**section 80 (2) of the Act read together with Article 227 (1) of the Constitution with respect to the following mandatory criterion: -**

- a) MR 1: Submission of one original and one copy of the pre-qualification application duly paginated and signed/initialed on every page

The Board will now address the first issue framed for determination as follows: -

As stated in the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**, jurisdiction is everything and without it, a court or any other decision making body has no power to make one more step the moment it holds that it has no jurisdiction.

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** held 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 respondents 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."***

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:

***"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. "***

Accordingly, once a jurisdictional issue is before a court or a decision making body, it must be addressed at the earliest opportune moment.

The Board observes the Applicant's prayer (i) in its Request for Review Application reads as follows: -

***i. That the Board do admit this Application out of time and consider the prayers sought without undue regard to procedural technicalities***

In view of this prayer therefore, it behooves upon this Board to determine whether it has the jurisdiction to entertain the Request for Review Application.

The jurisdiction of this Board flows from section 167 (1) of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act") which provides as follows: -

***"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"***

The Board observes that section 167 (1) of the Act has two limbs within which a candidate or tenderer may file a request for review namely;

- **Within fourteen days of notification of award; or**
- **Within fourteen days from the date of occurrence of an alleged breach at any stage of the procurement process, or disposal process.**

The Board considered the use of the word 'or' and notes that the Concise Oxford English Dictionary (11 Edition, Oxford University Press) defines "or" as a ***'conjunction used to link alternatives.'***

Applying the foregoing construction, the Board notes that the use of the word "or" in section 167 (1) of the Act connotes a conjunction that gives



alternatives. The first option which an aggrieved candidate or tenderer has, is to file its Request for Review within fourteen (14) days of notification of award. The alternative option is to file a Request for Review within fourteen (14) days from the date the aggrieved candidate or tenderer learns of the alleged breach by the Procuring Entity at any stage of the procurement process or disposal process.

In order to determine the time when the Applicant ought to have filed its Request for Review Application, the Board finds it necessary to give a brief background to the Request for Review as follows: -

The Procuring Entity invited interested and eligible firms to submit pre-qualification applications in response to the subject tender on 28<sup>th</sup> April 2020.

By the tender submission deadline of 12<sup>th</sup> May 2020, the Procuring Entity received one-hundred and seventy-five pre-qualification documents which were evaluated by the Procuring Entity's Evaluation Committee.

Upon conclusion of the evaluation process, the Evaluation Committee recommended sixty-three (63) law firms found to be technically responsive to be considered for pre-qualification in line with the criteria outlined in the pre-qualification document. All successful and

unsuccessful bidders were notified of the outcome of their pre-qualification documents via letters dated 25<sup>th</sup> June 2020.

On paragraph 2 of its Request for Review application, the Applicant contends that it received its letter of notification of unsuccessful bid dated 25<sup>th</sup> June 2020 on 29<sup>th</sup> July 2020 which letter is annexed to its Request for Review Application and marked 'AWM3' whereby the Procuring Entity stated as follows: -

***"Reference is made to the above pre-qualification process which you participated in. The Commission regrets to notify you that your application for pre-qualification was unsuccessful due to the following reason(s):***

***i. Did not initialize/sign the bid document as required.***

***The Commission takes this opportunity to thank you most sincerely for having participated in the above pre-qualification process and hopes that you will be able to participate in any other procurement opportunity that may arise in future."***

Upon receipt of its letter of notification of unsuccessful bid on 29<sup>th</sup> July 2020, the Applicant contended on paragraph 3 of its Request for Review that it wrote a letter to the Procuring Entity dated 6<sup>th</sup> August 2020 annexed to the Applicant's Request for Review Application and marked 'AWN 2' which stated as follows: -

**"APPLICATION TENDER NO. IEBC/PROQ/2019-2020  
PREQUALIFICATION FOR PROVISION OF LEGAL SERVICES**

***We refer to the above matter and acknowledge receipt of your letter of 25<sup>th</sup> June 2020 the contents of which are noted with regret.***

***In view of the fact that the reason for the bid not being successful was failure to initialize the bid document and not the substance of the bid we believe that this can be rectified by "rule of thumb".***

***We therefore wish to appeal to you to reconsider reversing your rejection of our bid and allow the same to proceed subject to the said rectification***

***We look forward to hearing from you."***

Aggrieved by a lack of response from the Procuring Entity, the Applicant filed the instant Request for Review Application.

The Applicant contended that it believed that the Procuring Entity would consider the contents of its letter dated 6<sup>th</sup> August 2020 and admit its tender document and for this reason, the Applicant contended on paragraph 5 of its Request for Review that it inadvertently failed to file its Request for Review Application within the prescribed timelines as stipulated under section 167 (1) of the Act.

It was therefore the Applicant's contention that the delay to file its Request for Review Application was excusable, further noting that upon

discovery of the delay, the Applicant duly filed the instant Request for Review Application 'without any further undue delay'.

Having considered the Applicant's submissions, the Board observes that the Procuring Entity's decision with respect to the subject tender was communicated to all bidders via letters dated 25<sup>th</sup> June 2020.

By its own admission as captured in paragraph 5 of its Request for Review application, this decision became known to the Applicant when it received its letter of notification of unsuccessful bid on 29<sup>th</sup> July 2020.

The Board notes that the Applicant in paragraph 5 of its Request for Review admits that it failed to file its Request for Review Application within the prescribed timelines as stipulated under section 167 (1) of the Act, albeit inadvertently, on the basis that it believed that the Procuring Entity would consider its letter dated 6<sup>th</sup> August 2020 and admit its bid. The Applicant therefore contended that the delay was excusable and that upon discovery of the delay, it duly filed its Request for Review Application 'without any further undue delay'.

Interestingly, upon receipt of its letter of notification of unsuccessful bid on 29<sup>th</sup> July 2020, the Applicant waited for eight days before writing a letter to the Procuring Entity. Further, the Board notes from the Applicant's Request for Review application that the Applicant offered no

explanation justifying the delay in writing the said letter to the Procuring Entity.

The Board examined the contents of the Applicant's letter to the Procuring Entity dated 6<sup>th</sup> August 2020 and notes that the Applicant requested the Procuring Entity to reconsider its rejection of the Applicant's bid and allow the same to proceed subject to rectification whereby it stated as follows: -

***"...In view of the fact that the reason for the bid not being successful was failure to initialize the bid document and not the substance of the bid. We believe this can be rectified by "rule of thumb".***

***We therefore wish to appeal to you to reconsider reversing the rejection of our bid and allow the same to proceed subject to the said rectification.*** [Emphasis by the Board]

From the above excerpt it is evident that the Applicant in its letter to the Procuring Entity dated 6<sup>th</sup> August 2020 was neither seeking clarification on the reason why its bid was found unsuccessful since the reason for its unsuccessfulness had already been disclosed in the Procuring Entity's letter of notification dated 25<sup>th</sup> June 2020 nor alleging any breach on the part of the Procuring Entity but was appealing to the Procuring Entity to reconsider its rejection of the Applicant's bid and allow the same to proceed subject to its rectification.

Notably, the appeal by the Applicant for the Procuring Entity to reconsider its rejection of the Applicant's bid is tantamount to seeking a

review of the Procuring Entity's decision, which is the purview of this Board in accordance with section 167 (1) of the Act, noting that a Procuring Entity cannot sit on appeal or in review of its own decision.

Moreover, after writing the letter dated 6<sup>th</sup> August 2020 addressed to the Procuring Entity, the Applicant waited for a further fourteen days before filing the instant Request for Review, which further delay has not been explained by the Applicant in its Request for Review Application.

In the Board's considered view, if the Applicant was aggrieved by the decision of the Procuring Entity in rejecting the Applicant's bid, its only option was to file a request for review application before this Board pursuant to section 167 (1) of the Act, within the prescribed timelines.

It is not lost to the Board that this is the third time that the subject tender is before the Board; the first time being **PPARB Application No. 111 of 2020** which was filed on 30<sup>th</sup> July 2020 and the second time in **PPARB Application No. 116 of 2020** which was filed on 14<sup>th</sup> August 2020.

Notably, once a request for review application is filed before the Board, all tenderers who participated in the subject tender are notified of the existence of the request for review application by the Board Secretary and are invited to submit any information with respect to the request for

review application within three (3) days from the date of notification, failure to which the review proceedings will proceed in their absence.

Noting that the Applicant submitted a pre-qualification document in response to the subject tender, as admitted in paragraph one of its Request for Review Application, and thus participated in the subject tender, the Board notes from the Board Secretariat records that in **PPARB Application No. 111 of 2020**, the Applicant was notified via email on 12<sup>th</sup> August 2020 of the request for review application whereas in **PPARB Application No. 116 of 2020** the Applicant was notified via email on 19<sup>th</sup> August 2020 of the request for review application. These notifications were sent by the Board Secretariat to the Applicant's email, that is, [merekawakili@gmail.com](mailto:merekawakili@gmail.com).

In both instances, the Board notes that by time the Applicant was notified of the review proceedings in **PPARB Application No. 111 of 2020** and **PPARB Application No. 116 of 2020**, the Applicant had already received its letter of notification of unsuccessful bid and thus was in a position to challenge the Procuring Entity's decision by filing a request for review application before this Board within fourteen days from the date it received its letter of notification of unsuccessful bid, in the same vein as the applicants in the aforementioned request for review applications.

Despite the said notifications, the Board notes that the Applicant did not file pleadings in support of the applicants or the Procuring Entity in the request for review applications mentioned hereinbefore.

In fact, when the Applicant was notified of the request for review application in **PPARB Application No. 111 of 2020** via email on 12<sup>th</sup> August 2020, the Applicant through one Mr. David Mereka using the email address [merekawakili@gmail.com](mailto:merekawakili@gmail.com), responded to the Board Secretariat's email on 17<sup>th</sup> August 2020 and stated as follows: -

***"Dear Sirs,***

***We refer to the above matter and to your email dated 12<sup>th</sup> August 2020 and note that we are not the Applicants (Zephania K. Yego and Harris Ayinga T/A Z.K. Yego Law Office). Accordingly, the email seems to have been sent to us in error. We are however lodging our application for review in due course."***

According to the above email, the Board notes that as at 17<sup>th</sup> August 2020 the Applicant intended to lodge an application before the Board but was yet to do so.

In this regard therefore, the Board is not persuaded by the Applicant's submissions justifying its delay to file its Request for Review Application within the prescribed timelines as stipulated under section 167 (1) of the Act.



The question that the Board must now answer is when did an alleged breach of duty occur for the fourteen-day period under section 167 (1) of the Act to start running.

As mentioned hereinbefore, the Procuring Entity's decision to award the subject tender was communicated to all bidders via letters dated 25<sup>th</sup> June 2020.

This means that an alleged breach of duty could only occur as at 29<sup>th</sup> July 2020 when the Applicant was notified that its tender was not successful, thereby necessitating the Applicant to lodge its Request for Review within fourteen (14) days from notification of the Procuring Entity's pre-qualification of bidders.

Given that the Request for Review was filed on 20<sup>th</sup> August 2020, which was twenty-two days after the Applicant received its letter of notification of the outcome of its bid from the Procuring Entity, the Board finds that the Request for Review was filed outside the statutory period under section 167 (1) of the Act.

It is important to note that the fourteen-day statutory period as provided under section 167 (1) of the Act ensures that this Board cannot bend or circumvent the same in favour of one party over another to ensure that the process of review is expeditious and in line with the

principles under section 4 of the Fair Administrative Action Act No. 4 of 2015 which states as follows: -

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

In **Judicial Review Case No. 21 of 2015, Republic v Public Procurement Administrative Review Board & 2 others [2015] eKLR**, the High Court while considering the purpose of the statutory timeline imposed under section 167 (1) of the Act held as follows: -

***"The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded. The Board has no jurisdiction to hear anything filed outside fourteen days..."***

***The timelines in the PP&DA [that is, the 2015 Act] were set for a purpose. Proceedings touching on procurement matters ought to be heard and determined without undue delay. Once a party fails to move the Board within the time set by the Act, the jurisdiction of the Board is extinguished in so far as the particular procurement is concerned..."***

**[Emphasis by the Board]**

The Board concurs with the High Court's finding in the above case and would like to add that the period set under section 167 (1) of the Act is a statutory timeline which must be adhered to by an aggrieved candidate or tenderer including all players in a procurement process. It provides an opportunity within which an aggrieved candidate or tenderer may exercise its right to administrative review to challenge a procurement process in view of a breach of duty by a procuring entity as soon as the breach occurs so that once the Board dispenses with a review application, the procurement process can proceed to its logical conclusion for the public good.

Having established that the Request for Review was filed outside the statutory period imposed under section 167 (1) of the Act, the Board holds that it lacks the jurisdiction to entertain the substantive issues raised in the Request for Review and proceeds to down its tools.

### **FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders: -

- 1. The Request for Review filed by the Applicant on 20<sup>th</sup> August 2020 with respect to Tender No. IEBC/PRQ/01/2019-2020 for Pre-Qualification for Provision of Legal Services be and is hereby struck out.**

**2. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi, this 10<sup>th</sup> Day of September, 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**