

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 147/2019 OF 30TH DECEMBER 2019

BETWEEN

UTMOST INSURANCE BROKERS LIMITED.....APPLICANT

AND

KENYA PORTS AUTHORITY.....1ST RESPONDENT

AND

THE ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY.....2ND RESPONDENT

AND

**DISNEY INSURANCE BROKERS
LIMITED.....1ST INTERESTED PARTY**

AND

**PELICAN INSURANCE BROKERS (KENYA)
LIMITED.....2ND INTERESTED PARTY**

AND

LIAISON GROUP INSURANCE.....3RD INTERESTED PARTY

Ruling in the Review against the decision of Kenya Ports Authority in respect of Tender No. KPA/003/2019-20/INS for the Provision of Insurance Services for the year 2020-2022.

BOARD MEMBERS

- | | |
|---------------------------|------------------|
| 1. Mr. Steven Oundo, OGW | -Member Chairing |
| 2. Ms. Phyllis Chepkemboi | -Member |

3. Mr. Alfred Keriolale -Member

IN ATTENDANCE

1. Mr. Philip Okumu -Holding brief for Secretary

2. Ms. Judy Maina -Secretariat

PRESENT BY INVITATION

APPLICANT

**-UTMOST INSURANCE
BROKERS LTD**

1. Mr. Gideon Muturi -Advocate, Mwaniki Gachoka & Co.
Advocates

2. Ms. Florence Mugi -Advocate, Mwaniki Gachoka & Co.
Advocates

3. Mr. Stanley Gikandi -S.P.O

PROCURING ENTITY

- KENYA PORTS AUTHORITY

1. Mr. Stephen Kyandih -Advocate

2. Mr. Moses Sirgoi -Procurement Officer

1ST INTERESTED PARTY

1. Mr. Anthony Kiprono
2. Mr. Kagwe Githui

**-DISNEY INSURANCE
BROKERS LTD**

- Advocate, A. E Kiprono Associates
- Pelican Insurance Brokers

2ND INTERESTED PARTY

1. Mr. Anthony Kiprono
2. Mr. Martin Ciira

**-PELICAN INSURANCE
BROKERS (K) LTD**

- Advocate, A. E Kiprono Associates
- Disney Insurance Brokers

3RD INTERESTED PARTY

1. Mr. Innocent Muganda
2. Ms. Ann Amisi
3. Mr. Moses Mathini

**-LIAISON GROUP INSURANCE
LTD**

- Advocate, Sagana Biriq & Co. Advocates
- Sagana Biriq & Co. Advocates
- Liaison Group

OTHER INTERESTED PARTIES

1. Mr. Boniface Mungai
2. Mr. Baron Ndolo

- Acentria Brokers Insurance Ltd
- Acentria Brokers Insurance Ltd

THE PRELIMINARY OBJECTION

The 3rd Interested Party filed a Notice of Preliminary Objection dated 15th January 2020 based on the following grounds:-

- 1. THAT the instant Request for Review is incompetent as it offends the mandatory provisions of section 55 (1) (a), section 59 and section 167 (1) of the Public Procurement and Asset Disposal Act, 2015 as read together with the Companies Act and the Constitution of Kenya.***
- 2. THAT the instant Request for Review is therefore fatally defective as the Applicant lacks legal capacity to enter into any procurement contract and thereby ineligible thus not suited for purposes of these proceedings.***
- 3. THAT in view of the foregoing, this Board lacks jurisdiction over this matter and the Request for Review herein is therefore incurably defective, frivolous and an abuse of the process of this Honourable Board.***

In response, the Applicant filed a Replying Affidavit in Response to the 3rd Interested Party's Preliminary Objection sworn on 15th January 2020 and filed on 16th January 2020 (hereinafter referred to as "the Applicant's Replying Affidavit"), while the Respondents and 1st and 2nd Interested Parties did not file any documentation in response to the 3rd Interested Party's Notice of Preliminary Objection.

When the Preliminary Objection came up for hearing, the Applicant was represented by Mr. Muturi on behalf of the firm of Mwaniki Gachoka & Company Advocates while the Respondents were represented by Mr. Kyandih on behalf of Addraya Dena Advocate. Mr. Kiprono represented the 1st and 2nd Interested Parties on behalf of the firm of A.E. Kiprono & Associates Advocates while the 3rd Interested Party was represented by Mr. Muganda on behalf of the firm of Caroline Oduor and Associates Advocates.

Counsel for the Respondents, Mr. Kyandih, together with Counsel for the 1st and 2nd Interested Parties, Mr. Kiprono, fully associated themselves with submissions by Counsel for the 3rd Interested Party, hence did not make further oral submissions.

PARTIES' SUBMISSIONS

3rd Interested Party's Submissions

In his submissions, Counsel for the 3rd Interested Party, Mr. Muganda, fully relied on the Notice of Preliminary Objection and annexures attached thereto.

Mr. Muganda submitted that the Preliminary Objection is premised on the grounds that the Applicant is ineligible to file a Request for Review. To support this view, he based his preliminary objection on sections 55 (1)

(a), 59 and 167 (1) of the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act"). Regarding section 55 (1) (a) of the Act, Mr. Muganda submitted that the Applicant is ineligible to enter into a contract. He read section 55 (1) (a) of the Act together with section 59 (1) (a) of the Act in support of his submission that there is a distinction between a public officer, member of a Board or committee and urged the Board to consider these provisions together with the definition of a public officer under Article 260 of the Constitution.

Mr. Muganda went further to make reference to Annexure MM4 attached to his bundle of documents, which he stated is a CR 12 extract of the Applicant and submitted that one of the directors of the Applicant is one Mr. Peter Kihara, the Honourable Member of Parliament for Mathioya Constituency. He therefore urged the Board to lift the corporate veil of the Applicant to determine the persons behind the management of the Applicant company. Mr. Muganda submitted that Articles 10 and 232 of the Constitution cites principles and values of governance that must be observed by Members of Parliament and thus avoid participating whether directly or indirectly in a procurement process. Having submitted that the Applicant is barred from participating in public procurement, he took the view that the Applicant is barred from approaching the Board under section 167 (1) of the Act.

He therefore urged the Board to find that it lacks jurisdiction to entertain the Request for Review and to uphold the Preliminary Objection with costs.

Applicant's Submissions

Counsel for the Applicant, Mr. Muturi opposed the Preliminary Objection while relying on the Applicant's Affidavit in Response to the Preliminary Objection. Firstly, Mr. Muturi referred the Board to Article 260 of the Constitution on the definition of a person. In that regard, he submitted that a corporation is also a person within the meaning of the Constitution. Therefore, in his view, a company or corporation being a person, is a separate legal entity from its members going further by the principles espoused in the case of **Salomon v. A Salomon and Co Ltd [1897] AC 22.**

Counsel then referred the Board to section 55 (1) read together with section 59 (1) (a) of the Act and submitted that the Board ought to address its mind on the question whether the Applicant as a company falls under any of the categories listed therein.

On his second point, Counsel submitted that the application before the Board is not a preliminary objection in terms of the finding made in **Mukisa Biscuit Manufacturing Co. Ltd –V- West-End Distributors Limited (1969) EA 696** since in his view, the 3rd Interested Party raised

disputed issues of fact that ought not to be entertained as preliminary points. He submitted that in the absence of the CR 12 extract referred to, and the Replying Affidavit attached to the 3rd Interested Party's Preliminary Objection, the 3rd Interested Party would have no basis for its preliminary objection.

Mr. Muturi further submitted that even if the Board interrogates section 59 of the Act, it will find that the said section does not preclude State officers and public officers from contracting in a public procurement process, so long as they comply with the conditions set therein.

Fourthly, Mr. Muturi submitted that there is a difference between a person eligible to bid as required by section 55 (1) of the Act, and a person who may invoke the jurisdiction of the Board pursuant to section 167 (1) of the Act. He therefore took the view that the Applicant having obtained a tender document from the Procuring Entity was a candidate, who became a tenderer by subsequently submitting a bid in response to the invitation notice. Consequently, Counsel submitted that the Board has jurisdiction to entertain the Request for Review.

Fifthly, Mr. Muturi submitted that the Applicant has demonstrated it is likely to suffer loss as a result of the procuring entity's decision awarding the tender to the Interested Parties, who the Applicant viewed were not qualified for award of the tender.

In conclusion, he urged the Board to dismiss the Preliminary Objection as the same lacks merit.

3rd Interested Party's Rejoinder

In a rejoinder, Mr. Muganda referred the Board to the Companies Act, 2015 on the interpretation of a corporation. He maintained his submissions that local and international companies' corporate veil must be lifted for the Board to interrogate the persons behind such companies.

Mr. Muganda further submitted that the Applicant did not dispute the fact that its director was a Member of Parliament for Mathioya Constituency, since the CR 12 extract adduced before the Board indicates as much.

He submitted that persons who are held accountable for the actions of a company are the directors of that company and the Board ought not to turn a blind eye to the national values and principles of governance enshrined under the Constitution that give public officers responsibilities even in public procurement processes.

He urged the Board to allow the Preliminary Objection and strike out the Request for Review application.

BOARD'S DECISION

The Board has considered each of the parties' oral submissions on the Preliminary Objection raised by the 3rd Interested Party and finds that the issues for determination are as follows:-

- i. Whether the 3^d Interested Party's Preliminary Objection raises pure points of law; and***
- ii. Whether the Board has jurisdiction to entertain the Applicant's Request for Review.***

The Board now proceeds to address the above issues as follows:-

On the first issue, the question as to what constitutes a preliminary objection was addressed in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd** (1969) EA 696 where Law JA stated as follows:-

"a preliminary objection consists of a point of law which has been pleaded or is clear by implication out of the pleadings,

and which if argued as a preliminary point may dispose of the suit.”

In the same case, Sir Charles Newbold P on the other hand held thus:-

“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.”

Justice J.B. Ojwang’ further held in the case of **Oraro vs Mbaja [2005]** eKLR that:-

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

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

This position was cited with approval by Justice Makau in **Petition No. 194 of 2019, The Clerk, Nairobi City County Assembly v. The Speaker, Nairobi City County Assembly & Another; Orange Democratic Party & 4 others (Interested Parties) [2019] eKLR** where the Judge held as follows:-

"After careful consideration of the Notice of the Preliminary Objection, pleadings, and the rival submissions, it is clear that ground 2 and 3 of the PO are overtaken by events because they relate to the petitioner's Notice of Motion that was disposed of by consent of the parties on 30.10.2019. On the other hand, ground 4 of the PO raises a factual question that requires evidence to prove and as such it does not stand within the four walls of a valid PO. The foregoing view is fortified by Oraro v. Mbaja [2005] eKLR..."

The question of what would constitute a proper preliminary objection was further addressed in **Attorney General of Tanzania v. African Network for Animal Welfare (ANAW) EACJ Appeal No. 3 of 2011** where the Appellate Division of the East African Court of Justice held that:-

"a preliminary objection could only be properly taken where what was involved was a pure point of law but that where

there was any clash of facts, the production of evidence and assessment of testimony it should not be treated as a preliminary point. Rather, it becomes a substantive adjudication of the litigation on merits with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross examined and a finding of fact made by the Court

In all the cases cited above, the Board notes that courts emphasize that a preliminary objection ought to be based on a pure point of law and should not be based on factual questions requiring evidence to prove the grounds raised in the preliminary objection.

In the present case, the 3rd Interested Party alleges that the Applicant is not eligible to bid for a contract in procurement or an asset being disposed by virtue of section 55 (1) (a) read together with section 59 (1) of the Act. To support this view, reference was made to a CR 12 extract of the Applicant and the Board was urged to lift the corporate veil of the Applicant to interrogate the persons who control the Applicant company.

Having considered the finding of the courts on what constitutes a preliminary objection, it is the Board's considered view that the production of evidence in the form of a CR 12 extract as Annexure MM4 as a ground that supports the Preliminary Objection raised by the 3rd Interested Party,

requires this Board to interrogate such evidence to ascertain issues of fact. In our view, this would be an exercise aimed at establishing whether or not the Applicant's director is indeed the Member of Parliament of Mathioya Constituency, and if so, whether or not such Member of Parliament is ineligible to bid for a contract in procurement or an asset being disposed in light of the provisions under section 55 (1) (a) read together with section 59 of the Act.

The Board also heard arguments by the 3rd Interested Party on the values and principles of governance espoused by the Constitution which ought to be observed by State Officers and public officers. To wit, the 3rd Interested Party cited the following:-

"10 (1): The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

232: (1) The values and principles of public service include—

(a) high standards of professional ethics;

- (b) efficient, effective and economic use of resources;***
- (c) responsive, prompt, effective, impartial and equitable provision of services;***
- (d) involvement of the people in the process of policy making;***
- (e) accountability for administrative acts;***
- (f) transparency and provision to the public of timely, accurate information”***

According to Counsel for the 3rd Interested Party, the Member of Parliament for Mathioya Constituency, who in his view, is the director of the Applicant, offended the principles enshrined under the Constitution by the Applicant’s participation in this procurement process. Having considered the 3rd Interested Party’s submissions, the Board observes that in order to address the question whether the aforementioned principles under the Constitution have been offended by the Applicant, one must first establish whether or not section 55 (1) (a) read together with section 59 of the Act make the Applicant’s director ineligible to bid for a contract in procurement or an asset being disposed.

We find that the issues raised by the 3rd Interested Party require consideration of arguments from each side on questions of fact and the evidence adduced before the Board.

It is not lost to the Board, that in basing its preliminary objection on sections 55 (1) (a) and 59 of the Act, the 3rd Interested Party further cited section 167 (1) of the Act. The latter provision touches on the conditions that an aggrieved candidate or tenderer must satisfy in order to invoke the jurisdiction of this Board. Secondly, the Applicant, in its Replying Affidavit to the 3rd Interested Party's Preliminary Objection, did not dispute the allegation that its director is a Member of Parliament for Mathioya Constituency, neither did Counsel for the Applicant make oral submissions before the Board on the same.

Further, the Board observes that paragraph 2 of the 3rd Interested Party's Replying Affidavit was sworn in response and in opposition of the Request for Review and not in support of the 3rd Interested Party's Preliminary Objection for the obvious reason that a preliminary objection would not be supported by an affidavit which adduces evidence. At paragraph 13 (b) of the Request for Review, the Applicant avers that the tender validity period of the subject tender was extended from 14th November 2019 to 14th December 2019. However, the 3rd Interested Party in Paragraph 6 of its Replying Affidavit controverted the Applicant's averment indicating the tender validity period remained valid up until 16th December 2019. In essence, it is clear that the Board is faced with issues of fact and evidence to consider and make a determination on the same noting that not all facts raised by the parties were uncontroverted.

Accordingly, the Board finds that the 3rd Interested Party's Preliminary Objection does not raise pure points of law to the extent that the 3rd Interested Party relies on a CR 12 extract of the Applicant's company as evidence to support one of the grounds of the Preliminary Objection in order for the Board to consider whether or not the Applicant violated the principles under Article 10 and 232 of the Constitution.

Nevertheless, if the Board were to find otherwise, it would be faced the question whether the provisions of section 55 (1) (a) read together with section 59 (1) of the Act affect the jurisdiction of this Board, taking into consideration the provisions of section 167 (1) of the Act as the second issue framed for determination.

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**, it was stated that 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.

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. "

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** pronounced itself regarding where the jurisdiction of a court or any other decision making body flows from. It held as follows:-

"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."

The decision of the Supreme Court in *Samuel Kamau Macharia Case* is very critical in determining where the jurisdiction of this Board flows from. Our attention is drawn to section 167 (1) of the Act which states 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."

On the other hand, section 2 of the Act provides that:-

"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity"

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

To invoke the jurisdiction of this Board, one must demonstrate that he was a candidate or tenderer within the meaning of section 2 of the Act. Secondly, such candidate or tenderer must demonstrate that he is likely to

suffer or has suffered loss by an alleged breach of duty by a procuring entity. Thirdly, such candidate or tenderer must approach this Board within fourteen days from the date of notification of award or date of occurrence of an alleged breach of duty by a procuring entity in the procurement process or disposal process.

The Board notes that the Act further provides instances when the jurisdiction of this Board may be ousted. Section 167 (4) of the Act states as follows:-

"The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with [section 63 of this Act]; and

(c) where a contract is signed in accordance with section 135 of this Act" [Emphasis by the Board]

In order to give full meaning to the circumstances when the jurisdiction of the Board may be ousted by section 167 (4) (a) of the Act, Part IX. Methods of Procurement of Goods, Works and Services, outlines the methods of procurement that a procuring entity may apply if the conditions for such a procurement method are satisfied. These methods are

specifically provided to give guidance on matters that the Board would have no jurisdiction in relation to a procuring entity's choice of procurement method.

With respect to section 167 (4) (b) of the Act, a reading of section 63 of the Act reveals the conditions to be satisfied in order for a termination or cancellation of procurement and asset disposal proceedings to be deemed lawful, thus ousting the jurisdiction of this Board. This is the same case with section 167 (4) (c) of the Act which requires the conditions under section 135 (3) of the Act to be satisfied for a procurement contract to be lawful thereby ousting the jurisdiction of this Board.

Further, section 4 (2) of the Act outlines the procurements and asset disposals for which the 2015 Act does not apply when it states as follows:-

"For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies—

(a) the retaining of the services of an individual for a limited term if, in providing those services, the individual works primarily as though he or she were an employee, but this shall not apply to persons who are under a contract of service;

- (b) the transfer of assets being disposed off by one state organ or public entity to another state organ or public entity without financial consideration;***
- (c) acquiring of services provided by government or government department;***
- (d) acquisition and sale of shares or securities, fiscal agency by a public entity, investments such as shares purchased by cooperative societies, state corporations or other public entities;***
- (e) procurement and disposal of assets under Public Private Partnership Act, 2013; and***
- (f) procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless as otherwise prescribed in the Regulations.***

Section 4 (2) (f) cited hereinabove must be read together with section 6 (1) of the Act which explains the other instance when the jurisdiction of this Board may be ousted, depending on the circumstance of a review before the Board. Section 6 (1) of the Act states as follows:-

"Subject to the Constitution, where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified

by Kenya and to which Kenya is party, the terms of the treaty or agreement shall prevail.”

Having examined the provisions that donate jurisdiction to this Board and circumstances when this Board’s jurisdiction will be ousted, it is important at this point to state that there is a difference between the requirements to invoke the jurisdiction of this Board by an Applicant (Applicant’s locus standi before the Board) as outlined hereinabove and the requirements relating to a person’s eligibility to bid for a contract in procurement or asset being disposed under the Act.

As regards the eligibility to bid, the Act provides for the designated functionary that specifies the eligibility requirements in a procurement process in section 74 (1) (h) of the Act which states as follows:-

“(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following:-

...(h) a declaration that the tender is only open to those who meet the requirements for eligibility”

Further, section 98 (1) of the Act states as follows:-

“98. Provision of tender documents

(1) Upon advertisement, the accounting officer of a procuring entity shall immediately provide copies of the tender documents and in accordance with the invitation to tender and the accounting officer shall upload the tender document on the website."

The requirements for eligibility mentioned in section 74 (1) (h) of the Act are usually contained in a tender document issued by the accounting officer pursuant to section 98 of the Act.

The specific requirements on eligibility to bid for a contract in procurement or an asset being disposed are also outlined in section 55 (1) of the Act as follows:-

"Eligibility to bid

(1) A person is eligible to bid for a contract in procurement or an asset being disposed, only if the person satisfies the following criteria-

(a) the person has the legal capacity to enter into a contract for procurement or asset disposal

(b) the person is not insolvent, in receivership, bankrupt or in the process of being wound up;

- (c) the person, if a member of a regulated profession, has satisfied all the professional requirements;***
- (d) the procuring entity is not precluded from entering into the contract with the person under section 38 of this Act;***
- (e) the person and his or her sub-contractor, if any, is not debarred from participating in procurement proceedings under Part IV of this Act;***
- (f) the person has fulfilled tax obligations;***
- (g) the person has not been convicted of corrupt or fraudulent practices; and***
- (h) is not guilty of any serious violation of fair employment laws and practices.”***

On its part, section 59 of the Act states that:-

"59. Limitation on contracts with state and public officers

- (1) A State Organ or public entity shall not enter into a contract for a procurement with—***

- (a) a public officer or state officer or a member of a committee or Board of that State organ or public entity; or*
 - (b) an officer of that public entity or state organ.*

- (2) A State officer or a public officer shall not award or influence the award of a contract to—*
 - (a) himself or herself;*
 - (b) the State officer's or public officer's spouse or child;*
 - (c) a business associate or agent; or*
 - (d) a corporation, private company, partnership or other body in which the officer has a substantial or controlling interest.*

- (3) A state officer or public officer who has an interest in a matter under consideration in a public procurement or asset disposal shall disclose in writing, the nature of that interest and shall not participate in any procurement or asset disposal relating to that interest."*

In order to understand the import of sections 55 (1) (a) and 59 of the Act, the Board shall first address the meaning of "public officer" and "state officer". We however note, the interpretation of the words "public office"

and "state office" must also be considered. In that regard, Article 260 of the Constitution states that:-

"public office" means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;

"public officer" means—

- (a) any State officer; or***
- (b) any person, other than a State Officer, who holds a public office***

"State office" means any of the following offices—

- (a) President;***
- (b) Deputy President;***
- (c) Cabinet Secretary;***
- (d) Member of Parliament;***
- (e) Judges and Magistrates;***

- (f) member of a commission to which Chapter Fifteen applies;***
- (g) holder of an independent office to which Chapter Fifteen applies;***
- (h) member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government;***
- (i) Attorney-General;***
- (j) Director of Public Prosecutions;***
- (k) Secretary to the Cabinet;***
- (l) Principal Secretary;***
- (m) Chief of the Kenya Defence Forces;***
- (n) commander of a service of the Kenya Defence Forces;***
- (o) Director-General of the National Intelligence Service;***
- (p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or***
- (q) an office established and designated as a State office by national legislation;***

"State officer" means a person holding a State office

From the above definitions, the Board observes that a public office means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament. Further, a public officer may be a State officer as defined in Article 260 of the Constitution including any other person, other than a State Officer who holds a public office.

The framers of the Constitution must have considered circumstances when a person may hold a public office in executing his or her functions, but such person is not necessarily a State Officer. In those circumstances, such a person is still a public officer, even though he or she is not a State Officer.

Further, the framers of the Constitution must have considered that certain persons may undertake functions on behalf of a public office or State Office in an advisory capacity and are not paid by that public office or State office using any monies from the Consolidated Fund or directly out of money provided by Parliament.

In order to understand the import of section 59 of the Act, the use of the word "or" under that provision should be given consideration at this point. R. Dickerson, in his book, *The Fundamentals of Legal Drafting (1965)* had this to say concerning the use of the word "or":-

"With reference to "or" for example, the question is whether it is to be (or has been) used in its "inclusive" sense (A or B, or both) or in its "exclusive" sense (A or B, but not both).

Dickerson further notes that:-

"observation of legal usage of "or" indicates that the tendency is to use "or" in the inclusive sense (A or B, or both).

If "or" is used repetitively in a legal text, then its inclusive sense, must govern"

Applying the foregoing construction to section 59 (1) of the Act, the Board notes the word "or" has been used under that provision which in our view, indicates that the ensuing sub-section will apply to a State organ as well as a public entity. The ensuing provision, that is, section 59 (1) (a) provides a list to wit:-

a public officer or state officer or a member of a committee or Board of that State organ or public entity

Section 59 (1) (a) of the Act uses the word “or” repetitively and each time a person to be described under that provision is introduced. This is indicative that the list therein is inclusive and applies to all persons described therein. We further note the use of the word “that” under Section 59 (1) (a) and (b), which according to the Cambridge Dictionary of English, 6th Edition, means:-

“a relative pronoun used to create a correlation with a subject or verb, already mentioned earlier in a sentence”

Accordingly, the use of the word “that” in section 59 (1) (a) of the Act, means, for the limitation under the said provision to apply, the public officer or state officer or a member of a committee or Board must be a person in the same State organ or same public entity which intends to offer a procurement contract.

Section 59 (1) (b) further states:-

an officer of that public entity or state organ.

In our view, section 59 (1) (b) refers to “an officer of the same public entity or an officer of the same State organ”, that intends to offer a procurement contract.

The Board observes, the legislature's intention under section 59 (1) (a) and (b) of the Act was to avoid conflict of interest situations that may arise such that, a State officer or public officer in the same State organ or public entity that intends to undertake a procurement or disposal of an asset does not enter into a procurement contract with that same State organ or public entity. However, this limitation does not bar a State officer or public officer from entering into a procurement contract with a different State organ or public entity in which such State officer or public officer does not belong to.

To better understand the import of this provision, one must further study section 59 (2) of the Act which precludes a State officer or a public officer from awarding or influencing the award of a contract to:-

- (a) himself or herself;*
- (b) the State officer's or public officer's spouse or child;*
- (c) a business associate or agent; or*
- (d) a corporation, private company, partnership or other body in which the officer has a substantial or controlling interest*

In other words, section 59 (2) read together with section 59 (1) of the Act allows State Officers and public officers to enter into a procurement contract with a State organ or public entity in which they do not belong to, as long as they are not awarding or influencing the award of a contract to

themselves or any of the persons listed in section 59 (2) (b), (c) and (d) of the Act.

This means, even if a State Officer or a public officer may enter into a procurement contract with a different State organ or public entity which such State Officer or public officer does not belong to, such a State Officer or public officer is prohibited from awarding or influencing an award of a contract to himself or herself, his or her spouse or child, his or her business associate, or agent or his or her corporation, private company, partnership or other body in which the officer has a substantial or controlling interest.

This explains why under section 59 (3) of the Act, a state officer or public officer who has an interest in a matter under consideration in a public procurement or asset disposal has the duty to disclose in writing, the nature of that interest and not to participate in any procurement or asset disposal relating to that interest if the limitation under section 59 (1) and (2) of the Act applies to such State Officer or public officer.

Having considered the meaning of the provision of section 59 of the Act, the Board observes that the said provision does not limit a Member of Parliament from bidding for a contract in procurement with any other State organ or public entity, but limits the Member of Parliament from entering into a procurement contract with the same State organ where such Member of Parliament belongs to (in this instance, Parliament). It further limits the Member of Parliament from awarding or influencing an award of

a contract for a procurement with any other State organ or public entity save for Parliament to himself or herself, his or her spouse or child, his or her business associate or agent; or his or her corporation, private company, partnership or other body in which the he or she has a substantial or controlling interest.

We therefore find that if a Member of Parliament is a director of a bidding company, in this instance, the Applicant, such a Member of Parliament would be ineligible to bid for a contract in procurement or an asset being disposed by Parliament and subsequently enter into a procurement contract with Parliament. Such Member of Parliament is also precluded from awarding or influencing awarding or influencing an award of a contract for a procurement with any other State organ or public entity to himself or herself, his or her spouse or child, his or her business associate or agent; or his or her corporation, private company, partnership or other body in which the he or she has a substantial or controlling interest.

We note that section 59 (1) of the Act provides limitations on contracts with State Officers and public officers. It therefore begs the question; In respect of the Applicant, who bid in this procurement process? Was it a State Officer or a public officer? We observe that, the Applicant is a company and the bidder in this procurement process.

The principle flowing from corporate personality was established in the well-known case of **Salomon v Salomon [1897] AC 78** where the House of Lords held:-

"a company is in law a separate person from its members. While the company remained precisely the same even after being incorporated with the same hands receiving profits; by law, the company was not an agent nor a trustee of the subscribers and the subscribers were also not liable for any of the company's liabilities"

The Court of Appeal in the case of **Victor Mabachi & Anor v Nurturn Bates Ltd NRB CA Civil Appeal No. 247 of 2005 [2013]** (hereinafter referred to as "Victor Mabachi Case") eKLR held that:-

"A company as a body corporate, is a persona juridica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil."

The Court of Appeal in the above case implied that certain factors may warrant the lifting of the veil of a company. This prompted the Board to consider the 3rd Interested Party's argument on the issue of lifting of the veil of a company.

Counsel for the 3rd Interested Party argued that the Applicant ought not hide behind the company law principle espoused in the *Salomon v. Salomon Case* and therefore urged this Board to lift the corporate veil of the Applicant to determine the persons behind the company.

Having considered the 3rd Interested Party's submissions, the Board must address its mind on the circumstances that warrant the lifting of the corporate veil of a company in light of the decision of the Court of Appeal in the *Victor Mabachi Case* cited above where it was held that factors must exist that warrant the lifting of the corporate veil of a company.

Paragraph 90 of the **Halsbury's Laws of England, 4th Edition Volume 7 (1)** explains the purpose of lifting the corporate veil of a company as follows:-

"90. Piercing the corporate veil.

Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere

status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced"

From the above excerpt, it is not all instances when a court or other decision making body may lift the corporate veil of a company. It is the Board's considered view that lifting of the corporate veil in this instance, would apply in terms of section 59 (2) (d) of the Act in order to establish whether a State Officer or public officer of a corporation, private company, partnership or other body in which such State Officer or public officer has a substantial or controlling interest.

In this instance, the Board is required to establish whether the person that bided for the subject tender meets the requirements under section 167 (1) of the Act for the jurisdiction of this Board to be invoked. This determination does not require the Board to lift the corporate veil of the Applicant.

Having disposed of the issues raised in respect of section 55 (1) (a) and 59 (1) of the Act, the remaining question before the Board would be whether the Applicant satisfied the requirements of section 167 (1) of the Act in order to invoke the jurisdiction of this Board.

To address this question, the Board observes that the Applicant participated as a company by submitting its bid in response to the Procuring Entity's invitation notice thereby qualifies as a tenderer within the meaning of section 2 of the Act. In addition to this, the Applicant approached this Board within the statutory timeline specified under section 167 (1) of the Act.

The Applicant herein was evaluated at preliminary, technical and financial evaluation stages. The Applicant's Request for Review raises issues that require the intervention of this Board to look into the manner in which the Procuring Entity conducted its evaluation, in order to establish whether the same complied with the provisions of the Tender Document, the Act and the Constitution. In the Board's view, the Applicant and will suffer loss if the issues raised in the Request for Review are not addressed and has therefore satisfied the requirements under section 167 (1) of the Act

The Board finds that even if it were to find the Preliminary Objection of the 3rd Interested Party was a proper preliminary objection in law, the grounds raised therein would fail as reasoned in this decision.

The Board holds that it has the jurisdiction to entertain the Request for Review and proceeds to make the following orders:-

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders:-

- 1. The 3rd Interested Party's Notice of Preliminary Objection filed on 15th January 2020, be and is hereby dismissed.**
- 2. The Request for Review filed on 30th December 2019 by the Applicant shall proceed for hearing forthwith.**
- 3. Costs shall be in the cause.**

Dated at Nairobi this 16th day of January 2020

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**CHAIRPERSON
PPARB**

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**SECRETARY
PPARB**

Delivered in the presence of:-

- i. Mr. Muturi for the Applicant;**
- ii. Mr. Kyandih for the Respondents;**
- iii. Mr. Kiprono for the 1st and 2nd Interested Parties; and**
- iv. Mr. Muganda for the 3rd Interested Party**

