

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO.19/2022 OF 1ST MARCH 2022

BETWEEN

MADISON GENERAL INSURANCE KENYA LIMITED APPLICANT

AND

Lt Col. (RTD) B.N NJIRAINI

THE ACCOUNTING OFFICER (KEBS) RESPONDENT

AND

CIC GROUP INSURANCE INTERESTED PARTY

Review against the decisions of the Kenya Bureau of Standards in relation to Tender No: KEBS/T007/2021-2022; Provision of Staff Medical Insurance Cover.

BOARD MEMBERS

- | | |
|---------------------------|---------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Ms. Phyllis Chepkemboi | - Member |
| 3. Mr. Nicholas Mruttu | - Member |
| 4. Eng. Kimani Mbiu, OGW | - Member |
| 5. Dr. Paul Jilani | - Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Holding brief for the Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

Kenya Bureau of Standards (hereinafter referred to as the "Procuring Entity"), invited sealed tenders from eligible firms for, *inter alia*, Tender No: KEBS/T007/2021-2022 for Provision of Staff Medical Insurance Cover (hereinafter referred to as the 'subject tender') by way of Open National Tendering method advertised in the Daily Nation Newspaper, the Procuring Entity's website (www.kebs.org) and at the Public Procurement Information Portal (www.tenders.go.ke) on 23rd November, 2021 with a closing date of 7th December 2021.

Addenda

The Procuring Entity issued a total of 3 Addenda. Addendum No. 1 dated 24th November 2021 amending the subject tender's number from KEBS/T006/2021/2022 to KEBS/T007/2021/2022. Addendum No. 2 dated 2nd December 2021 extending the tender submission deadline from 7th December 2021 to 12th January 2022 at 10.00 am. Addendum No.3 dated 15th December 2021 informing all eligible tenderers that the blank tender document issued to prospective tenderers by the Procuring Entity ((hereinafter referred to as the 'Tender Document') had been revised and clarifications sought addressed as per an attached document to Addendum No.3.

Tender Submission Deadline and Opening of Tenders

At the extended tender submission deadline of 12th January 2022 at 10.00a.m, the Procuring Entity received seven (7) tenders. The Tender Opening Committee appointed by the Respondent opened the seven (7)

tenders shortly thereafter in the presence of tenderers' representatives present and recorded the following tenderers as having submitted their respective tenders as captured in the tender opening register of 12th January 2022:

1. Madison General Insurance;
2. Liaison Group;
3. CIC Group;
4. Jubilee Insurance;
5. APA Insurance;
6. Britam General Insurance Company; and
7. UAP Old Mutual Insurance Company

Evaluation of Tenders

A Tender Evaluation Committee appointed by the Respondent (hereinafter referred to as the 'Evaluation Committee') evaluated the seven (7) tenders in the following stages as captured in the Evaluation Report signed by members of the Evaluation Committee and dated 23rd January 2022:

- i. Mandatory Requirements;
- ii. Technical Evaluation; and
- iii. Financial Evaluation;

Mandatory Requirements Evaluation

At this stage, the Evaluation Committee was required to apply the criteria set out in Clause 2.1 Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 26 to 27 of 85 of the Tender Document. Tenders

needed to meet all the mandatory requirements under this stage to proceed to the next stage of evaluation.

At the end of evaluation at this stage, the Evaluation Committee determined five (5) tenders non-responsive thus could not proceed to the next stage of evaluation while two (2) tenders (those of the Applicant and the Interested Party) were determined responsive to proceed to the next stage of evaluation.

Technical Evaluation

At this stage, the Evaluation Committee was required to apply the criteria set out in Clause 2.2 Technical Evaluation Criteria for underwriters and Technical Evaluation Criteria for Brokers of Section III- Evaluation and Qualification Criteria at page 27 to 29 of 85 of the Tender Document. Tenders needed to meet a minimum score of 80% at this stage to proceed to the next stage of evaluation.

At the end of evaluation at this stage, the Evaluation Committee determined both the Applicant's tender and the Interested Party's tender responsive to proceed to the next evaluation stage having attained a score of 88% and 91% respectively.

Financial Evaluation

At this stage, the Evaluation Committee was required to apply the criteria set out in the Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 29 to 30 of 85 of the Tender Document. Tenders' financial comparison was to be undertaken for purposes of identifying the tender with the lowest evaluated price.

The Evaluation Committee ranked the Interested Party's tender price of Kshs.186,142,836/= as 1st while the Applicant's tender price of Kshs.210,083,911/= was ranked 2nd.

The Evaluation Committee determined the Interested Party's tender to have the lowest evaluated tender price of Kshs.186,142,836/= and the Interested Party to be the tenderer who submitted the lowest evaluated responsive tender in the subject tender.

Post-qualification

Vide a letter dated 26th January 2022, the Procuring Entity notified the Interested Party that it will visit the Interested Party's premises on 28th January 2022 at 10:00a.m for purposes of conducting due diligence on the Interested Party to verify information in the Interested Party's tender.

The Evaluation Committee conducted due diligence on the Interested Party to confirm and verify the qualification and information given by the Interested Party in its tender which due diligence included, *inter alia*,

confirmation of original County Government Business Permits as captured in the Due Diligence report signed by members of the Evaluation Committee on 1st February 2022.

At the end of the due diligence exercise, the Evaluation Committee determined that the Interested Party had the relevant technical capacity and was qualified to be awarded the subject tender.

Recommendation

The Evaluation Committee recommended the subject tender be awarded to the Interested Party at a total tender sum of Ksh.186,142,836 (Kenya Shillings One Hundred and Eighty-Six Million One Hundred and Forty-Two Thousand Eight Hundred and Thirty-Six Only) inclusive of all levies per year for two years.

Professional Opinion

Pursuant to Section 84 of the Act, the Procuring Entity's Chief Manager, Supply Chain, Ms. Jane Ndinya, vide a professional opinion dated 28th January 2022, having reviewed the Evaluation Report, opined, *inter alia*, that the subject procurement proceedings complied with the Public Procurement Asset and Disposal Act, 2015 (hereinafter referred to as 'the Act') and recommended to the Respondent to award the subject tender to the Interested Party at Ksh.186,142,836 (Kenya Shillings One Hundred and Eighty-Six Million One Hundred and Forty-Two Thousand Eight Hundred and

Thirty-Six Only) inclusive of all levies per year and which amount was within the Procuring Entity's budget.

Notification to Tenderers

In letters of notification of intention to enter into a contract dated 15th February 2022, the Respondent notified tenderers in the subject tender of the outcome of evaluation.

REQUEST FOR REVIEW NO.19 OF 2022

The Applicant lodged a Request for Review dated 1st March 2022 and filed on even date together with a Statement signed by Hazoron Wambugu, the Applicant's Managing Director, on 1st March 2022 through the firm of Mwaniki Gachoka & Co. Advocates, seeking the following orders:

- a) The Respondent's decision awarding KEBS/T007/2021-2022; to the alleged successful bidder be and is hereby set aside and nullified.***
- b) The Respondent's decision notifying the Applicant that it had not been successful in by way of the letter dated 15th February 2022 be set aside and nullified.***
- c) The Board be pleased to review all records of the procurement process (particularly the mandatory evaluation thereof) relating to Tender No. KEBS/T007/2021-2022 and direct the Respondent to undertake fresh evaluation of all bids received in Tender No. KEBS/T007/2021-2022 in strict adherence to***

the Tender Document, the Act and the Regulations and award to the lowest competitive bidder.

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

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

In a Notification of Appeal and a letter dated 1st March 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board'), Mr. P. J. Okumu, notified the Respondent of the existence of the Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the Respondent a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 1st March 2022.

On 7th March 2022, the Respondent filed a Memorandum of Response dated 4th March 2022 through his advocate, Luise N. Rasanga. Further, the Respondent submitted confidential report with respect to the subject tender to the Board pursuant to Section 67(3)(e) of the Act.

Vide letters dated 7th March 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective addresses as provided by the Respondent, of the existence of the Request for Review while forwarding to the tenderers a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020. Further, all tenderers were invited to submit to the Board any information and arguments about the subject tender within 3 days from 7th March 2022.

On 11th March 2022, the Interested Party filed its Replying Affidavit sworn on 11th March 2022 by Lorna Karaka, the Interested Party's Business Development Manager Medical Division, through the firm of Chepkuto Advocates.

Pursuant to the Board's Circular No.2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

The Applicant filed its written submissions dated 17th March 2022 together with its List of Authorities dated 17th March 2022 on 18th March 2022. The Interested Party filed its written submissions dated 18th March 2022 together with its List of Authorities dated 18th March 2022 on 18th March 2022. The Respondent filed its written submissions dated 21st March 2022 on 22nd March 2022.

Upon considering each of the parties' pleadings, cases, documents, written submissions, list of authorities and confidential documents submitted to it by the Respondent pursuant to Section 67 (3) (e) of the Act the Board framed the following issues for determination:

1. Whether the Applicant has substantiated its case with respect to the allegation that the Interested Party does not possess business permits covering major towns specifically Nairobi, Mombasa, Kisumu, Nakuru and Eldoret as required under MR 24 of Clause 2.1 Mandatory Requirements of 2. Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 27 of 85 of the Tender Document;

Depending on the outcome of the first issue;

2. Whether the Interested Party satisfied MR 24 of Clause 2.1 Mandatory Requirements of 2. Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 27 of 85 of the Tender Document requiring a tenderer to have countrywide coverage with proof of business permits covering major towns including Nairobi, Mombasa, Kisumu, Nakuru and Eldoret.

In exercise of the powers conferred upon it by Section 173 of the Act, the Board made the following orders in the Request for Review dated 1st March 2022 after finding at page 31 of its Decision dated 22nd March 2022 that the Applicant failed to substantiate its case with respect to the allegation that the Interested Party did not possess business permits covering major towns

specifically Nairobi, Mombasa, Kisumu, Nakuru and Eldoret as required under MR24 of Clause 2.1 Mandatory Requirements of 2. Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 27 of 85 of the Tender Document and further that the Applicant failed to substantiate that in awarding the subject tender to the Interested Party, the Respondent breached the provisions of the Tender Document, the Act, the Public Procurement Asset and Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') and the Constitution:

- 1. The Applicant's Request for Review dated 1st March 2022 with respect to Tender No. KEBS/T007/2021-2022 for Provision of Staff Medical Insurance Cover be and is hereby struck out.***
- 2. Each party shall bear its own costs in the Request for Review.***

NAIROBI HIGH COURT JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO.E039 OF 2022

Aggrieved by the Decision of the Board dated 22nd March 2022 in Request for Review No.19 of 2022, the Applicant sought judicial review at the Judicial Review Division by the High Court in Nairobi in Judicial Review Miscellaneous Application No. E039 of 2022.

Arising from the Application, the Statement of facts, the Verifying Affidavit, the responses and learned submissions by counsel, the Judicial Review Court framed the broad issue for determination at paragraph 41 of its Decision dated 28th April 2022 as:

Whether the Applicant has established a case for the grant of judicial review orders of certiorari to quash the decision of the Respondent (the Board) and mandamus to direct the Respondent to review the confidential documents and make a fresh determination on compliance by the 2nd Interested Party (the Interested Party herein).

The Judicial Review Court at paragraph 56 of its Decision dated 28th April 2022 found the Applicant had established a case for the grant of judicial review orders of certiorari to quash the decision of the Respondent (the Board) on the one hand, and mandamus to direct the respondent (the Board) to review the confidential documents and make a determination on the 2nd Interested Party's responsiveness to the subject tender and made the following orders at paragraph 57 of its Decision dated 28th April 2022:

- 1. An order of certiorari be and is hereby issued to bring into this Honourable Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board in Review Application No. 19/2022 in regard to Tender No. KEBS/T007/2021-2022 for Provision of Staff Medical Insurance Cover (hereinafter the 'subject tender').***
- 2. An order of mandamus be and is hereby issued directing the Respondent to review the confidential bundle/documents and make a fresh determination as to whether the 2nd Interested Party complied with all mandatory requirements in the tender document and in particular requirement under Section III***

***paragraph 2.1, item MR24 of the Mandatory Requirements
Criteria within 30 days hereof.***

3. Each Party to bear its own costs.

FRESH DETERMINATION OF REQUEST FOR REVIEW NO.19 OF 2022

Vide a letter dated 4th May 2022, the Applicant through its Advocates, Mwaniki Gachoka & Co. Advocates forwarded to the Board Secretary, the Decision of the Judicial Review Court dated 28th April 2022 while informing the Board Secretary that the Judicial Review Court had remitted back the proceedings in Review No.19 of 2022 to the Board for fresh determination.

In a Notification of Appeal and a letter dated 4th May 2022, the Acting Board Secretary, notified the Respondent, the Interested Party and the Applicant of the Judicial Review Court's Decision of 28th April 2022 in Judicial Review Miscellaneous Application No.039 of 2022 and the suspension of procurement proceedings for the subject tender while forwarding to the Respondent a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 4th May 2022.

On 10th May 2022, the Respondent filed a Notice of Preliminary Objection dated 9th May 2022 through his advocate, Luise N. Rasanga. Further, the

Respondent submitted to the Board a file containing confidential documents with respect to the subject tender pursuant to Section 67(3)(e) of the Act.

On 19th May 2022, the Interested Party filed a Notice of Preliminary Objection dated 18th May 2022 and a Further Affidavit sworn on 19th May 2022 by Lorna Karaka, the Interested Party's Business Development Manager Medical Division, through the firm of Chepkuto Advocates.

On 23rd May 2022, the Applicant filed its Grounds of Opposition to the Interested Party's Preliminary Objection and its Written Submissions to the Interested Party's Preliminary Objection through its advocates, Mwaniki Gachoka & Co. Advocates.

Pursuant to the Board's Circular No.2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

On 19th May 2022, the Interested Party filed its Written Submissions dated 18th May 2022 with respect to its Notice of Preliminary Objection dated 18th May 2022. On 19th May 2022, the Respondent filed its Written Submissions dated 19th May 2022. On 23rd May 2022, the Applicant filed its Written

Submissions dated 23rd May 2022 with respect to the Interested Party's Preliminary Objection dated 18th May 2022.

APPLICANT'S CASE

The Applicant, who was the service provider of the Respondent's staff medical insurance cover for years 2019-2021, avers that the Respondent publicly invited interested tenderers to place their tenders for the subject tender starting from 31st May 2022 (we believe this date is erroneous because we are now on 27th May 2022 as we write this decision) with a submission deadline of 12th January 2022 at 10:00a.m and a tender validity period of 182 days from the date of tender opening. Further, that in response to the said invitation to tender, the Applicant submitted a valid tender for the subject tender before the deadline for submitting tenders.

The Applicant avers that the Tender Document was designed to consist of three stages namely; (a) Mandatory Evaluation stage, which entailed checking for all mandatory documents as listed under paragraph 2.1 and on page 22-27 of the Tender Document, (b) Technical Evaluation stage; which entails checking for satisfaction of all the requirements listed from page 27-29 of the Tender Document and (c) Financial Evaluation; which takes into account the prices of the evaluated tenders.

The Applicant avers that it passed the mandatory evaluation stage, technical evaluation stage having attained a score of 88% and proceeded to the financial evaluation stage where its tender was rendered unsuccessful.

According to the Applicant, it received a letter dated 15th February 2022 from the Respondent via email on 17th February 2022 notifying it that its tender was unsuccessful for the reason that its price was not competitive and that the successful tenderer was the Interested Party at a total tender sum of Kshs.186,142,836.

The Applicant being dissatisfied with the Respondent's decision, it vide a letter dated 21st February 2022 requested for a debriefing on its tender in terms of ranking in line with the debriefing requirements set in the Standard Tender Document and reconsideration on the Notification of Intention to Award in line with the evaluation criteria set out in the Tender Document. According to the Applicant, it received a response from the Respondent by a letter dated 24th February 2022 disclosing all the financial rankings of all the participants in the tender process while insisting that tenders were evaluated strictly as per the evaluation criteria set out in Section 3 of the Tender Document.

The Applicant alleges it has industry knowledge that the Interested Party does not possess business permits covering major towns specifically Nairobi, Mombasa, Kisumu, Nakuru and Eldoret and that proof of business permits for major towns was a mandatory requirement under paragraph 2.1, item MR24 of the Mandatory Requirements Criteria and therefore the Interested Party could not satisfy this mandatory requirement the effect of which, is that the Interested Party's tender ought to have been deemed non-

responsive and could not be evaluated any further at the Technical and Financial stages.

For the foregoing reason, the Applicant alleges that the Respondent's decision to award the subject tender to the Interested Party was prejudicial, unfair and offended the spirit of the Act which requires public entities to establish practices in order: (a) To maximize economy and efficacy; (b) To promote competition and ensure that competitors are treated fairly; (c) To promote the integrity and fairness of those procedures; (d) To increase transparency and accountability in those procedures; and (e) To increase public confidence in those procedures.

The Applicant alleges that the Respondent has failed to adhere to the requirements of Section 3 of the Act by failing to promote competition or ensure that competitors are treated equally and fairly and the Respondent's actions have greatly prejudiced the Applicant and have rendered the proceedings unfair.

The Applicant relies on the following case law to support its case; (a) ***Republic v Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) ex parte Meru University of Science and Technology [2019] eKLR*** on procuring entities considering conforming, compliant or responsive tenders and (b) ***Judicial Review No.90 of 2018 Republic v Public Procurement Administrative Review Board & 3 Others Ex Parte Saracen Media***

Limited [2018] eKLR on tenders complying with all aspects of the invitation to tender and meeting all other requirements laid down by the procuring entity in its tender document.

RESPONDENT'S RESPONSE

The Respondent confirms that the subject tender was advertised on 23rd November 2021 with a tender submission deadline of 7th December 2021 but pursuant to Addendum No.3, the tender submission deadline was extended to 12th January 2022 which extension had an impact on the mandatory requirements specifically MR 24 which required proof of country coverage where tenderers were to submit business permits as evidence.

According to the Respondent, in promoting equal and fair competition to all competitors and guided by Section 79(2)(a) of the Act, all tenders were evaluated as per the evaluation criteria set out in Section 3 of the Tender Document in strict compliance with the law and the requirements of the Tender Document, considered and reviewed business permits for the year 2021 and 2022 for the five counties as valid submissions and in this regard the Interested Party's tender was responsive having satisfied MR24 thus, was further evaluated at the Technical and Financial evaluation stages.

The Respondent contends that the Applicant's reliance of its industrial knowledge in alleging that the Interested Party did not meet the mandatory requirement is entirely based on the Applicant's own belief, not in good faith and without basis for failure by the Applicant to provide any form of proof or

concrete evidence to substantiate such allegation contrary to Section 107(1) and 109 of the Evidence Act which provides for any person who seeks to rely on a fact or allegation to bear the burden of proof to show that the facts or allegation exist. Further, the Respondent contends that the Applicant has not provided any form of proof or evidence to this Board to substantiate the allegation that the Respondent has acted in a manner that violates the requirements of the law and the Tender Document.

The Respondent confirms that the Applicant's tender just like the Interested Party's tender was responsive at the Mandatory and Technical evaluation stages but the Applicant's tender was unsuccessful at the Financial evaluation stage because the Interested Party offered a more competitive tender compared to the Applicant and consequently, the award of the subject tender to the Interested Party was fair.

The Respondent alleges that the Applicant is trying to arm twist it into awarding the Applicant the subject tender despite the fact that the Applicant presented a non-competitive tender compared to the tender presented by the Interested Party.

It is in this light, the Respondent prays for the Board not to entertain the instant Request for Review which according to the Respondent, is incompetent, fatally defective and should be struck out and dismissed with costs.

The Respondent relies on the following case law to support its response (a) ***Andrew Achoki Onchiri v Kenindia Assurance Co. Ltd [2004] eKLR*** on courts not entertaining allegations not backed by evidence, (b) ***Yunes Maniafu Mukowle v Moses Makokha & 3 others (2016) eKLR*** while quoting ***Stephen Wasike Wakho & another v Security Express Limited (2006) eKLR*** on the legal dictum of he who alleges must prove, (c) ***Paul Ng'ang'a Nyaga & 2 others v Attorney General & 3 others [2013] eKLR*** on allegations based on beliefs, thoughts and apprehensions, (d) ***OJSC Power Machines Limited, TransCentury Limited and Civicon Limited v Kenya Electricity Generating Company Limited (KenGen) Appl. No.38 of 2015*** on the Board not interfering with an evaluation conducted by an evaluation committee unless it is clearly demonstrated with evidence that the evaluation was done in violation of the provisions of a tender document.

The Respondent has raised a preliminary objection to the effect that the Board lacks jurisdiction to entertain the instant Request for Review in view of the provisions of Section 167(4)(c) of the Act which provides that in matters where a contract is signed in accordance with Section 135 of the Act, the same shall not be subject to the review of procurement proceedings under Section 167(1) of the Act. According to the Respondent, he and the Interested Party entered into a contract dated 6th April 2022 by signing the same in accordance with Section 135 of the Act and that this action automatically ousted the jurisdiction of the Board to entertain the instant Request for Review in line with Section 167(4)(c) of the Act, therefore the

Board should find as much and down its tools with respect to the substantive issue of the instant Request for Review.

To support its Preliminary Objection, the Respondent relies on (a) ***Macharia and Another vs Kenya Commercial Bank Ltd and 2 Others Civil Application No.2 of 2011*** on where the jurisdiction of court flows from and (b) ***Owners of Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd (1989) KLR 1*** on jurisdiction being everything.

INTERESTED PARTY'S RESPONSE

The Interested Party through its Business Development Manager Medical Division, Ms. Lorna Karaka, depones that it started as an insurance agency within the Kenyan National Federation of Co-operatives (KNFC) in 1968 and has since become a leading cooperative enterprise and micro-insurer in Africa, with three subsidiaries in Kenya, namely CIC General Insurance Ltd, CIC Life Assurance Ltd and CIC Asset Management Ltd and the group has additional regional footprint with presence in South Sudan, Uganda and Malawi.

It is the Interested Party's deposition that it has a proven track record in provision of medical insurance services and as the only cooperative insurance entity listed at the Nairobi Securities Exchange (NSE), it provides cutting-edge insurance and financial services to over 1 million customers through a robust system of 25 local branches, over 1000 financial advisors, and multiple online platforms. Further, that the Interested party has innovatively

created customized products that have positioned it as a trusted insurance and financial services provider with decades of excellence and a strong corporate brand that serves a wide range of customers from cooperatives to corporates, SMEs, NGOs, Government entities and individuals.

In response to the instant Request for Review, the Interested Party confirms that having ability and capacity to carry out the services under the subject tender, it procured the Tender Document as instructed in the advertisement of 23rd November 2021 and started to prepare its tender for purposes of participating in the tender process. However, the Procuring Entity issued Addendum No.2 dated 2nd December 2021 extending the tender submission deadline to 12th January 2022 at 10:00a.m. The Interested Party confirms having submitted its tender in the subject tender.

According to the Interested Party, it received a letter dated 26th January 2022 from the Respondent informing it of a due diligence exercise to be conducted on it on 28th February 2022 and which due diligence was conducted. Thereafter, vide a notification of award dated 15th February 2022, the Respondent informed the Interested Party that it was the successful tenderer. The Interested Party strongly believes that the Respondent carried out the entire procurement process within the parameters set out under the Act, Regulations 2020, the Constitution of Kenya, 2010 (hereinafter referred to as the Constitution') as well as the Tender Document.

In relation to the allegation by the Applicant that it has industry knowledge that the Interested Party does not possess business permits covering major towns specifically Nairobi, Mombasa, Kisumu, Nakuru and Eldoret and as a consequence could not have provided the required permits under its tender, the Interested Party contends that pursuant to Section 67(1)(d) of the Act, contents of tenders, proposals or quotations are confidential information which cannot be disclosed to third parties.

According to the Applicant, it complied with MR24 requiring proof of having countrywide coverage with proof of business permits including major towns of Nairobi, Mombasa, Kisumu, Nakuru and Eldoret since it submitted business permits as proof of coverage for the major towns as well as for all the other towns where the Interested Party carries out business contrary to the Applicant's allegation. In support of this, the Interested Party annexed to its Replying Affidavit a list of contacts of its branches countrywide.

The Interested Party contends that the due diligence conducted on it must have been successful because it was awarded the subject tender and this reinforces the fact that the Procuring Entity satisfied itself that the Interested Party provided and met the requirements under the tender document and existence of countrywide coverage including the major towns as required under the Tender Document.

The Interested Party contends that the Applicant has failed to discharge its burden of proof and by the Applicant throwing in the words 'industry

knowledge' without proof is clearly on a fishing expedition and intends to turn the Board into the Applicant's tool of satisfying the Applicant's deep curiosity as to the nature of confidential documents that the Interested Party submitted in a tender to further its great desire to have the Interested Party eliminated from the procurement process at all costs. According to the Interested Party, this fishing expedition that the Applicant is attempting to throw the Board into, amounts to an abuse of the legal process and lacks any basis in fact and/or law, making the instant Request for Review frivolous, vexatious and brought in bad faith.

The Interested Party contends that evaluation of tenders is purely the preserve of evaluation committee who are guided by the provisions of Section 80 of the Act and that upon evaluation, it was determined to be the tenderer with the lowest evaluated price in accordance with Section 86 of the Act. The Interested Party contends that cost-effectiveness is one of the guiding principles of procurement under Article 227(1) of the Constitution of Kenya, 2010 (hereinafter referred to as the 'Constitution') and that the Applicant's tender price as well as other tenderers' tenders were higher in comparison to its tender price.

The Interested Party contends that procurement processes are competitive, not an industry for a single entity to monopolize, and the fact that the Applicant was a service provider of the Procuring Entity's staff medical insurance cover for the years 2019-2021 neither disqualifies nor discredits the Interested Party's ability to conduct the said works required under the

subject tender. According to the Interested Party, it is clear beyond peradventure that the Applicant is looking for any means possible to be awarded the subject tender in order to continue providing the subject tender's services.

According to the Interested Party, the Applicant in a deliberate, desperate, and miserable fishing expedition attempt, has made various spurious allegations that have no legs to stand on and without adducing any evidence to support the same. With this, the Interested Party contends that the instant Request for Review should be struck out with costs to it based on the foregoing reasons.

To support its response to the instant Request for Review, the Applicant relies on the following case law; (a) ***Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR*** on the burden of proof being discharged by the person who would fail if no evidence at all were given on either side, (b) ***Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR*** on the evidential burden of proof shifting to the defendant depending on the nature and effect of evidence adduced by the claimant, (c) ***Muriungi Kanoru Jeremiah v Stephen Ungu M'mwarabua [2015] eKLR*** on the burden of proof.

The Interested Party has also raised a preliminary objection in opposition of the instant Request for Review to the effect that the Board lacks jurisdiction to entertain the instant Request for Review pursuant to Section 167(4)(c) of

the Act for reasons that a contract has been entered into between the Respondent and itself in accordance with Section 135 of the Act and that there is a pending Appeal at the Court of Appeal on the same subject matter and it is against the principle of hierarchy of courts for the Board to entertain the instant Request for Review before the Court of Appeal renders itself on the matter before it. According to the Interested Party, after the lapse of 14 day period within which a Judicial Review Application ought to be filed pursuant to the provisions under Section 175(1) of the Act, the Procuring Entity and the Interested Party executed a contract in accordance with Section 135 of the Act and which existence of the said contract was made known to the Judicial Review Court by the Interested Party. In addition, the Interested Party states that it has filed an appeal at the Court of Appeal against the entire judgment and orders of the Judicial Review Court dated 28th April 2022 by Honourable Justice Anthony Ndung'u together with an application for stay of execution of the said orders pending the hearing and determination of the Appeal.

To support its Preliminary Objection, the Interested Party relies on (a) ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989]*** on jurisdiction being everything, (b) ***Republic v Public Procurement Administrative Review Board; Ex parte Madison General Insurance Kenya Ltd; Vice Chancellor, Kenyatta University & another (Interested Parties) [2022] eKLR*** on ousting of the Board's jurisdiction once a contract is signed, (c) ***Law Society of Kenya v Attorney General & another [2019] eKLR*** on hierarchy of courts where a judge of the High Court needs to hold his/her horses, acknowledge the

hierarchy of the courts, and await for a higher court (the Supreme Court) to pronounce itself before rendering himself, if at all and (d) ***Abdiaziz Sheikh Maad & 3 others v Governor, Mandera County & 2 others [2021] eKLR*** on the principle of hierarchy of courts where the High Court acknowledged that it is bound by decisions of the Court of Appeal and the expeditious resolution of the matters before it would only be achieved if the High Court stayed further proceedings.

APPLICANT'S OPPOSITION TO THE INTERESTED PARTY'S PRELIMINARY OBJECTION

The Applicant opposes the Interested Party's Preliminary Objection contending that the review proceedings herein are being conducted pursuant to an order of mandamus issued by the High Court on 28th April 2022; that the Board is bound to comply with the order of mandamus to review the confidential bundle/documents and make a determination in 30 days on whether the Interested Party complied with all mandatory requirements in the Tender Document; that the Preliminary Objection cannot usurp a binding order of the High Court; that the contract signed between the Respondent and the Interested Party is an illegality as it was done pursuant to the decision of the Board which has since been quashed in its entirety and the Preliminary Objection is improper as it does not meet the threshold of a Preliminary Objection in law and given the foregoing the Preliminary Objection is devoid of merit, misplaced and *ex facie* incompetent.

To support its opposition to the Interested Party's Preliminary Objection, the Applicant relies on (a) ***Wildlife Lodges Ltd v County Council of Narok***

and Another [2005] 2EA 344 (HCK) and (b) *Soloh Worldwide Inter-enterprises v County Secretary Nairobi County & another [2015] eKLR* on obedience of an order made by a court of competent jurisdiction (c) *I. N. & 5 others v Board of Management St G. School Nairobi & another (2017) eKLR* on definition of a preliminary objection.

BOARDS DECISION

Regulation 209(4) of Regulations 2020 grants the Board the discretion to hear a preliminary objection either separately or as part of a substantive request for review and give a separate or one decision. We therefore shall hear the objection raised in the Respondent's Notice of Preliminary Objection and the objections raised in the Interested Party's Notice of Preliminary Objection as part of the substantive Request for Review dated 1st March 2022, by way of written submissions pursuant to the Board's Circular No.2/2020 dated 24th March 2020, and render one decision due to the limited time the Board has to dispense with the substantive Request for Review dated 1st March 2022. For avoidance of doubt, the substantive Request for Review dated 1st March 2022 that the Board is required to hear and determine, is on review of confidential bundle/documents and on making of a fresh determination as to whether the Interested Party complied with all the mandatory requirements in the Tender Document and in particular requirement under Section III paragraph 2.1, item MR24 of the Mandatory Requirements Criteria as ordered by the Hon. Justice A. K. Ndung'u in Judicial Review Miscellaneous Application No.E039 of 2022. In the event the Respondent's and the Interested Party's objections fail, we shall proceed to make a finding on the substantive Request for Review dated 1st March 2022.

However, in the event the Respondent's or any of the Interested Party's objections succeed, we shall down our tools at that stage because all the objections are challenging the jurisdiction of this Board to review the confidential bundle/documents and make a fresh determination as to whether the Interested Party complied with all the mandatory requirements in the Tender Document and in particular requirement under Section III paragraph 2.1, item MR24 of the Mandatory Requirements Criteria.

The Board has considered each of the parties' pleadings, cases, documents, written submissions, list of authorities and confidential documents submitted to it by the Respondent pursuant to Section 67 (3) (e) of the Act and finds the following issues call for determination:

- 1. Whether the signing of a contract with respect to the subject tender between the Respondent and the Interested Party on 6th April 2022 divested the Board of its jurisdiction pursuant to Section 167(4) (c) of the Act read with Section 135 of the Act;**

Depending on the outcome of the first issue;

- 2. Whether the Board lacks jurisdiction to review the confidential bundle/documents and make a fresh determination as to whether the Interested Party complied with all mandatory requirements in the Tender Document and in particular requirement under Section III paragraph 2.1,**

item MR 24 of the Mandatory Requirements Criteria within 30 days from 28th April 2022 because of a pending Appeal at the Court of Appeal challenging the decision of the Judicial Review court, to quash the decision of the Board and to compel the Board to consider the confidential documents submitted to it by the Respondent and make a fresh determination within 30 days from 28th April 2022, in recognition of the principle of hierarchy of courts.

Depending on the outcome of the second issue;

3. Whether the Interested Party complied with all mandatory requirements in the Tender Document and in particular requirement under Section III paragraph 2.1, item MR 24 of the Mandatory Requirements Criteria.

We now proceed to determine the issues framed for determination.

Whether the signing of a contract with respect to the subject tender between the Respondent and the Interested Party on 6th April 2022 divested the Board of its jurisdiction pursuant to Section 167(4) (c) of the Act read with Section 135 of the Act.

The Respondent objected to the jurisdiction of this Board to entertain the substantive Request for Review dated 1st March 2022 in view of the provisions of Section 167(4)(c) of the Act. In its written submissions dated 19th May 2022, the Respondent submits that the law is now settled on

jurisdiction being everything and without it, a court or tribunal has no power to make one step.

The Respondent cites the Supreme Court of Kenya's decision in ***Macharia and Another v Kenya Commercial Bank Ltd and 2 Others Civil Application No.2 of 2011*** on where a court's jurisdiction flows from, being the Constitution or legislation or both, and that a court of law can only exercise jurisdiction conferred by the Constitution or other written law and cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Further that an issue of whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality but goes to the very heart of the matter for without jurisdiction the court cannot entertain proceedings.

The Respondent further cites Nyarangi J in ***Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd (1989) KLR 1***, on jurisdiction being everything and without it, a court has no power to make one step. Further, where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.

The Respondent submits that the jurisdiction of this Board is ousted by Section 167(4) (c) of the Act where a contract is signed in accordance with Section 135 of the Act because in such an instant, such a matter shall not

be subject to the review of procurement proceedings under Section 167(1) of the Act.

The Respondent further submits that he and the Interested Party entered into a contract dated 6th April 2022 and the signing of the said contract by the Respondent and the Interested Party was in accordance with Section 135 of the Act which automatically ousted the jurisdiction of this Board to entertain the substantive Request for Review dated 1st March 2022 in line with Section 167(4)(c) of the Act.

In the circumstances, the Respondent submits that it is clear from the aforementioned case law and provisions of the Act that this Board lacks the requisite jurisdiction to hear and determine the substantive Request for Review dated 1st March 2022 and therefore, this Board must down its tools with respect to the substantive Request for Review dated 1st March 2022.

We note the Applicant did not specifically oppose this objection to the jurisdiction of the Board as raised by the Respondent since the Applicant's grounds of opposition dated 23rd May 2022 and written submissions dated 23rd May 2022 were specifically on the objections raised by the Interested Party.

The Interested Party on its part objects to the jurisdiction of this Board to entertain the substantive Request for Review dated 1st March 2022 pursuant to Section 167(4)(c) of the Act for reasons that a contract has been entered into between the Respondent and itself in accordance with Section 135 of

the Act and therefore the substantive Request for Review dated 1st March 2022 is bad in law and should be struck out with costs.

In its written submissions the Interested Party defines jurisdiction as the authority or power to hear and determine judicial disputes, or to even take cognizance of the same . Further, the Interested Party submits that before a court or any judicial body can be seized of a matter, it must satisfy itself that it has the authority to hear it and make a determination and if a court proceeds to hear a dispute without jurisdiction, then the result will be a nullity *ab initio* and any determination made by such court will be amenable to being set aside *ex debito justitiae*.

The Interested Party cites Nyarangi J, in what it calls the *locus classicus* case of ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989]*** on jurisdiction being everything and without it a court has no power to make one more step. Further, that where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence but to down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction and where a court takes upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing because jurisdiction must be acquired before judgment is given.

The Interested Party firmly believes that this Board's jurisdiction is ousted by Section 167(4)(c) of the Act because the Procuring Entity and the Interested Party entered into a contract in accordance with Section 135 as

read with Section 175(1) of the Act. The Interested Party submits that Section 135 of the Act provides the manner in which procurement contracts are to be entered into and especially Section 135(1) and (3) of the Act which requires creation of procurement contracts and their existence to be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract be signed by the accounting officer or an officer authorized in writing by the accounting officer of a procuring entity and the successful tenderer and the written contract be entered into within the period specified in the notification but not before fourteen days have lapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

The Interested Party submits that Section 167(1) of the Act provides for filing of the administrative review before the Board within fourteen days from the date of notification of award issued by procuring entities and in this instant review, the Applicant filed its Request for Review dated 1st March 2022 in accordance with Section 167(1) of the Act and on 22nd March 2022 this Board dismissed the same for failure by the Applicant to submit any evidence to prove its case.

The Interested Party submits that in accordance with Section 175(1) of the Act, the Applicant filed a judicial review application challenging the decision of the Board within fourteen days from the 22nd March 2022 but the Judicial Review court did not issue a stay of procurement proceedings in the first instance pending the hearing and determination of the application. Further, that the fourteen day period from the date of the decision of the Board

lapsed on 5th April 2022 and the Procuring Entity and Interested Party entered into a contract in accordance with Section 135 as read together with Section 175(1) of the Act on 6th April 2022 thus, the contract was properly entered and consequently, this Board has no jurisdiction to entertain the substantive Request for Review dated 1st March 2022.

The Interested Party further submits that courts have also had an opportunity of interrogating whether the Board has jurisdiction to hear a procurement matter where a contract has been signed in accordance with Section 135 of the Act. With this, the Interested Party cites the case of ***Republic v Public Procurement Administrative Review Board; Ex parte Madison General Insurance Kenya Limited; Vice Chancellor, Kenyatta University & another (Interested Parties) [2022] eKLR*** (hereinafter referred to as the Kenyatta University case) on once a contract has been signed, considering the provisions of Section 167(4)(c) of the Act, the appropriate forum before which the question of validity of a signed contract can be determined is the Judicial Review court and not this Board and that Section 167(4)(c) of the Act bars this Board from entertaining requests for review after a procurement contract has been signed.

Finally on this objection, the Interested Party submits that it fully agrees with the decision in the Kenyatta University case and it is very clear that once a contract has been signed in accordance with Section 135 of the Act, the jurisdiction of this Board is ousted and any aggrieved person will have to seek a remedy in any other appropriate forum other than the Board.

On its part, the Applicant, opposes this objection as raised by the Interested Party on grounds, *inter alia*, that the review proceedings are being conducted pursuant to an order of mandamus issued by the Judicial Review court on 28th April 2022; that this Board is bound to comply with the order of mandamus which directed the Board to review the confidential bundle/documents and make a determination in 30 days on whether the Interested Party complied with all mandatory requirements in the Tender Document; that this objection cannot usurp a binding order of the Judicial Review court; that the contract purportedly signed between the Respondent and the Interested Party is an illegality as it was done pursuant to the decision of the Board which has since been quashed in its entirety and that the preliminary objection as raised by the Applicant is improper as it does not meet the threshold of a preliminary objection in law thus the preliminary objection is devoid of merit, misplaced and *ex facie* incompetent .

In its written submissions on the Interested Party's preliminary objection, the Applicant submits that the Judicial Review court issued an order of certiorari quashing the Decision of the Board of 22nd March 2022 and further issued an order of mandamus directing the Board to review the confidential bundle/documents and make a fresh determination in 30 days as to whether the Interested Party complied with all mandatory requirements in the Tender Document and in particular requirement under Section III paragraph 2.1, item MR24 of the Mandatory Requirements Criteria. With this, the Applicant submits that the objection seeking to challenge the jurisdiction of the Board, is ostensibly seeking the Board to usurp a binding order of the court.

The Applicant further submits that the purported signing of the contract between the Respondent and the Interested Party was a consequence of the Decision of the Board of 22nd March 2022 which dismissed the Applicant's Request for Review and which Decision the High Court has since quashed in its entirety thus, the impugned Decision of the Board of 22nd March 2022 is null and void, of no consequence and has no force in law. Consequently, the Applicant submits that any action taken by the Respondent and the Interested Party pursuant to the Decision of the Board of 22nd March 2022, including purportedly signing the contract, is similarly null and void.

The Applicant further submits that unless the orders issued by the Judicial Review court are set aside, the same must be enforced and it is not open for the Board to decide whether to comply with the orders or not because a court of law does not issue orders in vain and it would be contemptuous for the Board to fail to comply with the orders of the court based on the Interested Party's objection. According to the Applicant it does not even matter whether the Board is of the view that it has no jurisdiction.

The Applicant cites ***Wildlife Lodges Ltd v County Council of Narok and Another [2005] 2 EA 344 (HCK)*** where the Court of Appeal expressed itself on being a plain and unqualified obligation of every person against or in respect of whom an order, whether null or valid, regular or irregular, was made by a court of competent jurisdiction to obey it until the order is discharged, and disobedience of such an order would, as a general rule, would result in the person disobeying it being in contempt and punishable

by committal or attachment and in an application to the court by him not being entertained until he has purged his contempt.

The Applicant further cites ***Soloh Worldwide Inter-enterprise v County Secretary Nairobi County & another [2015] eKLR***, where Justice G.V. Odunga quoted the Court of Appeal in ***Central Bank of Kenya & Another v Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006*** on judicial power in Kenya vesting in courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a court of law. Further, that the consequences of failure to obey court orders are that any action taken in breach of the court order is a nullity and of no effect.

From the aforementioned case law, the Applicant submits that the order of mandamus issued by the Judicial Review court must be obeyed and this objection does not create any room for the Board to wriggle itself out of complying with the orders of the Judicial Review court.

The Applicant submits that the Interested Party's preliminary objection is incompetent as it requires evidence to substantiate this objection and therefore, does not meet the threshold of a preliminary objection as the same is not based on a pure point of law. The Applicant cites ***I.N. & 5 others v Board of Management St G. School Nairobi & another (2017) eKLR*** while quoting ***Mukisa Biscuit Manufacturers Ltd v***

Westend Distributors Ltd on the definition of what constitutes a preliminary objection on a pure point of law being, first, must raise a point of law which has been pleaded or arises by clear implication out of pleadings, based on ascertained facts and not on evidence or blurred with factual details liable to be contested; secondly, if objection is sustained, the same would dispose of the matter while giving an example of a preliminary objection being an objection to the jurisdiction of a court.

The Applicant submits that the Interested Party through a Further Affidavit dated 19th May 2022 tried to adduce evidence in support of the Preliminary Objection and that alone, demonstrates that the Preliminary Objection is improper and must therefore fail and further, that the legality of the contract purportedly signed between the Respondent and the Interested Party is contested.

Finally, the Applicant submits that the Board should not allow itself to be waylaid by this objection but should rather proceed to make a fresh determination on the issues as ordered by the Judicial Review court.

On the issue raised with respect to this objection not being a pure point of law, we note the same is dispensed with because this objection is now an issue in the substantive Request for Review dated 1st March 2022 due to the fact that the Board is now hearing the same as part of the substantive Request for Review dated 1st March 2022, pursuant to Regulation 209(4) of Regulations 2020 while noting that the substantive Request for Review dated 1st March 2022 that the Board is now hearing and currently determining, is

on review of confidential bundle/documents and on making of a fresh determination as to whether the Interested Party complied with all the mandatory requirements in the Tender Document and in particular requirement under Section III paragraph 2.1, item MR24 of the Mandatory Requirements Criteria as ordered by the Hon. Justice A. K. Ndung'u in Judicial Review Miscellaneous Application No.E039 of 2022. Furthermore, it is worthwhile noting that this objection in issue is an objection on the jurisdiction of this Board to review of confidential bundle/documents and on making of a fresh determination as to whether the Interested Party complied with all the mandatory requirements in the Tender Document and in particular requirement under Section III paragraph 2.1, item MR24 of the Mandatory Requirements Criteria.

We note the Applicant agrees that an objection on the jurisdiction of a court is one of the examples of a preliminary objection that a party may raise, as submitted by the Applicant at paragraph 9 of its written submissions on the Interested Party's preliminary objection while citing ***I.N. & 5 others v Board of Management St G. School Nairobi & another (2017) eKLR*** quoting ***Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd.***

It is trite law that courts and decision-making bodies such as the Board can only act in cases where they have jurisdiction. Nyaragi, JA stated as follows in the *locus classicus* case of ***The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) eKLR:***

"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 a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." [Emphasis is ours]

Similarly, in the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

".....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. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that "**whether it is**

raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter.” (emphasis ours).

The Supreme Court in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] eKLR Application 2 of 2011** pronounced itself with respect to where the jurisdiction of a court or any other decision making body flows from when it held as follows:

“(68) 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. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution.

Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law. [Emphasis ours]

In **Xxcel Africa Ltd t/a Mathare United Football Club (MUFC) v Kenyan Premier League Ltd (KPL) & another [2017] eKLR Civil Miscellaneous Application 637 of 2016** Lady Justice Jayden Thurania held as follows with respect to conferring jurisdiction on Sports Tribunal:

"20. It is common ground that the 1st and 2nd Respondents have not consented to have this matter referred to the Sports Tribunal. Consequently, the dispute does not fall within the ambit of Section 58 of the Sports Act. This court cannot confer jurisdiction on the Sports Tribunal. In this regard my position is fortified by the decision of the Supreme Court in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others [2012] eKLR:..... [Emphasis ours]

The decision of the Supreme Court in Samuel Kamau Macharia Case is very critical in determining where the jurisdiction of this Board flows from noting that this Board's jurisdiction can either flow from the Constitution or any other written law or both.

Article 227 (2) of the Constitution provides for enactment of procurement laws as follows:

227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

(a) categories of preference in the allocation of contracts;

(b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;

(c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and

(d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.[Emphasis ours]

The Act on the other hand was enacted to give effect to Article 227(2) of the Constitution.

This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides as follows:

27. Establishment of the Public Procurement Administrative Review Board

- (1) *There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board.***

Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

- (a) reviewing, hearing and determining tendering and asset disposal disputes; and***
- (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.***[Emphasis ours]

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

The jurisdiction of the Board is provided under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific in Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

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

(2)

(3)

(4) 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]

168.

169.

170.

171.

172. Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the

purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;***
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***
- (e) order termination of the procurement process and commencement of a new procurement process.***

Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 of the Act read with Section 28 of the Act and Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before it.

However, the Board's jurisdiction is ousted under Section 167(4)(c) where a contract is signed in accordance with Section 135 of the Act.

Section 135 of the Act provides as follows:-

135. Creation of procurement contracts

(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—

(a) Contract Agreement Form;

(b) Tender Form;

(c) price schedule or bills of quantities submitted by the tenderer;

(d) Schedule of Requirements;

(e) Technical Specifications;

(f) General Conditions of Contract;

(g) Special Conditions of Contract;

(h) Notification of Award.

(7) A person who contravenes the provisions of this section commits an offence. [Emphasis ours]

From the foregoing, the mere fact that a procurement contract has been signed does not automatically oust the jurisdiction of the Board by dint of Section 167 (4) (c) of the Act. The provisions of Section 167(4)(c) of the Act is conditional on such a procurement contract being signed in accordance with Section 135 of the Act.

The pre-conditions of signing a procurement contract under Section 135 are; (a) such a procurement contract must be in writing, (b) signed by an accounting officer or an officer authorized in writing by an accounting officer of a procuring entity and the successful tenderer and (c) a procurement contract must be signed within the tender validity period but not earlier than fourteen days have elapsed following the giving of a notification of award.

In ***Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR Judicial Review 589 of 2017*** Justice Aburili held as follows with respect to the Board interrogating whether a procurement contract has been signed in accordance with Section 135 of the Act before making a determination that the Board's jurisdiction has been ousted by Section 167(4)(c) of the Act:

"In this case, the Review Board makes no reference to whether or not the contract allegedly signed was in accordance with section 135 of the Act. From the above cited case law, it is clear that the

Review Board should have first determined whether the contract in question was signed in accordance with section 135 of the Act. This is so because the mere fact that a contract has been signed does not necessarily deprive the Respondent of the jurisdiction to entertain the request for review. In other words before the Review Board makes a determination that it has no jurisdiction to entertain the request by virtue of section 167(4)(c) of the Act, it has the duty to investigate whether the contract in question was signed in accordance with section 135 of the Act and the failure to do so in my view will amount to improper deprivation of jurisdiction and in my further view, improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction.....

147. The respondent at the time of declining jurisdiction to entertain the request for review did not make any reference to or inquiry as to whether the subject contract was entered into in accordance with section 135 of the Act and therefore, in my humble view, the respondent acted in error by merely declining jurisdiction on account that the contract of procurement had already been signed between the procuring entity and the successful bidder.”

Turning to the circumstances of this instant review, it is not in dispute that the Judicial Review court issued the following orders on 28th April 2022 in ***Judicial Review Miscellaneous Application No.E039 of 2022 Republic v Public Procurement Administrative Review Board and LT. Col (RTD) B.N.Njiraini, The Accounting Officer (KEBS), CIC Group Insurance Exparte Madison General Insurance Kenya Ltd:***

- 1. An order of certiorari be and is hereby issued to bring into this Honourable Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board in Review Application No. 19/2022 in regard to Tender No. KEBS/T007/2021-2022 for Provision of Staff Medical Insurance Cover (hereinafter the 'subject tender').*
- 2. An order of mandamus be and is hereby issued directing the Respondent to review the confidential bundle/documents and make a fresh determination as to whether the 2nd Interested Party complied with all mandatory requirements in the tender document and in particular requirement under Section III paragraph 2.1, item MR24 of the Mandatory Requirements Criteria within 30 days hereof.*
- 3. Each Party to bear its own costs.*

Our understanding of the first order of the Judicial Review court is that our Decision of 22nd March 2022 with respect to the Applicant's Request for Review dated 1st March 2022 in which we struck out the Applicant's Request for Review for want of proof was quashed and the same no longer exists.

Our understanding of the second order of the Judicial Review court is that we have been ordered to review the confidential bundle/documents and make a fresh determination as to whether the Interested Party complied with all mandatory requirements in the Tender Document and in particular

requirement under Section III paragraph 2.1, item MR24 of the Mandatory Requirements Criteria within 30 days from 28th April 2022.

Indeed, as we have earlier observed reviewing of a tendering dispute such as in this instant review is one of our mandates under Section 28 of the Act which provides as follows:

28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.

(2) In performance of its functions under subsection (1)(a) of this section, the Review Board shall have powers to develop rules and procedures to be gazetted by the Cabinet Secretary. [Emphasis ours]

The tendering dispute we seek to resolve in the instant Request for Review is whether the Interested Party complied with all mandatory requirements in the Tender Document and in particular requirement under Section III paragraph 2.1, item MR24 of the Mandatory Requirements Criteria by reviewing the confidential bundle/documents and make a fresh determination within 30 days from 28th April 2022.

In Republic v Public Procurement Administrative Review Board & 2 others ex parte International Research and Development Actions Ltd [2017] Miscellaneous Civil Application 552 of 2016 Justice G. V. Odunga while quoting ***Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR*** held as follows with respect to the definition of administrative review and review as a role of the Board when determining a request for review while making reference to Section 93(1) of the Public Procurement and Asset Disposal Act, 2005 (now repealed and hereinafter referred to as the 'repealed Act) which is similar but not exactly the same with Section 167(1) of the Act

"72.:

"Administrative review" is defined by Black's Law Dictionary, 9th Edition at page 1434 inter alia as "review of an administrative proceeding within the agency itself" while Ballentines Law Dictionary at page 13 defines "administrative proceeding" as "a proceeding before an administrative agency, as distinguished from a proceeding before a court. Compare judicial proceeding". What then is expected of the Respondent [the Board herein] in exercising its jurisdiction on a request for review?.....

....."Review" is defined in Black's Law Dictionary, 9th Edition at page 1434 inter alia as "Consideration, inspection, or reexamination of a subject or thing." Ballentines Law Dictionary on the other hand defines the same word at page

482 inter alia as "A reevaluation or reexamination of anything." Clearly a review is much wider in scope than an appeal. [Emphasis ours]

With the definition of a review being made clear in the case law hereinbefore mentioned, we succinctly understand the second order of the Judicial Review court to mean that we need to consider, inspect, re-examine the confidential bundle/documents and make a fresh determination as to whether the Interested Party complied with all mandatory requirements in the Tender Document and in particular requirement under Section III paragraph 2.1, item MR24 of the Mandatory Requirements Criteria within 30 days from 28th April 2022.

Ordinarily, the Board would have jurisdiction to consider, inspect or re-examine confidential bundle of documents in a tendering dispute pursuant to Section 167(1) of the Act as long as a tender dispute is not on a choice of procurement, or on termination of procurement proceedings in accordance with Section 63 of the Act or where a contract has been signed in accordance with Section 135 of the Act as we have extensively demonstrated hereinbefore by provisions of the Act and case law.

It is not in dispute that the notification of intention to enter into a contract (notification of award) issued to the Interested Party was dated 15th February 2022 and the Applicant was issued with a letter of regret also dated 15th February 2022. The fourteen days period within which the Respondent and

the Interested Party were prohibited from signing a procurement contract in the subject tender, when taking the 15th February 2022 as the date of receipt of both the notification of award and letter of regret by the Interested Party and the Applicant respectively, was set to lapse on 1st March 2022 and if no request for review had been filed with respect to the subject tender before the Board, the Respondent and the Interested Party were at liberty to sign a procurement contract with respect to the subject tender anytime from 2nd March 2022.

In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

57. Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be***

considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;
(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

In computing time when the Respondent and the Interested Party was prohibited from signing a procurement contract with respect to the subject tender, 15th February 2022 is excluded pursuant to Section 57(a) of IGPA being the day which the Applicant received the notification of regret with reasons of its unsuccessful tender from the Respondent. This means, fourteen days started running from 16th February 2022 and lapsed on 1st March 2022.

However, the Applicant filed the instant Request for Review on 1st March 2022 effectively suspending procurement proceedings of the subject tender from 1st March 2022 pursuant to Section 168 of the Act. This means, the Respondent and the Interested Party could not sign a procurement contract with respect to the subject tender between 1st March 2022 and 22nd March 2022 (the date of the now quashed Decision of the Board), both dates included, pursuant to Section 171 of the Act.

It is also not in dispute that aggrieved by the now quashed Decision of the Board, the Applicant sought judicial review by the High Court within fourteen

days of the now quashed Decision of the Board pursuant to Section 175(1) of the Act, which fourteen days were set to lapse on 5th April 2022 and again, it is not in dispute that the Respondent and the Interested Party signed a procurement contract in the subject tender on 6th April 2022, being the fifteenth day after the now quashed Decision of the Board of 22nd March 2022. What is in dispute as raised by the Applicant with respect to the procurement contract signed by the Respondent and the Interested Party in the subject tender, is the validity of such a procurement contract but not the signing of the same on 6th April 2022.

Again, it is not in dispute that this Board was a Respondent and participated in the judicial review proceedings instituted by the Applicant at the High Court in Nairobi where the Applicant successfully challenged the now quashed Decision of the Board in the subject tender. It is also not in dispute that the Applicant in the aforesaid judicial review proceedings, in two attempts, unsuccessfully sought to stay the procurement process of the subject tender when it sought leave to file judicial review proceedings to operate as stay of the procurement process in respect of the subject tender, including signing of a contract before Hon. Justice Ngaa and an order for stay of the procurement process, including the signing of the contract between the Procuring Entity and the Interested Party before Hon. Justice Ndungu. In both instances, no order of stay of the procurement process, including the signing of the contract between the Respondent and the Interested Party was granted by either Hon. Justice Ngaa or Hon. Justice Ndungu. We note that the Applicant never, at any one point, sought for the stay of the now quashed Decision of the Board of 22nd March 2022 by the High Court in the judicial review proceedings and it is only after the Judicial

Review rendered its judgment on 28th April 2022 that the Decision of the Board of 22nd March 2022 was quashed. Despite the Judicial Review court not issuing stay of the procurement process, including the signing of a procurement contract in the subject tender and despite the Judicial Review court being notified that a procurement contract has been signed by the Respondent and the Interested Party with respect to the subject tender (as captured at paragraph 14 of the Judgment of the Judicial Review court dated 28th April 2022) the Judicial Review court did not address nor nullify the procurement contract of the subject tender signed by the Respondent and the Interested Party in its Decision dated 28th April 2022.

We have had sight of and carefully studied the original procurement contract of the subject tender dated 6th April 2022 which forms part of the confidential documents submitted to the Board by the Respondent pursuant to Section 67(3)(e) of the Act and note the following features thereof: (a) it is in writing, (b) it is between the Procuring Entity and the Interested Party, (c) it was made on 6th April 2022, which was the fifteenth day from the date of the now quashed Decision of the Board of 22nd March 2022 and the fiftieth day from the date of notification of award to the Interested Party dated 15th February 2022 and the letter of regret to the Applicant dated 15th February 2022, with reasons why the Applicant's tender was unsuccessful, from the Respondent, (d) it incorporates agreements between parties therein with respect to the subject tender, (e) it is signed by the Respondent ((B. N. Njiraini) in his capacity as the Managing Director of the Procuring Entity and who is also the accounting officer of the Procuring Entity for and on behalf of the Procuring Entity) and the Interested Party (Fredrica Ruoro the

Interested Party's General Manager, for and on behalf of the successful tenderer as indicated in the Notification of Award dated 15th February 2022) and (f) within the subject tender's validity period, which tender validity period has not been contested. For avoidance of doubt, the procurement contract dated 6th April 2022 with respect to the subject tender was not signed during the prohibited period of fourteen days of the notification of award as hereinbefore demonstrated. With the aforementioned features, we are of the considered opinion that the procurement contract was signed by the Respondent and the Interested Party in accordance with Section 135 of the Act.

The Applicant in its opposition of the procurement contract dated 6th April 2022 argues that the same was entered into (signed by the Respondent and the Interested Party) pursuant to the now quashed Decision of the Board of 22nd March 2022. We have read and re-read our Decision of 22nd March 2022 and have not found any paragraph whatsoever where we ordered for signing of a procurement contract with respect to the subject tender. What we ordered for, was striking out of the Applicant's Request for Review dated 1st March 2022 for want of proof and for each party to bear its own costs. We did not direct for continuation of, neither did we stop the continuation of, the procurement process of the subject tender save for when the procurement process of the subject tender was automatically suspended by operation of law pursuant to Section 168 of the Act between 1st March 2022 and 22nd March 2022. The law as provided in Section 171 of the Act is clear that in no case shall any appeal under the Act stay or delay a procurement process beyond the time stipulated in the Act or Regulations 2022.

Contrary to the Applicant's assertion that the procurement contract of the subject tender was entered into pursuant to the now quashed Decision of the Board of 22nd March 2022, we are of the considered opinion that the procurement contract of the subject tender was actually entered into and signed by the Respondent and the Interested Party pursuant to, and as a consequence of, the Applicant failing to obtain a stay of the procurement process of the subject tender, including the signing of the contract when it sought leave to file judicial review proceedings, as demonstrated hereinbefore and by the automatic lifting of suspension of the procurement proceedings of the subject tender under Section 171 of the Act after the Board rendered its now quashed Decision on 22nd March 2022.

With this, and having found that the procurement contract of the subject tender was signed in accordance with Section 135 of the Act and that the Judicial Review court, despite being notified of the existence of the same as hereinbefore outlined, did not cancel or nullify such procurement contract at the time of rendering its Judgement on 28th April 2022, we find we have no power to make any one more step in the instant review and have no jurisdiction to make a determination on the third issue framed for determination pursuant to our jurisdiction being ousted by Section 167(4) (c) of the Act on our understanding that our jurisdiction flows from the Act. Consequently, we now proceed to down our tools at this stage with respect to the substantive Request for Review dated 1st March 2022.

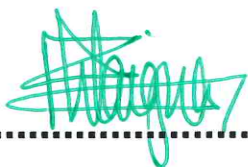
The upshot of our finding herein is that the Applicant's Request for Review dated 1st March 2022 is for striking out for want of jurisdiction.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, the Board makes the following orders in the Request for Review dated 1st March 2022: -

- 1. The Applicant's Request for Review dated 1st March 2022 with respect to Tender No. KEBS/T007/2021-2022 for Provision of Staff Medical Insurance Cover be and is hereby struck out for want of jurisdiction.**
- 2. Given the finding herein, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 27th Day of May 2022.



.....
CHAIRPERSON
PPARB



.....
SECRETARY
PPARB