

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 43/2022 OF 16<sup>TH</sup> MAY 2022**

**BETWEEN**

**BAYCOMS AFRICA LIMITED..... APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

**BARINGO COUNTY ASSEMBLY..... RESPONDENT**

**KENSUN ENTERPRISES .....INTERESTED PARTY**

Review of the decision of the Accounting Officer of the County Assembly of Baringo in relation to Tender Neg. No. 934928-2021/2022 for the Supply, Installation and Commissioning of Hansard System and Equipment at Baringo County Assembly.

**BOARD MEMBERS**

- |                      |               |
|----------------------|---------------|
| 1. Ms. Faith Waigwa  | - Chairperson |
| 2. Mr. Jackson Awele | - Member      |
| 3. Mr. Ambrose Ogeto | - Member      |
| 4. Dr. Joseph Gitari | - Member      |
| 5. Ms. Isabel Juma   | - Member      |

**IN ATTENDANCE**

Mr. Philip Okumu - Acting Board Secretary

## **BACKGROUND TO THE DECISION**

### **The Tendering Process**

The Baringo County Assembly (hereinafter referred to as the 'Procuring Entity'), re-advertised and invited sealed tenders from interested eligible tenderers for Tender Neg No: 934928- 2021/2022 for the Supply, Installation and Commissioning of Hansard System and Equipment at Baringo County Assembly(hereinafter referred to as the 'subject tender') by way of national competitive tendering method through advertisement published in The Standard Newspaper, the IFMIS Supplier Portal ([www.supplier.treasury.go.ke](http://www.supplier.treasury.go.ke)) and the Baringo County Assembly Portal ([www.baringoassembly.go.ke](http://www.baringoassembly.go.ke)) on 1<sup>st</sup> February 2022.

### **Tender Submission Deadline and Opening**

The Respondent used electronic-procurement system to manage the tendering process in issuing the blank tender document to interested eligible tenderers, submission of tenders to the Respondent by interested eligible tenderers, opening of tenders by the Respondent's Tender Opening Committee for the subject tender and partly in evaluating the tenders. Completed tenders by eligible tenderers were required to be submitted electronically in PDF format and uploaded on the GOK IFMIS portal.

The Procuring Entity received three tenders at the tender submission deadline of 15<sup>th</sup> February 2022 and a Tender Opening Committee appointed by the Respondent opened the three tenders and recorded the following tenderers as having submitted their respective tenders: -

No.	Tenderer's name
1.	Baycoms Africa Limited
2.	Kensuns Enterprises Limited
3.	Pillar Audio Visual Services

### **Evaluation of Tenders**

A Tender Evaluation Committee appointed by the Ag. Clerk, to Baringo County Assembly, the Respondent herein, (hereinafter referred to as the 'Evaluation Committee') evaluated the tenders in three stages as captured in an Evaluation Report signed by members of the Evaluation Committee on 24<sup>th</sup> March 2022 (hereinafter referred to as the 'Evaluation Report').

The three stages for evaluation were as follows:

- i) Preliminary Examination;
- ii) Technical Evaluation; and
- iii) Financial Evaluation

### **Preliminary Evaluation**

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the criteria set out at Clause A) Mandatory Evaluation Stage of Clause 2.2 Evaluation Criteria at page 31 of the blank tender document issued to prospective tenderers by the Procuring Entity (hereinafter referred to as the 'Tender Document'). Tenders needed to meet all the mandatory requirements on a Yes/No basis at this stage to qualify to proceed to the next stage of evaluation.

At the end of evaluation at this stage, both the Evaluation Committee and the GOK IFMIS evaluation matrix determined one (1) tendernon-responsive while another two (2) tenders were determined responsive. The Applicant's tender was one of the tenders determined responsive thus proceeded to the next stage of evaluation.

### **Technical Evaluation**

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the criteria set out at Clause B) Technical Evaluation of Clause 2.2 Evaluation Criteria at page 32 to 35 of the Tender Document. Tenders needed to attain at least 70 marks at this stage to be considered for the next stage of evaluation.

At the end of evaluation of this stage, the Evaluation Committee scored an average pre-technical score of 79.75 marks for the Applicant's tender and 89.5 marks for the Interested Party's tender. However, the Evaluation Committee noted in the Evaluation Report, that the automated GOK IFMIS systemcalculated the technical scoreof Applicant's tenderas 62marks and the Interested Party's tender as 70 marks.

### **Financial Evaluation**

At this stage of evaluation, the Evaluation Committee was required to evaluate tenders by applying the criteria set out at Clause C) Price

Evaluation of Clause 2.2 Evaluation Criteria at page 35 to 36 of the Tender Document. Tender prices were to be calculated by combining financial and technical scores using the formula provided for in the Tender Document.

At the end of evaluation of this stage, the Evaluation Committee noted that GOK IFMIS system awarded the Applicant a score of 23.65 points, while the Interested Party was awarded a score of 23.39 points. These financial scores were added to the Applicant's and Interested Party's respective technical marks, resulting to the Applicant scoring a cumulative score of 85.65 points and the Interested Party scoring 93.39 points. Accordingly, the system ranked the Interested Party as position 1 and the Applicant, position 2.

### **Post Qualification**

The Evaluation Committee subjected the Interested Party being the tenderer recommended for award of the subject tender to a due-diligence exercise to determine whether it was qualified to be awarded the contract and such due diligence exercise yielded a positive outcome.

### **Recommendation**

The Evaluation Committee recommended award of the subject tender to the Interested Party at the tender price of Kshs. 44,331,000 for having

been determined to be substantially responsive to the terms and conditions of tender and being the lowest evaluated tenderer.

### **Professional Opinion**

In a Professional Opinion dated 25<sup>th</sup> March 2022, the Ag. Clerk, Winnie J. Chemase, upon reviewing the Tender Evaluation Report opined that the procurement of the subject tender complied with the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') and that the evaluation process was carried out in accordance with the criteria set out in the Tender Document. With this, she recommended for approval of the Evaluation Committee's recommendations.

The Respondent approved the Evaluation Committee's recommendation to award the Interested Party the subject tender at Kshs44,331,000.00.

### **Notification to tenderers**

Vide letters dated 20<sup>th</sup> April 2022, the Respondent notified tenderers of the outcome of evaluation of the subject tender.

### **REQUEST FOR REVIEW**

Baycoms Africa Limited, the Applicant herein, lodged a Request for Review dated 16<sup>th</sup> May 2022 and filed on even date together with an Affidavit sworn on 16<sup>th</sup> May 2022 by Richard Oturi, a Managing Director of the Applicant, and a Supplementary Affidavit sworn on 27<sup>th</sup> May 2022 by Richard Oturi and filed on 30<sup>th</sup> May 2022 through the firm of OLM Law Advocates LLP seeking for the following orders:-

- a) The Procuring Entity's decision notifying the Applicant that its bid was not successful as contained in the Letter dated 20<sup>th</sup> April 2022 but emailed to the Applicant on 4<sup>th</sup> May 2022, be and is hereby annulled;***
- b) The procuring Entity be and is hereby ordered to ensure the reinstatement of the Applicant's bid at the financial stage and conduct an evaluation in strict compliance with the provisions of the Constitution, the Act, the Regulations and the Tender Document;***
- c) The Honourable Board be pleased to cancel and or annul the award of the Tender to the Bidder whose bid was purportedly adjudged as successful by the Procuring Entity;***
- d) In the alternative to (b) above, the Procuring Entity is hereby directed to award the Tender to Baycoms Africa Limited, the Applicant herein;***
- e) The Procuring Entity be and is hereby directed to reimburse the Applicant the costs of and incidental to this Request for Review;***
- f) The Honourable Board be pleased to levy a fine of Kshs. 4,000,000 against the Respondent pursuant to section 176 of the Act;***
- g) Such other, further, alternative and/or incidental Order(s) as the Honourable Board may deem just and expedient.***

In a Notification of Appeal and a letter dated 16<sup>th</sup> May 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') 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 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 16<sup>th</sup> May 2022.

On 24<sup>th</sup> May 2022, the Respondent filed a Response dated 20<sup>th</sup> May 2022 together with their Affidavit sworn on the 20<sup>th</sup> May 2022 by Jepkemoi Chemase, Ag Clerk of the Procuring Entity and the Respondent herein. Further, the Respondent submitted to the Board confidential information and documents with respect to the subject tender pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act').

Vide letters dated 25<sup>th</sup> May 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective email addresses as provided by the Respondent, of the existence of the Request for Review while forwarding to tenderers a copy of the Request for Review together

with the Board's Circular No.02/2020 dated 24<sup>th</sup> March 2020. Further, all tenderers were invited to submit to the Board any information and arguments on the subject tender within 3 days from 25<sup>th</sup> May 2022.

The Interested Party filed an Affidavit sworn on 30th May 2022 by Navdeep Singh Mehta, the sole proprietor of the Interested Party.

Pursuant to the Board's Circular No.2/2020 dated 24<sup>th</sup> 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.

None of the parties filed their written submissions with respect to the subject tender in this review.

### **APPLICANT'S CASE**

The Applicant alleges that the Respondent's delay in notifying them on the status of the outcome of the tender was not genuine and was mischievously calculated to lock them out from seeking judicial redress from the Board under Section 167 of the Act that restricts the Board's jurisdiction to matters filed within 14 days from when an aggrieved tenderer becomes aware of an alleged breach.

The Applicant contends that on 20<sup>th</sup> April 2022, it sought clarification from the Respondent inquiring on the status of the tender proceedings. It is the Applicant's averment that the Respondent responded fourteen (14) days later vide an email dated 4<sup>th</sup> May 2022 attaching a letter of notification of regret dated 20<sup>th</sup> April 2022. The Applicant believes that the Respondent backdated the letter, having the effect of ousting the Applicant outside the jurisdictional statutory 14-day limit considered under Section 167 of the Act.

The foregoing considered, the Applicant raises issue with the form of the Letter of Notification of Regret arguing that the same is defective as it contravenes Section 87 of the Act in the following ways:

- a.) The letter does not disclose the name of the successful tenderer in the Notification of Regret;
- b.) The letter does not disclose the successful tenderer's tender price and the reason why its tender was successful;
- c.) Unsuccessful tenderers were not notified at the same time as successful tenderers.

Further that the Notification Letter did not adhere to Clause 48 of the Tender Document requiring it to have the name, address and contract price of the successful tenderer.

This being the case, the Applicant objected to the Respondent's letter and requested to be issued with a notification letter compliant with the relevant

provisions of the law; to which it claims the Respondent, at the time of filing this Request for Review, has never availed.

It is also the Applicant's case that the Respondent failed to evaluate its tender in accordance with the provisions of the Tender Document read together with Section 80 (2) and (6) of the Act and Regulation 76 and 77 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as the 'Regulations 2020').

The Applicant contends that Clause 2.3 of the Tender Document and most particularly Clause 2.3.4 provides that a tender must attain at least 70 marks in the Technical Evaluation Stage in order to be considered for Financial Evaluation.

The Applicant argues that the Tender Document does not require tenderers to attain a combined score of 70% at the technical stage as insinuated by the Procuring Entity in its Letter of Notification of Regret. It is the Applicant's position that the requirement of calculating a combined score was reserved for financial evaluation stage as provided for under Clause 2.4 of the Tender Document.

The Applicant further raised issue with the Respondent's scoring its tender at 62 marks thereby making reference to its own Self-Assessment that indicated full compliance with requirements showing that the Applicant ought to have attained not less than 90 marks.

According to the Applicant, they provided the lowest evaluated tender and the Respondent acted in breach of Section 86 of the Act by not awarding it the tender on this basis. In this way, they argue that the Respondent also acted contrary to section 80 (2) of the Act by failing to conduct the concerned evaluation in accordance with the provisions of the Tender Document and Section 80 (6) by failing to complete the evaluation within the required 30 days. The Applicant also avers that the Respondent breached Regulation 76 and 77 as they failed to adhere to the technical and financial requirements of the Tender Document.

It is the Applicant's argument that despite the tenders being opened on 15<sup>th</sup> February 2022, the Procuring Entity only shared with the Applicant the Letter of Notification of Regret on 4<sup>th</sup> May 2022.

Lastly, the Applicant claimed that the Respondent had breached Section 176 of the Act by failing to implement the Board's decision in Consolidated Applications No. 162/2021 and 3/2022 by not reissuing the notification of termination of tender.

In light of the foregoing, the Applicant contends that through the aforesaid breaches, the Respondent breached the values of procurement enshrined under Article 227 of the Constitution of Kenya.

## **RESPONDENT'S CASE**

The Respondent argues that the Request for Review is statutory time-barred having been filed outside the mandatory 14-days period required under Section 167 (1) of the Act. The Respondent contends that it sent the Applicant's Letter of Notification of Regret through post on 20<sup>th</sup> April 2022, further arguing that the filing of this Application on 16<sup>th</sup> May 2022 placed the Applicant 12 days beyond the said statutory 14-day period. Accordingly, the Respondent posits that the Board does not have jurisdiction to entertain the matter.

The Respondent further raises issue with the Applicant's allegation that it acted contrary to Section 87 (3) of the Act by failing to dispatch the Applicant's Letter of Notification of Regret within the statutory period. It is their contention that they sent the letter to the Applicant on 20<sup>th</sup> April 2022 through post.

It is also the Respondent's case that it did not violate Clause 48 of its Tender Document as the Applicant was notified of the reason why it was not evaluated as the lowest tenderer through the Letter of Notification of Regret.

All considered, the Respondent holds that it has not breached Section 80 (6) of the Act because the Evaluation was conducted within 30 days. It is the Respondent's contention that the tenders were closed on 16<sup>th</sup> February 2022, with the evaluation process commencing on 23<sup>rd</sup> February 2022 and

the Evaluation Committee completing their Evaluation Report on 24<sup>th</sup> February 2022.

The Respondent further argued that it did not act in contravention of Section 80 (2) of Act as alleged, being that the Applicant attained a technical score of 62 marks which was below the required score of 70 marks. Indeed, in explaining the use of combined scores at the technical stage, the Respondent avers that public institutions are mandated to use the IFMIS System as per the Treasury Circular where the system generates a combined technical score based on individual scores when calculating marks during tender evaluations.

This being the case, the Respondent further argues that it adhered to the technical and financial requirements in the Tender Document, and in this way did not contravene Regulation 76 and 77 as alleged by the Applicant. To this end, it argues that the Self-assessment undertaken by the Applicant is biased and cannot be termed as an objective evaluation for purposes of consideration by the Procuring Entity, let alone this Board. Additionally, the respondent argues that she was not in breach of Section 86 of the Act as the Applicant was not the lowest evaluated tenderer.

The Respondent also contends that the Applicant erroneously miscalculated the tender document figures in its price schedules occasioning a total variance of Kshs. 935,135.50, having the effect of raising its total tender to Kshs. 44,781,298.00 from the previously tendered tender of Kshs. 43, 846,

163.00 captured in the Applicant's tender. This being the case, the Respondent considers the variance as a major deviation that affects the substance of the tender having the effect of disqualifying the tender as non-responsive within the purview of Section 79 (2) (b) of the Act.

According to the Respondent, she was not in breach of Section 176 of the Act because she issued notifications of cancellation to all tenderers as per the Board's orders through letters dated 25<sup>th</sup> January 2022, a matter of which the Applicant is aware of because it participated in the re-advertised tender.

This considered, it is the Respondent's assertion that she adhered to the principles of Article 227 of the Constitution of Kenya, further contending that she is likely to suffer irreparable harm if the process is not allowed to proceed to its due conclusion including losing its budget as appropriated for the current financial year. According to the Respondent, this would in turn lead to wastage of public resources to the tune of Kshs. 953,137.40.

This being the case, the Respondent urges the Board to dismiss the Application and allow the Procuring Entity to conclude the procurement process to its logical conclusion by awarding the tender to the lowest evaluated tenderer, the Interested Party herein, at a cost of Kshs. 44,846,163.00.

## **INTERESTED PARTY'S RESPONSE**

It is the Interested Party's contention that the Respondent adhered to the provisions of the Act and Tender Document in awarding the tender to them, while further arguing that the Board does not have jurisdiction to entertain the matter being that the instant application is time-barred and ought to be dismissed.

## **APPLICANT'S REJOINDER**

The Applicant denies the Respondent's allegation that the instant Request for Review is time-barred arguing that the Certificate of Posting adduced by the Respondent, did not indicate the specific document posted to the Applicant and other tenderers. It is further their contention that the said certificates do not indicate the date of which the Respondent alleges to have posted the concerned notifications of regret, while also stating that it has never received the said notification alleged to have been sent despite frequently checking their mailboxes.

Moreover, the Applicant further argues that if the Respondent's allegation were true, they would have notified them of said postage vide their email of 4<sup>th</sup> May 2022 responding to the Applicant's queries on the status of the procurement proceedings. Accordingly, they urge the Board to deem the Applicant legitimately notified of the award on the aforesaid date of 4<sup>th</sup> May 2022.

The Applicant further affirms that the Respondent wrongly calculated their score by applying the formula meant to be used at the financial stage, at

the technical stage. They further aver that the Tender Document does not provide for the scores to be calculated in percentages and that the Respondent's Response indicated that the Evaluation Committee had initially scored it 79.75 points, before having taken into consideration the findings of the GOK IFMIS system.

It is also the Applicant's case that the Respondent failed to complete the evaluation of tenders within 30 days of opening as considered under Section 80 (6) of the Act. It contends that the Respondent in her Response indicated that the tender opening date was 18<sup>th</sup> February 2022, meaning the Respondent ought to have completed the evaluation by 20<sup>th</sup> March 2022 and not on 24<sup>th</sup> March 2022, as was the case in the subject tender.

The foregoing considered, the Applicant is convinced that the Respondent was intent on awarding the tender to the Interested Party evidenced by the due diligence letter dated 23<sup>rd</sup> February 2022 issued to certain institutions seeking information on their capacity to deliver the tender. It is the Respondent's claim that by the said date the evaluation process had not been concluded and as such the Applicant had acted prematurely in coming to its conclusion to award the tender to the Interested Party.

The Applicant further alleges that the Respondent acted illegally by asking the Applicant to submit its financial statements at the technical stage, when the same was to be considered at the financial stage. In this way, the Applicant faults the Respondent's justifications stating that the

Applicant made reference to the financial statement, in effect, inclining them to seek more clarification on the same.

On the issue of an alleged Arithmetic Error in the Applicant's tender, the Applicant denies the same; further holding that even if there was an arithmetic error, it does not merit disqualifying its tender. It is the Applicant's case that by virtue of Section 82 of the Act, the Respondent is bound by the price quoted in the form of tender read on the tender opening date. All considered, the Applicant argues that any loss likely to be caused by any alleged error will be borne by them without any regard to the Respondent. Indeed, the Applicant cites Section 79 (2) (b) of the Act holding that it stipulates minor deviations including arithmetic errors that do not materially depart from the substance of the tender should not lead to an automatic finding of unresponsiveness.

Lastly, in response to the allegations made by the Respondent that the notification dated 29<sup>th</sup> March 2022 adhered to the provisions of the Act and Tender Document, the Applicant avers that it failed to indicate the name, address and contacts of the successful tender.

All considered, the Applicant contends that the Respondent will not suffer any loss or damage if the Board grants the instant application.

## **BOARD'S DECISION**

The Board has considered each of the parties' case, pleadings, documents and confidential documents submitted by the Respondent to the Board pursuant to Section 67 (3) (e) of the Act and finds the following issues crystallize for determination: -

- 1. Whether the Applicants' Request for Review was filed within the statutory period of 14 days under Section 167(1) of the Act to invoke the jurisdiction of this Board**

Depending on the outcome of the first issue;

- 2. Whether the Respondent complied with the orders of the Board dated 19<sup>th</sup> January 2022 in Consolidated Requests for Review Nos.162 of 2021 and 3 of 2022.**
- 3. Whether the Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document as read with Sections 80(2), 80 (6), 86 (1) of the Act and Regulation 76 and 77 of Regulations 2020.**
- 4. Whether the Notification of Intention to Award the subject tender dated 20<sup>th</sup> April 2022 issued by the Respondent complied with Section 87 of the Act read together with the provisions of the Tender Document.**

The Respondent objects to the hearing and determination of the instant Request for Review on the grounds that the Board does not have jurisdiction to entertain the Applicant's Request for Review because the same is statutory time-barred having been filed outside the mandatory 14 days' period required under Section 167 (1) of the Act.

Jurisdiction is defined in Halsbury's Laws of England (4 th Ed.) Vol. 9 as

***"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."***

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** 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...."***

The decision of the Supreme Court in *Samuel Kamau Macharia Case* is very critical in determining where the jurisdiction of this Board flows.

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.***

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 for 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. ....**

**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 (1) of the Act read with Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before it.

It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

Section 2 of the Act assigns the meaning of a candidate and a tenderer as follows:

***"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;***

The manner in which an aggrieved tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specifically under Regulation 203 of Regulations 2020 as follows:

***PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS***

***203. Request for a review***

***(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.***

***(2) The request referred to in paragraph (1) shall—***

***(a) .....***

***(b) .....***

***(c) be made within fourteen days of—***

***(i) the occurrence of the breach complained of, where the request is made before the making of an award;***

***(ii) the notification under section 87 of the Act; or***

***(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.***

***(d) .....***

***(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.***

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

Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act will be by way of a request for review. Further, this request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i)

occurrence of breach complained of, having taken place before an award is made, (ii) notification under Section 87 of the Act; or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

***87. Notification of intention to enter into a contract***

***(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.***

***(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.***

***(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.***

***(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.***

It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach.

Turning to the circumstances of this case, the Applicant avers that it received the letter of regret dated 20<sup>th</sup> April 2022 via email on 4<sup>th</sup> May 2022 and filed the instant Request for Review on 16<sup>th</sup> May 2022, thus within the 14 day statutory period. In support of this averment the Applicant attached an extract of the said email as annexure marked RO-8 in its Affidavit in Support of the Request for Review. The said email reads as follows in part:

***"Good evening,***

***Kindly find attach regret letter for tender you participated on supply delivery and commissioning of hansard system and equipment.***

***The hard copy hard been sent through the post.***

***Kind regards***

***Kiataria Kiptoo***

***HSCM"***

We note, contrary to the allegations by the Applicant that this email did not indicate that the letter of notification of regret had earlier been posted, the same actually indicated as much.

On the other hand, the Respondent contends that it posted the letter of regret dated 20<sup>th</sup> April 2022 to the Applicant via post on 20<sup>th</sup> April 2022. To support this contention the Respondent attached Certificate of Posting Registered postal article from Postal Corporation of Kenya bearing a stamp of 20<sup>th</sup> April 2022 annexed as Exhibit marked JC-4 in her Affidavit in Support of her Response to the Request for Review. We have perused the confidential documents submitted to us by the Respondent pursuant to Section 67(3)(e) of the Act and note that the original Certificate of Posting Registered postal article from Postal Corporation of Kenya were three in number. Each of the said Certificate of Posting Registered postal article

was with respect to one of the three tenderers who participated in the subject tender.

Important to the instant Request for Review, is the Certificate of Posting Registered Postal Article that concerned the Applicant. This original Certificate of Posting Registered Postal Article bore the following information:

***"SENDER'S NAME: Baringo County Assembly N.RD148661725KE***

***ADDRESS: BOX 159 KABARNET***

***POSTAGE PAID Shs 100/=***

***REGN. FEE Shs. 40/=***

***140/=***

***ADDRESSED TO: Baycoms Africa Ltd***

***ADDRESS: BOX 63373-00619***

***Accepting Officer's Initials .....[signature].....***

*(For regulations see over)*

We note that the aforementioned Certificate of Posting Registered Postal Article bore a stamp dated 20<sup>th</sup> April 2022 from Kabarnet. We also note all

the other two Certificates of Posting Registered Postal Article with respect to the other two tenderers bore the same stamp date of 20<sup>th</sup> April 2022.

We have studied the Applicant's original tender, which forms part of the confidential documents, and note that the Applicant provided its postal address as 63373-00619 Nairobi in its confidential business questionnaire at page 131 of its original tender. This postal address is what was contained in the letter of notification of regret dated 20<sup>th</sup> April 2022 addressed to the Applicant and was the same postal address in the aforementioned Certificate of Posting Registered Postal Article.

The Supreme Court in the case of **Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR** held as follows with respect to the burden of proof:

***'It is a timeless rule of the common law tradition <sup>3</sup>/<sub>4</sub> Kenya's juristic heritage <sup>3</sup>/<sub>4</sub> and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the "balance of probability". Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of which the Court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part.'***

In *Civil Appeal 17 of 2019 AIG Insurance Company Limited v Benard Kiprotich Kirui [2022] eKLR* in quoting the case of **Elizabeth Wambui Njuguna vs. Housing Finance Co. Kenya Ltd, Nairobi HCCC No. 293 of 2006** considered on whom the burden of proof lies with respect to postage by mail as follows: -

***"The Plaintiff ought to have brought evidence to show that the letter sent by the Defendants was not received by her and this could have been confirmed by the post master general."***

Section 3 (5) of the Interpretation and General Provisions Act provides as follows on registered post: -

***'Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post.*** [Emphasis ours]

The above provision of law allows for delivery of a document to be served by registered post and for the service of such a document on the

addressee to be deemed as having been effected at the time at which the letter would be delivered in the ordinary course of the post.

In ***Civil Appeal 17 of 2019 AIG Insurance Company Limited v Benard Kiprotich Kirui [2022] eKLR***, Justice R. Lagat Korir held as follows with respect to when delivery is deemed to have been effected on an addressee via post: -

***'It is probable that the Appellant was actually served. What is unclear is the exact date of postage that would be evidenced by an Affidavit of service and Certificate of posting or at the very least, a Post Office receipt confirming postage. It is common practice that when a document is posted, it is deemed to be delivered after two days.'***

The above case law fixes a period of two days as the ordinary time when a document posted is deemed to have been delivered.

The argument that the same does not indicate what document was posted does not hold any water because it cannot be a mere coincidence that the Certificates of Postage were only with respect to tenderers in the subject tender on 20<sup>th</sup> April 2022.

Accordingly, in this instant Request for Review, the Certificate of Postage Registered Article with respect to the Applicant is conclusive evidence of postage of the letter of regret to the Applicant on 20<sup>th</sup> April 2022. The aforementioned case law has on the other hand confirmed that in two days of postage, a mail is deemed to have been delivered.

In computing time on when the letter of regret addressed to the Applicant is deemed to have been delivered via post, 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 essence the date of posting being 20<sup>th</sup> April 2022 is excluded from computation of the two days for delivery and time starts running from 21<sup>st</sup> April 2022 and ends on 22<sup>nd</sup> April 2022. This means, the letter of regret addressed to the Applicant and posted via Postal Corporation of Kenya is deemed to have been delivered to the Applicant on 22<sup>nd</sup> April 2022.

Having established that the Letter of Notification of Regret dated 20<sup>th</sup> April 2022 is deemed to have been delivered to the Applicant on 22<sup>nd</sup> April 2022, time started running for purposes of the 14 day period on 23<sup>rd</sup> April 2022 and lapsed on 6<sup>th</sup> May 2022 being guided by Section 57(a) of the Interpretation of General Provision Act, Chapter 2 of the Laws of Kenya. In essence the Applicant had upto 6<sup>th</sup> May 2022 to file the instant Request for Review but instead filed the same on 16<sup>th</sup> May 2022 which was outside the statutory period of 14 days provided in Section 167(1) of the Act.

In light of the foregoing, we find and hold that the Applicant's Request for Review dated and filed on 16<sup>th</sup> May 2022 is time barred thus the Board has no jurisdiction to hear and determine the same. We therefore shall proceed

to down our tools at this point and shall not address the other issues framed for determination.

### **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act 2015, the Board makes the following orders in the Request for Review dated 16<sup>th</sup> May 2022: -

- 1. The Request for Review dated 16<sup>th</sup> May 2022 and filed on even date be and is hereby struck off for want of jurisdiction.**
- 2. Given the findings herein, each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 6<sup>th</sup> day of June 2022**

  
.....

**CHAIRPERSON**

**PPARB**

  
.....

**SECRETARY**

**PPARB**