

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 52 OF 2022 OF 22<sup>ND</sup> JUNE, 2022**

**BETWEEN**

**GURANDALA INVESTMENT LTD .....APPLICANT**

**VERSUS**

**THE ACCOUNTING OFFICER**

**COUNTY GOVERNMENT OF MARSABIT.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MARSABIT.....2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer in respect of Tender Number MBT/COU/T/HEALTH/11/2019-2020 – for Supply, Delivery and Installation, Testing and Commissioning of Medical Gas systems at Level 4 Hospital Sololo Makutano Sub-County Marsabit County.

**BOARD MEMBERS**

- |                       |                    |
|-----------------------|--------------------|
| 1. Ms Faith Waigwa    | - Chairperson      |
| 2. Mrs. Njeri Onyango | - Vice Chairperson |
| 3. Mr. Steven Oundo   | - Member           |
| 4. Mr. Ambrose Ogeto  | - Member           |
| 5. Ms Rahab Chacha    | - Member           |

**IN ATTENDANCE**

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

## **BACKGROUND OF THE AWARD**

### **The Tendering Process**

The County Government of Marsabit (hereinafter referred to as "the Procuring Entity" ), through its County Chief Officer, Department of Health Services invited bidders to submit bids in response to Tender No. MBT/COU/T/HEALTH/11/2019-2020 for Supply, Delivery and Installation, Testing and Commissioning of Medical Gas systems at Level 4 Hospital Sololo Makutano Sub-County Marsabit County (hereinafter referred to as "the subject tender") by way of Open Tendering Method pursuant to Section 96 of the Public Procurement and Asset Disposal Act 2015.

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

At the tender submission deadline, the Procuring Entity had received a total of three (3) bids. The tenders were opened on Friday 13<sup>th</sup> December, 2019 at DCSM Offices Governor's Office Building. The appointed Tender Opening Committee in its minutes recorded the following tenderers as having submitted their bids:

1. Partone Investment Limited;
2. Laismatt Enterprises Limited; and
3. Gurandala Investment Limited (hereinafter referred to as "the Applicant")

### **Evaluation of Tenders**

The 2<sup>nd</sup> Respondent appointed a Tender Evaluation Committee (hereinafter referred to as "the Evaluation Committee") as captured in the Evaluation Report signed by all members of the Evaluation Committee on 9<sup>th</sup> January 2020. Evaluation was done in the following three (3) stages:

1. Preliminary Evaluation/ Mandatory requirements;
2. Technical Evaluation; and

### 3. Financial Evaluation.

#### **Preliminary Evaluation/ Mandatory Requirements**

At this stage, the Evaluation Committee was required to apply the criteria as outlined as Eligibility Criteria for the Open Tender under clause 6.1 of the the Evaluation Report being the initial preliminary evaluation checklist qualification criteria for evaluation of the bids received from the tenderers.

At the end of the evaluation at this stage, one (1) tender was found to be non-responsive while two (2) tenders which included the Applicant's tender, were found to be responsive thus proceeded for the Technical Evaluation.

#### **Technical Evaluation**

At this stage, the Evaluation Committee was required to peruse all documents submitted individually and award marks as per the criteria for technical evaluation indicated under clause 6.3 of the evaluation report. At the end of evaluation at this stage, the evaluation committee determined one (1) tender non-responsive while the remaining tender, being the Applicant's tender, was determined to be responsive and thus proceeded to the next stage of evaluation.

#### **Financial Evaluation**

While evaluating the Applicant's tender, the Evaluation Committee was required to apply the criteria on financial evaluation under Clause 6.5 as detailed in the Evaluation report. The lowest evaluated tender to be considered for award must be economically responsive i.e. unit rates in the bill of quantities must realistically be within market rates and the tender sum be within reasonable range of the estimated budget.

#### **Recommendation**

The Evaluation Committee recommended award of the subject tender to the Applicant who had scored 75.5% as the highest total score of technical bid evaluated. The Applicant's quoted price was also the lowest bid at KES 18,995,150.00 (Eighteen Million, Nine Hundred Ninety-Five Thousand, One Hundred Fifty) only quoted from the form of tender thereof.

The next step of the procurement process would entail preparation of a Professional Opinion pursuant to Section 84 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") for presentation to the The Accounting Officer County Government of Marsabit, the 1<sup>st</sup> Respondent herein. However, information pertaining to details of the contents of the professional opinion, if any, are not available before this Board.

#### **Notification to Tenderer**

Vide a letter dated 15<sup>th</sup> January 2020 addressed to the Applicant from the procuring entity being the 2<sup>nd</sup> Respondent herein, the Applicant was notified of the outcome of the evaluation of its bid and was confirmed as the successful tenderer. The Applicant was awarded the Tender for Supply, Delivery and Installation, Testing and Commissioning of Medical Gas systems at Level 4 Hospital Sololo Makutano Sub-County Marsabit County.

#### **Acceptance**

In response to the Notification of the Award, the Applicant responded to the procuring entity vide a letter dated 22<sup>nd</sup> January 2020 indicating acceptance of the award for the subject tender and readiness to sign the contract document.

#### **Notification of Termination of Award**

On 8<sup>th</sup> June 2022, the Applicant received a letter dated 6<sup>th</sup> June 2022 from the procuring entity the subject of which read "Termination of Contract". From the body of the said letter, the procuring entity indicated that it was terminating the award for the subject tender. The reason advanced for termination was that the Applicant failed to avail itself to sign the agreement and take over the site. The tender would hence be re-advertised.

Consequently, the Applicant through its advocates, Roba & Associates, responded to the Procuring Entity's letter demanding for a rescission and/or withdrawal of the Procuring Entity's decision to terminate the tender award.

#### **REQUEST FOR REVIEW NO. 52 OF 2022**

Gurandala Investment Limited, being the Applicant herein, lodged a Request for Review dated and filed on 22<sup>nd</sup> June 2022 together with a Statement in Support of the Request for Review dated and filed on even date through the firm of Roba & Associates regarding the subject tender.

The Orders sought are:

- 1. A temporary injunction staying the decision of the 1<sup>st</sup> Respondent to re-advertise tender No. MBT/COU/T/HEALTH/8/2019-2020 pending the hearing and determination of this review.**
- 2. An order setting aside/vacating/cancelling/annulling/voiding the 1<sup>st</sup> Respondent's decision to cancel and re-advertise Tender No. MBT/COU/T/HEALTH/11/2019-2020 awarded to the Applicant on the 15<sup>th</sup> of January, 2020 and communicated through the letter dated 6<sup>th</sup> June, 2022.**

3. An order directed to the Respondents to cease and desist from commencing any fresh procurement proceedings in respect of the said tender or interfering with the Applicant's performance of the tender in any manner whatsoever.
4. An Order compelling the 1<sup>st</sup> Respondent to prepare a contract as mandated by Section 134 (1) of the Public Procurement Act and enter into a contract with the Applicant immediately as per the award granted to the Applicant dated the 15<sup>th</sup> of January, 2020
5. Any such orders as the Honourable Board may deem fit and just to issue.

The grounds relied on from the face of the Request for Review are that:

1. *In violation of Articles 10 (1) (c), 10 (2) (c), and 227 (1) of the Constitution, the principles enshrined in the Public Procurement and Asset Disposal Act, 2015, and the principle of rule of law as well as the legitimate expectation of candidates in procurement proceedings arising from Tender No. MBT/COU/T/HEALTH/11/2019-2020: Supply, Delivery, Installation, Testing, and Commissioning of Medical Gas Systems Level 4 Hospital Sololo Makutano Moyale Sub county Marsabit County, the Respondent has purported to terminate the award for the said tender made to the Applicant, re-advertise for the tender, and commence fresh procurement proceedings.*
2. *The purported termination of Tender No. MBT/COU/T/HEALTH/11/2019-2020: Supply, Delivery, Installation, Testing, and Commissioning of Medical Gas Systems Level 4 Hospital Sololo Makutano Moyale Sub county Marsabit County to pave way*



*for fresh procurement proceedings runs contrary to section 63(3) of the Public Procurement & Asset Disposal Act.*

- 3. The Respondents are in breach of Article 47 of the Constitution of Kenya, the Fair Administrative Action Act, 2015 as read with Article 227 (I) of the Constitution of Kenya.*
- 4. The first Respondent was in breach of Section 135 (3) of the Public Procurement and Assets Disposal Act, 2015 by failing to state clearly in the notification letter when the contract of the subject tender was to be entered into.*
- 5. The 1<sup>st</sup> Respondent having failed to prepare a contract within the tender validity period as required of her by Section 134 (1) of the Public Procurement and Disposal Act, she cannot now employ her own transgression as a basis of denying the Applicant a tender he was lawfully awarded by the County Government.*
- 6. The 1<sup>st</sup> Respondent was in breach of the Applicant's right by informing the Applicant that he was to enter into a contract with the 2<sup>nd</sup> Respondent on the 22<sup>nd</sup> of June, 2022 only to renege on her earlier undertaking on the basis that the contract validity period has lapsed.*
- 7. The Applicant is highly prejudiced by the unilateral and arbitrary termination of the award granted to it on the 15<sup>th</sup> of January, 2020 and terminated without any justifiable cause.*
- 8. Therefore, the purported termination, re-advertisement, and commencement of fresh procurement process is unlawful, spurious, and compromises the integrity of the entire procurement process,*

*hence this dispute is admissible in spite of section 167 (4) (b) of the Act.*

**BOARD'S NOTIFICATION TO THE RESPONDENTS OF THE FILED REQUEST FOR REVIEW**

In a Notification of Appeal and a letter dated 22<sup>nd</sup> June 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") notified the Respondents of the existence of the Request for Review and suspension of procurement proceedings for the subject tender while forwarding 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 1<sup>st</sup> Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 22<sup>nd</sup> June 2022. The said letter reads as follows:

***TO: 1) Chief Officer,***

***Department of Health Services, County Government of Marsabit P.O. Box 384-60500 MARSABIT.***

***2) GURANDALA INVESTMENT LTD***

***C/O Roba& Associates, Advocates***

***Madonna House, 2ND Floor, Suite 206,***

***Westlands Road, Off Mpaka Road, Westlands,***

***P.O. Box 22555-00400***

***NAIROBI***

***NOTIFICATION OF APPEAL***



**Tender No: MBT/COU/T/HEALTH/11/2019-2020 Item: SUPPLY AND INSTALLATION, TESTING AND COMMISSIONING OF MEDICAL GAS SYSTEMS AT ISOLO LEVEL 4 HOSPITAL.**

***You are hereby notified that on the 22<sup>nd</sup> June, 2022, a Request for Review was filed with the Public Procurement Administrative Review Board in respect of the above-mentioned tender.***

***Under Section 168 of the Public Procurement and Asset Disposal Act 2015, the procurement proceedings are hereby suspended and no contract shall be signed between the Procuring Entity and the tenderer awarded the contract unless the Appeal has been finalized.***

***A copy of the Request for Review is forwarded herewith to the Procuring Entity and the PPARB. Circular No. 02/2020 of 24<sup>th</sup> March 2020.***

***Dated on: 22<sup>nd</sup> June, 2022***

***MR. P. J. OKUMU***

***AG. BOARD SECRETARY***

**Regulation 205 (3) of the Public Procurement and Asset Disposal Regulations** mandates the Accounting Officer of a Procuring Entity to submit a written Memorandum in respect to the Request for Review together with confidential documents from the tendering process. The requirements under Section 205 (3) were also communicated to the 2<sup>nd</sup> Respondent as below:

***Chief Officer***

***Department of Health Services***

***County Government of Marsabit***

***P.O Box 384-60500***

***MARSABIT***

**Tender No. MBT/COU/T/HEALTH/11/2019-2020 Item: SUPPLY AND  
INSTALLATION, TESTING AND COMMISSIONING OF MEDICAL GAS  
SYSTEMS AT ISOLO LEVEL 4 HOSPITAL.**

*You are hereby informed that on 22<sup>nd</sup> June, 2022 a Request for Review was filed with the Public Procurement Administrative Review Board in respect of the above tender.*

*Please submit your response in 8 bound copies within 5 days from the date of this letter, including a soft copy of the response on the Review, background to the tender evaluation report and procurement officer's professional opinion. Your response should be filed separately from the confidential reports which should not be availed to other parties except as guided by section 67 of the Public Procurement and Asset Disposal Act 2015.*

*Please ensure that all documents submitted to the Review Board are properly paginated. You are required to complete the mandatory declarations in Part A of Schedule 1 Form 5 attached and submit the documents listed in Part D of the same Schedule. In addition, you are required to immediately submit to the undersigned the contact addresses of those who participated in this tender which should include their Postal address, Physical address, Email, Telephone and Fax numbers.*

*Please note that according to the Public Procurement and Asset Disposal Act 2015, the procurement process should be suspended and no contract subject to the Regulations can be signed between the Procuring Entity and the successful tenderers until the appeal has been finalized.*

***A copy of the Request for Review together with Schedule 1 Form 5 and the PPARB Circular No. 02/2020 of 24<sup>th</sup> March 2020 are forwarded herewith.***

***MR. P.J. OKUMU***

***AG. BOARD***

From the documents on record, a reminder was sent to the Accounting Officer of the Procuring Entity vide an email of 5<sup>th</sup> July, 2022 calling upon the Accounting Officer of the Procuring Entity to comply and furnish the Board with the confidential documents in the following terms:

***TENDER NO. MBT/COU/T/HEALTH/11/2019-2020 – FOR SUPPLY, DELIVERY AND INSTALLATION, TESTING AND COMMISSIONING OF MEDICAL GAS SYSTEMS AT LEVEL 4 HOSPITAL SOLOLO MAKUTANO SUB-COUNTY MARSABIT COUNTY.***

***Reference is made to the Notification of Appeal for Request of Review No. 52 of 2022 dated 22<sup>nd</sup> June, 2022 and served on you via email on the same day and a hard copy dispatched on 23<sup>d</sup> June, 2022. The above notification required you to submit your response together with all the original tender documents within 5 days.***

***Kindly note the provisions of Regulation 205 the Public Procurement and Asset Disposal Regulations, 2020 which provides that:***

***"(3) Upon being served with a notification of a request, the procuring entity shall (a) Notify the Secretary of the names and contact details of all parties to the review; and (b) within five days or such lesser period as may be specified by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the reasons for the request together with such documents as the Secretary may specify."***

***Further note the provision of Regulations 205 (4) of the Regulations' which provides that: ----***

***(4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.***

***Please note that the operations of the Board are time bound and matters must be concluded within 21 days. Therefore, the five days within which you were required to submit your response lapsed on or about 27th June, 2022. In view of the above, you are requested to submit all the Tender Documents requested to enable the Board perform its work.***

***Your prompt response and attendance will be of essence.***

***MR. P.J. OKUMU***

***AG. BOARD SECRETARY***

Despite the above notifications, the Respondents did not file their response nor forward any of the requested confidential documents to the Board. This is in violation of provisions of Section 67 (3) of the Act as read together with regulation 205 of the Regulations.

Regulation 205 states:

***205. Notification of the review and suspension of procurement proceedings***

***(1) The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.***

***(2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the Review Board Secretary.***

***(3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified.***

***(4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.***

***(5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3)***

The Applicant proceeded to file their submissions dated 7<sup>th</sup> July 2022 and filed on an even date. Attached to their submissions are the following High Court and Board decisions relied on:

1. Kenya Akiba Micro Financing Limited V Elizabeth Chebii & 14 Others [2012] eKLR.
2. Republic V Public Procurement Administrative Review Board; Principal Secretary, State Department of Interior, Ministry of Interior and Co-ordination of National Government (Interested Party); Ex Parte CMC Motors Group Limited [2020] eKLR.

3. PPARB Review Number 119/2020 of 17<sup>th</sup> August 2020 Rhombus Construction Company Limited V The Accounting Officer Kenya Ports Authority & Kenya Ports Authority.
4. PPARB Review Number 14/2016 of 4<sup>th</sup> March 2016 Rentco East Africa Limited/Lantech Africa Limited, Toshiba Corporation Consortium V Kenya Electricity Generating Company Limited (Kengen).

### **APPLICANT'S CASE**

The Applicant states that the Procuring Entity actions in purporting to terminate the subject tender and thereafter re-advertise the same violated the Constitution, the principles enshrined in the Public Procurement and Asset Disposal Act, 2015, and the principle of rule of law as well as the legitimate expectation of candidates in procurement proceedings arising from Tender No.BT/COU/T/HEALTH/11/2019-2020: Supply, Delivery, Installation, Testing, and Commissioning of Medical Gas Systems at Level 4 Hospital at Sololo Makutano Moyale Sub county Marsabit County.

The Applicant further states that the purported termination of the subject tender to pave way for fresh procurement proceedings runs contrary to section 63(3) of the Public Procurement & Asset Disposal Act.

The Applicant submits that the Procuring Entity was in breach of Section 135 (3) of the Public Procurement and Assets Disposal Act, 2015 by failing to state clearly in the notification letter when the contract of the subject tender was to be entered into.

The Applicant avers that the 1<sup>st</sup> Respondent having failed to prepare a contract within the tender validity period as required of her by Section 134 (1) of the Public Procurement and Disposal Act, cannot now employ its own transgression as a



basis of denying the Applicant a tender it was lawfully awarded by the County Government.

The Applicant further avers that the 1<sup>st</sup> Respondent was in breach of the Applicant's rights by informing the Applicant that he was to go into a contract with the 2<sup>nd</sup> Respondent on the 22<sup>nd</sup> June, 2022, only to renege on its earlier undertaking on the basis that the contract validity period has lapsed. The Applicant holds the Respondents in breach of Article 47 of the Constitution of Kenya, the Fair Administrative Action Act, 2015 as read with Article 227(1) of the Constitution of Kenya.

The Applicant submits that it is highly prejudiced by the unilateral and arbitrary termination of the award granted to it on the 15<sup>th</sup> of January, 2020 and terminated without any justifiable cause and therefore, the purported termination, re-advertisement, and commencement of fresh procurement process is unlawful, spurious, and compromises the integrity of the entire procurement process, hence this dispute is admissible in spite of Section 167 (4) (b) of the Act.

### **BOARD'S DECISION**

Having considered the Applicant's pleadings and submissions, and in the absence of a response by the Respondents, the Board finds that the following issues call for determination:

1. Whether termination of the award by the Procuring Entity was done in accordance with Section 63 of the Act as read together with Article 227 of the Constitution, thereby ousting the jurisdiction of the Board;
2. Whether the tender validity period has lapsed; and
3. What are the appropriate Orders to issue in the circumstances?

The first issue for determination is **whether termination of the award by the Procuring Entity was done in accordance with Section 63 of the Act as read together with Article 227 of the Constitution, thereby ousting the jurisdiction of the Board.**

Section 63 of the Act sets out the process and grounds for terminating procurement proceedings and where the Board is satisfied that the requirements of Section 63 are met its jurisdiction is then ousted by reason of the provisions Section of 167 (4) (b) of the Act.

***Section 167 (4)(b) states as follows:***

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

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

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

***(c)...***

As already observed, the jurisdiction of the Board flows from Section 167(1) of the Act which provides that:

***"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."***

It is trite law that jurisdiction is everything and when the question arises the Court or tribunal seized of the matter must as a matter of prudence enquire into it before doing anything concerning the matter in respect of which it is raised. The '*locus classicus*' on jurisdiction is the celebrated case of **The Owners of the Motor Vessel "Lillians" -V- Caltex Oil Kenya Ltd (1989) KLR 1** where Nyarangi J.A. held:

*"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."*

The Supreme Court of Kenya in the case of **Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, observed that:

*"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any*

*proceedings...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."*

In PPARB Review Number 21/2022 of 3<sup>rd</sup> March 2022 Cathemax Investments Limited V The County Government of Nyamira and The Accounting Officer County Government of Nyamira, the Board expressed itself as follows:

*"The Board has jurisdiction to interrogate whether the 2<sup>nd</sup> Respondent in arriving at his decision to terminate the procurement proceedings of the subject tender met the statutory pre-conditions for termination set out under Section 63 of the Act. In the event that we find the termination of procurement proceedings of the subject tender by the 2<sup>nd</sup> Respondent met the statutory pre-conditions for termination for termination set out in Section 63 of the Act then the Board's jurisdiction will be ousted by dint of Section 167(4)(b) of the Act in which case we shall down our tools at that stage. However, if we find that the decision to terminate the procurement proceedings of the subject tender by the 2<sup>nd</sup> Respondent did not meet the statutory pre-conditions for termination set out in Section 63 of the Act, we will deem such termination not to be in accordance with Section 63 of the Act, illegal and thus shall proceed to consider and determine the issues raised in the instant Request for Review having found that the Board's jurisdiction has not been ousted by dint of Section 167(4)(b) of the Act."*

Termination of procurement proceedings are guided by provisions of Section 63 of the Act which provides:

***63. Termination or cancellation of procurement and asset disposal proceedings.***

***(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—***

- (a) the subject procurement has been overtaken by—***
  - (i) operation of law; or***
  - (ii) substantial technological change.***
- (b) inadequate budgetary provision;***
- (c) no tender was received;***
- (d) there is evidence that prices of the bids are above market prices;***
- (e) material governance issues have been detected;***
- (f) all evaluated tenders are non-responsive;***
- (g) force majeure;***
- (h) civil commotion, hostilities or an act of war; or***
- (i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.***

***(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.***

***(3) A report under subsection (2) shall include the reasons for the termination.***

***(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.***

The Procuring Entity's letter dated 6<sup>th</sup> June 2022, terminating the award states:

*Dear Sir/Madam,*

**RE:TERMINATION OF CONTRACT**

**TENDER NO: MBT/COU/T/HEALTH/11/2019-2020**

**ITEM: SUPPLY, DELIVERY AND INSTALLATION, TESTING, AND COMMISSIONING OF MEDICAL GAS SYSTEMS LEVEL 4 HOSPITAL SOLOLO MAKUTANO MOYALE SUB COUNTY MARSABIT COUNTY. (AMOUNT 18,995,150)**

***We would like to regrettably inform you that we are terminating the award for the above tender. The reason for termination is that you failed to avail yourself to sign the agreement and take over the site. This tender will therefore be re-advertised.***

***Thank you for your interest to work with us.***

***Yours Faithfully,***

***Grace Galmo***

***Chief Officer Health***

It is quite clear that the Procuring Entity purported to terminate a tender that had already been awarded. Procurement proceedings can only be terminated prior to notification of an award to a successful bidder. Section 63 provides for termination of procurement and not termination of an award.

Additionally, the Procuring Entity did not comply with provisions of Section 63(2) of the Act which require the Accounting officer to give the Authority a written



report on the termination within fourteen days which includes reasons for termination.

The Applicant submits that the 1<sup>st</sup> Respondent's purported cancellation of the tender award and intended re-advertisement is illegal and does not advance the Constitutional values and principles set out under Article 10 and specifically the values of accountability and transparency due to its whimsical and unilateral nature.

**Article 10 on National Values and Principles of governance provides:**

- (1) *The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—***
  - (a) *applies or interprets this Constitution;***
  - (b) *enacts, applies or interprets any law; or***
  - (c) *makes or implements public policy decisions***
- (2) *The national values and principles of governance include—***
  - (a) *patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***
  - (b) *human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;***
  - (c) *good governance, integrity, transparency and accountability; and***
  - (d) *sustainable development.***

Additionally, the Procuring Entity failed to adhere to the mandatory principles of public procurement set out under **Article 227(1) of the Constitution.**

**Article 227 (1) stipulates:**

- (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.**

In PPARB Review Number 9 of 2022 of Intertek Testing Services (EA) PTY Limited & Another vs Energy and Petroleum Regulatory Authority & others the Board stated:

***"Section 63 of the Act is instructive on termination of procurement proceedings being undertaken by an accounting officer of a procuring entity at any time before notification of award is made and such termination must only be effected if any of the circumstances enumerated in Section 63(1)(a) to (i) are present. This is the substantive statutory pre-condition that must be satisfied before a termination of procurement proceedings is deemed lawful.***

***Further, following such termination, an accounting officer is required to give the Authority a written report on the termination with reasons and notify all tenderers, in writing, of the termination with reasons within fourteen (14) days of termination. This is the procedural statutory pre-conditions that must be satisfied before a termination of procurement proceedings is deemed lawful.***

***It is only after both the substantive and procedural statutory pre-conditions of termination are satisfied, that a termination of procurement proceedings can be deemed to have been effected in accordance with Section 63 of the Act for the Board's jurisdiction to be ousted by dint of Section 167(4)(b) of the Act."***

The Applicant argues that the decision by the Procuring Entity to unilaterally terminate the tender award is also contrary to the provisions of Article 47 (1) of the Constitution which states that:

- "1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.***
- 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"***

Administrative action has been defined to include any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

**Section 4(3) of the Fair Administrative Action Act, 2015** provides:

- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***
  - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;***
  - (b) an opportunity to be heard and to make representations in that regard;***
  - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***
  - (d) a statement of reasons pursuant to section 6;***
  - (e) notice of the right to legal representation, where applicable;***

***(f) notice of the right to cross-examine or where applicable; or  
(g) information, materials and evidence to be relied upon in  
making the decision or taking the administrative action***

The Board finds that the decision to terminate the award of the subject tender by the 2<sup>nd</sup> Respondent did not meet the statutory pre-conditions for termination set out in the Act, and deems such termination not to be in accordance with the principles articulated under Article 227 of the Constitution and Section 63 of the Act. As such, the Board's jurisdiction has not been ousted by dint of Section 167 (4)(b) of the Act.

The next issue for determination is **whether the tender validity period has lapsed.**

The Board did not have an opportunity to review confidential documents pertaining to the tendering process since the Procuring Entity did not file its response to the Request for review nor comply with the notification from the Acting Board Secretary to file confidential documents. We have relied on averments made by the Applicant and documents presented in support of the Request for Review.

The Applicant in its submissions urges the Board to consider the averments in its application together with the affidavit in support thereof as uncontroverted by the Respondents and hence true or unchallenged in any way. The Applicant submits that it is trite law that where a defendant fails to adduce any evidence or reply to a pleading or facts stated in a sworn affidavit, the claimants case or claim against them remains uncontroverted or unchallenged and is therefore taken to be true. The Applicant referred the Board to the case of **Kenya Akiba Micro Financing**

**Limited V Ezekiel Chebii & 14 others [2012]** where Hon. Justice Mabeya stated that:

***"...a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter."***

We note from the Applicant's annexures that a notification of award was issued by the Procuring Entity on 15<sup>th</sup> January 2020. The Applicant communicated its acceptance of the Award on 20<sup>th</sup> January 2020. However, parties did not proceed to sign any contract. Vide the letter dated 6<sup>th</sup> June 2022, received by the Applicant on 8<sup>th</sup> June 2022, the Procuring Entity communicated its intention to terminate the award and re-advertise due to failure by the Applicant to sign the agreement. This is despite the averments by the Applicant that it made constant follow ups on signing the contract but was never invited by the Procuring Entity to sign the contract.

It is also important to note that the notification of award dated 15<sup>th</sup> January 2020 did not stipulate timelines as to when parties would sign the contract.

**Section 87 of the Act** provides:

***87. (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.*

As much as a notification of award does not form a contract nor reduce the validity period for a tender, the successful bidder anticipates and has a legitimate expectation that they will enter into a contract with the Procuring Entity.

Section 134(1) of the Act stipulates that the accounting officer shall be responsible for preparation of contracts in line with the award decision. In addition, Section 135 of the Act makes provision on creation of procurement contracts and states:

***Section 135***

- (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***

Section 136 of the Act provides for refusal to sign a contract and states:

***136. (1) If the person submitting the successful tender refuses to enter into a written contract in writing as required under section 135 and section 61 of this Act, he or she shall forfeit his or her tender security and the procurement process shall proceed with the next lowest evaluated tenderer.***

***(2) This section does not apply if the period during which tenders shall remain valid has already expired.***

Pursuant to a Notification of Award, a contract in writing should be executed between the person(s) submitting the successful tender and the Accounting Officer of the Procuring Entity and no contract is formed unless the written agreement is signed and the same ought to be done within the tender validity period.

**Section 88 of the Act** provides for extension of tender validity period and states as follows:

- (1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.***
- (2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.***
- (3) An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.***

***(4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1).***

A tender remains valid for a specific period of time as indicated in the tender documents. An accounting officer is only allowed under the Act to extend the tender validity period in writing for a period of not more than 30 days. Such extension can only be done once.

In the Applicant's Supporting Affidavit sworn on 22<sup>nd</sup> July 2022 by the Applicant's director, Hussein Rob Jattani, states under paragraph 5:

***5. THAT, however, a proposed date when we were supposed to sign the contract between ourselves and the 1<sup>st</sup> Respondent was conspicuously missing from the award letter in blatant violation of Section 135(3) of the Public Procurement and Assets Disposal Act, 2015; this was further compounded by the fact that we received no further communication from the 1<sup>st</sup> Respondent as when the contract will be ready, leaving us in a limbo.***

In this instance, the Board is not in a position to determine the tender validity period and can only make assumptions on the same.

**What are the appropriate Orders to issue in the circumstances?**

The powers of the Board have been stipulated under Section 173 of the Act. In light of the foregoing, the Board makes the following orders in the Request for Review dated 22<sup>nd</sup> June, 2022.

- 1. The Letter of Notification of Cancellation of the Award in respect of Tender Number MBT/COU/T/HEALTH/11/2019-2020 for Supply, Delivery, Installation, Testing and Commissioning of Medical Gas Systems Installations at Level 4 Hospital at Sololo Makutano Moyale Sub County Marsabit County, dated 6<sup>th</sup> June, 2022 issued to the Applicant in the subject tender by the Procuring Entity be and is hereby cancelled and set aside.**
- 2. The Procuring Entity is hereby directed to enter into a written contract with the Applicant herein subject to the strict adherence with provisions of Section 135(3) of the Act and complete the procurement process to its logical conclusion .**
- 3. The Acting Board Secretary of the Public Procurement Administrative Review Board is hereby directed to furnish the Director General of the Public Procurement Regulatory Authority with this decision for purposes of taking lawful action against the Respondent, regarding the failure of the Accounting Officer to provide the Board with the confidential documents relating to this Tender with a request for the Director General to initiate appropriate proceedings and/or action in terms of Regulations 205 (4) of the Regulation.**

4. In view of the Board's findings and orders above, we order that the Procuring Entity shall bear the Applicant's costs of this Request for Review amounting to Kshs. 117,488/- (Kenya Shillings One Hundred and Seventeen Thousand Four Hundred and Eighty-Eight) only

Dated at Nairobi, this 13<sup>th</sup> Day of July, 2022



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**CHAIRPERSON**  
**PPARB**



.....

**SECRETARY**  
**PPARB**

