

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 53/2022 OF 22<sup>ND</sup> JUNE 2022**

**BETWEEN**

**PARTONE INVESTMENT LTD.....APPLICANT**

**AND**

**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 County Government of Marsabit with respect to Tender No. MBT/COU/T/HEALTH/8/2019-2020 for the Supply and Installation of Data, Voice, CCTV, and Access Control System Installation Works at Level 4 Hospital at Sololo Makutano Moyale Sub-County Marsabit County.

**BOARD MEMBERS**

- |                           |               |
|---------------------------|---------------|
| 1. Ms Faith Waigwa        | - Chairperson |
| 2. Ms. Phyllis Chepkemboi | - Member      |
| 3. Mr. Nicholas Mruttu    | - Member      |
| 4. Dr Paul Jilani         | - Member      |
| 5. Ms Isabella Juma       | - Member      |

## **IN ATTENDANCE**

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

## **BACKGROUND TO THE DECISION**

### **The Tendering Process**

The County Government of Marsabit, (hereinafter referred to as, "the Procuring Entity"), advertised Tender No. MBT/COU/T/HEALTH/8/2019-2020 for the Supply and Installation of Data, Voice, CCTV, and Access Control System Installation Works at Level 4 Hospital at Sololo Makutano Moyale Sub-County Marsabit County (hereinafter referred to as the 'subject tender') by way of Open Tendering Method.

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

According to the Evaluation Report dated 9<sup>th</sup> January 2020 submitted by the Applicant, a total of two (2) bids were received and opened on 13<sup>th</sup> December 2019 at the DSCM offices Governor's Office Building.

The following bidders submitted their bids: -

1. M/s. Galcha Construction and Suppliers Ltd.
2. M/s. Partone Investment Limited

### **Evaluation of Tender Bids**

An Evaluation Committee evaluated tender bids in three stages, namely;

- i. Mandatory/Eligibility Evaluation;
- ii. Technical Evaluation; and

### iii. Financial Evaluation

#### **Mandatory/ Eligibility Evaluation**

At this stage of evaluation, the Evaluation Committee evaluated the tender bids received by the Procuring Entity against the mandatory requirements as outlined in the Tender Document. Upon conclusion of the preliminary evaluation, the firm of M/s Galcha Construction and Suppliers Ltd was found non-responsive. Only one (1) firm M/s. Partone Investment Limited was found responsive and therefore proceeded to Technical Evaluation.

#### **Technical Evaluation**

At this stage of evaluation, each of the four members of the Evaluation team evaluated M/s Partone Investment Limited against the technical criteria in the Tender Document. At the end of the evaluation at this stage, the Evaluation Committee determined M/s. Partone Investment Limited responsive and proceeded to Financial Evaluation with an average score of 71.25% and therefore proceeded to the Financial Evaluation stage.

#### **Financial Evaluation**

At this stage, the Evaluation Committee was to consider the lowest evaluated tender for the award, having established that the proposed prices are within the market rates and within the estimated budget of the Procuring Entity.

At the end of the evaluation at this stage, the Evaluation Committee determined M/s. Partone Investment Limited as the lowest evaluated tenderer at its tender sum of KES 25,830,850.00 (Kenya Shillings Twenty-

Five Million, Eight Hundred and Thirty Thousand, Eight Hundred and Fifty) only.

### **The Evaluation Committee's Recommendation**

In view of the evaluation process, the Evaluation Committee resolved and recommend an award of the Tender No. MBT/COU/T/HEALTH/8/2019-2020 to M/s. Partone Investment Limited on account of its highest total score of technical bid evaluated and lowest quoted price.

### **Notification of Award**

In a letter dated 15<sup>th</sup> January 2020 the Procuring Entity notified the Applicant of the award of the subject tender which the Applicant accepted vide a letter dated 22<sup>nd</sup> January 2022.

### **THE REQUEST FOR REVIEW NO. 53 OF 2022**

M/s Partone Investment Limited, (hereinafter referred to as "the Applicant"), lodged a Request for Review dated and filed on 22<sup>nd</sup> June 2022 (hereinafter referred to as "the Request for Review") together with a Supporting Affidavit dated and filed on even date through the firm of Roba & Associates.

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

- i. 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.***

- ii. An order setting aside/vacating/cancelling/annulling/voiding the 1<sup>st</sup> Respondent's decision to cancel and re-advertise MBT/COU/T/HEALTH/8/2019-2020 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 and vide an email dated 21<sup>st</sup> of June, 2022.***
- iii. 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.***
- iv. 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.***
- v. Any such orders as the Honorable Board may deem fit and just to issue.***

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

with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

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

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

The Applicant lodged written submissions dated 7<sup>th</sup> July 2022. The Procuring Entity did not file any Written submissions.

### **THE APPLICANT'S CASE**

The Applicant argues that the Respondents' purported action of terminating the subject tender is illegal being done contrary to the provisions of Section 63 of the Act. The Applicant contends that the Respondents purport to terminate the subject tender on the grounds that the Applicant had failed to avail itself in signing the tender contract and taking over the site are unilateral and arbitrary since the 1<sup>st</sup> Respondent had violated the provisions of Section 135(3) of the Act.

The Applicant avers that vide a letter of notification of award dated 15<sup>th</sup> January 2020, the Respondents informed the Applicant that it had been awarded the subject tender. However, the said letter of notification did not indicate a date of which the 1<sup>st</sup> Respondent and itself were to sign the tender contract upon the lapse of the 14-day period provided for under Section 135 (3) of the Act.

Accordingly, on the inquiry of the Applicant the 1<sup>st</sup> Respondent excused the lack of a contract signing date on the notification of award to there being no urgency. The Applicant avers that the 1<sup>st</sup> Respondent attributed the lack of urgency to the fact that the building upon which the subject tender was based had not yet been erected. The Applicant further avers that the 1<sup>st</sup> Respondent also blamed the aforesaid delay on the COVID-19 pandemic that was at the time ravaging the country.

The Applicant avers that it proceeded to signify their acceptance vide a letter dated 20<sup>th</sup> January, 2020 in order to comply with the law and the terms of the notification letter. However, vide a letter dated 6<sup>th</sup> June 2022 but received by the Applicant on 8<sup>th</sup> June 2022, the 1<sup>st</sup> Respondent notified it of the Respondents' decision to terminate the subject tender on the basis that the Applicant had failed to avail itself to sign the contract and take-over the site. Consequently, the Respondents further informed it that they would be re-advertising the tender.

In response to this, the Applicant claims that it wrote a demand letter dated 8<sup>th</sup> June 2022 through the firm of Roba & Associates to the Respondents demanding that they rescind their decision to terminate the subject tender to which, the 1<sup>st</sup> Respondent responded vide an email dated

20<sup>th</sup> June 2022 agreeing to rescind their decision to terminate the subject tender, further indicating their intention of proceeding with the signing of the tender contract the following day being 21<sup>st</sup> June 2022 at 10:00a.m.

The Applicant avers that this intention to signing the tender contract was later withdrawn vide an email dated 21<sup>st</sup> June 2022, where the 1<sup>st</sup> Respondent communicated to the Applicant that they were no longer proceeding with said signing for reason that the tender validity period of the subject tender had lapsed. This being the case, the Respondents referred to its earlier decision to re-advertising the tender.

The Applicant argues that the Respondents have willfully disobeyed the provisions of the law, specifically those outlined under Section 135 (3) and Section 63 of the Act, in wrongfully terminating and seeking to re-advertise the subject tender. As a result of said breach, it is the Applicant's case that it has suffered loss and damages in the form of expenses used in travelling to different countries shopping for items to be used in the subject tender. Accordingly, the Applicant urges the Board to prevent the prevailing illegality by pronouncing itself on the matter and granting the prayers that the Applicant has prayed for.

### **The Respondents Case**

Despite the Notification of Appeal dated 22<sup>nd</sup> June 2022 issued pursuant to Regulation 205 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "the Regulations"), the Procuring Entity did not file its response within the statutory 5 days. This prompted the Acting Board Secretary to issue a further Notification dated 5<sup>th</sup> July 2022. To date,



the Respondents have continued in their intentional contumacious disobedience.

### **BOARD'S DECISION**

The Board has considered the Applicant's case, pleadings, documents and its written submission submitted to the Board and finds that the following issues crystalize for determination: -

- 1. Whether the Board has jurisdiction to entertain the Request for Review dated 22<sup>nd</sup> June 2022 filed by the Applicant challenging the Respondents' termination of the subject tender.**

In order to address the first issue, the Board shall make a determination of the following sub-issues: -

- i. Whether the Request for Review dated and filed on 22<sup>nd</sup> June 2022 was filed within the statutory period of fourteen days (14) of notification of award or date of occurrence of breach at any stage of the procurement process as provided in Section 167 (1) of the Act read with Regulation 203 (2) (c) of the Regulations;**

Depending on the determination of sub-issue (i) above: -

- ii. Whether a valid contract was entered into in adherence to Section 135 of the Act in this way divesting the Board**

**of its jurisdiction by dint of Section 167(4)(c) of the Act;**

Depending on the determination of sub-issue (ii) above: -

- iii. Whether the Respondents terminated the subject tender's procurement proceedings in accordance with Section 63 of the Act in this way divesting the Board of its jurisdiction by dint of Section 167(4)(b) of the Act;**

Depending on the outcome of the first issue;

## **2. What orders should the Board grant in the circumstances.**

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

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 is litigated before it or to take cognizance of matters presented in a formal way for decision."***

In his book, "Words and Phrases Legally Defined", Vol. 3, John Beecroft Saunders defines jurisdiction as follows: -

***"By jurisdiction is meant 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 its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court [or other decision-making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.” [Emphasis by the Board]*

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).

In consideration to the foregoing, we observe it to be 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]

Assumption of jurisdiction by courts and other decision-making bodies in Kenya is a subject regulated by the Constitution, by statute law, or both.

From the foregoing, it is sufficiently settled that the jurisdiction of a court, tribunal or any other decision-making body is derived from the Constitution, an Act of Parliament or both. This Board is a creature of an Act of Parliament owing to the provisions of section 27 of the Act with specific functions expressed in section 28 of the Act 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.***

***(2) .....***

***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."***

In order to invoke the jurisdiction of the Board, the conditions set out in section 167 (1) of the Act must be satisfied. The said provision states as follows: -

***"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the***

***alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."***

***[Emphasis ours]***

Section 167 (1) of the Act gives aggrieved candidates and tenderers who claim to have suffered or risk suffering loss or damage due to a breach of a duty imposed on a procuring entity by the Act or the Regulations a right to 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. Regulation 203 (2) (c) of the Regulations, expounds on the manner in which the fourteen-day period for seeking administrative review can be applied as follows: -

***"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) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;***

***b) be accompanied by such statements as the applicant considers necessary in support of its request;***

***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.”***

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, such request for review is to take the 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 the Regulations and the Fourteenth Schedule of the Regulations 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.

The Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches.

In this instant application, the Applicant bases its claim on a wrongful termination of tender contrary to Section 63 of the Act. To this end, the Board takes note of paragraph 8 of the Applicant's Supporting Affidavit that avers as follows: -

***"THAT vide a letter dated 6<sup>th</sup> June, 2022, but received by the Applicant on the 8<sup>th</sup> of June, 2022. The County Government of Marsabit through its Chief Officer, Health without citing any legal provisions, wrote to the Applicant informing and/or notifying it that it had decided to terminate the award for Tender No. MBT/COU/T/HEALTH/8/2019-2020 on the basis that the Applicant had failed to avail itself to sign the agreement and take over the site. Consequently, stated the letter, the tender will be re-advertised....."***

It is from the above-reading that the Board infers the Applicant's argument to the effect of claiming that since it received the letter of termination dated 6<sup>th</sup> June 2022 on the 8<sup>th</sup> June 2022 and lodged its Request for Review on 22<sup>nd</sup> June 2022, it was well within the statutory period of 14 days specified in Section 167 (1) of the Act. In the upshot, the Board is properly seized of the matter at hand.

**Whether a valid contract was entered into in adherence to Section 135 of the Act in this way divesting the Board of its jurisdiction by dint of Section 167(4)(b) of the Act**

Creation of Procurement Contracts is governed by Section 135 of the Act and where such creation meets the requirements of Section 135 of the Act, the jurisdiction of this Board is ousted by dint of Section 167 (4) (c) of the Act.

The provisions of Section 135 of the Act stipulate as follows: -

***"135. Creation of procurement contracts***

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

***(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender***

*based on the tender documents and any clarifications that emanate from the procurement proceedings.*

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

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

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

.....  
.....

*(7) A person who contravenes the provisions of this section commits an offence."*

The Applicant alleges that the Respondents acted contrary to the foresaid section by failing to indicate in the contended notification letter dated 15<sup>th</sup> January 2020, the period in which the contract would be entered into.

We reproduce the letter of notification of award below: -

**"RE: MBT/COU/T/HEALTH/8/2019-2020**

**15<sup>th</sup> January, 2020**

**M/S PARTONE INVESTMENT LTD  
P.O. BOX 123 -60700  
MARSABIT**

**RE: NOTIFICATION OF AWARD FOR TENDER**

**TENDER NO: MBT/COU/T/HEALTH/8/2019-2020**

**TENDER NAME: SUPPLY AND INSTALLATION OF DATA, VOICE,  
CCTV AND ACCESS CONTROL SYSTEM INSTALLATION WORKS AT  
LEVEL 4 HOSPITAL AT SOLOLO MAKUTANO MOYALE SUB COUNTY  
MARSABIT COUNTY**

Further to your bid submission for the above referenced, we are pleased to confirm that M/s. PARTONE INVESTMENT LIMITED have been awarded the Tender "*Supply and Installation of Data, Voice, CCTV and Access Control System Installation Works at Level 4 Hospital at Sololo Makutano Moyale Sub County Marsabit County*" as per specifications in the Bid Document.

This award is subject to the following terms and conditions:

***1. Amount of Award***

The total amount of the award will be Kes 25,830,850 (*Twenty-Five Million, Eight Hundred and Thirty Thousand, Eight Hundred and Fifty Only*) VAT Inclusive.

***2. Duration of the Contract***

The County of Marsabit will advise a Delivery schedule in the contract showing staged of the contract execution for approval by the contact persons.

### ***3. Acceptance and Commitment***

**Please sign and stamp, below and return a copy of this letter within 14 days as confirmation of acceptance of the award and the terms, failure to which the award will be deemed to have been declined by *M/s. PARTONE INVESTMENT LIMITED* and withdrawn by the *COUNTY GOVERNMENT OF MARSABIT*.**

**Yours faithfully,**

**Ms. Fatuma Jillo  
CHIEF OFFICER, HEALTH SERVICES."**

The Applicant avers that it complied with the all the terms of the aforesaid said letter specifically condition 3, whereby it signified its acceptance vide a letter of acceptance dated 20<sup>th</sup> January 2020.

Yet, even with the foregoing considered and the Applicant's inquiry on the intended date of signing the contract, the Respondents still failed to notify it of the requested date. Instead, the Applicant avers that Respondents' addressed their concerns by excusing the delay on the subsisting erection of the building to which the tender was subject to, while also excusing the delay on the COVID-19 pandemic that was then rampaging the country at that point in time.

Indeed, the Board observes that the contended notification letter did not indicate the period in which the contract was to be entered into, in this

way acting contrary to Section 135 (3) of the Act. It is also the Board's observation that till date, no contract has been entered into between the 1<sup>st</sup> Respondent and the Applicant as the invitation for a contract signing vide email dated 20<sup>th</sup> June 2022 was recalled before it materialized vide email dated 21<sup>st</sup> June 2022.

Section 135 (3) of the Act intends for a contract to be entered into within the tender validity period considered in the Tender Document. To this end, we find it important to note that the subject Tender Document considered herein has neither been adduced by the Applicant nor the Procuring Entity; as such, we find it difficult to conclusively determine the tender validity period considered in said Tender Document which would have help us determine a time frame in which the contract should have been entered.

Be that as it may, we make reference to the email of the 1<sup>st</sup> Respondent dated 21<sup>st</sup> June 2022 addressed to the Applicant. The said email indicated the Respondents' reason for terminating the subject tender to the expiration of the tender validity period. The email read as follows: -

***"Dear Hussein, on review of our decision by the legal department, we have come to realize that we are outside the tender validity period and therefore cannot go on with signing of the contract agreement.[Emphasis ours]***

***We will be forced to re-advertise and you have a chance to re-tender.***

*We regret any inconvenience caused by these decisions.*

*Regards,*

*Grace Galmo Boru  
Chief Officer Health Services  
Marsabit County"*

As stated hereinabove, neither the Applicant nor the Procuring Entity adduced the Tender Document of the subject tender. In the circumstances we are unable to determine whether the tender validity period has expired. We say no more concerning the particular subject save for the disposition rendered herein below.

**Whether the Respondent terminated the subject tender's procurement proceedings in accordance with Section 63 of the Act in this way divesting the Board of its jurisdiction by dint of Section 167(4)(b) of the Act**

Termination of procurement proceedings is governed by Section 63 of the Act and where such termination meets the requirements of Section 63 of the Act, the jurisdiction of this Board is ousted by dint of Section 167 (4) (b) of the Act.

Section 63 of the Act provides as follows: -

**(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—[Emphasis ours]**

- (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. [Emphasis ours]**
- (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.**

***[Emphasis ours]***

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) of the Act 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.

It is therefore important for the Board to determine the legality, or lack thereof, of the Respondents' decision of terminating the subject tender's procurement proceedings, which determination can only be made by

interrogating the procedure followed in terminating the tender noting whether the same was done in accordance to Section 63 of the Act, while further considering the reason cited for the impugned termination.

We have studied the documents submitted to the Board by the Applicant and note that the 1<sup>st</sup> Respondent, by a letter dated 6<sup>th</sup> June 2022 addressed to the Applicant, notified the Applicant of the termination of procurement proceedings of the subject tender. The said letter of notification of termination dated 6<sup>th</sup> June 2022 reads as follows: -

**"REF: MBT/PROC/06.06.001-22  
2022**

**Date: 6<sup>th</sup> June**

**M/S Partone Investment Ltd**

P.O. BOX 123 -60700

**MOYALE**

**Dear Sir/Madam**

**RE: TERMINATION OF CONTRACT**

**TENDER NO: MBT/COU/T/HEALTH/8/2019-2020**

**ITEM: SUPPLY AND INSTALLATION OF DATA, VOICE, CCTV, AND  
ACCESS CONTROL AMOUNT 25,830,850.00**

**We would like to regrettably inform you that we are terminating the award of 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 business support this far.**

**Yours faithfully**

**Grace Galmo**

**Chief Officer, Health**

**CC:**

**Director, Procurement and SCM" [*Emphasis ours*]**

The Applicant avers that it received the aforesaid notification of termination subsequent to having received the previously mentioned notification of award letter dated 15<sup>th</sup> January 2020.

Further, it is also the Applicant's claim that the contended letter of termination did not give reasons for terminating the subject tender as required under Section 63 (1) of the Act. Accordingly, it holds that the purported termination of the subject tender is invalid.

We have taken note of the Applicant's above claims together with the provisions of the Act, most particularly Section 63 (1) above, and note that a notification of termination can only be made before an award of tender has been issued.

It is the Board's observation that the 1<sup>st</sup> Respondent's letter of termination submitted herein was dated 6<sup>th</sup> June 2022; whereas the notification of award was dated 15<sup>th</sup> January 2020. This being the case, we note that the letter of termination was made about two and a half years after the letter of notification of award contrary to the provisions of Section 63 (1) of the Act.

The Board further observes that the reason given by the Respondents for terminating the subject tender was on account of the Applicant failing to avail themselves in signing the Agreement. We wish to observe that such a reason is not outlined as any of the exclusive grounds for termination provided for under Section 63 (1) of the Act.

It is in light of the above-noted observations that the Board notes that the Respondents failed to adhere to the substantive statutory pre-conditions of Section 63 of the Act.

On the aspect of the procedural pre-conditions of Section 63 (2) (3) and (4) of the Act, we find it difficult to make a pronouncement on the same being that the Respondents have not filed their Response to the instant application. All in all, we find the substantive pre-condition under Section 63 (1) of the Act was not satisfied when the Respondents purported to terminate the procurement proceedings of the subject tender on account of Applicant's failure of signing the Agreement. Accordingly, the Board's jurisdiction is not ousted by dint of Section 167(4)(b) of the Act.

This being the case, we hold and reiterate our above-stated arguments with the effect of concluding that the Respondents did not satisfy the substantive pre-conditions of Section 63 (1) of the Act. Accordingly, we find that the Respondents did not properly terminate the subject tender in accordance with Section 63 of the Act.

With the foregoing in mind, the Board now turns to the disposition of the request for review in the following specific orders:-

## **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders in the Request for Review dated 22<sup>nd</sup> June 2022:-

- 1. The Procuring Entity's Letter of Notification of Termination dated 6<sup>th</sup> June 2022 and received by the Applicant on 8<sup>th</sup> June 2022 and the email dated 21<sup>st</sup> June 2022 with respect to Tender No. MBT/COU/T/HEALTH/8/2019-2020 for the Supply and Installation of Data, Voice, CCTV and Access Control System Installation Works at Level 4 Hospital at Sololo Makutano Moyale Sub-County Marsabit County awarded to the Applicant on the 15<sup>th</sup> day of January 2020 be and are 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.134,578 (Kenya Shillings One Hundred and thirty four Thousand five Hundred and seventy -Eight) only

Dated at Nairobi this 13th July, 2022



.....  
**CHAIPERSON**

**PPARB**



.....  
**SECRETARY**

**PPARB**