REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 7/2023 OF 31ST JANUARY 2023

BETWEEN

BIOMAX AFRICA LIMITED ..... APPLICANT

AND

COUNTY GOVERNMENT OF UASIN GISHU ..... 1ST RESPONDENT

THE ACCOUNTING OFFICER,

CHIEF OFFICER HEALTH, UASIN GISHU COUNTY .2ND RESPONDENT

PARADIGM CONSTRUCTION LIMITED ..... INTERESTED PARTY

Review against the decision of the Accounting Officer, Uasin Gishu County in relation to Tender No. CGU/HLTH/T/001/2022-2023 for Proposed Construction of Model Sub County Hospital (OPD Block, Maternity Block, Family Planning Block, ANC Block, Dental Block, Incinerator, Kitchen, Laundry, Chapel, External Works and Morgue) at Turbo Health Centre- Uasin Gishu County.

BOARD MEMBERS PRESENT

1. Ms. Faith Waigwa - Chairperson
2. QS. Hussein Were - Member
3. CPA. Isabel Juma - Member

IN ATTENDANCE

Ms. Sarah Ayoo - Secretariat

PRESENT BY INVITATION

APPLICANT	**-BIOMAX AFRICA LIMITED**
1. Mr. Dennis Sang	-Advocate, Chege & Sang Company Advocates
2. Mr. Chege Kamau	-Advocate, Chege & Sang Company Advocates

RESPONDENTS - COUNTY GOVERNMENT OF UASIN GISHU & THE ACCOUNTING OFFICER, CHIEF OFFICER HEALTH, UASIN GISHU COUNTY	
Mr. Cheruiyot	-County Attorney, County Government of Uasin Gishu

INTERESTED PARTY	**- PARADIGM CONSTRUCTION LIMITED**
Ms. Sylvia Waiganjo	-Advocate, Gerivia Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

County Government of Uasin Gishu, the Procuring Entity and the 2nd Respondent herein, invited interested tenderers to submit tenders in response to Tender No. CGU/HLTH/T/001/2022-2023 for Proposed Construction of Model Sub County Hospital (OPD Block, Maternity Block, Family Planning Block, ANC Block, Dental Block, Incinerator, Kitchen, Laundry, Chapel, External Works and Morgue at Turbo Health Centre- Uasin Gishu County (hereinafter referred to as "the subject tender") by way of an advertisement on Wednesday, 7th December 2022 in the Daily Nation Publication as well as the 1st Respondent's website www.uasingishu.go.ke, on the IFMIS tender portal: www.supplier.treasury.go.ke; and also on the Public Procurement Information Portal (PPIP) www.tenders.go.ke. Tendering was open to all. The 2nd Respondent used an electronic procurement system referred to as IFMIS (hereinafter referred to as "IFMIS

Portal") to manage the tendering process. The subject tender submission deadline was 21st December 2022 at 10. 30 a.m.

Tender Submission Deadline and Opening of Tenders

The Tender Opening Committee opened the subject tender electronically through the IFMIS Portal. According to the Minutes for the Tender Opening signed by members of the Tender Opening Committee on 21st December 2021 (hereinafter referred to as "Tender Opening Minutes") a total of nine (9) tenderers were recorded as having submitted their tenders in response to the subject tender in the IFMIS Portal as follows:

Tender No.	Name of Tenderer
1.	Gokul Builders Limited
2.	Miliki Development Company Limited
3.	Paradigm Construction Company Limited
4.	Pinnie Agency Limited
5.	Stratogen Limited
6.	Shamim Investment
7.	Tulsi Construction Limited
8.	Biomax Africa Limited
9.	Wilkori Buildings and Civil Engineering Contractors Company Limited

Evaluation of Tenders

The 2nd Respondent appointed a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the nine (9) tenders in the following three stages as captured in an Evaluation

Report signed by members of the Evaluation Committee on 10th January 2023):

i. Preliminary Evaluation
ii. Technical Evaluation
iii. Financial Evaluation

Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as A) Preliminary Examination under Section II – Tender Data Sheet (TDS).

At the end of the evaluation at this stage, one (1) tender was found to be non-responsive, while eight (8) tenders which included the Interested Party's tender and Applicant's tender were found to be responsive. Only the responsive tenders proceeded for evaluation at the Technical Evaluation Stage.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Clause B) Technical Criteria of Section II-TENDER DATA SHEET (TDS). Tenders were required to score a minimum of 70 points to be able to proceed for evaluation at the Financial Evaluation Stage.

At the end of evaluation at this stage, three (3) tenders were found non-responsive having failed to meet the minimum qualifying score of 70 points while five (5) tenders were determined responsive having attained more than

the minimum required score of 70 points and proceeded for evaluation at the Financial Evaluation Stage. The tenders submitted by the Applicant and the Interested Party proceeded for evaluation at the Technical Evaluation stage.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders as outlined under the criteria set out as Financial Criteria under Section II-TENDER DATA SHEET (TDS) of the Tender Document. The Evaluation Committee was required to conduct financial evaluation and comparison of tenders to determine the lowest evaluated price by (a)ranking the responsive tenders according to their tender price and (b) checking arithmetic errors in computation and summations for purposes of due diligence.

At the end of evaluation at this stage, the Interested Party's tender emerged as the lowest tender as can be discerned from the Evaluation Report.

Evaluation Committee's Recommendation

The Evaluation Committee recommended the Interested Party to be awarded the subject tender at its tender sum of Kenya Shillings Seven Hundred and Five Million, Seven Hundred and Ten Thousand Three Hundred and Thirty and Seventeen Cents (Kshs.705,710,330.17) only being the lowest evaluated tender subject to confirmation of the tenderer's qualifications during post-qualification exercise pursuant to section 83 of the Public Procurement and Asset Disposal Act (herein referred to as "the Act").

Professional Opinion

In a professional opinion dated 10th January 2023 (hereinafter referred to as "the Professional Opinion") the Head/Supply Chain Management Unit, Mr. Kimutai Newton Choge, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

Notification to tenderers

Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 17th January 2023 and shared via email on 17th January 2023 and again on 27th January 2023

REQUEST FOR REVIEW

On 31st January 2023, the Applicant through the firm of Chege & Sang Company Advocates filed a Request for Review of even date together with a sworn statement by Kelly Nandasaba Watimah, its Project Manager, on 31st January 2023 seeking the following orders, verbatim:

1. ***Declaring that the Procuring Entity breached the provisions of the Public Procurement and Asset Disposal act, 2015 and article 47 and 227 of the Constitution.***
2. ***That the award and entire procurement proceedings in TENDER NUMBER: CGU/HLTH/T/001/2022-2023 be nullified in its entirety.***
3. ***That the 1st and 2nd Respondents be directed to re-admit the Applicant's bid and carry out fresh evaluation of the bids submitted in accordance with the dictates of the Public Procurement and Asset Disposal Act and the Tender Document.***

4. ***The Applicant be awarded the tender number CGU/HLTH/T/001/2022-2023 the Interested Party herein having been found not eligible for award.***
5. ***Costs of the Request for Review be awarded to the Applicant.***
6. ***Granting any other relief that the Review Board deems fit to grant under the circumstances.***

In a Notification of Appeal and a letter dated 31st January 2023, Mr. James Kilaka, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board") notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 1st and 2nd Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 31st January 2023.

In opposition to the Request for Review, Dr. Evans Kiprotich, on behalf of the 1st and 2nd Respondents on 7th February 2023, filed a Replying affidavit sworn on 6th February 2023 in response to the Request for Review and submitted confidential documents pursuant to section 67(3)(e) of the Act.

Vide letters dated 8th February 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenders in the subject tender were invited to submit to

the Board any information and arguments about the subject tender within 3 days from 8th February 2023.

On 10th February 2023 the Interested Party through the firm of Gerivia Advocates LLP filed a Memorandum of Response as well as a Notice of Preliminary Objection both dated 10th February 2023 in response to the Request for Review.

On 13th February 2023, the Applicant filed a Supplementary Affidavit sworn on 10th February by its Project Manager, Mr. Kelly Nandasaba Watimah.

Pursuant to the Board's Circular No. 02/2020, physical hearings were dispensed with and directions given for all requests for review applications to 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 render its decision within twenty-one (21) days of filing of the Request for Review in accordance with Section 171 of the Public Procurements and Asset Disposal Act, 2015 (hereinafter referred to as the "Act"). Clause 1 on page 2 of the Circular directed that pleadings and documents would be deemed as properly filed if they bore the Board's official stamp.

However, on 9th February 2023 the Board issued a hearing notice to all parties, inviting them for an online hearing of the instant Request for Review via a link provided in the said hearing notice.

On 14th February 2023 when the matter came up for hearing, Ms. Waiganjo, Counsel for the Interested Party applied for adjournment of the online

hearing on grounds that she had learnt of the hearing date earlier in the day and wished to file her submissions before the hearing. Mr. Sang, Counsel for the Applicant was not opposed to the application while the Respondents were not represented on this day. The Board allowed the application for adjournment, directed the Interested Party to file and serve written submissions on all parties by end of 14th February 2023 and stood over the hearing of the instant Request for Review to 15th February 2023.

The Applicant and the Interested Party filed their written submissions dated 10th January 2023 and 14th February 2023 respectively. On 15th February 2023, the Respondents filed their written submissions dated 14th February 2023.

PARTIES SUBMISSIONS

APPLICANT'S SUBMISSIONS

Counsel for the Applicant, Mr. Sang submitted that the Interested Party's tender was unresponsive as it did not conform to all the eligibility and other mandatory requirements. Specifically, Mr. Sang alleged that the Interested Party was a subject of control by another bidder in the subject tender. Mr. Sang expounded on this by alleging that the Interested Party and Pinnie Agency Limited shared a common Director, one Abdirizak Hussein Sheikh, contrary to Clause 3.3 of the Tender Document.

In support of the Request for Review, the Applicant attached the Companies Search Result for the Interested Party as at 12th January 2023 listing the following as the company's officials:

1. Abdirizak Hussein Sheikh- Director/Shareholder
2. Abdullah Khalif Derow- Director/Shareholder

3. Michael F. Wangamati-Secretary

The Applicant also attached the Companies Search Results for Pinnie Agency Limited as at 12th January 2023 listing the following as officials of the company:

1. Musa Osman Yarrow Elmi- Director/Shareholder
2. Abdirizak Hussein Sheikh- Director/Shareholder

The Applicant faulted the Respondents for failing to inquire on the conflict of interest upon being notified of the common directorship in the Interested Party and Pinnie Agency Limited on 12th January 2023. by the Applicant. According to the Applicant, the Respondents breached clause 3.3 of the Tender Document.

The Applicant also took issue with the fact that the Notification letter dated 17th January 2023 addressed to it did not provide reasons why its tender was not successful.

Through the supplementary affidavit of Mr. Kelly Nandasaba Watimah, the Applicant annexed a letter dated 12th January 2023 in which the Respondent was alerted on the common directorship of Abdirizak Hussein Sheikh in the Interested Party and Pinnie Agency Limited.

The Applicant annexed as Exhibit KW4 to the supplementary affidavit of Mr. Kelly Nandasaba Watimah, a certified copy of Notice of Appointment of Directors and their Particulars dated 21st April 2021 from the Companies Registry. This document indicated that Abdirizak Hussein Sheikh was appointed a Director at the Interested Party on 21st April 2021.

Also, the Applicant annexed as Exhibit KW3 to the supplementary affidavit of Mr. Kelly Nandasaba Watimah, a a certified copy of a Notice of Cessation of Office of Director dated 16th January 2023 from the Companies Registry. This document indicated one Abdirizak Hussein Sheikh ceased to hold office in the Interested Party on 8th January 2023.

RESPONDENTS' SUBMISSIONS

Counsel for the Respondents', Mr. Cheruiyot, affirmed that the Respondents were in compliance with the procurement laws and that the Applicant's bid was unsuccessful as it was not the lowest bid as per the Evaluation Report by the Evaluation Committee.

He argued that at the time of evaluation of the tenders for the subject tender, Pinnie Agency Limited and the Interested Party did not have a common Director. For this, he attached the CR-12 Company search result certificates for the Interested Party as at 12th October 2022 (EK-1) and Pinnie Agency Limited as at 6th September 2022 (EK-2).

From the CR12-Company search results for the Interested Party, as at 12th October 2022, the following were the officials at the company:

1. Suleiman Hussein Sheikh- Director/Shareholder
2. Abass Abdille Mohammed- Director/Shareholder
3. Michael F. Wangamati- Secretary

From the CR12 Company search results for Pinnie Agency Limited as at 6th September 2022, the following were the officials at the company:

1. Amos Yator Kibogot
2. Abdirizak Hussein Sheikh

Further, the Respondents indicated that upon receipt of the Request for Review of the subject tender on 31st January 2023, they obtained Company search results for the two companies annexed as (EK3) and EK 4) which indicated that the companies had different Directors.

From the Company Search results for the Interested Party, as at 31st January 2023, the following were the officials of the company:

1. Abdullahi Khalif Derow- Director/Shareholder
2. Michael F. Wangamati- Secretary

From the Company search results for Pinnie Agency Limited, as at 31st January 2023, the following were the officials at the company:

1. Musa Osman Yarrow
2. Abdirizak Hussein Sheikh

INTERESTED PARTY'S SUBMISSIONS

Counsel for the Interested Party, Ms. Sylvia Waiganjo opposed the Request for Review and sought for its dismissal citing that the instant Request for Review was time-barred and thus the jurisdiction of the Board had been improperly invoked.

Ms. Waiganjo pointed out that the Applicant in its Request for Review had attached copies of Company search results for the Interested Party and Pinnie Agency Limited showing company officials as at 12th January 2023. Accordingly, as at 12th January 2023, the Applicant were aware of the alleged breach forming part of their Request for Review and thus the last day available to the Applicants for bringing a claim for the alleged breach was 26th January 2023.

The Interested Party maintained that its bid was not in breach of clause 3.3 of the tender document. It was the Interested Party's case that the Applicant made allegations of conflict of interest but failed to substantiate them in evidence. According to them, the Applicant did not furnish proof that at the time of tender evaluation, Abdirizak Hussein Sheikh was a Director at both Pinnie Agency Limited and the Interested Party.

The Interested Party decried that the Applicant did not attach its notification letter to its Request for Review and thus denied the Interested Party, the opportunity to comment on the same.

According to the Interested Party, the Applicant's request for the Respondents to evaluate the Interested Party's tender on the basis of Company search results dated 12th January 2023 would amount to a modification of the Interested Party's bid and contrary to section 76 and 80(2) of the Public Procurement and Asset Disposal Act.

REJOINDER BY THE APPLICANT

Mr. Sang Counsel for the Applicant, in a brief rejoinder submitted that as at 12th January 2023 when they complained to the Respondents on the alleged conflict of interest occasioned by the Interested Party and Pinnie Agency Limited no breach had occurred. He submitted that the breach on the part of the Respondents only occurred after the issuance of the notification letter dated 17th January 2023. He submitted that the Interested Party had misrepresented itself in the CR 12 documents submitted to the Respondents in the subject tender.

BOARD'S DECISION

The Board has considered each party's case, documents, pleadings, written submissions, authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

i. ***Whether the Board has jurisdiction to hear and determine the instant Request for Review?***

In determining the first issue, the Board will make a determination on whether the instant Request for Review was filed within the statutory period of 14 days of notification of award or occurrence of alleged breach by the Respondents in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.

Depending on the determination of the first issue;

ii. ***Whether, on the basis of documents before it during evaluation of tenders, the Evaluation Committee of the 1st Respondent could reasonably establish a conflict of interest between the Interested Party and Pinnie Agency Limited as defined under Clause 3.3(a) of A. General Provisions of Section I: Instructions To Tenderers of the Tender Document;***

iii. ***Whether, upon receipt of the Applicant's Complaint, the 1st Respondent was duty bound to ascertain whether a conflict of interest existed with the participation of the Interested Party and Pinnie Agency Limited as defined under Clause 3.3(a) of***

A. General Provisions of Section I: Instructions To Tenderers of the Tender Document;

iv. ***Whether the Notification of Intention To Award dated 17th January 2023 issued by the 2nd Respondent complied with the provisions of Section 87 of the Act read with Regulation 82 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as 'Regulations 2020')***

v. ***What orders should the Board grant in the circumstances?***

Whether the Board has jurisdiction to hear and determine the instant Request for Review?

The Interested Party raised a Preliminary Objection citing that the instant Request for Review was time-barred having been filed outside the statutory timelines provided for under Section 167(1) of the Act and Regulation 203(2)(c) of the Regulations 2020.

It is now a settled principle of law that courts and decision-making bodies can only hear and determine matters that are within their jurisdiction. Therefore, prudence would dictate that a court or tribunal seized of a matter should first enquire into its jurisdiction before considering the matter.

Black's Law Dictionary, 8th Edition defines jurisdiction as:

> ***"...the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties...the power of courts to inquire in to facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."***

Jurisdiction is defined in Halsbury Laws of England (4th 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."***

The celebrated Court of Appeal decision in ***The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989]eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989*** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

> ***"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 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 in ***Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012]eKLR; Supreme Court Application No. 2 of 2011*** added its voice on the source of jurisdiction of a court or other decision making body as follows;

> ***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written***

law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondent 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 Board is a creature of statute tracing its establishment under Section 27(1) of the Act:

"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.

Section 28 of the Act outlines the functions of the Board in the following terms:

(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.

A reading of section 167 of the Act denotes that the jurisdiction of the Board should be invoked within a specified timeline of 14 days:

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 <u>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</u>.

Regulation 203(2) (c) of the Regulations 2020 equally affirms the 14-days timeline in the following terms:

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***

Our interpretation of the above provisions is that an Applicant seeking the intervention of this Board in any procurement proceedings must file their request within the 14-day statutory timeline. Accordingly, Requests for Review made outside the 14 days would be time-barred and this Board would be divested of the jurisdiction to hear the same.

It is therefore clear from a reading of section 167(1) 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 (3) instances namely, before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract has been made and (iii) after a notification to enter into a contract has been made. The option available to 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 breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued, the same is only complained of after the notification to enter into a contract

has been issued. We say so because there would be no need to provide three (3) instances within which a Request for Review may be filed.

The Interested Party argued that from the Applicant's own documents before the Board, the Applicant confirmed that as at 12th January 2023 they were aware of the directorship and shareholding position of both the Interested Party and Pinnie Agency Limited. They therefore pressed that any request for review predicated on the shareholding and directorship status of the two companies should have been filed by 26th January 2023, which is exactly 14 days from 12th January 2023.

On the other hand, the Applicant argued that it filed their Request for Review within 14 days from the date they received the Notification letter dated 17th January 2023. According to the Applicant, it received the notification on 27th January 2023 and thereafter filed its Request for Review on 31st January 2023 which was only 4 days later.

Section 167 of the Act and Regulation 203 of the 2020 Regulations identifies the benchmark events for the running of time to be the date of notification of the award or date of occurrence of the breach complained of. We are of the view that as at 12th January 2023 when the Applicant complained to the Respondents about a possible conflict of interest in the participation of both the Interested Party and Pinnie Agency Limited in the subject tender no breach by the Respondents had occurred. The Respondents did not act on the Applicant's complaint and it was not until 17th January 2023 and thereafter 27th January 2023 that the 2nd Respondent issued a notification letter communicating the Interested Party's tender as the successful tender.

The Applicant received the 2nd Respondent's communication on 27th January 2023. This date is crucial for determining when the 14 day limitation period started running. We say so because the alleged breach by the Respondents became known to the Applicant when the Applicant learnt that despite complaining of a possible conflict of interest between the Interested Party and Pinnie Agency Limited, the 2nd Respondent proceeded to award the subject tender to the Interested Party.

In computing the 14 days contemplated under the Act, we are guided by section 57 of the Interpretation and General Provisions Act (hereinafter the IGPA) which provides:

57. Computation of time

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

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time

In computing time when the Applicant ought to have sought administrative review before the Board, the 27th January 2023 is excluded as per section 57(a) of the IGPA being the day the Applicant learnt of the occurrence of the alleged breach. This means time started to run on 28th January 2023 and lapsed on 10th February 2023. In essence the Applicant had been the 28th January 2023 and 10th February 2023 to seek administrative review before the Board. The instant Request for Review was filed on 31st January 2023 which was the 4th day from the day the Applicant received the notification of intention to award.

We find that this was within the 14-days statutory period required under Section 167(1) Act read with Regulation 203(2)(c) of Regulations 2020. We find fault in the Interested Party's argument that the Applicant should have filed their Request for Review within 14 days from 12th January 2023. We say so because the Applicant could not possibly have filed their Request for Review using 12th January 2023 as a benchmark date since as at that date there was no breach of the provisions of the Act by the Respondents.

Accordingly, the Board has jurisdiction to hear and determine the instant Request for Review the same having been filed in good time.

Having disposed of the above preliminary aspect, the Board now proceeds to address the substantive issues framed for determination.

Whether, on the basis of documents before it during evaluation of tenders, the Evaluation Committee of the 1st Respondent could reasonably establish a conflict of interest between the Interested Party and Pinnie Agency Limited as defined under Clause 3.3(a) of A. General Provisions of Section I: Instructions To Tenderers of the Tender Document;

The gravamen of the instant Request for Review according to the Applicant is that though the Respondents found the Interested Party's tender as the successful tender, the Interested Party was not eligible for award of the subject tender pursuant to Clause 3.3(a) of A. General Provisions of Section I: Instructions To Tenderers of the Tender Document.

The said Clause 3.3(a) of the Tender Document reads as follows:

> ***"3.3 A tenderer shall not have a conflict of interest. Any tenderer found to have a conflict of interest shall be disqualified. A tenderer may be considered to have a conflict of interest for the purpose of this tendering process, if the tenderer:***
>
> ***(a) Directly or indirectly controls or is controlled by or is under common control with another tenderer, or ..."***

Mr. Sang argued that the Interested Party and Pinnie Agency Limited, another tenderer in the subject tender, had a control relationship giving rise to a conflict of interest under the said Clause 3.3 of the Tender Document. In support of this, the Applicant produced in evidence:

i. CR 12 dated 12th January 2023... 2023 being a company search results for the Interested Party as at 12th January 2023.

ii. CR 12 dated 12th January 2023... 2023 being a company search results for Pinnie Agency Limited as at 12th January 2023.

iii. CR6 dated 21st April 2021 being a Notice of Appointment of Directors and their particulars appointing Abdirizak Hussein Sheikh as a director of the Interested Party effective 21st April 2021.

iv. CR9 dated 16th January 2023 being a Notice of Cessation of Office of Directors on Abdirizak Hussein Sheikh ceasing from serving as a director of the Interested Party effective 8th January 2023.

The Respondents through the Replying affidavit sworn by Dr. Evans Kiprotich indicated that the Respondents' Evaluation Committee conducted the evaluation of tender documents as submitted by the tenderers. Further, that the Company search results in their possession as per the submitted tenders did not indicate that the Interested Party and Pinnie Agency Limited shared a common directorship.

On her part, Ms. Waiganjo, Counsel for the Interested Party argued that there did not exist any control relationship between the Interested Party and Pinnie Agency Limited. She submitted that section 125 of the Companies Act, 2015 spells out the circumstances when a Director is to be regarded as controlling a body corporate and in the instant case, there did not exist any such control.

Ms. Waiganjo further argued that the Evaluation Committee was bound in law to evaluate tenders on the basis of tender documents received before the tender submission deadline. According to them, considering documents introduced after the deadline would amount to modification of bids contrary to section 76 of the Act.

Section 125 of the Companies Act, 2015 reads as follows:

125. When a director is to be regarded as controlling a body corporate for purposes of this Part

(1) For the purposes of this Part, a director of a company is taken to control a body corporate if, but only if—

(a) the director or any person connected with the director—

(i) has an interest in any part of the equity share capital of that body; or

(ii) is entitled to exercise or control the exercise of any part of the voting power at any general meeting of that body; and

(b) the director, the persons connected with the director and the other directors of that company, together—

(i) are interested in more than fifty percent of that share capital; or

(ii) are entitled to exercise or control the exercise of more than fifty percent of that voting power

Section 76 of the Act reads as follows:

76. Modification of bids

(1) Before the deadline for submitting tenders, a person who submitted a tender may only change or withdraw it in accordance with the following—

(a) the change or withdrawal shall be in writing; and

(b) the change or withdrawal shall be submitted before the deadline for submitting tenders and in accordance with the procedures for submitting tenders.

(2) After the deadline for submitting tenders, a person who submitted a tender shall not change, or offer to change the terms of that tender.

Clause 3.1 of A. General Provisions of Section I. Instructions to Tenderers of the Tender Document describes the eligible tenderers in the subject tender in the following terms:

3.1 A Tenderer may be a firm that is a private entity, a state-owned enterprise or institution subject to ITT 3.7 or any combination of such entities in the form of a joint venture (JV) under an existing agreement or with the intent to enter into such an agreement supported by a letter of intent. Public employees and their close relatives (spouses, children, brothers, sisters and uncles and aunts) are not eligible to participate in the tender. In the case of a joint venture, all members shall be jointly and severally liable for the execution of the entire Contract in accordance with the Contract terms. The JV shall nominate a Representative who shall have the authority to conduct all business for and on behalf of any and all the members of the JV during the tendering process and, in the event the JV is awarded the Contract, during contract execution. The maximum number of JV members shall be specified in the TDS.

From the above provision of the Tender Document it is clear that a tenderer would be a firm. Section 2 of the Act defines a tenderer as a person who submits a tender pursuant to an invitation by a public entity. On the other

hand Section 2 of the Act defines the meaning of a person as assigned to it under Article 260 of the Constitution which includes a company.

The Interested Party and Pinnie Agency Limited are private companies limited by shares and each submitted a tender in response of the subject tender pursuant to an invitation by the Respondents. To this end, both the Interested Party and Pinnie Agency Limited are tenderers within the meaning of Section 2 of the Act and Clause 3.1. of A. General Provisions of Section I. Instructions to Tenderers of the Tender Document. The individual directors and/or shareholders of the Interested Party and Pinnie Agency Limited were not tenderers in the subject tender.

Our interpretation of the said Clause 3.3(a) of the Tender Document read with Section 125 of the Companies Act is that it excludes from the tender process, tenderers who are themselves controlling shareholders in another tenderer participating in the subject tender.

We say so on the basis of the enduring principle that a company is in law a separate and distinct entity from its shareholders and directors. This principle has been endorsed by the superior courts of this Country. Notably the Court of Appeal in ***Charles Ray Makuto v Almakony Limited & another [2016] eKLR; Eldoret Court of Appeal Civil Appeal No. 329 of 2013*** restated the separate personality principle in the following terms:

> ***15. It is a long-standing legal principle that a company is in law a separate person distinct from its members. [See Salomon v Salomon [1897] AC 78.] In Victor Mabachi & Another v Nurturn Bates Ltd, Civil Appeal No. 247 of 2005 [2013] eKLR, the Court held that a company "as a body***

corporate, is a persona jurisdica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil." For example, where there is fraud or improper conduct, the corporate veil may be lifted. Whether factors or circumstances exist for warranting the lifting of the veil is a question of fact in each case.

The Interested Party and Pinnie Agency Limited are limited liability companies incorporated under the Companies Act, 2015. Thus, absent proof of one company being a controlling shareholder of the other, we are unable to find that there exists a control relationship between the Interested Party and Pinnie Agency Limited.

As at the time of evaluation of the tenders, the Evaluation Committee considered company search results that had been submitted alongside the Interested Party's and Pinnie Agency Limited's tender documents.

These company searches revealed as follows;
The CR12 dated 12th October, 2022 by the Interested Party listed the following as officials:-
(a)Suleiman Hussein Sheikh- Director/Shareholder
(b)Abass Abdille Mohamed- Director/Shareholder
(c)Michael wangamati -Secretary
The CR 12 dated 6th September, 2022 by Pinnie Agency Limited listed the following as officials of the company:-

Amos Yator Kibogut- Director/Shareholder

None of the company search documents revealed that the Interested Party was controlled by or controlled Pinnie Agency Limited. Accordingly, we find that the Evaluation Committee of the 1st Respondent cannot be faulted for its evaluation based on the documents submitted before it comprising the tender documents submitted by the Interested Party and Pinnie Agency Limited.

We find that for there to be control as alleged, the Applicant ought to have led evidence demonstrating that the Interested Party was a controlling shareholder in, or was controlled by Pinnie Agency Limited or vice versa. In the instant case, no such evidence was adduced.

The Evaluation Committee of the 1st Respondent **could not** therefore reasonably establish a conflict of interest between the Interested Party and Pinnie Agency Limited as defined under Clause 3.3(a) of A. General Provisions of Section I: Instructions To Tenderers of the Tender Document on the basis of documents before it during evaluation.

Whether upon receipt of the Applicant's Complaint, the 1st Respondent was duty bound to ascertain whether a conflict of interest existed with the participation of the Interested Party and Pinnie Agency Limited as defined under Clause 3.3(a) of A. General Provisions of Section I: Instructions To Tenderers of the Tender Document;

The Tender Document has a number of clauses affirming that there would be checks for conflicts of interest throughout the procurement process. A few would suffice:

Clause 19.6 of the Tender document reads:

> ***The Tenderer shall provide further documentary proof, information or authorisations that the Procuring Entity may request in relation to ownership and control which information on and changes to information which was provided by the tenderer under ITT 6.3. The obligations to require this information shall continue for the duration of the procurement process and contract performance and after completion of the contract, if change to the information previously provided may reveal a conflict of interest in relation to the management of the contract.***

Clause 19.9 of the Tender document reads:

> ***If information submitted by a tenderer pursuant to these requirements, or obtained by the Procuring Entity (whether through its own enquiries, through notification by the public or otherwise), shows any conflict of interest which could materially and improperly benefit the tenderer in relation to the procurement management process then:***
>
> ***i) If the procurement process is still ongoing, the tenderer will be disqualified from the procurement process,***

ii) If the contract has been awarded to that tenderer, the contract award will be set aside,

From the above clauses it is apparent that the subject tender called on all the participating tenderers to provide information on their respective ownership and control. Clause 19.9 even makes it explicit that tenderers who would be discovered as having been conflicted during the tender proceedings would be disqualified from the subject tender and their awards set aside.

The Applicant's complaint to the Respondent over the conflict of interest alleged to exist by virtue of the participation of both the Interested Party and Pinnie Agency Limited ought to have been dispelled with or confirmed by conducting a due diligence on the Interested Party's documents as presented in its original tender the moment the Interested Party's tender was determined the lowest evaluated responsive tender by the Evaluation Committee.

Section 3 of the Act as read with article 10(2)(c) of the Constitution of Kenya 2010 underpin good governance, integrity, transparency and accountability as key pillars in public procurement and asset disposal proceedings. Accordingly, prudence would have dictated that the Respondents would have upon receipt of the Applicant's Complaint about the ownership and control structure of the Interested Party and Pinnie Agency Limited, conducted due diligence on the CR12 documents presented in the Interested Party's tender and that of Pinnie Agency Limited.

In the circumstance, we find and hold that upon receipt of the Applicant's Complaint, the 1st Respondent was duty bound to ascertain whether a

conflict of interest existed with the participation of the Interested Party and Pinnie Agency Limited as defined under Clause 3.3(a) of A. General Provisions of Section I: Instructions To Tenderers of the Tender Document the moment the Evaluation Committee determined the Interested Party's tender as the lowest evaluated responsive tender;

Whether the Notification of Intention To Award dated 17th January 2023 issued by the 2nd Respondent complied with the provisions of Section 87 of the Act read with Regulation 82 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as 'Regulations 2020')

The Applicant took issue with the Notification of Intention To Award dated 17th January 2023 identifying the Interested Party as the successful tenderer citing that the notification did not outline the reasons why the Applicant's tender was unsuccessful in breach of section 87 of the Act.

Section 87 of the Act prescribes the contents of the notification letter to bidders on the tender results in the following terms:

> ***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.

Regulation 82 of the 2020 Regulations offers further clarity on the details to be included in the notification to enter into a contract in the following terms:

Notification of intention to enter into a contract

(1) ***The notification to the unsuccessful bidder under section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.***

(2) ***For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.***

(3) ***The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86(1) of the Act.***

From the above provisions of the Act and Regulations 2020, it is clear that a Procuring Entity should in its notice to unsuccessful tenderers disclose the reasons why the successful tenderer was successful.

In the instant Request for Review, the Applicant did not attach a copy of the Notification of Intention To Award dated 17th January 2023. However, a copy of the Notification of Intention To Award can be gleaned from the

confidential file submitted by the Respondents. The notification is reproduced herein:

"17/01/2023

For the attention of Tenderer's Authorized Representative

Name: ...

Address: ...

Telephone numbers: ...

Email address: ...

DATE OF TRANSMISSION. This Notification is sent by email on 17th January 2023 at 12.00 noon

Procuring Entity: Uasin Gishu County

Contract Title: Proposed Construction of Model Sub County Hospital (Opd Block, Maternity Block, Family Planning Block, Anc Block, Dental Block, Incinerator, Kitchen, Laundry, Chapel, External Works And Morgue At Turbo Health Centre- Uasin Gishu County.

ITT No. CGU/HLTH/T/001/2022-2023, INFMIS Negotiation No.1150864

This Notification of Intention to Award (Notification) notifies you of our decision to award the above contract. The transmission of this Notification begins the Standstill Period. During the Standstill Period you may:

a) **Request a debriefing in relation to the evaluation of your Tender, and/or**
b) **Submit a Procurement-related Complaint in relation to the decision to award the contract**

The successful Tenderer

Name	**PARADIGM CONSTRUCTION LIMITED**

Address	P.O. BOX ...
Contract Price	KHS. 705,710,330.17

Other Tenders

Bidder No.	Name of Tenderer	Tender Price	Evaluated Tender Price (if applicable)
B9	WILKORI BUILDING & CIVIL ENG. LTD	KSHS. 717,709,085.00	-
B6	SHAMIM INVESTMENT COMPANY LTD	KSHS. 692,677,709.20	-
B5	STRATOGEN LTD	KSHS. 810,180,000.00	-
B1	GOKUL BUILDERS	KSHS. 981,191,988.00	-
B3	PARADIGM CONSTRUCTION LIMITED	KSHS. 705,710,330.17	KSHS. 705,710,330.17
B2	MILIKI DEVELOPMENT COMPANY	KSHS. 762,257,079.00	KSHS. 762,257,079.00
B4	PINNIE AGENCY LIMITED	KSHS. 739,756,497.57	KSHS. 739,756,497.57
B7	TULSI CONSTRUCTION	KSHS. 786,343,267.00	KSHS. 786,343,267.00

B8	**BIOMAX AFRICA LIMIITED**	**KSHS. 748,250,000.00**	**KSHS. 748,250,000.00**

1. How to request for debriefing..."

From the above, the notification letter identifies the Interested Party as the successful tenderer. However, the notification does not communicate the reasons why the Interested Party was the successful tenderer contrary to the express provisions of section 87(3) of the Act and Regulation 82 (3) of Regulations 2020.

In the circumstance, we find and hold that the Notification of Intention To Award dated 17th January 2023 issued by the 2nd Respondent did not comply with the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020.

What orders should the Board grant in the circumstances?

We have found that the instant Request for Review was filed within the statutory timelines contemplated under the Act. Accordingly, the Preliminary Objection by the Interested Party fails.

Additionally, we have made a finding that upon receipt of the Applicant's Complaint, the 1st Respondent was duty bound to ascertain whether a conflict of interest existed with the participation of the Interested Party and Pinnie Agency Limited as defined under Clause 3.3(a) of A. General Provisions of Section I: Instructions To Tenderers of the Tender Document. Accordingly, it is fair and just that the Evaluation Committee conducts due

diligence on the CR12 documents provided in the tenders submitted by the Interested Party.

We also found that the Notification of Intention To Award dated 17th January 2023 issued by the 2nd Respondent did not comply with the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020 and therefore warrants to be nullified and be set aside.

The upshot of our decision is that the instant Request for Review succeeds in terms of the following specific orders

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act No. 33 of 2015, the Board makes the following orders in the Request for Review dated 31st January 2023:

1. **The Interested Party's Notice of Preliminary Objection dated 10th February 2023 be and is hereby dismissed.**
2. **The 2nd Respondent's Notification of Intention To Award dated 17th January 2023 issued to the Interested Party be and is hereby nullified and set aside.**
3. **The 2nd Respondent's Notification of Intention To Award dated 17th January 2023 issued to the Applicant and all other unsuccessful tenderers be and are hereby nullified and set aside.**
4. **The 2nd Respondent is hereby ordered to direct the Evaluation Committee of the 1st Respondent to conduct due diligence to confirm and verify the qualifications of the Interested Party in**

accordance with the Act while taking into consideration the findings of the Board in this decision.

5. Further to Order 4, the 2nd Respondent is hereby ordered to proceed with the subject tender to its logical conclusion within fourteen (14) days from the date hereof in accordance with the provisions of the Tender Document, Regulations 2020, the Act and the Constitution.
6. Given the subject procurement proceedings are not complete, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 21st day of February 2023

Chairperson
PPARB

Secretary
PPARB