

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 15/2023 OF 21ST MARCH 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, Chief Officer Health 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. Dr. Paul Jilani | - | Member |
| 3. Mrs. Irene Kashindi | - | Member |

IN ATTENDANCE

Ms. Sarah Ayoo - Secretariat

PRESENT BY INVITATION

APPLICANT - BIOMAX AFRICA LIMITED

Mr. Sang - Advocate, Chege & Sang Company Advocates

RESPONDENTS -COUNTY GOVERNMENT OF UASIN GISHU

**THE ACCOUNTING OFFICER, CHIEF OFFICER
HEALTH COUNTY GOVERNMENT OF UASIN
GISHU**

Mr. Cheruiyot -Advocate, Office of the County Attorney, County
Government of Uasin Gishu

**INTERESTED PARTY -PARADIGM CONSTRUCTION COMPANY
LIMITED**

Ms. Waiganjo - Advocate, Gerivia Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

The County Government of Uasin Gishu, the Procuring Entity and the 1st 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 1st Respondent used an electronic procurement system referred to as IFMIS (hereinafter referred to as "IFMIS Portal") to manage the tendering process and the whole sourcing 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 constituted 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 (hereinafter referred to as the 'Evaluation Report):

- 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 Clause A) Preliminary Examination under Section II – Tender Data Sheet (TDS) of the blank tender

document issued to prospective tenderers by the Respondents (hereinafter referred to as the 'Tender Document').

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.

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.

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.

Due Diligence

According to the Due Diligence report signed by members of the Evaluation Committee on 9th January 2023, the Evaluation Committee carried out due diligence on the tenderers who had met the Technical Evaluation. The scope of the due diligence included (a) ascertaining the authenticity of the tenderer's experience; and (b) confirming status of two sample projects of similar nature, complexity and magnitude done by the four (4) tenderers (including the Applicant and Interested Party) who had passed the Technical Evaluation.

The Evaluation Committee was satisfied that all the four (4) tenderers that were subjected to due diligence had given truthful information and was capable of carrying out the subject tender.

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

tenderer subject to confirmation of the tenderer's qualifications during post-qualification exercise pursuant to Section 83 of the Public Procurement and Asset Disposal Act, 2015 (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 via email on 17th January 2023 and on 27th January 2023.

REQUEST FOR REVIEW NO. 7 OF 2023

On 31st January 2023, the Applicant through the firm of Chege & Sang Company Advocates filed a Request for Review dated 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.***

The Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') considered the parties' pleadings, documents, written submissions, the list and bundle of authorities together with the confidential documents submitted by the Respondents to the Board pursuant to Section 67(3)(e) of the Act and found the following issues called for determination:

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

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?***

On the first issue framed for determination, the Board found that it had jurisdiction to hear and determine the Request for Review the same having been filed within the statutory timelines.

On the second issue framed for determination, the Board found that the Evaluation Committee of the 1st Respondent **could not** 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.

On the third issue framed for determination, the Board found and held 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.

On the fourth issue framed for determination, the Board found and held 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.

On 21st February 2023, the Board issued the following orders with respect to the Request for Review No. 7 of 2023 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.***

2ND DUE DILIGENCE

According to a Due Diligence Report dated and signed on 3rd March 2023 by the Evaluation Committee members, the Evaluation Committee conducted a second due diligence exercise (hereinafter referred to as “the 2nd Due Diligence”) to verify the qualification of the Interested Party in line with the findings of the Board in Request for Review No. 7 of 2023. The Evaluation Committee members visited the Business Registration Services in Nairobi and sought for more information, through the 2nd Respondent’s letter to the Director General, Registrar of Companies dated 27th February 2023, on the ownership of Pinnie Agency Limited and Paradigm Construction Company Limited as well as the history of the two companies and specifically if any of them ever had control over the other.

From the response by the Registrar of Companies, the Evaluation Committee established the details of the 2 companies’ directorship and shareholding and also confirmed that neither company ever held shares nor was a director in the other. The Evaluation Committee thereafter recommended the subject tender to be awarded to the Interested Party at their tender price of Kshs. 705,710,330.17 (Seven Hundred and Five Million, Seven Hundred and Ten Thousand Three Hundred and Thirty and Seventeen Cents.)

2nd Professional Opinion

In a professional opinion dated 3rd March 2023 (hereinafter referred to as “the 2nd 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 the evaluation of the subject tender vide letters of Notification of Intention to Award dated 7th March 2023.

REQUEST FOR REVIEW NO. 15 OF 2023

On 21st March 2023, Biomax Africa Limited, the Applicant herein, filed the the instant Request for Review dated 21st March 2023 together with a Statement in Support of the Request for Review sworn on 21st March 2023 by Kelly Nandasaba Watimah. through the firm of Chege & Sang Company Advocates 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 the 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 financial evaluation of the bids submitted in accordance with the dictates of the Public Procurement and Assets Disposal Act and the Tender document with specific instruction that Pinnie Agency Limited and the Interested party herein were not eligible for award in account of clause 3.3 c and d of the Tender document.***
- 4. The Applicant be awarded the tender number CGU/HLTH/T/001/2022-2023 the interested party herein and Pinnie Agency limited 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 21st March 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the instant 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 instant Request for Review together with confidential documents concerning the subject tender within five days from 21st March 2023.

On 27th March 2023, in response to the instant Request for Review, the Respondents, through the Office of the County Attorney, County Government of Uasin Gishu filed a Memorandum of Appearance dated 23rd March 2023 and the 1st & 2nd Respondents Replying Affidavit sworn by Dr. Paul Wangwe Ongeti, the 1st Respondent's Chief Officer, Department of Health-Clinical Services, on 23rd March 2023. The Respondents also submitted to the Board a confidential file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 27th March 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the instant Request for Review while forwarding to all tenderers a copy of the instant Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 27th March 2023.

On 30th March 2023, the Interested Party through the firm of Gerivia Advocates LLP, filed a Notice of Appointment of Advocates dated 30th March

2023, a Notice of Preliminary Objection dated 30th March 2023 together with the Interested Party's Replying Affidavit sworn by Jonyo Geoffrey Okuto, an authorized representative of the Interested Party, on 30th March 2023.

Vide a Hearing Notice dated 30th March 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender that the hearing of the instant Request for Review will be by online hearing on 5th April 2023 at 12:00 noon., through a link availed in the said Hearing Notice.

On 4th April 2023 the Applicant filed a Supplementary Affidavit sworn by Kelly Nandasaba Watimah on 4th April 2023 together with the Applicant's Written Submissions dated 4th April 2023.

On 5th April 2023 when the hearing of the instant Request for Review was scheduled for online hearing, Mr. Cheruiyot, Counsel for the Respondents sought an adjournment to allow the Respondents to file their Written Submissions as he had only been served with the Applicant's Written Submissions on 5th April 2023.

Ms. Waiganjo, Counsel for the Interested Party, supported the request for adjournment to also allow the Interested Party file its Written Submissions.

Mr. Sang, Counsel for the Applicant, indicated that he was ready to proceed but had no objection to the request for an adjournment.

Upon considering that the only working day before the Easter holiday was Thursday the 6th day of April 2023 and that 21 days within which the instant Request for Review must be heard and determined was set to lapse on 11th April 2023, the Board allowed the application for adjournment and ordered that the Respondents and the Interested Party file and serve their respective Written Submissions by 5 p.m. on 5th April 2023. The Board stood over the hearing of the instant Request for Review to 6th April 2023 at 12 noon.

The Interested Party filed and served its Written Submissions dated 5th April 2023 together with its List and Bundle of Authorities dated 5th April 2023 on even date.

On the same day of 5th April 2023, Mr. Cheruiyot, Counsel for the Respondents, sent an email containing the Respondents' Written Submissions dated 5th April 2023 to the Board. On the same day of 5th April 2023, the Board sent a copy of the Respondents' Written Submissions dated 5th April 2023 to the Applicant and the Interested Party via email.

During the hearing of the instant Request for Review on 6th April 2023, Mr. Cheruiyot, Counsel for the Respondents, sought to have the Respondents' Written Submissions deemed as filed with the Board but indicated that he

could not serve the Applicant and the Interested Party because the Respondents' Written Submissions were filed with the Board via email and had no received stamp by the Board. Upon confirmation by Counsel for the Applicant and Counsel for the Interested Party that the Board had served upon them the Respondents' Written Submissions via email of 5th April 2023, the Board ordered the Respondents' Written Submissions to be properly on record and the same to have been served upon the Applicant and Interested Party.

Noting that the Interested Party had filed a notice of preliminary objection and the Respondents had raised an objection on account of the principle of *res judicata*, the Board directed that it shall proceed to hear the objections as part of the substantive request for review. This was inline with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board with the discretion to hear preliminary objections as part of substantive request for review and render one decision.

PARTIES' SUBMISSIONS

Applicant's Submissions

During the online hearing, Counsel for the Applicant, Mr. Sang relied on the pleadings and documents filed by the Applicant i.e. Request for Review dated 21st March 2023, Statement in Support of the Request for Review sworn on 21st March 2023 by Kelly Nandasaba Watimah, Supplementary Affidavit

sworn on 4th April 2023 by Kelly Nandasaba Watimah and the Applicant's Written Submissions dated 4th April 2023.

Mr. Sang submitted that there was an earlier Request for Review No. 7 of 2023 in which this Board dispensed with and issued orders to be followed by the Respondent but the said orders were not complied with in terms of the conduct of due diligence.

He submitted that the Applicant received a regret letter dated 7th March 2023 which is also the subject of this instant Request for Review. He submitted that the main contention is that there was non-compliance with the earlier orders issued. Mr. Sang argued that the Interested Party and Pinnie Agency Limited participated in the subject tender yet they ought to have been disqualified on account of conflict of interest as per clause 3.3 (c) and (d) of the Tender Document. He submitted that as at close of the tender the two companies shared a common directorship and postal address, which facts he contended raised a conflict of interest.

Counsel contended that the earlier finding of the Board in Request for Review No. 7 was not on clauses 3.3 (c) and (d) of the Tender Document and thus this matter was yet to be determined. He referred the Board to annexures to the Supplementary Affidavit of Kelly Nandasaba Watimah, CR12 for Paradigm Construction Company Limited (KNW1b) and CR12 for Pinnie Agency Limited (KNWc) both dated 12th January 2023 indicating Abdirizak Hussein Sheikh as a Director in both companies. He added that from the

CR12 documents, the 2 companies shared a common postal address P.O Box 104080 Jamia.

Counsel further exhibited certified copies of documents from the Registrar of Companies which he argued had not been disputed by the Respondents or the Interested Party on when Abdirizak Hussein Sheikh ceased to hold office as a Director in the Interested Party. He referred to annexure KNW2a, a Notice of Cessation of Directors which indicated Abdirizak Hussein Sheikh ceased to hold office at the Interested Party on 16th January 2023, at which time the tender had closed. He also directed the Board to annexure KNW2a showing that Abdirizak Hussein Sheikh was appointed a Director at the Interested Party on 21st April 2021. He argued that the said Director held the said position at the Interested Party between 21st April 2021 and 16th January 2023.

Counsel submitted that the Procuring Entity conducted due diligence in regards to information of the period after the tender had closed. He argued that from a look at the Respondents' Replying Affidavit they erred as regards the period they were to look into. According to Counsel, they ought to have looked at the state of affairs of the 2 companies as of 21st December 2022 and not February and March 2023 as they did.

He submitted that allowing the conduct of the Procuring Entity would be tantamount to allowing a party to modify its tender contrary to express provisions of the Act.

Mr. Sang notified the Board that even the feedback the Respondents received from the Registrar of Companies that the CR 12 as per the Companies register is totally different from the one the Interested Party had submitted in its tender. He invited the Board to look at the 2 CR12 documents alongside the information the Respondents received and discover the difference and that this would amount a modification of the tender.

It was Counsel's submission that 1st Respondent was occasioning delay in the conclusion of the subject tender as they were not complying with the orders of the Board in Request for Review No. 7 of 2023. He therefore sought for the grant of the orders sought in the Request for Review.

The Board sought clarification as to when the Applicant learnt of the common legal representatives and postal address between the Interested Party and Pinnie Agency Limited. Mr. Sang indicated that the Applicant learnt of the same upon receipt of the Notification of Intention to Award dated 7th March 2023.

The Board also sought clarity as to whether the CR12 documents filed in Request for Review No. 7 of 2023 did not have the legal representatives and postal address of the 2 companies. Mr. Sang responded citing that the Directors of a company are its legal representatives.

The Board also inquired whether there were any new documents introduced in the current Request for Review different from those in Request for Review No. 7 of 2023 other than the Letter of Notification. Mr. Sang indicated that the new document introduced is the annexure KNW1 which is a Letter of authorization from the Applicant authorizing Kelly Nandasaba Watimah to swear affidavits on its behalf.

Respondents' Submissions

Counsel for the Respondents, Mr. Cheruiyot relied on the documents filed by the Respondents i.e. 1st & 2nd Respondents Replying Affidavit sworn on 23rd March 2023 by Dr. Paul Wangwe Ongeti, Confidential file containing confidential documents regarding the subject tender, 1st & 2nd Respondents' Written Submissions dated 5th April 2023.

Mr. Cheruiyot submitted that the present Request for Review raises the same issues that the Applicant had raised in Request for Review No. 7 of 2023. He referred to section 7 of the Civil Procedure Act and submitted that proceedings that have already been heard and determined should not be reheard after determination. He submitted that the Applicant had raised the conflict of interest claim in Request for Review No. 7 of 2023 under clause 3.3 of the Tender Document.

He pointed out that clause 3.3 of the Tender Document seeks to precludes tenderers on the basis of conflict of interest arising on any of the conditions under clauses (a) to (h). He submitted that all issues of conflict of interest should have been raised in Request for Review No. 7 of 2023 and it was not

open for the Applicant to bring separate Requests for Review on each of the sub-clauses under clause 3.3. Counsel argued that the Applicant was re-introducing the claim for conflict of interest and that this Board lacked the jurisdiction to rehear the claim as this had been heard and determined in Request for Review No. 7 of 2023. For this proposition, he relied on the decision of the East African Court of Appeal in *Gurbachan Singh Kalsi v Yowani Ekor* [1958] EA 450 as well as the High Court decision in *Republic v Public Procurement Administrative Review Board & 4 Ors Ex-parte J. Knieriem*.

It was Counsel's submission that a Board should not consider an issue that has already been considered and further that a party should bring forth its case in whole and not through piecemeal litigation. He cautioned that if a party is permitted to litigate in piecemeal, it would not come as a surprise that the Applicant would bring a new claim of conflict of interest under clause 3.3 (e) of the Tender Document.

He argued that allowing piecemeal litigation will be unfair to the Procuring Entity, all the tenderers in the subject tender and to the people of Uasin Gishu who expect that the procuring processes would result in development projects being undertaken in the County.

Mr. Sang argued that the Applicant was using the present Request for Review to relitigate matters that had been raised and introducing matters which ought to have been introduced in the previous Request for Review.

He submitted that the Respondents complied with the orders of the Board in Request for Review No. 7 of 2023. He also referred the Board's decision and indicated that the Procuring Entity was to conduct due diligence to confirm and verify the qualifications of the Interested Party in accordance with the Act and also taking in to account the finding of the Board. It was his contention that the Board at page 37 of its decision considered that it is only just and fair that the evaluation committee conducts due diligence on the CR12 documents provided in the submitted tender by the Interested Party. He submitted that on the basis of the annexures annexed to the Replying affidavit, the Respondents conducted due diligence process on the CR12 document submitted.

Counsel, further argued that the Board did not direct the Respondents to conduct due diligence on any other document but the documents submitted at the close of the tender on 21st December 2022. He indicated that the results of the due diligence exercise are the letters from the Registrar of Companies annexed to the Replying affidavit of Dr. Paul Wangwe Ongeti. In response to the allegation for delaying the conclusion of the subject tender, Mr. Sang submitted that the validity period for the subject tender had not lapsed.

He referred to the letters dated 28th February 2023 and 2nd March 2023 from the Business Registration Service and addressed to the 1st Respondent. Mr. Cheruiyot argued that the letter dated 28th February 2023 indicates that the Interested Party was registered in 2015 and details of the directorship of the company are also supplied as of 28th February 2023. Counsel submitted that this did not mean that due diligence was only conducted on 28th February 2023 since the letter gave information from incorporation in 2015 to 28th February 2023, which period included time as at the close of the tender. He therefore indicated that the Respondents complied with the orders of the Board.

It was Counsel's submission that the issue of common directorship and postal address were issues raised in Request for Review No. 7 of 2023. He maintained that a company is a distinct legal entity separate from its directors and shareholders as had been held by the Board in Request for Review No. 7 of 2023.

Counsel, contended that the letter dated 2nd March 2023 from the Companies Registry confirmed that neither the Interested Party nor Pinnie Agency Limited has ever been a director or shareholder in the other.

He further stated that no tenderer in the subject tender had at any stage of the procurement process been allowed to modify its tender. He submitted that in fact the Applicant who was attempting to modify the submitted tenders by introducing documents bearing dates after the close of the tender was an attempt at modifying the submitted tender documents.

In conclusion Mr. Cheruiyot sought the Board to find that it had no jurisdiction to hear the matter and dismiss the Request for Review as filed.

The Board sought clarity on whether due diligence had been conducted on the CR12 submitted by the Interested Party. Mr. Cheruiyot responded in the affirmative.

Mr. Cheruiyot waived his right to offer a rejoinder on the principle of *res judicata* and instead donated his time to the Board.

Interested Party's Submissions

Counsel for the Interested Party, Ms. Waiganjo relied on the pleadings and documents filed by the Interested Party i.e. Notice of Preliminary Objection dated 30th March 2023, Replying Affidavit sworn on 30th March 2023 by Jonyo Geoffrey Okuto, Written Submissions and Bundle of Authorities dated 5th April 2023.

Ms. Waiganjo submitted that the matter was *res judicata* as this Board in Request for Review No. 7 of 2023 heard and determined the issues raised in the present Request for Review. She submitted that the matter in Request No. 7 of 2023 was between the same parties and that the Board was a competent forum to hear the said matter.

It was Counsel's submission that the issue in the instant Request for Review i.e. allegation of breach of clause 3.3. of the Tender Document was directly

and substantially in issue in Request for Review No. 7 of 2023. She argued that the present Request for Review offends section 7 of the Civil Procedure Act and thus the Board lacks jurisdiction and should down its tools.

Ms. Waiganjo objected to the annexures annexed to the Statement in support of the Request for Review sworn by Kelly Nandasaba Watimah i.e. documents marked KW1, KW1a, KW2, KW3 and KW4. She submitted that the documents are incompetent for not being securely sealed under the seal of a Commissioner for Oaths contrary to Rule 9 of the Oaths and Statutory Declarations Rules that requires all exhibits to affidavits to be secured under the seal of a Commissioner for Oaths. Counsel invited the Board not to consider the said documents as they were not properly on record.

Counsel went on to submit that exhibits go to the root of the evidence the Applicant wishes to rely on and sought for their exclusion from the record as their propriety is questionable. She argued that it appeared that the exhibits were never presented to the Commissioner for Oaths at all. Accordingly, she sought for exhibits to be expunged from the record leaving the Statement in support of the Request for Review incomplete. Counsel submitted that an affidavit without annexures is valueless and should be rejected and in the event the affidavit is rejected, the filed Request for Review will remain unsupported by a Statement in Support of the Request for Review contrary to Regulation 203(2)(b) of Regulations 2020.

Ms. Waiganjo added that aside from making allegations of non-compliance with the Board's orders in Request for Review No. 7 of 2023, the Applicant

did not expressly state what the Procuring Entity as against the orders issued as to constitute non-compliance. She submitted that the documents submitted by the tenderers in the subject tender were evaluated by the Evaluation Committee and a decision was made. It was Counsel's contention that the issue of conflict of interest was addressed by the Board in Request for Review No. 7 of 2023 and that the Applicant did not file judicial review proceedings against it therefore relitigating the same issue through the present Request for Review is an exercise in futility.

Counsel argued that due diligence was carried out as per the orders of the Board in Request for Review No. 7 of 2023 and the improper Exhibits introduced by the Applicant do not form part of the due diligence exercise. She submitted that the Applicant was attempting to modify the Interested Party's tender through the improper exhibits contrary to Section 76 of the Act.

Ms. Waiganjo argued that Section 83 of the Act was clear that the mandate for due diligence vest in the Evaluation Committee of the Procuring Entity and not tenderers. Counsel therefore submitted that the improper exhibits annexed to the affidavit of Kelly Nandasaba Watimah cannot take precedence over the findings of the due diligence exercise done by the Evaluation Committee.

Counsel contended that paragraphs 9 to 13 of the Respondents' Replying Affidavit stipulate when and how the Evaluation Committee conducted due diligence and from whom the Procuring Entity obtained confidential

references. The Respondents have also highlighted their findings and have also directed the Board to review the due diligence report submitted as part of the confidential documents.

Ms. Waiganjo contended that the Procuring Entity complied with section 64(1) Act by contacting the Registrar of Companies in writing and the Procuring Entity also received an official report from which they were able to generate a due diligence report.

She submitted that the Applicant had not adhered to the evidential principle that he who alleges must prove. She argued the Applicant has failed to prove that due diligence was not carried out as ordered and the improper exhibits do not prove that there is conflict of interest between the Interested Party and Pinnie Agency Limited.

She argued that based on the Tender Document and orders of the Board in Request for Review No. 7 of 2023, a finding of conflict of interest would not be possible since the Tender Document defined control in the context of a Tenderer. She pointed out that a tenderer in this case are the companies Paradigm Construction Company and Pinnie Agency Limited. She submitted that the Registrar of Companies from the response filed by the Respondents confirms that there has never been a control relationship between the Interested Party and Pinnie Agency Limited.

Ms. Waiganjo contended that the Interested Party was qualified for the award of the subject tender and that the evaluation was fair and that there

was no conflict of interest between it and Pinnie Agency Limited to warrant its disqualification. She also added that the Respondents did not breach the Act and they complied with orders of the Board in Request for Review No. 7 of 2023. She therefore sought that the instant Request for Review be found *res judicata* and the Board lacks jurisdiction to hear the same, Exhibits to the affidavit in support of the Request for Review are not properly on record and the Request for Review to be dismissed with costs.

In conclusion Ms. Waiganjo submitted that the issue of the postal address and legal representation was known to the Applicant from the time it filed Request for Review No. 7 of 2023. She argued that the exhibits annexed to Request for Review No. 7 of 2023 are the same ones the Applicant wishes to rely on in the present Request for Review.

Counsel further argued that there is no law that prohibits companies from sharing postal addresses and that even clauses 3(c) and (d) do not prohibit the sharing of postal addresses.

Ms. Waiganjo submitted that parties to a litigation ought to bring their cases as a whole and that this Board should not unless in special circumstances permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest but which was not brought forward only because of negligence or inadvertence

She argued that the Applicant in Request for Review No. 7 of 2023 omitted as part of their case provisions under clause 3.3 (c) and (d) of the Tender Document which were within the Applicant's knowledge so as the issue of postal address. She affirmed that the exhibits that the Applicant was relying on in the present Request for Review are the same ones the Applicant relied on in Request for Review No. 7 of 2023. Essentially, the Applicant was litigating in instalments and that there is no new cause of action to warrant the Board to exercise its jurisdiction.

Ms. Waiganjo submitted that Regulations 2020 require that a Request for Review should be accompanied by a statement without stipulating the form but Applicant elected to accompany the Request for Review with an affidavit. Therefore, she argued that the minute they elected an affidavit they were bound to comply with the Oaths and Statutory Declaration Act on preparation of affidavits and exhibits to such affidavits. Counsel further indicated that that Applicant filed a supplementary affidavit sworn on 4th April 2023, subsequent to being served with the Interested Party's Notice of Preliminary Objection dated 30th March 2023. She submitted that the Applicant was purporting to reintroduce amended versions of the exhibit which the Interested Party had objected to. Counsel argued that the Applicant did not respond to the Preliminary Objection and were attempting to defeat it by amending the exhibits. Counsel urged the Board to see through this and reject the amendments sought to be introduced through the supplementary affidavit. She prayed for the Board to find that the amended exhibits annexed to the supplementary affidavit were not properly on record as to grant the court jurisdiction over the matter.

Applicant's Rejoinder

In a rejoinder, Mr. Sang, submitted that there were earlier orders by the Board on due diligence that had not been complied with and this created a new set of facts that occasioned the present Request for Review.

It was Counsel's submission that the new set of fact that the Board should consider is whether the due diligence that due diligence was conducted in line with the Act and orders of the Board. He argued that the due diligence was not conducted in compliance with the orders of the Board and the Act. Counsel pointed out that the report that the Respondents have filed in their due diligence, annexures PO3 shows that they obtained records as of 28th February 2023 and 27th February 2023.

Mr. Sang argued that the Respondents ought to have obtained records as at the time of close of tender, 21st December 2022. He added that the response that the Respondents got, is that they are omitting to notify the Board that there have been changes in the directorship. He referred the Board to the CR12 submitted by the Interested Party i.e. one dated 12th October 2022. It bears 2 Directors i.e. Suleiman Hussein and Abbas Abdile. These are the Directors that the Interested party had indicated in their tender document but the due diligence is yielding the status as 28th February 2023. The Applicant makes this as a modification of its tender being that there has been variance from the documents that had been submitted earlier. Counsel submitted that on the face of the results it shows that there is a new set of intervening facts.

He submitted that Regulation 203(1) of the Regulations 2020 envisions a statement to accompany a Request for Review and in the Applicant's case what was submitted accompanying the statement was purely for marking to show the documents being relied upon. Further, it was submitted that the Board is not bound by the rules of evidence as per Regulation 218 of the Regulations 2020 and thus the invitation not to consider the documents should be ignored. He submitted that the documents are after all properly reintroduced through the supplementary affidavit of Kelly Nandasaba Watimah.

Mr. Sang submitted that the court in *Republic v Public Procurement Administrative Review Board Ex-parte Techno Relief Services Limited* [2019]eKLR clarified where there are intervening facts that create a new cause of action *res judicata* cannot be pleaded. He submitted that the present case had intervening facts that warranted the filing of the present Request for Review.

He argued that issue of jurisdiction was settled by the Court of Appeal in **Kenya Pipeline Company Ltd vs Hyosung Ebara Company Limited & 2 Others** where it was affirmed that the Board is granted wide jurisdiction to determine everything before it and that if this Board does not determine the present issues there is no other forum to address the same.

Counsel submitted that the prayers sought in the present Request for Review were different from the ones in Request for Review No. 7 of 2023. He argued

that they related to the new intervening set of facts. He submitted that the Respondents conducted due diligence as a formality as opposed to ascertaining the eligibility of the Interested Party. He argued that if they properly conducted the due diligence they could have noticed that there was a variation from the documents earlier provided.

Counsel further argued that the Respondents and Interested Party had not commented on the documents introduced by the Applicant and thus concluded that it was an admission on their part as to the contents of the said documents.

The Board sought clarity on which prayer touches on non-compliance with the Board's orders in Request for Review No. 7 of 2023 to which Mr. Sang pointed out Prayer No. 3 of the Request for Review.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 21st March 2023 had to be determined by 11th April 2023 and that the Board would communicate its decision on or before 11th April 2023 to all parties via email.

BOARD'S DECISION

The Board has considered each of the parties' cases, documents, pleadings, oral and written submissions, authorities together with the 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 issues raised in the instant Request for Review touching on conflict of interest under clauses 3.3 (c) and (d) of A. General Provisions of Section I: Instructions To Tenderers of the Tender Document are barred by the doctrine of res judicata as provided for under Section 7 of the Civil Procedure Act with respect to issues raised and determined in Request for Review No.7 of 2023 as to divest the Board of jurisdiction to hear and determine the same?

Depending on the determination of the first issue;

- II. Whether the Exhibits annexed to the Applicant's Statement in Support of the Request for Review sworn by Kelly Nandasaba Watimah on 21st March 2023 are properly on record?***
- III. Whether the Respondents complied with this Board's orders issued on 21st February 2023 in Request for Review No.7 of 2023?***
- IV. What orders should the Board grant in the circumstances?***

Whether the issues raised in the instant Request for Review touching on conflict of interest under clauses 3.3 (c) and (d) of A. General Provisions of Section I: Instructions To Tenderers of the Tender Document are barred by the doctrine of res judicata as provided for under Section 7 of the Civil Procedure Act with respect to issues raised and determined in Request for Review No.7 of 2023 as to divest the Board of jurisdiction to hear and determine the same?

The Respondents and the Interested Party assailed the instant Request for Review on account that the issues raised in the instant Request for Review were similar to issues that the Applicant had raised in Request for Review No. 7 of 2023 and which issues had been heard and determined by this Board. They highlighted that the Applicant filed Request for Review No. 7 of 2023 alleging conflict of interest on the part of the Interested Party for having a common directorship with another tenderer, Pinnie Agency Limited contrary to Clause 3.3 (a) of A. General Provisions of Section I: Instructions To Tenderers of the Tender Document.

Counsel for the Respondent and Counsel for the Interested Party separately pointed out that the instant Request for Review raised the same issue of conflict of interest on the part of the Interested Party for having common directorship and postal address as Pinnie Agency Limited only that this time the conflict of interest was couched as being brought under Clause 3.3 (c) and (d) of A. General Provisions of Section I: Instructions To Tenderers of the Tender Document. They submitted that the matter on conflict of interest with respect to the Interested Party and Pinnie Agency Limited was res judicata having been heard and determined by a competent Board and thus the Board lacked the jurisdiction to re-open the matter for reconsideration through the instant Request for Review. They pointed out that the documents the Applicant sought to rely on in the instant Request for Review are the very same the Applicant tendered in evidence in Request for Review No. 7 of 2023.