

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 32/2024 OF 12TH APRIL 2024

BETWEEN

COMPUFIX TECHNOLOGIES LTD APPLICANT

AND

THE ACCOUNTING OFFICER (CHIEF OFFICER-ICT). 1ST RESPONDENT

THE COUNTY GOVERNMENT OF MAKUENI

DEPARTMENT OF EDUCATION, ICT & INTERNSHIP. 2ND RESPONDENT

PINNACLE INTEGRATED TECHNOLOGIES

LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer (Chief Officer - ICT), County Government of Makueni in relation to Tender No. GMC/ICT/T/1474504/2023/2024 for Supply, Delivery, Installation, Testing and Implementation of a County Integrated Health Management Information System.

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCIArb - Chairperson
2. Eng. Lilian Ogombo - Member
3. Dr. Susan Mambo - Member



IN ATTENDANCE

- 1. Ms. Sarah Ayoo - Holding Brief for Acting Board Secretary
- 2. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT

COMPUFIX TECHNOLOGIES LTD

Mr. Nyaberi Justin - Advocate, Omwonyo, Momanyi Gichuki
Advocates

RESPONDENTS

**THE ACCOUNTING OFFICER (CHIEF
OFFICER-ICT)& THE COUNTY
GOVERNMENT OF MAKUENI
DEPARTMENT OF EDUCATION, ICT &
INTERNSHIP**

Mr. Dennis Mung'ata -Advocate, Gichimu Mung'ata & Co.
Advocates

INTERESTED PARTY

**PINNACLE INTEGRATED
TECHNOLOGIES LIMITED**

Mr. Kabugu - Advocate, Kabugu & Company Advocates



BACKGROUND OF THE DECISION

The Tendering Process

1. The County Government of Makueni through its Chief Officer - ICT invited qualified and interested tenderers to submit sealed tenders in response to Tender No. GMC/ICT/T/1474504/2023/2024 for Supply, Delivery, Installation, Testing and Implementation of a County Integrated Health Management Information System (hereinafter referred to as the "subject tender"). Tendering was conducted under open competitive method (National) and the invitation was by way of an advertisement on 15th March 2024 on the Procuring Entity's website www.makueni.go.ke and on the Public Procurement Information Portal (PPIP) website www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. Tenders were to be submitted electronically through the GOK IFMIS portal <https://supplier.treasury.go.ke> and the tender's submission deadline was scheduled on 25th March 2024 at 02.00 p.m.

Submission of Tenders and Tender Opening

2. According to the Minutes of the subject tender's opening held on 25th March 2024 signed by members of the Tender Opening Committee (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board

(hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of fourteen (14) tenders were submitted in response to the subject tender. The fourteen (14) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1.	Apps Pool Business Solutions Limited
2.	Compufix Technologies Limited
3.	Digital Tailor Agency Limited
4.	Kyania Enterprises Limited
5.	Maat Systems East Africa Limited
6.	Medbook Kenya Limited
7.	Pinnacle Intergrated Technologies Limited
8.	Q-Afya Hmis Ltd
9.	Riverbank Solutions Limited
10.	Smart Applications International Limited
11.	Soft Consult Limited
12.	Softcom Business Solutions Limited
13.	Tritek Consulting Limited
14.	Wisedigits Limited

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the fourteen (14) tenders as captured in a GOK IFMIS Evaluation Matrix Report for the subject tender signed by members of the Evaluation Committee (hereinafter referred to as the "Evaluation Report") in the following stages:

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

Preliminary Evaluation

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Preliminary Evaluation of Section III- Evaluation and Qualification Criteria at page 27 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the technical evaluation stage.

5. At the end of evaluation at this stage eleven (11) tenders were determined non-responsive, including the Applicant's tender, while three (3) tenders were determined responsive and proceeded for Technical Evaluation.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Technical Evaluation of Section III- Evaluation and Qualification Criteria at page 28 to 29 of the Tender Document. Tenderers were required to score 75 marks to proceed to the financial evaluation stage.
7. At the end of evaluation at this stage, two (2) tenders were determined non-responsive while one (1) tender was determined responsive having met the minimum technical score and proceeded for evaluation at the Financial Evaluation stage.

Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 30 of the Tender Document. The subject tender would be awarded to the lowest evaluated responsive bidder.
9. Following the conclusion of evaluation at this stage, the Evaluation Committee found as follows:

EVALUATION TABLE FOR AWARD

Quote No.	Bidder	Technical Score	Bid Total	Price Points	Total Points	Total Points Rank
..2254	Pinnacle Intergrated Technologies Limited	95	34,892,800.00	0.00	95.00	1

Evaluation Committee's Recommendation

10. The Evaluation Committee recommended award of the subject tender to the Interested Party, Pinnacle Intergrated Technologies Limited, being the lowest evaluated bidder at a total cost of Kenya Shillings Thirty-Four Million Eight Hundred and Ninety-Two Thousand Eight Hundred only (Kshs. 34,892,800.00).

Professional Opinion

11. In a Professional Opinion dated 28th March 2024 (hereinafter referred to as the "Professional Opinion"), the Head of Procurement, CM Fidel Muema, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to Pinnacle Intergrated Technologies Limited, being the lowest evaluated bidder at a total cost of Kenya

Shillings Thirty-Four Million Eight Hundred and Ninety-Two Thousand Eight Hundred only (Kshs. 34,892,800.00).

12. Thereafter, the Professional Opinion was approved by the 1st Respondent herein on 28th March 2024.

Notification to Tenderers

13. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 28th March 2024.

REQUEST FOR REVIEW NO. 32 OF 2024

14. On 12th April 2024, Compufix Technologies Ltd, the Applicant herein filed a Request for Review dated 10th April 2024 (hereinafter referred to as the 'Instant Request for Review') together with an Affidavit sworn on 11th April 2024 by Jefferson Wambua Mule, its Director seeking the following orders from the Board in verbatim:

a) Set aside the intention to award the above-named open tender to The Interested Party with quote amounting to Ksh. 34,892,800 pending your review.

b) The honorable board to compel the procuring entity to readmit the applicant for re-evaluation at the financial

stage and declare the applicant the lowest responsive evaluated bidder.

c) The honorable board to compel the procuring entity to proceed with the procuring process to its logical conclusion and adhere to the Public Procurement and Asset Disposal Act, 2015 and the constitution of Kenya 2010.

d) The procuring entity to be compelled to award the bidder who has a responsive and value for money bid after re-evaluation.

e) The current procuring entity evaluation report on the named tender be annulled and set aside.

f) The professional opinion from the head of procurement be annulled and set aside.

g) The determination of the applicant's tender as non-responsive at the preliminary evaluation stage and the consequent disqualification be annulled and set aside.

h) The procuring entity decision to disqualify the applicant's tender be substituted with the honorable

board's decision that the applicant's tender was responsive at the preliminary evaluation stage.

i) The determination of the interested party's tender as responsive at the preliminary stage, the technical qualification and the rating as the lowest evaluated tender be annulled and set aside.

j) The procuring entity decision to qualify the interested party's tender as responsive and lowest evaluated be substituted with the honorable board's decision that the interested party's tender was non-responsive and disqualified at the financial evaluation stage.

k) The procuring entity to be compelled by the board to meet all the costs of the review

15. In a Notification of Appeal and a letter dated 12th April 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 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 Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 12th April 2024.

16. On 17th April 2024, the Respondents filed, through Gichimu Mung'ata & Co Advocates a Notice of Appointment of Advocate dated 16th April 2024, a Respondent's Index of Documents dated 16th April 2024, a Respondent's Memorandum of Response to the Request for Review dated 16th April 2024, a Respondent's Replying Affidavit sworn by Alfonse Itumo Kanunga, the 1st Respondent herein, on 16th April 2024, a Notice of Preliminary Objection dated 16th April 2024 together with a Respondent's Bundle and Index of Documents containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

17. *Vide* email dated 17th April 2024, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the 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 three (3) days.

18. On 19th April 2024, the Interested Party filed through Kabugu and Company Advocate a Notice of Appointment dated 19th April 2024.

19. *Vide* a Hearing Notice dated 19th April 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 25th April 2024 at 2.00 p.m. through the link availed in the said Hearing Notice.
20. On 24th April 2024, the Interested Party filed through its advocates an Interested Party's Replying Affidavit sworn on 23rd April 2024 by John Mwangi Chege, its Director.
21. On 24th April 2024, the Respondents filed through their advocates Written Submissions dated 24th April 2024.
22. On 25th April 2024, the Applicant filed through Omwoyo, Momanyi Gichuki & Co. Advocates a Notice of Appointment dated 23rd April 2024.
23. When the matter first came up for hearing on 25th April 2024 at 2.00 p.m., the Board read out pleadings filed by parties in the matter. Counsel for the Respondents sought to know in what capacity was Mr. Nyaberi appearing for the Applicant. The Board through the Secretariat confirmed that a Notice of Appointment dated 23rd April 2024 had been filed via email on behalf of the Applicant by Mr. Nyaberi through the firm of Omwoyo, Momanyi Gichuki & Co. Advocates on 25th April 2024 at 12.42 p.m.

24. Mr. Nyaberi, counsel for the Applicant, proceeded to seek for an adjournment to enable him file a Further Affidavit in response to the Notice of Preliminary Objection filed by the Respondents so as to prove capacity of the Applicant and that the instant Request for Review was properly filed in addition to written submissions. On their part, both counsels for the Respondents and Interested Party, Mr. Mung'ata and Mr. Kabugu respectively, indicated that they were ready to proceed with the hearing noting the limited timelines within which the Board was required to issue a decision in the matter.

25. Having considered parties' submissions on the application for adjournment, the Board sought to know whether parties were agreeable to canvassing the instant Request for Review by way of filing exhaustive written submissions in the interest of time. There being no objection by parties, the Board directed that the instant Request for Review would be canvassed by way of written submissions and directed (a) Mr. Nyaberi to serve his Notice of Appointment upon all parties by 5.00 p.m. on 25th April 2024, (b) the Applicant to file and serve its further affidavit together with written submission by 11.00 a.m. on 26th April 2024, (c) the Respondents to file and serve any supplemental submissions by 3.00 p.m. on 26th April 2024, (d) the Interested Party to file and serve its written submissions by 6.00 p.m. on 26th April 2024. Parties were cautioned to adhere to the strict timelines as specified in the Board's directions and that any pleading filed outside the stipulated timelines would be struck out since the

Board would rely strictly on the documentation filed before it in rendering its decision.

26. Parties were also informed that the instant Request for Review having been filed on 12th April 2024 was due to expire on 2nd May 2024 and that the Board would communicate its decision on 2nd May 2024 to all parties to the Request for Review via email.

27. On 26th April 2024, the Applicant filed through its advocates a Supporting Affidavit sworn on 26th April 2024 by Jefferson Wambua Mule together with Written Submissions dated 26th April 2024.

28. On 26th April 2024, the Respondents filed through their advocates Supplementary Written Submissions dated 26th April 2024.

29. On 26th April 2024, the Interested Party filed through its advocates Written Submissions dated 26th April 2024.

PARTIES' SUBMISSIONS

Applicant's case

30. In its submissions, the Applicant relied on the Request for Review dated 10th April 2024 together with the Affidavit sworn on 11th April 2024 by Jefferson Wambua Mule, the Supporting Affidavit sworn on 26th April 2024 by Jefferson Wambua Mule together with Written Submissions dated 26th April 2024 filed before the Board.

31. The Applicant submitted that it participated in the subject tender following an advertisement by the Respondents and was on 28th March 2024 issued with a notification of intention to award the subject tender to the Interested Party which also notified it of the standstill period which was to lapse at midnight on 12th April 2024 with a rider that this period could be extended.

32. The Applicant contends that in computing time within which it was required to file the instant Request for Review, time was to run from the 28th March 2024 and lapse on 12th April 2024. The Applicant pressed on that taking into consideration that 29th March 2024 was a public holiday (Good Friday) and 1st March 2024 (*perhaps meant 1st April 2024*) was another public holiday (Easter), the last day of filing the instant Request for Review was 16th April 2024 and as such, the same had been timeously filed on 12th April 2024.

33. With regard to the issue of whether Jefferson Wambua Mule had capacity to sign and execute documents on behalf of the Applicant in the instant Request for Review, the Applicant submitted that Mr. Jefferson Wambua Muleto was its director and that in a board meeting held on 19th March 2024, a resolution was passed nominating Jefferson Wambua Muleto to sign and execute all documents relating to the subject tender and related transactions including swearing the Affidavit of 11th April 2024 filed together with the Request for Review application.

34. With regard to whether the Affidavit sworn on 11th April 2024 by Jefferson Wambua Muleto is defective for not disclosing the drawer, the Applicant submitted that it drafted and filed the instant Request for Review in person and ought not to be dismissed for failure to comply with the strict provisions of drafting legal documents and made reference to the provisions of Article 50(1) of the Constitution and Section 173 and 178 of the Act.

35. On the substantive issues raised in the instant Request for Review, the Applicant contends that the notification of intention to award the subject tender dated 28th March 2024 did not give reasons why the Applicant's bid was not successful as it quoted that '*the price schedule (recurrent cost subtable attached was Not in format given in the tender document and was not duly filled.*'

36. The Applicant submitted that it sought a debriefing on evaluation of its tender vide letter dated 2nd April 2024 and in a response issued vide letter dated 5th April 2024, the Respondents did not give a genuine reason why the bid was not successful.

37. The Applicant further submitted that it complied with the tabulation as the subject tender was for one year and its tabulation met all financial evaluation criteria. That for purposes of preliminary evaluation, the table provided all the specifications and there were no other underlying costs as claimed for all the other years (y2, y3...yn)

and that the subject tender was not infinite for it provided tabulation for y2, y3.....Yn which is infinite. The Applicant contends that none of the other bidders supplied the infinite tabulation of costs.

38. In support of its case, the Applicant referred the Board to the provisions of Article 227(1) of the Constitution on compliance by procuring entities when contracting for goods and services with the principles of fairness, equity, transparency, competitiveness, and cost effectiveness and for there to be fairness, all bids ought to be considered on the basis of their compliance with the terms of the solicitation documents and a bid should not be rejected for reasons other than those specifically stipulated in the Tender Document.

39. It is the Applicant's case that the Evaluation Committee did not act fairly in disallowing the Applicant's bid which met all the stipulated specifications and that its bid ought to be construed against the background of the system envisaged by Article 227(1) of the Constitution. The Applicant submitted that its bid provided a cost of Kshs. 24,998,346.14 against the Interested Party's cost of Kshs. 34,892,800.00 and urged the Board to allow the Request for Review as prayed.

Respondents' case

40. In their submissions, the Respondents relied on the Respondent's Memorandum of Response to the Request for Review dated 16th April 2024, the Respondent's Replying Affidavit sworn by Alfonse Itumo

Kanunga, the 1st Respondent herein, on 16th April 2024, the Notice of Preliminary Objection dated 16th April 2024 together with confidential documents concerning the subject tender submitted pursuant to Section 67(3)(e) of the Act that were filed before the Board.

41. The Respondents submitted that the Applicant's bid was found non-responsive at the Preliminary Evaluation stage since it failed to submit a duly filled signed and stamped price schedule form in the format provided as stipulated under Mandatory Requirement No. 7 of the Tender Document and vide the notification of intention to award the subject tender dated 28th March 2024, the Applicant was issued with the specific reason why its tender was disqualified.

42. The Respondents contend that the Applicant lodged with the Board the instant Request for Review on 12th April 2024 being the fifteenth day from the date of notification contrary to Regulation 203 of Regulations 2020 and as such, the instant Request for Review is incompetent having been filed outside the stipulated statutory timelines of 14 days pursuant to Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020.

43. It is the Respondents case that it is not in contest that the Applicant was notified of intention to award the subject tender on 28th April 2024 and that the timelines provided under the Act and Regulations are strict and mandatory and failure to comply with the same extinguishes the right to review. The Respondents submitted that the last day of

seeking review was on 11th April 2024 and not 12th April 2024 and that the Applicant's computation of time was wrong considering the provisions of Section 57 of the Interpretation and General Provisions Act which clear that in computing time, the 29th March 2024 and 1st April 2024 despite being public holidays were not excluded days and the Request for Review would have been within time if only the 11th day of April 2024 was a Sunday, a public holiday or a gazetted non-working day or otherwise excluded day triggering application of Section 57(b) of the Interpretation and General Provisions Act making the last day of filing the Request for Review on 12th April 2024.

44. The Respondents pressed on that the 29th March 2024 and 1st April 2024 would only be excluded from computation of time if only the time allowed for filing a request for review did not exceed six (6) days which would have triggered the applicability of Section 57(d) of the Interpretation and General Provisions Act. In support of their arguments, the Respondents referred the Board to the holding in the case of *Republic v Attorney General & Another Ex parte Francis Moriasi (2019) eKLR*.

45. The Respondents submitted that the instant Request for Review was signed by an agent without written authorization contrary to Regulation 203 of Regulations 2020 read together with the Fourteenth Schedule of the Act making it fatally flawed and for striking out.

46. While making reference to Section 40(1) of the Companies Act, the Respondents pointed out that the Applicant was a limited liability company and being a company, its decision are made by resolution of a Board of Directors and/or shareholders and noting that Jefferson Wambua Mule was not a sole director of the Applicant, he has not exhibited any resolution of the company or power of attorney authorizing him to undertake the review and sign any documents on behalf of the Applicant. The Respondents contend that the capacity of a party to bring proceedings and sign documents on behalf of a company is not a matter of technicality but a substantive issue as to the standing of that party to bring action on the name of the company and to find otherwise would invite disorder and confusion were the party in whose name the proceedings are brought was to disown those proceedings especially if an adverse order was to be made against that party.

47. The Respondents further contend that there is no competent statement accompanying the Request for Review and in the absence of the same, the instant Request for Review is fatally flawed.

48. The Respondents pressed on that the Affidavit by Jefferson Wambua Mule was fatally flawed as it failed to comply with the requirements of Section 5 of the Oaths and Statutory Declarations Act which stipulates under Section 5 that every commissioner for oaths shall state at what place and on what date the affidavit was made or oath taken. The Respondents contend that the said Affidavit fails to state who and

where it was drawn and is therefore flawed for failure to disclose who drew it in order to confirm the authority of the drawer to make the said affidavit.

49. On the substantive issues raised in the instant Request for Review, the Respondents submitted that after conducting a comprehensive preliminary evaluation of the mandatory requirements on the Applicant's bid, it was found non-responsive since it failed to submit a duly filled signed and stamped price schedule form in the format provided as stipulated under Mandatory Requirement No. 7 of the Tender Document which reason was supplied in the letter dated 28th March 2024. The Respondents further submitted that the Applicant requested a debriefing and was sufficiently advised vide letter dated 5th April 2024.

50. The Respondents contend that the Tender Document required a very specific criterion in order for a bid to be considered responsive and provided a clear and specific format that was to be filled by all bidders on the recurrent cost sub-table.

51. The Respondents pressed on that tenderers were required to use the tables provided as price schedules and in the recurrent cost sub table provided, the Applicant filled Kshs. 0 for all other years (Y2, Y3,YN) except for year 1 and went ahead to provide a different contradictory table for year 2 only amounting to Kshs. 1,926,760.00 as seen at page 404 of its bid document.

52. The Respondents submitted that at the bottom of the recurrent cost sub table (page 35 of the Applicant's bid document), the Applicant captured an annual maintenance cost of Kshs. 1,440,000.00 which was not summed up to the total recurrent cost sub table/summary/grand summary and in so doing, the Applicant departed substantively from the price schedule format provided in the Tender Document.
53. The Respondent further submitted that the Applicant departed substantively from the price schedule format provided in the Tender Document as the price schedule provided captured all the costs of the tender in a uniform format for comparison and the Applicant departed from this format and introduced rows and columns other than those provided in addition to varying and contradictory recurrent costs which were not captured in the summary and the Applicant has not denied the same.
54. The Respondents contend that the Applicant's bid was justifiably disqualified and that it treated all bidders in the subject tender in a similar manner. The Respondents submitted that there was no contradiction in the instructions on the price schedule and reiterated that the Applicant was at liberty to seek any clarification before tendering.
55. Further, the Respondent pointed out that the contradictory figures for recurrent cost provided by the Applicant constituted a major deviation

that affected the substance of the tender and thus the Applicant's bid was non-responsive pursuant to Section 74(1)(i), 79 and 80(1) and (2) of the Act read with Regulation 74(1)(b) of Regulations 2020. Additionally, the Respondents indicated that the Evaluation Committee adhered to the evaluation criteria set out in the Tender Document and complied with the provisions of Constitution and the Act. In support of their arguments, the Respondents referred the Board to the holding in *PPARB Application No. 7 of 2024 Emcure Pharmaceutical Limited v Chief Executive Officer Kenya Medical Supplies Authority & Hetero Labs Limited*; *Republic v Public Procurement Administrative Review Board & Another*; *Premier Verification Quality Services (PVQS) Limited Ex parte TUV Austria Turk [2020] eKLR* and *Republic v Public Procurement Administrative Review Board Accounting Officer Kenya Rural Roads Authority & 2 Others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR*.

56. The Respondents submitted that the Applicant has not in any way demonstrated loss and/damage suffered as a result of the Respondents' actions following issuance of the notification of intention to award. The Respondents further submitted that the Applicant's submission that no other bidder provided costs for subsequent years is unsettling since they are left to wonder if the Applicant was privy to other bidders' submissions while it is evident from the documents supplied to the Board that some tenders were found responsive while others were disqualified.

57. The Respondents urged the Board to dismiss the instant Request for Review with costs.

Interested Party's case

58. In its submissions, the Interested Party relied on the Replying Affidavit sworn on 23rd April 2024 by John Mwangi Chege, its Director and Written Submissions dated 26th April 2024 filed before the Board.

59. The Interested Party submitted that the basis of the instant Request for Review is the notification of intention to award communicated to the Applicant on 28th March 2024 leading to filing of the review on 12th April 2024, a fact that is not contested. While referring to the provisions of Section 167(1) of the Act and Section 57 of the Interpretation and General Provisions Act, the Interested Party further submitted that the instant Request for Review was filed outside the stipulated statutory timelines of 14 days making it time barred and ousting the jurisdiction of the Board to hear and determine it. In support of its argument, the Interested Party relied on the holding in *Civil Appeal No. E1009 of 2023 Public Procurement Administrative Review Board v Four M Insurance Brokers Limited & 3 others*.

60. While supporting the Respondents submissions, the Interested Party pointed out that the Applicant's Supporting Affidavit sworn on 11th April 2024 is fatally defective for failure to comply with the provisions of Section 34 and 35 of the Advocates Act and for lack of a Board Resolution. The Interested Party pressed on that the Applicant's

Supplementary Affidavit sworn on 26th April 2024 defied every provision and legal safeguard of the presentation and authentication of an affidavit evidence as provided under the Oaths and Statutory Declarations Act and ought to be struck out.

61. The Interested Party submitted that evaluation of the subject tender was fair, equitable and transparent. While making reference to the provisions of Section 87(3) of the Act on notification of intention to award, the Interested Party indicated that the reason provided for disqualification of the Applicant's bid was in line with the provisions of the Tender Document as bidders were required to complete their documents in the prescribed format.

62. The Interested Party urged the Board to allow the Respondents' Preliminary Objection and to strike out the instant Request for Review with costs.

BOARD'S DECISION

63. The Board has considered each of the parties' cases, documents, pleadings, written submissions, list and bundle of 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.

A. 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:

- i. Whether the instant Request for Review was filed within the statutory period of 14 days of notification of award in accordance with Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020 to invoke the jurisdiction of the Board.*
- ii. Whether the instant Request for Review as filed is fatally defective.*

Depending on the outcome of Issue A;

B. Whether the 2nd Respondent's Evaluation Committee evaluated the Applicant's tender in the subject tender in accordance with the provisions of the Tender Document read with Section 80 of the Act and Article 227(1) of the Constitution.

C. Whether the Letter of Notification dated 28th March 2024 issued to the Applicant in the subject tender met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020;

D. What orders should the Board grant in the circumstances?

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

64. It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before taking any further steps in the matter.

65. 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 into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

66. 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.

67. The Supreme Court added its voice on the source of jurisdiction of a court or other decision making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second 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."

68. In the persuasive authority from the Supreme Court of Nigeria in the case of **State v Onagoruwa [1992] 2 NWLR 221 – 33 at 57 – 59** the Court held:

"Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based."

69. In the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing

of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

70. Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that:

"whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter."

71. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

72. This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides:

"(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."

73. Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

"(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.”

74. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

75. The jurisdiction of the Board is provided for and also limited under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within

fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed. [Emphasis by the Board]

(2)

(3)

.....

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

76. Given the forgoing provisions of the Act, the Board is a creature of the Act and its jurisdiction flows from and is circumscribed under Section 28 and 167 of the Act. It therefore follows, that an applicant who seeks to invoke the jurisdiction of the Board must do so within the four corners of the aforesaid provisions. Section 167(1) of the Act allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

77. Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specifically under Regulation 203 of Regulations 2020 read with the Fourteenth Schedule of Regulations 2020 prescribes the format of the request for review as follows:

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

203. Request for a review

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

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

(a)

(b);

(c) be made within fourteen days of —

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

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

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

(d)

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

(4)

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

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person

submitting the successful tender that his tender has been accepted.

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

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

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

79. A reading of the above provisions shows that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to

enter into a contract is made and (iii) after a notification to enter into a contract has been made.

80. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. 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 notification to enter into a contract has been issued. We say so because there would be no need to provide under Regulation 203 (2)(c) of Regulations 2020 the three instances within which a Request for Review may be filed.

i Whether the instant Request for Review was filed within the statutory period of 14 days of notification of award in accordance with Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020 to invoke the jurisdiction of the Board;

81. The Respondents filed on 17th April 2024 a Notice of Preliminary Objection dated 16th April 2024 seeking for the instant Request for Review to be struck out on the ground that the Board lacks jurisdiction to entertain the same since it is time barred having been filed outside the statutory period of 14 days of notification of award contrary to

Section 167(1) of the Act read with regulation 203(2)(c)(ii) of Regulations 2020.

82. The Respondents submitted that it was not in contest that the Applicant was served with the Notification of Intention to Award the subject tender on 28th March 2024 and despite there being public holidays on Friday 29th March 2024 (Good Friday) and Monday 1st April 2024 (Easter Monday) these were not excluded days pursuant to Section 57(d) of the Interpretation and General Provisions Act and the instant Request for Review would have been within time had it been filed on 11th April 2024 and not on 12th April 2024.

83. On its part, the Interested Party supported the submissions by the Respondents and urged the Board to strike out the Request for Review for having been filed outside the statutory period of 14 days as prescribed.

84. In response, the Applicant submitted that taking into consideration the public holidays on 29th March 2024 and 1st April 2024, the last day of filing the instant Request for Review was on 16th April 2024 and as such, the review was filed within the prescribed timelines.

85. Having considered parties' pleadings and submissions, the Board notes that it is not in contest that the Applicant was served with its Notification of Intention to Award the subject tender on 28th March 2024. As such, the Applicant ought to have challenged the decision of

the Procuring Entity by virtue of Regulation 203(2)(c)(ii) of Regulations 2020.

86. In computing time when the Applicant ought to have lodged the instant Request for Review, we are guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

"57. Computation of time

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

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done***

or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

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

87. In computing time when the Applicant ought to have sought administrative review before the Board being aggrieved by the decision of the Procuring Entity communicated on 28th March 2024, the 28th of March 2024 is excluded pursuant to Section 57(a) of the IGPA being the date the Applicant learnt of the outcome of evaluation of its tender. This mean that 14 days started running from 29th March 2024 and lapsed on 11th April 2024.

88. We note that the Applicant took the position that since there were public holidays within the stipulated timelines of 14 days that it was required to have filed its review being Friday 29th March 2024 (Good Friday) and Monday 1st April 2024 (Easter Monday), these days ought to be excluded from computation of time and that the last day of filing the instant Request for Review was on 16th April 2024.

89. However, with regard to this line of argument by the Applicant, the Board notes that Section 57 (d) of the IGPA specifies the circumstances under which excluded days shall not be reckoned in the

computation of time being *'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.'*

90. Section 167(1) of the Act gives a period of fourteen (14) days to file a request for review before the Board and this period is more than the six (6) days specified under Section 57(d) of the IGPA. Therefore, when the period of the happening of an act or proceeding is more than 6 days, excluded days must be reckoned in the computation of time.

91. Assuming that the fourteenth day fell on the 10th of May 2024 which was declared and gazetted as a public holiday to mark Idd-ul-Fitr by the Cabinet Secretary for Interior and National Administration, Hon. Kithure Kindiki *vide* Gazette Notice No.4339 dated 9th April 2024, the 10th of April 2024 would be excluded pursuant to Section 57(b) of the IGPA and then the next following day being 11th May 2024 would be considered as the fourteenth day.

92. From the foregoing, the Board notes that the statutory period of 14 days started running on from 29th March 2024 and lapsed on 11th April 2024 and that the Applicant's right to approach the Board lapsed on 11th April 2024.

93. In the same vein, this Board in **PPARB Application No. 119 of 2019 CMC Motors Group Limited v Principal Secretary, State**

**Department of Interior Ministry of Interior and Coordination
of National Government held as follows:**

"The Board would like to make an observation that fourteen-day statutory period ensures that this Board cannot bend or circumvent the same in favour of one party over another to ensure that the process of review is expeditious and in line with the principles under section 4 of the Fair Administrative Action Act No. 4 of 2015 which states as follows:-

"Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair."

In Judicial Review Case No. 21 of 2015, Republic v Public Procurement Administrative Review Board & 2 others [2015] eKLR, the High Court while considering the purpose of the statutory timeline imposed under section 167 (1) of the Act held as follows:

"The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded. The Board has no

jurisdiction to hear anything filed outside fourteen days...

The timelines in the PP&DA [that is, the 2015 Act] were set for a purpose. Proceedings touching on procurement matters ought to be heard and determined without undue delay. Once a party fails to move the Board within the time set by the Act, the jurisdiction of the Board is extinguished in so far as the particular procurement is concerned..."
[Emphasis by the Board]

The Board concurs with the High Court's finding in the above case and would hasten to add that the period set under section 167 (1) of the Act is a statutory timeline which must be adhered to by an aggrieved candidate or tenderer including all players in a procurement process. It provides an opportunity within which an aggrieved candidate or tenderer may exercise its right to administrative review to challenge a procurement process in view of a breach of duty by a procuring entity as soon as the breach occurs so that once the Board dispenses with a review application, the procurement process can proceed to its logical conclusion for the public good.

94. In the circumstances, we find and hold that the instant Request for Review was filed outside the statutory timelines of 14 days prescribed

under Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020. The Board therefore lacks the jurisdiction to entertain the substantive issues raised in the instant Request for Review and proceeds to down its tools at this juncture.

95. In totality, the instant Request for Review is struck out for want of jurisdiction and the Board makes the following orders:

FINAL ORDERS

96. 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 10th April 2024 and filed on 12th April 2024:

A. The Request for Review dated 10th April 2024 and filed on 12th April 2024 with respect to Tender No. GMC/ICT/T/1474504/2023/2024 for Supply, Delivery, Installation, Testing and Implementation of a County Integrated Health Management Information System be and is hereby struck out for want of jurisdiction.

B. The Procuring Entity is hereby ordered to proceed with the procurement process in Tender No.



GMC/ICT/T/1474504/2023/2024 for Supply, Delivery, Installation, Testing and Implementation of a County Integrated Health Management Information System to its logical and lawful conclusion.

C. Each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 2nd Day of May 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB