

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 89/2024 OF 11TH SEPTEMBER 2024

BETWEEN

FRINI INVESTMENT LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

BASE TITANIUM LIMITED.....1ST RESPONDENT

BASE TITANIUM LIMITED.....2ND RESPONDENT

AND

MSAMBWENI COMMUNITY

DEVELOPMENT AGREEMENT COMMUNITY.....INTERESTED PARTY

Review against the decision of the Tender Committee of Base Titanium Limited in conjunction with Msambweni Community Development Agreement Community (CDAC) communicated on 5th September 2024 in the matter of Tender for Implementation of Proposed Projects within Msambweni Sub-County and in particular, construction of a Perimeter Wall at Magaoni Primary School.

BOARD MEMBERS PRESENT

- | | | |
|-------------------------|---|-------------|
| 1. Ms. Jessica M'mbetsa | - | Panel Chair |
| 2. Eng. Lilian Ogombo | - | Member |
| 3. Mr. Daniel Langat | - | Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT

FRINI INVESTMENT LIMITED

Mr. Titus Kirui Advocate, Kirui Kamwibua & Company
Advocates

RESPONDENTS

ACCOUNTING OFFICER, BASE TITANIUM LIMITED

BASE TITANIUM LIMITED

Ms. Pauline Vata Advocate, Pauline Vata & Company Advocates

INTERESTED PARTY

MSAMBWENI COMMUNITY

DEVELOPMENT AGREEMENT COMMUNITY

Ms. Pauline Vata Advocate, Pauline Vata & Company Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Base Titanium Limited, the 2nd Respondent herein invited interested suppliers to submit their bids in response to the Tender for Implementation of Proposed Projects within Msambweni Sub-County and in particular, construction of a Perimeter Wall at Magaoni Primary School (herein "the subject tender") under an open tender. Interested suppliers



were required to submit their bids before the tender closing date of Tuesday, 14th November 2023.

Submission of Tenders and Tender Opening

2. From the filed documents, the number of bidders who participated in the subject tender is not apparent. However, it is apparent that the Applicant is aggrieved by the manner in which the procurement process was undertaken.

REQUEST FOR REVIEW

3. On 11th September 2024, the Applicant filed a Request for Review dated 10th September 2024 supported by a Statutory Statement sworn on 10th September 2024 by Abdul Bundu, a Director at the Applicant, seeking the following orders from the Board in verbatim:

a) The Respondents' decision to re-advertise the Tender for Implementation of Proposed Projects within Msambweni Sub-County and in particular, construction of a Perimeter Wall at Magaoni Primary School as communicated to the Applicant vide a phone call on 5th September, 2024 be cancelled and set aside;

b) Any letter of award of Tender for Implementation of Proposed Projects within Msambweni sub-County and in particular, construction of a Perimeter Wall at Magaoni Primary School sought to be issued by the Respondents to any other party other than the Applicant be cancelled and set aside;

c) The Public Procurement Administrative review Board be pleased to declare that the Applicant having emerged the successful bidder and having been notified of the award in respect of Tender for Implementation of Proposed Projects within Msambweni Sub-County and in particular, construction of a Perimeter Wall at Magaoni Primary School be allowed to proceed and execute the contract to pave way for works to begin;

d) The procurement and proceedings leading to the decision by the Respondents to purport to re-advertise Tender for Implementation of Proposed Projects within Msambweni Sub-County and in particular construction of a Perimeter Wall at Magaoni Primary School be reviewed and the Board be pleased to direct the 1st Respondent to proceed and execute the contract;

e) Award of costs to the Applicant

4. In a Notification of Appeal and a letter dated 11th September 2024, Mr. James Kilaka, the Ag. Board Secretary of the Board notified the 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 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 said 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 11th September 2024.

5. On 20th September 2024, the Board Secretary sent a reminder to the Respondents bringing to their attention Regulation 205 of the Regulations 2020 requiring them to file a response within 5 days or shorter period directed by the Board.
6. On 23rd September 2024, the Ag. Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 26th September 2024 at 2:30 p.m. through the link availed in the said Hearing Notice.
7. On the morning of 26th September 2024, the Respondents and the Interested Party through the law firm of Pauline Vata & Company Advocates filed a Memorandum of Appearance of even date.
8. Later on the same date, 26th September 2024, when the Board convened for the online hearing, all parties were present and represented by their representatives. The Board read through the documents filed noting that the only filed document was the Request for Review.
9. Counsel for the Respondents and Interested Party, Ms. Vata made an application for adjournment of the hearing citing she had just received instructions to come on record on behalf of her Clients and that she

needed at least 7 days to familiarize herself with the Request for Review before filing a response on behalf of her Clients.

10. Counsel for the Applicant, Mr. Kirui, was not opposed to the application for adjournment save that the Board reschedules the matter having in mind the 21-days statutory timeline within which the Request for Review should be determined.
11. The Board brought it to the attention of parties that the 21 days statutory timeline within which the instant Request for Review was to be determined was scheduled to lapse on Wednesday, 2nd October 2024. The Board equally inquired from the parties whether they were amenable to being granted time to file their documents and thereafter the Board determines the Request for Review through reference to documents filed in the matter, a suggestion that all parties were agreed to.
12. Accordingly, the Board gave hearing directions and the order of address as follows:
 - i. The Respondents and Interested Party to file all their pleadings and supporting documents including submissions by close of business on Friday, 27th September 2024;
 - ii. The Applicant to file any further responses, if need be, by 9:00 a.m. on Monday, 30th September 2024;
 - iii. The Respondents and Interested Party to file any further responses, if need be, by 12 noon on Monday, 30th September, 2020;
 - iv. The Board would consider the filed documents and render a Decision on or before Wednesday, 2nd October 2024.

13. On 27th September 2024, the Respondents and Interested Party filed a Notice of Preliminary Objection and Written Submissions, both dated 27th September 2024.
14. On 1st October 2024, the Applicant filed its Written Submissions dated 30th September 2024.
15. Below is a summary of the parties' respective cases as urged through their filed documents.

PARTIES SUBMISSIONS

Applicant's Submissions

16. The Applicant's case was that it participated in the subject tender in which the Respondents and Interested Party notified it that it had emerged the successful bidder. Further, that before the contract for the subject tender was signed, the Applicant learnt that the Respondent and Interested Party were re-advertising the same tender. According to the Applicant it was not legally possible for the Respondent and Interested Party to re-advertise the same tender when the Applicant having emerged the successful bidder was ready to undertake the works under the tender.
17. The Applicant believes that the Respondents and Interested Party's actions were in breach of the Constitution of Kenya, 2010, the Act and the Regulations 2020.

18. It was contended on behalf of the Applicant under Section 167 of the Act; that this Board has jurisdiction to hear and determine the present Request for Review. Further that whereas Base Titanium Limited was a private entity, the subject of procurement was intertwined with public interests of residents in Msambweni Sub-County and particularly Magaoni Primary School. That under the Community Development Agreement, Base Titanium was a quasi-public entity facilitating projects that would otherwise fall under public procurement. In support of this argument reliance was placed on ***Hydropower International (PVI) Limited v Kenya Tea Development Agency (Holdings) Ltd & 5 others [2017]eKLR and Republic v Public Procurement Administrative Review Board & 3 Others ex parte Olive Telecommunication Pvt Limited[2014]eKLR .***

Respondents' Submissions

19. The Respondents and Interested Party relying on ***Republic v Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati [2008]eKLR, Kenya Ports Authority v Mitu-Bell Welfare Society & 2 Others [2016]eKLR and Owners of Motorvessel Lilian S v Caltex Oil (Kenya) Limited [1989]KLR*** contended that the Board lacked jurisdiction over the subject tender citing Section 4 of the Act which limits the application of the Public Procurement and Asset Disposal Act. It was their submission that section 4 of the Public Procurement and Asset Disposal Act is limited in its application to state organs and public entities.

20. It was their contention that the Act is only applicable to procurement matters concerning public entities as defined in section 2 of the Act to include state organs, county governments and other public entities.
21. It was their submission that Base Titanium Limited is a private entity undertaking a private enterprise. Further that Msambweni Community Development Agreement Committee lacks legal personality and does not equally constitute a public entity as contemplated under Section 4 of the Act. That Msambweni Community Development Agreement Committee is a committee intended to advise and support the development needs of the Msambweni Community in relation to the activities of Base Titanium Limited.
22. It was contended on behalf of the Respondents and Interested Party that the subject tender was for a project meant to benefit the Community considered to be affected by the mining activities of Base Titanium Limited. Further that the project was privately funded by Base Titanium and not from public funds.

BOARD'S DECISION

23. The Board has considered all documents, submissions and pleadings and finds the following issues call for determination:

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

In determining this issue, the Board will consider whether Respondents and Interested Party constitute a Procuring Entity within the meaning of Section 4 and 2 of the Act?

Depending on the Board's finding on Issue (I) above,

II. ***Whether the Respondents and Interested Party breached the Act in re-advertising the subject tender?***

III. ***What orders should the Board issue in the circumstance?***

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

24. Following the filing of the instant Request for Review, the Respondents and Interested Party filed a Notice of Preliminary Objection dated 27th September 2024 assailing the jurisdiction of the Board to hear and determine the Request for Review. The Respondents and Interested Party argue that none of them is a Procuring Entity within the meaning of Sections 2 and 4 of the Act and are thus exempt from the application of the provisions of the Act.
25. On the flip side the Applicant contended that the Board has jurisdiction over the above Request for Review. According to the Applicant, though Base Titanium was a private entity, the subject tender was intertwined with public interest.
26. For starters, this Board recognizes the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into

it before doing anything concerning such a matter in respect of which it is raised.

27. The 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."

28. On its part, Halsbury's Laws of England (4th Ed.) Vol. 9 defines jurisdiction as:

"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

29. The locus classicus case on the question of jurisdiction is the celebrated case of ***The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1*** where Nyarangi J.A. made the oft-cited dictum:

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

A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

30. In the case of ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR***, the Court of Appeal emphasized 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...."

31. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

"(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."

32. Further, Section 28 of the Act provides for the functions of the Board as:

***The functions of the Review Board shall be—
reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function***

conferred to the Review Board by this Act, Regulations or any other written law."

33. Further, a reading of Section 167 of the Act denotes the jurisdiction of the Board in the following terms:

"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...

(2)...

(3)...

(4) ...

34. From the above Section it is apparent that this Board's jurisdiction is circumscribed to hearing disputes arising from a breach of a duty imposed on a Procuring Entity under the Act.

35. Section 2 of the Act offers a definition of a Procuring Entity in the following terms:

"procuring entity" means a public entity making a procurement or asset disposal to which this Act applies;

36. On its part, Section 4 of the Act provides for the circumstances under which the Act finds application in the following terms:

4. Application of the Act

(1) This Act applies to all State organs and public entities with respect to—

- (a) procurement planning;***
- (b) procurement processing;***
- (c) inventory and asset management;***
- (d) disposal of assets; and***
- (e) contract management.***

(2) For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies—

- (a) the retaining of the services of an individual for a limited term if, in providing those services, the individual works primarily as though he or she were an employee, but this shall not apply to persons who are under a contract of service;***
- (b) the transfer of assets being disposed of by one state organ or public entity to another state organ or public entity without financial consideration;***
- (c) acquiring of services provided by government or government department;***
- (d) acquisition and sale of shares or securities, fiscal agency by a public entity, investments such as shares purchased by cooperative societies, state corporations or other public entities;***
- (e) procurement and disposal of assets under Public Private Partnership Act, 2013; and***
- (f) procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya***

and any other foreign government, agency, entity or multilateral agency unless as otherwise prescribed in the Regulations.

(3) For greater certainty, all public procurement are procurements with respect to the application of this Act.

37. Drawing from the above, the Act applies to State organs and public entities.

38. Section 2 of the Act offers the following important definitions within the Act:

"public procurement" means procurement by procuring entities using public funds;

"public entity" includes—

(a) the national government or any organ or department of the national government;

(b) a county government or any organ or department of a county government;

(c) the Judiciary and the courts;

(d) the Commissions established under the Constitution;

(e) the Independent Offices established under the Constitution;

(f) a state corporation within the meaning of the State Corporations Act (Cap. 446);

(g) the Central Bank of Kenya established under the Constitution;

- (h) a public school within the meaning of the Basic Education Act, 2013 (No. 14 of 2013);***
- (i) a public university within the meaning of the Universities Act, 2012 (No. 42 of 2012);***
- (j) a city or urban area established under the Urban Areas and Cities Act, 2011 (No. 13 of 2011);***
- (k) a company owned by a public entity;***
- (l) a county service delivery coordination unit under the National Government Co-ordination Act, 2013 (No. 1 of 2013);***
- (m) a constituency established under the Constitution;***
- (n) a Kenyan diplomatic mission under the state department responsible for foreign affairs;***
- (o) a pension fund for a public entity;***
- (p) a body that uses public assets in any form of contractual undertaking including public private partnership;***
- (q) a body in which the national or county government has controlling interest;***
- (r) a college or other educational institution maintained or assisted out of public funds;***
- (s) an entity prescribed as a public entity for the purpose of this paragraph; or***
- (t) any other entity or a prescribed class of public entities or particular public entities that uses public money for purposes of procurement or any other entity as declared under sections 4 and 5 of the Public Finance Management Act, 2012 (No. 18 of 2012);***

"public money" includes monetary resources appropriated to procuring entities through the budgetary process, as well as extra budgetary funds, including aid, grants and loans, put at the disposal of procuring entities by donors;

39. From the above definitions, the following is apparent:
- i. A Procuring Entity as contemplated under the Act is a public body.
 - ii. Public procurement as envisioned under the Act is a procurement by a public body using public funds.
 - iii. Public funds include monies as appropriated in the budget, loans, grants and donations to public bodies.
40. Turning to the present case, it remains undisputed that Base Titanium Limited, which is the entity spearheading the procurement process, is a private enterprise and not a public body or a state organ. Further that Base Titanium Limited was funding the project under the subject tender from its own resources and not from public funds. Given these facts, the Board is unable to find the subject procurement process as constituting a public procurement process. The Board as empowered under Section 167(1) of the Act is required to hear tender disputes that arise from public procurement and not private procurement processes.
41. It may well be that the Applicant herein has a genuine grievance as against the Respondents and the Interested Party. However, this Board's jurisdiction does not extend to private procurement processes like the one at hand. Accordingly, this Board is not the appropriate forum to consider

the tender dispute that the Applicant may have as against the Respondents and Interested Party.

42. The Applicant placed reliance on ***Hydropower International (PVI) Limited v Kenya Tea Development Agency (Holdings) Ltd & 5 others [2017]eKLR*** and ***Republic v Public Procurement Administrative Review Board & 3 Others ex parte Olive Telecommunication Pvt Limited[2014]eKLR*** for the proposition that the Act finds application in the subject tender which in its nature is a private procurement process. The Board has keenly studied the 2 decisions and finds them inapplicable in the present proceedings for the following reasons:

- i. ***The Hydropower case*** was a suit filed at the High Court and not before this Board. The High Court therefore did not have an opportunity to consider the question as to whether this Board has jurisdiction to hear tender disputes arising from private procurement processes. Being that there was no finding that this Board has jurisdiction over disputes arising from private procurement processes, the Board finds the decision distinguishable from the present Request for Review.
- ii. ***The Olive Telecommunication Case*** had its genesis from a public procurement process and not a private procurement process like the case at hand. Additionally, in this Case the High Court did not affirm that the Board has jurisdiction over tender disputes arising from private procurement processes. Being that there was no finding that this Board has jurisdiction over disputes arising from

private procurement processes, the Board finds the decision distinguishable from the present Request for Review.

43. In view of the foregoing we find that the Board lacks the jurisdiction to hear and determine the instant Request for Review being that it emanates from a private procurement process and therefore proceeds to down its tools.

Whether the Respondents and Interested Party breached the Act in re-advertising the subject tender?

44. The Board shall not delve in to an analysis of this issue in view of the finding that it is divested jurisdiction over the instant Request for Review.

What orders the Board should grant in the circumstances?

45. The Board has found that it lacks jurisdiction over the instant Request for Review.
46. The upshot of our finding is that the Request for Review dated 11th September 2024 in the matter of Tender for Implementation of Proposed Projects within Msambweni Sub-County and in particular, construction of a Perimeter Wall at Magaoni Primary School fails in the following specific terms:

FINAL ORDERS

47. 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 11th September 2024:

- 1. The Respondents and Interested Party's Notice of Preliminary Objection dated 27th September 2024 be and is hereby upheld.**
- 2. The Request for Review dated 11th September 2024 be and is hereby struck out.**
- 3. The tender for Implementation of Proposed Projects within Msambweni Sub-County and in particular, construction of a Perimeter Wall at Magaoni Primary School be and is hereby allowed to proceed to its logical conclusion.**
- 4. Each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI this 2nd Day of October 2024.



PANEL CHAIRPERSON

PPARB



SECRETARY

PPARB