

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 91/2025 OF 12<sup>TH</sup> AUGUST 2025**

**BETWEEN**

**AIR FILTER MAINTENANCE SERVICES**

**INTERNATIONAL (PTY) LTD..... APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

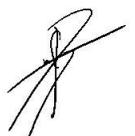
**THE PRINCIPAL SECRETARY FOR PUBLIC HEALTH AND**

**PROFESSIONAL STANDARDS, MINISTRY OF**

**HEALTH ..... 1<sup>ST</sup> RESPONDENT**

**AMREF HEALTH AFRICA ..... 2<sup>ND</sup> RESPONDENT/PROCURING ENTITY**

Request for Review of the decision by Amref Health Africa (The Procuring Entity) in the matter of Expression of Interest – Re-advertisement for the Proposed Design Works, Refurbishment and Equipping of Biosafety Level 3 (BSL 3) and Refurbishment of Biosafety Level 2 (BSL 2) Laboratories at the National Public Health Laboratory (Block B) for the Division of National Laboratory Services, Ministry of Health: EOI No./AMREF/11/02/2025/005-01 in April 2025.



## **BOARD MEMBERS PRESENT**

1. Mr. George Murugu FCI Arb & IP - Chairperson
2. Mrs. Njeri Onyango FCI Arb - Member
3. Mr. Stanslaus Kimani - Member

## **IN ATTENDANCE**

1. Mr. Robert Mwangi - Holding brief for Board Secretary
2. Ms. Evelyn Weru - Secretariat

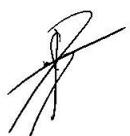
## **PRESENT BY INVITATION**

### **APPLICANT AIR FILTER MAINTENANCE SERVICES INTERNATIONAL (PTY) LTD**

1. Mr. Thomas Maosa - Advocate, Maosa & Co. Advocates
2. Mr. Peter Otieno - Advocate, Maosa & Co. Advocates
3. Mr. Eric Maosa - Advocate, Maosa & Co. Advocates

### **1<sup>ST</sup> RESPONDENT THE ACCOUNTING OFFICER, THE PRINCIPAL SECRETARY FOR PUBLIC HEALTH AND PROFESSIONAL STANDARDS, MINISTRY OF HEALTH**

No Appearance



## **2<sup>ND</sup> RESPONDENT      AMREF HEALTH AFRICA**

1. Mr. Peter Njeru, OGW - Advocate, Kaplan & Stratton
2. Dr. Githuka George - Programme Director, Amref
3. Ms. Joan Birir            - Senior Procurement and Administration Manager
4. Mrs. Stacy Mboya       - Legal Officer, Amref
5. Jane Kitonga             - Amref
6. Anthony Wamatu       - Amref

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Amref Health Africa, the Procuring Entity and 2<sup>nd</sup> Respondent herein invited proposals from eligible candidates through a re-advertisement for the Proposed Design Works, Refurbishment and Equipping of Biosafety Level 3 (BSL-3) and Refurbishment of Biosafety Level 2 (BSL2) Laboratories at the National Public Health Laboratory (Block-B) for the Division of National Laboratory Services, Ministry of Health vide an open Tender No. EOI No./AMREF/11/02/2025/005-01 (hereinafter referred to as "the subject tender"). The advertisement was in the Daily Nation on 24<sup>th</sup> April 2025 and the subject tender's Tender Documents availed on the website <http://amref.org/ways-to-give/tenders/>. The tender submission deadline was scheduled on 28<sup>th</sup> May 2025 at 12 Noon (EAT), 9 AM GMT (UK), and 10 AM CET.



## **Submission of Tenders and Tender Opening**

2. According to the documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the "Board") by the 2<sup>nd</sup> 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 six (6) tenders were submitted in response to the subject tender and were recorded as follows:

<b>No.</b>	<b>Bidders Name</b>
1	Dama Services Limited
2	Planning Systems Services Limited
3	Safer Power Limited
4	Air Filter Maintenance Services International (PTY) Ltd
5	Scientific Select Technologies Limited
6	AIA Architects Limited

## **Evaluation of Tenders**

3. Evaluation of submitted bids was to take place in two stages as follows:
- i. Stage 1 – Submission of Preliminary technical proposal, conceptual designs and estimated financial proposal
  - ii. Stage 2 - the Successful bidders making a presentation of their design, technical proposal and estimated financial proposal and to respond to additional questions regarding their past experience and technical capacity.



### **Stage 1: Preliminary evaluation for mandatory requirements**

4. At this stage, bidders were required to submit mandatory business requirements and organizational capacity documents. A bidder was expected to submit a preliminary technical proposal, a proposed conceptual design and a preliminary estimated financial proposal based on the User Requirement Specification, as-built floor plan layouts and proposed works sketch designs and list of equipment annexed to the Tender Document.
5. Following evaluation at this stage, four (4) bidders were found to be non-responsive while two (2), including the Applicant were found responsive and progressed for further evaluation

### **Technical Evaluation**

6. The two bidders who met all the mandatory requirements were reviewed at this stage. Bidders who scored less than 161 marks at this stage would be considered non-responsive and would be eliminated at this juncture.
7. At the end of the technical evaluation, the two bidders, including the Applicant herein, who had progressed to this stage were found responsive and qualified for further evaluation under stage 2 of the Expression of Interest.



## **Stage 2:**

8. At this stage, the shortlisted bidders would be invited to make a presentation of their design, technical proposal and estimated financial proposal and to respond to additional questions regarding their past experience and technical capability.
9. The bidder who would score the highest following the presentation and questions would be deemed successful and proceed to submit the final design, BoQ, final technical proposal and final financial proposal.
10. At the end of evaluation at this stage, the Applicant's tender was found to be unsuccessful and Scientific Select Technologies was recommended as the successful bidder.
11. Subsequently, the Applicant was informed of its disqualification vide letter dated 29<sup>th</sup> July 2025.

## **REQUEST FOR REVIEW NO. 91 OF 2025**

12. On 12<sup>th</sup> August 2025, the Applicant filed a Request for Review dated 11<sup>th</sup> August 2025 together with a Supporting Affidavit sworn on 11<sup>th</sup> August 2025 by Humphrey Crister Musuluma Lwamba (hereinafter referred to as the 'instant Request for Review') through the firm of Maosa & Co. Advocates seeking the following orders from the Board in verbatim:



- a) **The letter of regret addressed to the Applicant with respect to the Expression of Interest - Proposed Design Works, Refurbishment and Equipping of Biosafety Level 3 (Bsl3) And Refurbishment of Biosafety Level 2 (Bsl2) Laboratories at The National Public Health Laboratory (Block-B) For The Division of National Laboratory Services, Ministry of Health (hereinafter the Tender) be annulled and set aside.**
- b) **That the Respondents be prohibited from executing or signing any contract pursuant to the impugned disqualification of the Applicant pending compliance with the orders and directions of this Honourable Board;**
- c) **The award(s) made by the Respondents to any other candidate(s) (Other than the applicant) who participated in the subject tenders be nullified.**
- d) **The Board be pleased to order a re-evaluation of the subject Tender herein and compels the Respondents to award the tender to the Applicant being the lowest evaluated responsive tenderer in accordance with Section 86(1)(a) of the Public Procurement and Asset Disposal Act, 2015.**
- e) **That the costs of this Request for Review be awarded to the Applicant;**
- f) **That the Board do grant such other or further relief or reliefs as it shall deem just, fair, and expedient in the circumstances of this case.**



13. In a Notification of Appeal and a letter dated 12<sup>th</sup> August 2025, Mr. P. Kiprop, the Board Secretary notified the 1<sup>st</sup> and 2<sup>nd</sup> 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 24<sup>th</sup> March 2020. 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 12<sup>th</sup> August 2025.
14. On 21<sup>st</sup> August 2025, the 2<sup>nd</sup> Respondent filed through Kaplan & Stratton Advocates a Notice of Appointment of Advocates dated 20<sup>th</sup> August 2025, a letter dated 21<sup>st</sup> August 2025 addressed to the Board Secretary and a Procuring Entity's Preliminary Objection to the Request for Review dated 20<sup>th</sup> August 2025.
15. Vide a Hearing Notice dated 25<sup>th</sup> August 2025, the Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 27<sup>th</sup> August 2025 at 11.00 a.m. through the link availed in the said Hearing Notice.
16. On 26<sup>th</sup> August 2025, the 2<sup>nd</sup> Respondent filed a 2<sup>nd</sup> Respondent's Reply to the Request for Review dated 25<sup>th</sup> August 2025, 2<sup>nd</sup> Respondent's Submissions dated 25<sup>th</sup> August 2025 and 2<sup>nd</sup> Respondent's Case Digest dated 25<sup>th</sup> August 2025.



17. On 26<sup>th</sup> August 2025, the Applicant filed a Supplementary Affidavit sworn by Humphrey Crister Musuluma Lwamba on 26<sup>th</sup> August 2025 and Written Submissions dated 26<sup>th</sup> August 2025.
18. Vide email dated 26<sup>th</sup> August 2025, parties were notified by the Board Secretary that the hearing of the instant Request for Review had been rescheduled to 28<sup>th</sup> August 2025 at 11.00 a.m.
19. On 27<sup>th</sup> August 2025, the 2<sup>nd</sup> Respondent filed 2<sup>nd</sup> Respondent's List and Bundle of Documents dated 25<sup>th</sup> August 2025.
20. Vide letter dated 27<sup>th</sup> August 2025 addressed to the Applicant's advocates on record, the Board Secretary sought for the payment of the remainder of the filing fees and informed parties that the Board in the circumstances was constrained to hear the matter on the slated date of 28<sup>th</sup> August 2025 at 11:00 a.m.
21. On 28<sup>th</sup> August 2025, the 2<sup>nd</sup> Respondent filed 2<sup>nd</sup> Respondent's Replying Affidavit sworn by Joan Birir on 28<sup>th</sup> August 2025 and 2<sup>nd</sup> Respondent's Replying Submissions dated 27<sup>th</sup> August 2025.
22. Vide email dated 28<sup>th</sup> August 2025, parties were notified by the Board Secretary that the instant Request for Review was slated to be heard on 29<sup>th</sup> August 2025 at 11.00 a.m.



23. On 28<sup>th</sup> August 2025, the Applicant filed Applicant's Further List of Documents dated 28<sup>th</sup> August 2025 and an Affidavit of Service sworn on 28<sup>th</sup> August 2025 by James Asudi, a licensed Court Process Server.
24. On 29<sup>th</sup> August 2025, the Applicant filed Applicant's Further Affidavit sworn by Humphrey Crister Musuluma Lwamba on 29<sup>th</sup> August 2025 in response to the 2<sup>nd</sup> Respondent's Reply to the Request for Review dated 25/8/2025; Replying Submissions dated 27/8/2025 and Replying Affidavit sworn on 28/8/2025.
25. At the hearing of the instant Request for Review on 29<sup>th</sup> August 2025 at 11.00 a.m., the Board confirmed the pleadings on record as filed by all parties in the instant Request for Review. It proceeded to confirm that the 1<sup>st</sup> Respondent in the proceedings had been served and was aware of the instant Request for Review.
26. The Board directed that the hearing of the preliminary objection by the Respondents would be heard as part of the substantive instant Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which also allows the Board to deliver one decision having considered the preliminary objections as part of the substantive instant Request for Review.
27. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.



## **PARTIES' SUBMISSIONS**

### **2<sup>nd</sup> Respondent's Submissions on its Preliminary Objection**

28. Mr. Njeru submitted that the main ground of the 2<sup>nd</sup> Respondent's Preliminary Objection is that the Board lacks jurisdiction to hear and determine the instant Request for Review by virtue of the fact that the Procuring Entity is a private entity and not a public institution hence not bound by the Act. He further submitted that pursuant to Section 4 of the Act, the Act only applies in respect to procurement and asset disposal by public entities.

29. Counsel referred to the definition of a public entity as provided under Section 2 of the Act and indicated that this includes a state organ, departments, state corporations, county governments and any other body.

30. He pointed out that Section 167 of the Act permits only a candidate or tenderer aggrieved by the conduct of a procuring entity to lodge an administrative review before the Board and referred to the definition of a procuring entity under Section 2.

31. Mr. Njeru urged the Board to evaluate the nature of the 2<sup>nd</sup> Respondent and submitted that the 2<sup>nd</sup> Respondent is a non-government organization. He referred the Board to the 2<sup>nd</sup> Respondent's Certificate of Registration showing that it is a NGO hence not subject to the provisions of the Act. In support of his argument, he



referred to the holding in *Mary Muthoni Njogu v Ndima Tea Factory Co. Ltd & 2 other* (2015) eKLR.

32. Without prejudice to the foregoing, Counsel submitted that even in assuming that the Procuring Entity is a public entity, Section 170 of the Act provides for parties to a review and lists an accounting officer as a party to the review under Section 170(b) of the Act. He indicated that the Procuring Entity having not been listed as a party to a review renders it as improperly joined to the proceedings as the proper party would be its accounting officer. He pressed on that Section 2 of the Act defines an accounting officer as per the meaning assigned to it under Section 2 of the Public Finance Management Act, 2012 and indicated that there was nowhere that a private entity would be required to have an accounting officer. He submitted that the 2<sup>nd</sup> Respondent as it stands has no accounting officer and urged the Board to strike out the instant Request for Review.

### **Applicant's Submissions on the Preliminary Objection and Request for Review**

33. Mr. Maosa submitted that the key issue in the instant proceedings is the intent demonstrated in the Tender Advert for the subject tender. He indicated that a tenderer or procuring entity must identify itself in the tender advert and as concerns its legal status, he indicated that Amref's legal status was brought before the Board after filing of the instant Request for Review.



34. Counsel submitted that from the adverts, the status of Amref has not been disclosed and based on its allegation that it is a private entity yet engaged itself in a process that involves public funds, there is an element of fraud and non-disclosure of material particulars. He reiterated that from the tender advert and proceedings, what is involved is public funds hence the reason for joining the Ministry of Health. He pointed to Sections 107, 108 and 109 of the Evidence Act and submitted that the Procuring Entity must disclose to the Board under what circumstances it was spending public money for a project yet upon lodging the instant administrative review, allege that it is a private entity.

35. He indicated that the basis of the review is from the advert and that there was no mention as to whether the procurement method was to be closed or open nor disclosure as to whether the tender was national or international which is mandatory. He pointed out had there been full disclosure, a potential bidder would be put on notice on the nature of the procurement proceedings and applicable jurisdiction. He further pointed out that on account of these non-disclosures, there is mischief on the part of the Procuring Entity and the Board has the mandate to review the procurement process since public funds are involved.

36. Counsel made reference to Article 227 of the Constitution and Chapter 12 of the Constitution and urged the Board to find that it has jurisdiction to review the procurement process in the subject tender.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

37. He indicated that it is widely known that the government can fundraise internationally through donors, the donor funds are remitted to the government and the donors dictate who utilizes the said funds but the bottom line is the beneficiary is the public as the consumer and as such, the Board has jurisdiction.

38. At this juncture, Mr. Otieno pointed out that the Procuring Entity's Certificate of Registration as adduced in the Written Submissions is improper since evidence cannot be adduced via submissions and urged the Board to ignore the same.

39. He submitted that pursuant to Regulation 205 of Regulations 2020, it is mandatory for the Respondents once served with a review application to file their responses within 5 days from the date of service. He further submitted that the documents filed by the Respondents were filed after this period of time had lapsed and without leave and prayed for the same to be struck out from the proceedings.

40. As to the substantive ground raised in the instant Request for Review, counsel submitted that the Applicant was never issued with reasons for disqualification of its tender at the 2<sup>nd</sup> stage of the procurement process. He made reference to the holding in PPARB Application No. 94 of 2022 EcoOryx Solutions Ltd v Kisii County Assembly & AO Kisii County Assembly, Section 87 (3) of the Act as read with Regulation 82 of Regulations 2020 and submitted that failure by the Respondents to

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

furnish the Applicant with reasons to its decision to disqualify its tender was illegal rendering the said decision null and void.

41. As to whether the Respondents never provided for strict eligibility requirements for potential bidders and capacity to carry out the project, counsel submitted that the criterion used to assess suitability of bidders for the advertised procurement process was not detailed enough in terms of requiring capacity to carry out the contract. He pointed out that the original tender advert made in February 2025 had detailed specifications requiring the main contractor to be the actual one undertaking the actual complex aspects of the project, provisions that the 2<sup>nd</sup> Respondent inexplicably removed in the subsequent re-advertisement.

42. It is the Applicant's case that the 2<sup>nd</sup> Respondent's meddling with the initial compliant advertisement in terms of capacity to perform is an illegality for failing to take into account the complexity and specialized goods being tendered thus arriving at a decision that is detrimental to the public interest.

43. As to whether the Applicant acted illegally and in breach of Clause 5.14.1 at page 9 of the Tender Document for failing to respond to or offer resolution on the appeal lodged by the Applicant, the Applicant submitted that the 2<sup>nd</sup> Respondent failed to offer any form of communication regarding its appeal against its regret letter dated 29<sup>th</sup> July 2025 and it was only until the present proceedings had been filed

A handwritten signature in black ink, consisting of several overlapping, stylized strokes, located in the bottom right corner of the page.

and notification on suspension of any further proceedings regarding the subject tender issued that it responded with its decision. The Applicant further submitted that failure by the 2<sup>nd</sup> Respondent to timeously respond meant that they were in breach of their own Tender Document.

44. As to whether the Respondents acted illegally and in breach of Section 86(1) of the Act and Regulations 2020 by failing to approve the Applicant as the candidate to proceed to the final stage of submitting an official tender having been the bidder with the lowest and most competitive evaluated price during the 2<sup>nd</sup> Stage, the Applicant submitted that the Procuring Entity ought to award tenders to the bidder with the most competitive and lowest price so as to ensure that the public obtain value for money. The Applicant urged the Board to exercise its powers under Section 173 of the Act and overturn the Procuring Entity's decision.

45. The Applicant while relying on Section 70(1), (2), and (3) of the Act submitted that the Respondents left out these critical provisions in terms of availing scoring procedure in order to create a loophole to be utilized by an unscrupulous technical evaluation committee to its detriment.

46. The Applicant urged the Board to allow the instant Request for Review as prayed.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

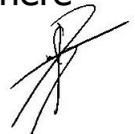
## **2<sup>nd</sup> Respondent's Rejoinder to its Preliminary Objection and Submissions on the Request for Review.**

47. Mr. Njeru in a rejoinder on the question of jurisdiction submitted that while it is true that the subject tender is in regards to works on a public facility, this does not mean that Amref itself uses a public asset in a contractual undertaking within the meaning of Section 2(p) of the Act. He pointed out that this provision is intended generally to cover arrangements such as public-private partnerships where a private body is given use of a public asset to perform a contract.

48. He indicated that in the present case, Amref was not leasing or exploiting the NPHL facility for its own commercial purposes but rather, acting as an implementing partner to improve a public facility for the benefit of the health sector. He further indicated that procuring contractors to refurbish a government -owned lab does not transform Amref into a public entity.

49. Counsel submitted that by law, public procurement is defined as procurement by procuring entities using public funds and it therefore follows that Amref's tender on behalf of a donor funded project, even if it concerns a public building is not a public procurement under the Act.

50. In addressing the Applicant's allegation of controlling interest by the government via public officials, counsel submitted that a controlling interest refers to ownership or governance control i.e. where



government owns the majority shares or has decisive voting power in an entity. He pointed out that Amref is an independent NGO with its own governance and as such, the Government of Kenya has no ownership stake or management control and the presence of public officers as stakeholders or observers in a project does not equate to government control over Amref's procurement.

51. As to the aspect of Amref using public money (Global Fund Donor Funds via Kenya Coordinating Mechanism) in the project, Mr. Njeru submitted that donor funds remain donor funds and not Kenyan public funds unless and until they are appropriated into the State's budget or placed at the disposal of a public entity. He pointed out that the definition of public money as provided under the Act explicitly includes donor aid and grants only when such funds are appropriated to procuring entities through the budgetary process or otherwise put at the disposal of a procuring entity by donors.

52. Counsel submitted that in the present case, Global Fund grants were not given to a government ministry for procurement but to Amref since it is a non-governmental implementer meaning that the funds are extra-budgetary aid managed by a private entity and have never been appropriated by Parliament to any state organ nor entrusted to a public procuring entity.

53. He pressed on that the Applicant's own evidence shows that Global Fund operates through a public-private partnership model and utilizes



entities like Amref to reach its goals and as such, this sort of a set up does not transform Amref into a government department. He urged the Board to uphold the 2<sup>nd</sup> Respondent's Preliminary Objection.

54. On the substantive issues raised in the instant Request for Review, counsel submitted that the procurement process was conducted lawfully and fairly in strict compliance with the Tender Document and applicable guidelines and that the Applicant's elimination at the 2<sup>nd</sup> Stage of the procurement process was justified.

55. The 2<sup>nd</sup> Respondent while acknowledging that its Reply to the Request for Review was filed outside the 5 days stipulated under Regulation 205 of Regulations 2020 indicated that the delay was minimal and occasioned by the need to address the jurisdictional question as a priority. Mr. Njeru argued that this delay did not prejudice the Applicant in any way as it was served with the reply well before the hearing and as such, its right to be heard and to know the 2<sup>nd</sup> Respondent's case were fully preserved. He urged the Board to exercise its discretion to admit the 2<sup>nd</sup> Respondent's Reply out of time and enable the dispute be determined on merits with the benefit of both parties' positions. He further urged the Board to note that the filing of a response in a review is a procedural step that does not confer or oust jurisdiction not pointed out that the Board is not bound by the strict rules of evidence.

56. Counsel indicated that he wrote a letter to the Board while filing the Preliminary Objection seeking for guidance on the directions on

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

dispensing the same. That having not received a response on directions for canvassing the Preliminary Objection, and out of abundance of caution, the 2<sup>nd</sup> Respondent took steps to file the response.

57. As to the reasons for the Applicant's disqualification, the 2<sup>nd</sup> Respondent submitted that the Applicant was formally notified of the outcome of evaluation of its tender vide letter dated 29<sup>th</sup> July 2025 which clearly stated that the Applicant was not successful in progressing to the final stage based on the evaluation criteria outlined in the Tender Document. Mr. Njeru pointed out that the Applicant scored lower than the other bidder with a score of 35.5 and the other bidder scored 36.1.

58. The 2<sup>nd</sup> Respondent contends that the Applicant had either misapprehended the nature of the procurement proceedings or deliberately sought to mislead the Board since from the wording of the Expression of Interest, this was an open tender where 6 bidders collected the Tender Document and submitted their bids.

59. The 2<sup>nd</sup> Respondent further contends that the Applicant cannot claim prejudice from a process that gave it a chance to compete and demonstrate its capacity, which it did though another firm did slightly better. It indicated that the Applicant in the instant Request for Review makes general accusations of bias and unfair treatment without proof and has failed to discharge the burden of proof.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

60. It emphasized that no contract award is yet to be made in the subject tender and that the process as designed is not complete since only upon satisfactory completion of the final stage by the bidder recommended to proceed to the final stage would a formal contract be awarded. As such, the 2<sup>nd</sup> Respondent submitted that there is no award to be set aside and the instant Request for Review as filed is speculative and premature.

61. In view of the foregoing, the 2<sup>nd</sup> Respondent urged the Board to dismiss the instant Request for Review with costs.

### **Applicant's Rejoinder**

62. In a rejoinder, Mr. Maosa submitted that the 2<sup>nd</sup> Respondent ought to have made a distinction between advertisement and single sourcing and as a private entity, it could have single sourced.

63. He indicated that the question yet to be resolved is that Amref should have made full disclosure of the particulars pertaining the subject tender and that funds being utilized were not public funds but donor funds.

64. He indicated that from the advert, it was not clear if the tender was an expression of interest or a request for proposal.



## CLARIFICATIONS

65. Asked if it is only public entities that can advertise a tender, Mr. Maosa submitted that any party, either individual or corporate can advertise a tender.
66. As a follow up, the Board sought to understand the Applicant's submission that the 2<sup>nd</sup> Respondent ought to have gone for single sourcing and not advertising. In response, Mr. Maosa submitted that there are several modes of tendering such as single sourcing, and advertising whereby bidders are invited since there is an intention to treat and enter into a contract.
67. As to applicability of the Act, Mr. Maosa conceded that the Act is applicable to public entities and indicated that in the absence of full disclosure by the procuring entity that it was either not using public funds or private funds from its advert, there is mischief. In this instant, he indicated that Amref was the advertiser and the Procuring Entity.
68. The Board sought to know if the 1<sup>st</sup> Respondent appeared as part of the Tender Advert. In response, Mr, Maosa submitted that while the 1<sup>st</sup> Respondent did not appear directly, the wording of the Advert was not clear and the Applicant had to carry out due diligence as part of checking for background information.
69. On whether the Applicant sought clarifications from the Procuring Entity on any hazy areas of the advertised tender, Mr. Maosa submitted



that clarification can only be sought pursuant to the wording of the Advert whereby full information has been disclosed.

70. At this juncture, Mr. Otieno referred the Board to the definition of a public entity as provided under Section 2 of the Act and indicated that the key word therein was 'a body that uses public assets in any form of contractual undertaking'. He pointed out that in the Tender Advert, it was indicated that the laboratories the subject of the tender are public property and were handed over to the Ministry of Health in 2015.

71. Asked if the foregoing is what makes the procurement in the subject tender a public procurement, Mr. Otieno pointed out that these being public assets for contracting brought the process under the jurisdiction of the Act and Regulations 2020.

72. Counsel pressed on that Global Fund as disclosed in the advert is not just any other donor as Kenya contributes to the said fund as seen from the Kenya Coordinating Mechanism under Global Fund where the chairperson is the PS, Public Health. He stated that proposals are made to Global Fund which brings funds and chose a principal recipient.

73. When asked at what stage the Applicant realized that public funds were being used in the instant subject tender for purposes of computation of time pursuant to Section 167(1) of the Act, Mr. Otieno made reference to the Tender Advert under which Amref came to be allocated the funds and indicated that there was no exclusion clause



directing that Amref is not subject to the jurisdiction of the Board. He submitted that time started running as from 29<sup>th</sup> July 2025 when the Applicant learnt of its disqualification.

74. As to the source of funds, Mr. Njeru submitted that the funds were from Global Fund and Amref is the principal recipient. He indicated that the initial project was funded by CDC.

75. Asked to expound on how Amref approached Global Fund for the resources, Dr. Githuka explained that this is a grant from Global Fund which has a dual funding mechanism where one part of the funds go to National Treasury being the state recipient which in turn disperses the funds to the Ministry of Health being the sub-recipient for the state principal recipient. He further explained that the second funding mechanism for Global Fund is through non-state principal recipients under which is the case in the current circumstances, Amref was a non-state principal recipient and funds came directly to it.

76. Asked if it was the Applicant's submission that Global Fund granted the Government of Kenya monies for the procurement in the subject tender and the implementing agency is Amref for purposes of funding, Mr. Otieno answered in the affirmative and pointed the Board to the Applicant's annexure marked HCML-10 being a Tender Notice by Kenya Coordinating Mechanism for Global Fund. He qualified this to be a public procurement.

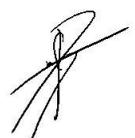


77. The Board referred parties to Section 4(2)(f) of the Act and sought parties' concurrence on whether the Board had jurisdiction in the circumstances. On his part, Mr. Njeru concurred that based on the bilateral agreement, the Board's jurisdiction if any, would be ousted. On his part, Mr. Otieno maintained that he was guided by the Applicant's Written Submissions which sets out the definition of a public entity under Section 2 of the Act.

78. The Board then referred parties to Section 167(1) of the Act and sought clarification from the Applicant on its submission that Amref is a public entity. Mr. Otieno submitted that in the present circumstances, due to use of public assets and public money and control by government employees playing critical roles, it qualifies as a public entity making the subject tender a public procurement using public funds as defined under Section 2 of the Act.

79. Asked if the Applicant had any evidence of use of public funds, Mr. Otieno submitted that Section 2 identifies donor funds as one of the sources of funds that can be used in procurement.

80. The Board sought to know who the accounting officer was for the purposes of the impugned procurement. In response, Mr. Otieno indicated that the Act allows accounting officers to procure through agents under Section 51 of the Act.



81. As a follow up, the Board sought to know if Amref is a registered procuring agent by dint of Section 51 of the Act relied upon by Mr. Otieno. In response, Mr. Otieno submitted that it is not for the Applicant to prove since the Ministry acting together with Global Fund had advertised and asked bidders to come on board and procure on their behalf. He proceeded to state that if the 2<sup>nd</sup> Respondent was engaging in full disclosure, it would have disclosed the membership of the Tender Evaluation Committee which was convened by the Kenya Coordinating Mechanism chaired by the PS, Public Health who is the 1<sup>st</sup> Respondent herein who is responsible of approving for contracting.

82. Mr. Otieno indicated that the accounting officer for purposes of the subject tender is the Principal Secretary and 1<sup>st</sup> Respondent who was served with the instant Request for Review. He further indicated that the Ministry of Health is joined in the instant proceedings through the 1<sup>st</sup> Respondent and that Amref are indicated as the Procuring Entity since it floated the advert.

83. Asked to clarify if the government officials in the subject tender were to participate on account of invitation by the Procuring Entity or as a matter of statutory provision, Mr. Otieno submitted that from the 2<sup>nd</sup> Respondent's response, there was no disclosure or indication as to the invitation of the government officials either as ex official members or as observers and were working in tandem in procurement on the project in the subject tender. He affirmed that participation by the government officials reinforces the public nature of said procurement.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

84. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 12<sup>th</sup> August 2025 was due to expire on 2<sup>nd</sup> September 2025 and that the Board would communicate its decision on or before 2<sup>nd</sup> September 2025 to all parties to the Request for Review via email.

### **BOARD'S DECISION**

85. The Board has considered each of the parties' cases, documents, pleadings, oral and 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 2<sup>nd</sup> Respondent's Preliminary Objection as filed is premature, bad in law, and incompetent and ought to be struck out.**

**B. Whether the substantive responses filed by the 2<sup>nd</sup> Respondent in response to the instant Request for Review ought to be struck out.**

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

In determining this issue, the Board will consider



- i. Whether the procurement in the subject tender constitute public procurement within the meaning of Section 2 as read with Section 4 and 167(1) of the Act so as to clothe the Board with jurisdiction to hear and determine the instant Request for Review.

Depending on sub-issue (i)

- ii. Whether the instant Request for Review as filed is time-barred.

Depending on sub-issue (ii)

**D. Whether the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with the procedures and criteria for evaluation set out in the Tender Document and in accordance with the provisions of the Act as read with Article 227(1) of the Constitution.**

**E. Whether the Applicant was notified of the outcome of evaluation of the subject tender in accordance with Section 87(3) of the Act as read with Regulation 82 of Regulations 2020.**

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



**Whether the 2<sup>nd</sup> Respondent's Preliminary Objection as filed is premature, bad in law, and incompetent and ought to be struck out.**

86. The 2<sup>nd</sup> Respondent vide its Procuring Entity's Preliminary Objection to the Request for Review dated 20<sup>th</sup> August 2025 objected to the hearing and determination of the instant Request for Review by the Board on the ground that the Board does not have jurisdiction to hear and determine the matter by virtue of the fact that the Procuring Entity is a private entity and not a public institution hence not bound by the Act. It sought for the said Preliminary Objection to be heard and determined first before any other or further steps are taken in connection with the issues arising in the instant Request for Review.

87. The Applicant in a Supplementary Affidavit sworn on 26<sup>th</sup> August 2025 by Humprey Crister Musuluma Lwamba deponed that the 2<sup>nd</sup> Respondent's Preliminary Objection as filed is premature, bad in law, incompetent, misguided, misplaced, and frivolous for being filed before the Procuring Entity had filed its substantive response and issuance of a Hearing Date of the instant Request for Review by the Board and sought for dismissal of the same. In its submissions, the Applicant made reference to Regulation 206 of Regulations 2020 and contends that the Preliminary Objection as filed is contrary to Regulation 209 of Regulations 2020.

88. A reading of Regulation 209(1) of Regulations 2020 provides as follows:



**“Preliminary Objection**

**(1) A party notified under regulation 206 may file a preliminary objection to the hearing of the request for review to the Secretary of the Review Board within three days from the date of notification.”**

89. Further, Regulation 206 of Regulations 2020 referred to above provides:

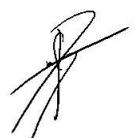
**“206. Notice of Hearing**

**(1) The Review Board Secretary shall give reasonable notice of the date fixed for hearing to all parties to the review.**

**(2) The notice referred to in paragraph (1) shall be in the format set out in the Sixteenth Schedule of these Regulations.”**

90. In essence, Regulation 206 as read with 209(1) of Regulations 2020 dictate that any party notified by the Board Secretary of a date fixed for hearing of a request for review **may** file a preliminary objection to the hearing of the request for review within three (3) days from the date of being notified by the Board Secretary of the date fixed to hear the request for review.

91. In considering the use of the word ‘may’ in the abovementioned regulation, we take note of the holding by Justice John M. Mativo (as he then was) in **Republic v Council of Legal Education & another**



**Ex parte Sabiha Kassamia & another [2018] eKLR** where he held that:

“....

**14. In construing a statutory provision, the first and the foremost rule of construction is that of literal construction. All that the Court has to see at the very outset is, what does the provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it...”**

92. The Learned Judge further held that:

“ .....

**17. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.[19] But it must be kept in mind in what sense the terms are used. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are**



**directory.[20] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.....**

**19. A provision in a statute is mandatory if the omission to follow it renders the proceeding to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceeding, and a statute may be mandatory in some respects and directory in others.[21] One of the important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and, if it does, then the court would say that, the provision must be complied with and that it is obligatory in its character.[22]....."**

93. Going by the High Court's holding, the questions that emerges in the instant circumstances is when does the right to file a preliminary objection get triggered and subsequently, is the filing of a preliminary objection within three (3) days of notification of the hearing as provided



for under Regulation 209 (1) of Regulations 2020 set in mandatory or directory terms?

94. In answering the above questions, we must first define a preliminary objection. In the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** Law JA at page 700 stated:

**“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. ....”**

95. In essence, a valid preliminary objection should, if successful, dispose of the suit. For it to succeed, it ought to be raised on a pure point of law which has been pleaded or arises by clear implication of pleadings. As such, a preliminary objection gets triggered from parties' pleadings as filed. It must therefore stem from pleadings and raise pure points of law.

96. Bearing this in mind, we note that the 2<sup>nd</sup> Respondent's preliminary objection calls into question the jurisdiction of the Board to determine the matter. In the well-known case of **Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd (1989) KLR 1**, the Court of Appeal explained that:



**"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction .... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."**

97. In **Kenya Ports Authority v Modern Holding (EA) Limited MSA CA Civil Appeal No. 108 of 2016 (2017) eKLR**, the Court of Appeal stated that jurisdiction is so fundamental that it can be raised at any time including on appeal. It held as follows:

**"We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself provided that where the court raises it suo motu parties are to be accorded the opportunity to be heard."**

98. Based on the aforesaid decisions, and having considered the nature of the preliminary objection raised by the 2<sup>nd</sup> Respondent, it is the Board's



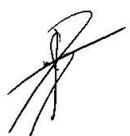
considered view that the use of the word 'may' under Regulation 209 (1) of Regulations 2020 neither connote a compulsory nor mandatory obligation on a party raising a preliminary obligation to do so within three (3) days from the date of notification of a hearing by the Board Secretary.

99. Put differently, a party can file its preliminary objection at any stage of the proceedings prior to hearing and not necessary only upon being served with a hearing notice by the Board Secretary. In saying so, we note that the Board in **PPARB Application No. 44 of 2023 Trident Insurance Company Limited v Secretary to Independent Electoral & Boundaries Commission & Others**, while considering whether or not the preliminary objection raised by the Interested Party is defective by reason of failure to have filed a response to the request for review held as follows:

**"The Civil Procedure Act defines "pleading" as follows:**

**"Pleading includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff and of defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of a defendant".**

**In view of the above meaning of a pleading, it is clear that a preliminary objection can be raised on points of law which arise from clear implications of pleadings filed by either an Applicant/Claimant, a**



**Defendant/Respondent or Interested Party and there is no requirement in law for it to be backed by any other pleading since a preliminary objection is solely based on points of law.**

.....

**In our considered view, there is no requirement for a party in an administrative review to file a response for it to raise a preliminary objection. The filing of a response is not a basis for a party in an administrative review to address the Board on a preliminary issue arising from pleadings filed before it.**

**In the circumstance, we find that the Interested Party's Notice of Preliminary Objection dated 21<sup>st</sup> June 2023 is properly before the Board and is not defective by reason of failure by the Interested Party to have filed a response to the instant Request for Review. "**

100. The Board in the above matter found that there is no requirement for a party to file a response for it to raise a preliminary objection and that the filing of a response is not a basis for a party in an administrative review to address the Board on a preliminary issue arising from pleadings filed before it.



101. In buttressing the above position, we note that Paragraph 2 of PPARB Circular No. 2/ 2020 dated 24<sup>th</sup> March 2020 stipulates that:

**“Upon being notified of and served with an electronic copy or hard copy of a Request for Review, an Accounting Officer of a Procuring Entity and/or any other Respondent to the Request for Review shall file and submit to PPARB Secretary his/her Memorandum of Response and/or Preliminary Objection to the Request for Review within 5 days of service together with all documentation (including the confidential documentation referred to herein before) with respect to the procurement or asset disposal proceedings in issue.”**

102. In the circumstances, we find that the 2<sup>nd</sup> Respondent’s Preliminary Objection as filed is competent and properly before the Board.

**Whether the substantive responses filed by the 2<sup>nd</sup> Respondent in response to the instant Request for Review ought to be struck out.**

103. During the hearing, Mr. Otieno for the Applicant submitted that pursuant to Regulation 205 of Regulations 2020, it is mandatory for the respondents once served with a request for review application to file their responses within 5 days from the date of service. Counsel argued that the responses to the instant Request for Review filed by the 2<sup>nd</sup> Respondents were filed after this period of time had lapsed and without leave and prayed for the same to be struck out from the proceedings.



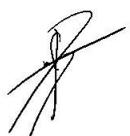
104. In response, Mr. Njeru for the 2<sup>nd</sup> Respondent acknowledged that the responses were filed outside the 5-day period as stipulated under Regulation 205 of Regulations 2020 and submitted that the delay was minimal and occasioned by the need to address the jurisdictional question as a priority. He further submitted that this slight delay did not prejudice the Applicant in any way since it was served with the responses prior to the hearing and its right to be heard and to know the 2<sup>nd</sup> Respondent's case were fully preserved.

105. Regulation 205 of Regulations 2020 provides:

**“(1) The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.**

**(2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the Review Board Secretary**

**(3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified.**



**(4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.**

**(5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3)."**

106. In essence, the Board's Secretary serves a notice to the accounting officer of a procuring entity in accordance with Section 168 of the Act upon receipt of a request for review. Upon service of the notice of the request for review, the accounting officer is under an obligation to file a response together with all confidential document in the procurement proceedings within five days of the notice or such lesser period as may be specified. Failure by the accounting officer to submit a response and documents requested within the stipulated time is an offence which attracts a fine not exceeding four million shillings or imprisonment for a term not exceeding ten years or both.

107. Turning to the instant Request for Review, the 2<sup>nd</sup> Respondent admits to the filing of its responses outside the 5 days stipulated statutory timelines. It contends that this delay did not prejudice the Applicant in



any way since it was served with the said responses, and its right to be heard and know the 2<sup>nd</sup> Respondent's case were fully preserved.

108. The Board is cognizant of the provisions under Article 159(2)(d) of the Constitution which provide that justice shall be administered without undue regard to procedural technicalities. However, this provision should not be used to trash procedural provisions as the rules are the handmaidens of justice. It has however been reiterated that courts should not pay undue attention to procedural technicalities and requirements at the expense of substantive justice. The Supreme Court of Kenya in the case of **Raila Odinga v I.E.B.C & Others (2013) eKLR**, held that:

**“Article 159(2)(d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”**

109. In the Board's considered view, Regulation 205 (3) & (4) of Regulations 2020 seeks to cure the mischief where procuring entities delay in submitting responses to allegations by candidates and tenderers of breach of a duty imposed by the Act or Regulations considering the limited timelines within which administrative reviews ought to be heard and determined or altogether fail to respond or



submit confidential documents thus frustrating the Board in reviewing and determining administrative reviews.

110. This Board has a duty to do substantive justice to parties while at the same time considering whether a matter before it has been properly filed. The Board is cognizant of the need to exercise its discretion with utmost care when faced with an application to strike out pleadings for having been filed out of time as striking out pleadings is a draconian action which may have the consequence of slamming the door of justice on the face of one party without according it an opportunity to be heard. This was the position held by Madan JA (as he then was) in **DT Dobie & Co (K) Ltd V Muchina, [1982] KLR**, where the Court of Appeal expressed itself as follows:

**“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way ... no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no**



**reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward ....”**

111. Further, the Board notes that the power to strike out a pleading is a discretionary one as held in **Crescent Construction Co Ltd V Delphis Bank Limited, [2007] eKLR**, where the Court of Appeal stated as follows:

**“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”**

112. Guided by the holding in the above cases, we find that no prejudice was occasioned on the Applicant as none has been presented in filing of the Respondent’s responses to the instant Request for Review. All parties have indeed filed and served their respective pleadings and



documents as requested and attended the virtual hearing as scheduled. These documents have enabled the Board have an informed view of the procurement proceedings in the subject tender and in review of the instant Request for Review.

113. In the circumstances, we find that the 2<sup>nd</sup> Respondent's responses as filed in the instant Request for Review are properly before the Board and may be relied upon in these proceedings.

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

114. It is trite law that courts and decision-making bodies can only act in 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.

115. 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 ju**



**gment; The legal rights by which judges exercise their authority.”**

116. The locus classicus case on the question of jurisdiction is the celebrated case of **The Owners of the Motor Vessel “Lillians” -v- Caltex Oil Kenya Ltd (1989) KLR 1** where Nyarangi J.A. held:

**“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.”**

117. 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 overarching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It**



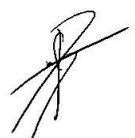
**is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain....”(Emphasis ours)**

118. 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.”**

119. The Supreme Court in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others [2012] eKLR** pronounced itself regarding the source of jurisdiction of a court or any other decision-making body as follows:

**“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We**



**agree with Counsel for the first and second respondents 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.”**

120. 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.”**

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

**(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.”**



122. The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the powers the Board can exercise upon completing a review 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.**

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

**(3) .....**

**(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—**

**(a) the choice of a procurement method;**



**(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and**

**(c) where a contract is signed in accordance with section 135 of this Act.**

**168. ....**

**169. ....**

**170. ....**

**171. ....**

**172. ....**

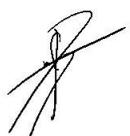
**172. Dismissal of frivolous appeals**

**Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.**

**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.**

123. Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act though limited under the provisions of Section 167(4) of the Act. The Board exercises its powers under Section 172 and 173 of the Act with respect to reviewing an administrative review of procurement proceedings filed before it.

124. It therefore follows that if the Act is not applicable, then the Board is divested of jurisdiction to hear and determine an administrative review



presented before it since its jurisdiction flows from the Act and it can only exercise powers as granted by the Act.

**As to whether the procurement in the subject tender constitute public procurement within the meaning of Section 2 as read with Section 4 and 167(1) of the Act so as to clothe the Board with jurisdiction to hear and determine the instant Request for Review.**

125. We have hereinabove established that the 2<sup>nd</sup> Respondent in its Preliminary Objection contends that the Board is divested of jurisdiction to hear and determine the instant Request for Review on the ground that the Procuring Entity is a private entity and not a public entity as defined by Section 2 of the Act hence not bound by the provisions of the Act and Regulations 2020.

126. The 2<sup>nd</sup> Respondent submitted that Section 167(1) of the Act permits only a candidate or tenderer aggrieved by the conduct of a procuring entity under the Act to seek review by the Board and that the threshold issue is whether the 2<sup>nd</sup> Respondent qualifies as a public entity under the Act.

127. It further submitted that it is a Non-Governmental Organization (NGO) registered under the Non-Governmental Organizations Coordination Act and that its procurement is conducted solely from its private resources and not from public monies.



128. In response to the 2<sup>nd</sup> Respondent's Preliminary Objection, the Applicant submitted that there were material non-disclosures from the 2<sup>nd</sup> Respondent's advert and that:

- a) The 2<sup>nd</sup> Respondent is using public assets i.e., the National Public Health Laboratory (NPHL), under the Ministry of Health, for purposes of contractual undertaking within the meaning of Section 2(p) of the Act hence making its conduct and procurement proceedings in the subject tender subjects of the Act and within the jurisdiction of the Board.
- b) The 2<sup>nd</sup> Respondent had public/government officials play crucial roles in the impugned procurement proceedings thus meeting the definition of "controlling interest" as provided under Section 2(q) of the Act.
- c) The impugned procurement proceedings by the 2<sup>nd</sup> Respondent is being done using public money obtained from the Global Fund under the Kenya Coordinating Mechanism (KCM) thus qualifying and bringing its conduct and procurement proceedings subjects of the Act and the jurisdiction of the Board.

129. In rejoinder, the 2<sup>nd</sup> Respondent submitted that it was neither leasing nor exploiting the NPHL for its own commercial purposes but rather



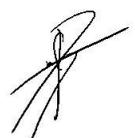
acting as an implementing partner to improve a public facility for the benefit of the health sector.

130. It also submitted that the Applicant had misunderstood the legal concept of a controlling interest as provided under Section 2(q) of the Act and reiterated that it is funded through its own resources and donor grants and that the Government of Kenya neither owns it nor controls it. It pointed out that the occasional collaboration with the Ministry of Health officials did not give the state any decision-making authority over its tender.

131. It further submitted that donor funds remain donor funds and not Kenyan funds unless and until they are appropriated into the State's budget or placed at the disposal of a public entity and as such, the Global Fund grants were given to it as a non-governmental implementer and have never been appropriated by Parliament to any state organ nor entrusted to a public procuring entity.

132. Based on parties' pleadings and rival submissions, the question that requires this Board's determination is whether the procurement in the subject tender constitute public procurement within the meaning of Section 2 as read with Section 4 of the Act so as to clothe the Board with jurisdiction to hear and determine the instant Request for Review.

133. We note that Section 2 of the Act defines public procurement as:



**"Public procurement" means procurement by procuring entities using public funds**

134. Hence, for a process to be termed as public procurement, it ought to be procurement by a procuring entity using public funds/money.

135. Procuring entities are also defined under Section 2 of the Act as:

**"Procuring entity" means a public entity making a procurement or asset disposal to which this Act applies."**

136. Public money is also defined under Section 2 of the Act as:

**"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"**

137. Despite the Applicant's claims that the money used in funding the project in the subject tender comprises of public money since it is a grant from Global Fund via the Kenya Coordinating Mechanism, the Board notes that for a procuring entity to be termed as using public money in making a procurement or asset disposal to which the Act applies, it must be a public entity subjected to appropriation of monetary resources, which includes aid, grants, and loans put at the disposal of procuring entities by donors, through the budgetary process as well as extra budgetary funds.



138. In saying so, we note that as a measure of securing efficient and transparent fiscal management, Article 226 of the Constitution dictates that every public entity must have the designation of an accounting officer. Section 2 of the Act incorporates the definition of an accounting officer as assigned under the Public Finance Management Act as follows:

**Accounting Officer as: having the meaning assigned to it under section 2 of the Public Finance Management Act, 2012 (No. 18 of 2012)**

139. Section 2 of the Public Finance Management Act defines an accounting officer as:

**(a) an accounting officer of a national government entity referred to in section 67;**

**(b) an accounting officer of a county government entity referred to in section 148;**

**(c) in the case of the Judiciary, the Chief Registrar of the Judiciary; or**

**(d) in the case of the Parliamentary Service Commission —**

**(i) the Clerk of the Senate in respect of the Senate;**

**(ii) the Clerk of the National Assembly in respect of the National Assembly; and**

**(iii) such other officer in the parliamentary service in respect of any other office in the parliamentary service as the Cabinet Secretary shall, upon resolution by the Commission,**



**designate, within fourteen days of the resolution;**

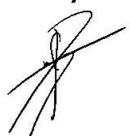
140. Section 67 of the Public Finance Management Act on designation of accounting officers for national government, it provides that:

**“(1) The Cabinet Secretary, except as otherwise provided by law, shall in writing designate accounting officers to be responsible for the proper management of the finances of the different national government entities as may be specified in the different designations.**

**(2) Except as otherwise stated in other legislation, the person responsible for the administration of a Constitutional Commission or institution or Independent Office shall be the accounting officer responsible for managing the finances of that Commission, institution or Independent Office.”**

141. The import of the above provision is that the person responsible for the administration of an institution and for its budgetary concerns shall be the accounting officer responsible for managing the finances of that institution.

142. In the same vein, the Act effectively makes provision for the responsibilities of an accounting officer of a public entity and dictates under Section 44 of the Act that the accounting officer shall be primarily



responsible for ensuring that the procuring entity complies with the Act. Additionally, in performance of his/her responsibilities, the accounting officer shall ensure that procurements of goods, works and services of the public entity are within approved budget of that entity and that procurement plans are prepared in conformity with the medium-term fiscal framework and fiscal policy objectives. Section 45 (3)(a) of the Act clearly stipulates that all procurement processes shall be within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan.

143. Accordingly, preparation of procurement and asset disposal planning as provided for under Section 53(2) states that an accounting officer shall prepare an annual procurement plan which is realistic in a format set out in the Regulations within the approved budget prior to commencement of each financial year as part of the annual budget preparation process. An accounting officer has a duty to ensure that there are sufficient funds to meet the obligations of the resulting contract reflected in its approved budget estimates. Furthermore, Section 53 (9) of the Act makes it an offence for an accounting officer of a procuring entity to start a procurement process without first ascertaining that the goods, works, or the services have been budgeted for.

144. In the instant procurement proceedings, no evidence has been tendered to show that the Respondents had in place a designated accounting officer responsible for the budgetary process envisioned

A handwritten signature in black ink, consisting of several overlapping, stylized lines, located in the bottom right corner of the page.

under the Act as far as use of the Global Funds grants is concerned with regard to the subject tender let alone adducing approved budget estimates or a procurement plan in the format set out in Regulations 2020 for the said funds prior to floating the subject tender.

145. Moreover, a scrutiny of the Constitution and Conflict of Interest Policy of the Kenya Country Coordinating Mechanism (KCM) for Global Fund to Fight Aids, Tuberculosis and Malaria reveals that the purpose of the Global Fund is to attract and disburse additional resources through public private partnerships and that KCM was established in response to the requirements and recommendations of the Global Fund as an overall country partnership body guiding the allocation and use of Global Fund Resources. We further note the composition of KCM as provided at page 4 of the Constitution to include 23 members representing the Government of Kenya, government parastatals, non-governmental organizations (NGOs) Faith Based Organizations, persons living with or affected by the diseases, key affected populations, bilateral and multilateral development partners, the private sector (formal and informal private sector), County Governments, adolescents, and young people.

146. Notably, Section 4 of the Act provides for Application of the Act as follows:

**"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;**

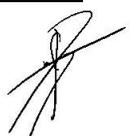
**(b) the transfer of assets being disposed off by one state organ or public entity to another state organ or public entity without financial consideration;**

**(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 Partnerships Act (Cap. 430); 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.”**

147. The import of the above provision is that all public procurement are procurements with respect to the application of the Act save for what has been exempted therein such as procurement and asset disposal under public private partnerships Act and 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 under Regulations 2020.

148. Without prejudice to the foregoing, even if the Global Fund grant was to be considered as public money as far as procurement in the subject tender is concerned, the same would be exempted under Section 4(2)(f) of the Act for being a procurement of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency thus divesting the Board of jurisdiction to review a tendering dispute relating the same.

149. We have considered the arguments by the Applicant that (i) the 2<sup>nd</sup> Respondent is a public entity by dint of using the National Public Health



Laboratory under the Ministry of Health for purposes of contractual undertaking making it subject to the Act and (ii) that there were government officials playing crucial roles in the procurement proceedings in the subject tender hence meeting the definition of controlling interest under the Act. We note that under Section 2 of the Act, a public entity includes

**(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;**

150. In our considered view, no evidence has been availed to show that the 2<sup>nd</sup> Respondent as the Procuring Entity is using public assets in the subject tender in any form of contractual undertaking. Further no evidence has been led to show existence of a controlling interest by the Government of Kenya in the 2<sup>nd</sup> Respondent either by shareholding or management control.

151. We have established that the 2<sup>nd</sup> Respondent acts as an implementing agency of the Global Fund grant being a non-state principal recipient that works towards improving identified public facilities for the benefit of the health sector and this does not in effect transform it into a public entity and neither does the existing collaboration with Ministry/ Government Officials signify a controlling interest as stipulated under Section 2(q) to render it as a public entity.



152. It is imperative to note that paragraphs 2.1 and 2.2 the 2<sup>nd</sup> Respondent's Procurement Policy provides a distinct set up of the Procurement Function as compared to the Procurement Function provided under the Act and Regulations 2020. It reads:

**" 2.1 Authority of the Procurement Function**

**The procurement function sits within the Directorate of Finance and Procurement and is led by the Group Finance Resources Director (GFRD). At corporate level, the Tender Committee reports to the Group Chief Executive Officer (GCEO) under Terms of Reference approved by the GCEO and to the relevant Country or Regional Director across the rest of Africa.**

**2.2 Management Procurement Function**

**The GFRD shall be responsible for the execution of procurement processes across Amref, delegating to the Shared Services Center in Kenya, Country Directors and Regional Directors for the rest of Africa. The delegation includes:**

- 1. Establishing a Tender Committee.**
- 2. Ensuring that Procurement Units are staffed to an appropriate level with procurement professionals."**

153. In the circumstances, the application of the Act in conducting the subject tender is ousted by dint of Section 2 as read with Section 4 and 167(1) of the Act for the reason that the procurement in the subject



tender does not constitute public procurement envisioned under the Act in view of the fact that the 2<sup>nd</sup> Respondent is not a public entity and neither is it using public money towards the subject tender. Hence there is no breach of duty imposed under the Act and Regulations 2020 against the 2<sup>nd</sup> Respondent.

154. The ousting of the application of the Act to the procurement of the subject tender effectively divests the Board of jurisdiction to entertain the instant Request for Review.

155. We therefore have no option but to down our tools at this stage and shall not proceed to address the other issues framed for determination.

156. The upshot of our finding is that the 2<sup>nd</sup> Respondent's Preliminary Objection dated 20<sup>th</sup> August 2025 succeeds and the instant Request for Review is ripe for striking out for want of jurisdiction.

## **FINAL ORDERS**

157. 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 instant Request for Review:

**A. The 2<sup>nd</sup> Respondent's Preliminary Objection dated 20<sup>th</sup> August 2025 be and is hereby upheld.**



**B. The Request for Review dated 11<sup>th</sup> August 2025 be and is hereby struck out for want of jurisdiction.**

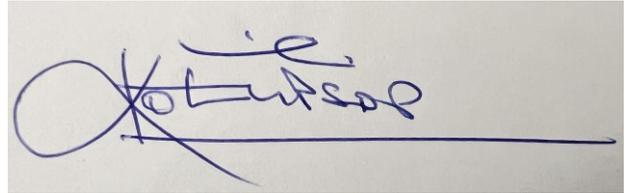
**C. Each party shall bear its own costs in the Request for Review.**

**Dated at NAIROBI this 2<sup>nd</sup> Day of September 2025.**



.....  
**CHAIRPERSON**

**PPARB**



.....  
**SECRETARY**

**PPARB**

