

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NUMBER 123/2019 OF 22ND OCTOBER 2019

BETWEEN

**THE GARDENS AND WEDDINGS CENTRE
LTD.....APPLICANT**

AND

**THE ACCOUNTING OFFICER,
NAKURU COUNTY GOVERNMENT-
THE RIFT VALLEY PROVINCIAL GENERAL
HOSPITAL.....1ST RESPONDENT**

AND

**NAKURU COUNTY GOVERNMENT-
THE RIFT VALLEY PROVINCIAL GENERAL
HOSPITAL.....2ND RESPONDENT**

Review seeking compliance with the orders issued by the Public Procurement Administrative Review Board in PPARB Application No. 107 of 2019, The Gardens and Weddings Centre Limited v. The Accounting Office, Nakuru County Government- The Rift Valley Provincial General Hospital in respect of Tender No. NCG/MOH/PGH/T/5/2019-2021 for the Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Joseph Gitari | -Member |
| 3. Mr. Ambrose Ngare | -Member |
| 4. Ms. Phyllis Chepkemboi | -Member |
| 5. Ms. Rahab Chacha | -Member |

IN ATTENDANCE

- | | |
|-------------------------|----------------------------------|
| 1. Mr. Stanley Miheso | -Holding brief for the Secretary |
| 2. Ms. Maryanne Karanja | - Secretariat |

PRESENT BY INVITATION

APPLICANT

-THE GARDENS AND WEDDINGS CENTRE LTD

- | | |
|-----------------------------|---|
| 1. Mr. Nathan Karugu Mbugua | -Advocate, Karugu Mbugua & Co.
Advocates |
| 2. Mr. Geoffrey Jomo | -Officer |
| 3. Mr. Daniel Gathogo | -Officer |

PROCURING ENTITY

-NAKURU COUNTY GOVERNMENT

- | | |
|------------------------|----------------------------------|
| 1. Ms. Sandra Opiyo | -A. E. Kiprono & Associates |
| 2. Mr. Kevin Gitau | -Head of Supply Chain Management |
| 3. Dr. Mburu M. Joseph | -Client |

4. Ms. Mercy Jelimo -Procurement Officer
5. Mr. Dennis Kamau -Supply Chain Officer

INTERESTED PARTIES

BLUE SEA SERVICES LIMITED

1. Mr. Davidson Ngibuini -Advocate, Gikandi & Company Advocates
2. Mr. Immanuel Beyo -Director

LIMAH EAST AFRICA LIMITED

1. Ms. Samantha Mugo -Advocate, Achoki & Company Advocates

BACKGROUND TO THE DECISION

The Bidding Process

Nakuru County Government, Rift Valley Provincial General Hospital (hereinafter referred to as "the Procuring Entity") advertised Tender No. NCG/MOH/PGH/T/5/2019-2021 for Provision of Maintenance for Grounds, Flowers, Hedges and Planting of Trees and Flowers (hereinafter referred to as "the subject tender") on 31th May 2019 on *The Star Newspaper* and was

closed on 14th June 2019 and opened on the same day by the tender opening committee.

First Evaluation of Bids

The first evaluation was done between 15th June 2019 to 17th June 2019 and the recommended bidders were awarded but a Request for Review was filed by two Applicants Blue Sea Service Ltd and The Gardens and Weddings to the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") after receiving regret letters. The Board ordered that a re-evaluation of the three categories be conducted in terms of the following specific orders:-

- 1) The Letter of Notification of Award of Tender No. Review against the decision of the Nakuru County Government-Rift Valley Provincial General Hospital with respect to Tender No. NCG/MOH/PGH/T/5/2019/2020 for the Maintenance of Grounds, Hedges, Flower Beds and Fences addressed to M/s Adah Design, be and is hereby cancelled and set aside.**
- 2) The Letters of Notification of unsuccessful bid addressed to all bidders who participated in Review against the decision of the Nakuru County Government-Rift Valley Provincial General Hospital with respect to Tender No. NCG/MOH/PGH/T/5/2019/2020 for the Maintenance of Grounds, Hedges, Flower Beds and Fences. are nullified.**

- 3) The Due Diligence Report dated 4th July 2019 be and is hereby cancelled and set aside.**
- 4) The Evaluation Report dated 17th June 2019 be and is hereby cancelled and set aside.**
- 5) The Procuring Entity is hereby directed to reconstitute a new evaluation committee in accordance with section 46 (4) (b) of the Act and to re-evaluate the bids received in Tender No. NCG/MOH/PGH/T/5/2019/2020 for the Maintenance of Grounds, Hedges, Flower Beds and Fences, taking into consideration the Board's findings in this case and to proceed with the procurement process, including the making of an award within fourteen (14) days from the date of this decision.**
- 6) Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Re-evaluation of Bids

The tender re-evaluation exercise was carried out in three (3) stages starting with the evaluation of the mandatory requirements, technical evaluation and Financial Evaluation. The evaluation process was carried out by the tender evaluating committee comprising of four (4) members who were present. The evaluation team started by evaluating the documents presented.

Thereafter mandatory documents were verified through various notification i.e KRA, NSSF, DEPARTMENT OF LABOUR to verify if they were genuine.

Upon concluding re-evaluation, the Procuring Entity recommended award of the subject tender to HIGAWA ENTERPRISES LIMITED at Kshs.4, 816,320 (Four million Eight hundred and Sixteen Thousand Three Hundred and Twenty only per annum).

A due diligence exercise was conducted which returned a positive response that the tender be awarded to HIGAWA ENTERPRISES LIMITED. The Accounting Officer having considered the Professional Opinion awarded the subject tender to HIGAWA ENTERPRISES LIMITED.

REQUEST FOR REVIEW NO. 107/2019

M/s The Gardens and Weddings Centre Ltd lodged a Request for Review on 11th September 2019 seeking for the following orders:-

- a) An order annulling the award;***
- b) An order directing that a fresh evaluation of the bids be conducted as the Board may deem fit and the tender be awarded to the deserving/lowest bidder;***
- c) An order for costs of this Application be awarded to the Applicant; and***

d) Any other orders that the Honourable Board may deem just and fit.

The Board having considered each of the parties' submissions ordered as follows in its decision dated 2nd October 2019:-

- 1. The Contract dated 12th September 2019 signed between the Procuring Entity and M/s Higawa Enterprises Limited with respect to Tender No. NCG/MOH/PGH/T/5/2019-2021 for Provision of Maintenance for Grounds, Flowers, Hedges and Planting of Trees and Flowers, be and is hereby cancelled and set aside.**
- 2. The Due Diligence Report signed on 28th August 2019 with respect to the subject tender is hereby cancelled and set aside.**
- 3. The letter of notification of unsuccessful bid dated 28th August 2019 addressed to the Applicant herein, be and is hereby cancelled and set aside**
- 4. The Procuring Entity is hereby directed to conduct a re-evaluation of the Applicant's bid at the Preliminary Evaluation Stage with respect to the following criteria taking into consideration the findings of the Board in this case:-**
 - a) MR 7: Copy of Compliance with NSSF and PAYE; and**
 - b) MR 8: provide age limits of employees.**

5. Further to Order 4 above, the Procuring Entity is hereby directed to conclude the procurement process including the making of an award within fourteen (14) days from the date of this decision.

6. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Professional Opinion

On 16th October 2019, the Head of Supply Chain Management issued a Professional Opinion stating as follows:-

- I. Having gone through the PPARB decision on the following cases (PPARB No. 106, 107, 108 & 109), the Procuring Entity requests the board to allow the procuring entity to re-tender due to lack of clarity in the bid document;
- II. Re-evaluation of the bids using the same evaluation criteria of providing age limits of employees may be a challenge to the Procuring Entity since concerns raised may not be addressed.

In view of the foregoing, he recommended that the tender be cancelled and be r-advertised after preparation of clear standard bid documents.

His Professional Opinion was approved by the Accounting Officer on the same date of 16th October 2019.

Notification to Bidders

In letters dated 17th October 2019, the Accounting Officer notified all bidders that the subject tender has been cancelled and will be re-advertised after preparation of clear bid documents.

Notification to the Director-General of the Public Procurement Regulatory Authority

In a letter dated 18th October 2019, the Accounting Officer of the Procuring Entity notified the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") on the procurement process and previous litigation before the Board. He then stated as follows:-

"In light of the foregoing, the Procuring Entity has pursuant to the provisions of section 63 of the PPAD Act taken the decision to terminate the procurement process to pave way for fresh tendering of the said three (3) tenders"

REQUEST FOR REVIEW NO. 123/2019

The Gardens and Weddings Centre Ltd (hereinafter referred to as "the Applicant") lodged this Request for Review on 22nd October 2019 seeking the following orders:-

a) An order allowing the Request for Review;

- b) An order substituting the decision of the Procuring Entity with a decision awarding the tender to the lowest bidder as per the Tender Evaluation Criteria;***
- c) An order extending the Tender Validity Period taking into account that the subject tender has been the subject of review before the Honourable Board on two occasions (PPARB Request for Review No. 84 of 2019 and PPARB Request for Review 107 of 2019);***
- d) An order holding the Procuring Entity for contempt of the Honourable Board;***
- e) An order awarding costs of this application and two previous related requests (PPARB Request for Review No. 84 of 2019 and PPARB Request for Review 107 of 2019) be awarded to the Applicant;***
- f) Any other orders that the Honorable Board may deem just and fit***

The Procuring Entity filed a Preliminary Objection dated 31st October 2019 but filed on 1st November 2019 on the grounds that:-

- 1) The Board lacks jurisdiction to entertain the request for review herein by dint of the provisions of section 167 (4) (b) of the Public Procurement and Asset Disposal Act, 2015;***
- 2) The tender validity period has since lapsed and further proceedings in the tender are but a nullity.***

During the hearing, the Applicant was represented by Mr. Mbugua on behalf of the firm of Karugu Mbugua & Company Advocates, the Procuring Entity was represented by Ms. Opiyo, holding brief for Mr. Kiprono on behalf of the firm of A. E Kiprono Advocates. Mr. Beyo appeared on behalf of the Interested Party intimating that he was ready to proceed but chose not to address the Board.

PARTIES' SUBMISSIONS

Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. Mbugua, fully relied on the Request for Review, Supporting Affidavit and the documents attached thereto.

On the preliminary objection raised by the Procuring Entity, Counsel submitted on the first limb that the Procuring Entity did not have an option to terminate the subject tender since the Board directed it to award the same within 14 days from 2nd October 2019. In Counsel's view, if such option exists, then it ought to have been exercised before 16th October 2019. Given that the Procuring Entity terminated the tender on 17th October 2019, it was Counsel's view that such termination was a nullity.

On the second limb of the preliminary objection, Counsel submitted that the subject tender is still subsisting noting that the Procuring Entity did not

correctly compute the time within which the tender was to lapse. To support this view, Counsel directed the Board to the decision in **Judicial Review No. 540 of 2017, Republic v. Public Procurement Administrative Review Board ex-parte Transcend Media Group Limited** and submitted the same was cited by the Board in **PPARB Application No. 70 of 2017, Transcend Media Group Limited v. Kenya Power and Lighting Company** (Fresh Hearing pursuant to orders of the High Court).

Mr. Mbugua took the view that the finding in the above cases is that a stand-still period exists each time a matter is before the Board. Counsel then submitted that the instant review is before the Board for the third time wherein the last time the Board sitting at that time issued orders in Request for Review No. 107 of 2019 directing the Procuring Entity to conduct a re-evaluation and conclude the procurement process including the making of an award within 14 days from 2nd October 2019. According to Counsel, those fourteen days lapsed on 16th October 2019 without the Procuring Entity complying the orders of the Board.

Mr. Mbugua submitted that no appeal or Judicial Review was lodged by the Procuring Entity against the Board's decision making such decision binding to the Procuring Entity. He submitted that the failure to obey lawful orders of the Board has been addressed in several court decisions to wit, **Judicial Review No. 103 of 2018, Republic v. Public Procurement Administrative Review Board ex-parte Central Kenya Fresh**

Merchants where the consequences of not complying with orders issued by a court of law of a quasi-judicial nature just like the Board was addressed. He further referred the Board to its decision in **PPARB Application No. 31 of 2016, Top Image Cleaning Solutions Ltd v. GDC.**

In conclusion, Counsel urged the Board to allow the Request for Review in terms of the prayers therein.

Procuring Entity's Submissions

In her submissions, Counsel for the Procuring Entity, Ms. Opiyo, who was holding brief for Mr. Kiprono, fully relied on the Procuring Entity's Response and Preliminary Objection.

On the Preliminary Objection, Ms. Opiyo submitted that the Board lacks jurisdiction to entertain the Request for Review pursuant to section 167 (4) (b) of the Act. According to Counsel, the Procuring Entity had the option to terminate the subject tender pursuant to section 63 of the Act to pave way for fresh tendering process. According to Ms. Opiyo, the Procuring Entity having perused the Board's decision in PPARB Application No. 107/2019, arrived at the conclusion that the Tender Document was not clear as to whether bidders should provide an age range or an age limit for employees in the Criteria MR 8. The Procuring Entity, as stated by Counsel, considered the Board's decision and took the view that it could not proceed with evaluation since the Board put into question the clarity of the Tender Document. In that regard, Ms. Opiyo submitted that a material governance

issue had been detected by the Procuring Entity necessitating termination of the subject tender.

Ms. Opiyo then submitted that the Procuring Entity notified all bidders that the subject tender had been terminated including a notification to the Director General of the Authority and urged the Board to note that most bidders provided an age range whereas the Applicant provided age limit for its employees. It would therefore be difficult for the Evaluation Committee to wade through a conflicting position in a third evaluation hence the Procuring Entity opined that it was prudent to terminate the subject tender and re-advertise for the services it was procuring.

On the second limb of Preliminary Objection, Ms. Opiyo submitted that the tender validity period has lapsed and made reference to the Board's decision in **PPARB Application No. 70 of 2017, Transcend Media Group v. Kenya Power and Lighting Company Limited** when it was first heard by the Board. Upon being prompted that this decision was overturned by the High Court in **Judicial Review No. 540 of 2017, Republic v. Public Procurement Administrative Review Board ex-parte Transcend Media Group**, Counsel confirmed that she still wished to rely on the earlier mentioned decision of the Board.

In Counsel's view, the subject tender died a natural death when the tender validity period lapsed thus making it impossible for the Board to issue any orders that have the effect of continuing the procurement process.

In response to the grounds raised in the Request for Review, Ms. Opiyo submitted that having noted that the tender validity period has lapsed, the Procuring Entity is incapable of awarding the tender to the lowest evaluated bidder. She further submitted that the Procuring Entity is not in contempt of the Board's decision in PPARB Application No. 107/2019 for the reason that the decision to terminate the subject tender is part of the retendering process wherein the Applicant will still have an opportunity to participate. She took the view that the Board has not powers to punish for breaches under the Act and no inherent powers or jurisdiction to sanction any party for disobedience of the orders of the Board. She submitted that the Board in PPARB Application No 84/2019 and 107/2019 directed each party to bear its own costs and that a prayer for costs in the instant review means the Board would be reviewing its earlier decisions. She thus urged the Board to uphold the terminating by the Procuring Entity to allow a re-tendering process based on a clear, objective and quantifiable Tender Document as per the provisions of section 80 (3) (a) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act").

Upon enquiry by the Board on the orders issued in PPARB Application No. 107/2019 and whether the Procuring Entity conducted a re-evaluation as

requested, Ms. Opiyo submitted that a re-evaluation was done but that no award was made by the Procuring Entity. She submitted that upon receipt of the Board's decision in PPARB Application No. 107/2019, the Procuring Entity requested the Authority to retender for the services in the subject tender.

The Procuring Entity's Procurement Officer submitted that no re-evaluation nor award of the tender was done. She confirmed that no response was given by the Authority and that having received no response, the Procuring Entity proceeded to terminate the tender process.

Applicant's Rejoinder

In a rejoinder, Mr. Mbugua submitted that the decision to terminate a tender must be done in good faith and that the powers donated to the Accounting Officer cannot be exercised capriciously and in bad faith. Counsel took the view that the Procuring Entity terminated the subject tender after the instant Review was filed and outside the timeline given by the Board within which the Procuring Entity was to conclude the procurement process, including the making of an award.

Mr. Mbugua submitted that the Board cannot revisit its decision in PPARB Application No. 107/2019 as the same became final and binding to all parties after the period for lodging a Judicial Review at the High Court lapsed. According to Counsel, Article 227 of the Constitution lays down principles of public procurement and if read together with Article 10 thereof, the principle of the rule of law is identified therein and that the Procuring Entity failed to

observe the said principle. In Counsel's view, if orders issued by the Board cannot be obeyed by the Procuring Entity, then the existence of the Board would be put into question. In that regard, Counsel urged the Board to protect its reputation.

On the powers of the Board, Mr. Mbugua made reference to section 173 of the Act and submitted that a party that is in contempt of the orders of the Board could not go unpunished. To support this view, Counsel referred the Board to its decision in PPARB Application Number 94 of 2016 where an award of costs was previously made by the Board. Mr. Mbugua reiterated that the Applicant lodged the instant review for the third time noting further that procurement processes are costly including filing fees and legal fees payable to the Advocate.

He urged the Board to exercise its powers under the Act to punish the Procuring Entity and grant the prayers requested for in the Request for Review.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 and the oral submissions of parties to the Request for Review.

The issues that call for determination are as follows:-

- I. Whether the Procuring Entity terminated or cancelled the procurement proceedings in the subject tender in accordance with section 63 (1) of the Act thus ousting the jurisdiction of this Board;**
- II. Whether the Procuring Entity complied with the orders of the Board issued in the decision rendered on 2nd October 2019 in PPARB Application No. 107 of 2019, The Gardens and Weddings Centre Ltd v. The Accounting Officer, Nakuru County Government-Rift Valley Provincial General Hospital & Higawa Enterprises Ltd;**
- III. Whether the Tender Validity Period of the subject tender has lapsed.**

The Board now proceeds to entertain the above issues as framed.

- I. Whether the Procuring Entity terminated or cancelled the procurement proceedings in the subject tender in accordance with section 63 (1) of the Act thus ousting the jurisdiction of this Board**

One of the grounds in the Procuring Entity’s Preliminary Objection challenges the jurisdiction of this Board to entertain the Request for Review since the Procuring Entity terminated the subject procurement proceedings.

Termination of procurement proceedings is governed by section 63 of the Act. In addition to this, when the said termination meets the threshold of that provision, the jurisdiction of this Board is ousted by section 167 (4) (b) of the Act which states that:-

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

(a)

(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act..."

[Emphasis by the Board]

The Court in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute** (2018) eKLR (hereinafter referred to as "JR No. 142 of 2018") held as follows regarding the extent of jurisdiction of this Board when a termination of procurement proceedings exists:-

"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction

to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement...

A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory precondition that first needs to be satisfied in the said subsection namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted...

The Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory preconditions leading to termination of procurement proceedings were satisfied...

The Court in JR No. 142 of 2018 held that this Board has jurisdiction to determine whether the statutory pre-conditions of section 63 of the Act have been satisfied to warrant termination of a procurement process.

It is therefore important for this Board to determine the legality, or lack thereof, of the Procuring Entity's decision terminating the subject tender, which determination can only be made by interrogating the reason cited for the termination.

The Applicant received a letter of "Cancellation of Tenders" dated 17th October 2019 with the following details:-

"After going through the PPARB decision, we noted that re-evaluation of the same bids using the same criteria will be a challenge since concerns may not be addressed.

Therefore, the following tenders have been cancelled and will be re-advertised after preparation of clear bid documents

***...Tender for provision of Maintenance of grounds, flowerbeds, hedges and planting of trees and flowers-
NCG/MOH/PGH/T/5/2019/2020"***

Further to this, a letter dated 18th October 2019 written by the Procuring Entity's Accounting Officer was addressed to the Director General of the Public Procurement Regulatory Authority stating as follows:-

"Our awards in the above tenders were challenged by M/s Gardens & Weddings Centre Ltd. The Review Board rendered

its decision on the three (3) applications on 2nd October 2019...

Request for Review No. 107 of 2019 was in respect on Tender for provision of Maintenance of grounds, flowerbeds, hedges and planting of trees and flowers- NCG/MOH/PGH/T/5/2019/2020...

The Applicant challenged the Procuring Entity's decision to declare its bids in the three (3) tenders non-responsive at the preliminary evaluation stage on the twin issue of NSSF compliance (criteria MR 7) and age limits (criteria MR 8)

On NSSF's compliance, the Board held that the Procuring Entity had unfairly evaluated the Applicant on this criteria for the reason that the Board was unable to establish how the Procuring Entity was able to establish that the Applicant does not remit contributions for the employees

On the age limits, the Board found that the tender document was not clear as to whether the bidders should provide an age range, hence the Applicant could not be faulted as a result of lack of clarity in the Procuring Entity's own tender document

In view of the Board's findings on the two issues, the Board proceeded to allow the three applications and directed the Procuring Entity to re-evaluate the Applicant's bid at the Preliminary Evaluation stage with respect to the two criteria within fourteen days from 2nd October 2019

After considering the Board's decision on the clarity of the tender document, we are of the view that it will not be prudent with the tender evaluation because the Board's decision put into question the clarity of the tender document. We note the provisions of section 80 (3) (a) of the PPAD Act which states as follows:

'The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-

(a) The criteria shall, to the extent possible be objective and quantifiable'

The Board's decision, in our mind, questioned the objectivity of the age limits criterion. We are therefore of the view that proceeding with the re-evaluation as directed by the Board with the tender document in its current form will achieve the same outcome

In light of the foregoing, the Procuring Entity has pursuant to the provisions of section 63 of the PPAD Act taken the decision to terminate the procurement process to pave way for fresh tendering of the said three tenders.”

From the foregoing, the Board notes, the Procuring Entity terminated the subject tender because it was of the view that it would not be prudent to proceed with the tender evaluation because the Board’s decision in **PPARB Application No. 107 of 2019**, in the Procuring Entity’s view, questioned the *clarity of the Tender Document with respect to criteria MR 8: Provide age limits of employees.*

During oral submissions, the Procuring Entity, through its Counsel, cited this as a material governance issue that paved way for termination of the subject procurement proceedings.

According to the decision in **PPARB Application No. 107 of 2019**, the Board held as follows:-

“On the second sub-issue, that is:-

a) Provide age limits of the employees.

On one hand, the Board heard parties’ submissions on their interpretation of the above criterion. The Applicant contended

that it provided the age of 25 years for its employees and that was sufficient to demonstrate the age limit of its employees. On the other hand, the Procuring Entity submitted that the Applicant ought to have provided the age range of its employees. In the Procuring Entity's view, the Applicant's assertion that it would engage employees of the age of 25 years old, meant that there was a possibility that the Applicant would engage minors.

Upon being prompted by the Board that the Tender Document does not expressly state that bidders should provide an age range, Counsel for the Procuring Entity urged the Board to address its mind to employment laws of Kenya and find that the Applicant ought to have taken the same into consideration and specify an age range, and not just a particular age which creates an assumption that minors will be engaged to work for the Applicant. On further enquiry, Counsel for the Procuring Entity submitted that the Procuring Entity wanted an age range of 18 to 60 years.

It is the Board's finding that the Tender Document was not clear as to whether bidders should provide an age range, hence the Applicant cannot be faulted as a result of lack of clarity in the Procuring Entity's own Tender Document.

The Board therefore finds that the Procuring Entity unfairly evaluated the Applicant with respect to this criterion. "

The Board considered the above finding together with the Procuring Entity's submission that there was a material governance issue detected with respect to this criterion and proceeds to make the following observations:-

In an Internal Memo dated 16th October 2019, the Procuring Entity's Head of Supply Chain Management issued a Professional Opinion stating that:-

"The procuring entity requested that the bidders provide age limits which were not clear to some bidders. Re-evaluation of the bids using the same evaluation criteria may be a challenge to the Procuring Entity since concerns raised may not be addressed"

This professional opinion does not specifically state the material governance issue detected and the evidence informing such material governance issues. This is followed by notification letters to bidders and to the Authority without specifically stating the evidence that informed the material governance issue. In essence, the Procuring Entity first equated Criteria MR8: Provide age limits of employees to a material governance issue during its oral submissions but

not at the time it was considering the findings and orders of the Board in **PPARB Application No. 107 of 2019.**

In **PPARB Application No. 69 of 2019, CMC Motors Group Limited v. The Principal Secretary, Ministry of Interior and Coordination of National Government & Another**, the Board held as follows regarding termination of a tender as a result of detection of material governance issues:-

"To understand what material governance is, the Board first interpreted the word "governance" and how it relates to public procurement. The Cambridge Dictionary of English defines "governance" as:-

"the way that organizations or countries are managed at the highest level, and the systems for doing this"

According to the United Kingdom Department for International Development (DFID) (2001), governance is:-

"how institutions, rules and systems of the executive, legislature, judiciary and military operate at central and local level and how the state relates to individual citizens, civil society and the private sector"

On the other hand, governance and how it relates to public procurement is explained in the book "Public Procurement: International Cases and Commentary, (2012) edited by Louise Knight, et al, as follows:-

"Effective procurement practices provide governments with a means of bringing about social, economic and environmental reform. Conversely, malpractice within public procurement demonstrates a failure of governance and typically arises from corruption and fraud"

From the above definitions, the Board notes that principles of governance dictate that a procuring entity and bidders avoid any form of malpractice that compromise a procurement process leading to failure of good governance practices.

Principles of governance that bind public procurement are explained in the Constitution, some of which include the following:-

"Article 10 (2) (c): The national values and principles of governance include:-... good governance, integrity, transparency and accountability

Article 201 (d) The following principles shall guide all aspects of public finance in the Republic:-... public money shall be used in a prudent and responsible way

Article 227 (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective."

The Cambridge Dictionary of English defines "material" as "significant, major, important, of consequence, consequential".

Therefore, it can be said that material governance issues as they relate to a procurement process, are significant issues detected by a procuring entity, for example, corruption, fraud and collusive tendering during the procurement process, that are contrary to the principles of governance and national values under the Constitution. Consequently, when such material governance issues are detected, the accounting officer has the option to terminate procurement proceedings.

In **PPARB Application No. 69/2019** cited above, the Board went on to hold that:-

"The Board finds, the Procuring Entity failed to terminate the subject tender in accordance with section 63 of the Act, which not only provides a procedure for termination, but grounds which may require real and tangible evidence to support a termination process"

The Board would like to reiterate that material governance issues is one of the grounds in section 63 (1) of the Act that requires real and tangible evidence.

The Procuring Entity in this case did not adduce any persuasive evidence to demonstrate how Criteria MR 8 as expressed in the Tender Document amounts to detection of a material governance issue. The requirement of real and tangible evidence supports the provision of Article 47 of the Constitution which states that:-

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative

action, the person has the right to be given written reasons for the action”

A reasonable and procedurally fair administrative decision making process dictates that the Procuring Entity demonstrate the reasonable steps taken to obtain real and tangible evidence of material governance issues. No bidder was given written reasons leading to termination of the subject tender as a result of material governance issues and details of the specific governance issue detected.

It is the Board’s finding that no real and tangible evidence has been adduced by the Procuring Entity to persuade us that termination of the subject tender on the ground of material governance issues having been detected, meets the threshold under section 63 (1) of the Act.

The Board finds that the Procuring Entity failed to terminate the subject procurement proceedings in accordance with section 63 of the Act. The effect of this finding is that the Board has jurisdiction to entertain the other issues framed for determination.

II. Whether the Procuring Entity complied with the orders of the Board issued in the decision rendered on 2nd October 2019 in PPARB Application No. 107 of 2019, The Gardens and Weddings Centre Ltd v. The Accounting Officer, Nakuru

County Government-Rift Valley Provincial General Hospital & Higawa Enterprises Ltd

In its decision dated 2nd October 2019 in PPARB Application No. 107 of 2019, The Gardens and Weddings Centre Ltd v. The Accounting Officer, Nakuru County Government-Rift Valley Provincial General Hospital & Higawa Enterprises Ltd (hereinafter referred to as "PPARB Application No. 107 of 2019"), the Board directed as follows:-

- 1. The Contract dated 12th September 2019 signed between the Procuring Entity and M/s Higawa Enterprises Limited with respect to Tender No. NCG/MOH/PGH/T/5/2019-2021 for Provision of Maintenance for Grounds, Flowers, Hedges and Planting of Trees and Flowers, be and is hereby cancelled and set aside.**
- 2. The Due Diligence Report signed on 28th August 2019 with respect to the subject tender is hereby cancelled and set aside.**
- 3. The letter of notification of unsuccessful bid dated 28th August 2019 addressed to the Applicant herein, be and is hereby cancelled and set aside.**
- 4. The Procuring Entity is hereby directed to conduct a re-evaluation of the Applicant's bid at the Preliminary Evaluation Stage with respect to the following criteria taking into consideration the findings of the Board in this case:-**

- a) MR 7: Copy of Compliance with NSSF and PAYE; and**
- b) MR 8: provide age limits of employees.**

5. Further to Order 4 above, the Procuring Entity is hereby directed to conclude the procurement process including the making of an award within fourteen (14) days from the date of this decision.

6. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review

The Board notes that Orders 1, 2, 3 and 6 in the above decision did not require performance of an obligation on the part of the Procuring Entity. It is only by Order 3 and 4 that the Board needs to address the question whether the Procuring Entity complied with the orders of this Board.

During the hearing of the Request for Review, Counsel for the Procuring Entity submitted that the Procuring Entity carried out a re-evaluation. Upon enquiry by the Board as to whether there was a Re-Evaluation Report of the re-evaluation process alleged to have been conducted, Counsel sought instructions from the Procuring Entity's Procurement Officer, Ms. Mercy Jelimo.

Ms. Mercy Jelimo submitted that no re-evaluation was done, hence there was no re-evaluation report. Further to this, she submitted that no award of the subject tender was made by the Procuring Entity. On further enquiry by the Board, Ms. Jelimo submitted that once the Procuring Entity obtained the decision of the Board in **PPARB Application No. 107 of 2019**, the Procuring Entity wrote to the Authority requesting to retender for the subject tender.

Ms. Jelimo confirmed that no response was received from the Authority and that the Procuring Entity proceeded to terminate the subject tender.

The Board studied the Procuring Entity's confidential file but only found a letter dated 18th October 2019 addressed to the Director General of the Authority informing him that the subject tender has been terminated. The Procuring Entity gives a background to the procurement process, the protracted review proceedings before this Board, the findings of the Board and that the Procuring Entity "*...has taken the decision to terminate the procurement process to pave way for fresh tendering*". This letter does not contain a request to retender the subject procurement process but a notification that the Procuring Entity has terminated the subject tender to pave way for fresh retendering. No letter was adduced before the Board containing a request to terminate the subject tender.

In terms of a re-evaluation on Criteria *MR 7: Copy of Compliance with NSSF and PAYE*; and *Criteria MR 8: provide age limits of employees and subsequently to award the subject tender within fourteen (14) days from 2nd October 2019*, the Board finds that the Procuring Entity did not comply with the orders of the Board.

It is worth noting that upon receiving the decision of the Board in PPARB Application No. 107 of 2019, the Procuring Entity did not lodge Judicial Review proceedings or an appeal against the Board's decision. Section 175 of the Act states that:-

"Section 175: Right to judicial review to procurement

(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties."

On its part, Article 165 (6) of the Constitution gives the High Court supervisory jurisdiction over subordinate courts, a person, body or authority exercising judicial or quasi-judicial function, and such supervisory power is exercised by the High Court through Judicial Review or Appeals lodged to it. The said section provides as follows:-

"The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court"

The Procuring Entity failed to lodge an appeal or Judicial Review proceedings against the decision of the Board in **PPARB Application No. 107 of 2019**, thus making the Board's decision final and binding to it, leaving no room to choose whether or not to implement the decision of the Board

The Board heard submissions by Counsel for the Procuring Entity that this Board has no powers to find a party to be in contempt as a result of disobedience of the Board's orders. To support this view, the Procuring Entity referred the Board to **Judicial Review Miscellaneous Civil Application No. 621 of 2016, Republic v. Public Procurement Administrative Review Board & 3 Others Ex parte Furniture Elegance Limited (2017) eKLR** (hereinafter referred to as "the Furniture Elegance Case") where the court held as follows:-

"The next ancillary question relates to whether the Review Board has power to exercise criminal jurisdiction. It was claimed by the Review Board that it acted within the purview of Section 176 of the Act which stipulates that failure to obey orders of the Review Board amounts to a criminal offence.

The Review Board argued that the Procuring Entity disobeyed its orders in Review Board Case No. 83/2016 by refusing to readmit the interested party in the Technical and Financial Evaluation of the tender and for that reason, although in Review Board case No. 83/2016, the Review Board had ordered each party to bear their own costs, the Review Board penalized the Procuring Entity to pay costs in the Review Board case No. 83/2016 while deliberating on the subsequent case.

Section 176 of the Act falls in Part XVI of the Act on offences and sanctions. Section 176(1) (m) is clear that a person shall contravene a lawful order of the authority given under part IV or the Review Board under part XV. The rest of the prohibitions concern the tendering processes. Section 176 (2) stipulates that a person who contravenes the provisions of Subsection (1) of this Section, commits an offence and shall be liable upon conviction. If the person is a natural person, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years or to both; If the person is a body corporate, to a fine not exceeding ten million shillings. In addition to the penalty under Subsection (2), a state or public officer involved shall be subject to

internal disciplinary action while any other person or officer shall be de barred.

The above provisions, among others, provide for offences and penalties or sanctions under the Act and where there is no specific penalty provided, Section 177 comes in to provide for the penalty upon conviction.

The powers of the Review Board can be found in Section 173 of the 2015 Act and such powers, regrettably, do not include the power to give criminal sanctions. In other words, the powers of the Review Board do not include punishing for breaches under the Act, even if the breach involved breach of orders of the Review Board. The Review Board undoubtedly has no inherent powers or jurisdiction to punish any party before it for disobeying its orders or for breach of the provisions of the Act. A conviction contemplated under the Act for the stated breaches can only occur if there is a criminal trial initiated by the Director of Public Prosecutions and a person tried before a court of law. The Review Board can, at most, report the breaches to the DPP for investigation and prosecution.

The powers of the Review Board are expressly donated by the Act and not by implication.

Accordingly, I find and hold that the Review Board could not, under any circumstances purport to impose a penalty upon the procuring Entity for failure to adhere to the orders of the Review Board to readmit the interested party into the reevaluation process."

The Board observes that the Court in the *Furniture Elegance Case* was dealing with the question whether the offences in section 176 of the Act, which fall under Part XVI of the Act donate powers to this Board to impose criminal sanctions. The context of the Court's interpretation was with respect to a conviction contemplated under the Act for breaches that have occurred which are punishable when there is a criminal trial initiated by the Director of Public Prosecutions and a person tried before a court of law.

Thus, if the Board cannot impose criminal sanctions for the disobedience of its orders, what powers can the Board resort to?

Section 175 (6) of the Act states that:-

"A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary

to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void”

It is clear from the above provision that disobedience of a decision of this Board and any action by a procuring entity contrary to such decision is null and void. In **Judicial Review Miscellaneous Application No. 154 of 2016, Republic v Public Procurement Administrative Review Board Ex parte Kenya Electricity Generating Company Limited (KENGEN) & 3 others [2016] eKLR**, (hereinafter referred to as “the KENGEN Case”) the court held that:-

“In this case, the finality of the Board’s decision as affirmed by this Court was that the procuring Entity was at liberty to proceed with the procurement process to its logical conclusion in accordance with the law. If in the course of purporting to proceed with the procurement the applicant made a decision which was contrary to the law, an aggrieved party was of course at liberty to challenge the same as the interested party did in this matter. However, that challenge had to be in accordance with the law and the challenge had to be initiated within 7 days of the decision under the repealed statute and within 14 days under the current statute. A failure to comply with a decision of the Review Board or to appeal from such decision leads to blatant disobedience of the orders of a decision making body established by law”

Further in **PPARB Application No. 94 of 2016, Lyape Investments v. Kenya Marine & Fisheries Research Institute & Another**, the Board held that:-

"The Procuring Entity having failed to follow the orders of the Board in Review No. 83 of 2016, this Board cannot fold its hands when faced with a situation where the Procuring Entity fails to obey the orders made by it. The Board will employ the powers conferred upon it by section 173 of the Act and make such orders as will meet the ends of justice in any matter pending before it"

Having considered the above authorities, the Board would like to note that the framers of the Act, in establishing this Board envisioned that public procurement processes would be guided by tenets of the Constitution. This means that the public would benefit from services offered by a procuring entity but that such procuring entity would uphold the rule of law and constitutional democracy in its procurement process.

The Constitution cannot be upheld where a procuring entity chooses not to comply with orders issued to it. The Court in **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J (as he then was)** which was cited with approval in **Petition No. 11 of 2019, Gideon Omare v Machakos University** [2019] eKLR stated that:-

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged".

In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:-

"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an

order was null or valid – whether it was regular or irregular. As long as a court order exists, it must not be disobeyed”

Courts have exhaustively dealt with the consequences of a party’s disobedience of the orders of a court or other decision making body, for the simple reason that disobedience of orders issued by a court offends the rule of law and constitutional democracy. The Procuring Entity herein made no attempt to comply with the orders of the Board issued in the decision rendered in PPARB Application No. 107 of 2019, did not appeal from the said decision, neither did it give any justifiable reason why no attempt was made to implement the Board’s decision.

This disobedience ought not to be overlooked noting that the national values and principles of governance as provided for in Article 10 of the Constitution serve no purpose when a procuring entity such as the one herein, makes no effort to abide by the law. Article 10 (2) of the Constitution states that:-

“The national values and principles of governance include—

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;***

(c) good governance, integrity, transparency and accountability

The national values and principles of governance cited in Article 10 (2) of the Constitution, including good governance and accountability should guide a procuring entity in upholding the rule of law. The Procuring Entity herein failed to take these principles into account by its failure to comply with the orders of this Board and such failure cannot go unpunished. The Act under section 173 (d) thereof donates a discretionary power to this Board where a party has disobeyed the orders issued to it. Section 173 (d) of the Act states as follows:-

"Upon completing a review, the Review Board may do any one of the following:-

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

In **Petition No. 240 of 2017, Kenya National Highways Authority v PPP Petition Committee & 2 others [2018] eKLR**, the court extensively dealt with the issue of costs when it held that:-

The question of costs is a legal issue and a natural consequence of litigation which in ordinarily "follow the events". This means

that the court or tribunal hearing a dispute may award costs to the winning party...

The principle that “costs follow the events” was emphasized in the case of **Solomon v Solomon [2013] EWCA Civ. 1095** Where it was held:

"The judge correctly stated the general rule did not relate to the interim applications he had decided. Costs were then in the discretion of the court, and the principles set out in CPR Part 44 applied. The starting point for what are described as "clean sheet" cases is that costs follow the event. To find that principle one need look no further than Gojkovic v Gojkovic (No. 2) [1991] 2 FLR 233 (CA) where Butler – Sloss LJ (as she then was) said:

There still remains the necessity for some starting – point. The starting point, in my judgment, is that costs prima facie follow the event....but may be displaced much more easily than, and in circumstances which would not apply, in other Divisions of the High Court....'

When considering the issue of costs following the event, the Supreme Court of Uganda stated as follows in the case of Impressa Ing Fortunato Federice vs. Nabwire [2001] 2 EA 383:

The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or a judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... While it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are: - (i). Under section 27(1) of the Civil Procedure Act (Chapter 65), costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii). A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought. The costs should follow the event even when the party succeeds only in the main purpose of the suit...It is trite law that where judgment is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability since admission of liability implied acceptance of the particulars of injuries enumerated in the plaint and the evidence in favour of the Respondent, including loss of hearing and speech."

Going by the dictum in the above cited cases and the principle that costs naturally follow the outcome of a litigation, I find that it would be inconceivable to have a scenario where a specialized tribunal, such as the Petition Committee herein, could be granted powers to consider all complainants related to the tendering process and be denied the power to consider costs that arise from such proceedings. When faced with a similar question on whether or not the National Environmental Tribunal can make an award of costs in the case of Jane Ngonyo Muhia vs. Director General, National Environmental Management Authority & another [2017] eKLR the Environment and Land Court held as follows:

'On the issue of costs, Rule 39 of NET's Rules of Procedure, 2003 provides that NET would not normally award costs but can award costs against a party when it reaches a finding that such a party had acted frivolously or vexatiously or where a party's conduct in making, pursuing or resisting an appeal is wholly unreasonable.'

The court in the above case was considering the principle that "costs follow the event" in light of the power of a tribunal (i.e. the Public Private Partnerships Petition Committee and National Environment Tribunal) to order an award of costs. This power is donated to this Board by dint of section 173 (d) of the Act.

We however take note that the circumstances of the case before the Board as at this time relate to disobedience of the orders of the Board and not whether the Applicant should be awarded costs if we find that the Request for Review succeeds.

In these circumstances, the instant review has been lodged before us three times, that is through, **PPARB Application No. 84 of 2019**, **PPARB Application No. 107 of 2019** and now the **Request for Review No. 123 of 2019**. In PPARB Application No. 84 of 2019, the Board ordered a re-evaluation which was done by the Procuring Entity. Similarly, in PPARB Application No. 107 of 2019, a re-evaluation was ordered but that the Procuring Entity refused to comply with such orders.

We also take note of the fact that section 171 (1) of the Act gives this Board a maximum of twenty-one days within which to hear and determine procurement and asset disposal disputes, to allow a procurement process to proceed without undue delay, depending on the Board's orders. The spirit of that provision is to facilitate speedy litigation but not that the Board should entertain numerous applications on the same procurement process thus denying the public from benefiting from goods and services in good time.

The Procuring Entity's disobedience has occasioned this Board to deal with the same procurement dispute for the third time and such fact must not be overlooked or encouraged. Ordinarily, the Board refrains from awarding

costs upon completing a review given the nature of procurement processes that involve tax payer's money and that it would serve the public good if a procuring entity that is still continuing with a procurement process not to be burdened with payment of costs. Further, that an Applicant who has succeeded in a Request for Review still gets a chance to participate in the procurement process, hence no need to award costs.

However, in this instance, the Board cannot be rendered toothless for blatant disobedience of its orders, because the orders of this Board are not issued in vain, but to ensure a procuring entity observes principles of public procurement under the Act, the national values and principles of governance under the Constitution when directed to redo something in a procurement process.

Accordingly, the Board shall make appropriate orders for the award of costs to the Applicant in the final orders herein.

The Board considered the Authority's power to ensure public entities' compliance with provisions of the Act and notes that section 34 thereof provides as follows:-

"Section 34. Powers to ensure compliance

A public entity shall provide the National Treasury or the Authority with such information relating to procurement and asset disposal as may be required in writing.”

From the above provision, the Authority has the power to obtain information from a public entity relating to procurement and asset disposal as may be required in writing. It is the Board’s considered view that this provision allows the Board to request the Authority to exercise its powers relating to compliance under section 34 of the Act when a procuring entity fails to comply with the orders of this Board.

The failure by the Procuring Entity herein to comply with the Board’s orders necessitates this Board to refer its decision to the Authority in light of section 34 of the Act for further investigation.

III. Whether the Tender Validity Period of the subject tender has lapsed.

In addressing the third issue, the Board has had occasion to address the importance of the tender validity period in its previous decisions. In **PPARB Application No. 161 of 2019, Debroso Construction Limited v. Kenya Rural Roads Authority**, the Board held as follows:-

"Section 87 (1) "Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify the person submitting the successful tender that his tender has been accepted".

Section 88 (1) "Before the expiry of the period during which tenders shall remain valid, the accounting officer of a procuring entity may extend that period".

It is clear from the wording of both sections 87 (1) and 88 (1) that any action, including the award of the tender and extending its validity, can only be done before the expiry of the tender validity.

The validity period of the tender subject of this Request for Review expired on or before 16th August 2018. The Request for Review having been filed on 8th November 2018 was brought more than 60 days after the expiry of the tender validity. Hence, there was no valid tender in place when the Request for Review was filed on 8th November 2018 as the tender already "died a natural death"..."

The Board notes that the tender validity period is a central aspect that determines whether a procuring entity can proceed with a procurement

process or not. The Procuring Entity herein contended that the tender validity period of the subject tender already lapsed and thus any orders issued by the Board directing the Procuring Entity to proceed with the procurement process would be meaningless.

The Applicant on its part submitted that the subject tender still exists and referred the Board to the decision in **Judicial Review No. 540 of 2017, Republic v. Public Procurement Administrative Review Board & Others, ex parte Transcend Media Group Limited**, (hereinafter referred to as "JR No. 540 of 2017") cited with approval by the Board in **PPARB Application No. 70 of 2017, Transcend Media Group Limited v. Kenya Power & Lighting Company Limited**.

On the other part, Counsel for the Procuring Entity, Ms. Opiyo made reference to **PPARB Application No. 40 of 2016, Transcend Media Group Limited v. Kenya Power & Lighting Company Limited** which first came up before the Board prior to the same being challenged at the High Court through **JR No. 540 of 2017. PPARB Application No. 40 of 2016** was overturned by the High Court in JR No. 540 of 2017 where the Court found that the Board erred in its computation of the tender validity period.

Despite the Board bringing this fact to the attention of Counsel for the Procuring Entity, Ms. Opiyo still maintained its submissions that it would rely on the finding of the Board in **PPARB Application No. 40 of 2016**.

We find that the decision in **PPARB Application No. 40 of 2016** is no longer good law, the same having been overturned by the High Court and such authority cannot be used to conclusively determine the Tender Validity Period of the subject tender.

We will therefore address our minds to the decision in JR No. 540 of 2017, which was cited with approval by this Board in **PPARB Application No. 70 of 2017**.

In JR No. 540 of 2017, the court held as follows:-

"The question that needs to be answered by this Court is whether the Respondent correctly interpreted the provisions of the law on the effect of the litigation before it on the tender validity period. The Respondent in this respect held that a notice by the Secretary of the Review Board and any stay order contained therein can only affect the procurement process from proceedings further but cannot act as an extension of the tender validity period, nor can it stop the tender validity period from

running. It in this respect relied on its previous decisions on this interpretation, which are not binding on this Court, and which were decided before the Public Procurement and Asset Disposal Act of 2015 was enacted.

I find that this position is erroneous for three reasons, Firstly, section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound.

Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point, at least for any deadlines defined by reference to a period of time, which in this case included the tender validity period. It would also be

paradoxical and absurd to find that procurement proceedings cannot proceed, but that time continues to run for the same proceedings.”

The Board observes that the court in JR No. 540 of 2017 considered the provisions of section 168 of the Act which states that:-

“Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed”

The court in JR No. 540 of 2017 while considering section 168 of the Act found that when procurement proceedings are stayed as a result of pending review proceedings before this Board, such a stay includes the tender validity period.

We reiterated the court’s finding in JR No. 540 of 2017, since the tender validity period cannot continue running when proceedings are ongoing before the Board. There is a likelihood that upon conclusion of review proceedings, a procuring entity is unable to continue with a procurement

process if ordered by the Board, yet the tender validity period lapsed when the Request for Review was pending.

It therefore behooves upon this Board to address the question whether the Procuring Entity rightfully computed the date when the Tender Validity Period of the subject tender would lapse. To address this question, the Board tabulated the sequence of events in this tendering process as hereunder:-

Tender Advertisement	31 st May 2019		
Opening of Tenders	14 th June 2019	Tender Validity Period (Total 120 days <u>after</u> date of tender opening (clause 2.13.1 of the Tender Document	
	15 th June 2019	Tender Validity period started running	
Request for Review No. 84 of 2019	Filed on 2 nd August 2019	Tender validity period stopped running	
	15 th June 2019 to 2 nd August 2019= 49 days spent		
Decision of the Board in Review No. 84 of 2019	16 th August 2019		
	17 th August 2019	Tender Validity period continued to run	
	17 th to 31 st August	15 days spent	15 + 49= 64 days spent
Request for Review No. 107 of 2019	Lodged on 11 th September 2019	Tender Validity Period 11 days spent in September	64 + 11= 75 days spent
Decision of the Board in Review No. 107 of 2019	Delivered on 2 nd October 2019		
	3 rd October 2019	Tender Validity Period continued to run	

	3 rd to 22 nd October 2019= 20 days spent
	20 + 75= 95 days spent on the Tender Validity Period

From the above analysis, the Board observes, the Tender Validity period had run for 95 days by the time the Applicant lodged this Request for Review, having considered the stand-still period when review proceedings were before this Board in respect of PPARB Application No. 84 of 2019, PPARB Application No. 107 of 2019 up to the time this Request for Review was lodged.

According to clause 2.16.1 of the Tender Document, the tenders were opened on 14th June 2019. Clause 2.13.1 states that tender would run for a period of 120 after the date of tender opening.

The Board finds that the tender validity period has 25 days remaining, which will resume running a day after the Board renders its decision in this Request for Review.

In order to give effect to the Board’s orders and having found that the Procuring Entity’s decision terminating the subject tender fails to meet the threshold of section 63 of the Act, the Board deems it necessary to extend the tender validity period for a further period of 45 days.

In totality, the Request for Review succeeds in terms of the following specific orders:-

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:-

- 1) The Procuring Entity's Notification of Termination of procurement proceedings in Tender No. NCG/MOH/PGH/T/5/2019-2021 for the Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers dated 17th October 2019, that was addressed to all bidders who participated in the subject tender, be and is hereby cancelled and set aside.**
- 2) The Procuring Entity's Notification of Termination of the procurement proceedings in the subject tender addressed to the Director General of the Public Procurement Regulatory Authority which is dated 18th October 2019, be and is hereby cancelled and set aside.**
- 3) The Procuring Entity is hereby directed to comply with the orders of the Board issued on 22nd October 2019 in PPARB Application No. 107 of 2019, The Gardens and Weddings Centre Ltd v. The Accounting Officer, Nakuru County Government-Rift Valley Provincial General Hospital & Higawa**

- Enterprises Ltd within fourteen (14) days from the date of this decision, taking into account the Board's findings in this case**
- 4) The Tender Validity Period of the subject tender is hereby extended for a further period of 45 days from 22nd October 2019.**
- 5) The Procuring Entity shall bear the costs of this Request for Review amounting to Kshs. 100,000/- to be paid to the Applicant**

Dated at Nairobi this 7th day of November, 2019

Signed

**CHAIRPERSON
PPARB**

Signed

**SECRETARY
PPARB**

Delivered in the presence of:-

- i. Mr. Mbugua for the Applicant;**
- ii. Ms. Opiyo holding brief for Mr. Kiprono for the Respondents and**
- iii. Mr. Mwesigwa**