

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 133/2019 OF 18th NOVEMBER 2019
BETWEEN
MED MARINE KILAVUZLUK VE ROMORKOR HIZMETLERI
INS. SAN. VE TIC. A.S.....APPLICANT
AND
THE ACCOUNTING OFFICER,
KENYA PORTS AUTHORITY.....RESPONDENT
AND
CHEOY LEE SHIPYARDS LIMITED.....INTERESTED PARTY

Review against the decision of Kenya Ports Authority to delay/refuse/decline to complete the re-evaluation process and the Accounting Officer of Kenya Ports Authority's decision to delay/refuse/decline to issue a notification of award and failing and/or declining to complete the procurement process in respect of Tender No. KPA/077/2018-19/ME Design, Manufacture, Supply and Commissioning of One (1) New Salvage Tug Boat.

BOARD MEMBERS

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

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT

-MED MARINE KILAVUZLUK VE ROMORKOR HIZMETLERI INS. SAN. VE TIC. A.S

- | | |
|------------------------|---|
| 1. Mr. George Kamau | -Advocate, Wambugu & Muriuki
Advocates |
| 2. Ms. Sylvia Waiganjo | -Advocate, Wambugu & Muriuki
Advocates |
| 3. Mr. Tito Mutai | -Representative |

RESPONDENT

-KENYA PORTS AUTHORITY

- | | |
|----------------------|---------------------------|
| 1. Mr. Billy Kongere | -Advocate, MMC Africa Law |
|----------------------|---------------------------|

INTERESTED PARTY

A. CHEOY LEE SHIPYARDS LIMITED

- | | |
|-------------------------|--------------------------------------|
| 1. Mr. Felistus Njoroge | -F. W Njoroge & Company
Advocates |
|-------------------------|--------------------------------------|

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Ports Authority (hereinafter referred to as “the Procuring Entity”) advertised Tender No. KPA/077/2018-19/ME Design, Manufacture, Supply and Commissioning of One (1) New Salvage Tug Boat (hereinafter referred to as “the subject tender”) in MyGov pull out of People Daily Newspaper.

The Procuring Entity, having received a total of nine (9) bidders by the tender submission deadline of 15th July 2019 subject the same to Preliminary, Technical and Evaluation stages. During Financial Evaluation, the Evaluation Committee noted that M/s Cheoy Lee Shipyards Ltd’s bid document had a cost deviation. The tabulation consolidation for the form of tender was not accurate i.e. the Form of Tender price was to consolidate a total cost of the 4 elements listed below as per the tender document:-

- i. The total cost of the Salvage Tug Boat
- ii. The cost of ancillary equipment if any
- iii. The priced list of special tools if any
- iv. The cost of spares during 24 months’ warranty period if any

However, M/s Cheoy Lee Shipyard Ltd indicated the total cost of the price schedule on the Form of Tender. The Evaluation Committee proceeded to recommend award of the subject tender to **M/s Cheoy Lee Shipyards Ltd**

REQUEST FOR REVIEW NO. 105/2019

M/s Med Marine Kilavuzluk Ve Romorkor Hizmetleri Ins. San. Ve Tic. A.S (hereinafter referred to as "the Applicant") lodged a Request for Review on 9th September 2019 seeking the following orders:-

- a) An order compelling the Procuring Entity to immediately complete the procurement process;***
- b) An order extending the time for evaluation of tenders by fourteen (14) days to allow the Procuring Entity to complete the process;***
- c) An order directing that once the results of the evaluation are received, the Applicant shall have the right to file further documents in response to the outcome of evaluation;***
- d) An order compelling the Respondents to pay to the Applicant the costs arising from and/or incidental to this Application; and***
- e) Such and further orders as the Board may deem fit and appropriate in ensuring the ends of justice are fully met in the circumstances of this Request for Review***

BOARD'S DECISION AND ORDERS

The Board, having heard all parties and studied all documents filed before it, including confidential documents submitted pursuant to section 67 (3) (e)

of the Public Procurement and Asset Disposal Act, 2015, allowed the Request for Review in terms of the following specific orders:-

- 1. The Financial Evaluation Report received on 19th August 2019 with respect to Tender No. KPA/077/2018-19/ME Design, Manufacture, Supply and Commissioning of One (1) New Salvage Tug Boat be and is hereby cancelled and set aside.**
- 2. The Procuring Entity is hereby directed to conduct a re-evaluation at the Financial stage of the Applicant's bid and the Interested Party's bid, in accordance with section 80 (2) read together with section 82 of the Act, taking into consideration the findings of the Board in this case including the making of an award within fourteen (14) days from the date of this decision and to complete the procurement process to its logical conclusion.**
- 3. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

In a letter dated 7th November 2019, the Chairperson of the Evaluation Committee wrote to the Head of Procurement and Supplies detailing the subject procurement process, the prices of the Applicant and M/s Cheoy Lee

Shipyards Limited as read out at tender opening and the price schedule indicated by each bidder in their respective financial bids as follows:-

No	Firm Name	Amount as read in Form of Tender (USD)
1	M/s Cheoy Lee Shipyards Limited	16,227,000.00
2	M/s Med Marine	15,970,301.08

He then tabulated the schedule of prices for the two bidders in the items; Total cost of Salvage Tug Boat, the cost of Ancillary Equipment, the Priced List of Special tools and the Cost of spares during 24 months as indicated below:-

No.	Description	Form of Tender Total Price CIF Mombasa	
		Cheoy Lee Shipyards Limited	Med Marine
1	Cost of Salvage Tug Boat	15,200,000.00	15,852,102.47
2	Cost of Ancillary Equipment if any	0.00	0.00
3	Priced List of Special tools if any	6,000.00	16,950.00
4	Cost of spares during 24 months warranty period if any	40,000.00	101,248.61
	TOTAL	15,246,000.00	15,970,301.08

The Chairperson of the Evaluation Committee, having noted the Committee's observations informed the Head of Procurement function and Supplies that there is a conflict between the Tender Document and section 82 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and sought his guidance.

The Head of Procurement and Supplies in his response of 15th November 2019 stated that where there is a conflict between the Tender Document and the Act, the Act prevails. He further urged the Evaluation Committee to finalize the tender process before expiry of the tender validity period.

On 19th November 2019, the Chairperson of the Evaluation Committee responded to the letter of 15th November 2019 stating that “*considering the huge discrepancy of the quoted price and evaluated price of the lowest bidder, M/s Med Marine (USD 1,059,589.35 CIF Mombasa) and the principle of good governance and accountability, it would not be in the best interest of the Authority to ignore such material fact, the PPAD Act section 82 notwithstanding. Consequently, the Committee is unable to make a decision*”

REQUEST FOR REVIEW NO. 133/2019

The Applicant lodged this Request for Review dated and filed on 18th November 2019, together with a Statement in Support of the Request for Review sworn and filed on even date (hereinafter referred to as “the Applicant’s Statement”) and a Further Statement sworn and filed on 2nd December 2019 (hereinafter referred to as “the Applicant’s Further Statement”). The Applicant also filed a List of Authorities on 2nd December 2019.

The Applicant sought for the following orders in the Request for Review:-

- a) An order, in exercise of the Board's discretion, directing the Respondent to immediately issue the notification of award in the matter relating to Tender No. KPA/077/2018-19/ME Design, Manufacture, Supply and Commissioning of One (1) New Salvage Tug Boat;***
- b) An order extending the validity of the Tender to allow the conclusion of the procurement process;***
- c) An order compelling the Respondent to pay the costs to the Applicant arising from/and incidental to this Application; and***
- d) Such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Application.***

In response, the Procuring Entity lodged a Memorandum of Response dated and filed on 27th November 2019 (hereinafter referred to as "the Procuring Entity's Response") and a List of Authorities on 2nd December 2019.

During the hearing, the Applicant was represented by Mr. Goerge Kamau appearing together with Ms. Sylvia Waiganjo on behalf of the firm of Wambugu & Muriuki Advocates while the Procuring Entity was represented by Mr. Billy Kongere on behalf of the firm of MMC Africa Law. The Interested Party was represented by Ms. Felistus Njoroge on behalf of the firm of F.W Njoroge Advocates, who did not file any documentation on behalf of the

Interested Party but was ready to proceed with the hearing and addressed the Board on the law as it applies to the case when prompted to do so.

PARTIES' SUBMISSIONS

Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. Goerge Kamau, fully relied on the Request for Review, the Applicant's Statement and Further Statement together with the Applicant's List of Authorities.

Mr. Kamau began by stating the main grounds under which the Request for Review was lodged. These are:-

- i. That the Procuring Entity failed to comply with the orders of the Board issued on 30th September 2019 in the decision rendered in **PPARB Application No. 105/2019, Med Marine Kilavuzluk VE Romorkor Hizmetleri Ins. San. VE TIC. A.S v. The Accounting Officer, Kenya Ports Authority & Cheoy Lee Shipyards Limited** as articulated on page 77 of the Applicant's bundle of documents, which contains a copy of the signed decision of the Board in the aforementioned case;
- ii. That the Tender Validity Period of the subject tender is at the risk of lapsing and that if such period is not extended, the any resultant contract executed by the Procuring Entity and the successful bidder

will be null and void for failure to comply with section 135 (3) of the Act; and

- iii. That the Procuring Entity committed a serious breach of Article 227 (1) of the Constitution in the manner in which it carried out the subject procurement process, which procedure has been prejudicial to the Applicant.

On his first ground, Mr. Kamau gave a history of the subject procurement process indicating further that on 9th September 2019, the Applicant challenged the Procuring Entity's failure to adhere to the mandatory period of 30 days for evaluation of bids in the subject tender as provided for in section 80 (6) of the Act.

He then submitted that the Board having considered the documentation and submissions by parties before it, allowed the Request for Review. However, on 4th October 2019, the Procuring Entity initiated Judicial Review proceedings challenging the decision of the Board through **Judicial Review Miscellaneous Application No. 46 of 2019, Republic v. Public Procurement Administrative Review Board & Another ex parte Kenya Ports Authority**. Shortly thereafter on 8th October 2019, the High Court issued an order for leave, which orders was to operate as a stay. However, on 5th November 2019, the Procuring Entity, having applied to the High Court to withdraw its Judicial Review Application, the High Court issued orders to that effect as can be seen at page 39 of the Procuring Entity's bundle of documents.

According to Counsel, once the Procuring Entity withdrew its Judicial Review application, the procurement process reverted to the orders of the Board issued on 30th September 2019 thereby creating an obligation on the Procuring Entity to comply with the orders of the Board, specifically, to conduct a re-evaluation at the Financial Evaluation stage of the two bids that made it to that stage.

On the second ground of the Request for Review, Mr. Kamau took the position that the Tender Validity period of the subject tender has not lapsed and that the Procuring Entity could not state it was unable to comply with the orders of the Board because no tender existed. To support this view, Counsel submitted that the tender submission deadline was 15th July 2019 with a tender validity period of 90 days. By the time the Applicant lodged Request for Review No. 105/2019, it was Counsel's position that 57 days of the tender had lapsed. He further submitted that between 9th to 30th September 2019 when the Board heard and determined Review No. 105/2019, the tender validity period remained suspended.

According to Mr. Kamau, the tender validity period started running again a day after 30th September 2019 to 4th October 2019 when the Procuring Entity lodged its Request for Review. He then stated that a total of 60 days of the tender validity period had lapsed by 4th October 2019. Mr. Kamau further submitted that the tender validity period remained suspended again up to

5th November 2019 when the Procuring Entity withdrew its Judicial Review application. At that point, it was Mr. Kamau's position, that the tender validity period started running again until 18th November 2019 when the Applicant lodged the instant Request for Review application.

In summary, Counsel submitted that cumulatively, a total of 73 days of the tender validity period had lapsed by 18th November 2019, thereby making the tender validity period of the subject tender still valid as at 18th November 2019. He therefore urged the Board to find that the Procuring Entity's Response to the Request for Review is anchored on the presumption that the tender validity period of the subject tender has lapsed. Given the sequence of events outlined by Counsel, it was his view that the Procuring Entity has no basis for its failure to comply with the Board's orders having indicated to the Board that the tender validity period has not lapsed.

Mr. Kamau relied entirely with the High Court's finding in **Judicial Review Miscellaneous Application No. 540 of 2017, Republic v. Public Procurement Administrative Review Board & Another ex parte Transcend Media Group Limited** on the interpretation given on section 168 of the Act.

On the Procuring Entity's contention that the Board lacks jurisdiction by virtue of the tender having lapsed and that this means the tender has been terminated by operation of the law under section 63 (1) (a) (i) of the Act,

Counsel submitted that the Procuring Entity did not comply with the formalities of termination under section 63 of the Act and could not therefore assert that the subject tender has been terminated.

He therefore took the view that the moment the Board finds the tender validity period of the subject tender is still valid, the Board should direct the Procuring Entity to comply with its orders issued on 30th September 2019 in Review No. 105/2019.

Mr. Kamau further urged the Board to examine the conduct of the Procuring Entity in terms of the prohibitions and offences outlined under section 176 (1) (m) of the Act which precludes any person or entity from disobeying lawful orders of the Board.

In conclusion, Counsel urged the Board to allow the Request for Review and grant costs in favour of the Applicant.

Procuring Entity's Submissions

In his submissions, Counsel for the Procuring Entity, Mr. Billy Kongere, fully relied on the Procuring Entity's Response and List of Authorities.

Mr. Kongere began by submitting that the filing of a Request for Review before the Board and Judicial Review proceedings at the High Court does not prevent the tender validity period from running. He referred the Board to the decision of the High Court in **Judicial Review Miscellaneous Application No. 540 of 2017, Republic v. Public Procurement Administrative Review Board & Another ex parte Transcend Media Group Limited** and invited the Board to depart from the finding in that case. According to Mr. Kongere, the High Court, in interpreting section 168 of the Act, failed to take section 171 (2) thereof into account. In such an instance, it was Counsel's position that the Board may depart from a decision that would otherwise be binding on it, if the higher court failed to take into account a provision in the same statute in consideration. To support this view, Counsel referred the Board to the decision of the Court of Appeal in **Civil Appeal No. 238 of 2003, Abu Chiaba Mohamed v. Mohamed Bwana Bukari & 2 others (2003) eKLR** and submitted that section 171 (2) of the Act deals with all appeals, which as interpreted by section 2 of the Act, means "a request for administrative review lodged before the Board. In Counsel's view, since section 171 (2) of the Act precludes the Board from delaying procurement proceedings, had the High Court considered that provision, it would have found that the tender validity period does not stop from running by virtue of the filing of review proceedings before the Board.

The Board directed Counsel to previous decisions of the Board cited in **Judicial Review Miscellaneous Application No. 540 of 2017, Republic v. Public Procurement Administrative Review Board &**

Another ex parte Transcend Media Group Limited, which were overturned by the High Court because the Board (at that time) failed to take into account the tender validity period in interpreting section 168 of the Act. Nonetheless, Counsel maintained his submissions that the High Court failed to take into account section 171 of the Act and that by virtue of the decision of the Court of Appeal in **Civil Appeal No. 238 of 2003, Abu Chiaba Mohamed v. Mohamed Bwana Bukari & 2 others (2003) eKLR**, the Board may depart from the High Court's decision.

Upon enquiry by the Board, Mr. Kongere submitted that the tender was to lapse the first time on 14th October 2019 but that the Procuring Entity extended this period to 14th November 2019 therefore no tender existed as at the time the Applicant lodged the instant Request for Review on 18th November 2019. He further submitted that even if it is assumed that the tender still exists, the Board has no powers to extend the tender validity period since pursuant to section 88 (1) of the Act, it is only a procuring entity that may extend that period.

On whether the Procuring Entity complied with the orders of the Board issued on 30th September 2019 in Review No. 105/2019, Counsel submitted that the original documents pertaining to this procurement process had not been filed with the Board but that the letter dated 7th November 2019, which cites the orders of the Board is a true copy of the financial re-evaluation conducted by the Procuring Entity. He submitted that the Procuring Entity was at the

stage of making a decision whether or not to award the tender and that before the Head of Procurement function could submit a signed professional opinion, the Procuring Entity was served with the Request for Review necessitating it to suspend the procurement process.

Upon enquiry by the Board, Mr. Kongere submitted that the tender sums of the Interested Party and the Applicant were USD 16,227,000 and USD 15,970,301.80 respectively. The Board directed Counsel to the figures reproduced in the letter dated 7th November 2019 which were USD 15,266,000 for the Interested Party and USD 15,970,301.80 for the Applicant and enquired from Counsel what made the Interested Party's tender sum reduce. In response, Mr. Kongere submitted that there was no correction of errors but a reduction in the items.

On the prayers sought by the Applicant, Counsel submitted that the Board cannot award the subject tender to the Applicant, but that, that decision should be left to the Procuring Entity. In his view, the Procuring Entity provided evidence that it complied with the orders of 30th September 2019, the Applicant is not entitled to an order awarding the subject tender to it.

In conclusion, Counsel urged the Board to dismiss the Request for Review and allow the Procuring Entity to complete the procurement process.

Interested Party's Submissions

While relying on submissions by the Procuring Entity, Counsel for the Interested Party, Ms. Florence Njoroge submitted that the Applicant seems to support the view that the tender validity period has lapsed for it to ask for an extension.

Ms. Njoroge submitted that the Procuring Entity has demonstrated the steps it took to comply with the orders of the Board issued on 30th September 2019 and that the procurement process has not been completed since it was suspended upon receiving notification of the existence of the instant Request for Review. She therefore took the view that the Applicant's Request for Review is premature.

She therefore urged the Board to dismiss the Request for Review and proceed with the procurement process to its logical conclusion.

Applicant's Rejoinder

In a rejoinder, Counsel for the Applicant referred the Board to section 171 (2) of the Act cited by the Procuring Entity and submitted that the said provision is with respect to stipulated timelines under the Act, such as fourteen days for lodging a Request for Review under section 167 (1) of the Act and thirty days for evaluating open tenders under section 80 (2) of the

Act. He took the view that the tender validity period is not a period stipulated under the Act, thus section 171 (2) of the Act does not apply in this instance.

Mr. Kamau further referred the Board to the Procuring Entity's Response and submitted that despite the Procuring Entity submitting that the tender validity period of the subject tender lapsed on 14th November 2019, some steps were still being taken between 15th to 20th November 2019 to the effect that the Procuring Entity seems to have been continuing with the subject procurement process.

On the orders sought in the Request for Review, Mr. Kamau submitted that the Applicant did not pray for award of the subject tender but that the Board be pleased to direct the Procuring Entity to issue notification letters of award, since the Procuring Entity admits that the remaining decision it is left with is whether or not to award the subject tender. He further prayed that the Board to issue orders directing the Procuring Entity to comply with the orders issued on 30th September 2019.

In conclusion, he urged the Board to issue orders that would allow the subject procurement process to proceed to its logical conclusion.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documentation filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and oral submissions of the parties.

The issues for determination are as follows:-

I. Whether the Tender Validity Period of the subject tender still exists;

Depending on the outcome of issue (I) above:-

II. Whether the Procuring Entity complied with the orders of the Board issued on 30th September 2019 in PPARB Request for Review Application No. 105/2019; and

III. What are the appropriate reliefs to issue in the circumstances?

The Board now proceeds to address the above issues as follows:-

It is an uncontested fact in this Request for Review that the tender submission deadline for the subject tender was 15th July 2019 by virtue of Addendum No. 5 dated 7th June 2019. It is also not contested that the Tender Document, at clause 18.1 of Section II. Instructions to Tenderers read

together with clause 22 of Section III. Tender Data Sheet thereof provides as follows:-

"Clause 18.1: Tenders shall remain valid for the period specified in the Tender Data Sheet after the Tender submission deadline prescribed by the Procuring Entity, pursuant to ITT Clause 22. A tender valid for a shorter period shall be rejected by the Procuring Entity

Clause 22: The Tender validity period shall be 90 days"

The Applicant, while relying on a decision of the High Court in **Judicial Review Application No. 540 of 2017, Republic v. Public Procurement Administrative Review Board & Another ex parte Transcend Media Group Limited (2018) eKLR** (hereinafter referred to as "the Transcend Media Case") on the court's interpretation of section 168 of the Act submitted that the tender validity period of the subject tender has not lapsed.

However, the Procuring Entity, while urging the Board to distinguish the High Court's decision in the Transcend Media case from the circumstances herein, relied on the Court of Appeal's decision in **Civil Appeal No. 238 of 2003, Abu Chiaba Mohamed v. Mohamed Bwana Bukari & 2 Others (2003) eKLR** (hereinafter referred to as "the Abu Chiaba Case") to support its view that the court in the Transcend Media Case failed to take section 171 (2) of

the Act into account while interpreting section 168 of the Act. In that regard, Counsel for the Procuring Entity took the view that the Board may depart from the principle of *stare decisis* and decline to follow a decision that would otherwise be binding on it, where a higher court fails to consider a provision of statute in interpreting another provision in the same statute.

Before determining whether the rule established in the Abu Chiaba Case applies to this review application in relation to the decision in the Transcend Media Case, the Board would like to address its mind on the importance of the principle of *stare decisis* and its exceptions.

While considering the aforementioned principle, Njoki Ndungu, SCJ in her concurring opinion in **Supreme Court Petition No. 18 of 2014 (Consolidated with Petition No. 20 of 2014), Kidero & 5 Others v. Waititu and Others**, made the following remarks:-

"The principle of stare decisis in Kenya unlike other jurisdictions is a constitutional requirement aimed at enhancing certainty and predictability in the legal system."

Notably, Article 162 of the Constitution states that:-

The superior courts are the Supreme Court, the Court of Appeal, the High Court and other courts with the same status

as the High Court established to hear and determine disputes relating to:-

(a) employment and labour relations; and

(b) the environment and the use and occupation of and title to land

The decisions of the courts as outlined in Article 162 of the Constitution are binding to lower courts, tribunals and other decision making bodies in Kenya by virtue of the principle of stare decisis.

Further, in **Civil Appeal No. 139 of 2018, Jacinta Nduku Masai v Leonida Mueni Mutua & 4 others [2018] eKLR**, the court while appreciating the importance of the principle of *stare decisis*, cited the following exceptions to the principle:-

"It is trite law that a lower court should follow the decisions of a court higher than it within the vertical application. However, a court can shift from the principle of stare decisis only in the following instances:-

- a) Where there are conflicting previous decisions of the court.***
- b) The previous decision is inconsistent with a decision of another court binding on the court***

(c) The previous decision was given per incuriam."

In respect of the first and second exception, the Board studied the decision in the Transcend Media Case and notes the following at paragraphs 51 to 52 thereof:-

"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.

I am in this respect persuaded by the decision in UK Highways A 55 Ltd vs Hyder Consulting (UK) Ltd (2012) EWHC 3505 (TCC) that proceedings had automatically continued from the point they left once a stay was lifted, and therefore time for service of particulars of a claim had expired in the interim period between when the initial stay expired and a second stay was agreed upon. It was also held in R (H) vs Ashworth Special Hospital Authority (2003) 1 WLR 127 that the purpose of a stay is to preserve the status quo pending the final

determination of a claim for review, and to ensure that a party who is eventually successful in his or her challenge will not be denied the full benefit of his or her success. The relevant status quo that will determine a successful party's benefit in the instant case includes the tender validity period."

The High Court in the Transcend Media Case first noted the previous decisions relied on by the Board (that is, **PPARB Application No. 45 of 2004, Vulcan Limited v. Ministry of Health** and **PPARB Application No. 2 of 2009, Delta Guards (K) Ltd and Guardforce Security Ltd v. Kenya Power and Lighting Company Ltd**) when entertaining **PPARB Application No. 70 of 2017, Transcend Media Group Limited v. Kenya Power and Lighting Company** (that is before **PPARB Application No. 70 of 2017** went to the High Court through **JR No. 540 of 2017**), which decisions were decided before the enactment of the 2015 Act. These decisions were rendered pursuant to section 94 of the repealed Public Procurement and Disposal Act, 2005 which provided as follows:-

"Upon receiving a request for review under section 93, the Secretary to the Review Board shall notify the procuring entity of the pending review and the suspension of the procurement proceedings in such manner as may be prescribed"

Notably, section 94 of the repealed Act resembles section 168 of the Act in all respects. However, the Board, in its previous decisions rendered before

the enactment of the 2015 Act, failed to take suspension of the tender validity period into account when interpreting section 94 of the repealed Act.

The High Court proceeded to rely on decisions of the High Court of England which support the view that the purpose of a stay, which include suspension of the tender validity period is to preserve the status quo pending the final determination of a claim for review. This Board did not find a decision of the Kenyan High Court that contradicts the decision in the *Transcend Media Case* or a decision of the Court of Appeal and the Supreme Court, specifically dealing with computation of the tender validity period, that contradicts the position taken in the *Transcend Media Case*.

As a matter of fact, the High Court in **Judicial Review No. 67 of 2018, Republic v Public Procurement Administrative Review Board; Simba Pharmaceuticals Limited & Another Ex parte Kenya Ports Authority [2018] eKLR** (hereinafter referred to as “the Simba Pharmaceuticals Case”) took the same position taken by the High Court in the *Transcend Media Case* when it held at paragraph 27 thereof as follows:-

Be that as it may, the decision of the Respondent was made on 25th September, 2018. Was the period outside the tender validity period? The 1st Interested Party suggested that by lodging the review the tender validity period was extended. Section 168 of the Public Procurement and Asset Disposal 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". In my view, the lodging of a review with the Respondent suspended the procurement proceedings including the validity period...

Having compared the finding in the Transcend Media Case to that of the Simba Pharmaceuticals case cited above, the Board notes, these were decisions made by two courts of the same status and they both concur with each other that suspension of procurement proceedings under section 168 of the Act, includes the tender validity period.

In respect of the first exception to the *stare decisis principle*, there seems to be no conflict in the decisions rendered by the High Court, but a concurrence that suspension of procurement proceedings under section 168 of the Act, includes the tender validity period.

On the second exception to the *stare decisis principle*, the Board having noted that there seems to be no decision of the Court of Appeal and Supreme Court, specifically dealing with the interpretation of section 168 of the Act and contradicting the position taken in the Transcend Media case, we deem

it fit to consider the decision of the Court of Appeal cited by the Procuring Entity in light of the third exception to the *stare decisis principle*.

On the third exception, the Board notes that the Black's Law Dictionary, 7th Edition, defines a decision made *per incuriam* to be **"a decision made which ignores a contradictory statute or binding authority, and is therefore wrongly decided and of no force."**

The Board further notes that the 2015 Act is the only substantive law dealing with public procurement and asset disposal proceedings in so far as such proceedings are not exempted from application of the Act by dint of section 4 (2) thereof.

Given that the Procuring Entity contends that the High Court in the Transcend Media Case failed to take into account the provision of section 171 (2) of the Act, the Board must now consider the finding in the *Abu Chiaba Case* where it was held as follows:-

"...The learned Judge found, inter alia, that the Court of Appeal in *Kibaki v. Moi* failed to comment on Rule 14 (2); that rule 14 (2) is not in conflict with section 20 (1) (a) of the Act...

The Court is bound by the principle of *stare decisis* to follow its own decision except where, inter alia, the decision was given *per incuriam* and a decision if it given in ignorance or

forgetfulness of some inconsistent statutory provision or binding authority on it. The Court of Appeal in Kibaki v. Moi did not construe rule 14 (2) which is a subsidiary legislation having the same status as an Act of Parliament”

The Board studied the decision in *Abu Chiaba Case* and notes that the court was dealing with the following two provisions:-

Section 20 (1) (a) of National Assembly and Presidential Elections Act, Chapter 7, Laws of Kenya (repealed)

"A petition—

(a) to question the validity of an election, shall be presented and served within twenty-eight days after the date of publication of the result of the election in the Gazette”

Rule 14 (2) of the National Assembly and Presidential Elections (Election Petition) Rules, 1994 (repealed)

"Service may be effected either by delivering the notice and copy to the advocate appointed by the respondent under rule 10 or by posting them by a registered letter to the address given under rule 10 so that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate has been appointed, or no such address has been given, by a notice

published in the Gazette stating that the petition has been presented and that a copy of it may be obtained by the respondent on application at the office of the Registrar"

The Court of Appeal in the *Abu Chiaba Case* found that the High Court failed to take into account Rule 14 (2) cited above in determining the interpretation of Section 20 (1) (a) of the repealed National Assembly and Presidential Elections Act, Chapter 7, Laws of Kenya. Both provisions dealt with service to a party when the validity of Presidential and National Assembly elections were contested and the Court of Appeal found that the High Court failed to consider the modes of service outlined in Rule 14 (2) above.

However, section 168 of the Act deals with Notification of review and suspension of procurement proceedings and provides as follows:-

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

Whereas, section 171 of the Act deals with completion of review and provides as follows:-

"(1) The Review Board shall complete its review within twenty-one days after receiving the request for the review.

(2) In no case shall any appeal under this Act stay or delay the procurement process beyond the time stipulated in this Act or the Regulations made thereunder"

Having compared the two provisions, the Board notes, section 171 (1) of the Act prescribes a period of 21 days within which this Board must hear and determine a review application before it. It is also not in doubt that section 171 (2) of the Act makes reference to "an appeal", which as interpreted by section 2 of the Act means:-

"a request for administrative review or complaint filed with the Appeals Review Board pursuant to section 167 of this Act"

Therefore, in determining the import of section 171 (2) of the Act, this provision must be read together with sub-section (1) thereof so that the correct interpretation of section 171 (2) of the Act is that, the Board cannot stay or delay procurement proceedings beyond 21 days, being the period stipulated for completion of a review (i.e. an appeal before the Board).

The Applicant took the position that in making reference to "stipulated time", section 171 (2) of the Act must be interpreted by looking at other stipulated periods under the Act, such as 14 days within which an appeal must be

lodged before this Board under section 167 (1) of the Act and 30 days within which evaluation of open tenders (where the Request for Proposal method of tendering is not used) must be carried out.

We take cognizance that these are indeed mandatory timelines stipulated in the Act and that a tender validity period is usually prescribed by a procuring entity in its tender document. However, section 171 (2) of the Act is specific to the life-span of an appeal before this Board.

It is the Board's finding therefore that the decision of the High Court in *Transcend Media Case* need not apply section 171 (2) of the Act, which does not relate to tender validity period, but relates to the period of 21 days within which the Board must complete review proceedings before it. Hence, the third exception to the principle of stare decisis, that is, a decision making body may depart from a decision of a higher court that would otherwise be binding on it, if the higher court's decision was made per incuriam, does not apply in this instance.

The Board therefore resists the invitation to depart from the decision in the *Transcend Media Case* as the finding thereof is still good law and is binding on this Board by virtue of the principle of *stare decisis*, since the exceptions to the aforestated principle and the circumstances in the *Abu Chiaba Case* do not apply in this instance.

The Board must now consider the finding of the court in the Transcend Media Case where it was held that, the effect of a stay under section 168 of the Act 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. In essence, the court found that a stay under section 168 of the Act includes the tender validity period as it would be absurd that procurement proceedings are suspended by virtue of review proceedings before the Board, yet the tender validity period continues to run.

The High Court must have considered the fact that a procuring entity would be incapable of implementing any of the orders of the Board if the tender validity period continues to run and lapses when review proceedings are pending. Secondly, that an award cannot be made and a contract executed after the lapse of the tender validity period. It was never the intention of the legislature that review proceedings before this Board renders a procurement process of no significance, if upon completing a review, the tender validity period already lapsed and a procuring entity is unable to conclude the procurement process to its logical conclusion.

The Board would like to note that in respect of Judicial proceedings before the High Court, the question whether an automatic stay exists or not has been addressed in **Miscellaneous Civil Application No. 468 of 2017,**

Republic v Public Procurement Administrative Review Board Ex-Parte Transcend Media Group Limited [2017] eKLR, as follows:-

"I have considered the foregoing submissions. Section 175 (1) of the 2015 Act provides as follows:

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.

It is therefore clear that the section does not expressly state that the commencement of judicial review proceedings is an automatic stay.

Having considered the issues raised before me it is my view that I should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. In this case it is that the voter education ought to proceed so that the citizenry can make informed decisions on 8th August 2017, an occasion which ordinarily presents itself only once in five years.

In the premises I decline to direct that the leave granted herein shall operate as a stay of the procurement proceedings and the decision being challenged by the ex parte applicant...”

According to the High Court, filing of Judicial Review proceedings does not automatically operate as a stay of the decision of this Board or procurement proceedings. However, the High Court may issue stay orders suspending a decision of this Board that is being challenged before it and the procurement proceedings.

In the instant review, the court in **Judicial Review Miscellaneous Civil Application No. 46 of 2019, Republic v. The Accounting Officer, Kenya Ports Authority & The Public Procurement Administrative Review Board ex parte Med Marine Kilavuzluk VE Romorkor Hizmetleri Ins San. Vetic A.S & Another** (hereinafter referred to as “JR No. 46/2019”), granted leave to the Procuring Entity on 8th October 2019 specifying that such leave shall operate as a stay. This means, a stand-still period existed when the High Court in JR No. 46/2019 granted leave to the Procuring Entity herein on 8th October 2019, which had the effect of suspending the procurement proceedings including the tender validity period of the subject tender.

The question that the Board must now answer is whether the Tender Validity period of the subject tender existed as at 18th November 2019 when the Applicant filed the instant Request for Review application.

The relevant timelines including the stand-still period in this procurement process are tabulated as follows:-

Tender Advertisement	16 th April 2019		
Tender submission date/deadline pursuant to clause 8 of Addendum No. 5 dated 7 th June 2019	15 th July 2019	Tender validity period is 90 days <u>after</u> the tender submission deadline	
	16 th July 2019	Tender Validity Period started running	
16th July 2019 to 9th September 2019= 56 days spent			
First Review No. 105/2019	9 th September 2019	Stand still period	
Board's decision in 1 st Review No. 105/2019	30 th September 2019		
1st October to 8th October 2019= 8 days spent			
Stay issued in JR No. 46/2019	8 th October 2019	Stand still period	
Court Order marking JR No. 46/2019 as withdrawn with no orders as to costs	5 th November 2019		
6th November to 18th November 2019= 13 days spent			
Review No. 133/2019	18 th November 2019	Stand still period	
		Total number of days spent on tender validity=77	

		Number of days remaining (90-77) = 13	
--	--	--	--

From the above table, the Board notes that the tender validity period of the subject tender had 13 days remaining as at 18th November 2019.

The Board observes that the Procuring Entity, in its Response, averred that vide a letter dated 11th October 2019, it extended the tender validity period of the subject tender for a further period of 30 days from 14th October 2019, and that such period expired on 14th November 2019. The said letter was supplied to the Board but it is not clear from its contents, the date when the Procuring Entity anticipated the tender validity period of the subject tender would lapse for it to issue an extension of 30 days.

However, since the Procuring Entity was of the view that after its extension, the tender validity period would lapse on 14th November 2019, it is evident that the stand still period considered hereinbefore were not taken into account as at the time the Procuring Entity was making a decision to extend the tender validity period of the subject tender.

At paragraphs 11 to 13 of the Procuring Entity's Response, the Procuring Entity avers that certain steps were being taken which demonstrate that the procurement proceedings of the subject tender was still ongoing between

15th November 2019 to 20th November 2019 despite the Procuring Entity's contention that the tender already lapsed on 14th November 2019. At paragraphs 11 to 13 of its Response, the Procuring Entity avers as follows:-

"11: On 15th November 2019, the Acting Head of Procurement and Supplies advised the Tender Evaluation Committee that the provisions of section 82 of the PPAD Act prevailed in cases of conflict

12: Vide a letter dated 19th November 2019, the Tender Evaluation Committee advised the Acting Head of Procurement & Supplies that they were unable to reach a determination given the huge discrepancy between the quoted price and evaluated price of the lowest bidder, even after complying with section 82 of the PPAD 2015

13: The Acting Head of Procurement and Supplies embarked on issuing a Professional Opinion noting the decision by the Tender Evaluation Committee. However, the Acting Head of Procurement & Supplies was, on 20th November 2019, notified of the present Request for Review thus making it impossible to render the Professional Opinion"

Notably, in a letter dated 15th November 2019, the Procuring Entity's Acting Head of Procurement and Supplies took the view that:-

"...the tender validity period is expiring on 27th November 2019. You are therefore requested to continue with the

evaluation and submit your report by Tuesday, 19th November 2019 to enable us finalize the tender process before expiry of the tender validity period”

Counsel for the Procuring Entity, in his oral submissions, took a different position that the tender validity period of the subject tender has 3 days remaining before it lapses and that such a period is not sufficient to award the subject tender and execute a contract. This submission was made despite the Procuring Entity’s earlier assertion that the tender validity period already lapsed on 14th November 2019.

It is the Board’s considered view that the Procuring Entity’s oral submissions and pleadings are misleading on the correct date when the tender validity period would lapse noting that the Procuring Entity never took the stand-still period when proceedings were before this Board pursuant to Review No. 105/2019 and before the High Court pursuant to JR No. 46/2019, into account.

Having studied the finding of the Court in the Transcend Media Case and the sequence of events in this procurement process, the Board is inclined to find that the tender validity period of the subject tender still exists.

On the second issue, the Board observes that in its decision dated 30th September 2019 in **PPARB Application No. 105/2019, Med Marine Kilavuzluk VE Romorkor Hizmetleri Ins. San. VE TIC. A.S v. The Accounting Officer, Kenya Ports Authority & Cheoy Lee Shipyards Limited** (hereinafter referred to as “the First Review”), the Board ordered as follows:-

- 1. The Financial Evaluation Report received on 19th August 2019 with respect to Tender No. KPA/077/2018-19/ME Design, Manufacture, Supply and Commissioning of One (1) New Salvage Tug Boat be and is hereby cancelled and set aside.**
- 2. The Procuring Entity is hereby directed to conduct a re-evaluation at the Financial stage of the Applicant’s bid and the Interested Party’s bid, in accordance with section 80 (2) read together with section 82 of the Act, taking into consideration the findings of the Board in this case including the making of an award within fourteen (14) days from the date of this decision and to complete the procurement process to its logical conclusion.**
- 3. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

It is worth noting that, it is only Order No. 2 of the decision in the First Review that required the Procuring Entity to fulfill an obligation. Even though

the Procuring Entity lodged Judicial Review proceedings, through JR No. 46/2019 challenging the Board's decision in the First Review, on 5th November 2019, the said proceedings were withdrawn and orders issued by the High Court to that effect. Section 175 (1) of the Act provides as follows:-

"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."

Hence, the moment the Procuring Entity withdrew its Judicial Review application, it had no option but to comply with the orders issued in the First Review.

Before making a determination on whether or not the Procuring Entity complied with the orders issued in the First Review, the Board would like to note that the Procuring Entity lodged documents pertaining to this procurement process on 29th November 2019, which documents are marked as "Original Copy". The Procuring Entity also lodged internal correspondence letters which are also copies. However, an original re-evaluation report that would demonstrate the re-evaluation process at the Financial Evaluation stage, if at all, conducted pursuant to the orders in the First Review was not lodged before the Board.

Upon enquiry by the Board, Counsel for the Procuring Entity submitted that the copy of the Re-evaluation report at the Financial Evaluation stage, reproduced in the letter dated 7th November 2019 submitted to the Board was a true copy of the original.

The Board studied all documents submitted to it by the Procuring Entity to establish whether the Procuring Entity complied with the orders issued in the First Review and we proceed to make the following observations:-

In a letter dated 7th November 2019 that was addressed to the Procuring Entity's Head of Procurement and Supplies, the Chairperson of the Financial Evaluation Committee gives the genesis of Financial Evaluation before the First Review and proceeds to note the following observations of the Evaluation Committee:-

"Going by the tender document financial evaluation criteria, the figures obtained from the price schedule were USD 15,246,000.00 by M/s Cheoy Lee Shipyard Limited and USD 15,970,301.08 by M/s Med Marine as tabulated

Going by the letter Ref PSM/CTC/1/01 (077) Vol. 1 dated 6th November 2019 from your office, the PPRA review board implies we award based on the opening quoted figure on the opening without examining the bids to determine

responsiveness to specific values of components sort in the tender document financial evaluation criteria

Guided by governance principle of transparency and accountability that requires financial information to be relevant and faithfully presented for it to be reliable, the figures quoted were evaluated by verifying their sources and accuracy of the summation of values of each and every component stated in the financial evaluation criteria

The committee notes that there is a conflict between the tender financial evaluation criteria in the tender document and the Public Procurement and Asset Disposal Act, 2015-section 82. In view of the above, the committee hereby seeks your guidance"

The Acting Head of Procurement and Supplies, having received the said letter, responded as follows in a letter dated 15th November 2019:-

"We refer to your letter dated 7th November 2019 which was received in our office on 13th November 2019

We have noted that the committee noted a conflict between the tender financial evaluation criteria in the tender document and the Public Procurement and Asset Disposal Act, 2015. You are therefore seeking guidance on the matter

We wish to advise that where there is a conflict between the Public Procurement and Asset Disposal Act, 2015 and the tender document, the PPAD Act prevails...”

The Chairperson of the Evaluation Committee further responded to the letter of 15th November 2019, through a letter dated 19th November 2019 stating as follows:-

"We refer to your letter dated 15th November 2019 regarding the above-mentioned tender

The committee deliberated and unanimously made the following conclusion

Considering the huge discrepancy of the quoted price and the evaluated price of the lowest bidder, M/s Med Marine (USD 1,059,581.35 CIF Mombasa) and the principle of good governance and accountability, it would not be in the best

interested of the Authority to ignore such material fact, the PPADA Act, section 82 notwithstanding.

Consequently, the committee is unable to make a decision”

The Board observes that, in the letter dated 7th November 2019, the Chairperson of the Evaluation Committee reproduced the respective tender sums of the Applicant and the Interested Party herein. The corrected tender sum of the Interested Party was also noted, which amount is similar to the amount recorded in the initial Financial Evaluation Report received on 19th August 2019.

The Evaluation Committee itself admitted that it was unable to make a decision on recommendation of award of the subject tender, notwithstanding the provision under section 82 of the Act, even after the Acting Head of Procurement and Supplies advised the Evaluation Committee that section 82 of the Act prevails in case of contradicting provisions in the Tender Document on the manner of conducting financial evaluation.

The Board at pages 36 to 55 of its decision in the First Review traced the history of the repealed Public Procurement and Disposal Act, 2005, and the mischief that section 82 of the Act cured. At page 51 of the decision in the First Review, the Board held as follows:-

"It is the Board's considered view that the mischief the Act [section 82 of the Act] has cured is a scenario where a bidder can quote a figure 'X' as its tender sum in the Form of Tender in anticipation of being the lowest evaluated bidder. However, upon realization that such a bidder is the second lowest evaluated bidder, it may collude with a procuring entity to correct errors which it 'deliberately' created in its breakdown of prices comprising of the amount in the Form of Tender so that upon correction, its tender sum is revised downwards, lower than the initial lowest evaluated bidder and be awarded the tender based on the corrected sum." [Emphasis by the Board]

At page 55 of its decision, the Board further held as follows:-

"Having noted that provisions of the repealed Act and the 2006 Regulations that previously allowed correction of errors have been abolished by the Act, the Board finds, correcting the Interested Party's tender sum is immaterial during evaluation of tender. This is because the tender sum which is final and absolute already reflects the total amount at which a bidder accepts to perform the works of a tender"

Despite the above findings, the Procuring Entity did not comply with the orders of the Board issued on 30th September 2019 in the First Review.

Section 176 (1) (m) of the Act states that:-

"A person shall not:-

...(m) contravene a lawful order of the Authority given under Part IV or the Review Board under Part XV."

The Board, while entertaining the First Review, exercised its discretionary power under section 173 (b) of the Act (found under Part XV of the Act) which allows it to *"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"*. The Board's orders in the First Review remain final and binding to all parties following the withdrawal of JR No. 46/2019 on 5th November 2019.

Therefore, the Procuring Entity ought to have complied with the Board's orders between 1st October 2019 (which was a day after the orders in the First Review were issued) and 8th October 2019 (when a stay was issued in JR No. 46/2019) or between 6th November 2019 (which was a day after withdrawal of JR No. 46/2019) and 18th November 2019 (when the instant Request for Review was filed) being a cumulative number of 21 days, which were days when no stay of proceedings existed.

Having found that the Procuring Entity tender validity period of the subject tender still exists, the Board makes the following findings:-

Firstly, the Procuring Entity failed to carry out a re-evaluation process with a view of recommending the bidder for award of the subject tender within the cumulative 21 days when no stand-still period existed. Secondly, the Procuring Entity had sufficient number of days amounting to a cumulative 21 days to fully comply with the Board's orders, despite the Board having directed the Procuring Entity to comply with the orders issued in the First Review within 14 days.

Thirdly, the fact that the Tender Validity period is still existing shows that the Procuring Entity had the opportunity to fully comply with the orders of the Board as the subject tender was still valid as at 18th November 2019 and could not therefore assert that it was unable to proceed with the procurement process based on a presumption that the tender validity period already lapsed on 14th November 2019.

It is the Board's finding that, as at 18th November 2019, the Procuring Entity failed to comply with the Board's orders in the First Review despite Order No. 2 thereof requiring the Board's orders to be complied with, within 14 days from 30th September 2019.

Section 176 (1) (m) of the Act, which is couched in mandatory terms expressly prohibits any person such as the Procuring Entity herein from contravening a lawful order of this Board. The question that we must now address, is what are the consequences of contravening the orders of this Board?

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**, 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 Procuring Entity 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. 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 by a decision making body established under any written law. 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...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 established by any written law, for the simple reason that disobedience of orders issued to a public entity offends the rule of law and constitutional democracy. The Procuring Entity herein blatantly refused to comply with the orders of the Board issued in the decision rendered in the First Review, neither did it give any justifiable reason why it did not implement the Board's orders.

The national values and principles of governance as provided for in Article 10 of the Constitution serve no purpose when a procuring entity, 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 Board finds that the Procuring Entity herein failed to take the national values and principles of governance cited in Article 10 (2) of the Constitution into account by its failure to comply with the orders of this Board.

The Board further notes that the Public Procurement Regulatory Authority (hereinafter referred to as “the Authority”) has powers under the Act to ensure public entities comply with provisions of the Act and the Constitution that relate to public procurement. 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. 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.

Pursuant to section 34 of the Act, this is a case that the Authority ought to follow up with a view of ensuring compliance with the decision of the Board for the Authority to take appropriate action.

The Board is now left with the third issue, that is what are the appropriate orders to issue in the circumstances?

The Board, having taken into account the stand-still period when proceedings were before it during the First Review and when proceedings were before the High Court, has found that the tender validity period of the subject tender still exists.

Counsel for the Interested Party submitted that the Applicant's prayer that the tender validity period of the subject tender, be extended by this Board could not be granted, since in her view, if the tender validity period has already expired, then there is nothing for the Board to extend. It however seems that having found the tender validity period of the subject tender still exists, Counsel for the Interested Party would agree that the same can be extended.

On its part, the Procuring Entity submitted that the Board cannot extend the Tender Validity period of the subject tender. To support this view, Counsel for the Procuring Entity cited section 88 (1) of the Act which provides thus:-

"Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period"

As a result, it was the position of Counsel for the Procuring Entity that it is only a procuring entity that can extend the tender validity period.

The Board studied the decision in Transcend Media case and notes that the High Court pronounced itself on whether this Board can extend the tender validity period. It was held at paragraph 55 thereof as follows:-

"Secondly, section 135 of the Act provides for a standstill period of fourteen days between the notification of an award and the conclusion of a contract, to enable any party who wishes to challenge an award decision to do so. A plain interpretation of this section would therefore mean that as long as there is a challenge to an award decision, there is a standstill period, and no action can be taken on an award. In the event that there is no stay, there will then be a need for the Respondent [Review Board] or procuring entity to extend the tender validity period if it becomes necessary to do so to conclude the procurement proceedings." [Emphasis by the Board]

The Board notes, the High Court found that the tender validity period may be extended by a procuring entity or by this Board. In ordinary circumstances, it is expected that a procuring entity would exercise its power under section 88 (1) of the Act and extend the tender validity period to enable it conclude a procurement process by making an award and executing a contract before such period lapses.

However, section 88 (3) of the Act gives the extent of this power as it states:-

"An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once."

This means, once a procuring entity extends the tender validity period under section 88 (1) of the Act for a further 30 days, such power cannot be exercised a second time by the Procuring Entity, even if it is possible that after such extension, the Procuring Entity still fails to award the tender and execute a contract within the tender validity period.

In such instance, the Procuring Entity or bidders approach the Board for an order extending the tender validity period for purposes of concluding the procurement process to its logical conclusion (i.e. to award the tender and execute a contract before the tender validity period lapses). The Act never intended that a procurement process dies a natural death due to the fact

that a procuring entity is incapable of extending the tender validity period a second time.

In the Simba Pharmaceuticals Case cited hereinbefore, it was further held as follows:-

"...It would then follow that the decision of the Respondent could not have been implemented if there was no valid tender in the first place. The Respondent in allowing the review ought to have considered the validity period of the tender so as to avoid issuing orders in vain."

The courts support the view that this Board ought to take the tender validity period of a tender into account so as to avoid issuing orders in vain. In taking such period into account, nothing bars the Board from extending the tender validity period (if such period has not lapsed before review proceedings are lodged before the Board) to ensure a procuring entity can comply with the orders of this Board and that the procurement process is completed to its logical conclusion.

As a result, the Board finds it fit to extend the tender validity period and shall specify the appropriate extended period in the final orders herein.

In considering the appropriate direction to give the Procuring Entity, the Board observes that the Evaluation Committee, even after being advised by its Acting Head of Procurement and Supplies that section 82 of the Act supersedes the provisions of the Tender Document and thus making the tender sum absolute and final, the Procuring Entity's Evaluation Committee still declined to recommend award of the tender to the lowest evaluated responsive bidder stating that they are unable to make a decision.

If the Board is to direct the Procuring Entity to comply with Order No. 2 issued in the decision rendered on 30th September 2019 in the First Review, the Procuring Entity will find that there are only two bidders at the Financial Evaluation stage and that award should be made to the lowest evaluated bidder.

The Board has carefully considered its power under section 173 (c) of the Act which states as follows:-

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

(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"

In the instant review, where the Evaluation Committee has admitted inability to exercise the duty conferred upon it by statute (unable to make a decision) and blatantly refused to comply with the orders of the Board in the First Review, the Board finds that, this makes a good case for the accounting officer to procedurally disband the current Evaluation Committee and appoint a new evaluation committee in accordance with section 46 (4) (b) read together with section 46 (4) (d) of the Act for purposes of conducting a re-evaluation of the subject tender at the Financial Evaluation stage and to fully comply with the orders of the Board rendered in the First Review.

As regards the issue of costs, section 173 (d) of the Act provides that:-

"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 ordinarily "follows the event".

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

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...”

While considering the principle that costs follow 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 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) ...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 judiciously.

(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..."

The courts in the above cases considered the principle that "costs follow the event" but emphasized that awarding costs is a discretionary power. This power is donated to this Board by dint of section 173 (d) of the Act cited hereinabove.

Ordinarily, the Board refrains from awarding costs especially in instances where the procurement process has not been concluded since an aggrieved applicant who has succeeded in a review will get an opportunity to participate in the procurement process if the Board orders the procuring entity to conduct a re-evaluation or to re-tender for the goods or services.

In those circumstances, it would serve the public good that a procuring entity is not burdened with payment of costs to an applicant yet the procurement process is still ongoing.

However, in the circumstances, the Board finds it fit to exercise its discretionary power under section 173 (d) of the Act and to award costs to the Applicant, being the successful party in the Request for Review and we shall make appropriate orders for the award of costs to the Applicant in the final orders herein.

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 Accounting Officer of the Procuring Entity is hereby directed to disband the current Evaluation Committee and appoint a new Evaluation Committee in accordance with section 46 (4) (b) read together with section 46 (4) (d) of the Act for purposes of conducting a re-evaluation of the Applicant's and Interested Party's financial bids at the Financial Evaluation stage in compliance with Order No. 2 in PPARB Application No. 105/2019, Med Marine Kilavuzluk VE Romorkor Hizmetleri Ins. San. VE TIC. A.S v. The Accounting**

Officer, Kenya Ports Authority & Cheoy Lee Shipyards Limited within seven (7) days from the date of this decision.

2. The Procuring Entity is hereby directed to fully comply with the orders of the Board dated 30th September 2019 in PPARB Application No. 105/2019, Med Marine Kilavuzluk VE Romorkor Hizmetleri Ins. San. VE TIC. A.S v. The Accounting Officer, Kenya Ports Authority & Cheoy Lee Shipyards Limited within fourteen (14) days from the date of this decision.

3. The Tender Validity Period of the subject tender is hereby extended for a further period of forty-five (45) days from 22nd December 2019.

4. The Applicant is hereby awarded costs of this Request for Review which costs will be paid by the Procuring Entity.

Dated at Nairobi, this 9th December 2019

.....

CHAIRPERSON

PPARB

.....

SECRETARY

PPARB

Delivered in the presence of:-

i. Ms. Waiganjo for the Applicant;

- ii.** Mr. Otieno holding brief for Mr. Kongere for the Respondent; and
- iii.** Ms. Njoroge for the Interested Party