

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 66/2020 OF 27TH MAY 2020

BETWEEN

CENTRAL ELECTRICALS INTERNATONAL LTD.....APPLICANT

AND

THE CLERK OF SENATE/SECRETARY,

PARLIAMENTARY SERVICE COMMISSION.....1ST RESPONDENT

AND

PARLIAMENTARY SERVICE COMMISSION.....2ND RESPONDENT

Review against the decision of Parliamentary Service Commission inviting bids in respect of Tender No. PJS/014/2019-2020 for the Supply, Delivery, Installation, Testing and Commissioning of a Building Management System at the Proposed Multi-Storey Office Block for the Kenya National Assembly.

BOARD MEMBERS

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|----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms. Robi Chacha | -Member |
| 3. Dr. Joseph Gitari | -Member |

IN ATTENDANCE

1. Mr. Philemon Kiprop -Holding brief for the Secretary

BACKGROUND TO THE DECISION

Parliamentary Service Commission (hereinafter referred to as “the Procuring Entity”) advertised Tender No. PJS/014/2019-2020 for the Supply, Delivery, Installation, Testing and Commissioning of a Building Management System at the Proposed Multi-Storey Office Block for the Kenya National Assembly (hereinafter referred to as “the subject tender”) in the Star Newspaper on 27th April 2020 inviting eligible bidders to bid for the same specifying an initial bid submission deadline of 29th May 2020 which was extended to 8th June 2020.

THE REQUEST FOR REVIEW

M/s Central Electricals International Limited (hereinafter referred to as “the Applicant”) lodged a Request for Review dated 26th May 2020 and filed on 27th May 2020 together with a Statement in Support of the Request for Review sworn and filed on even date and a Further Statement in Support of the Request for Review sworn and filed on 9th June 2020, through the firm of A.E. Kiprono & Associates Advocates, seeking the following orders:-

- 1. An order declaring the Respondents’ decision inviting bids in respect of Tender No. PJS/014/2019-2020 for the Supply, Delivery, Installation, Testing and Commissioning of a***

Building Management System at the Proposed Multi-Storey Office Block for the Kenya National Assembly, contrary to the law and the Constitution;

- 2. An order annulling Tender No. PJS/014/2019-2020 for the Supply, Delivery, Installation, Testing and Commissioning of a Building Management System at the Proposed Multi-Storey Office Block for the Kenya National Assembly;***
- 3. An order declaring that the Respondents of Tender No. PSC/012/2016-2017 for the Supply, Delivery, Installation, Testing and Commissioning of a Building Management System at the Proposed Multi-Storey Office Block for the Kenya National Assembly subsists;***
- 4. An order awarding costs of the Request for Review to the Applicant; and***
- 5. Any other relief that the Review Board deems fit to grant under the circumstances.***

In response, the Respondents lodged a Response to the Request for Review in form of a Letter dated 3rd June 2020 addressed to the Board Secretary, through Susan Mukindia Advocate.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19

pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged Written Submissions dated and filed on 9th June 2020 while the Procuring Entity lodged Written Submissions dated and filed on 10th June 2020.

BOARD'S DECISION

The Board has considered each of the parties' pleadings and written submissions together with the confidential file submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015

(hereinafter referred to as “the Act”) and finds that the following issues call for determination: -

- I. Whether the Board has jurisdiction to entertain the Applicant’s dispute relating to termination of the sub-contract agreement executed with respect to Tender No. PSC/012/2016-2017 for the Supply, Delivery, Installation, Testing and Commissioning of a Building Management System at the Proposed Multi-Storey Office Block for the Kenya National Assembly.***

- II. Whether the Procuring Entity’s advertisement of Tender No. PJS/014/2019-2020 for the Supply, Delivery, Installation, Testing and Commissioning of a Building Management System at the Proposed Multi-Storey Office Block for the Kenya National Assembly has occasioned or is likely to occasion breach to the Applicant.***

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

It has well been an enunciated principle that jurisdiction is everything, following the decision in **The Owners of Motor Vessel ‘Lillian ‘S’ vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, where Justice Nyarangi held that:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and

the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Further in **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011**, the court had occasion to interrogate the instruments that arrogate jurisdiction to courts and other decision making bodies. The court held as follows:-

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

This Board is a creature of statute owing to the provision of Section 27 (1) of the Act which provides that:-

"27. Establishment of the Public Procurement Administrative Review Board

(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

Further, Section 28 of the Act provides as follows:-

"28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes. To invoke the jurisdiction of this Board, a party must file its Request for Review within the timelines specified in Section 167 (1) of the Act, which provides that:-

"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring

entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed”

On the other hand, the circumstances when the jurisdiction of this Board is ousted are specified in section 167 (4) of the Act which provides as follows:-

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

- (a) the choice of a procurement method;***
- (b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and***
- (c) where a contract is signed in accordance with section 135 of this Act”***

Having considered the manner in which the jurisdiction of this Board is invoked and the circumstances when such jurisdiction is ousted, the Board studied the pleadings before it and the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act to understand the background of the subject procurement process. The Board was furnished with a letter of Invitation to Tender dated 5th June 2012, forming part of the Procuring Entity’s confidential file, wherein the Procuring Entity invited M/s China

Jiangxi International Kenya Limited to submit a tender with regards to **Proposed Multi Storey Office Block for Kenya National Assembly- WP ITEM NO. D29 NB 901 JOB NO. 7753C**. According to the confidential documents submitted to the Board, M/s China Jiangxi International Kenya Limited submit its tender in response to the Procuring Entity's Letter of Invitation at a bid price of Five Billion, Eight Hundred and Ninety-Three Million, Six Hundred and Forty-Six Thousand, Eight Hundred and Forty-Nine, and Sixty-Seven Cents (Kshs. 5,893,646,849.67).

In a letter dated 26th August 2013 addressed to M/s China Jiangxi International Kenya Limited, the Procuring Entity awarded the said bidder the tender for **Proposed Multi Storey Office Block for Kenya National Assembly- WP ITEM NO. D29 NB 901 JOB NO. 7753C**, and further stated as follows:-

"Reference is made to the above tender for the proposed Multi-Storey Office Block for Kenya National Assembly, Nairobi- WP ITEM NO. D29 NB 901 JOB NO. 7753C, for which you submitted a bid.

Pursuant to the ruling of 17th January 2013 of the Public Procurement Review Board in Review No. 71/2012 and the subsequent decision of the High Court at Nairobi in Judicial Review (MISC) Application No. 32 of 2013, this is to advise you that your bid of Kenya Shillings Five Billion, Eight Hundred and Ninety-Three Million, Six Hundred and Forty-Six

Thousand, Eight Hundred and Forty-Nine, and Sixty-Seven Cents (Kshs. 5,893,646,849.67) has been accepted.

The contract document is under preparation and will be signed after fourteen (14) days as per the provisions of the Public Procurement and Disposal Act, 2005 (section 68 (2)

The Project Manager for the project shall be the Chief Architect, Ministry of Public Works. The contract period is one thousand and ninety-eight (1098) days and the commencement date shall be advised by the Project Manager”

These two letters prompted this Board to study the decision in **PPARB Application No. 71 of 2012, China Jiangxi International Kenya Limited v. Parliamentary Service Commission** (hereinafter referred to as “Review No. 71 of 2012”) and we note that advertisement of tender for the **Proposed Multi Storey Office Block for Kenya National Assembly- WP ITEM NO. D29 NB 901 JOB NO. 7753C** had attracted twelve firms by the tender submission deadline, among them, M/s China Jiangxi International Kenya Limited. An Evaluation Committee conducted evaluation of bids received in the tender and upon conclusion of evaluation, recommended award of the tender to M/s China Jiangxi International Kenya Limited. However, this recommendation was forwarded to a Tender Committee that resolved as follows as noted at page 25 of the Board’s decision in Review No. 71 of 2012:-

"The works on the construction of the Proposed Multi Storey Office Block Main Works be retendered. None of the bidders met all the mandatory requirements as indicated in the tender document"

Pursuant to the recommendation by the Tender Committee, the Procuring Entity terminated the procurement proceedings for the **Proposed Multi Storey Office Block for Kenya National Assembly- WP ITEM NO. D29 NB 901 JOB NO. 7753C** vide letters of notification of termination dated 19th December 2012 addressed to bidders. M/s China Jiangxi International Kenya Limited was aggrieved by that decision thereby filed Review No. 71 of 2012. The Board in Review No. 71 of 2012, annulled the said termination and further directed as follows:-

"Having found that as at the time the Application was filed before the Board all the bid bonds were still valid, in the circumstances, the Board orders that the Procuring Entity should proceed to award the tender to the bidder whose bid was declared to be the lowest evaluated in accordance with the recommendation of the Evaluation Committee and the Provisions of the Act"

The Procuring Entity was aggrieved by the Board's decision in Review No. 71 of 2012, therefore lodged Judicial Review proceedings at the High Court through a Notice of Motion Application dated 31st January 2013. In a

judgement dated 3rd June 2013 in **Judicial Review (Miscellaneous) Application 32 of 2013, Republic v Public Procurement Administrative Review Board & another ex-parte Parliamentary Service Commission [2013] eKLR**, the High Court held as follows:-

"Accordingly, it is my view and I so hold that the ex parte applicant has failed to satisfy me that the Respondent's decision was tainted with illegality, irrationality or procedural impropriety.

Accordingly, it follows that the Notice of Motion dated 31st January 2013 lacks merit and the same is dismissed with costs to the Respondent and the Interested Party."

The decision of the Board in Review No. 71 of 2012 was upheld by the High Court in Judicial Review No. 32 of 2013 thereby informed the Procuring Entity's decision to award tender for the **Proposed Multi Storey Office Block for Kenya National Assembly- WP ITEM NO. D29 NB 901 JOB NO. 7753C** to M/s China Jiangxi International Kenya Limited vide letter of award dated 26th August 2013 outlined hereinbefore. M/s China Jiangxi International Kenya Limited accepted the award vide a letter dated 2nd September 2013.

Subsequently on 23rd September 2013, the Procuring Entity and M/s China Jiangxi International Kenya Limited entered into a contract for **Proposed Multi Storey Office Block for Kenya National Assembly- WP ITEM**

NO. D29 NB 901 JOB NO. 7753C with the recital clause at page 2 thereof identifying parties to the contract as follows:-

"THIS AGREEMENT (hereinafter called the "Contract") is made this 23rd day of September 2013 between Parliamentary Service Commission (hereinafter called "the Employer") of the one part and M/s China Jiangxi International Kenya Limited (hereinafter called the "Contractor" of the other part"

Meanwhile, the Procuring Entity, being the Employer under the Contract for **Proposed Multi Storey Office Block for Kenya National Assembly-WP ITEM NO. D29 NB 901 JOB NO. 7753C**, advertised Tender Number PSC/012/2016-2017 for the Supply, Delivery, Installation, Testing and Commissioning of a Building Management System at the Proposed Multi-Storey Office Block for the Kenya National Assembly (hereinafter referred to as "Tender No. 12"). The Board studied the Tender Document applicable in Tender No. 12 and notes that page 4 thereof provided as follows:-

"Special Notes to all Tenderers

The site for the proposed works has a number of existing installations. The Sub-contractor will be required to ensure there's no interference with supply of services to neighboring organizations. The sub-contractor will be required to take all precaution and care so that no damage will occur to the existing installations on site. The sub-contractor is also advised to secure all the necessary insurance policies as he

will be solely held responsible for any damages to the existing system, injuries to persons resulting from his activities and/or interference with normal operations of the building that may result from his negligence, actions or otherwise.”

Further, Clause 1.1. of the Conditions of Contract of the Tender Document for Tender No. 12 provided that:-

“A Sub-contractor” is a person or corporate body who has a Contract with the Contractor to carry out a part of the Work in the Contract, which includes work on the Site.”

Section C: SUB-CONTRACT AGREEMENT (KABCEC) of the Tender Document for Tender No. 12 further provided the Sample Agreement that would be executed between the Contractor and the Sub-Contractor with the following details:-

AGREEMENT

***1.1 This agreement is made on
between
of (or whose registered office is situated at)
.....
(hereinafter called “the Contractor”) of the one part
and
of (or whole registered office is situated at)
.....
(hereinafter called “the Sub-Contractor”) of the other part:***

1.2 SUPPLEMENTAL to an agreement(hereinafter referred to as the "the main contract")

made on

Between

.....

(hereinafter called "the Employer") of the one part and the Contractor of the other part based on the Agreement and Conditions of Contract for Building Works, published by the Joint Building Council, Kenya .

..... edition.

1.3 WHEREAS the contractor is desirous of sub-letting to the Sub-Contractor

.....

.....

.....

hereinafter called "the sub-contractor works" at.....

on Land Reference No.....being part of the main

contract works.

1.4 And whereas the Sub-Contractor has supplied the Contractor with a priced copy of the bills of quantities (hereinafter referred to as "the sub-contractor bills"), where applicable, which together with the drawings

numbered.....

.....

(hereinafter referred to as "the sub-contract drawings), the specifications and the conditions of sub-contract have been signed by or on behalf of the parties thereto.

And whereas the Sub-Contractor has had reasonable opportunity of inspecting the main contract or a copy thereof except the detailed prices of the Contractor included in the bills of quantities or schedule of rates.

1.5 And whereas the Architect, with the approval of the Employer, has nominated the Sub-Contractor to carry out the works described at clause 1.3 herein:

NOW IT IS HEREBY AGREED AS FOLLOWS:

1.6 For the consideration herein stated, the Sub-Contractor shall upon and subject to the conditions annexed hereto carry out and complete the sub-contract works shown upon the sub-contract drawings and described by or referred to in the subcontract bills, specifications and in the said conditions

Accordingly, it was very clear that there was a Contractor (i.e. M/s China Jiangxi International Kenya Limited) who undertakes the Main Works through the contract for **Proposed Multi Storey Office Block for Kenya National Assembly- WP ITEM NO. D29 NB 901 JOB NO. 7753C** between it and the Employer (i.e. the Procuring Entity herein). Further to this, the Procuring Entity being the Employer, would undertake procurement

for sub-contract works through Tender No. 12 to be implemented by a sub-contractor. The identified successful bidder (i.e. the sub-contractor) would then enter into an agreement for Sub-Contract Works with the Main Contractor, M/s China Jiangxi International Kenya Limited.

From the pleadings before the Board, all parties are in agreement that the Applicant participated in Tender No. 12 and was awarded the same vide a letter dated 6th June 2017. The Applicant accepted the said award through a letter dated 12th June 2017. Subsequently thereafter, through a letter dated 25th July 2017, the Principal Secretary, Ministry of Transport, Infrastructure, Housing and Urban Development being the Project Manager, instructed the Main Contractor, M/s China Jiangxi International Kenya Limited, to execute a sub-contract agreement with the Applicant.

All parties to the Request for Review further confirm that the Applicant executed a sub-contract agreement with M/s China Jiangxi International Kenya Limited on 25th October 2017. Copies of the Sub-Contract Agreement are attached to the Applicant's Request for Review and the Procuring Entity's Response that verify this position.

The Board notes, according to the Applicant, whereas it mobilized its resources and procurement items to execute works in Tender No. 12, the site wherein works ought to have been commenced has never been ready for what the Applicant terms as BMS cabling and BMS module installations

and that the Main Contractor denied the Applicant access to the site. The Applicant further submits that in a letter dated 4th April 2019, the Main Contractor alleged that the Applicant failed to proceed diligently with the sub-contracted works. This prompted the Applicant to address a letter dated 9th April 2019 to the Main Contractor enumerating steps taken by the Applicant in implementing works in the Sub-Contract agreement.

The Applicant contends that, despite its efforts to implement works in the Sub-Contract agreement, it received a letter dated 18th April 2019 from the Main Contractor terminating its sub-contract agreement as stated below:-

"Re: Termination of sub-contract

Reference is made to your duly signed sub-contract agreement

Further reference is made to our letter referenced CJIC/KEN/KNA/CEL/01 requesting that you be certified in default by the Project Manager for your failure to remedy the default within the timelines provided and we therefore forthwith terminate your sub-contract as per clause 30.1 of the KABCEC sub-contract agreement due to failure to proceed diligently with the works"

The Applicant proceeded to address a letter dated 17th May 2019 to the Main Contractor stating that:-

"We refer to your letters...dated 5th April 2019 and 18th April 2019... and to our response letter dated 9th April 2019..."

In our above response letter, we stated that BMS cabling, which is the only task we can possibly undertake at present, is hindered by installation of cable ways and containment which is being carried out by another contractor. Please note, and as is apparent from site, these works are still in-complete in most of the areas thus the cabling cannot proceed. We therefore deny any default on our part and affirm that besides attending all meetings and inspections we have proceeded diligently with our works both on and off site..."

The Applicant addressed another letter dated 9th July 2019 to the Ministry of Transport, Infrastructure, Housing & Urban Development, State Department for Works challenging the Main Contractor's decision terminating the Sub-Contract agreement dated 25th October 2017. Being dissatisfied by the decision terminating its sub-contract agreement, the Applicant lodged a Request for Review before this Board.

Having traced the background to the procurement process of the Main Works and Sub-Contract works in the two different tenders, it is worth noting that the Applicant is not challenging creation of the sub-contract agreement between it and the Main Contractor. The Applicant is aggrieved by the

decision of the Main Contractor terminating the sub-contract agreement dated 25th October 2017.

As already noted, the Tender Document for Tender No. 12 explains that a Sub-contractor" is a person or corporate body who has a Contract with the Contractor to carry out a part of the Work in the Contract, which includes work on the Site. Therefore, this Board infers the definition of a Sub-Contract to mean:-

"a procurement contract between a sub-contractor and a main contractor to carry out a part of the work in the contract, which includes work on the site"

Since the procurement process in Tender No. 12 leading to the sub-contract agreement was undertaken pursuant to the 2015 Act, the provisions of the 2015 Act on creating of a procurement contract apply. Accordingly, a sub-contract executed pursuant to a tender process identifying a successful bidder to be awarded the sub-contract works, must meet the requirements of section 135 (3) of the Act. When the requirements of section 135 (3) of the Act are satisfied, the jurisdiction of this Board is ousted by dint of section 167 (4) (c) of the Act outlined hereinbefore. Section 135 (3) of the Act provides that:-

"The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification

provided that a contract shall be signed within the tender validity period”

The Board observes that there is no dispute as to whether the Applicant and the Main Contractor took into account the stand-still period of fourteen days before signing the sub-contract agreement and whether the same was signed within the tender validity period. In essence, the Applicant would like the Board to review the decision of the Main Contractor terminating the sub-contract agreement dated 25th October 2017.

The Court in **Miscellaneous Civil Application No. 386 of 2008, Republic v. Permanent Secretary Ministry of States for Defence [2008] eKLR** while considering the effect of execution of a procurement contract between parties held that:-

“Several legal arguments have been put before me. However, the main arguments are whether the termination of contract of procurement is a private contractual matter which does not fall within the Judicial Review jurisdiction.

In my view, once this agreement was entered into, what applied between the parties were the principles of the law of contract. Therefore, the termination of the contract by any of the parties is outside the purview of Judicial Review proceedings. It is a matter to be sorted out through the applicable laws of contract.”

The Court in the above case affirmed that once parties enter into a procurement contract, the law of contract applies to their contractual obligations. This Board only determines whether a procurement contract was executed in accordance with section 135 (3) of the Act. In this instance the question whether the requirements of section 135 (3) of the Act were met, is not in dispute, therefore, the Board has no obligation to interrogate the contractual obligations between the Applicant and the Main Contractor. Furthermore, the Board cannot review the decision of the Main Contractor terminating the sub-contract agreement with the Applicant.

The Applicant ought to have pursued the remedies available to it in the sub-contract agreement dated 25th October 2017, since the jurisdiction of this Board was extinguished the moment parties executed a contract pursuant to section 135 (3) of the Act and did not at any point in time challenge the manner in which the contract was created.

Accordingly, the Board finds that it lacks jurisdiction to entertain the Applicant's dispute challenging termination of the sub-contract agreement dated 25th October 2017 executed in respect of Tender No. PSC/012/2016-2017 for the Supply, Delivery, Installation, Testing and Commissioning of a Building Management System at the Proposed Multi-Storey Office Block for the Kenya National Assembly.

On the second issue for determination, the Board notes that the Applicant took the view that the Procuring Entity's decision advertising the subject tender (i.e. Tender No. PJS/014/2019-2020 for the Supply, Delivery, Installation, Testing and Commissioning of a Building Management System at the Proposed Multi-Storey Office Block for the Kenya National Assembly) will result in the Applicant suffering loss and damages in excess of 24.6 Million Kenya Shillings if the procurement process in the subject tender proceeds to its logical conclusion. The Applicant further submits that advertisement of the subject tender is in breach of the Act and the Constitution because award to the Applicant has not been terminated nor the contract closed out by the Procuring Entity. According to the Applicant, it was entitled to an explanation as to the fate of its tender award dated 6th June 2017 and reasons for the retender before a decision to retender was made by the Procuring Entity.

In addressing this issue, the Board observes that section 2 of the Act provides that:-

"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity

The Applicant submits that it obtained the Tender Document applicable in the subject tender free of charge from the Procuring Entity's website, an assertion that was not challenged by the Procuring Entity.

It is worth noting that, the Procuring Entity, being the Employer has the obligation to procure for the Main Works and the Sub-Contract Works. This therefore means, the moment the Procuring Entity learnt that there was no longer a sub-contract in force, it was well within its right to initiate a procurement process to procure services of a Sub-Contractor.

We say so because, the Applicant and all other tenderers who participated in Tender No. 12 were informed of the purpose of the invitation to tender for the sub-contract works and had full knowledge that the Procuring Entity was undertaking its role as the Employer to procure for the subcontracted works since there was no sub-contract agreement in force at that time when procurement process in Tender No. 12 was still ongoing.

The Applicant also knew of the remedies available to a sub-contractor, the same having been outlined in the Tender Document for Tender No. 12 and later on incorporated in Clause 31.0 at page 18 of its Subcontract agreement dated 25th October 2017 with the Main Contractor as follows:-

"In case any dispute or difference shall arise between the Contractor and the Sub-Contractor, either during the progress or after the completion or abandonment of the sub contracted works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice. The dispute shall be referred to the arbitration

and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of any of the following professional institutions”

In the instant case, termination of the Sub-Contract agreement dated 25th October 2017 was done by the Main Contractor and not the Procuring Entity, and the Applicant ought to have explored the remedies available under that contract.

The Board studied the Tender Document applicable in the subject tender and notes that any firm with the technical capacity to execute the sub-contract works may participate in the procurement process, a right that is available to the Applicant who had already shown interest by participating as a candidate and still has leeway to submit its bid as a tenderer. The Board did not find any provision that bars the Applicant from participating in the subject tender noting that there is a likelihood that it may defeat other tenderers and emerge the successful tenderer as was the case in Tender No. 12.

It is the Board's considered finding that the Applicant's allegation that the Procuring Entity's advertisement of the subject tender has occasioned breach to the Applicant, has not been substantiated.

In totality, the Applicant's Request for Review fails and the Board proceeds to make the following specific orders:-

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review: -

- 1. The Request for Review filed by the Applicant on 27th May 2020 with respect to Tender No. PJS/014/2019-2020 for the Supply, Delivery, Installation, Testing and Commissioning of a Building Management System at the Proposed Multi-Storey Office Block for the Kenya National Assembly, be and is hereby dismissed.**
- 2. The Procuring Entity is hereby directed to extend the tender submission deadline in the subject tender for a further fifteen (15) days from the date of this decision and proceed with the procurement process to its logical conclusion.**
- 3. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 17th day of June 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB