

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 137/2020 OF 13TH NOVEMBER 2020

BETWEEN

**PREMIER VERIFICATION QUALITY SERVICES (PVQS)
LTD.....APPLICANT**

AND

**THE ACCOUNTING OFFICER, KENYA BUREAU
OF STANDARDS.....1ST RESPONDENT**
KENYA BUREAU OF STANDARDS.....2ND RESPONDENT

Review against the decision/refusal/neglect and delay of the Managing Director of Kenya Bureau of Standards to execute the contract awarded to Premier Verification Quality Services in respect of Tender No. KEBS/T009/2019-2021 for Enlargement of Provision of Pre-Export Verification of Conformity to Standard Services.

BOARD MEMBERS

- | | |
|-------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Ambrose Ogetto | -Member |
| 3. Mr. Alfred Keriolale | -Member |

IN ATTENDANCE

- | | |
|-----------------------|----------------------------------|
| 1. Mr. Stanley Miheso | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

Kenya Bureau of Standards (hereinafter referred to as “the Procuring Entity”) advertised Tender No. KEBS/T009/2019-2021, International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services (hereinafter referred to as “the subject tender”) on its website and on MyGov Publication website, on 3rd December 2019.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received 3 No. bids by the tender closing date of 7th January 2020 where after a Tender Evaluation Committee appointed by the Procuring Entity’s Managing Director opened the said bids at the Procuring Entity’s Headquarters, TC Room 1.

Evaluation of Bids

Having appointed an Evaluation Committee, the Procuring Entity evaluated bids in the Preliminary, Technical and Financial Evaluation stages as explained hereinbelow:-

1. Preliminary Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Clause 2.11.2 of Section II. Appendix to Instructions to Tenderers of the Tender Document. Based on its findings, the Evaluation Committee found two bidders responsive, hence qualified to proceed to Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criterion provided for in Clause 2.22.1 of Section II. Appendix to Instructions to Tenderers of the Tender Document which required bidders to achieved a minimum technical score of 70 points out of the maximum of 100 points in order to proceed to Financial Evaluation. The sub-categories of Technical Evaluation were further outlined at pages 22 to 24 of the Tender Document. At the end of Technical Evaluation, Bidder No. 1 and 3 achieved scores of 82.05 and 78.55 were found responsive, this eligible to proceed to Financial Evaluation. The Managing Director of the Procuring Entity received a letter of notification of Review dated 28th January 2020 filed by M/s Tuv Austria Turk from the Board Secretary hence suspended the subject procurement process.

REQUEST FOR REVIEW NO. 14/2020

M/s Tuv Austria Turk lodged a Request for Review on 28th January 2020 seeking the following orders:-

- 1. An order allowing the Applicant's Request for Review with respect to Tender No. KEBS/T009/2019-2021, International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services;***
- 2. An order declaring that the purported notification of non-responsiveness with respect to Tender No. KEBS/T009/2019-2021, International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards***

Services dated 13th January 2020 and delivered to the Applicant's representative on 14th January 2020 is invalid, illegal, null and void;

- 3. An order nullifying and setting aside the decision by the Procuring Entity rejecting the Applicant's tender on grounds of non-responsiveness with respect to Tender No. KEBS/T009/2019-2021, International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services;***
- 4. An order directing the Procuring Entity to terminate the current procurement process with respect to Tender No. KEBS/T009/2019-2021, International Tender for Enlargement of Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services and commence a fresh and fair procurement process; and***
- 5. An order awarding costs of the Request for Review to the Applicant.***

In response, the 1st and 2nd Respondents lodged a Memorandum of Response dated 13th February 2020 and filed on 14th February 2020 while M/s Niavana Agencies Limited lodged a Memorandum of Response dated 10th February 2020 and filed on 12th February 2020.

The Board held a hearing on 12th February 2020 wherein M/s Tuv Austria Turk was represented by Mr. Sisule Mvungu on behalf of the firm of Sisule

& Associates Advocates, the 1st and 2nd Respondents were represented by Mr. Hiram Nyaburi on behalf of the firm of Iseme, Kamau & Maema Advocates while M/s Niavana Agencies Limited was represented by Mr. Justus Omollo on behalf of the firm of Sigano, Omollo Advocates, LLP.

The Board having considered all parties' pleadings and oral submissions including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") rendered a decision dated 18th February 2020 directing as follows: -

- 1. The Interested Party's Memorandum of Response filed on 12th February 2020, be and is hereby struck out.**
- 2. The Procuring Entity is hereby directed to issue a letter of notification of unsuccessful bid to the Applicant in accordance with section 87 (3) of the Act, read together with Article 47 of the Constitution within seven (7) days from the date of receipt of the signed decision of the Board, taking into consideration the Board's findings in this case.**
- 3. Further to Order No. 3 above, the Procuring Entity is at liberty to proceed with the procurement process to its logical conclusion.**
- 4. Each party shall bear its own costs in the Request for Review**

The salient features of the decision of the Board in **PPARB Application No. 14 of 2020, Tuv Austria Turk v. The Accounting Officer, Kenya Bureau of Standards & Another** were as follows: -

- *On the first limb of the question whether the Board had jurisdiction to entertain the issues raised in the Memorandum of Response filed by M/s Niavana Agencies Limited, the Board addressed its mind on the import of section 2 of the Act and found that a candidate is a person who has obtained tender documents from a public entity pursuant to an invitation notice by a procuring entity. In that regard, M/s Niavana Agencies Limited failed to demonstrate that it obtained the tender document in the manner and procedure specified by the Procuring Entity having failed to provide evidence of payment of the upfront amount of Kshs. 10,000/-, thus failed to satisfy the definition of a candidate under section 2 of the Act;*
- *The Board held that M/s Niavana Agencies Limited lacked the locus standi as a candidate in the subject procurement process within the meaning of section 2 of the Act;*
- *On the second limb of the question whether the Board had jurisdiction to entertain the grounds raised in the Memorandum of Response filed by M/s Niavana Agencies Limited, the Board found that M/s Niavana Agencies Limited was challenging the contents of the Tender Document, which it alleged was obtained on before the tender closing date of 7th January 2020. In that regard, the Board observed that M/s Niavana Agencies Limited had 14 days after 7th January 2020 to challenge the contents of the Tender Document by filing a Request for*

Review and not raising new grounds, separate from the ones raised in the Request for Review filed by M/s Tuv Austria Turk, through a Memorandum of Response. Accordingly, the Board held that it lacked jurisdiction to entertain the issues raised in the Memorandum of Response filed by M/s Niavana Agencies Limited;

- *On the second jurisdictional issue raised by the Procuring Entity alleging that the Request for Review by M/s Tuv Austria Turk was filed out of time, the Board found that the Procuring Entity failed to provide evidence of its allegation of the date when notification letters were issued to bidders. M/s Tuv Austria Turk alleged that it received its letter of notification on 14th January 2020 and provided evidence of its company receiving stamp affixed on its letter of notification of unsuccessful bid. In the absence of any evidence to the contrary, the Board found that M/s Tuv Austria Turk had up to 28th January 2020 to file its Request for Review. Given that the said Request for Review was filed on 28th January 2020, the Board held that the same was within the statutory period specified in section 167 (1) of the Act and thus the Board had jurisdiction to entertain the Request for Review;*
- *On the third issue for determination, the Board observed that the Procuring Entity failed to provide specific reasons why the bid of M/s Tuv Austria Turk was found non-responsive at the Preliminary Evaluation Stage, especially because Clause 2.11.2 (a) at page 16 to 17 of the Tender Document provided a total of 13 sub-categories of evaluation at the Preliminary Evaluation Stage. As a result, the Board*

- held that the letter of notification of unsuccessful bid dated 13th January 2020 failed to meet the threshold of section 87 (3) of the Act;*
- *On the fourth issue for determination, the Board found M/s Tuv Austria Turk had failed to substantiate its allegation that the Procuring Entity failed to notify it (M/s Tuv Austria Turk) of all Addenda. This is because, having studied all confidential documents submitted by the Procuring Entity, the Board noted that a Representative of M/s Tuv Austria Turk indicated its email as suziemahi@gmail.com and not suziemanie@gmail.com as alleged by M/s Tuv Austria Turk during the hearing. The Board found the Procuring Entity could not be faulted for the failure by M/s Tuv Austria Turk to clearly indicate its correct email in a legible manner so as to receive all Addenda from the Procuring Entity;*
 - *On the fifth issue for determination, the Board addressed its mind on the import of section 78 (6) (c) of the Act and found that whatever is read out loud during tender opening is reduced in writing as Tender Opening Minutes. The allegation by M/s Tuv Austria Turk that the Procuring Entity did not read out what was provided as tender security by bidders was not substantiated leading the Board to find the Procuring Entity complied with section 78 (6) of the Act; and*
 - *On the sixth issue for determination, the Board observed that Clause 2.12.1 of Section II. Instructions to Tenderers of the Tender Document provided guidance to bidders that tender security shall be provided in the Technical Proposal submitted to the Procuring Entity. Contrary to this requirement, M/s Tuv Austria Turk admitted that its tender security*

was not in the Technical Proposal it submitted to the Procuring Entity but assumed the same ought to be attached in its Financial Envelope. The Board further addressed its mind on the import of section 79 (1) and 80 (2) of the Act and found that the Procuring Entity had no option but to evaluate all tenders using the procedures and criteria set out in the Tender Document, thus found the Applicant's bid non-responsive for its failure to provide a tender security in its Technical Proposal as instructed by Clause 2.12.1 of Section II. Instructions to Tenderers of the Tender Document.

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 60 OF 2020

M/s Tuv Austria Turk was aggrieved by the decision of the Board dated 18th February 2020 in **PPARB Application No. 14 of 2020, Tuv Austria Turk v. The Accounting Officer, Kenya Bureau of Standards & Another**, thus instituted Judicial Review proceedings at the High Court through **Judicial Review Miscellaneous Application No. 60 of 2020, Republic v. Public Procurement Administrative Review Board & 2 Others ex parte Tuv Austria Turk** on 2nd March 2020, seeking the following orders:-

- a) An Order of PROHIBITION prohibiting and/or restraining the 2nd Respondent from awarding the Tender and/or signing any contract with respect to Tender No. KEBS/T009/2019-2021 for Enlargement of Provision of Pre-Export Verification of Conformity to Standard Services;**
- b) An Order of MANDAMUS directing the 2nd Respondent to terminate the current procurement process with respect to**

Tender No. KEBS/T009/2019-2021 for Enlargement of Provision of Pre-Export Verification of Conformity to Standard Services, and commence a fresh and fair procurement process;

- c) The remedy of a DECLARATION OF RIGHTS declaring the proceedings in Request for Review Application No. 14 of 2020, Tuv Austria Turk v. The Accounting Officer, Kenya Bureau of Standards & Another, were conducted in a manner ultra vires Articles 10, 47, 50 and 227 of the Constitution and guiding principles of public procurement and asset disposal under Section 3 of the Public Procurement and Asset Disposal Act No. 33 of 2015;**
- d) Such further orders and/or incidental orders or directions as the Honourable Court shall deem just and expedient; and**
- e) Costs of the Judicial Review proceedings.**

Having considered each of the parties' arguments, the High Court in a judgement delivered on 5th August 2020, dismissed the Applicant's Notice of Motion dated 12th March 2020 and filed on 13th March 2020 with costs to the Respondents and the Interested Party in the Judicial Review application.

3. Financial Evaluation

At the Financial Evaluation Stage, the Evaluation Committee observed that M/s Premier Verification Quality Services had the lowest evaluated tender price as per its financial proposal for Routes A, B, C & D as follows: -

a) Proposed Verification fee for Route A, B, C & D

| | FOB Value of goods | Minimum Fee (USD) | Maximum Fee (USD) |
|---------|--------------------|-------------------|-------------------|
| Route A | 0.60% | 265 | 2,700 |
| Route B | 0.55% | 265 | 2,700 |
| Route C | 0.35% | 265 | 2,700 |
| Route D | 0.75% | 265 | 2,700 |

b) Proposed Royalty Fee on monthly basis- 31%

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Premier Verification Quality Services according to the schedule outlined hereinbefore.

Professional Opinion

In his professional opinion, the Procuring Entity's Head of Procurement having satisfied himself that the subject procurement process met the requirements of the Constitution, the Act, advised the Managing Director to award the subject tender to M/s Premier Verification Quality Services.

Notification to Bidders

In letters dated 24th August 2020, the Procuring Entity's Managing Director notified the successful bidder and unsuccessful bidders of the outcome of their bids.

REQUEST FOR REVIEW NO. 137 OF 2020

M/s Premier Verification Quality Services (PVQS) (hereinafter referred to as “the Applicant”) lodged a Request for Review dated 11th November 2020 and filed on 13th November 2020 together with a Supporting Affidavit sworn on 11th November 2020 and filed on even date, a Supplementary Statement sworn on 2nd December 2020 and filed on even date and a Supplementary Affidavit sworn on 2nd December 2020 and filed on 3rd December 2020, through the firm of Andrew Ombwayo & Co. Advocates, seeking the following orders: -

- 1) An order directing the 1st and 2nd Respondents to immediately, execute their part of the consequential contract awarded to the applicant upon agreed terms upon reviewing the decision/refusal/neglect and delay of the Managing Director, Kenya Bureau of Standards, to execute the contract already awarded to the Applicant as a successful bidder in tender no. KEBS/T009/2019-2021 INTERNATIONAL TENDER FOR ENLARGEMENT OF PROVISION OF PRE-EXPORT VERIFICATION OF CONFORMITY TO STANDARDS SERVICES;***
- 2) An order suspending time as regards the lapse of the tender validity period of Tender no. KEBS/T009/2019-2021 INTERNATIONAL TENDER FOR ENLARGEMENT OF PROVISION OF PRE-EXPORT VERIFICATION OF CONFORMITY TO STANDARDS SERVICES that is set to lapse on or about the 13th November 2020 and to thereafter extend the validity period of the subject tender upon this review to enable the 1st and 2nd***

Respondents execute the consequential contract awarded to the Applicant; and

3) An order awarding costs of the Request for Review to the Applicant.

In response, the 1st and 2nd Respondents lodged a Memorandum of Response dated 30th November 2020 and filed on even date together with a Supporting Affidavit sworn on 30th November 2020 and filed on even date through Luise Nudi Rasanga 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 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 pandemic.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said

Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged its Written Submissions dated 2nd September 2020 and filed on even date. The Respondents did not file written submissions.

BOARD'S DECISION

The Board has considered all parties' pleadings together with the confidential documents filed before it pursuant to section 67 (3) (e) of the Act and find that the following issues call for determination: -

I. Whether the Board has jurisdiction to entertain the Request for Review.

Depending on the outcome of the above issue: -

II. What are the appropriate orders to issue in the circumstances?

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

At paragraph 1 of the Request for Review, the Applicant avers that the Respondents ignored and refused to conclude the subject procurement

process by executing their part of the contract that was already awarded to the Applicant. According to the Applicant, it already executed its part of the contract and returned the same to the Respondents. The Applicant further states at paragraph 2 of the Request for Review that the excuse given by the Respondents in delaying execution of their part of the contract is based on unjustifiable basis. According to paragraph 4 of its Supporting Affidavit, the Applicant depones that the Respondents previously extended the tender validity period of the subject tender with effect from 14th October 2020 and that the Applicant was apprehensive that the Respondents delayed execution of their part of the contract with the hope that the tender validity period would lapse. In its Supplementary Statement, the Applicant depones that the Request for Review was lodged on 13th November 2020 before the contract was entered into between the Applicant and the Respondents. According to the Applicant, it executed the said contract because it feared the sanctions under section 136 (1) of the Act would be imposed on it, if it failed to sign such contract. According to the Applicant, the terms and conditions in the contract were not part of the subject procurement process thus violating section 135 (2) & (6) of the Act. In its written submissions, the Applicant reiterates that the jurisdiction of this Board is not ousted because the conditions in section 135 of the Act have not been satisfied.

At paragraph 1 of their Memorandum of Response, the Respondents refute all allegations of fact and/or breach of law set out in the Request for Review and put the Applicant to strict proof of the said allegations. According to the Respondents, the Board lacks jurisdiction to hear and determine the issues

raised in the Request for Review pursuant to section 167 (4) (c) of the Act. In the Respondents' view, the Applicant's allegations that the Respondents refused to sign a contract are not true, because a contract was duly executed between the Respondents and the Applicant on 13th November 2020. To support its objection to the jurisdiction of the Board, the Respondents referred the Board to the case of **The Owners of Motor Vessel "Lillian S" v. Caltex Oil (K) Ltd (1989) KLR 1** and **Samuel Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others, Civil Application No. 2 of 2011**. In their Supporting Affidavit, the Respondents reiterate the averments in their Memorandum of Response that execution of a contract with the Applicant on 13th November 2020 automatically ousted the jurisdiction of the Board to entertain the Request for Review.

In its determination of the first issue framed hereinbefore, the Board takes cognizance that the Respondents raised an objection to the jurisdiction of this Board to entertain the Request for Review at paragraph 5 of the Respondents' Memorandum of Response and paragraph 5 of their Supporting Affidavit.

It is established that jurisdiction is everything and without it a court or any other decision making body must down its tools. In the famous words of Nyarangi, J.A. in the often cited case of **The Owners of Motor Vessel Lillian "S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1** at page 14 it was held that: -

"Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The Supreme Court followed the same path in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others, Application No. 2 of 2011**, where it pronounced itself on the question of jurisdiction as follows: -

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court 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 alive to the principles set out in the aforementioned cases and must now consider the question whether it has jurisdiction to entertain the instant Request for Review. Section 167 (4) (c) of the Act states as follows:-

"Section 167 (1);
(2);
(3);

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

(a)

(b); and

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

In order for the Board’s jurisdiction to be ousted, a contract must be signed in accordance with section 135 of the Act. This means, the Board’s jurisdiction is not automatically ousted by the mere existence of a contract executed between a procuring entity and a successful bidder. Section 135 of the Act is on creation of procurement contracts after award of tender to a successful bidder. According to section 135 (3) of the Act, “**the contract is 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.**”

In addressing this question, the Board observes that at the onset of these proceedings, the Applicant filed a Notice of Withdrawal of the Request for Review on 16th November 2020 stating as follows: -

"TAKE NOTICE that the Applicant, Premier Verification Quality Services (PVQS) hereby withdraws this application for review dated 11th November 2020 with no order as to costs"

Upon receipt of the said Withdrawal Notice, the Board Secretary addressed a letter dated 16th November 2020 informing the Applicant on the requirements for withdrawal of a Request for Review, specifically, the requirement of a duly signed consent between the parties concerned, filed at the Review Board. The said letter reads as follows: -

"We acknowledge receipt of your notice of withdrawal dated 16th November 2020 and filed with the Board on the same date with respect to the above referenced application, contents whereof are noted with thanks.

As you are aware, the Public Procurement and Asset Disposal Regulations, 2020 are in force and as such your notice of withdrawal must comply with Regulation 212 of 2020 Regulations...

.....

Your Notice of Withdrawal must comply with the above mentioned Regulation including Regulation 212 (2) thereof before it is MARKED as withdrawn by the Board"

This requirement is captured in Regulation 216 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") as follows: -

"216 (1) A Request for Review may be withdrawn at any time before or during the hearing by notice in writing to the Review Board Secretary signed by the Applicant.

(2) The withdrawal under paragraph (1) shall be based on consent signed between parties concerned and registered with the Review Board.

(3) Upon such a withdrawal notice under paragraph (1) being received by the Review Board Secretary, the request for review shall be deemed to have been withdrawn.

(4) When a Request for Review is withdrawn, the Review Board Secretary shall forthwith inform the Review Board and all parties to the review of the withdrawal"

The Applicant did not file any consent between it and the Respondents in respect of withdrawal of the Request for Review. Instead, the Respondents lodged their Memorandum of Response to the Request for Review on 30th November 2020 together with a Supporting Affidavit sworn and filed on even date thus the Request for Review was never marked as withdrawn.

Whereas the Applicant previously attached a copy of an extract of a contract in respect of the subject tender dated 8th October 2020, which we observe was only executed by a representative of the Applicant and without indication that the Respondents executed the same, the Respondents attached a contract in respect of the subject tender, executed by the Applicant and the Respondents on 13th November 2020. Having considered parties' pleadings, the Board makes the following findings: -

In its Supplementary Statement, The Applicant depones that upon filing the Request for Review, the Respondents invited it to sign the contract dated 13th November 2020. This makes it necessary for the Board to address its mind on the provision of section 168 of the Act which states as follows: -

"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 **Judicial Review Application No. 540 of 2017, Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR** (hereinafter referred to as "the Transcend Media Case"), the Court had occasion to interpret the import of section 168 of the Act and pronounced itself as follows: -

"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.

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.

It is evident from the findings of the High Court that, as long as there is a challenge to an award decision, there is a stand-still period and no action can be taken on an award. In the instant case, the Applicant challenged the Procuring Entity's delay in executing a contract because proceedings at the High Court in **Judicial Review Miscellaneous Application No. 60 of 2020, Republic v. Public Procurement Administrative Review Board & 2 Others ex parte Tuv Austria Turk** were already concluded by 5th August 2020 and the Applicant was awarded the subject tender on 24th August 2020. Furthermore, no tenderer approached this Board challenging the award of the subject tender to the Applicant within fourteen days from 24th August 2020. The Procuring Entity and the Applicant both confirm the contract was signed on 13th November 2020, which is the same date the Applicant lodged its Request for Review. The Applicant confirms that it was invited to sign the said contract upon filing the Request for Review, meaning that there was a challenge to the procuring entity's alleged delay to sign a contract with the Applicant and thus the Respondents and the Applicant ought not to have signed a contract because procurement proceedings in the subject tender were suspended on 13th November 2020.

The Board takes cognizance that the reason why the Applicant lodged a Request for Review in the first instance was to compel the Respondents to execute a contract with the Applicant in respect of the subject tender and it is evident such execution took place upon filing of the Request for Review. However, the Board has found the said contract was signed during suspension of procurement proceedings under section 168 of the Act, thus

offending the said provision of the law. As rightly put by the High Court in the Transcend Media Case, it would be absurd for Request for Review proceedings to be ongoing before this Board while at the same time a successful bidder and a procuring entity are continuing with the procurement proceedings (i.e. signing a contract) with respect to the same tender process being entertained by the Board.

In **Environment and Land Case 203 of 2016, Joseph Kamau Kiguoya v. Rose Wambui Muthike [2016] eKLR**, the court held that: -

"BLACK'S LAW DICTIONARY 9TH EDITION defines the term void as follows:

"of no legal effect; null"

And with regard to validity of a contract, the same Dictionary states as follows: -

"A contract is void ab initio if it seriously offends law or public policy"."

Having considered the finding in the foregoing case and the import of section 168 of the Act, the Board finds that the contract dated 13th November 2020 is void ab initio because it offends section 168 of the Act and such contract cannot be allowed to stand.

It is important at this point for the Board to address its mind on the conduct of the Applicant in this matter. It is a well-established principle that he who comes to equity must come with clean hands. In **Civil Case No. 43 of 2019, Esther Nugari Gachomo v Equity Bank Limited [2019] eKLR**, the Court while citing the decision in **Caliph Properties Limited –vs- Barbel Sharma & Another [2015] eKLR** held as follows: -

"He that comes to equity must come with clean hands and must also do equity. He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently, he has not done equity."

The Board cannot turn a blind eye to the Applicant's conduct while pursuing remedies before this Board. It first filed a Request for Review application on 13th November 2020 and on the same day signed a contract with the Respondents. Having noted that it has signed a contract with the Respondents, which is what the Applicant desired when filing its Request for Review, the Applicant sought withdrawal of the Request for Review on 16th November 2020. This Board is not in the very least persuaded by the Applicant's argument that it signed the said contract in fear of the sanctions under section 136 of the Act, noting that the Applicant selectively chose when to comply with the Act when such provisions suited its needs and where it felt its needs were threatened, the Applicant was quick to invoke some provisions of the Act to claim an alleged breach by the Respondents. Even if the Board has found the contract dated 13th November 2020 is null

and void, both the Applicant and the Respondents were authors of such unlawful conduct. Having found the contract dated 13th November 2020 is null and void, the same cannot be said to be a valid contract within the threshold of section 135 of the Act in order for section 167 (4) (c) of the Act to apply.

Accordingly, the Board finds that it has jurisdiction to entertain the Request for Review and now turns to address the second issue for determination.

On the second issue, the Board observes that the Applicant's Request for Review sought for an order compelling the Respondents to execute their part of the contract. The Applicant made this prayer because according to it, it had signed its part of the contract but the Respondents delayed execution of their part of the contract in anticipation that the tender validity period would lapse. In determining the appropriate orders to grant in the circumstances, the Board is mindful that both the Applicant and the Respondents confirm that the tender validity period of the subject tender was extended once by the Respondents for a further period of 30 days with effect from 14th October 2020 as stated in the letter dated 9th October 2020 that was addressed to the Applicant. In essence, the Procuring Entity already exercised the power under section 88 of the Act which provides as follows:

-

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

(2)

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

This means, the tender validity period of the subject tender was due to lapse on 13th November 2020 but for the filing of the Request for Review, which suspended all procurement proceedings including the tender validity period. This position has well been settled by the High Court in the Transcend Media Case cited hereinbefore where the High Court held that: - *"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"*.

In the same case, the High Court held that: -

"In the event that there is no stay, there will then be a need for the Respondent or procuring entity to extend the tender validity period if it becomes necessary to do so to conclude the procurement proceedings"

According to the finding in the Transcend Media Case, this Board may extend the tender validity period if it becomes necessary to do so to conclude the procurement proceedings. This finding is “on all fours” with the instant Request for Review because it is necessary for the Procuring Entity and the Applicant to execute a contract in the subject tender, thus concluding the subject procurement process within the tender validity period. In that regard, the Board finds it necessary to extend the tender validity period for a number of days specified 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 Act, the Board makes the following orders in the Request for Review: -

- 1. The Contract for Provision of Pre-Export Verification of Conformity (PVOC) to Standard Services executed between Accounting Officer of the Procuring Entity and the Applicant, be and is hereby cancelled and set aside.**

- 2. The Accounting Officer of the Procuring Entity is hereby directed to sign a contract with the Applicant in respect of Tender No. KEBS/T009/2019-2021 for Enlargement of Provision of Pre-Export Verification of Conformity to Standard**

Services in accordance with section 135 of the Act, within fourteen (14) days from the date of this decision.

3. The Tender Validity Period of Tender No. KEBS/T009/2019-2021 for Enlargement of Provision of Pre-Export Verification of Conformity to Standard Services is hereby extended for a further period of thirty (30) days from the date of this decision.

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

Dated at Nairobi this 4th day of December 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB