

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 131/2020 OF 2<sup>ND</sup> OCTOBER 2020**

**BETWEEN**  
**RHOMBUS CONSTRUCTION COMPANY**  
**LIMITED.....APPLICANT**

**AND**

**ACCOUNTING OFFICER,**  
**KENYA PORTS AUTHORITY.....1<sup>ST</sup> RESPONDENT**  
**KENYA PORTS AUTHORITY.....2<sup>ND</sup> RESPONDENT**  
**CARGOTEC FINLAND OY.....INTERESTED PARTY**

Review against the decision of Kenya Ports Authority dated 21<sup>st</sup> September 2020 with respect to Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers.

**BOARD MEMBERS**

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

**IN ATTENDANCE**

- |                     |                                  |
|---------------------|----------------------------------|
| 1. Mr. Philip Okumu | -Holding brief for the Secretary |
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## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

Kenya Ports Authority (hereinafter referred to as "the Procuring Entity") advertised Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers (hereinafter referred to as "the subject tender") on 14<sup>th</sup> January 2020 on MyGov Publication Website and the Lloyd's List on 15<sup>th</sup> January 2020 inviting sealed bids from eligible tenderers.

### **Bid Submission Deadline and Opening of Bids**

The Procuring Entity received a total of nine (9) bids by the bid submission deadline of 7<sup>th</sup> May 2020. The same were opened shortly thereafter by a Tender Opening Committee and recorded as follows: -

<b>No.</b>	<b>Firm</b>
1.	Holman Brothers
2.	JGH Marine A/S
3.	ZPMC Engineering (Pty)
4.	Rhombus Construction Company Ltd
5.	Konecranes LiftTrucks AB
6.	Ferrari
7.	Joh Achelis Soehne GmbH
8.	Neral Holdings
9.	Kalmar Reachstacker (in JV with Cargotech Finland Oy)

## **Evaluation of Bids**

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was undertaken in the following three stages: -

- i.** Preliminary Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

### **1. Preliminary Evaluation**

At this stage, the Evaluation Committee applied the criteria under Clause 10 of Section III. Tender Data Sheet of the Tender Document. At the end of Preliminary Evaluation, the following tenderers were found responsive therefore qualified for Technical Evaluation: -

- M/s Rhombus Construction Company Limited;
- M/s Joh Achelis & Soehne GmBH;
- M/s Neral Holdings Ltd; and
- M/s Kalmar Reachstackers.

### **2. Technical Evaluation**

At this stage, the Evaluation Committee applied the criteria under Clause 30 of Section III. Tender Data Sheet of the Tender Document. The Tender Document provided that tenderers would be required to achieve a minimum technical score of 75% in order to proceed to Financial Evaluation. At the

end of Technical Evaluation, the following tenderers achieved the minimum technical score required to proceed to Financial Evaluation: -

- M/s Rhombus Construction Company Limited; and
- M/s Kalmar Reachstackers.

### **3. Financial Evaluation**

At this stage, the Evaluation Committee applied the criterion under Clause 10. Envelope B-Financial Proposal of Section III. Tender Data Sheet of the Tender Document. The prices quoted by the two tenderers were recorded as follows: -

<b>No.</b>	<b>Firm name</b>	<b>Price schedule in the form of tender</b>
1	M/s Rhombus Construction Company Limited	<b>USD 5,628,207.01</b>
2	M/s Kalmar Reach Stacker	<b>USD 5,475,000.00</b>

### **Recommendation**

The Evaluation Committee recommended award of the subject tender to M/s Rhombus Construction Company Ltd having determined that it was the lowest evaluated bidder at the price of USD 5,628,207.01

### **Professional Opinion**

In a professional opinion dated 29<sup>th</sup> July 2020, the Procuring Entity's Acting Head of Procurement and Supplies outlined the manner in which the

Procuring Entity undertook the subject procurement process whilst reviewing the Evaluation Report received on 10<sup>th</sup> June 2020. He then recommended cancellation of the subject tender in accordance with section 63 (1) (b) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") due to inadequate budgetary provision. The said professional opinion was approved by the Procuring Entity's Acting Managing Director on 6<sup>th</sup> August 2020.

### **Letters of Notification of Cancellation of Tender**

In letters dated 10<sup>th</sup> August 2020, the Procuring Entity notified all tenderers that the subject procurement process had been cancelled due to inadequate budgetary provision.

### **REQUEST FOR REVIEW NO. 119/2020**

M/s Rhombus Construction Company Limited lodged a Request for Review dated 14<sup>th</sup> August 2020 and filed on 17<sup>th</sup> August 2020 together with a Supporting Affidavit dated and filed on even date and a Supplementary Affidavit sworn on 27<sup>th</sup> August 2020 and filed on 28<sup>th</sup> August 2020, through the firm of Sigano & Omollo LLP Advocates, seeking the following orders: -

- a) An order declaring the Procuring Entity's Notification of the purported Termination of procurement proceedings in Tender Number KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers) dated 10<sup>th</sup> August 2020, that was addressed to the Applicant and/or any***

***other bidder who participated in the subject tender process, null and void;***

***b) An order directing the Procuring Entity to award Tender No. KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers) to the Applicant herein having met the award criteria under Clause 33 of the Instructions to Tenderers in the Tender Document;***

***c) Any other relief that the Board may deem fit and just to grant; and***

***d) An order awarding costs of the Review to the Applicant.***

Having considered each of the parties' cases, the Board rendered a decision on 7<sup>th</sup> September 2020 directing as follows: -

- 1. The Procuring Entity's Letter of Notification of Cancellation of Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers addressed to all tenderers, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity is hereby directed to proceed with the procurement proceedings in Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers to its logical conclusion within fourteen (14) days from the date of this decision whilst taking into consideration the findings of the Board in this Review.**

**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 Professional Opinion dated 17<sup>th</sup> September, 2020, the Procuring Entity's Acting Head of Procurement and Supplies wrote to the Accounting Officer stating that having reviewed the decision of the Board, he did not agree with the Board's argument that the price of M/s Kalmar Reachstacker was within the Procuring Entity's budget as the bid price was on CIF basis. According to him after including all the taxes and levies likely to be charged, the lowest bid price adds up to Kshs. 711,002,909.00 which was not within the Procuring Entity's budget of Kshs. 550,000,000. The Acting Head of Procurement and Supplies further stated that whereas the Board took the view that the Procuring Entity ought to have engaged in competitive negotiation with M/s Rhombus Construction Company Limited as stipulated in Section 131 of the Act, the Procuring Entity had never used such method before and that the time left was not sufficient for the procurement process to be carried out. He further stated that the bid by M/s Rhombus Construction Company Limited, despite being Delivery Duty Paid, did not indicate the VAT chargeable and therefore did not comply with the Procuring Entity's tender requirements requiring prices to be inclusive of all taxes and was thus incomplete, which incompleteness makes it a non-conformity and rules out the option of competitive negotiation. In conclusion, the Acting Head of Procurement and Supplies made the following recommendations to the Accounting Officer on action required: -

- *Note the argument advanced by the Review Board on competitive negotiations;*
- *Cancel/terminate the subject tender on the basis of section 63(1) (b) of the Act due to inadequate budgetary provision;*
- *Approve re-tendering; and*
- *Direct as appropriate*

On 21<sup>st</sup> September 2020, the Accounting Officer of the Procuring Entity approved the said professional opinion and directed a retender subject to budget availability and user requirements.

### **Notification of Cancellation of Tender**

In letters dated 21<sup>st</sup> September 2020, the Procuring Entity notified all tenderers of cancellation of the subject tender due to inadequate budgetary allocation.

### **REQUEST FOR REVIEW NO. 131/2020**

M/s Rhombus Construction Company Limited (hereinafter referred to as "the Applicant") lodged another Request for Review dated 30<sup>th</sup> September 2020 and filed on 2<sup>nd</sup> October 2020 together with a Supporting Affidavit sworn on 30<sup>th</sup> September 2020 and filed on even date and a Supplementary Affidavit sworn on 14<sup>th</sup> October 2020 and filed on 16<sup>th</sup> October 2020, through the firm of Sigano & Omollo LLP Advocates, seeking the following orders: -

- a) An order declaring the Procuring Entity's notification of purported Termination of procurement proceedings in Tender Number KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers) dated 21<sup>st</sup> September 2020, addressed to the Applicant and/or any other bidder who participated in the subject tender process, null and void;***
- b) An order directing the Procuring Entity to award Tender Number KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers) to the Applicant herein having met the award criteria under Clause 33 of the Instructions to Tenderers in the Tender Document;***
- c) Any other relief that the Board may deem fit and just to grant; and***
- d) An order directing the 1<sup>st</sup> Respondent to bear the costs of the Review.***

In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents lodged a Memorandum of Response dated 9<sup>th</sup> October 2020 and filed on 12<sup>th</sup> October 2020 together with an Affidavit in support of the Respondents' Memorandum of Response, sworn on 9<sup>th</sup> October 2020 and filed on 12<sup>th</sup> October 2020, through Addraya Dena Advocate while the Interested Party lodged a Notice of Appointment of the firm of Muthee Kihiko Soni & Associates Advocates dated 14<sup>th</sup> October 2020 and drawn by Muthee Kihiko Soni & Associates LLP. Further, a Replying Affidavit sworn by Vishal Soni as a Director of Powerparts Kenya Limited on

14<sup>th</sup> October 2020 on behalf of the Interested Party was filed through the firm of Muthee-Soni & Associates Advocates on 16<sup>th</sup> October 2020.

On 16<sup>th</sup> 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](http://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 24<sup>th</sup> 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 Written Submissions dated 15<sup>th</sup> October 2020 and filed on 16<sup>th</sup> October 2020 while the Respondents lodged Written Submissions dated and filed on 19<sup>th</sup> October 2020. The Interested Party did not lodge any written submissions.

## **BOARD'S DECISION**

The Board has considered the pleadings and written submissions filed before it, including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issue calls for determination:

**Whether the Procuring Entity complied with the orders of the Board issued on 7<sup>th</sup> September 2020 in PPARB Application No. 119 of 2020, Rhombus Construction Company Limited v. The Accounting Officer, Kenya Ports Authority & Another.**

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

The instant Request for Review emanates from a procurement process initiated by the Procuring Entity through an advertisement published on MyGov Publication Website and the Lloyd's List on 14<sup>th</sup> January 2020 and 15<sup>th</sup> January 2020 respectively. Evaluation of bids were conducted and recommendation of award of the subject tender was made to the Applicant herein at its tender sum of USD 5,475,000.00 as can be seen from the Evaluation Report received by the Procuring Entity's Head of Procurement and Supplies Department on 10<sup>th</sup> June 2020. Thereafter, a professional opinion was issued by the Acting Head of Procurement and Supplies on 29<sup>th</sup> July 2020 recommending cancellation of the subject procurement process.

due to inadequate budgetary allocation. The said professional opinion was approved by the Acting Managing Director on 6<sup>th</sup> August 2020 thus paving way for notification of cancellation of tender issued to tenderers on 10<sup>th</sup> August 2020.

The Applicant was aggrieved by the said decision, thus challenged the same before this Board through **PPARB Application No 119 of 2020, Rhombus Construction Company Limited v. The Accounting Officer, Kenya Ports Authority & Another** (hereinafter referred to as "Review No. 119/2020"), determined by this Board on 7<sup>th</sup> September 2020. In its final orders, the Board in Review No. 119/2020 directed as follows: -

- "1. The Procuring Entity's Letter of Notification of Cancellation of Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers addressed to all tenderers, be and is hereby cancelled and set aside.***
- 2. The Procuring Entity is hereby directed to proceed with the procurement proceedings in Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers to its logical conclusion within fourteen (14) days from the date of this decision whilst taking into consideration the findings of the Board in this Review.***
- 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 the Board nullified the Procuring Entity's decision terminating the subject procurement process, directed the Procuring Entity to proceed with the procurement process to its logical conclusion, within fourteen days from 7<sup>th</sup> September 2020 taking into consideration the findings of the Board in Review No. 119/2020 and directed each party to bear its own costs.

The salient findings of the Board's decision of 7<sup>th</sup> September 2020 with respect to Order No. 2 are as follows:

- a) *Page 27 of the decision, the Board listed circumstances available under section 131 of the Act where a procuring entity may conduct competitive negotiations which included; open tender, Request for Proposal (mostly used in procurement of consultancy services), Restricted Method of tendering etc;*
- b) *Page 29 of the decision, the Board emphasized that termination of procurement proceedings should be a last resort to be considered only after all options available under the Act have been exhausted by the Procuring Entity while making reference to the available option of competitive negotiation under section 131 of the Act;*
- c) *Page 30 of the decision where the Board found the Procuring Entity failed to provide real and tangible evidence of its alleged approved budget (Kshs. 550,000,000/-) for the subject procurement process at least in the form of financial statements for the Board to ascertain the*

*alleged budget in support of the Procuring Entity's reason for termination under section 63 (1) (b) of the Act;*

- d) Page 32 of the decision, the Board found the Procuring Entity did not submit the letter of termination and report of termination of the subject procurement process to the Director General of the Public Procurement Regulatory Authority within fourteen days of termination as required by section 63 (4) of the Act;*
- e) Page 41 of the decision, the Board found that the letters of notification of termination of the subject tender dated 10<sup>th</sup> August 2020 were issued by a person who did not have delegated authority from the Procuring Entity's Acting Managing Director;*
- f) Page 41 of the decision, the Board found the Procuring Entity failed to terminate the subject procurement process in accordance with the procedural requirements of section 63 (2) (3) and (4) of the Act; and*
- g) Page 42 of the decision, the Board found the Procuring Entity failed to terminate the subject procurement process in accordance with section 63 of the Act.*

All parties to the instant Request for Review have confirmed that no party challenged the Board's decision through Judicial Review proceedings filed at the High Court within fourteen (14) days of the decision rendered on 7<sup>th</sup> September 2020 in Review No. 119/2020. This means that the Board's decision of 7<sup>th</sup> September 2020 in Review No. 119/2020 is final and binding to all parties to the instant Request for Review in accordance with section 175 (1) of the Act and any action by a party in Review No. 119/2020 contrary to the decision of the Board of 7<sup>th</sup> September 2020 in Review No. 119/2020

will be in disobedience of the Board's decision in breach of the Act and such action shall be null and void in accordance with section 175 (6) of the Act.

It now behooves upon this Board to determine whether the Procuring Entity complied with the orders of the Board, specifically in relation to the findings in Review No. 119/2020 that the Procuring Entity was required to take into consideration in concluding the subject procurement process.

To address this question, the Board studied the Procuring Entity's confidential file submitted pursuant to section 67 (3) (e) of the Act and notes that after receiving the written decision of the Board, the Procuring Entity's Acting Head of Procurement and Supplies issued another professional opinion dated 17<sup>th</sup> September 2020 outlining the manner in which the subject procurement process was undertaken whilst making the following remarks:

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***"1.3. The Public Procurement Administrative Review Board rendered its ruling on 7<sup>th</sup> September 2020. In its findings, the Board faulted the Authority for terminating the tender on the grounds that the lowest price was above the available budget without exhausting all the available options in the Act. The Board specifically referred to section 131 of the Act on competitive negotiations and argued that this was allowed in open tendering in a case where the lowest evaluated bidder is***

*in excess of the available budget and the Authority should have tried to negotiate with the lowest evaluated bidder before resorting to cancellation*

**1.4. ....**

**1.5. ... We have obtained details on taxes from the Authority's clearing agent M/s Keihin Maritime Services Limited and compared the likely payable taxes for the two bidders as follows:**

<b>Item to be compared</b>	<b>Cargotech Finland Oy (Kalmar Reach Stackers)</b>	<b>Rhombus Construction Company Limited</b>
Total CIF Prices (USD)	5,475,000.00	5,088,876.80
Conversion at USD 108.549	594,305,775.00	552,392,487.76
Duty	1,594,730.00	3,470,529.00
VAT	83,416,930.00	78,601,977.00
IDF	19,800,664.00	19,333,701.00
RDL	11,884,810.00	11,159,443.00
<b>Gross Total Delivered Duty Paid (Kshs)</b>	<b>711,002,909.00</b>	<b>664,958,137.76</b>

*From the above analysis it follows that both bids including the one for Kalmar Reach stackers were above*

***our budget of Kshs. 550,000,000.00 contrary to the findings of the Review Board.***

***1.6. The Board emphasized that the Authority should use termination as a last resort after exhausting all options under the Act.***

***1.7. The Review Board directed that the Authority proceeds with the procurement process to its conclusion within 14 days as from 7<sup>th</sup> September 2020.***

***1.9. The Principal Legal Officer, Litigation and Disputes in a letter No. MCS/4/3/6968 dated 9<sup>th</sup> September 2020, reiterated the findings of the Review Board that the bid submission by Kalmar Reachstacker of USD 5,475,000.00 was within the approved budget. This was further emphasized in the email dated 12<sup>th</sup> September 2020 from Litigation and Disputes Department.***

#### **PART C. RECOMMENDATION TO ACCOUNTING OFFICER**

***1.0. I have reviewed the ruling of the Public Procurement Administrative Review Board and noted its finding on the bid price of Kalmar Reach Stacker. However, I do not agree with the Board's argument that this bid was within our budget as the bid price was on CIF basis and after loading all the taxes and levies likely to be charged, this***

**bid adds up to Kshs. 711,002,909.00 which is not within our budget of Kshs. 550,000,000.00**

**2.0. The Board also dwelt so much on the fact that the Authority ought to have competitively negotiated with M/s Rhombus Construction Company Limited as stipulated in section 131 of the Act. The Authority has never used this method before and considering that the time left is not sufficient for the process to be carried out. Further, the bid by M/s Rhombus Construction Company Limited despite being Delivery Duty Paid, did not indicate the VAT chargeable and therefore did not comply to the Authority tender requirements requiring prices to be inclusive of all taxes and was thus incomplete. This incompleteness of the bid makes it a non-conformity and rules out the option of competitive negotiation.**

**3.0. Action Required. You are requested to consider and if deemed fit:**

- i. Note the argument advanced by the Review Board on competitive negotiations and direct.**
- ii. Cancel/Terminate Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers on the basis of section 63 (1) (b) of the Public Procurement and Asset Disposal Act, 2015 due to inadequate budgetary provision.**

***iii. Approve retendering.***

***iv. Direct as appropriate."***

The Board studied the Procuring Entity's Professional Opinion dated 17<sup>th</sup> September 2020 and notes that, ten days after the decision in Review No. 119/2020, the Acting Head of Procurement and Supplies issued a professional opinion stating that the time left was insufficient for the Procuring Entity to apply competitive negotiations in the subject procurement. Secondly, the Acting Head of Procurement and Supplies computed what he refers to as the Gross Total Delivered Duty Paid for M/s Kalmar Reachstacker as Kshs 711,002,909.00 and Kshs. 664,958,137.76 for the Applicant, after adding taxes and levies likely to be charged. He then compared the Gross Total Delivered Duty Paid amounts for the two bidders with the Procuring Entity's alleged budget of Kshs. 550,000,000.00 to conclude that these amounts were way above the Procuring Entity's budget.

Having considered the foregoing, this Board deems it necessary to revisit the decision in Review No. 119/2020 and we note that the Respondents never raised any issue with the tender prices quoted by the Applicant and M/s Kalmar Reachstacker as being either inclusive or exclusive of taxes and levies neither was computation of the Gross Total Delivery Duty Paid undertaken when comparing such tender prices with the budget of the Procuring Entity.

According to the Evaluation Report received on 10<sup>th</sup> June 2020 by the Head of Procurement and Supplies Department, the Evaluation Committee recommended award of the subject tender to the Applicant at its tender price of **USD 5,628,207.01**, which was the amount quoted in the Applicant's Form of Tender dated 3<sup>rd</sup> April 2020. In the initial professional opinion issued on 29<sup>th</sup> July 2020, the Acting Head of Procurement and Supplies never raised the issue of Gross Total Delivered Duty Paid for M/s Kalmar Reachstacker as Kshs. 711,002,909.00 and Kshs. 664,958,137.76 for the Applicant, after adding taxes and levies likely to be charged. Furthermore, these amounts were also never raised by the Respondents in Review No. 119/2020. The Board was informed that the subject procurement process was terminated because the Procuring Entity had a budgetary allocation of Kshs. 550,000,000.00 compared to the Applicant's tender sum of USD 5,628,207.01 translated to Kshs. 597,022,189.36. It is also worth noting that the Evaluation Committee recommended award of the subject tender based on the Applicant's tender sum because section 82 of the Act provides that: -

***"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity."***

From the Evaluation Report received on 10<sup>th</sup> June 2020 by the Head of Procurement and Supplies Department, the Evaluation Committee recorded the price of the Applicant's bid as USD 5,628,207.01 during the opening of the financial proposals.

At paragraph 7.2 of the professional opinion dated 29<sup>th</sup> July 2020, the Acting Head of Procurement made this comparison and noted that there was a deficit of Kshs. 47,022,189.36, being the difference between the Procuring Entity's alleged budget and the Applicant's tender sum. At no point was the Procuring Entity's alleged budget compared to the Gross Total Delivery Duty Paid amounts added to the Applicant's and M/s Kalmar Reachstacker's respective tender prices, neither did any party canvass this issue in their pleadings filed with respect to Review No. 119/2020.

In any case, the Procuring Entity at paragraph 4 of its Memorandum of Response confirms that "none of the parties appealed against the decision of the Board which therefore became binding on all parties", which decision therefore became binding on all parties. The Respondents echoed what is already provided in section 175 (1) of the Act 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"***

Having noted that the decision of the Board was final and binding to all parties in Review No. 119/2020 including the Respondents herein who never challenged the said decision, and having noted the provisions of section 82 of the Act that the tender sum read out during tender opening shall be absolute and final, and not subject to correction, adjustment or amendment

by any person or entity, the Acting Head of Procurement and Supplies was wrong in introducing Gross Total Delivery Duty Paid amounts and using the same as the basis for determining whether the Applicant's and M/s Kalmar Reachstacker's respective evaluated prices were above the Procuring Entity's alleged budget. We say so because, the Board did not order a re-evaluation at the Financial Evaluation Stage where prices quoted by bidders ought to be considered neither is adjustment of the tender sum permitted in section 82 of the Act.

The Board in Review No. 119/2020 noted that if the Procuring Entity's alleged budget of Kshs. 550,000,000.00 is considered against the Applicant's tender sum of USD 5,628,207.01 translated to Kshs. 597,022,189.36 and M/s Kalmar Reachstacker's tender sum of USD 5,475,000.00 translated to Kshs. 580,770,480.00 (using the prevailing Central Bank Exchange Rate of 1 USD=Kshs. 106.0768 as at the tender opening date of 7<sup>th</sup> May 2020), then it would mean the Applicant's tender sum and that of M/s Kalmar Reachstacker were within the 25% threshold (i.e. not more than 25% above the Procuring Entity's budget) required for competitive negotiations under section 132 (2) (b) of the Act. At page 27 to 29 of the decision in Review No. 119/2020, the Board clearly addressed instances when competitive negotiations may be used and held as follows: -

***"The Board further makes an observation that the Applicant is not challenging the method of procurement that was used by the Procuring Entity. It is also worth noting that the***

*circumstances listed under section 131 of the Act where a procuring entity may conduct competitive negotiations include an open tender (i.e. section 131 (a) and (c) of the Act) because a successful tenderer in an open tender under section 86 (1) (a) of the Act is one whose tender has the lowest evaluated price; Request for Proposal (i.e. section 131 (b) of the Act) because a successful tenderer in a Request for Proposal is one whose tender has the highest score determined by combining the technical and financial proposal in accordance with section 86 (1) (b) of the Act; and restricted method of tendering (i.e. section 131 (d) of the Act) because the restricted method of tendering under section 102 (1) (b) & (c) of the Act, is used when the time and costs required to examine and evaluate tenders would be disproportionate to the value of what is being procured and there are only a few known suppliers in the market. This in the Board's view demonstrates that competitive negotiation can be used in an open tender where the Request for Proposal method of procurement is not used. In addition to this, competitive negotiation is not a stand-alone method of procurement but same is applied after other methods of procurement have been used up to the Financial Evaluation Stage but; (a) there is a tie in the lowest evaluated price by two or more tenderers; (b) there is a tie in highest combined score points; (c) the lowest evaluated price is in excess of available budget; or (d)*

***there is an urgent need that can be met by several known suppliers.***

**The Board further notes that the Applicant's tender price of USD 5,628,207.01 and M/s Kalmar Reach Stacker's tender price of USD 5,475,000.00 are within the threshold of 25% more than the Procuring Entity's available budget of Kshs. 550,000,000.00 in order for the invitation for competitive negotiations to apply as stated in section 132 (2) (b) of the Act. In essence, two bidders made it to Financial Evaluation, the lowest evaluated price is in excess of the Procuring Entity's available budget, the prices quoted by M/s Kalmar Reach Stacker and the Applicant are not more than twenty-five percent above the Procuring Entity's available budget, in order for competitive negotiations to apply.**

**It is the Board's considered view that this option ought to have been considered by the Procuring Entity with a view of determining the bidder that is willing to implement the subject tender within the Procuring Entity's approved/available budget."**

Having considered the Procuring Entity's Acting Head of Procurement's Professional Opinion dated 17<sup>th</sup> September 2020 and letters of cancellation of the subject tender dated 21<sup>st</sup> September 2020 issued by the Procuring

Entity's Acting Managing Director, the Board observes that the Procuring Entity did not explore the option for competitive negotiation which was applicable in the subject tender but cancelled the tender on the basis that; (a) it has never used the method of competitive negotiations before, (b) cited insufficient time remaining to consider competitive negotiations, (c) the Applicant's bid did not indicate the VAT chargeable and thus did not comply to tender requirements requiring prices to be inclusive of all taxes and was thus incomplete ruling out the option of competitive negotiation and (d) arrived at Gross Total Delivery Duty Paid amounts and used the same as the basis for determining whether the Applicant's and M/s Kalmar Reachstacker's respective evaluated prices were above the Procuring Entity's alleged budget, (e) inadequate budgetary provision.

The Board finds these reasons to lack justifiable basis because; (a) the Procuring Entity affirms that the Board's decision in Review No. 119/2020 was final and binding to it, having failed to challenge the same, (b) the mere fact that competitive negotiations had never been used by the Procuring Entity as alleged, does not mean such method should not be explored when the conditions for competitive negotiations exist in the procurement process as held by the Board in Review No. 119/2020, (c) the Procuring Entity had 14 days from 7<sup>th</sup> September 2020 to finalize on the procurement process, which time was sufficient since competitive negotiations require identified tenderers to revise their tenders by submitting their best and final offer within a period not exceeding 7 days and thus for the Procuring Entity to finalize the procurement process with the remaining days in accordance with

section 132 (5) of the Act, (d) the Procuring Entity cannot interfere with a tender sum read out at tender opening and provided for in a Form of Tender because if payable taxes are not captured in the tender sum, the loss is on the bidder and not the Procuring Entity as the Procuring Entity is bound to enter into a contract at the tender sum and not to award a tender to the successful bidder based on an amount that is above the tender sum as quoted in the Form of Tender and (e) the Procuring Entity failed to provide real and tangible evidence of its approved budget both in Review No. 119/2020 and the instant Request for Review and cannot rely on figures without proving the same to the Board.

At the very least, the Procuring Entity ought to have demonstrated to this Board that it initiated competitive negotiations with the Applicant and M/s Kalmar Reachstacker, and perhaps there was no positive outcome or there were challenged with competitive negotiations leaving the Procuring Entity with no other option but to exercise the discretion under section 63 of the Act.

Having considered the sequence of events undertaken by the Procuring Entity, the Board finds that the Procuring Entity did not comply with the Board's orders issued on 7<sup>th</sup> September 2020 in Review No. 119/2020. The fact that the Procuring Entity asserts that it concluded all processes such as termination and notification to bidders within 14 days from 7<sup>th</sup> September 2020 shows that the Procuring Entity seems to have viewed compliance with

the Board's orders as a mere formality as opposed to taking into consideration the findings made regarding the option of competitive negotiations and to conclude the procurement process within the timelines provided by the Board; if the negotiations do not have a positive outcome and/or there were challenges, to exercise discretion under section 63 of the Act within the timelines provided by the Board.

It is clear from the foregoing that the Procuring Entity failed to comply with the orders of the Board having ignored the Board's findings on the instances and manner in which competitive negotiations may be applied and having failed to make reasonable steps to conduct competitive negotiations with the Applicant and M/s Kalmar Reachstacker. The actions by the Procuring Entity amount to disobedience of the orders issued by this Board which were not challenged within the statutory period of fourteen days specified in section 175 (1) of the Act, therefore such orders remain final and binding to all parties to Review No. 119/2020. Section 175 (6) of the Act states that:-

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

It is clear from the above provision that disobedience of a decision of this Board amounts to a breach of the Act. 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 applicant made a decision which was contrary to the law, an aggrieved party was of course at liberty to challenge the same as the interested party did in this matter. However, that challenge had to be in accordance with the law and the challenge had to be initiated within 7 days of the decision under the repealed statute and within 14 days under the current statute. A failure to comply with a decision of the Review Board or to appeal from such decision leads to blatant disobedience of the orders of a decision making body established by law"***

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

***"The Procuring Entity having failed to follow the orders of the Board in Review No. 83 of 2016, this Board cannot fold its hands when faced with a situation where the Procuring Entity fails to obey the orders made by it. The Board will employ the***

***powers conferred upon it by section 173 of the Act and make such orders as will meet the ends of justice in any matter pending before it”***

Having considered the above authorities, the Board would like to note that the framers of the Act, in establishing this Board envisioned that public procurement processes would be guided by tenets of the Constitution and the Act. This means that the public would benefit from services offered by a procuring entity but such procuring entity would uphold the rule of law and constitutional democracy in its procurement process. The Constitution and the Act cannot be upheld where a procuring entity chooses not to comply with orders issued to it and at the same time fails to challenge such orders.

The Board will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with a party that disobeys the Board's orders. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by this Board to obey it unless and until that order is 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 Advocates, could themselves judge whether an order is null or valid – whether it is regular or irregular. As long as a Board's order exists, it must not be disobeyed. Disobedience of the orders of this Board offends the rule of law. The Procuring Entity herein made no attempt to appeal or seek Judicial Review of the decision in Review No. 119/2020, made no attempt to explore

the option of competitive negotiations and did not give any justifiable reason why no attempt was made to implement the Board's decision.

This disobedience ought not to be overlooked noting that the national values and principles of governance provided in Article 10 of the Constitution would 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 marginalized;***
- (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 Accounting Officer of the Procuring Entity herein failed to take these principles into account by its failure to comply with the orders of this Board and such failure cannot be overlooked.

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

***"Section 34. Powers to ensure compliance***

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

From the above provision, the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") has the power to obtain information from a public entity relating to procurement and asset disposal as may be required in writing. Further, in its Annual Report 2018/2019, the Authority explains the manner in which it ensures procuring entities comply with the Act by stating as follows: -

***"The Authority is mandated to enforce standards developed under the Act; to act on complaints received on procurement and asset disposal proceedings and to undertake investigations. Compliance and Monitoring reviews have continued to ensure value for money is achieved by public procurement systems that pay attention to economy and efficiency. A strategic outcome of compliance has allowed stakeholders to understand and monitor how public funds are spent through public procurement. During the period in review, the Authority monitored compliance through***

***procurement assessments, reviews, contract audits, and review of procurement plans submitted by Procuring Entities.”***

The failure by the Procuring Entity herein makes the instant Request for Review, a good case for the Authority to pursue investigations with or without other investigative agencies to ensure compliance with the Board's orders of 7<sup>th</sup> September 2020 in Review No. 119/2020 and take the necessary action, which orders remain final and binding to all parties following an admission by all parties herein that no Judicial Review was sought at the High Court within 14 days from 7<sup>th</sup> September 2020 with respect to the orders of the Board in Review No. 119/2020.

Lastly, the Board notes the Tender Validity period of the subject tender was 150 days after the tender submission deadline as stipulated in Clause 22 of the Tender Data Sheet read together with Clause 18.1 of the Instructions to Tenderers of the Tender Document. By the time the Applicant lodged the instant Request for Review, 125 days of the tender validity period had run and this period is exclusive of the time Request for Review proceedings were pending before this Board through Review No. 119/2020 (i.e. between 17<sup>th</sup> August 2020 to 7<sup>th</sup> September 2020) and the instant Request for Review (i.e. 2<sup>nd</sup> October 2020 to the date of this decision) since the subject procurement proceedings were suspended pursuant to section 168 of the Act, including the tender validity period. Time will again start running a day after the date of the decision of the Board in the instant Request for Review. From the

documentation provided to the Board, there is no evidence that the 1<sup>st</sup> Respondent exercised discretion under section 88 (1) of the Act to extend the tender validity period of the subject tender. Having noted the time taken by the Procuring Entity in undertaking the subject procurement process including use of public resources and that the tender validity period will only have 25 days remaining from the date of this decision, the Board finds it necessary to direct the Accounting Officer of the Procuring Entity to exercise the power under section 88 (1) of the Act to extend the tender validity period of the subject tender for a period of 30 days and to conclude the subject procurement process herein by fully complying with the Board's orders issued on 7<sup>th</sup> September 2020 in Review No. 119/2020.

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 issues the following orders in the Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification of Cancellation of Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers dated 21<sup>st</sup> September 2020 directed to the Applicant and all other tenderers, be and is hereby cancelled and set aside.**

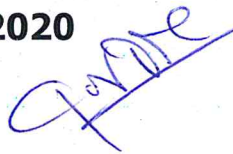
2. The Accounting Officer of the Procuring Entity is hereby directed to fully comply with the orders of the Board issued on 7<sup>th</sup> September 2020 in PPARB Application No. 119 of 2020, Rhombus Construction Company Limited v. The Accounting Officer, Kenya Ports Authority & Another within fourteen (14) days from the date of this decision, taking into consideration the findings of the Board in this Review.
3. The Accounting Officer of the Procuring Entity is hereby directed to extend the Tender Validity Period of the subject tender pursuant to section 88 (1) of the Act for a period of thirty (30) days from the date of its expiry.
4. The Procuring Entity shall bear the costs of this Request for Review amounting to Kshs. 305,000/- to be paid to the Applicant.

Dated at Nairobi this 23<sup>rd</sup> day of October 2020



CHAIRPERSON

PPARB



SECRETARY

PPARB