

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 150/2020 OF 16<sup>TH</sup> DECEMBER 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**

Review against the decision of Kenya Ports Authority with respect to Tender No. KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers.

**BOARD MEMBERS**

- |                           |              |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa       | -Chairperson |
| 2. Mr. Alfred Keriolale   | -Member      |
| 3. Dr. Joseph Gitari      | -Member      |
| 4. Ms. Phyllis Chepkemboi | -Member      |
| 5. Ms. Isabella Juma      | -Member      |

**IN ATTENDANCE**

- |                       |                                  |
|-----------------------|----------------------------------|
| 1. Mr. Stanley Miheso | -Holding brief for the Secretary |
|-----------------------|----------------------------------|

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

Kenya Ports Authority (hereinafter referred to as “the Procuring Entity”) invited sealed tenders from eligible tenderers to bid for Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers (hereinafter referred to as “the subject tender”) 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.

### **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.	CVS 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 and thus eligible for Technical Evaluation: -

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

## **2. Technical Evaluation**

At this stage, the Evaluation Committee applied the criteria outlined in Clause 30 of Section III. Tender Data Sheet of the Tender Document. Tenderers were also required to achieve a minimum technical score of 75% 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 Reachstacker.

### 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.

According to the Statement of Professional Opinion dated 29<sup>th</sup> July 2020 by the Head of Procurement and Supplies, the Evaluation Committee considered the Delivery Duty Paid (DDP) & Cost, Insurance and Freight (CIF) prices quoted by the two tenderers as per their price schedule so as to award the tender on the basis of CIF Price Comparison because both bidders were required to quote CIF Prices. The same were recorded as follows: -

Item	Item to be compared	Cargotech Oy (Kalmar Reachstacker)	Finland (Rhombus Construction Company Limited)
1	Total cost for 12 reachstackers price CIF (USD)	5,280,000.00	4,746,000.00
2	Cost of tools and special	FOC	111,780.67
3	Cost of spares to use during 24 months warranty period preventive maintenance (USD)	68,400.00	152,386.13
4	Cost of backup spares after	77,800	6,190.00
5	Cost of local training (USD)	FOC	6,190.00
6	Cost of overseas training	48,800.00	18,520.00
7	Pre-shipment inspection	FOC	FOC
8	One spare wheel complete with rim for 12 Reach stacker	FOC	54,000.00
	TOTAL CIF PRICES	5,475,000.00	5,088,876.80

	Other overheads (CFS, SLC, Agency Fee, MSS, RDL, COC, Transport etc	NA	539,330.21
	Grand Total, DDP Prices	NA	5,628,207.01

## **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 on the basis of CIF Price Comparison.

## **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 was 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 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 the 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 lodged a Request for Review dated 30<sup>th</sup> September 2020 and filed on 2<sup>nd</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.*

Having considered parties' pleadings and written submissions, the Board rendered a decision on 23<sup>rd</sup> October 2020 directing as follows: -

- 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.**

### **Request to Submit the best and final offer**

In letters dated 5<sup>th</sup> November 2020, the Procuring Entity requested M/s Rhombus Construction Company Limited and M/s Kalmar Reachstacker to submit their best and final offer within a period of 7 days. The Procuring Entity further requested the said bidders to demonstrate the DDP and CIF prices separately in their revised financial bids.

### **Financial Opening of Tenders**

According to Minutes dated 12<sup>th</sup> November 2020, a Tender Opening Committee opened the revised Financial Bids of M/s Rhombus Construction Company Limited and M/s Kalmar Reachstacker and recorded the same as follows: -

<b>Name of Bidder</b>	<b>Revised Prices</b>
Rhombus Construction Company Ltd	USD 4,982,345.10 (DDP)
Kalmar Reachstacker	USD 5,068,972.80 (DDP)

### **Evaluation of Bids and Recommendation for Award**

According to Clause 3.1 and 5.0 of the Evaluation Report received on 17<sup>th</sup> November 2020 by the Head of Procurement and Supplies, the Evaluation

Committee carried out financial evaluation of the revised Financial Bids of M/s Rhombus Construction Company Limited and M/s Kalmar Reachstacker. The Evaluation Committee found that M/s Rhombus Construction Company Limited submitted the lowest evaluated bid and thus recommended the said bidder for award of the subject tender.

### **Professional Opinion**

In a professional opinion dated 19<sup>th</sup> November 2020, the Procuring Entity's Acting Head of Procurement and Supplies concurred with the Evaluation Committee's recommendation thus advising the Acting Managing Director to award the subject tender to M/s Rhombus Construction Company Limited for submitting the lowest evaluated bid. Through handwritten comments on the face of the said professional opinion, the Acting Managing Director directed the Head of Procurement function to "*consider due diligence on governance issues raised and/or acknowledged by PPRA*" and thus did not approve the recommendation for award of the subject tender.

### **REQUEST FOR REVIEW NO. 150/2020**

M/s Rhombus Construction Company Limited (hereinafter referred to as "the Applicant") lodged the 3<sup>rd</sup> Request for Review with respect to the subject tender dated 16<sup>th</sup> December 2020 and filed on even date together with a Supporting Affidavit sworn on 16<sup>th</sup> December 2020 and filed on even date and a Supplementary Affidavit sworn on 28<sup>th</sup> December 2020 and filed on

29<sup>th</sup> December 2020, through the firm of Sigano & Omollo LLP Advocates, seeking the following orders: -

- i. An order extending the tender validity period in exercise of powers conferred upon it by section 173 (b) and section 28 (1) of the Public Procurement and Asset Disposal Act read with section 48 of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya;***
- ii. 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;***
- iii. An order recommending sanctions against the Respondents for failure to comply with the orders of the Review Board in Review No. 119/2020 and Review No. 131/2020, in exercise of the powers under section 28 (1) of the Public Procurement and Asset Disposal Act as read with section 48 of the Interpretation and General Provisions Act Cap 2 of the Laws of Kenya;***
- iv. Any other relief that the Board may deem fit and just to grant;  
and***
- v. An order awarding costs of the Review including legal costs to the Applicant.***

In response, the Respondents lodged a Memorandum of Response dated 22<sup>nd</sup> December 2020 and filed on 24<sup>th</sup> December 2020 together with an

Affidavit in Support of the Memorandum of Response, sworn on 22<sup>nd</sup> December 2020 and filed on 24<sup>th</sup> December 2020 through Addraya E. Dena Advocate.

On 24<sup>th</sup> March 2020, the Board issued Circular No. 2/2020 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 28<sup>th</sup> December 2020 and filed on 29<sup>th</sup> December 2020. The Respondents filed written submissions dated 4<sup>th</sup> January 2021 and filed on 5<sup>th</sup> January 2021.

### **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 issues call for determination:

-

- I. Whether the Accounting Officer of the Procuring Entity complied with the orders of the Board issued on 23<sup>rd</sup> October 2020 in PPARB Application No. 131 of 2020, Rhombus**

**Construction Company Limited v. The Accounting Officer,  
Kenya Ports Authority & 2 Others.**

**II. What are the appropriate reliefs to grant in the  
circumstances?**

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

All parties to the Request for Review are in agreement that the procurement proceedings herein have been the subject of review before this Board on two previous occasions. In **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"), the Board; (1) nullified the Procuring Entity's decision terminating the subject procurement process, (2) 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 (3) directed each party to bear its own costs. The salient findings of the Board's decision of 7<sup>th</sup> September 2020 in Review No. 119/2020 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;*
- 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.*



In **PPARB Application No. 131 of 2020, Rhombus Construction Company Limited v. The Accounting Officer, Kenya Ports Authority & 2 Others** (hereinafter referred to as "Review No. 131/2020"), all parties confirmed that no party challenged the Board's decision in Review No. 119/2020 through Judicial Review proceedings filed at the High Court within fourteen (14) days of the decision rendered on 7<sup>th</sup> September 2020. As a result, the Board's decision of 7<sup>th</sup> September 2020 in Review No. 119/2020 was final and binding to all parties to Review No. 131/2020 by dint of section 175 (1) of the Act.

In Review No. 131 of 2020, the Board; (1) nullified the 1<sup>st</sup> Respondent's Letter of Cancellation of Tender dated 21<sup>st</sup> September 2020 addressed to the Applicant herein including all tenderers in the subject tender, (2) directed the 1<sup>st</sup> Respondent to fully comply with the orders of the Board issued on 7<sup>th</sup> September 2020 with respect to Review No. 119/2020 within fourteen (14) days from 23<sup>rd</sup> October 2020, taking into consideration the findings of the Board in Review No. 131/2020, (3) directed the 1<sup>st</sup> Respondent 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 expiry of the tender validity period and (4) directed the Procuring Entity to pay the costs of the Request for Review amounting to Kshs. 305,000/- to the Applicant.

The salient findings of the Board's decision of 23<sup>rd</sup> October 2020 in Review No. 131/2020 with respect to Order No. 1, 2 & 3 thereof, are as follows: -

- *Page 25 of the decision, the Board observed that the Procuring Entity did not explore the option for competitive negotiation but cancelled the tender on the basis that; (a) it had 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, (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, and (e) it had inadequate budgetary provision;*
- *Page 25 to 26 of the decision, the Board found the aforelisted reasons to lack justifiable basis because; (a) the Procuring Entity affirmed 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, did 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 could not 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, because 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 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 Review No. 131 of 2020 and thus could not rely on figures without proving the same to the Board;*

- *Page 27 of the decision, the Board found 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; and*
- *Page 33 of the decision, the Board noted there was no evidence showing the Accounting Officer of the Procuring Entity exercised discretion under section 88 (1) of the Act to extend the tender validity period and further established that the tender validity period would only have 25 days remaining from 23<sup>rd</sup> October 2020, being the date of the decision in Review No. 131 of 2020. As a result, the Board found 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 further period of 30 days so as to conclude the subject procurement process by fully complying with the Board's orders issued on 7<sup>th</sup> September 2020 in Review No. 119/2020.*

From the pleadings filed before it, the Board notes that the Applicant avers at paragraph 3 and 4 of the instant Request for Review that the decision of the Board in Review No. 131/2020 was not challenged by any party to Review No. 131/2020 through Judicial proceedings at the High Court. According to the Applicant, the Board's decision in Review No. 131/2020 is final and binding to all parties by dint of section 175 (1) of the Act and that any action by a party in Review No. 131/2020 contrary to the Board's decision dated 23<sup>rd</sup> October 2020 in Review No. 131/2020 is null and void by dint of section 175 (6) of the Act. The Board observes that the Respondents did not controvert the Applicant's averment in their Response and Affidavit in support of the Respondents' Response.

It now behooves upon this Board to determine whether the Procuring Entity complied with the orders of the Board in Review No. 131/2020 which basically required the 1<sup>st</sup> Respondent to pay the Applicant Kshs. 305,000/= as costs and to fully comply with the orders of the Board in Review No. 119/2020 in concluding the subject procurement process.

From the confidential documents furnished to the Board, it is worth noting that 13 days after receiving the Board's decision dated 23<sup>rd</sup> October 2020 in

Review No. 131/2020, the Procuring Entity addressed a letter dated 5<sup>th</sup> November 2020 to the Applicant and another one dated 5<sup>th</sup> November 2020 to M/s Kalmar Reach Stacker. Both letters contain the details outlined hereinbelow: -

***"Your participation in the above tender and ruling in the Public Procurement Administrative Review Board (Review Board) in Application No. 131/2020 of 2<sup>nd</sup> October refers.***

***As guided and pursuant to section 131 and 132 of the Public Procurement and Asset Disposal Act, 2015, please note the budget for the subject tender is Kshs. 550 million.***

***You are therefore required to revise and submit your best and final offer within a period of seven (7) days. Form of tender and schedule of prices are attached for ease of reference.***

***Note that the terms and conditions of the tender remain the same and there should be no compromise on the quality specified in the original tender.***

***Your final and revised quote should show both DDP and CIF prices separately, should be sealed and delivered to the office of the Ag. Head of Procurement and Supplies, Kenya Ports Authority, Kipevu Headquarters 4<sup>th</sup> Floor, Finance Block III, B.L.K, Kilindini Mombasa on or before 10.00 am on 12<sup>th</sup> November 2020."***

According to Clause 1.6 of the Professional Opinion dated 19<sup>th</sup> November 2020, the two bidders sent their revised financial bids to the Procuring Entity by 12<sup>th</sup> November 2020. The same were opened on the same date wherein the Tender Opening Committee noted that bidders quoted their respective Delivery Duty Paid & Cost, Insurance and Freight prices separately.

Subsequently thereafter, the Evaluation Committee conducted financial evaluation and recommended award of the subject tender to the Applicant for being the lowest evaluated bidder. In his professional opinion dated 19<sup>th</sup> November 2020, the Acting Head of Procurement and Supplies advised the 1<sup>st</sup> Respondent to award the subject tender to the Applicant at the revised price of USD 4,982,345.10 (DDP). Through handwritten comments on the face of the said professional opinion, the 1<sup>st</sup> Respondent noted the following:

-

***"Consider due diligence on governance issues raised and/or acknowledged by PPRA. Not approved on recommendation"***

The Board observes that in making reference to "consideration of due diligence on governance issues raised and/or acknowledged by the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority"), the 1<sup>st</sup> Respondent was referring to a letter dated 10<sup>th</sup> December 2020 from the Acting Director General of the Authority addressed to the 1<sup>st</sup> Respondent which states as follows: -

***"Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers."***

***We have received complaints from M/s Benedict Kabugi Ndungu dated 9<sup>th</sup> November 2020 and from Sales Port Equipment dated 30<sup>th</sup> November 2020 on the above subject tender.***

***The complainants alleged as follows: -***

***M/s Benedict Kabugi Ndungu:***

- 1. That your procuring entity on two previous occasions has unlawfully attempted to terminated the above subject tender with the intention of directly awarding it to M/s Cargotec Finland Oy [i.e. Kalmar Reachstacker] of P.O Box 38733101 Tampere, Ruskonitie 55 33710 Tampere Finland;***
- 2. That the subject procurement had been to the Public Procurement Administrative Review Board on two occasions i.e. Review No. 119 of 2020 and Review No. 131 of 2020;***
- 3. That the Review Board in its decision dated 23<sup>rd</sup> October 2020 directed the procuring entity to fully comply with the decision of the Review Board issued on 7<sup>th</sup> September 2020. During the ruling, the Board directed the procuring entity to exhaust statutory options such as competitive negotiations before resorting to termination of the procurement proceedings;***

**4. That your procuring entity has commenced competitive negotiations and that from the Review Board decision, there were two bidders who had proceeded to the financial stage of evaluation as below:**

**i. Rhombus Construction Co. Limited-  
Kshs. 664,958,137.76**

**ii. Cargotech Finland Oy  
-Kshs. 711,002,909.00**

**5. That they are aware the budget of your procuring entity is Kshs. 550,000,000.00 and therefore as per the provisions of section 132 (2) (b) of the Act, its only bidders who quoted below Kshs. 687,500,000.00 for competitive negotiations;**

**6. That your procuring entity has invited M/s Cargotech Finland Oy whose evaluated price exceeds the stipulated limit;**

**Sales Port Equipment:**

**7. That the tender was advertised in January 2020 and submission date for the tender was on the 7<sup>th</sup> May 2020 and that the following firms submitted their bid documents:**

**i. Holman Brothers;**

**ii. JGH Marine;**

**iii. ZPMC;**



***iv. Rhombus Construction;***

***v. Konecranes;***

***vi. CVS Ferrari;***

***vii. Achelis;***

***viii. Neral Holdings;***

***ix. Kalmar***

***8. That out of the above named companies, only two were qualified to proceed to financial stage as per the evaluation committee, that is Kalmar and Rhombus Construction;***

***9. That M/s Rhombus Construction submitted forged documents to meet the mandatory requirements;***

***10. That beyond the massive forgery, the only correspondence from KPA in regard to the above tender to all bidders who participated is a notification of termination of the tendering process due to inadequate budget;***

***11. That whereas the notification for termination was sent to all bidders and financial proposal in "Envelope B" mailed to the seven bidders who allegedly did not qualify technically, there is still an ongoing process that could lead to an award of the tender and which is unknown to the rest of the bidders since all the seven bidders are currently aware that the tendering process was terminated on 21<sup>st</sup> September 2020; and***

***12. That it should be a concern that M/s Rhombus Construction did not qualify for a similar tender for supply of empty container handlers due to an issue of not submitting correct ISO 9001 certificate in qualifying in the tender for Reach Stackers which had the same requirement.***

***In view of the above complaints we note as follows: -***

***13. The above procurement was filed at the Public Procurement Administrative Review Board under Review No. 119 of 2020 and Review No. 131 of 2020.***

***14. That the Review Board in its decision delivered on 23<sup>rd</sup> October 2020 in Review No. 131/2020 directed the procuring entity to fully comply with the decision of the Board dated 7<sup>th</sup> September 2020 and explore statutory options including competitive negotiations before resorting to termination of the procurement proceedings.***

***15. We draw your attention to Part X-Procurement of Consultancy Services of the Public Procurement and Asset Disposal Act, 2015 (the Act). Section 115 provides that "This Part applies to procurement of professional services which are predominately intellectual or advisory in nature". We have noted your procurement is for Supply, Testing and Commissioning of 12No. New Reach***

***Stackers, this means you are procuring goods and not consultancy services.***

***16. Competitive negotiations are provided for in section 131 and 132 of the Act, which falls under Part X of the Act for procurement of consultancy services. The procedure defined in section 132 is only applicable for procurement of consultancy services and not procurement of goods. Further, the procedure for competitive negotiation for procurement of consultancy services limits the invitation to bidders who quoted below 25% of the approved budget.***

***17. We have further noted that the second complainant alleged that the documents submitted by M/s Rhombus Construction Company in the procurement proceeding were forged. We will therefore refer the matter to the Directorate of Criminal Investigations to investigate the same.***

***Taking cognizant of the above, kindly inform the Authority and the Public Procurement Administrative Review Board of the current status of the tender and steps taken in light of the issues raised by the complainants above and our observations.”***

The Respondents also referred the Board to a letter dated 26<sup>th</sup> November 2020 written by Concern Citizens Kenya, addressed to the Directorate of Criminal Investigations and copied to the 1<sup>st</sup> Respondent, stating as follows:-

***"Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers***

***We, Concern Citizens Kenya, are a lobby group whose main aim is to enforce public accountability, social justice, implementation of the Constitution and the rule of law.***

***In order to achieve this, we institute public petitions, peaceful demonstrations/picketing and legal actions against any person (s) or institution (s) in both public and private sectors found to have contravened the law in any form.***

***It has been brought to our attention that the above-mentioned tender was officially opened on the week ending November 14 with a hidden agenda***

***The exercise was carried out through politically well-connected persons against the laid down procurement and asset disposal act procedures in favour of Rhombus Construction Company Limited.***

***The documents at our disposal show that only selected firms were asked to submit their bids afresh for the tender to supply the equipment's after several attempts to cancel the same process.***

***The move is against the Public Procurement Regulatory Authority rules and which is expected to give a nod on***

***the process which went against the Procurement Act. The PPRA which is a regulatory body established under the Public Procurement Act has failed to guide and assist on the way forward in the controversial procurement of the equipment.***

***The move leaves more questions than answers in the way it was hurriedly done.***

***We have established there are forces behind the project prepared to do whatever it takes for their agenda to succeed.***

***We have also established that:***

- 1. The tender on the said security expired and therefore it is against the public procurement and asset disposal by public entities and for connected purposes act enacted by Parliament.***
- 2. The alleged lowest bidder has under quoted against the current market value of 40 percent.***
- 3. The tender validity has elapsed which is against the public procurement and asset disposal by public entities and for connected purposes.***
- 4. The tender has been cancelled several times and re-tendered under unclear circumstances with word going around there was no budgetary allocation for procurement of the equipment.***

***5. That the KPA carried out the process of procuring such equipment without a budgetary allocation raises questions as to the motive behind the scam.***

***6. The Public Procurement Regulatory Authority (PPRA) which is a regulatory body established under the Public Procurement Act has failed to guide and assist on the way forward in the controversial procurement of the equipment.***

***We ask your able office to kindly commence immediate investigations into the said TENDER and establish the culpability of the officers involved and possibly cancel the TENDER.***

***NB-The procurement of the equipment is not above board and it is a waste of government resources. It is another white elephant project and we can do without the equipment at the moment as it is not a priority as at now."***

The Respondents aver that even though recommendation for award of the subject tender was made to the Applicant herein, they received the letter dated 10<sup>th</sup> December 2020 from the Authority and the one dated 26<sup>th</sup> November 2020 from Concern Citizens Kenya and thus the Respondents were in the process of terminating the subject procurement process pursuant to section 63 (1) (e) of the Act.

Before addressing our minds on the question whether the 1<sup>st</sup> Respondent complied with the orders issued in Review No. 131/2020, it is necessary for the Board to interrogate the import of section 40 of the Act which provides as follows: -

***"(1) No investigation shall be commenced or continued under this Part, and no order shall be made under this Part, in relation to an issue that the Review Board [i.e. the Board] is reviewing or has reviewed under the relevant provisions of this Act.***

***(2) Subsection (1) ceases to apply if, after the Review Board has completed its review, information comes to the attention of the Board [i.e. Public Procurement Regulatory Board] that was not brought before the Review Board in the course of its review."*** [Emphasis by the Board]

Section 40 (1) of the Act precludes the Authority from commencing or continuing investigations and the making of an order by the Director General of the Authority in respect of a matter that this Board is reviewing or has reviewed. However, this provision does not apply if, after the Board has completed a review, information comes to the attention of the Public Procurement Regulatory Board that was not brought before this Board in the course of its review.

The Board studied the two letters dated 26<sup>th</sup> November 2020 and 10<sup>th</sup> December 2020 and notes that the same contain allegations against the Applicant in respect of the following: -

**A. Letter dated 10<sup>th</sup> December 2020 from the Acting Director General of the Authority**

Complaints by Benedict Kabugi Ndungu in respect of; Unlawful Termination of the subject tender, the Budget of the Procuring Entity being Kshs. 550,000/-, allegation that the tender price of M/s Cargotech Finland Oy (in partnership with M/s Kalmar Reachstacker) exceeded the threshold of competitive negotiation, allegation that the Applicant submitted forged documents, unlawful termination of the subject tender, allegation that the Applicant failed to submit ISO 9001 Certificate in a tender for Supply of Empty Container Handlers

**B. Letter dated 26<sup>th</sup> November 2020**

Complaints by Concern Citizens Kenya on; Selected Firms submitting bids afresh, Expiry of Tender Security, expiry of Tender Validity, Lowest bidder quoted below the market value of 40% and Termination of the tender due to inadequate budgetary allocation

Having noted the complaints raised in the letter dated 26<sup>th</sup> November 2020 and the one dated 10<sup>th</sup> December 2020, the Board observes that; unlawful termination of the subject tender due to inadequate budgetary allocation, budget of the Procuring Entity and requirements for competitive negotiation are issues that were raised by parties and settled by this Board in Review



No. 119/2020 and Review No. 131/2020. The Board already established the Procuring Entity failed to meet the substantive and procedural requirements for termination including the failure to prove its alleged budgetary allocation in Review No. 119/2020 and directed the Procuring Entity the fact that there are options that can be exhausted before considering termination of a tender. In Review No. 131/2020 the Board settled the manner in which competitive negotiation can be applied. Thus, the issue on selected firms submitting bids afresh is an issue relating to competitive negotiation and the Board already settled the manner in which this procedure is conducted in its decision in Review No. 131/2020.

Having outlined the issues that were raised and settled by this Board in Review No. 119/2020 and Review No. 131/2020, the Board is mindful of application of the doctrine of res judicata in respect of matters which have been determined by a decision making body between the same parties litigating under the same title and the same subject matter (i.e. **Tender No. KPA/121/2019-20/TE for Supply and Commissioning of Five (5) New Empty Container Handlers (ReachStacker Type)**) and that such parties have failed to challenge the decision of the Board through Judicial Review proceedings at the High Court.

In **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR**, the Supreme Court outlined the elements that must be satisfied for the doctrine of res judicata to apply. That is: -

***"(a) The suit or issue was directly and substantially in issue in the former suit.***

***(b) That former suit was between the same parties or parties under whom they or any of them claim.***

***(c) Those parties were litigating under the same title.***

***(d) The issue was heard and finally determined in the former suit.***

***(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."***

Expounding further on the essence of the doctrine, the Court of Appeal in **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** pronounced itself as follows: -

***"The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the***

***possibility of inconsistency in judgments of concurrent courts.***  
***It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."***

The Board is mindful that it does not have powers to review its own decisions (i.e. Review No. 119/2020, & Review No. 131/2020) which were not challenged by way of Judicial Review at the High Court, thus are final and binding to all parties by dint of section 175 (1) of the Act.

The issues that were raised after the Board completed its review in Review No. 131/2020 on 23<sup>rd</sup> October 2020 are; allegations that the Applicant forged mandatory documents, the Applicant's ISO Certificate, expiry of the tender validity period, expiry of tender security and accusations against the Authority.

The issue of the Applicant's ISO Certificate is an issue that was raised in a different tender (**Tender No. KPA/121/2019-20/TE for Supply and Commissioning of Five (5) New Empty Container Handlers (ReachStacker Type) in PPARB Application No. 118 of 2020, Rhombus Construction Company Limited v. The Accounting Officer, Kenya Ports Authority & Another** (hereinafter referred to as "Review No. 118/2020") and was not an issue for determination before this Board in

Review No. 119/2020 and Review No. 131/2020 which we note are with respect to **Tender No. KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers**. The Board settled the issue of the Applicant's ISO Certificate in **Tender No. KPA/121/2019-20/TE for Supply and Commissioning of Five (5) New Empty Container Handlers (ReachStacker Type)** by finding the Applicant failed to provide the ISO Certificate required in Clause 10 (vi) of Section III. Tender Data Sheet of the Tender Document applicable in Review No. 118/2020. At pages 22 to 23 of the decision in Review No. 118/2020, the Board held as follows: -

***"The criterion under consideration required bidders to provide quality certificate stating clearly that the systems being offered by the manufacturer is for design, manufacture and supply of New Empty Container Handlers (Reachstacker Type) i.e. ISO certification or equivalent and not a quality certificate for Design, Manufacturing, Sales and Technical Service of Heavy Port Machinery and its Frame Structure provided by the Applicant. In essence, the Applicant's quality certificate was not specific to design, manufacture and supply of New Empty Container Handlers (Reachstacker Type).***

***Accordingly, the Board finds that the Applicant failed to satisfy the criterion under Clause 10 (vi) of Section III. Tender Data Sheet of the Tender Document."***

Even if allegations are made with respect to an ISO Certificate submitted by the Applicant in the instant Request for Review and in the subject tender, the Board observes that the 1<sup>st</sup> Respondent viewed due diligence as one of the ways in which documents submitted by bidders can be verified in light of complaints made to the Authority.

On the issue of expiry of the tender validity period and expiry of tender security, this Board already directed the 1<sup>st</sup> Respondent (through Order No. 3 of the decision in Review No. 131/2020) to extend the tender validity period for a period of 30 days from the date of its expiry. Consequently, on 6<sup>th</sup> November 2020, the Applicant and M/s Kalmar Reachstacker agreed to extension of the tender validity period for a further 30 days with effect from 18<sup>th</sup> November 2020. A Procuring Entity usually requires tenderers to agree to extension of the tender validity period so that such tenderers can extend their tender securities because pursuant to section 61 (4) (d) of the Act, a procuring entity may immediately release any tender security if a bidder declines to extend the tender validity (i.e. bid validity).

Having dispensed with the above issues, the remaining issue is on allegation on forgery of mandatory documents. The Procuring Entity relied on allegations raised against the Applicant in the letter dated 26<sup>th</sup> November 2020 by Concern Citizens Kenya to the Directorate of Criminal Investigations and the one dated 10<sup>th</sup> December 2020 from the Authority to support its view that it could not proceed with the procurement process by awarding the tender to the Applicant. The said allegations only state that the Applicant relied on forged documents without pointing out the specific documents

forged by the Applicant. Furthermore, the allegations were forwarded to the Directorate of Criminal Investigations for investigations and no documentation was adduced by the Board demonstrating that the said investigations have been concluded and that the outcome of the said investigation verifies the truthfulness, or lack thereof, of allegations levelled against the Applicant.

The Board is alive to the 1<sup>st</sup> Respondent's comment in the professional opinion dated 19<sup>th</sup> November 2020 that a due diligence exercise would be appropriate on the governance issues raised and/or acknowledged by the Authority. The said due diligence was not conducted because in the Respondents' view, the time remaining to conduct due diligence while at the same time, to comply with the timelines provided by the Board in Review No. 131/2020, was not sufficient.

The Board has already established that a process of competitive negotiation between the Applicant and M/s Kalmar Reachstacker was initiated on 5<sup>th</sup> November 2020, which was 13 days after the Board rendered a decision dated 23<sup>rd</sup> October 2020 in Review No. 131/2020. As a result of the Respondents' own delay, thirteen (13) days of the period required to comply with the orders of the Board were lost. Despite this, the Respondents never took reasonable steps to seek orders for extension of time within which to conduct due diligence and to comply with the orders of the Board. This would have been an appropriate action to assist in verifying the alleged forged

documents rather than relying on unverified allegations. The Board would then determine whether the Procuring Entity is entitled to extension of time within which to; carry out a due diligence exercise and comply with the orders of the Board. If the outcome of due diligence on the Applicant gives negative responses touching on their documentation, then the Procuring Entity would have the option of disqualifying the Applicant and forward the due diligence report to the Directorate of Criminal Investigations and the Authority for further investigation.

On its second reason, the Respondents aver at paragraph 5 of their Memorandum of Response that, the allegations raised against the Applicant affect the integrity of the subject procurement process and thus, the Respondents were in the process of terminating the same pursuant to section 63 (1) (e) of the Act. In response, the Applicant depones at paragraph 10 of its Supplementary Affidavit that the 1<sup>st</sup> Respondent took extraneous considerations made through letters from third parties and ostensibly relied upon by the 1<sup>st</sup> Respondent without affording the Applicant an opportunity to respond to the said letters.

In addressing this reason, the Board observes that from the documentation provided by the Procuring Entity, there is no evidence that investigations have been conducted with finality regarding the allegations raised against the Applicant. Furthermore, no evidence was furnished to the Board showing that real and tangible evidence of material governance issues were discovered following conclusion of investigations by the aforementioned

institutions, so as to justify the exercise of the discretion under section 63 (1) (e) of the Act.

In **PPARB Application No. 50 of 2020, Danka Africa (K) Limited v. The Accounting Officer, Kenya Ports Authority & Another** (hereinafter referred to as the "Danka Africa (K) Limited Case"), the Board when faced with a scenario where a procuring entity terminated a tender on the basis of material governance issues, held as follows: -

***"According to section 63 (1) of the Act, termination of a procurement process is done by an accounting officer of a procuring entity prior to notification of tender award, without signing a contract. The Procuring Entity must have real and tangible evidence that supports its grounds for termination of a tender, and not merely stating the grounds provided in the aforementioned section. In the Board's view, "material governance issues having been detected" is one of the grounds requiring real and tangible evidence to support termination based on that ground."***

Having considered the finding in the Danka Africa (K) Limited Case, the Board observes that the 1<sup>st</sup> Respondent herein should first ensure the allegations on forgery of documents are verified through a due diligence exercise instead of relying on mere allegations in terminating a procurement processes.



Otherwise, it would disenfranchise tenderers if for example, an investigation is undertaken and the outcome of it shows there was no real and tangible evidence to support allegations of material governance issues, yet a procuring entity already terminated a procurement process relying on unverified allegations on forgery of documents. This goes to the heart of the rules of natural justice in that tenderers are not deprived of their right to administrative review where a procurement process they have participated in, is terminated solely on allegations without a verification process undertaken. In essence, an investigation by relevant institutions ought to verify allegations against the Applicant herein on forgery of documents thus providing real and tangible evidence of the material governance issues detected in the subject procurement process. It is the Board's considered finding that the 1<sup>st</sup> Respondent's intended termination based on allegations on forgery of documents without a verification process to obtain real and tangible evidence of the material governance issues would not meet the threshold of section 63 (1) (e) of the Act.

The Board studied Clause 24.2 (g) of the General Conditions of Contract of the Tender Document which provides as follows: -

***"The Procuring Entity or the Suppliers, without prejudice to any other remedy for breach of contract, by written notice of default sent to the concerned party may terminate the contract if the other party causes a fundamental breach of the contract"***

***Fundamental breaches of contract shall include but not limited to the following: -***

***... (g) The supplier, in the judgement of the Procuring Entity, has engaged in corrupt or fraudulent practices in competing for or in executing the contract”***

The provision under Clause 24.2 (g) of the General Conditions of Contract of the Tender Document demonstrates that even if the contract is the lowest evaluated bidder and the Procuring Entity discovers later that the lowest evaluated bidder acted in a fraudulent manner by submitting forged documents, this would amount to a fundamental breach of the contract between the Procuring Entity and the lowest evaluated bidder. Such a contract would be terminated.

In such scenarios, a procuring entity may state in the contract that the lowest evaluated bidder (i.e. supplier) would have obligation to refund any amounts paid to it by the procuring entity if the contract is terminated as a result of any fraudulent action by the lowest evaluated bidder (i.e. supplier).

The Applicant also averred that the 1<sup>st</sup> Respondent did not pay the amount of Kshs. 305,000/- as directed by the Board in Order No. 4 of the decision rendered on 23<sup>rd</sup> October 2020 in Review No. 131/2020. This assertion was not controverted by the Respondents; neither was the Board furnished with evidence of payment of the amount of Kshs. 305,000/- to the Applicant.

It is the Board's considered finding that the 1<sup>st</sup> Respondent's failure to comply with the orders issued in Review 131/2020 lacks justifiable basis because (i) the Respondents did not challenge the Board's decision in Review No. 131/2020 and therefore, the same is final and binding to it pursuant to section 175 (1) of the Act; with this knowledge, the Respondents initiated competitive negotiations, (ii) the Respondents did not provide any justifiable basis for the unreasonable delay of 13 days after 23<sup>rd</sup> October 2020 and thus began competitive negotiations when the time provided by the Board was about to lapse, and this delay resulted in limited time remaining to comply with the orders of the Board (iii) after realizing the time remaining was limited, the Respondents did not approach this Board seeking extension of time within which to comply with the Board's orders in Review No. 131/2020 (iv) the 1<sup>st</sup> Respondent did not furnish the Board with evidence of payment of the amount of Kshs. 305,000/- to the Applicant as directed through Order No. 4 of the Board's decision of 23<sup>rd</sup> October 2020 in Review No. 131 of 2020. In essence, even though the Procuring Entity initiated competitive negotiations, the same was not completed within the required period of 14 days from 23<sup>rd</sup> October 2020 as directed by the Board in Review No. 131/2020 and the reasons provided for failure to comply with the orders of the Board are not justifiable.

Given the circumstances and the foregoing reasons, the Board finds that the 1<sup>st</sup> Respondent failed to comply with the orders of the Board issued on 23<sup>rd</sup> October 2020 in PPARB Application No. 131 of 2020, Rhombus Construction

Company Limited v. The Accounting Officer, Kenya Ports Authority & 2 Others.

In determining the appropriate reliefs to grant as the second issue for determination, the Board observes that at paragraph 67 to 69 of its Written Submissions, the Applicant referred the Board to the provision of section 173 (c) of the Act to support its view that the Board should substitute its decision for the decision of the 1<sup>st</sup> Respondent, by awarding the subject tender to the Applicant. To support its view, the Applicant took the view that the Board was furnished with evidence to show recommendation for award of the subject tender was made to the Applicant and supported by the Head of Procurement function in his professional opinion.

Having considered the foregoing pleadings, the Board observes that section 173 (c) of the Act provides that: -

***"Upon completing a review, the Review Board may do any one or more of the following—***

***(a) .....***;

***(b) .....***;

***(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings"***

The Board takes cognizance of the fact that it has only exercised the power under section 173 (c) of the Act in exceptional circumstances, including instances where an applicant is the only remaining bidder at the Financial Evaluation Stage and thus it is obvious such an applicant would be awarded the tender in question, if the Board directs a re-evaluation. In the instant case, the 1<sup>st</sup> Respondent considered due diligence as one of the options of verifying the allegations made against the Applicant before making a decision whether or not to award the subject tender to the Applicant. The Board has also established that the said allegations could be verified through a due diligence exercise and if the Procuring Entity received negative responses, then the Procuring Entity would disqualify the Applicant's bid. From the documentation provided to the Board, there is no evidence that a due diligence exercise was conducted. It is the Board's considered view that the obtaining circumstances do not justify the exercise of the power under section 173 (c) of the Act for the reasons stated hereinbefore.

The Applicant cited section 173 (b) of the Act and section 48 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya to support its view that the Board ought to extend the tender validity period of the subject tender. In response, the Respondents aver at paragraph 8 (b) of their Memorandum of Response that the Board lacks jurisdiction to extend or direct the 1<sup>st</sup> Respondent to extend the tender validity period, which can only be extended once pursuant to section 88 (3) of the Act.

Section 88 (1) and (3) of the Act which are relevant in addressing the question whether the Board has powers to extend the tender validity period, provide 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"***

It is common ground between parties that the Board directed the 1<sup>st</sup> Respondent 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 as can be seen from Order No. 3 of the Board's decision in Review No. 131/2020. Parties are also in agreement that in a letter dated 6<sup>th</sup> November 2020, the Applicant duly accepted the Procuring Entity's request for extension of the tender validity period for a further 30 days with effect from 18<sup>th</sup> November 2020 with the understanding that the extended period would lapse on 17<sup>th</sup> December 2020. This therefore means, by the time the Applicant filed its Request for Review on 16<sup>th</sup> December 2020, the tender validity period of the subject tender had one day remaining for it to lapse.

Section 168 of the Act states that: -

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

The import of section 168 of the Act, has been the subject of proceedings at the **High Court in Judicial Review Application No. 540 of 2017, Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Ex parte Transcend Media Group Limited [2018] eKLR** (hereinafter referred to as "the Transcend Media Case") where the Honourable Justice Nyamweya held at paragraphs 52 and 53 as follows: -

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

***[53] 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."***

It is therefore clear from the foregoing findings that suspension of the procurement proceedings pursuant to section 168 of the Act includes suspension of the tender validity period. As to whether the Board can extend the tender validity period having noted that the 1<sup>st</sup> Respondent already exercised the power under section 88 (1) of the Act, the Board observes that section 173 (b) of the Act cited by the Applicant provides that: -

***"Upon completing a review, the Review Board may do any one or more of the following—***

***(a) .....***

***(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings"***

The Applicant also cited section 48 of the Interpretation and General Provisions Act which states as follows: -

***"Where a written law confers power upon a person to do or to enforce the doing of an act or thing, all powers shall be***



**deemed to be also conferred as are necessary to enable the person to do or to enforce the doing of the act or thing”**

Having considered the provision of section 173 (b) of the Act together with section 48 of the Interpretation and General Provisions Act, the Board is of the considered opinion that it was never the intention of the framers of the Act that the Board would have a discretionary power under section 173 (b) of the Act to give directions on what needs to be done or redone in a procurement process without an inherent power to extend the tender validity period after the 1<sup>st</sup> Respondent has exhausted the power under section 88 (1) of the Act. To assume that the Board has no powers to extend the tender validity period would mean that the power under section 173 (b) of the Act would be exercised in vain especially in instances where an accounting officer ought to conclude a procurement process within the timelines provided by this Board and within the tender validity period. A good example is a case where the tender validity period has one day remaining for it to lapse yet there are certain actions that ought to be taken by an accounting officer of a procuring entity within the tender validity period and such actions cannot be concluded in one day.

To support the Board’s position that it has an inherent power to extend the tender validity period, the Board observes that the Honourable Justice Nyamweya addressed this issue in the Transcend Media Case where it was held at paragraph 55 thereof as follows: -

***"[55] In the event that there is no stay, there will then be a need for the Respondent [Board] or procuring entity to extend***

***the tender validity period if it becomes necessary to do so to conclude the procurement proceedings” [Emphasis by the Board]***

The foregoing finding fortifies the Board’s position that it has an inherent power to extend the tender validity period so as to ensure a procurement process is concluded in accordance with the direction given to the 1<sup>st</sup> Respondent pursuant to section 173 (b) of the Act. This inherent power assists in avoiding instances where an accounting officer of a procuring entity refuses to extend the tender validity period pursuant to section 88 (1) of the Act and thus the Board would compel the accounting officer to exercise such power, or instances where after exercising the power under section 88 (1) of the Act, an accounting officer mischievously waits for the tender validity period to lapse because he or she is well aware that award of a tender and signing of a contract cannot be made after the lapse of the tender validity period since such a tender would have “died a natural death”.

One of the reasons the Applicant approached this Board on 16<sup>th</sup> December 2020 is because it knew the tender validity period would lapse on 17<sup>th</sup> December 2020 and had not received any communication from the 1<sup>st</sup> Respondent regarding conclusion of the subject procurement proceedings. Furthermore, the Applicant was well aware that the 1<sup>st</sup> Respondent already exhausted the power under section 88 of the Act and thus, the only recourse

the Applicant had was to rush to the Board seeking extension of the tender validity period before the same lapses.

In order to ensure the 1<sup>st</sup> Respondent complies with the Board's orders in Review No. 131/2020, the Board finds it necessary to extend the tender validity period of the subject tender for a further period of 30 days from the date of this decision.

Having found that the 1<sup>st</sup> Respondent failed to comply with the orders of the Board issued on 23<sup>rd</sup> October 2020 in Review No. 131/2020, it is the Board's considered view that the 1<sup>st</sup> Respondent must comply with the said orders whilst taking into consideration the Board's finding on the options that were available to the 1<sup>st</sup> Respondent when allegations against the Applicant were brought to his attention. Section 176 (1) (m) and (2) of the Act states that:

***"(1) A person shall not: -***

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

***(2) A person who contravenes the provisions of subsection (1) of this section, commits an offence..."***

It is therefore clear that any person that contravenes the orders of the Board commits an offence under the Act. The Board is mindful of the powers to ensure compliance with the Act vested on the Director General of the Authority pursuant to section 34 of the Act which provides that: -

***"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."***

The Board observes that the subject procurement process has taken a long period and the same has not been concluded since advertisement on 14<sup>th</sup> and 15<sup>th</sup> January 2020. The same has now been the subject of three request for review proceedings through Review No. 119/2020, Review No. 131/2020 and the instant Request for Review where the Board has established the 1<sup>st</sup> Respondent fails to comply with the orders of the Board. The Board finds it necessary for the Director General of the Authority to ensure the 1<sup>st</sup> Respondent complies with the orders issued by this Board by requesting information pertaining to the subject procurement process in exercise of the power under section 34 of the Act.

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 Accounting Officer of the Procuring Entity is hereby directed to fully comply with the orders of the Board issued on**

**23<sup>rd</sup> October 2020 in PPARB Application No. 131 of 2020, Rhombus Construction Company Limited v. The Accounting Officer, Kenya Ports Authority & 2 Others with respect to Tender No. KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers within fourteen (14) days from the date of this decision, taking into consideration the findings of the Board in this Review.**

- 2. The Accounting Officer of the Procuring Entity is hereby directed to furnish the Board with a status report on compliance with the orders of the Board issued on 23<sup>rd</sup> October 2020 in PPARB Application No. 131 of 2020, Rhombus Construction Company Limited v. The Accounting Officer, Kenya Ports Authority & 2 Others with respect to Tender No. KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers within twenty-one (21) days from the date of this decision.**
- 3. The Tender Validity Period of Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers be and is hereby extended for a further period of thirty (30) days from the 7<sup>th</sup> day of January 2021.**
- 4. The Procuring Entity shall bear the costs of this Request for Review amounting to Kshs. 255,000/- to be paid to the**

**Applicant within fourteen (14) days from the date of this decision.**

**Dated at Nairobi this 6<sup>th</sup> day of January 2021**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**