

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 47/2020 OF 6<sup>TH</sup> APRIL 2020**

**BETWEEN**

**AMBER CONSTRUCTION LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**COUNTY ASSEMBLY OF MACHAKOS.....RESPONDENT**

Review against the decision of the County Assembly of Machakos with respect to Tender No. 751979-2019-2020 for Proposed Construction, Equipping and Furnishing of County Assembly Chambers and Associated Works at Machakos Town

**BOARD MEMBERS**

- |                           |              |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa       | -Chairperson |
| 2. Ms. Rahab Chacha       | -Member      |
| 3. Ms. Phyllis Chepkemboi | -Member      |

**IN ATTENDANCE**

- |                      |                              |
|----------------------|------------------------------|
| 1. Mr. Phillip Okumu | -Holding brief for Secretary |
|----------------------|------------------------------|

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

The County Assembly of Machakos (hereinafter referred to as "the Procuring Entity") invited eligible and interested bidders to submit their bids in response to Tender No. 751979-2019-2020 for Proposed Construction, Equipping and Furnishing of County Assembly Chambers and Associated Works at Machakos Town (hereinafter referred to as "the subject tender"). The Tender was advertised in the Standard Newspaper on 24<sup>th</sup> October 2019.

Bidders were instructed to download tender documents from the Procuring Entity's website [www.machakosassembly.go.ke](http://www.machakosassembly.go.ke) and also from the IFMIS portal [www.supplier.treasury.go.ke](http://www.supplier.treasury.go.ke).

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

A total of six (6) firms submitted bids and the same were opened on 7<sup>th</sup> November 2019 as follows: -

<b>No</b>	<b>Firm name</b>
1.	M/s Stepal Builders Company Limited
2.	M/s Nova General Trading Company Limited
3.	M/s Amber Construction Limited
4.	M/s Cocy Holdings Investments Limited
5.	M/s Epco Builders Limited
6.	M/s Commercial Hpldings Limited

*“the Act”), a responsive tender shall not be affected by minor deviations that do not materially depart from the requirements set out in the tender documents or errors or oversights that can be corrected without affecting the substance of the tender.*

The Evaluation Committee resolved to seek advice from the Public Procurement Regulatory Authority (hereinafter referred to as “the Authority) as to whether the said certification can be treated as a minor deviation that doesn’t materially depart from the requirements set out in the tender documents or errors or oversights that can be corrected without affecting the substance of the tender. The evaluation process was halted and a letter to seek advice was written to the Authority dated 22<sup>nd</sup> November 2019.

Via a letter dated 27<sup>th</sup> November 2019, the Authority responded as follows: -

- ✓ In their view, the bidder did not deviate from the express requirements of the mandatory criteria since the requirement of certification by a commissioner of oaths did not clearly indicate that it must be signed and dated by an advocate;
- ✓ As provided for under section 83 of the Act and in accordance with Part D of the criteria in the Tender Document a due diligence exercise may be conducted with respect to the subject tender. The Authority thus recommended that the Assembly conduct due diligence if the bidder emerges as the lowest evaluated bidder, in

## **Evaluation of bids**

According to the Procuring Entity's Tender Document with respect to the subject tender, evaluation was to be conducted in the following three stages:-

- Preliminary/Mandatory Evaluation
- Technical Evaluation;
- Financial Evaluation.

## **Preliminary Evaluation**

At this stage of evaluation, bids were to be evaluated against fifteen (15) mandatory criteria as outlined in the Tender Document.

The Evaluation Committee examined the mandatory criteria and noted the following: -

- a) Some of the mandatory requirements/documents needed to be certified as true copies of the original;
- b) There was a requirement that a hard copy of the bid bond needed to be submitted manually;
- c) One of the bidders, M/s Amber Construction Limited, had their document stamped by a commissioner of oaths but not signed and dated.

The Evaluation Committee deliberated on the aforementioned observations and it was noted that pursuant to section 79 (2) of the Public Procurement and Asset Disposal Act (hereinafter referred to as

order to confirm the authenticity of the documents before making a recommendation of award.

The Evaluation Committee thus proceeded with the preliminary evaluation of tenders and evaluated the six bids against the mandatory requirements as outlined in the Tender Document.

Upon conclusion of the exercise, five (5) bidders were disqualified for failing to meet the set criteria as follows: -

- a) M/s Stepal Builders Company Limited;
- b) M/s Nova General Trading Company Limited;
- c) M/s Cocy Holdings Investments Limited;
- d) M/s Epco Builders Limited;
- e) M/s Commercial Holdings Limited.

Only one (1) bidder, M/s Amber Construction Limited qualified for the next stage of evaluation.

## **2. Technical Evaluation**

At this stage of evaluation, bidders were evaluated against the technical specifications in the Tender Document. Scores were assigned and marked out of a total score of 100. Bidders who scored a pass mark of 80% would qualify for the next stage of evaluation.

Upon conclusion of this stage of evaluation, all bids were found to be non-responsive as no bidder met the pass mark of 80%.

### **The Evaluation Committee's Recommendation**

Upon conclusion of the evaluation process, the Evaluation Committee recommended that the tender should be re-advertised and the following to be considered: -

- a) The pass mark for technical evaluation to be revised down to 75%;
- b) The evaluation criteria should be defined/reviewed to be clear;
- c) Estimated bill of quantities to be provided by the quantity surveyor;
- d) Members cited a letter from the Ministry of Public Works on chamber expenditure limit and recommended that the Assembly to seek clarification from the Commission on Revenue Allocation on the same.

### **Professional Opinion**

In view of the evaluation process, the Procuring Entity's Head of Supply Chain Management reviewed the Evaluation Report and commented as follows: -

***"Having gone through the scores the discrepancy is big between the highest and lowest i.e. 59-86 scores. In my view the assignment be returned to the Committee to harmonize the scores."***

The Head of Supply Chain Management thus advised the Accounting Officer to return the assignment back to the Evaluation Committee to harmonize the scores.

The Accounting Officer wrote to the Authority vide a letter dated 23<sup>rd</sup> December 2019 seeking guidance on the same. In the Authority's response dated 4<sup>th</sup> February 2020, it cited that for the scorers to come up with such a disparity in score margins, this may imply subjective application of the evaluation criteria by the evaluators or that the evaluation criteria applied was not objective. The Authority also cited Regulation 6 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations"), as amended by the Public Procurement and Disposal (Amendment) Regulations, 2013 which provides that "*each member of the evaluation committee shall evaluate the tender or proposals received by the procuring entity independently from the other members prior to sharing his or her analysis questions and evaluation including his or her rating with the other members of the committee.*"

Following the aforementioned communication, the Accounting Officer brought to the attention of the Evaluation Committee that the said tender was not done in an objective manner as per the laid evaluation criteria in the Tender Document and required the Evaluation Committee Members to sit again and come up with an objective report as outlined in the Act and the Regulations.

## Re-evaluation Process

The Accounting Officer re-appointed the Evaluation Committee members vide a memo dated 17<sup>th</sup> February 2020 and further appointed two technical officers to join the committee in its evaluation of bids. The Accounting Officer further invited observers from the Law Society of Kenya and the Authority to oversee the evaluation process but the Authority did not attend the meeting.

The Evaluation Committee agreed that since there was only one bidder who had qualified for technical evaluation, the Committee would re-evaluate the said bidder at technical evaluation as per the technical evaluation criteria stipulated in the Tender Document.

Upon conclusion of this stage of evaluation, the bidder was awarded an average score of 83% and thus qualified for the next stage of evaluation.

## Financial Evaluation

At this stage of evaluation, the Evaluation Committee went through the engineer's estimate vis-a-vis the bidder's quotes as below: -

No.	Description	Engineers Estimate (Kshs)	Bidder's Quote
1.	Builders Works including services	247,552,814.00	248,728,037.00
2.	Furniture and curtains	42,292,066.00	29,217,150.00
3.	Multimedia installations	40,360,650.00	56,757,300.00
4.	Artwork and Murals	10,594,470.00	14,610,500.00
		340,800,000.00	<b>349,312,987.00</b>

Members of the Evaluation Committee noted some significant variances on some items between engineers estimate and the bidder's quote and after thorough scrutiny the public works quantity surveyor members advised that the items are within market rates

### **The Evaluation Committee's Recommendations**

Upon conclusion of the re-evaluation process, the Evaluation Committee recommended that the contract be awarded to M/s Amber Construction Limited as the lowest evaluated bidder at their tender price of Kshs 349,312,987.00 subject to the following: -

a) Confirmation of the Proposed County Infrastructure Designs and Expenditure Limits for Construction of Assembly Modern Chamber where the limit for County Assembly of Machakos falls under category of 30-60 capacity (County Assembly of Machakos has 59 members) where the limit is Kshs 250 million for total build up area i.e mechanical works, electrical works, and external facilities e.g. perimeter wall and toilet as outlined in a letter from the Department of Public Works dated 27<sup>th</sup> August 2018.

b) Enquire whether the said expenditure limit includes cost for designs and supervision. The Assembly had already engaged a consultant on the same and signed a contract whereby it was required to pay 9.5% of the engineer's estimate, of which 70% of the 9.5% of the engineer's estimate was paid. We recommend that the Accounting Officer seek guidance on the same before the award.

c) Members agreed, considering the process was initiated through IFMIS, the Accounting Officer to liaise with the Director IFMIS to unlock technical scoring to enable the members to finalize the process in the IFMIS system.

### **Due Diligence**

The Evaluation Committee members conducted due diligence on M/s Amber Construction Limited on 12<sup>th</sup> and 13<sup>th</sup> March 2020 at their offices in Nairobi and at the bidder's project site in Nakuru respectively.

Due diligence was conducted with respect to four parameters: -

#### **1. Visitation of the bidder's office**

On this parameter, the Evaluation Committee was to identify if the contractor had sufficient capacity to undertake the works successfully and also how established the contractor was in the construction industry.

#### **2. Visitation of bidder's ongoing project sites**

The Evaluation Committee checked on how the bidder was currently handling similar building projects and analysed the contractor's ability to undertake a similar project by studying an ongoing work with similar parameters.

### **3. Visitation of bidder's completed project site(s)**

The Evaluation Committee checked on how the contractor completed his works in terms of quality of finishes, workmanship, cost, timelines, satisfaction of client and users etc.

### **4. Authenticity of Financial Documents**

The Evaluation Committee sought clarification from the contractor on why its documents were stamped but not signed by the advocate. The bidder responded that the volume of documents were huge and at the time of submission of the tender in IFMIS the advocate did not manage to sign all the documents but stamped them as evidence of full certification of the same.

The Evaluation Committee further received a response from Equity Bank in a letter dated 16<sup>th</sup> March 2020 in which it confirmed that the information given by the bidder was true and the documents submitted by it were true copies of the original. The bidder further provided an original copy of the financial statements for verification.

The Deputy Clerk, Nakuru County Assembly, further informed the Evaluation Committee that the bidder was undertaking their project worth Kshs 303 million and that the bidder was six (6) weeks ahead of the scheduled time frame from the commencement of works on 16<sup>th</sup> December 2019.

Based on the findings from the four (4) Evaluation Committee members and in view of the response from the three (3) companies that information was sought in order to confirm the authenticity of the bidder's documents, the Evaluation Committee was satisfied that the bidder qualified to be awarded the contract.

### **Second Professional Opinion**

In view of the re-evaluation process, the Procuring Entity's Head of Supply Chain Management reviewed the Evaluation Report and forwarded the same to the Accounting Officer for approval.

The Accounting Officer signified his approval on 19<sup>th</sup> March 2020, subject to confirmation and approval of the proposed works and expenditure limits by the Ministry of Works and the Senate.

### **THE REQUEST FOR REVIEW NO. 47 OF 2020**

M/s Amber Construction Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated and filed on 6<sup>th</sup> April 2020 (hereinafter referred to as "the Request for Review") together with an Affidavit in Support of the Request for Review sworn on even date (hereinafter referred to as "the Applicant's Affidavit").

In response, the Procuring Entity filed a Memorandum of Response dated 14<sup>th</sup> April 2020 and filed on 16<sup>th</sup> April 2020 (hereinafter referred to

as “the Procuring Entity’s Response”) together with a Replying Affidavit sworn on 14<sup>th</sup> April 2020.

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

- i. An order directing the Respondent to continue with the subject tender process to its logical conclusion within an extended tender validity period of such number of days as the Board may deem fit to order;*
- ii. An order directing the Respondent to notify all tenderers of their success or otherwise in accordance with the provisions of section 87 of the Act upon conclusion of the tender process herein but in any event before expiry of the extended tender validity period;*
- iii. An order directing the Respondents to pay the costs of the review;*
- iv. Such further orders as the Board may find necessary for the ends of justice.*

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 (hereinafter referred to as “the PPRA”) website ([www.ppra.go.ke](http://www.ppra.go.ke)) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review

proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 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 the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions.

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, No, 33 of 2015 (hereinafter referred to as "the Act").

In compliance with the directions of the Board, the Applicant filed its written submissions on 20<sup>th</sup> April 2020. No written submissions were filed by the Procuring Entity.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act,

2015 (hereinafter referred to as "the Act") together with the written submissions by parties.

The main issue for determination is as follows: -

***I. Whether the Applicant's prayer to extend the tender validity period of the subject tender is merited and the appropriate reliefs to grant in the circumstances.***

The Applicant in this Request for Review application submitted that the tender validity period of the subject tender was due to lapse on 7<sup>th</sup> April 2020 and that it was apprehensive that the tender process would not be completed within the tender validity period including entering into a contract in accordance with section 135 (3) of the Act.

The Applicant, while relying on the decision of this Board in **PPARB Application No 133 of 219 Med Marine Kilavuzluk VE Romorkor Hizmetleri Ins. San. Ve. A.S v. The Accounting Officer, Kenya Ports Authority and Cheoy Lee Shipyards Limited**, urged the Board to extend the tender validity period to ensure completion of the subject procurement process, noting that the Procuring Entity had already exercised its power to extend the same for a further thirty (30) days in line with section 88 (3) of the Act, which stipulates that a procuring entity can only extend the tender validity period of a tender once.

The Procuring Entity in its Response conceded this ground of review and did not contest the Applicant's prayer before this Board for an extension of the tender validity period. It however explained that the lapse of time and its inability to conclude the subject procurement process within the tender validity period was occasioned by reasons beyond its control.

According to the Procuring Entity it encountered numerous hurdles during the tender evaluation process which necessitated it to seek advice on two separate instances from the Authority thereby delaying the evaluation process and further consuming the tender validity period.

Further, this was the first time that the Procuring Entity utilized the e-procurement system for a major procurement process and it thus encountered numerous technical challenges for which it had to seek support from the National Treasury.

More importantly however, it was the Procuring Entity's submission that upon conclusion of the evaluation process, the Evaluation Committee recommended *inter alia* that the Accounting Officer seek guidance on the following issues before award of the tender to the lowest evaluated bidder: -

- a) Confirmation of the Proposed County Infrastructure Designs and Expenditure Limits for Construction of Assembly Modern Chamber where the limit for County Assembly of Machakos falls under category of 30-60 capacity (County Assembly of Machakos has 59 members) where the limit is Kshs 250 million for total build up

area i.e mechanical works, electrical works, and external facilities e.g. perimeter wall and toilet as outlined in a letter from the Department of Public Works dated 27<sup>th</sup> August 2018.

b) Whether the said expenditure limit includes cost for designs and supervision. The Assembly had already engaged a consultant on the same and signed a contract whereby it was required to pay 9.5% of the engineer's estimate, of which 70% of the 9.5% of the engineers estimate was paid.

The Procuring Entity submitted that vide a letter dated 2<sup>nd</sup> March 2020, it sought advice from the Ministry of Public Works, who advised the Procuring Entity in a response dated 24<sup>th</sup> March 2020 to seek further clarification from the Senate.

According to the Procuring Entity it wrote a letter to the Senate dated 26<sup>th</sup> March 2020 seeking clarification on the maximum number of Members of County Assembly to make provision for in the proposed assembly chamber as advised by the Ministry of Public Works. It however was still awaiting a response from the Senate on the expenditure limits for the construction of an assembly chamber without which the Procuring Entity may not be able to award the tender and thus complete the subject procurement process.

It was the Procuring Entity's submission that although it budgeted for the assembly chamber in compliance with the recommendations of the

Ministry of Public Works to the Senate on the expenditure limits, subsequent guidelines provided by the national regulation bodies were unclear thus the Procuring Entity's need for clarification on whether to proceed as is with the subject procurement process.

On 15<sup>th</sup> March 2020 the President issued a raft of government directives concerning the COVID-19 pandemic which substantively minimized government office operations. Further, on 27<sup>th</sup> March 2020, the Authority also issued Circular No. 2/2020 and instituted several preventative measures for handling of procurement activities by procuring entities during the COVID-19 pandemic which included *interalia*: -

- a) That procuring entities should scale down their procurement activities with exception of the ongoing procurement processes, save for the procurement of essential and critical services;
- b) That for the initiated procurement processes, accounting officers should make a decision on whether the procurement process can proceed in the context of the prevailing circumstances and in view of the government directives as well as objectives/principles enshrined in the Act and the possibility of the entity achieving the intended outcome of the subject procurement within the existing constraints;
- c) That where a procuring entity is unable to process an ongoing procurement to conclusion, the Accounting Officer will be expected to make a rational decision on whether to terminate the

procurement by invoking provisions of section 63 of the Act on the basis of *force majeure* to avoid inherent challenges and risks.

In view of the foregoing, it was the Procuring Entity's submission that although it was not averse to the Applicant's prayers for extension of the tender validity period and for notifications to be issued to all tenderers on the outcome of their bids, it urged the Board to grant the extension of the tender validity period conditional to the receipt of a reply from the Senate on whether to proceed with the subject procurement process.

In its view the procurement process ought to be suspended until such a time as it gets a response from the Senate, in which case the suspension of the procurement process would be explained by the *force majeure* of the COVID-19 pandemic.

In the alternative, the Procuring Entity was also of the view that the procurement process ought to be terminated in accordance with section 63 of the Act citing *force majeure* as the reason for termination since the Procuring Entity cannot proceed with the subject procurement process without a response from the Senate which was not sitting owing to the COVID-19 pandemic, in which case the procurement process would have to commence afresh once normal government operations resume.

Having considered all parties pleadings, written submissions and supporting documentation submitted before this Board in this Request for Review application, the Board finds it necessary to first determine the meaning of a tender validity period.

The interpretation section of the Act defines a "tender" in the following terms: -

***"tender" means an offer in writing by a candidate to supply goods, services or works at a price; or to acquire or dispose stores, equipment or other assets at a price, pursuant to an invitation to tender, request for quotation or proposal by a procuring entity.***

Accordingly, in a procurement process, bidders submit a tender, that is an offer in writing to supply goods, services or works at a price pursuant to an invitation to tender, by a procuring entity.

Notably, the Act does not define what tender validity means in its interpretation section. Despite this, the Board studied section 88 of the Act to understand the meaning of tender validity, which section reads 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) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.***

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

***(4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1)."***

Section 88 (1) of the Act only provides a discretion to the Procuring Entity to extend the tender validity period. From this provision, it can be said the tender validity period is the period within which tenders shall remain valid or alive, that is to say, a procuring entity may specify a period within which the life of a tender runs.

According to section 88(1) of the Act, a procuring entity is required to extend the period during which tenders may remain valid, that is the tender validity period, before the period expires. Notice of this extension shall be made in writing to each bidder who submitted a tender and may only be done once and for a period of not more than thirty days.

In the instant case, we observe that the Procuring Entity conceded to the Applicant's submission that the tender validity period of the subject tender was insufficient to conclude the subject procurement process.

The Board observes Clause 3.6 of Section II Instructions to Tenderers on page 2/7 of the Tender Document provides as follows: -

**"Tenders shall remain valid for a period of One Hundred and Twenty Days (120) days from the date of submission. However, in exceptional circumstances, the Employer may request that the tenderers extend the period of validity for a specified additional period. The request and the tenderer's response shall be made in writing. A tenderer may refuse the request without forfeiting the tender security. A tenderer agreeing to the request will not be required or permitted to otherwise modify the tender, but will be required to extend the validity of tender security for the period of extension and in compliance with Clause 3.7 -3.11 in all respects."** [Emphasis by the Board}

Accordingly, the tender validity period of the subject tender was set for a period of one hundred and twenty (120) days from the tender submission deadline.

The Board observes that the tender submission deadline of the subject tender was 7<sup>th</sup> November 2019 and thus in view of the aforementioned clause in the Tender Document, the tender validity period of the subject tender was set to lapse on 6<sup>th</sup> March 2020.

However, vide a letter dated 3<sup>rd</sup> March 2020, the Procuring Entity informed the Applicant of its extension of the tender validity period, which letter read as follows: -

***"Reference is made to Tender No. 751979-2019-2020 for Proposed Construction, Equipping and Furnishing of County Assembly Chamber and Associated Works, advertised in the Standard Newspaper on 24<sup>th</sup> October 2019 on the above subject.***

***The County Assembly of Machakos has not finalized the evaluation process; the validity period of the said tender expires on 7<sup>th</sup> March 2020. Thereby I hereby notify you of the extension of the tender validity period of thirty (30) days from 7<sup>th</sup> March 2020, as stipulated in the law pursuant to section 88 of the PPDA 2015 subsection:***

- 1. Before the expiry of the period during which tenders shall remain valid the accounting officer of the procuring entity may extend that period***
- 2. The accounting officer of the procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.***

***You are required to respond within seven (7) days from the date of this letter... "***

From the above communication, we note that the Procuring Entity extended the tender validity period for a further thirty (30) days from 7<sup>th</sup> March 2020.

The Board is cognizant of section 88 (3) of the Act which gives the extent of the Procuring Entity's power to extend the tender validity period as it states: -

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

Accordingly, once the Procuring Entity extended the tender validity period for a further thirty (30) days, it cannot exercise this power a second time, even if the Procuring Entity has not concluded the subject procurement process by making an award and executing a contract within the tender validity period after such an extension.

This Board considered the recourse available to parties to a procurement process in such an instance in its determination in **PPARB Application No 133 of 2019 Med Marine Kilavuzluk VE Romorkor Hizmetleri Ins. San. Ve. A.S v. The Accounting Officer, Kenya Ports Authority and Cheoy Lee Shipyards Limited**

***"...the procuring entity or bidders approach the Board for an order extending the tender validity period for purposes of concluding the procurement process to its logical conclusion (i.e to award the tender and execute a contract before the tender validity period lapses). The Act never intended that a procurement process dies a natural death***

***due to the fact that a procuring entity is incapable of extending the tender validity period a second time.***

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

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

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

Further, in **Judicial Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR**, the High Court opined as follows: -

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

From the above two decisions, it is evident that the Procuring Entity or bidders may approach this Board for an order extending the tender validity period if such period has not lapsed before review proceedings are lodged before this Board, for purposes of concluding the procurement process to its logical conclusion. Notably, the High Court recognized the powers of this Board to extend the tender validity period where necessary to do so, in order to allow for the conclusion of a procurement process.

In the instant case, the Board notes that following the Procuring Entity's extension of the tender validity period for a further thirty (30) days in accordance with section 88 (3) of the Act, the tender validity period was set to lapse on 6<sup>th</sup> April 2020, which the Board observes was the date this Request for Review was lodged before this Board by the Applicant.

In this regard therefore, it is the Board's considered view that nothing bars it from extending the tender validity period in order to allow the Procuring Entity to complete the procurement process to its logical conclusion and in turn comply with any order the Board may issue with respect to this Request for Review application.

However, the Board takes note of the Procuring Entity's submission that it cannot conclude the subject procurement process through the making of an award of tender, until it receives advice from the Senate on the expenditure limits for the construction of an assembly chamber, as recommended by the Ministry of Public Works.

The Board observes that via a letter dated 2<sup>nd</sup> March 2020, the Procuring Entity wrote to the Principal Secretary, Ministry of Public Works stating as follows: -

***"Reference is made to your circular Re: PW/A/200/103 VOL I/136 dated 27<sup>th</sup> August 2018 in regards to expenditure limits for County Infrastructure Designs. County Assembly of Machakos Service Board has proposed to construct a modern chamber and its process is at an advanced stage of procurement.***

***Currently we have a membership of up to sixty (60) including the Speaker which is at the upper limit.***

*Machakos County have a membership of forty (40) wards and in the last general elections, only three (3) women were elected and to adhere to the general parity in the house, seventeen (17) members had to be nominated. Other nominations included two (2) representing the people with disability (PWD), one woman and one man.*

*Taking into consideration the worst case scenario, if there is no elected women/men and the above requirement has to be met, implication is that the membership of the chamber will be in the range of sixty four to sixty seven (64-67).*

*Subsequently, having the above consideration, we have proposed to construct a modern chamber with a capacity of sixty seven (67) members for prosperity.*

*Estimated costs for various components are as follows: -*

<i>Building works</i>	<i>247,522,814.00</i>
<i>Furniture</i>	<i>42,292,066.00</i>
<i>Multimedia/Broadcasting</i>	<i>40,360,650.00</i>
<i>Artworks and murals</i>	<i>10,594,470.00</i>
<i>Totals</i>	<i><u>340,800,000.00</u></i>

***The purpose of this letter is therefore to seek for your clearance and guidance in line with the circular so we can finalize the procurement of the construction of the project."***

The Board observes from the above letter that the Procuring Entity wrote to the Ministry of Public Works seeking guidance and clearance to construct an assembly chamber with a capacity of sixty seven (67) members at an estimated cost price of Kshs 340,800,000/- at an advanced stage of the procurement process.

In a response dated 24<sup>th</sup> March 2020, the Principal Secretary, Ministry of Public Works made observations with respect to the scheme designs of the assembly chamber and advised as follows: -

***"...We note that the cost estimate for the proposed chambers is Kshs 340,800,000.00. This estimate is above the limits of Kshs 250,000,000 for Type 2 chambers accommodating 30-60 MCAs as communicated vide letter Ref PW/A/200/103/LOV.1/136 dated 27<sup>th</sup> August 2019 when gauged against the number of MCAs in the current assembly i.e 60 No including the Speaker.***

***We have further noted your justification that the number of MCAs could rise to between 64-67 in future in cases where one gender is elected for all elective MCA seats and that the other gender and persons from special groups***

***would have to be nominated to meet constitutional thresholds. In such scenario, the chamber will fall within Type 3 (60-90 MCAs) with limits of Kshs 400,000,000.00 and therefore would accommodate the cost estimates of Kshs 340,800,000.00.***

***You may engage the Senate for further guidance on this matter with regard to numbers. The State Department for Public Works, together with other agencies, namely the Commission on Revenue Allocation (CRA) and the Office of the Controller of Budget (COB) who form the Multi Agency Team will provide recommendations to the Senate when called upon to do so. Further, once the Senate has pronounced itself on the matter, the State Department for Public Works will be at hand to offer any support as need would arise.”***

The Board observes from the above communication that the Principal Secretary, Ministry of Public Works was of the view that the Procuring Entity should consult the Senate for further guidance with regards to the numbers of Members of County Assembly concerning its proposal to construct Type 3 assembly chambers (60-90 MCAS) at its cost estimate of Kshs 340,800,000.00.

Following the advice of the Principal Secretary, the Procuring Entity wrote to the Clerk/Secretary of the Parliamentary Service Commission, via a letter dated 26<sup>th</sup> March 2020, requesting for approval for

construction of the proposed Machakos County Assembly Chamber as Type 3 (61-90 MCAs) with a construction cost limit of Kshs 400 million.

It was therefore the Procuring Entity's submission that it did not receive a response from the Senate and thus could not proceed with the subject procurement process.

At this juncture the Board finds it necessary to establish the role played by the Senate, if any, with respect to the financial management of county assemblies within the context of a county government.

The Constitution of Kenya ushered in a devolved system of governance which according to Article 6 (2) established governments at the national and county levels **"...distinct and interdependent and which shall conduct their mutual relations on the basis of consultation and cooperation."**

The Board studied Article 176 of the Constitution of Kenya which provides for a county government as follows: -

***(1) There shall be a county government for each county, consisting of a county assembly and a county executive.***

***(2) Every county government shall decentralize its functions and the provision of its services to the extent that it is efficient and practicable to do so.***

Accordingly, the Constitution provides for a county level of government which shall consist of a county assembly as the legislative arm of the county government and a county executive. Further, every county government shall decentralize the functions of government and the provision of services to the extent it is efficient and practicable to do so.

In order to execute its functions as a county government, the Constitution established a framework to enable resource sharing and allocation between the national and county levels of government as articulated under Article 202 of the Constitution which provides that: -

***"Revenue raised nationally shall be shared equitably among the national and county governments"***

In this regard therefore, a revenue fund for county governments was established under Article 207 of the Constitution which stipulates as follows: -

***"(1) There shall be established a Revenue Fund for each county government, into which shall be paid all money raised or received by or on behalf of the county government, except money reasonably excluded by an Act of Parliament.***

***(2) Money may be withdrawn from the Revenue Fund of a county government only—***

***(a) as a charge against the Revenue Fund that is provided for by an Act of Parliament or by legislation of the county; or***

***(b) as authorized by an appropriation by legislation of the county.***

***(3) Money shall not be withdrawn from a Revenue Fund unless the Controller of Budget has approved the withdrawal.***

***(4) An Act of Parliament may—***

***(a) make further provision for the withdrawal of funds from a county Revenue Fund; and***

***(b) provide for the establishment of other funds by counties and the management of those funds.”***

Accordingly, a revenue fund shall be established for each county government into which all money raised or received by or on behalf of the county government shall be paid. Moreover, money shall only be withdrawn from the revenue fund of a county government as a charge provided for by an Act of Parliament or by legislation of the county or as authorized by an appropriation by legislation of the county. Further, money shall not be withdrawn from a revenue fund unless the Controller of Budget has approved the withdrawal.

This proviso is in line with Article 228 of the Constitution which states as follows:-

***"The Controller of Budget shall oversee the implementation of the budgets of the national and county governments by authorizing withdrawals from public funds under Articles 204, 206 and 207"***

Oversight of a county government's revenue fund is also exercised by the Senate in accordance with Article 96 (3) of the Constitution which provides that: -

***"The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments."***

The responsibilities exercised by the Senate with respect to a county government's revenue fund is articulated under section 8 of the Public Finance Management Act, No. 18 of 2012 (hereinafter referred to as the Public Finance Management Act) which states as follows: -

***"(1) The Committee of the Senate established to deal with budgetary and financial matters has responsibilities for the following matters, in addition to the functions set out in the Standing Orders—***

***(a) present to the Senate, subject to the exceptions in the Constitution, the proposal for the basis of allocating revenue among the Counties and consider any bill dealing with county financial matters;***

**(b) review the County Allocation of Revenue Bill and the Division of Revenue Bill in accordance with Article 218(1)(b) of the Constitution at least two months before the end of the financial year;**

**(c) examine financial statements and other documents submitted to the Senate under Part IV of this Act, and make recommendations to the Senate for improving the management of government's public finances; and**

**(d) monitor adherence by the Senate to the principles of public finance set out in the Constitution, and to the fiscal responsibility principles of this Act.**

**(2) In carrying out its functions under subsection (1)(a) and (b), the Committee shall consider recommendations from the Commission on Revenue Allocation, County Executive Committee member responsible for finance, the Intergovernmental Budget and Economic Council, the public and any other interested persons or groups."**

From the above provision, the Senate through its Committee established to deal with budgetary and financial matters, reviews the County Allocation of Revenue Bill and the Division of Revenue Bill at least two months before the end of the respective financial year.

Turning to the circumstances of the case, the Board observes that vide a letter dated 27<sup>th</sup> August 2018 from the Ministry of Public Works

addressed to the Clerk of the Senate, the Ministry of Public Works outlined the expenditure limits for the proposed works, for country infrastructure facilities including Type 2 (30-60 MCAs) Assembly Chambers and Type 3 (60-90 MCAs) Assembly Chambers.

The Board examined the Procuring Entity's Tender Document for the subject tender and observes that the works sought to be procured therein was for the "*Proposed Construction, Equipping and Furnishing of County Assembly Chambers and Associated Works at Machakos Town*". The Board further examined the Procuring Entity's confidential documents submitted to this Board in accordance with section 67 (3) (e) of the Act and observes that the Procuring Entity commenced a procurement process for construction of Type 2 (30-60 MCAs) Assembly Chambers, which tender it advertised on 24<sup>th</sup> October 2019 and closed on 7<sup>th</sup> November 2019.

The Board is cognizant of section 45 (3) of the Act which clearly stipulates that all procurement processes shall be: -

**(a) within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan;**

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

**(c) undertaken in strict adherence to Article 227 of the Constitution. [Emphasis by Board]**

Accordingly, all procurement processes should be undertaken by a procuring entity within its approved budget and as provided for within an annual procurement plan. Further, all procurement processes should be undertaken in strict adherence to Article 227 of the Constitution, which on its part provides that all procurement processes should be conducted in a fair, equitable, transparent, cost-effective manner.

Further, section 53 (5), (8) and (9) of the Act stipulates as follows: -

**"(5) A procurement and asset disposal planning shall be based on indicative or approved budgets which shall be integrated with applicable budget processes and in the case of a State Department or County Department, such plans shall be approved by the Cabinet Secretary or the County Executive Committee member responsible for that entity.**

**(6).....;**

**(7).....;**

**(8) An accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.**

**(9) An accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offence under this Act."** [Emphasis by Board]

This means that all procurement and asset disposal proceedings should be based on approved budgets and no procurement process should be commenced without an accounting officer ascertaining that a particular procurement process has been adequately budgeted for.

Noting the aforementioned requirements under law, this Board is of the considered view that once a procurement process is commenced by a procuring entity in accordance with its annual procurement plan, funds from its approved budget are allocated and committed to a particular procurement process.

It therefore follows that once a procurement process is commenced, it must be completed to its logical conclusion unless there are cogent and real reasons for cancellation or termination of procurement proceedings as provided for under section 63 of the Act.

From an examination of the Procuring Entity's confidential documents including the re-evaluation report dated 17<sup>th</sup> March 2020 and the second professional opinion also dated 17<sup>th</sup> March 2020, the Board notes, the evaluation process with respect to the subject tender has been finalized and a recommendation of award approved by the Accounting Officer, albeit conditional on approval from the Ministry of Public Works and Senate of the proposed county infrastructure designs and expenditure limits for construction of the assembly modern chamber.

In this instance therefore, it is the Board's considered view that the Procuring Entity should not interfere with a live and ongoing tender midstream or suspend the subject procurement process in order to seek approval from the Senate.

As outlined hereinbefore, the role of the Senate is restricted to allocation of national revenue to counties in accordance with Article 96 (3) of the Constitution and review of the County Allocation and the Division of Revenue Bill at least two months before the end of the financial year in accordance with section 8 of the Public Finance and Management Act.

In this regard therefore, the Ministry of Public Works and the Senate have no role to play in so far as the subject tender is concerned as it already had the necessary approvals and more so a budget had already been allocated for implementation of the subject tender. The Ministry of Public Works and the Senate approvals (if any) ought to be obtained before procurement proceedings commence under any of the methods of procurement recognized under the Act.

Once procurement proceedings commence, a procuring entity must complete such proceedings to their logical conclusion unless terminated as provided under section 63 of the Act.

In so far as the procurement process is concerned, we are of the view that all tenderers who participated in the subject procurement process

were duly guided by the provisions in the Procuring Entity's Tender Document and as such a legitimate expectation was created in the minds of all tenderers that the subject procurement process would be undertaken as provided for in the Tender Document.

Thus, in view of the foregoing, the Board finds it fit to extend the tender validity period, in order to allow the Procuring Entity to complete the subject procurement process to its logical conclusion and shall specify the appropriate extended period in the final orders herein.

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

***"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 Board notes from the Procuring Entity's confidential file that the subject procurement process has not been completed and that the tender validity period was due to expire on 6<sup>th</sup> April 2020, save that a standstill period took effect the moment this Request for Review was lodged before this Board.

The Board is cognizant of section 87 of the Act which stipulates as follows: -

- "(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.**
- (2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.***
- (3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.**
- (4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security."* [Emphasis by Board]**

Accordingly, a procuring entity must notify, in writing, the bidder who submitted the successful tender, that its tender was successful before

the expiry of the tender validity period. This section further requires that in the same breath, a Procuring Entity must also notify other bidders who participated in the subject tender that their respective bids were not successful.

Moreover, a procuring entity's notification of unsuccessful bid to a bidder should disclose the reasons why its bid was unsuccessful and further disclose the successful bidder in the procurement process therein, who is determined at the conclusion of an evaluation process. The Board notes, one of the rules of natural justice is that a person likely to be affected by the decision of an administrative body, ought to be given the specific reasons of the outcome as espoused under Article 47 (2) of the Constitution which states as follows:-

***"47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair***

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action***

In view of the foregoing, the Board deems it necessary to direct the Procuring Entity to issue all bidders with a notification of the outcome of their bids in accordance with section 87 of the Act.

In totality, the Board holds that the Request for Review succeeds only with respect to the following specific orders:-

### **FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:-

- 1. The Tender Validity Period of Tender No. 751979-2019-2020 for Proposed Construction, Equipping and Furnishing of County Assembly Chambers and Associated Works at Machakos Town be and is hereby extended for a further sixty (60) days from 6<sup>th</sup> April 2020.**
  
- 2. The Procuring Entity is hereby directed to proceed with the procurement process in Tender No. 751979-2019-2020 for Proposed Construction, Equipping and Furnishing of County Assembly Chambers and Associated Works at Machakos Town to its logical conclusion, including issuing of Letters of Notification of the Outcome of Bids to all bidders within seven (7) days from the date hereof.**

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

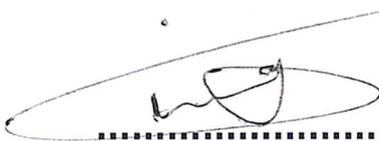
Dated at Nairobi, this 27<sup>th</sup> Day of April 2020



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**CHAIRPERSON**

**PPARB**



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**SECRETARY**

**PPARB**