

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 5/2021 OF 25TH JANUARY 2021

BETWEEN

DANIELS OUTLETS LIMITED.....APPLICANT

AND

**THE ACCOUNTING OFFICER,
NUMERIC MACHINING COMPLEX LIMITED.....1st RESPONDENT**

**NUMERIC MACHINING COMPLEX
LIMITED.....2nd RESPONDENT**

Review against the decision of the Accounting officer of Numeric Machining Complex Limited in respect of Tender No. NMC/ONT/04/2020-2021 for Supply, Installation, Testing, Training and Commissioning of 1 No. Laser Cutter Machine and 1 No. Press Brake Machine.

BOARD MEMBERS:

1. Ms. Faith Waigwa -Chairperson
2. Eng. Mbiu Kimani, OGW -Member
3. Mr. Nicholas Mruttu -Member
4. Mr. Ambrose Ogetto -Member
5. Mr. Jackson Awele -Member

IN ATTENDANCE:

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

BACKGROUND TO THE DECISION

The Bidding Process

Numerical Machining Complex Limited (hereinafter referred to as "the Procuring Entity") invited sealed tenders for Tender No. NMC/ONT/04/2020-2021 for the Proposed Supply, Installation, Testing, Training and Commissioning of 1No. Laser Cutter Machine and 1No. Press Brake Machine (hereinafter referred to as "the subject tender") through an advertisement published in MyGov Newspaper on 1st September 2020. A mandatory site visit was conducted on 7th September 2020 for prospective bidders.

Bid submission deadline and opening of bids

The initial bid submission deadline of 16th September 2020 was extended to 30th September 2020 vide an Addendum dated 11th September 2020. The bids were opened on 30th September 2020 by a Tender Opening Committee in the presence of bidders' representatives. The same were recorded as follows: -

Bid No.	Bidder Name
1.	M/s Panorama Engineering & Trading Ltd
2.	M/s Weensllyn Ventures Ltd
3.	M/s Finton Logistics Ltd
4.	M/s Nariana Enterprises Ltd
5.	M/s Daniels Outlets Ltd
6.	M/s Vaghjiyani Enterprises Ltd
7.	M/s Glistar Enterprises Ltd
8.	M/s Amada (UK) Johannesburg Branch
9.	M/s Brainstorm Holdings Ltd
10.	M/s Stonefield Company Ltd
11	M/s Wayforward Company Ltd

Evaluation of Bids

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

i. Mandatory Requirements/Preliminary Evaluation;

ii. Technical Evaluation; and

iii. Financial Evaluation.

1. Preliminary Evaluation

At this stage, the Evaluation Committee subjected the 11 bids received to the criteria outlined in Clause (A). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document. At the end of Preliminary Evaluation, the following three (3) bidders were found responsive and thus proceeded to Technical Evaluation: -

- Bidder 1, M/s Panorama Engineering & Trading Ltd;
- Bidder 3, M/s Finton Logistics Ltd; and
- Bidder 4, M/s Nariana Enterprises Ltd.

2. Technical Evaluation

At this stage, the Evaluation Committee subjected the remaining 3 bids to the criteria outlined in Clause (B). Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document which required bidders to achieve a minimum technical score of 90% to proceed to Financial Evaluation. At the end of Technical Evaluation, Bidder No. 3, M/s Finton Logistics Ltd achieved the minimum technical score specified in the Tender Document and thus qualified for Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee subjected the remaining 4 bids to the criteria outlined in Clause (C). Financial Evaluation of the Appendix to Instructions to Tenderers of the Tender Document which required bidders to achieve a pass mark of 15 out of the total score of 20 marks. Award of the subject tender would then be recommended to the bidder who submitted the lowest evaluated price as stated in the Award Criteria specified in the Appendix to Instructions to Tenderers at page 27 of the Tender Document. The Evaluation Committee found that the price of Kshs. 43,510,000.00 submitted by Bidder No. 3, M/s Finton Logistics Ltd was the lowest evaluated price.

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Finton Logistics Ltd at its tender price of Kshs. 43,510,000.00 having determined the said bidder submitted the lowest evaluated tender price.

Professional Opinion

In a professional opinion dated 5th January 2021, the Procuring Entity's Head of Supply Chain Management reviewed the manner in which the subject procurement process was undertaken including evaluation of bids. He further noted that despite the Evaluation Committee having recommended award of the subject tender to M/s Finton Logistics Ltd at its tender price of Kshs. 43,510,000.00, the Procuring Entity's budget for the subject tender was Kshs. 16,000,000.00. As a result, he recommended termination of the subject procurement process because of inadequate budgetary provision and that the same be re-advertised once funds are available for the tender.

The professional opinion was approved by the Procuring Entity's Managing Director on 7th January 2021.

Notification to Bidders

In letters dated 8th January 2021, the Managing Director notified all bidders of the outcome of their bids. Further to this, the Managing Director informed bidders that the subject procurement process was terminated because of inadequate budgetary provision.

THE REQUEST FOR REVIEW

M/s Daniel Outlets Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 21st January 2021 and filed on 25th January 2021 together with a Supporting Affidavit sworn on 21st January 2021 and filed on 25th January 2021 through the firm of Andrew Ombwayo & Co. Advocates, seeking the following orders: -

- 1. An order setting aside and cancelling the notification dated 8th January 2021 (but communicated on the 11th January 2021) and the decision therein that disqualified the Applicant's tender/bid at the preliminary evaluation stage and terminated and or purported to terminate or cancel the tender;***
- 2. An order re-instating the tender validity and the Applicant's tender and directing the Respondents to evaluate the Applicant's tender/bid according to the criteria set out in the Tender Document, the Public Procurement & Asset Disposal Act, 2015, the Regulations thereunder and the Constitution.***

3. An order directing the Respondent to pay the costs of this Review to the Applicant.

In response, the Respondents addressed a letter dated 4th February 2021 to the Acting Secretary of the Board and filed the same on 5th February 2021 while M/s Panorama Engineering and Trading Ltd sent a letter dated 5th February 2021 to the official email of the Board (pparb@ppra.go.ke) but did not lodge the same at the Board's offices.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications 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 10th February 2021 and filed on 11th February 2021 while the Respondents and M/s Panorama Engineering & Trading Ltd did not lodge written submissions.

BOARD'S DECISION

After careful consideration of the parties' pleadings, documents in support thereof and confidential documents supplied to the Board by the Procuring Entity pursuant to section 67 (3) (e) of the Public Procurement and Asset

Disposal Act (hereinafter referred to as "the Act"), the Board finds that the following issues crystallize for determination: -

I. Whether the Procuring Entity terminated the subject procurement process in accordance with substantive and procedural requirements specified in section 63 of the Act thus ousting the jurisdiction of this Board.

Depending on the outcome of the first issue: -

II. Whether the Procuring Entity evaluated the Applicant's bid at the Mandatory Requirements/Preliminary Stage in accordance with section 79 (1) & 80 (2) of the Act with respect to the criteria of tender security specified in Clause 2.14.1 of the Appendix to Instructions to Tenderers of the Tender Document.

III. Whether the Procuring Entity evaluated bids in the subject tender within the maximum period of 30 days specified in section 80 (6) of the Act.

IV. Whether the Board can re-instate the Tender Validity Period after its expiry.

V. What are the appropriate orders to grant in the circumstances?

Termination of procurement and asset disposal proceedings is governed by section 63 of the Act. Further, if such termination meets the requirements of section 63 of the Act, the jurisdiction of this Board is ousted pursuant to section 167 (4) (b) of the Act which provides as follows: -

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

(a)

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act" [i.e. section 63 of the Act] Emphasis by the Board

In the recent decision of the High Court in **Judicial Review Application No. 117 of 2020, Parliamentary Service Commission vs. Public Procurement Administrative Review Board & Another**, the Honourable Justice Nyamweya addressed the question whether this Board has jurisdiction to determine whether the statutory pre-conditions for termination of a tender have been met. At paragraph 51 of the said judgement, the Court held as follows: -

"This being the case, the Respondent and this Court upon an application for review have jurisdiction to determine whether or not the statutory pre-condition was satisfied....

Therefore, from the outset, the Respondent [Review Board] has jurisdiction to determine if the conditions of section 63 have been met when a tender is terminated on any of the grounds listed thereunder, and a termination under the section does not automatically oust the Respondent's jurisdiction. It is only upon a finding that the termination was conducted in accordance with section 63 of the Act that the Respondent is then divested of jurisdiction and obliged to down its tools"

It is therefore important for this Board to determine whether the Procuring Entity terminated the subject tender in accordance with provisions of section 63 of the Act, which determination can only be made by interrogating the reason (s) cited by the Procuring Entity and whether or not the Procuring Entity satisfied the statutory pre-conditions for termination outlined in section 63 of the Act. The statutory pre-conditions for termination of a tender include substantive and procedural requirements specified in section 63 of the Act as follows: -

"63. (1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

- (a)**
- (b) inadequate budgetary provision**
- (c)**
- (d)**
- (e)**
- (f)**
- (g)**
- (h)**
- (i)**

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.

From the pleadings submitted to the Board, the Applicant avers that the reason for terminating and or cancelling the subject tender is vague, ambiguous and actuated by ulterior motives intended to defeat competition offered by the Applicant's bid. According to the Applicant, since procurement proceedings commence only after a procurement plan is made and budgetary allocation done, it was unreasonable, irrational and an abuse of discretion for the Respondents to terminate the subject tender. The Applicant thus urged that the termination of the tender be declared null and void.

The Applicant further asserts that the decision to terminate the subject tender is invalid as the Respondents failed to communicate it within 14 days of arriving at such a decision judging by the date on the Applicant's notification letter vis-a-vis the date the decision was communicated and thus the Respondents violated Section 63 (4) of the Act and the Applicant's right to fair administrative action. In response, the Procuring Entity avers that the reason for termination of the Procurement proceedings was in accordance with Section 63 of the Act. M/s Panorama Engineering & Trading Ltd stated in its letter dated 5th February 2021 that it was satisfied by the Respondent's decision terminating the subject tender and that the subject procurement process was transparent.

The Board has considered parties' rival cases and observes that the Evaluation Committee in its report signed on 6th November 2020 recommended award of the subject tender to M/s Finton Logistics Ltd. The Head of Supply Chain Management in his professional opinion dated 5th January 2021 however recommended termination on the following grounds:

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- "1. In my professional opinion, I consider that the subject procurement has satisfied the constitutional requirements of Article 227(1) and statutory requirements of the Public Procurement and Asset Disposal Act, 2015 and the Public Procurement and Asset Disposal Regulations, 2020.***
- 2. The recommended bid price is in excess of available budget however it is within the indicative market price.***
- 3. The Procurement proceedings to be terminated because of inadequate budgetary provisions.***
- 4. I recommend that Management reallocate adequate funds to finance the purchase of the equipment.***
- 5. Once funds are confirmed available, the tender to be re-advertised."***

The documentation provided to the Board shows that the recommendation by the Head of Supply Chain Management for termination of the subject tender due to inadequate budgetary allocation was approved by the 1st Respondent on 7th January 2021. Subsequently thereafter, letters of

notification dated 8th January 2021 were issued to bidders notifying them of the reasons why their bids were not successful and that: -

"the tender proceedings were terminated because of inadequate budgetary provision"

Even though the Procuring Entity did not clearly indicate the provision of the Act it relied on, it is evident the said reason is anchored on section 63 (1) (b) of the Act cited hereinbefore. The Board further notes that the reason provided by the Procuring Entity is one that ought to be founded on verifiable evidence of the Procuring Entity's budgetary allocation for the procured items. An Accounting Officer has the primary responsibility of ensuring a procuring entity complies with the provisions of the Act. In doing so, one of the obligations vested upon such accounting officer is to ensure that procurements of goods, works and services of a public entity are within approved budget of that entity. Section 53 of the Act further provides that:

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- "(1) All procurement by State organs and public entities are subject to the rules and principles of this Act.***
- (2) An accounting officer shall prepare an annual procurement plan which is realistic in a format set out in the Regulations within the approved budget prior to commencement of each financial year as part of the annual budget preparation process.***
- (3)***
- (4)***

- (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) **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”**

Having considered the foregoing provisions, the Board notes that prior to commencement of each financial year, an accounting officer ought to prepare an annual procurement plan which is realistic and within the procuring entity’s approved budget. Furthermore, an accounting officer can only commence procurement proceedings if satisfied that sufficient funds are available to meet the obligations of the resulting contract and are reflected in the procuring entity’s approved budget estimates. This means that, the 1st Respondent is required by the Act to commence a procurement

process only if he is satisfied that sufficient funds are available for the procurement process as reflected in the Procuring Entity's approved budget.

Pursuant to section 53 (2) of the Act, the procuring entity ought to have known well in advance of the indicative market rates for the procured items prior to tendering. Under the said section, accounting officers are required to prepare realistic annual procurement plans within the approved budget prior to commencement of each financial year as part of the annual budget preparation process. Additionally, pursuant to section 54 (3) of the Act, the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") issues a quarterly market price index as a reference guide to assist accounting officers make informed price decisions. Without evidence of the reason provided for termination therefore, taken together with the foregoing forecasting provisions of the Act, the reasonable presumption is that the termination decision was made without good reason. In this regard, section 6(4) of the Fair Administrative Actions Act, 2015 provides as follows:-

"6 (4) Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason. [Emphasis by the Board]

From the onset, the Respondents failed to prove termination of the subject tender met the substantive requirements under section 63 (1) (b) of the Act. That alone, renders the termination null and void ab initio. Be that as it may,

the Board has an obligation of determining whether the procedural requirements for termination of the subject procurement proceedings were satisfied. In **Republic v. Public Procurement Administrative Review Board & another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR**, the court held that: -

"In a nutshell therefore, the procuring entity is under duty to place sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Procuring Entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of section 63 of the Public Procurement and Asset Disposal Act, 2015"

Having considered the finding in the foregoing case, the Board notes that, in addition to citing any of the reasons listed in section 63 (1) of the Act, a procuring entity must also comply with the procedural requirements for termination of a tender specified in section 63 (2), (3) and (4) of the Act. Section 63 (2) and (3) of the Act gives the Procuring Entity an obligation to submit a written report on the termination to the Authority within fourteen days.

Regarding notification to the Director General of the Authority, the Respondents merely furnished the Board with a Report on Termination of the subject tender dated 20th January 2021 without evidence of the date the said report was dispatched to the office of the Director General of the

Authority or when it was received by the Authority. As regards the Applicant's assertion that the decision terminating the subject tender is invalid for the reason that the Respondents failed to communicate it within 14 days of arriving at such a decision, the Board observes that the Head of Supply Chain Management recommended termination in his professional opinion issued on 5th January 2021, the Managing Director approved the said professional opinion on 7th January 2021 and termination letters were prepared on *8th January 2021*. On the other hand, the Applicant merely asserted at paragraph 1 of its Request for Review that it received its letter of notification on 11th January 2021 without furnishing the Board with any evidence of the manner it obtained its letter of notification on the alleged date of 11th January 2021. The Applicant asserts that the Respondents knowingly withheld notification of tender results in violation of Section 176 (1) (k) of the Act up until the tender validity expired without any lawful justification. In response the Procuring Entity avers that the notification of termination was communicated to all the bidders through a letter and telephonic communication on 8th January 2021.

The Board has considered the rival cases of the parties and observes that pursuant to section 63 (2) & (3) of the Act, the burden of proving notification of termination was made to the Director General of the Authority within 14 days from the date of termination rests on the Respondents. This burden of proof has not been discharged to the satisfaction of the Board because the Respondents merely furnished the Board with a report on the termination with no evidence of dispatch of the same or evidence of the date the said report was received by the Director General of the Authority.

On the other hand, in the confidential questionnaire form, bidders were required to provide inter-alia their postal, email and telephone contacts to facilitate communication by the Respondents. From their Response, the Respondents aver that bidders were notified of the tender results through a letter dated 8th January 2021 and that on the same date of 8th January 2021 it communicated to the Applicant and other bidders through telephonic communication. The Applicant further submitted that it received the letter dated 8th January 2021 on 11th January 2021 and that the Respondents violated section 176 (1) of the Act by delaying notification of evaluation to bidders.

The Board observes that the Applicant failed to substantiate its case that the Respondents violated section 176 (1) of the Act because the Applicant never provided any evidence of the manner in which it obtained its letter of notification but merely stated the same was received on 11th January 2021. As regards the Respondents' allegation that notification was made to bidders through a letter and telephone communication on 8th January 2021, the Respondents never provided evidence of dispatch of the letters of notification to bidders, thus failed to also discharge their burden of proof.

This leads the Board to find that the Respondents failed to prove that they complied with the procedural requirements under section 63 (2), (3) & (4) of the Act because the Board was not furnished with evidence of the date of dispatch and/or receipt of the Report of termination dated 20th January

2021 by the Director General of the Authority. Further, no evidence of dispatch was given to support the allegation that notification letters were communicated to bidders on 8th January 2021. Failure to satisfy the procedural requirements for termination means such a termination does not meet the threshold of section 63 (2), (3) & (4) of the Act.

In totality of the foregoing, the Board finds that the Respondents failed to terminate the subject procurement proceedings in accordance with section 63 (1) (b) of the Act thus, the said termination is null and void. The effect of this finding is that the Board has jurisdiction to entertain the Request for Review and shall now address the other issues framed for determination as follows: -

On the second issue for determination, the Applicant avers that the Respondent unlawfully disqualified its tender at the preliminary evaluation stage for failure to provide tender security from a commercial bank despite the Applicant providing security from a recognized financial institution licensed by Central Bank of Kenya. According to the Applicant, the Respondents' decision disqualifying its (Applicant's) bid violated Sections 61 (1) and (2) (a) of the Act and Regulation 45 (1) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") which recognizes tender securities from financial institutions licensed by the Central Bank of Kenya other than Commercial Banks.

In response, the Respondents aver that the Applicant was disqualified at the preliminary evaluation stage because it did not provide a bid bond from a

Commercial Bank as stipulated Clause 2.14.1 of the Appendix to Instruction to Tenderers of the Tender Document, which expressly stated as follows: -

"Bidder MUST provide tender security of Kshs. 300,000.00 from a Commercial Bank and valid for 90 days."

The Respondents cited Clause 2.14.1 of the Appendix to Instruction to Tenderers of the Tender Document in support of their view that the tender security provided by bidders in the subject tender must be from a Commercial Bank.

The Board has carefully considered the rival arguments of the parties. Pursuant to section 61 (1) of the Act a procuring entity may require tender security to be provided with tenders. Where it does so, it is required, pursuant to Section 70 (6)(e)(ii) of the Act to provide instructions for the preparation and submission of the same including *the form* of such security. In the event, where applicable as was in this case, Regulation 74 (1) (c) of the Regulations requires the evaluation committee upon opening of tenders to first conduct a preliminary evaluation to determine whether inter-alia the tender securities submitted by bidders are in the *required form*.

A tender security may take any of the various forms stipulated under Regulation 45 (1) of the Regulations 2020 as follows: -

(1) Where an accounting officer of a procuring entity requires a tender security under section 61(1) of the Act, that tender security shall be in the form of—

(a) cash;

(b) a bank guarantee;

(c) a guarantee by an insurance company registered and licensed by the Insurance Regulatory Authority listed by the Authority; or

(d) a guarantee issued by a financial institution approved and licensed by the Central Bank of Kenya.

Turning to the provisions of section 2 of the Banking Act, Chapter 488, Laws of Kenya, the Board observes that, a Bank is defined as follows;

'a company which carries on or proposes to carry on, banking business in Kenya but does not include the Central Bank'

The preamble of the Banking Act describes the said statute as:

"An Act of Parliament to amend and consolidate the law regulating the business of banking in Kenya and for connected purposes."

As regards, registration, the preamble of the Companies Act describes the said Act as

"AN ACT of Parliament to consolidate and reform the law relating to the incorporation, registration, operation, management and regulation of companies; to provide for the

appointment and functions of auditors; to make other provision relating to companies; and to provide for related matters”

If the definition of a bank under section 2 of the Banking Act is compared with the preamble of the Companies Act, the Board reasonably concludes that a bank is a company and thus the formalities for registration of a company specified in the Companies Act applies to banks. Licensing of institutions that undertake the business of banking pursuant to the Banking Act is specified in section 5 (1) of the said Act as follows: -

"5. (1) Subject to section 4, the Central Bank may, upon payment of the prescribed fee, grant a license to an institution to carry on business."

As regards the business of microfinance, the Preamble of the Microfinance Act describes the said statute as: -

"An Act of Parliament to make provision for the licensing, regulation and supervision of microfinance business and for connected purposes”

The term **“Microfinance Bank”** is described in section 2 of the Microfinance Act as follows: -

"microfinance bank means a company which is licensed to carry on microfinance bank business, and includes all branches, marketing units, outlets, offices and any other place of business that may be licensed by the Central Bank of Kenya"

On its part, section 4 (1) of the Microfinance Act states as follows: -

"4 (1) No person shall carry out any deposit-taking microfinance business, hereinafter referred to as –deposit-taking business, unless such person is –
(a) A company registered under the Companies Act whose main objective is to carry out such business"

Further, Section 4 (A) (1) of the Central Bank of Kenya Act, Chapter 491, Laws of Kenya cites one of the functions of the Central Bank of Kenya as: -

"Without prejudice to the generality of section 4 the Bank shall
... license and supervise authorized dealers"

Having considered the foregoing provisions, the Board observes that institutions that undertake the business of banking under the Banking Act and institutions that undertake the microfinance business under the Microfinance Act are registered under the Companies Act owing to the provisions of the Preamble of the Companies Act and formalities of registration of a company specified in the said Act. The said institutions are licensed and supervised by the Central Bank of Kenya after registration pursuant to the Companies Act.

The Respondents referred the Board to a List of **"Central Bank of Kenya Directory of Licensed Commercial Banks, Mortgage Finance Institutions and Authorized Non-Operating Holding Companies"** attached to the Respondent's Response. According to the Respondents, the

said list can be found in the official website of the Central Bank of Kenya (www.centralbank.go.ke). This prompted the Board to visit the said website wherein some of the functions of the Central Bank of Kenya is described therein as follows: -

"One of the Central Bank of Kenya's mandates is to foster the liquidity, solvency and proper functioning of a market-based financial system. This is achieved through the following:

- Licensing commercial banks, non-bank financial institutions, mortgage finance companies, credit reference bureaus, foreign exchange bureaus, money remittance providers and microfinance banks.***
- Inspection of commercial banks, microfinance banks, non-bank financial institutions, mortgage finance companies, building societies, credit reference bureaus, foreign exchange bureaus, money remittance providers and representative offices of foreign banks to ensure that they comply with all the relevant laws, regulations and guidelines and protect the interests of depositors and other users of the banking sector"***

Further to this, the **"Central Bank of Kenya Directory of Licensed Commercial Banks, Mortgage Finance Institutions and Authorized Non-Operating Holding Companies"** referred to by the Respondents can be found on the said website with details of commercial banks licensed by the Central Bank of Kenya provided therein as follows: -

**CENTRAL BANK OF KENYA DIRECTORY OF LICENCED COMMERCIAL BANKS,
MORTGAGE FINANCE INSTITUTIONS AND AUTHORISED NON-OPERATING
HOLDING COMPANIES**

A: COMMERCIAL BANKS

1	African Banking Corporation Limited
2	Bank of Africa Kenya Limited
3	Bank of Baroda (K) Limited
4	Bank of India
5	Barclays Bank of Kenya Limited
6	Charterhouse Bank Limited
7	Chase Bank (K) Limited
8	Citibank N.A Kenya
9	Commercial Bank of Africa Limited
10	Consolidated Bank of Kenya Limited
11	Co-operative Bank of Kenya Limited
12	Credit Bank Limited
13	Development Bank of Kenya Limited
14	Diamond Trust Bank Kenya Limited
15	DIB Bank Kenya Limited
16	Ecobank Kenya Limited
17	Equity Bank Kenya Limited
18	Family Bank Limited
19	First Community Bank Limited
20	Guaranty Trust Bank (K) Ltd
21	Guardian Bank Limited
22	Gulf African Bank Limited
23	Habib Bank A.G Zurich
24	I & M Bank Limited
25	Imperial Bank Limited IN RECEIVERSHIP
26	Jamii Bora Bank Limited
27	KCB Bank Kenya Limited
28	Mayfair Bank Limited
29	Middle East Bank (K) Limited
30	M-Oriental Bank Limited
31	National Bank of Kenya Limited
32	NIC Bank Kenya Plc
33	Paramount Bank Limited
34	Prime Bank Limited
35	SBM Bank Kenya Limited
36	Sidian Bank Limited
37	Spire Bank Ltd
38	Stanbic Bank Kenya Limited
39	Standard Chartered Bank Kenya Limited
40	Trans-National Bank Limited

CENTRAL BANK OF KENYA DIRECTORY OF LICENCED COMMERCIAL BANKS, MORTGAGE FINANCE INSTITUTIONS AND AUTHORISED NON-OPERATING HOLDING COMPANIES	
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A: COMMERCIAL BANKS	
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41	UBA Kenya Bank Limited
42	Victoria Commercial Bank Limited

On the same website of Central Bank of Kenya, a “**Directory of Licensed Microfinance Banks**” is provided therein with the following details: -

DIRECTORY OF LICENCED MICROFINANCE BANKS	
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1	Caritas Microfinance Bank Limited
2	Century Microfinance Bank Limited
3	Choice Microfinance Bank Limited
4	Daraja Microfinance Bank Limited
5	Faulu Microfinance Bank Limited
6	Kenya Women Microfinance Bank Limited
7	Rafiki Microfinance Bank Limited
8	Remu Microfinance Bank Limited
9	SMEP Microfinance Bank Limited
10	Sumac Microfinance Bank Limited
11	U & I Microfinance Bank Limited
12	Uwezo Microfinance Bank Ltd
13	Maisha Microfinance Bank Limited

From the foregoing, the Board observes that; (i) institutions that undertake the business of banking are regulated under the Banking Act whereas institutions that undertake microfinance bank business are regulated under the Microfinance Act, but are registered as companies under the Companies Act owing to the provisions of the Preamble of the Companies Act and formalities of registration of a company specified in the said Act and (ii) both types of institutions are licensed and supervised by the Central Bank of Kenya. This means that Faulu Microfinance Bank Ltd is a **microfinance bank** owing to the definition of a microfinance bank specified in section 2 of the Microfinance Act and it falls under the list of licensed microfinance banks in Kenya as specified in the Directory of Licensed Microfinance Banks

issued by the Central Bank of Kenya. Faulu Microfinance Bank Ltd must have been registered as a company pursuant to the provisions of the Companies Act so as to obtain a Licence from the Central Bank of Kenya to undertake microfinance bank business. In the same vein, commercial banks must have been registered as companies pursuant to the Companies Act so as to obtain a license from the Central Bank of Kenya to undertake the business of banking.

After a cursory review of the Tender Document and in particular, Clause 2.14.1 of the Appendix to Instruction to Tenderers of the Tender Document, the Procuring entity was unequivocal (in mandatory terms) in its preference for tender security from a Commercial Bank and not from other financial institutions such as microfinance banks. That said, under section 79 (1) of the Act, ***a tender is considered responsive only if it conforms to all the eligibility and other mandatory requirements in the tender documents*** (Emphasis by the Board). Further to this, section 80 (2) of the Act provides that the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents. Pursuant to Regulation 75 (1) of Regulations 2020, a procuring entity is entitled to reject all tenders, which do not conform to the requirements of section 79 of the Act and inter-alia Regulation 74 (1)(c) of Regulations 2020.

For these reasons and noting that submission of a tender security from a commercial bank was a mandatory requirement in the Tender Document, the Board is inclined to find that the Applicant's tender security did not satisfy the criteria specified in Clause 2.14.1 of the Appendix to Instructions to Tenderers of the Tender Document and that the Procuring Entity was

therefore justified in disqualifying the Applicant's bid at the preliminary evaluation stage.

The Applicant also referred the Board to a letter dated 9th May 2014 written by Central Bank of Kenya and addressed to the Managing Director of Faulu Microfinance Bank Limited. The said letter has the following details: -

"New Products

We refer to your letter dated 24th April 2014 seeking approval to introduce six loan products and three saving accounts products

This is to advise that we have no objection to the introduction of the loan products namely; Faulu Milele Mortgage, Bid & Performance Bonds and Guarantees, Business Chap, Wholesale Loan, Loan Fund Management Facility, Tamba Imara Loan and Saving Accounts namely; Collection Account, Faulu Salary Account and Quick E-Account"

A second letter dated 5th June 2014 attached to the Applicant's Request for Review, written by the Director General of the Authority and addressed to the Chief Executive Officer of Rafiki Deposit Taking Microfinance (K) Ltd, has the following details: -

"We refer to your email received on 16th April 2014 on the above captioned subject.

We have noted your submissions and approval from Central Bank of Kenya allowing your company to issue guarantees. We also note that various procuring entities have indicated to

you the need to have a letter from the Authority on issuance of such guarantees

Your attention is drawn to the Public Procurement and Disposal (Amendment) Regulations, 2013 which recognizes tender guarantees by deposit taking microfinance institutions as one of the forms in which tender security may be provided. Therefore, you do not need any letter from the Authority since the cited legislation is in force."

From the foregoing, the Board notes that Faulu Microfinance Bank Limited and Rafiki Deposit Taking Microfinance (K) Ltd are examples of micro-finance institutions approved by Central Bank of Kenya Limited to provide tender security. The term "**financial institution**" is defined by section 2 of the Central Bank of Kenya Act as "***a body corporate or other body of persons, carrying on, whether on their own behalf or as agent for another, financial business within the meaning of the Banking Act (Cap. 488), whether in Kenya or elsewhere***". On its part, financial business is described in the Banking Act as: -

- "(a) the accepting from members of the public of money on deposit repayable on demand or at the expiry of a fixed period or after notice; and***
- (b) the employing of money held on deposit or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money"***

Having compared the nature of business undertaken by microfinance banks and commercial banks, the Board observes that both institutions fit the

definition of financial institutions and as such, a tender security can be provided in form of a guarantee issued by a micro finance bank (which is a financial institution) approved and licensed by the Central Bank of Kenya. That notwithstanding, Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document specified the type of financial institutions that must provide tender security in the subject tender as commercial banks.

The Applicant had full knowledge of the implication of Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document compared to Regulation 45 (1) of Regulations 2020 but failed to seek clarifications from the Procuring Entity as to whether bidders can provide tender securities from financial institutions that are not categorized by the Central Bank of Kenya as commercial banks, or to challenge the criteria under Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document before this Board. Instead, the Applicant participated in the subject procurement process and now seeks to have the evaluation criteria changed to suit its circumstances because its bid was found non responsive on a mandatory requirement that was known to it from the onset. The Applicant is estopped from challenging the criteria under Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document because its participation in the subject procurement proceedings shows that the Applicant all along had knowledge of and was comfortable with this requirement.

Having noted that some microfinance institutions are approved by the Central Bank of Kenya to issue tender securities, there is need for the Authority to advise procuring entities that they do not need to limit the requirement of tender security to those issued by commercial banks because some bidders may only have relationships with other financial institutions other than commercial banks which would issue tender securities pursuant to Regulation 45 (1) of Regulations 2020.

The Tender Document applicable to the subject procurement process limited the requirement of tender securities to the ones issued by commercial banks registered in Kenya and this criterion was binding to all bidders including the Applicant leaving the Evaluation Committee with no option but to apply the same during evaluation of bids.

Accordingly, the Board finds that the Procuring Entity evaluated the Applicant's bid at the Mandatory Requirements/Preliminary Evaluation Stage in accordance with Clause 2.14.1 of the Appendix to Instructions to Tenderers of the Tender Document read together with section 79 (1) and 80 (2) of the Act.

On the third issue for determination, the Applicant asserts that the tender was evaluated beyond the period of 30 days required under section 80 (6) of the Act, thus rendered the evaluation process invalid. In response, the Respondents state that the technical evaluation committee was appointed on 8th October 2020 and submitted its report on 6th November 2020.

From the confidential documents provided to the Board, the tender was opened on 30th September 2020. The Evaluation Committee members were

appointed on 8th October 2020, the evaluation report was prepared and signed by members of the Evaluation Committee on 6th November 2020.

Section 80 (6) of the Act provides that: -

"evaluation shall be carried out within a maximum period of thirty days"

Neither the Act nor Regulations 2020 prescribe the date from which time starts running for purposes of determining the period for evaluation circumscribed under section 80 (6) of the Act. In **PPARB Application No. 136 of 2020, Chania Cleaners Limited v. The Accounting Officer, National Social Security Fund & Another** (hereinafter referred to as the "Chania Cleaners Ltd Case"), the Board considered the meaning of **"tender evaluation"** provided in the Third Schedule of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") and held as follows: -

"Tender evaluation — is the process used to identify the most preferred bidder technically and financially. This process should not take more than 30 calendar days... Having established that evaluation is the process of identifying the most preferred bidder technically and financially, it means that the period of 30 days for evaluation ought to be the number of days taken by an evaluation committee to identify the most preferred bidder that is technically and financially responsive. Therefore, the number of days between commencement of evaluation and signing of the evaluation report would constitute the period taken to determine the

preferred bidder that is both technically and financially responsive"

In the Chania Cleaners Limited Case, the Board held that that the period of 30 days for evaluation ought to be the number of days taken by an evaluation committee to identify the most preferred tenderer that is technically and financially responsive. In most instances, the Tender Document does not specify the date from which evaluation ought to start running. In addition to this, the Act and Regulations 2020 are silent on the issue, save for the Third Schedule to Regulations 2020 which states that evaluation shall take 30 calendar days.

Turning to the circumstances in the instant Request for Review, the Board observes that Clause 2.24.6 of Section II. Instructions to Tenderers of the Tender Document specified that: -

"The tender evaluation committee shall evaluate tenders within 30 days of the validity period from the date of opening of the tender. "

According to the confidential documents furnished to the Board, tenders were opened on **30th September 2020**. Despite this, the Evaluation Committee was appointed on **8th October 2020**. This means that, no evaluation took place between 30th September 2020 and 8th October 2020 and thus the Respondents failed to adhere to their own Tender Document, specifically, Clause 2.24.6 of Section II. Instructions to Tenderers of the Tender Document which required evaluation to commence from the date of tender opening.

The Board is cognizant of the fact that evaluation of bids is done by an Evaluation Committee and thus evaluation can only be undertaken after the appointment of the evaluation committee. As a result, a practical and purposive determination of the period taken for evaluation of bids in the subject tender requires the Board to determine the period when the Evaluation Committee identified the most preferred bidder technically and financially, after their appointment by the Accounting Officer.

The Evaluation Report signed on **6th November 2020** shows that evaluation at the preliminary, technical and financial evaluation stages was concluded on 6th November 2020. In determining the days taken for evaluation of bids in the subject tender, the Board is mindful of section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which guides on the manner in which time ought to be computed for purposes of written law. The said provision states as follows: -

"In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done"

If the period between 8th October 2020 to 6th November 2020 when evaluation was concluded is taken into consideration, evaluation took 29 days because 8th October 2020 is excluded from computation of time.

It is worth noting that section 176 (1) (c) of the Act provides that a person shall not: -

"delay without justifiable cause the opening or evaluation of tenders, the awarding of contract beyond the prescribed period or payment of contractors beyond contractual period and contractual performance obligations"

A purposive interpretation of the above provision requires the 1st Respondent to ensure that an evaluation committee is appointed prior to opening of tenders so as to commence evaluation of tenders immediately after the tenders are opened by the Tender Opening Committee. This ensures that the integrity of the procurement process is maintained and that the bids provided are not tampered with after they have been opened. It was never the intention of the framers of the Constitution and the Act that evaluation of bids would take an unreasonable delay for the same to commence despite the Respondents having opened bids on 30th September 2020 but only commencing evaluation of bids after a considerable number of days have lapsed between 30th September 2020 and 8th October 2020 when the Evaluation Committee was appointed.

Having found evaluation of bids in the subject tender took a period of 29 days, the Board finds that the Procuring Entity evaluated bids in the subject tender within the maximum period of 30 days specified in section 80 (6) of the Act.

As regards the fourth issue for determination, it is not in dispute that the tender validity period of the subject tender has lapsed. With this knowledge and owing to its own admission, the Applicant sought an order of the Board at paragraph 2 of the prayers in the Request for Review for the tender

validity to be re-instated. The Respondents did not controvert the Applicant's admission that the tender validity period has lapsed neither did the Respondents controvert the Applicant's prayer for the tender validity to be re-instated.

It is worth noting that Clause 2.15.1 of Section II. Instructions to Tenderers of the Tender Document provides that the tender validity period of the subject tender was 90 days after the tender opening date of 30th September 2020 and thus, the same lapsed on 29th December 2020. Whereas the Procuring entity knew that the tender validity period would expire on 29th December 2020, it issued a professional opinion on 5th January 2021 and the same was approved on 7th January 2021, well outside the tender validity period. No explanation has been given by the Respondents for the unreasonable delay in issuance of a professional opinion despite the fact that evaluation was concluded by 6th November 2020.

The Board was not furnished with any evidence by the Respondents to show that the tender validity period was extended for a further period of 30 days pursuant to section 88 (1) of the Act before expiry of the same. It is also worth noting that the Applicant slept on its right to approach this Board before expiry of the tender validity period seeking orders of extension of the said period.

Having found the tender validity period lapsed on 29th December 2020 with no evidence that the same was extended by the Procuring Entity, it is evident that the Applicant lodged its Request for Review on 25th January 2021 after the subject tender already "died a natural death" on 29th December 2020.

This therefore leads the Board to address the question whether it can reinstate a tender that has lapsed.

At paragraph 70 of his decision in **Judicial Miscellaneous Application 103 of 2019, Republic v Public Procurement Administrative Review Board, Consortium of GBM Projects Limited and ERG Insaat Ticaret Ve Sanayi A.S (interested party) & National Irrigation Board [2020] eKLR**, (hereinafter referred to as “the National Irrigation Board Case”) Justice Mativo dealt with the question whether a tender that has lapsed can be resuscitated while holding as follows: -

"An "acceptable tender" is any tender which in all respects, complies with the specification and conditions of tender as set out in the tender document. The procurement process including the award of the tender must be completed during the tender validity period. Once the tender validity period lapses, it cannot be resuscitated, not even by consent, or an order by the Respondent [Board]. A reading of the bid documents and the act leaves me with no doubt that it cannot be revived once it expires. In addition, the Bid document does not provide for extension to be granted retrospectively, that is, an extension that will operate to revive an expired tender. This means that, objectively, the bid had expired as at 5th February 2019 when the order was made. Irrespective of the intention of the parties to extend the bid after its expiry as they purported to do so, such an extension could not

breathe life into a dead procurement process. [Emphasis by the Board]

The Board observes that the Court in the National Irrigation Board Case addressed two aspects of the tender validity period, that is; (i) once the tender validity period lapses, it cannot be resuscitated, not even by consent, or an order by this Board and (ii) irrespective of an intention to extend the tender validity period after its expiry, such an extension cannot breathe life into a “dead procurement process”.

The effect of expiry of the tender validity period was further discussed in the decision of Justice Mativo in the National Irrigation Board Case as follows: -

[71]. Once the validity period of the proposals had expired with no extension of the period being made before the expiry of the validity period, there were no valid bid in existence either for the Procuring Entity to extend it or for the Respondent [Board] to extend as it purported to do. [Emphasis by the Board]

Turning to the instant case, the tender validity period of the subject tender lapsed on 29th December 2020 and the same cannot be reinstated or resuscitated by an order of this Board because such an order would be null and void. The effect of lapse of the tender validity period of the subject tender on 29th December 2020 is that any action taken by the Respondents after 29th December 2020 renders those actions null and void. Furthermore, the Board cannot issue orders which have the effect of continuing a procurement process with respect to a tender that does not exist.

Even assuming for a moment the Board was asked to extend the tender validity period, an order of extension cannot breathe life into a tender that already lapsed on 29th December 2020 because there is no tender for the Board to extend. The Court of Appeal of South Africa in **Joubert Galpin Searle and Others v. Road Accident Fund and Others [2014] 1 All SA 604 (ECP)** addressed the question whether a tender that has died “a natural death” can be revived through an extension by stating as follows: -

"The central issue to be decided was the effect on the tender process of the expiry of the tender validity period and whether, if the expiry of the tender validity period put an end to the process, it could subsequently be revived.

Once the tender validity period had expired, the tender process had been completed, albeit unsuccessfully. There were then no valid bids to accept and the tender could not be revived by an extension

It is worth noting that the Board has only extended the tender validity period in instances where a request for review is filed before the expiry of the tender validity period. Pursuant to section 168 of the Act, suspension of procurement proceedings including suspension of the tender validity period and as such, the tender validity period (which has not lapsed) stops running when a request for review is filed. In **PPARB Application No. 133 of 2019, Med Marine Kilavuzluk Ve Romorkor Hizmetleri Ins. San. Ve Tic. A.S v. The Accounting Officer, Kenya Ports Authority & Another** (hereinafter referred to as “the Med Marine Case”), the Board extended the tender validity period for a further period of 45 days to allow the procuring

entity in that case to conclude the procurement process because in the Med Marine Case, the Board found that the tender validity period was still in existence at the time the Request for Review was filed. At page 57 of its decision, the Board held as follows: -

"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. As a result, the Board finds it fit to extend the tender validity period"

The circumstances of the Med Marine Case are different from the instant Request for Review where we have found the tender validity period lapsed on 29th December 2020 and no tender existed on 25th January 2021 when the Applicant filed this Request for Review.

The upshot of the foregoing is that the Board cannot re-instate the tender validity period of the subject tender given the same lapsed on 29th December 2020.

Having found the tender validity period of the subject tender already lapsed and the same cannot be reinstated, it calls upon the Board to determine the appropriate reliefs to grant in the circumstances as the last issue for

determination.

The Board has found that the Respondents failed to terminate the subject procurement proceedings in accordance with the substantive and procedural requirements for termination of a tender pursuant to section 63 of the Act. The Board has also found the tender validity period of the subject tender lapsed on 29th December 2020 and that all actions undertaken after 29th December 2020 were null and void. Despite the Board having found the termination and all actions taken after expiry of the tender validity period are null and void, the Board cannot issue orders directing the Respondents to remedy such actions in respect to a tender that has already lapsed.

In determining the appropriate reliefs in the circumstances, the Board observes that at paragraph 157 of his decision in **Miscellaneous Application No. 284 of 2019, Republic v Public Procurement Administrative Review Board, & Another Ex Parte CMC Motors Group Limited [2020] eKLR**, the Honourable Justice Mativo cited the decision of the South African Constitutional Court in **Minister of Health & Others v Treatment Action Campaign & Others (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002)** where it was held as follows:-

"Perhaps the most precise definition of "appropriate relief" is the one given by the South African Constitutional Court in Minister of Health & Others v Treatment Action Campaign & Others thus: -

"...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."

Having considered the finding in the foregoing case, the Board observes that an appropriate relief in the circumstances ought to be one that ensures the public can still benefit from the services the Procuring Entity sought to procure through the subject tender. Given that the tender validity period lapsed on 29th December 2020 and that no action can be taken by the Respondents in respect to a tender that has lapsed, it is only appropriate for the 1st Respondent to undertake a fresh procurement process for the **Proposed Supply, Installation, Testing, Training and Commissioning of 1 No. Laser Cutter Machine and 1 No. Press Brake Machine.**

In totality, the Board issues the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon in by section 173 of the Act, the Board makes the following final orders: -

- 1. The Accounting Officer of the Procuring Entity is at liberty to retender for the Supply, Installation, Testing, Training and Commissioning of 1 No. Laser Cutter Machine and 1 No. Press Brake Machine in accordance with the Constitution, the Act and Regulations 2020.**

- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 15th day of February 2021

CHAIRPERSON

SECRETARY