

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 9/2021 OF 26<sup>TH</sup> JANUARY 2021**

**BETWEEN**

**DANIELS OUTLETS LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**NUMERICAL MACHINING**

**COMPLEX LIMITED.....1<sup>ST</sup> RESPONDENT**

**NUMERICAL MACHINING**

**COMPLEX LIMITED.....2<sup>ND</sup> RESPONDENT**

Review against the decision/notification dated 19<sup>th</sup> January 2021 by Numerical Machining Complex Limited with respect to Tender No. NMC/ONT/07/2020-2021 for the Proposed Supply, Installation, Testing, Training and Commissioning of 1 No. Bending Machine.

**BOARD MEMBERS**

- |                           |              |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa       | -Chairperson |
| 2. Mr. Alfred Keriolale   | -Member      |
| 3. Mr. Ambrose Ogetto     | -Member      |
| 4. Ms. Phyllis Chepkemboi | -Member      |
| 5. Eng. Mbiu Kimani, OGW  | -Member      |

## **IN ATTENDANCE**

1. Mr. Philemon Kiprop

-Holding brief for Acting Board  
Secretary

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

Numerical Machining Complex Limited (hereinafter referred to as "the Procuring Entity") invited interested and eligible bidders to submit bids in response to Tender No. NMC/ONT/07/2020-2021 for the Supply, Installation, Testing, Training and Commissioning of 1 No. Bending Machine (hereinafter referred to as "the subject tender") via an advertisement in MyGov pullout Newspaper on Tuesday, 1<sup>st</sup> September 2020 as well as publication in the Procuring Entity's website [www.nmc.go.ke](http://www.nmc.go.ke) and the Public Procurement Information Portal [www.tenders.go.ke](http://www.tenders.go.ke).

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

Upon issuance of an Addendum on 11<sup>th</sup> September 2020, the bid submission deadline was extended to 5<sup>th</sup> October 2020 at 11:00 am. One (1) bidder/firm, that is the Applicant herein, submitted a bid in response to the subject tender which were opened on 5<sup>th</sup> October 2020 and recorded as follows: -

<b>Bidder No.</b>	<b>Bidder's name</b>
1.	M/s Daniels Outlets Limited

## Evaluation of Proposals

The evaluation process was conducted in three stages:

1. Preliminary Evaluation;
2. Technical Evaluation;
3. Financial Evaluation.

### 1. Preliminary Evaluation

At this stage of evaluation, bids were evaluated for compliance with the preliminary mandatory criteria as outlined in the Tender Document as follows: -

No.	Criteria
1.	Bidder MUST submit two sets of tender documents clearly marked <b>ORIGINAL &amp; COPY</b>
2.	Bidder MUST provide tender security of <b>Kshs 100,000.00</b> from a <b>Commercial Bank</b> and <b>valid for 90days</b>
3.	Bidders equipment's country of origin MUST be any of the following only: <b>Europe, America, South Africa, India, Japan</b>
4.	Bidder MUST provide <b>Litigation history</b> in the format provided in the Tender document, must be filled, signed and stamped to be returned with tender submission. <b>(Form A.)</b>
5.	Bidder Must Dully fill, sign and stamp price schedule
6.	Bidder MUST Duly fill, sign and stamped form of Tender
7.	Bidder must paginate/serialize all the documents in the tender document in a continous manner without alteration
8.	Bidder MUST duly fill, stamp and sign the confidential business questionnaire.
9.	Bidder MUST provide copy of valid tax compliance issued by Kenya Revenue Authority
10.	Bidder MUST provide Copy of Certificate of Incorporation or a Certificate of Registration
11.	Bidder MUST provide Copy of valid Business permit from the County Government
12.	Bidder MUST provide Copy of CR 12
13.	Bidder MUST Attach Original Equipment Manufacturer's Authorization or Dealership Certificate with clear site and addresses/contacts for verification of the same.
14.	Bidder MUST provide Power of Attorney
15.	Bidder MUST provide recommendation letters from three (3) clients whom he/she have supplied, Installed and commissioned a powered equipment
16.	Bidder MUST provide Copy of brochure/manual for the machine. It Must be in English

17.	Bidder MUST attach Manufacturer's statement of warranty .Must be in English
18.	Bidder MUST attach Certified Audited Financial Statement for the last 3-consecutive years.
19.	Bidder MUST attach a duly signed and stamped form by one of our Engineers as proof of site visit scheduled to take place on 9 <sup>th</sup> September, 2020 at 11:00am at Numerical Machining Complex Ltd.

Upon conclusion of Preliminary Evaluation, Bidder No. 1 M/s Daniels Outlets Limited was found non-responsive to the preliminary mandatory requirements for the following reasons: -

- a) Bidder did not provide tender security from a commercial bank;
- b) The equipment's country of origin was not among the list provided;
- c) The form of tender was not signed;
- d) Bidder did not attach the site visit certificate.

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

In view of the evaluation process, the Evaluation Committee found that the subject tender was non-responsive as Bidder No. 1 M/s Daniels Outlets Limited did not meet all the mandatory requirements laid out in the Tender Document.

### **Professional Opinion**

The Head of Supply Chain Management reviewed the Evaluation Report, concurred with the Evaluation Committee's finding and on this basis recommended termination of the subject tender vide a Professional Opinion signed on 5<sup>th</sup> January 2021.

The Managing Director of the Procuring Entity approved the Evaluation Committee's finding and termination of the subject tender on 11<sup>th</sup> January 2021.

### **REQUEST FOR REVIEW NO. 9 OF 2021**

Daniels Outlets Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated 25<sup>th</sup> January 2021 and filed on 26<sup>th</sup> January 2021 together with a Supporting Affidavit sworn on 25<sup>th</sup> January 2021 and filed on 26<sup>th</sup> January 2021, through the firm of Andrew Ombwayo & Company Advocates, seeking the following orders: -

- i. An order setting aside and cancelling the notification dated 19<sup>th</sup> January 2021 (but communicated on the 25<sup>th</sup> January 2021) and the decision therein that disqualified the Applicant's tender/bid at the preliminary evaluation stage and that terminated and or purported to terminate or cancel the tender;***
- ii. An order re-instating the tender validity and the Applicant's tender and to direct the Respondents to evaluate the Applicant's tender/bid according to the criteria set out in the Tender Document, the Public Procurement and Asset Disposal Act, 2015, the Regulations thereunder and the Constitution***
- iii. An order directing the Respondent to pay the costs of this Review to the Applicant.***

In response, the Procuring Entity, acting through its Managing Director, lodged a response to the Request for Review in form of a letter addressed to the Board Secretary titled 'Response on Request for Review on Application No. 9 of 2021' dated 4<sup>th</sup> February 2021 and filed on 5<sup>th</sup> February 2021.

On 24<sup>th</sup> March 2020, the Board issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications 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 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").

The Applicant lodged a document titled 'Applicant's Submissions Proposing Request for Review' dated 10<sup>th</sup> February 2021 on 11<sup>th</sup> February 2021. The Procuring Entity did not file written submissions.

## **BOARD'S DECISION**

The Board has considered each of the parties' cases, the documents filed before it, confidential documents filed in accordance with section 67 (3) (e) of the Act including the Applicant's written submissions and finds that the following issues call for determination: -

**I. Whether the Procuring Entity terminated the subject procurement proceedings in accordance with the 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 framed for determination: -

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

**III. Whether the Board can reinstate the Tender Validity Period of the subject tender after its expiry.**

**IV. 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 **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR** (hereinafter referred to as "the Selex Sistemi Integrati Case"), the court while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Repealed Act") that dealt with termination of procurement proceedings held as follows: -

***"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005, section 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the jurisdiction of the Review Board. That question can be answered by a close scrutiny of section 36 (6) of the said Act which provides: -***

***"A termination under this section shall not be reviewed by the Review Board or a court."***

***In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board.***



**The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated.**

***In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of Smith v. East Elloe Rural District Council [1965] AC 736 Lord Viscount Simonds stated as follows: -***

***"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."***

***It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures.***

***To illustrate the point, the failure by the 2<sup>nd</sup> Respondent [i.e. the Procuring Entity] to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether the termination met the threshold under the Act, before***

**finding that it lacks jurisdiction to entertain the case before it on the basis of a mere letter of termination furnished before it.”**

The court in the Selex Sistemi Integrati Case held that this Board (as was constituted then) had the duty to question whether a decision by a procuring entity terminating a tender met the threshold of section 100 (4) of the Repealed Act, and that the Board’s jurisdiction was not ousted by mere existence of a letter of termination furnished before it.

Further, in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR** (hereinafter referred to as “JR No. 142 of 2018”) it was held as follows: -

***“The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction to entertain the Interested Party’s Request for Review of the Applicant’s decision to terminate the subject procurement...”***

***A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63***

**were satisfied, before the jurisdiction of the Respondent can be ousted.**

**As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A-Light Ltd [2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body which is the primary decision maker, [in this instance the Applicant as the procuring entity] to determine if the statutory pre-conditions and circumstances in section 63 exists before a procurement is to be terminated...**

**However, the Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard...**

**The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v. Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati**

***which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act”***

The Court in JR No. 142 of 2018 affirmed the decision of the Court in the *Selex Sistemi Integrati Case* that this Board has the obligation to first determine whether the statutory pre-conditions of section 63 of the Act have been satisfied to warrant termination of a procurement process, in order to make a determination whether the Board’s jurisdiction is ousted by section 167 (4) (b) of the Act.

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.

Section 63 of the Act specifies the statutory pre-conditions for termination of a tender which include substantive and procedural requirements 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) .....***

***(c) .....***

***(d) .....***

***(e) .....***

***(f) all evaluated tenders are non-responsive***

**(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.**

In its pleadings before this Board, the Applicant avers that the Procuring Entity's termination of the subject tender was an abuse of its discretion under section 63 of the Act and more so, the reason for terminating/cancelling the subject tender was vague, ambiguous and founded on ulterior motives, rendering the said termination null and void.

According to the Applicant, the Procuring Entity's decision to terminate/cancel the subject tender was not communicated prior to the notification of award and thus the said decision is invalid, unlawful and in breach of section 63 (1) of the Act. Further, the Procuring Entity failed to communicate its decision to terminate the subject tender within fourteen (14) days of its termination of the procurement proceedings,

rendering the said termination null and void and thus violating the Applicant's right to fair administrative action.

The Procuring Entity disputes the Applicant's submissions and avers that it terminated the subject procurement proceedings in accordance with section 63 of the Act.

Having studied the confidential documents submitted by the Procuring Entity pursuant to section 67 (3) (e) of the Act, the Board observes that according to the Professional Opinion signed on 5<sup>th</sup> January 2021, the Head of Supply Chain Management noted at Clause 2 thereof that **"the bidder who submitted his/her tender document did not meet the mandatory requirements hence was non-responsive"** and thus recommended that the tender be terminated. Evidently, the reason cited by the Procuring Entity for termination of the subject tender is anchored on section 63 (1) (f) of the Act outlined hereinbefore.

Given that the Procuring Entity terminated the subject tender because it took the view that all tenders were non-responsive, the Board must now establish whether or not the Procuring Entity rightfully arrived at the decision of responsiveness of tenders, and in particular, the Board observes that the Applicant challenged the reason why its bid was found non-responsive through this Request for Review.

Apart from informing the Applicant of termination of the subject procurement proceedings, the Applicant's letter of notification dated 19<sup>th</sup> January 2021 contains the following details: -

***"This is to notify you that your bid for proposed supply, installation, testing, training and commissioning of 1 No. Bending Machine was unsuccessful because you did not***

- provide tender security from a Commercial Bank as stipulated in the tender document"***

In its pleadings before the Board, the Applicant avers in paragraph 3 of its Supporting Affidavit that it provided sufficient tender security from Faulu Micro-Finance Bank Limited, which is licensed by the Central Bank of Kenya to offer bid securities recognized by the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") under the Act and its attendant regulations. On its part, the Procuring Entity contends that the Applicant's bid was disqualified at the Preliminary Evaluation Stage since it did not provide a bid bond in the form stipulated in the Tender Document, that is, a bid bond from a commercial bank.

In its determination of this issue, the Board studied the Tender Document and observes Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document states that: -



***"Tender security of Kshs. 100,000.00 valid for 90 days from the date of opening of the tender from a Commercial Bank Registered in Kenya"***

It is not in dispute that the Applicant provided a tender security amounting to Kshs. 100,000.00 issued by Faulu Microfinance Bank Ltd as can be seen from the letter dated 24<sup>th</sup> September 2020 found at page 7 to 9 of the Applicant's original bid. Having considered parties' pleadings, the Board observes that 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"***

An evaluation committee has an obligation of evaluating tenders using the procedures and criteria set out in the Tender Documents. One of the criteria for evaluation and comparison of tenders in the subject tender is set out in Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document requiring bidders to provide tender security of Kshs. 100,000.00 valid for 90 days from the date of tender opening from a Commercial Bank registered in Kenya. The question that arises is whether Faulu Microfinance Bank Ltd is a Commercial Bank registered in Kenya.

The Oxford Dictionary of English, 8<sup>th</sup> Edition, defines a commercial bank as:

***"A commercial bank is a kind of financial institution which carries all the operations related to deposit and withdrawal of money for the general public, providing loans for investment, etc. These banks are profit-making institutions and do business to make a profit."***

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."***

A bank is described in section 2 of the Banking Act as follows: -

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

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 may reasonably conclude 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 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 Procuring Entity annexed to its Response a List of **“Central Bank of Kenya Directory of Licensed Commercial Banks, Mortgage Finance Institutions and Authorized Non-Operating Holding Companies”**. According to the Procuring Entity, the said list can be found in the official website of the Central Bank of Kenya ([www.centralbank.go.ke](http://www.centralbank.go.ke)). The Board visited the said website wherein some of the functions of the Central Bank of Kenya are described therein as follows: -

***“One of the Central Bank of Kenya’s mandate 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” [Emphasis by the Board]***

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 Procuring Entity can be found on the said website with details of commercial banks licensed by the Central Bank of Kenya provided therein as follows: -

<b>CENTRAL BANK OF KENYA DIRECTORY OF LICENCED COMMERCIAL BANKS, MORTGAGE FINANCE INSTITUTIONS AND AUTHORISED NON-OPERATING HOLDING COMPANIES</b>	
<b>A: COMMERCIAL BANKS</b>	
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

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

**A: COMMERCIAL BANKS**

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
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**

1	Caritas Microfinance Bank Limited
2	Century Microfinance Bank Limited
3	Choice Microfinance Bank Limited
4	Daraja Microfinance Bank Limited
<b>5</b>	<b>Faulu Microfinance Bank Limited</b>
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 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. Further, 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.

As mentioned hereinbefore, the Tender Document required tender security from Commercial Banks registered in Kenya. The Applicant submitted a tender security from a microfinance bank that must have been registered pursuant to the provisions of the Companies Act so as to obtain a license from the Central Bank of Kenya to undertake microfinance business. Since the Applicant's tender security is not from a commercial bank, it fails to satisfy the criterion under Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document.

The Board has already observed that an evaluation committee must evaluate tenders using the procedures and criteria specified in the tender document and in this instance, Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document required bidders to provide tender



security from Commercial Banks registered in Kenya and not Microfinance Banks registered in Kenya. Section 79 (1) of the Act further states that: -

***"A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents"***

Eligibility and mandatory requirements as specified in a tender document are mostly considered at the Preliminary Evaluation Stage following which other stages of evaluation are conducted. Bidders found to be non-responsive are excluded from further evaluation, regardless of the merits of their bids for failure to satisfy the eligibility and mandatory requirements specified in a tender document.

At paragraph 38 of his decision in **Miscellaneous Civil Application No. 85 of 2018, Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/s Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR**, the Honourable Justice Mativo addressed the importance of requirements in the tender document whilst stating as follows: -

***"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply***

***with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions.”***

The Applicant’s failure to provide a tender security from a commercial bank registered in Kenya means that the Evaluation Committee had no option but to find the Applicant’s bid non-responsive for failure to satisfy the criterion under Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document.

The Board also considered the Applicant’s contention that its tender security was issued by a financial institution approved and licensed by the Central Bank of Kenya thus satisfied the criterion under Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document. To support its position, the Applicant cited provisions on tender security specified in section 61 (1) of the Act and Regulation 45 (1) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as “Regulations 2020”) as follows: -

***“Section 61 (1) An accounting officer of a procuring entity may require that tender security be provided with tenders, subject to such requirements or limits as may be prescribed.***

**Regulation 45 (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”**

The Applicant also referred the Board to a letter dated 9<sup>th</sup> 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 24<sup>th</sup> 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 5<sup>th</sup> 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 16<sup>th</sup> 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 and Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document read together with section 79 (1) and 80 (2) of the Act.

The statutory pre-conditions for termination of a tender requires this Board to consider both substantive and procedural requirements for termination outlined in section 63 of the Act whenever a procuring entity relies on the said provision to terminate a tender. 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 from the date of termination.

The Board observes that there is no evidence in the Procuring Entity's confidential file to suggest that a report of termination of the subject procurement proceedings was issued to the Authority within fourteen days of termination disclosing the reason thereof.

On the other hand, the Applicant merely asserted at paragraph 1 of its Request for Review that it received its letter of notification on 25<sup>th</sup> January 2021 without furnishing the Board with any evidence of the manner it obtained its letter of notification on the said date. Further to this, the Applicant asserts that the Procuring Entity 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 at paragraph 3 of its Response that the notification of termination was communicated to all bidders through a letter and telephonic communication on 19<sup>th</sup> January 2021.

The Board observes that the Applicant failed to substantiate its case that the Procuring Entity 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 25<sup>th</sup> January 2021. As regards the Procuring Entity's allegation that notification was made to bidders through a letter and telephone communication on 19<sup>th</sup> January 2021, the Procuring Entity did not provide evidence of service of the letters of notification to bidders, thus failed to also discharge their burden of proof.

Accordingly, the Board finds that the Procuring Entity failed to prove that it complied with the procedural requirements under section 63 (2), (3) & (4) of the Act because the Board was not furnished with evidence of a report of termination prepared pursuant to section 63 (2) of the Act and issued to the Authority. Further, no evidence of service/dispatch was furnished in support of the allegation that notification letters were communicated to bidders on 19<sup>th</sup> 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.

It is important to emphasize that both substantive and procedural requirements for termination of a tender must be satisfied for the Board to find such a termination satisfied the statutory pre-conditions for termination specified in section 63 of the Act. The Procuring Entity's decision terminating the subject tender fails to meet the threshold set by section 63 of the Act and thus cannot be allowed to stand.

In totality of the foregoing, the Board finds that the Procuring Entity failed to terminate the subject procurement proceedings in accordance with the procedural requirements provided for in section 63 of the Act thus rendering the said termination 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.

With respect to the second issue framed for determination, the Board studied Section 80 (6) of the Act which specifies the period for evaluation of open tenders as follows: -

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

In addressing this issue, the Board is mindful that on several occasions in the past, it has addressed the meaning of the word "**evaluation**" so as to make a determination on the date from which the period of 30 days under section 80 (6) of the Act ought to start running. Having considered provisions of Regulations 2020, the Board observes there is

no express provision therein stating the date from which the 30 days for evaluation ought to start running.

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 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 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 **5<sup>th</sup> October 2020**. However, the Evaluation Committee was only appointed on 23<sup>rd</sup> October 2020. This means that, no evaluation took place between 5<sup>th</sup> October and 23<sup>rd</sup> October 2020 and thus the Procuring Entity 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 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.

In the instant case, evaluation was concluded by 12<sup>th</sup> November 2020 as can be seen from the Evaluation Report dated 12<sup>th</sup> November 2020. In computing 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 23<sup>rd</sup> October to 12<sup>th</sup> November 2020 when the evaluation was concluded is taken into consideration, evaluation took 20 days because 23<sup>rd</sup> October 2020 is excluded from computation of time. In essence, evaluation of bids took 20 days and this period was within the maximum period of 30 days specified in section 80 (6) of the Act.

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 Procuring Entity 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.

Having found evaluation of bids in the subject tender took a period of 20 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.

With respect to the third issue framed for determination, the Board observes that 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 reinstated. In their Response to the Request for Review, the Procuring Entity did not controvert the Applicant's position that the tender validity

period of the subject tender has lapsed neither did it controvert the Applicant's prayer for the tender validity period to be reinstated.

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 5<sup>th</sup> October 2020 and thus, the same lapsed on 3<sup>rd</sup> January 2021. The Board was not furnished with any evidence by the Procuring Entity 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 did not exercise 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 3<sup>rd</sup> January 2021 with no evidence that the same was extended by the Procuring Entity, it is evident that the Applicant lodged its Request for Review on 26<sup>th</sup> January 2021 after the subject tender already "died a natural death" on 3<sup>rd</sup> January 2021.

This therefore leads the Board to address the question whether it can re-instate 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 5<sup>th</sup> 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 3<sup>rd</sup> January 2021 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 3<sup>rd</sup> January 2021 is that any action taken by the Procuring Entity after 3<sup>rd</sup> January 2021 renders such 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 3<sup>rd</sup> January 2021 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 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 in the Med Marine Case are different from the instant Request for Review where we have found the tender validity period lapsed on 3<sup>rd</sup> January 2021 and no tender existed on 26<sup>th</sup> January 2021 when the Applicant filed this Request for Review.

It is therefore the finding of this Board that it cannot re-instate the tender validity period of the subject tender given the same lapsed on 3<sup>rd</sup> January 2021.

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 Procuring Entity failed to terminate the subject procurement proceedings in accordance with the 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 3<sup>rd</sup> January 2021 and that all actions undertaken after 3<sup>rd</sup> January 2021 are null and void. Despite the Board having held the foregoing actions by the Procuring Entity were unlawful, the Board cannot issue orders directing the Procuring Entity 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 3<sup>rd</sup> January 2021 and that no action can be taken by the Procuring Entity in respect of a tender that has lapsed, it is only appropriate for the Procuring Entity to undertake a fresh procurement process for the **Supply, Installation, Testing, Training and Commissioning of 1 No. Bending Machine.**

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

## **FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review: -

- 1. The Accounting Officer of the Procuring Entity is at liberty to retender for the Proposed Supply, Installation, Testing, Training and Commissioning of 1 No. Bending 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 16<sup>th</sup> day of February 2021**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**