

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 123/2020 OF 12TH OCTOBER 2021

BETWEEN

RHOMBUS CONSTRUCTION COMPANY LIMITED APPLICANT

AND

ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY 1ST RESPONDENT

KENYA PORTS AUTHORITY 2ND RESPONDENT

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

BOARD MEMBERS

- | | |
|---------------------------|-------------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mrs. Njeri Onyango | -Vice Chairperson |
| 3. Mr. Alfred Keriolale | -Member |
| 4. Dr. Joseph Gitari | -Member |
| 5. Ms. Phyllis Chepkemboi | -Member |
| 6. Ms. Isabella Juma | -Member |

IN ATTENDANCE

Mr. Philip Okumu -Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

Kenya Ports Authority the 2nd Respondent herein invited sealed tenders from eligible tenderers to bid for Tender No. KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers (hereinafter referred to as "the subject tender") through an advertisement published on MyGov Publication Website and the Lloyd's List on 14th January 2020 and 15th January 2020 respectively. The subject tender was a two envelope tender.

Tender Submission Deadline and Opening of Tenders

The 2nd Respondent having issued 6 addenda in the subject tender, received a total of nine (9) tenders by the tender submission deadline of 7th May 2020. The same were opened shortly thereafter by a Tender Opening Committee in the presence of tenderers representatives and recorded in the Tender Opening Minutes of 7th May 2020 as follows: -

1. Holman Brothers
2. JGH Marine A/S
3. ZPMC Engineering (Pty)
4. Rhombus Construction
5. Konecranes Lifting
6. Ferrari
7. Joh Achelis

8. Neral Holdings

9. Kalmar Reachstacker

Evaluation of Tenders

An Evaluation Committee having been appointed, evaluated tenders in the following three stages: -

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

1. Preliminary Evaluation

At this stage, the Evaluation Committee applied the criteria under Clause 10 of Part C. Preparation of Tenders of the Tender Data Sheet at page 51 of the Tender Document of the subject tender (hereinafter referred to as the 'Tender Document') read together with Clause 12.1 of Section II: Instructions To Tenderers at page 19 of the Tender Document. At the end of Preliminary Evaluation, the following tenderers were found to have submitted responsive tenders , thus eligible for Technical Evaluation:

- Rhombus Construction;
- Joh Achelis;
- Neral Holdings Ltd; and
- Kalmar Reachstacker.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause 30 of Part E. Opening and Evaluation of Tenders of the Tender Data Sheet at page 57 of the Tender Document. Tenders were required to achieve a minimum technical score of 75% to proceed to Financial Evaluation. At the end of Technical Evaluation, the following tenderers were found to have submitted tenders that achieved the minimum technical score required to proceed to Financial Evaluation: -

- Rhombus Construction; and
- Kalmar Reachstacker.

3. Financial Evaluation

The subject tender being a two envelope tender, only tenders eligible for financial evaluation had their respective financial envelopes opened. At this stage, the Evaluation Committee applied the criterion under sub-clause i to ix of Envelope B-Financial Proposal of Clause 10 of Part C. Preparation of Tenders of the Tender Data Sheet at page 55 of the Tender Document read together with Clause 31 of Part E. Opening and Evaluation of Tenders of the Tender Data Sheet at page 59 of the Tender Document. At the end of this stage of evaluation, M/s Rhombus Construction Company Ltd was found to have submitted the lowest evaluated tender.

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

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

	TOTAL CIF PRICES	5,475,000.00	5,088,876.80
	Other overheads (CFS, SLC, Agency Fee, MSS, RDL, COC, Transport etc	NA	539,330.21
	Grand Total, DDP Prices	NA	5,628,207.01

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Rhombus Construction Company Ltd having determined that it was the lowest evaluated tenderer at the price of USD 5,628,207.01 (total price DPP) based on CIF Price Comparison.

Professional Opinion

In a professional opinion dated 29th July 2020, the Procuring Entity's Acting Head of Procurement and Supplies outlined the manner in which the Procuring Entity undertook the subject procurement process whilst reviewing the Evaluation Report received on 10th June 2020. He then recommended cancellation of the subject tender in accordance with section 63 (1) (b) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") due to inadequate budgetary provision. The said professional opinion was approved by the Procuring Entity's Acting Managing Director on 6th August 2020.

Letters of Notification of Cancellation of Tender

In letters dated 10th August 2020, the Procuring Entity notified all tenderers that the subject procurement process was cancelled due to inadequate budgetary provision.

REQUEST FOR REVIEW NO. 119/2020

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

- a) An order declaring the Procuring Entity's Notification of the purported Termination of procurement proceedings in Tender Number KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers) dated 10th August 2020, that was addressed to the Applicant and/or any other bidder who participated in the subject tender process, null and void;***

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

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

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

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

- 1. The Procuring Entity's Letter of Notification of Cancellation of Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers addressed to all tenderers, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity is hereby directed to proceed with the procurement proceedings in Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers to its logical conclusion within fourteen (14) days from the date of this decision whilst taking into consideration the findings of the Board in this Review.**
- 3. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

In a Professional Opinion dated 17th September, 2020, the Procuring Entity's Acting Head of Procurement and Supplies wrote to the Accounting Officer stating that having reviewed the decision of the Board, he did not agree with

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

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

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

Notification of Cancellation of Tender

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

REQUEST FOR REVIEW NO. 131/2020

M/s Rhombus Construction Company Limited lodged a second Request for Review dated 30th September 2020 and filed on 2nd October 2020, through the firm of Sigano & Omollo LLP Advocates, seeking the following orders: -

- a) An order declaring the Procuring Entity's notification of purported Termination of procurement proceedings in Tender Number KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers) dated 21st September 2020, addressed to the Applicant and/or any other bidder who participated in the subject tender process, null and void;***
- b) An order directing the Procuring Entity to award Tender Number KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers) to the Applicant***

- herein having met the award criteria under Clause 33 of the Instructions to Tenderers in the Tender Document;*
- c) Any other relief that the Board may deem fit and just to grant;*
and
- d) An order directing the 1st Respondent to bear the costs of the Review.*

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

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification of Cancellation of Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers dated 21st September 2020 directed to the Applicant and all other tenderers, be and is hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity is hereby directed to fully comply with the orders of the Board issued on 7th September 2020 in PPARB Application No. 119 of 2020, Rhombus Construction Company Limited v. The Accounting Officer, Kenya Ports Authority & Another within fourteen (14) days from the date of this decision, taking into consideration the findings of the Board in this Review.**
- 3. The Accounting Officer of the Procuring Entity is hereby directed to extend the Tender Validity Period of the subject**

tender pursuant to section 88 (1) of the Act for a period of thirty (30) days from the date of its expiry.

4. The Procuring Entity shall bear the costs of this Request for Review amounting to Kshs. 305,000/- to be paid to the Applicant.

Request to Submit the best and final offer

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

Financial Opening of Tenders

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

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

Evaluation of Tenders and Recommendation for Award

According to Clause 3.1 and 5.0 of the Evaluation Report received on 17th November 2020 by the Head of Procurement and Supplies, the Evaluation Committee carried out financial evaluation of the revised Financial Tenders of M/s Rhombus Construction Company Limited and M/s Kalmar Reachstacker. The Evaluation Committee found that M/s Rhombus Construction Company Limited submitted the lowest evaluated tender and thus recommended M/s Rhombus Construction Company Limited for award of the subject tender at its quoted price of USD 4, 982,345.19.

Professional Opinion

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

REQUEST FOR REVIEW NO. 150/2020

M/s Rhombus Construction Company Limited lodged the third Request for Review with respect to the subject tender dated 16th December 2020 and

filed on even date together with a Supporting Affidavit sworn on 16th December 2020 and filed on even date and a Supplementary Affidavit sworn on 28th December 2020 and filed on 29th December 2020, through the firm of Sigano & Omollo LLP Advocates, seeking the following orders: -

- i. An order extending the tender validity period in exercise of powers conferred upon it by section 173 (b) and section 28 (1) of the Public Procurement and Asset Disposal Act read with section 48 of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya;***
- ii. An order directing the Procuring Entity to award Tender Number KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers) to the Applicant herein having met the award criteria under Clause 33 of the Instructions to Tenderers in the Tender Document;***
- iii. An order recommending sanctions against the Respondents for failure to comply with the orders of the Review Board in Review No. 119/2020 and Review No. 131/2020, in exercise of the powers under section 28 (1) of the Public Procurement and Asset Disposal Act as read with section 48 of the Interpretation and General Provisions Act Cap 2 of the Laws of Kenya;***
- iv. Any other relief that the Board may deem fit and just to grant;***
and
- v. An order awarding costs of the Review including legal costs to the Applicant.***

The Board having considered the pleadings and written submissions filed before it, including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act granted the following orders on 6th January 2021: -

- 1. The Accounting Officer of the Procuring Entity is hereby directed to fully comply with the orders of the Board issued on 23rd October 2020 in PPARB Application No. 131 of 2020, Rhombus Construction Company Limited v. The Accounting Officer, Kenya Ports Authority & 2 Others with respect to Tender No. KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers within fourteen (14) days from the date of this decision, taking into consideration the findings of the Board in this Review.**
- 2. The Accounting Officer of the Procuring Entity is hereby directed to furnish the Board with a status report on compliance with the orders of the Board issued on 23rd October 2020 in PPARB Application No. 131 of 2020, Rhombus Construction Company Limited v. The Accounting Officer, Kenya Ports Authority & 2 Others with respect to Tender No. KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers within twenty-one (21) days from the date of this decision.**
- 3. The Tender Validity Period of Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New**

Reachstackers be and is hereby extended for a further period of thirty (30) days from the 7th day of January 2021.

- 4. The Procuring Entity shall bear the costs of this Request for Review amounting to Kshs. 255,000/- to be paid to the Applicant within fourteen (14) days from the date of this decision.**

MOMBASA JUDICIAL REVIEW CASE NO. E002 OF 2021

The Respondents being dissatisfied with the decision of the Board dated 6th January 2021 in PPARB Application No. 150 of 2020 challenged the same in the High Court at Mombasa in **Judicial Review Case No. E002 of 2021 Republic vs Public Procurement Administrative Review Board, Rhombus Construction Company Limited Ex Parte Kenya Ports Authority and the Accounting Officer, Kenya Ports Authority** seeking an order of certiorari for purposes of quashing the entire decision of the Board dated 6th January 2021 in PPARB Application No.150 of 2020.

On 5th March 2021, Judge J. N. Onyiego of the High Court at Mombasa dismissed the Respondents Notice of Motion Application dated 26th January 2021 having found no basis to fault the decision of the Board dated 6th January 2021 in PPARB Application No.150 of 2020 on extension of the validity period of the subject tender and refusing to uphold the termination of the subject tender on account of material governance issues (forgery

documents) while reiterating that the Respondents do comply with the orders of the Board issued on 23rd October 2020 and 6th January 2021.

MOMBASA CIVIL APPEAL NO.E11 OF 2021

Dissatisfied with the decision of the High Court in Mombasa Judicial Review Case No.E002 of 2021, the Respondents challenged the same by filing an appeal at the Court of Appeal in Mombasa in **Civil Appeal No.E11 of 2021 The Kenya Ports Authority, The Accounting Officer, Kenya Ports Authority vs Rhombus Construction Company Limited, Public Procurement Administrative Review Board and Republic**

On 26th April 2021, a three judge bench of the Court of Appeal in Mombasa comprising of Judge W. Karanja, Judge D. K. Musinga and Judge F. Sichale, while reserving the reasons for their decision to be delivered at a later date, dismissed the Respondents' appeal seeking to challenge the decision of Judge J. N. Onyiego and allowed the Applicant's cross-appeal on costs with respect to Mombasa Judicial Review Case No. E002 of 2021. The Court of Appeal ultimately gave reasons for its decision on 9th July 2021.

REQUEST FOR REVIEW NO. 123 OF 2021

Rhombus Construction Company Limited, the Applicant herein, filed the 4th Request for Review with respect to the subject tender dated 12th October

2021 on even date together with a Supporting Affidavit sworn by Evanson Githinji Kinyanjui on 12th October 2021 and filed on even date through the firm of Sigano & Omollo LLP Advocates, seeking the following orders:

- a) The Procuring Entity's Notification of purported Termination of procurement proceedings in Tender Number KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers) dated 21st September 2021 and delivered through email on 28th September 2021 that was addressed to the Applicant and/or any other bidder who participated in the subject tender process, be and is hereby declared null and void and set aside.**
- b) The Honourable Review Board be pleased to order extension of the tender validity period in exercise of powers conferred upon it by section 173(b) and section 28(1) of the Public Procurement and Asset Disposal Act as read with section 48 of the Interpretation and General Provisions Act Cap 2 of the Laws of Kenya.**
- c) The procuring entity be and is hereby directed to award the subject Tender Number KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12 No. New Reachstackers) to the Applicant herein having met the award criteria under Clause 33 of the Instructions to Tenderers in the tender document.**

- d) In exercise of the powers under section 28(1) of the Public Procurement and Asset Disposal Act as read with section 48 of the Interpretation and General Provisions Act Cap 2 of the Laws of Kenya, the Honourable Review Board be pleased to recommend appropriate sanctions against the Respondents for failure to comply with the orders of the Review Board in Review No.131/2020 and Review No.150/2020.**
- e) The Applicant be awarded costs of the administrative review proceedings herein according to scale (the Advocates Remuneration Order) pursuant to section 173(d) of the Public Procurement and Asset Disposal Act.**
- f) Any other relief that the Board may deem fit and just to grant.**

In response, the Respondents filed a Notice of Appointment of Advocates dated 21st October 2021 on 22nd October 2021 and a Memorandum of Response dated 26th October 2021 and filed on 27th October 2021 together with an Affidavit in Support of the Memorandum of Response sworn by Cosmas Makori the Head of Procurement of the 2nd Respondent on 26th October 2021 and filed on 27th October 2021 through the firm of Munyao, Muthama & Kashindi Advocates.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all request for review applications be canvassed by way of written submissions in an effort to

mitigate the spread of Covid 19. Clause 1 at page 2 of the said Circular specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board. None of the parties to the Request for Review filed Written Submissions.

THE APPLICANT'S CASE

The Applicant avers that the decisions of the Board dated 23rd October 2020 and 6th January 2021 in PPARB Application No.131 of 2020 and 150 of 2020 respectively, are binding and final following the unsuccessful attempt to challenge the decision of the Board dated 6th January 2021 in PPARB Application No.150 of 2020 by the Respondents in Mombasa_Judicial Review Case No. E002 of 2021 and subsequently in Mombasa Civil Appeal No.E11 of 2021. According to the Applicant, once the Respondents' judicial review application in Mombasa Judicial Review Case No. E002 of 2021 and Civil Appeal No.E11 of 2021 were dismissed by the High Court and Court of Appeal sitting in Mombasa respectively, the decision of the Board dated 6th January 2021 in PPARB Application No.150 of 2020 became final and binding.

Consequently, the Applicant avers that the purported termination of the proceedings of the subject tender on account of operation of law since the tender validity period had expired, as contained in a letter of termination delivered to the Applicant on 28th September 2021, is contrary to the final and binding decisions of the Board in PPARB No.131 of 2020 and 150 of 2020

and therefore null and void because (i) the Respondents acted contrary to the orders of the Board by failing to conclude the tender process within the period stipulated in PPARB No.150 of 2020 (ii) the Respondents failed to furnish the Board with status of compliance as stipulated in the Board's decision in PPARB No.150 of 2020 (iii) the reasons for termination of procurement proceedings are irrational and incompatible with the letter and spirit of section 63(1)(a)(i) of the Act which contemplates that a termination of procurement proceedings must take place before notification of award (which according to section 87 of the Act is typically within the tender validity period) (iv) the Respondents withheld notification of award to the Applicant which had been determined to be the successful bidder as conceded by the Respondents in the pleadings filed in PPARB No.150 of 2020.

From the foregoing, it is the Applicant's averment that the Respondents have breached their obligation under the Act namely, compliance with the final and binding decision of the orders of the Board thus contravening a lawful order of the Board and in so doing committed an offence under section 176(1)(m) of the Act. Further, the Applicant avers that the Respondents have contravened the principles enshrined in Article 10(2)(a) of the Constitution read together with section 3(a) of the Act.

It is the Applicant's averment that as a result of the Respondents' failure to comply with their obligation under the Act, it stands to suffer loss and damage that includes (i) lost income and profit that would have accrued to

it had it been awarded the subject tender considering that it has incurred substantial expenses towards preparation and submission of its tender (ii) it has been unfairly denied an opportunity to undertake the contract in the subject tender at its reasonable minimum costs.

The Applicant concludes by praying for the Board to exercise its powers in accordance with section 173 and 28 of the Act read with section 48 of the Interpretation and General Provisions Act Cap 2 of the Laws of Kenya (hereinafter referred to as the 'IGPA') while further praying for (i) the nullification of the purported termination of procurement proceedings of the subject tender by the Respondents (ii) extension of the tender validity for the subject tender by the Board (iii) the Respondent be directed to award the subject tender to it (iv) the Board recommends appropriate sanctions against the Respondents for failure to comply with the Board's orders in PPARB No.131 of 2020 and 150 of 2020 and (v) costs according to scale (the Advocates Remuneration Order).

THE RESPONDENTS' CASE

In opposing the instant Request for Review the Respondents contend that the Request for Review ought to be dismissed summarily for failing to comply with the mandatory provisions of section 167(2) of the Act as read together with Regulation 204 (1) of Regulations 2021.

The Respondents contend that the instant Request for Review is an abuse of the judicial process because it seeks the same or substantially the same orders that the Applicant has sought through an Application Notice filed on 29th September 2021 before Mombasa High Court in Judicial Review No. E002 of 2021 Republic vs. Public Procurement Administrative Review Board, Rhombus Construction Company Ltd Ex Parte Kenya Ports Authority and Another and subsequently amended through an Amended Application Notice dated 7th October 2021.

It is the Respondents contention that the said Amended Application Notice filed by the Applicant at the High Court in Mombasa in Judicial Review No. E002 of 2021 seeks the following orders and which orders are the same or substantially the same with the orders sought by the Applicant in the instant Request for Review (i) summons to be issued and date granted for the personal attendance of the 1st Respondent before Mombasa High Court for hearing of the Amended Application Notice for contempt against the act of disobedience of ((a) Orders of the High Court issued on 5th March 2021 (b) Orders of the Board issued on 23rd October 2020 in PPARB No.131 of 2020 (c) Orders of the Board issued on 6th January 2021 in PPARB No.150 of 2020) (ii) the 1st Respondent stands committed to jail for a period as the High Court in Mombasa may determine and or pay a punitive fine for contempt of court in that the 1st Respondent, being aware of Orders made by the High Court (Onyiego J) on 5th March 2021 and the Orders made by the Board on 23rd October 2020 and 6th January 2021, knowingly and wilfully failed to comply and or take reasonable steps to ensure that the said orders were obeyed (iii) costs of the Amended Application Notice be borne by the 1st

Respondent on indemnity basis (iv) the 1st Respondent be compelled or allowed to purge the contempt forthwith by revoking the notification of purported termination of procurement proceedings in the subject tender (v) the 1st Respondent be compelled or allowed to purge the contempt by forthwith issuing a notification of award to the Applicant and notification to unsuccessful tenderers in the subject tender.

It is the Respondents contention that it is highly likely the High Court sitting in Mombasa will issue orders with respect to the Amended Application Notice and which orders would contradict or conflict with the orders of the Board in the instant Request for Review causing an embarrassment to the judiciary. Further, it is the Respondents contention that even if the High Court sitting in Mombasa and the Board were to arrive at a similar decision, the Respondents would suffer double jeopardy in the event the drastic and contested orders prayed for by the Applicant are granted both at the High Court and by the Board.

The Respondents contend that they have not failed to comply with the orders of the Board, the High Court, and the Court of Appeal and that they have a corporate culture of complying with court orders. Further, it is the Respondents contention that the 1st Respondent is entitled to exercise his discretion by concluding the tendering process through inter alia termination and cancellation of the process within the confines of the law and orders of the Board. The Respondents' proceed to show case how they attempted to

comply with the orders of the Board in PPARB 119 of 2020, 131 of 2020 and 150 of 2020 and in each instant resulting to termination of the procurement proceedings of the subject tender albeit for different reasons.

The Respondents admit that their judicial review application was dismissed by the High Court in Mombasa on 5th March 2021 and their appeal to the Court of Appeal was equally dismissed by the Court of Appeal in Mombasa on 26th April 2021.

It is the Respondents contention that it set out to complete the procurement process of the subject tender following the dismissal of their appeal at the Court of Appeal sitting in Mombasa on 26th April 2021 in compliance with the Board's orders. According to the Respondents, an important part of completing the procurement process included the consideration of the criminal complaints that had been raised in relation to the subject tender. The Respondents therefore wrote to the Director of Criminal Investigation (hereinafter referred to as the 'DCI') vide a letter dated 29th April 2021 seeking DCI's confirmation that he had concluded his investigations in relation to complaints raised in respect to the subject tender. It is the Respondents contention that the DCI responded vide a letter dated 17th May 2021 but delivered to the Respondents on 21st September 2021 which was after the tender validity period had lapsed and the Respondents had no powers in law to extend the tender validity period. It was for this reason that the 1st Respondent issued letters of termination dated 21st September 2021

because the tender validity period had expired and it would have been a breach of the law if the Respondents did not terminate the procurement process once the tender validity period had expired.

The Respondents do not oppose extension of tender validity period but instead supports the extension of the tender validity period and requests the Board to extend the same for a period of 180 days to enable the Respondents conclude the procurement process of the subject tender. The Respondents contend that only a candidate or tenderer can approach the Board, so they could not approach the Board to seek extension of the tender validity period because they are neither candidates nor tenderers envisaged under section 167(1) of the Act.

The Respondents contend that an order to conclude procurement proceedings does not imply the tender must be concluded by making an award to the Applicant and therefore opposes the prayer by the Applicant for the Respondents to be directed to award the subject tender to the Applicant.

The Respondents conclude by stating that the instant Request for Review lacks merit, is premature and an overreaction to a delayed tendering process and that the Board ought to resist the invitation by the Applicant to potentially embarrass the judicial system by simultaneously seeking similar

remedies before two competent judicial forums. The Respondents pray for the entire instant Request for Review to be dismissed with costs to them and in the alternative, the Respondents assert that they support an order for extension of tender validity period in order to enable them conclude the procurement process in respect of the subject tender if the Board finds it fit to extend the tender validity period of the subject tender for 180 days from the date of the Board's decision.

BOARD'S DECISION

The Board has considered each of the Parties' pleadings together with their respective supporting documentation and confidential documents submitted to the Board by the Respondents pursuant to section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') and finds the following issues call for determination: -

1. Whether the Board has jurisdiction to hear and determine the instant Request for Review;

In addressing this issue the Board will make a finding on the following two sub-issues:

a. Whether failure by the Applicant to comply with section 167(2) of the Act read together with Regulation 204(1) of the Public Procurement and Asset Disposal Regulations, 2020

(hereinafter referred to as the 'Regulations 2020') warrants a summary dismissal of the instant Request for Review for want of jurisdiction;

Depending on the outcome of the first sub-issue: -

b. Whether the Procuring Entity terminated the Subject Procurement in accordance with section 63 of the Act so as to oust the Jurisdiction of the Board pursuant to section 167(4)(b) of the Act;

Depending on the outcome of the second sub-issue: -

2. Whether the proceedings in the instant Request for Review before the Board seeks the same or substantially the same orders sought by the Applicant before the High Court in Amended Application Notice of 7th October 2021 in Mombasa Judicial Review Number E002 of 2021 Republic vs. Public Procurement Administrative Review Board, Rhombus Construction Company Limited Ex Parte Kenya Ports Authority and Another;

3. Whether the Procuring Entity deliberately failed to comply with the Board's orders 6th January 2021 in PPARB Application No. 150 of 2020.

4. Whether the Board can extend the tender validity period of the subject tender after expiry of the period during which the tender was to remain valid.

5. What are the appropriate orders for the Board to grant in the circumstances.

On the first issue for determination with respect to the jurisdiction of the Board, we are reminded of the *locus classicus* case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1,** where the Court of Appeal held that jurisdiction is everything and the moment it holds that it has no jurisdiction, a court or any *other decision-making body* has no power to make one more step.

On the other hand the Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** reinforced the above decision as follows;

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that

which is conferred upon it by law. We agree with Counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

The Board is a creature of statute established under section 27 of the Act as a central independent procurement appeals review board whose main function and power is to review, hear and determine tendering and asset disposal disputes as stipulated under section 28 of the Act.

Tendering or asset disposal disputes are lodged before the Board in accordance with section 167 of the Act and Regulations 203 and 204 of Regulations 2020.

Section 167 of the Act provides as follows;

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.

(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.

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

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act.

Regulation 203 of Regulations 2020 provides as follows:

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

(b) be accompanied by such statements as the applicant considers necessary in support of its request;

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is

made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

(d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

(4) The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.

Regulation 204 of Regulations 2020 provides as follows:

(1) Pursuant to section 167(2) of the Act, the filing of a request for review shall be accompanied by a refundable deposit valued at fifteen percent (15%) of the applicant's tender sum which shall be paid into a deposit account.

(2) Despite paragraph (1), where the tender sum is not determinable at the time of filing of the request for review the amount of deposit shall be two hundred thousand shillings.

(3) Where it is established that the applicant has provided false information on his or her tender sum, the request for review shall be dismissed and the deposit forfeited.

(4) The deposit submitted shall be refunded to the applicant, within twenty one days, upon receipt of the signed judgement or withdrawal of the application and original receipt from applicant and shall not accrue any interest.

From the foregoing provisions of law it is clear the jurisdiction of the Board flows from section 28 of the Act and is invoked pursuant to section 167 of the Act read together with Regulation 203 and 204 of Regulations 2020. What this means is that for the Board to hear and determine any Request for Review, the Board's jurisdiction has to be properly invoked by a candidate or tenderer who files before the Board a Request for Review that meets the threshold of Section 167 of the Act read together with Regulation 203 and 204 of Regulations 2020.

We note the Respondents have prayed for the summary dismissal of the instant Request for Review for failure to comply with section 167(2) of the Act and Regulation 204(1) of Regulations 2020. The Applicant on the other hand has not supported nor opposed this prayer by the Respondents.

The provisions of section 167(2) of the Act and Regulation 204(1) of Regulations 2020 require a tenderer, such like the Applicant herein, to deposit with the Board a refundable deposit valued at fifteen percent (15%) of the Applicant's tender sum when filing the instant Request for Review.

The Board confirms no such refundable deposit was deposited with it by the Applicant in the instant Request for Review. However, the Board is alive to the fact that on 27th July 2020, Justice Weldon Korir in Nairobi Constitutional and Human Rights Petition No.E26 of 2020 Roads and Civil Engineering Contractors Association, Energy Sector Contractors Association vs. Attorney General, Cabinet Secretary for National Treasury, the Public

Procurement Administrative Review Board and the National Assembly issued a conservatory order staying the implementation or operation of Regulation 204(1) of Regulation 2020 among other provisions of Regulation 2020.

With the stay of implementation or operation of the enabling provision of Regulations 2020, it is justifiable for tenderers and candidates not to pay the deposit anticipated under section 167(2) of the Act for lack of the enabling regulations. We buttress our view by relying on Republic vs. Public Procurement Administrative Review Board Ex-parte Kenya Power and Lighting Company & Another [2017]eKLR where Justice G. V. Odunga held as follows;

"88. It was contended that the Request for Review is not accompanied by a deposit as required under section 167(2) of the Public Procurement and Assets Disposal Act, 2015. The said provision provides as hereunder:

A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.

89. This Court has had occasion to deal with a provision couched in similar terms being section 175(2) of the Act which provides as hereunder:

The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

90. In Republic vs. Public Procurement Administrative Review Board & 2 others Ex Parte Kenya National Highway Authority [2016] eKLR this Court expressed itself as hereunder:

"...since section 175(2) of the Act places an obligation on the aggrieved party to pay a prescribed percentage of the contract value as security fee, I am unable to agree with the applicant that the said provision does not apply to it. As to what

percentage is required to be paid, is a matter for the regulations. It is however contended which contention is not disputed that the regulations prescribing percentages are yet to be formulated. It is my view that section 175(2) of the Act with respect to payment of the percentage can only be implemented after the Regulations are in place. It is therefore my view and I hold that this application cannot be disallowed on the basis of the failure to pay a percentage which is yet to be prescribed."

91. It is on that basis that I find the position taken by the Respondent on the issue incapable of being faulted."

Accordingly, we find the failure by the Applicant to comply with section 167(2) of the Act and Regulation 204(1) of Regulations 2020 in light of the Conservatory orders of Justice Weldon Korir staying the implementation or operation of Regulation 204(1) of Regulations 2020 is justifiable, thus the instant Request for Review does not warrant summary dismissal for want of jurisdiction.

On the second sub-issue of the first issue, the Board notes this is the fourth time the Applicant is approaching it having been aggrieved by the 1st Respondent's decision to terminate the proceedings of the subject tender. The Applicant has previously and successfully challenged three attempts by the 2nd Respondent to terminate the proceedings of the subject tender in PPARB Application No.119 of 2020, 131 of 2020 and 150 of 2020 for various different reasons.

Section 167(4)(b) of the Act divests the Board of its jurisdiction to review, hear and determine tendering and asset disposal disputes where a termination of procurement or asset disposal proceedings have been effected in accordance with section 63 of the Act.

The said section 167(4)(b) of the Act provides as follows:

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

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act.

The Respondents have admitted to having terminated the subject procurement proceedings on account of operation of law pursuant to section 63(1)(a)(i) of the Act since the tender validity period of the subject tender has expired. The Appellant has not disputed that the tender validity has expired but has challenged the purported termination of the proceedings of the subject tender on grounds that such termination is contrary to the final and binding decisions of the Board in PPARB No.131 of 2020 and 150 of 2020 and therefore null and void because (i) the Respondents acted contrary to the orders of the Board by failing to conclude the tender process within the period stipulated in PPARB No.150 of 2020 (ii) the Respondents failed to furnish the Board with status of compliance as stipulated in the Board's

decision in PPARB No.150 of 2020 (iii) the reasons for termination of procurement proceedings are irrational and incompatible with the letter and spirit of section 63(1)(a)(i) of the Act which contemplates that a termination of procurement proceedings must take place before notification of award (which according to section 87 of the Act is typically within the tender validity period) (iv) the Respondents withheld notification of award to the Applicant which had been determined to be the successful bidder as conceded by the Respondents in the pleadings filed in PPARB No.150 of 2020.

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 2nd 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 then constituted) had the duty to question whether a decision by a procuring entity terminating procurement proceedings of a tender met the threshold of section 100 (4) of the Repealed Act, and that the Board's jurisdiction was not ousted by the 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 subsection 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, to make a

determination whether the Board's jurisdiction is ousted by section 167 (4) (b) of the Act.

In a 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 procurement proceedings of the subject tender were terminated in accordance with Section 63 of the Act, which determination can only be made by interrogating the reason cited by the Respondents and whether the Respondents 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) the subject procurement have been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

(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.

The substantive statutory requirements for termination of procurement proceedings are stipulated in section 63(1) of the Act whilst the procedural statutory requirement is outlined in section 63(2), (3), & (4) of the Act. Further such termination can only be effected before award of a tender and by the Accounting Officer. For a termination of procurement proceedings of the subject tender to be said to have been effected in accordance with section 63 of the Act, the same must satisfy both the substantive and procedural statutory requirements.

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"

The Board has carefully studied the 1st Respondent's letter of termination dated 21st September 2021 addressed to the Applicant and which the Applicant claims it received on 28th September 2021 and notes the same reads as follows *inter alia*;

"

You are hereby notified that pursuant to section 63(1)(a)(i) of the Public Procurement and Asset Disposal Act, 2015, the tender has been terminated on account of operation of law since tender validity period has expired.

.....
....."

The reason given to the Applicant for termination of the procurement proceedings of the subject tender and which reason the Respondents

reiterated in its pleadings was on account of operation of law pursuant to section 63(1)(a)(i) of the Act since the tender validity period had expired. Therefore, the substantive statutory requirement that must be satisfied for termination of the procurement proceedings of the subject tender to be said to have met the threshold of section 63(1)(a)(i) is proof that the subject procurement has been overtaken by operation of law.

It now behoves on the Board to determine what operation of law is and whether the procurement proceedings of the subject tender were capable of being terminated on account of operation of law since the tender validity period of the subject tender had expired.

Black's Law Dictionary defines 'operation of law' rather technically as the

“manner in which rights, and sometimes liabilities, devolve upon a person by the mere application to the particular transaction of the established rules of law, without the act or co-operation of the party themselves.”

Simply put, operation of law is an instance where a person acquires certain rights or liabilities/responsibilities automatically under the law, without taking individual action or in action or being the subject of a court order.

In the circumstances of the subject tender, the Respondents have admitted that the tender validity of the subject tender had expired by the time the 1st Respondent issued the letter of termination dated 21st September 2021. This admission has not been challenged by the Applicant. Going by the admission of the Respondents, if indeed the tender validity period of the subject tender had expired by the time of issuance of the letter of termination, then there was no valid tender. Differently put, the subject tender had died a natural death.

If the subject tender had died a natural death, what was remaining for the Respondents to terminate? It is an absurdity for the Respondents to on one hand claim that the tender validity period of the subject tender had expired meaning, the tender had died a natural death, and on the other hand claim to terminate the procurement proceedings of an already dead tender. If a tender is dead, its procurement proceedings are equally dead and need not be killed a second time by a purported termination.

It is the Board's view that the reason for termination of the procurement proceedings by operation of law since the tender validity period of the subject tender had expired was not available as a substantive reason for termination because the subject tender was already dead at the time of the purported termination of procurement proceedings of the subject tender as admitted by the Respondents.

In addition to citing and proving any of the reasons listed in section 63 (1) of the Act, the Respondents 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 requires an accounting officer of a procuring entity to furnish the Public Procurement Regulatory Authority (hereinafter referred to as 'Regulatory Authority') with a written report on termination while giving reasons for such termination within fourteen (14) days of termination. Section 63(4) of the Act on the other hand requires an accounting officer of a procuring entity to inform tenderers of the termination of procurement proceedings within fourteen (14) days of such termination containing reasons for terminating.

The Respondents having admitted to terminating the procurement proceedings of the subject tender on 21st September 2021, they ought to have furnished the Regulatory Authority with their report on termination containing the reasons for termination by 5th October 2021. The Respondents did not furnish the Board with such a report as proof of having sent the same to the Regulatory Authority. Therefore, there is no evidence of any report addressed to the Regulatory Authority as required by section 63 (2) of the Act. In the circumstances, the termination of the procurement proceedings of the subject tender failed to meet the procedural requirements outlined in section 63(2) & (3) of the Act.

Accordingly, the Board finds the Respondents termination of the procurement proceedings of the subject tender failed to satisfy the substantive and procedural statutory requirements under Section 63(1)(a)(i) and 63(2) and (3) of the Act, thus null and void and does not divest the Board of its jurisdiction.

In other words and in totality of the first issue framed for determination, the Board has jurisdiction to hear and determine the instant Request for Review and shall now proceed to make a determination on the other issues framed for determination.

On the second issue for determination the Board reiterates that it is a creature of statute established under section 27 of the Act as a central independent procurement appeals review board whose main function and power is to review, hear and determine tendering and asset disposal disputes as stipulated under section 28 of the Act which provides for the powers and functions of the Board as follows:

- (1) The functions of the Review Board shall be—***
- (a) reviewing, hearing, and determining tendering and asset disposal disputes; and***
- (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.***

The High Court in its decision in **Miscellaneous Application No. 537 of 2021 Republic V Ministry of Transport, Infrastructure, Housing & Urban Development and Public Procurement Oversight Authority Ex Parte Agro Logistics Limited** at paragraph 47 held follows when making reference to the Board;

"The Review Board is a specialized body mandated to review as a first port of call, decisions of the procuring entity."

The import of the provisions of section 167(1) of the Act read with section 28 of the Act and guided by the decision of the High Court in Miscellaneous Application No.537 of 2021, the Board is the first place a tenderer, such like the Applicant, runs to when dissatisfied with the decision of a procuring entity, such like the Respondents herein with respect to an obligation imposed on a procuring entity under the Act and Regulations 2020.

In the instant Request for Review, the Applicant prays for the Board to exercise its powers in accordance with section 173 and 28 of the Act read with section 48 of the Interpretation and General Provisions Act Cap 2 of the Laws of Kenya (hereinafter referred to as the 'IGPA') and (i) nullify the purported termination of procurement proceedings of the subject tender by the Respondents (ii) extend the tender validity period of the subject tender (iii) direct the Respondent to award the subject tender to it (iv) recommend

appropriate sanctions against the Respondents for failure to comply with the Board's orders in PPARB No.131 of 2020 and 150 of 2020 and (v) costs according to scale (the Advocates Remuneration Order).

We note all the orders prayed for, by the Applicant, in the Instant Request for Review are within the powers of the Board to grant under section 173 of the Act which provides as follows:

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

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

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

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

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

The Import of the above is that the orders sought by the Applicant in the instant request for review pursuant to section 167(1) of the Act can only be sought at first instance before the Board and not in a court of law.

On the other hand, the Applicant has sought the following orders in the Amended Application Notice filed by the Applicant at the High Court in Mombasa Judicial Review No. E002 of 2021 (i) summons to be issued and date granted for the personal attendance of the 1st Respondent before Mombasa High Court for hearing of the Amended Application Notice for contempt against the act of disobedience of ((a) Orders of the High Court issued on 5th March 2021 (b) Orders of the Board issued on 23rd October 2020 in PPARB No.131 of 2020 (c) Orders of the Board issued on 6th January 2021 in PPARB No.150 of 2020) (ii) the 1st Respondent stands committed to jail for a period as the High Court in Mombasa may determine and or pay a punitive fine for contempt of court in that the 1st Respondent, being aware of Orders made by the High Court (Onyiego J) on 5th March 2021 and the Orders made by the Board on 23rd October 2020 and 6th January 2021 ,knowingly and wilfully failed to comply and or take reasonable steps to ensure that the said orders were obeyed (iii) costs of the Amended Application Notice be borne by the 1st Respondent on indemnity basis (iv) the 1st Respondent be compelled or allowed to purge the contempt forthwith by revoking the notification of purported termination of procurement proceedings in the subject tender (v) the 1st Respondent be compelled or allowed to purge the contempt by forthwith issuing a notification of award

to the Applicant and notification to unsuccessful tenderers in the subject tender.

It is our understanding the proceedings before, and orders sought in the said Amended Application Notice in Mombasa High Court Judicial Review No.E002 of 2021 are contempt proceedings under section 5(1) of the Judicature Act Chapter 8 of the Laws of Kenya, Part 81 of the English Civil Procedure Rules, 1998 (as amended) which is within the purview of the High Court.

Noting the proceedings of the Board are time bound and the Board is required to make a determination within 21 days of filing of the Request for Review pursuant to section 171 (1) of the Act, the Board is not convinced that the proceedings before it arising from allegation by the Applicant that the Respondents have breached the duty imposed on them by the Act and Regulations 2020 are the same or substantially the same as the contempt proceedings before Mombasa High Court Judicial Review No.E002 of 2021 pursuant to the said Amended Application Notice.

On the third issue for determination the Board in PPARB 119 of 2020 issued the following orders on 7th September 2020:

1. The Procuring Entity's Letter of Notification of Cancellation of Tender No. KPA/073/2019-20/TE for Supply and Commissioning

of 12No. New Reachstackers addressed to all tenderers, be and is hereby cancelled and set aside.

- 2. The Procuring Entity is hereby directed to proceed with the procurement proceedings in Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12 New Reachstackers to its logical conclusion within 14 days from the date of this decision whilst taking into consideration the finding of the board in this Review.***
- 3. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.***

In PPARB 131 of 2020 the Board issued the following orders on 23rd October 2020:

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification of Cancellation of Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers dated 21st September 2020 directed to the Applicant and all other tenderers, be and is hereby cancelled and set aside.***
- 2. The Accounting Officer of the Procuring Entity is hereby directed to fully comply with the orders of the Board issued on 7th September 2020 in PPARB Application No.119 of 2020, Rhombus Construction Limited v. The Accounting Officer,***

Kenya Ports Authority & Another within fourteen (14) days from the date of this decision, taking into consideration the findings of the Board in this Review.

- 3. The Accounting Officer of the Procuring Entity is hereby directed to extend the Tender Validity Period of the subject tender pursuant to section 88(1) of the Act for a period of thirty (30) days from the date of its expiry.***
- 4. The Procuring Entity shall bear the costs of this Request for Review amounting to Kshs.305,000/= to be paid to the Applicant.***

The Board in PPARB 150 of 2020 issued the following orders on 6th January 2021:

1. The Accounting Officer of the procuring Entity is hereby directed to fully comply with the orders of the Board issued on 23rd October 2020 in PPARB Application No.131 of 2020, Rhombus Construction Limited v. The Accounting Officer, Kenya Ports Authority & 2 Others with respect to Tender No. KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers within fourteen (14) days from the date of this decision, taking into consideration the findings of the Board in this Review.

2. The Accounting Officer of the Procuring Entity is hereby directed to furnish the Board with a status report on compliance with the orders of the Board issued on 23rd October 2020 in PPARB Application No.131 of 2020, Rhombus Construction Limited v. The Accounting Officer, Kenya Ports Authority & 2 Others with respect to Tender No. KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers within twenty-one (21) days from the date of this decision.

3. The Tender Validity Period of Tender No. KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers be and is hereby extended for a further period of thirty (30) days from the 7th day of January 2021.

4. The Procuring Entity shall bear the costs of this Request for Review amounting to Kshs.255,000/= to be paid to the Applicant within fourteen (14) days from the date of this decision.

In essence as at the date of 6th January 2021, the 1st Respondent had been directed by the Board to comply with the orders of the Board in PPARB No.131 of 2020, which sought for compliance of the orders of the Board in PPARB No.119 of 2020, which sought for the 2nd Respondent to proceed with the procurement proceedings in the subject tender to its logical conclusion within 14 days from 6th January 2021 taking into consideration the findings of the Board in PPARB No.150 of 2020. Further, on the same date of 6th January 2021, the 1st Respondent was directed to furnish the Board with a

status report on compliance with the orders of the Board issued in PPARB No.131 of 2020 with respect to the subject tender within 21 days from 6th January 2021.

The Boards decision was dated 6th January 2021, therefore, the Respondents ought to have complied with the 1st order of the Board in PPARB No.150 of 2020 by 20th January 2021 and the 2nd order of the Board in PPARB No.150 of 2020 on 27th January 2021.

However, in exercise of their right to Judicial Review envisaged in section 175(1) of the Act which provides, *"a person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties"* the Respondents filed a Judicial Review Application by way of Chamber Summons on 19th January 2021 seeking leave to file the substantive application and for such leave to operate as a stay of execution/implementation of the Board's orders in PPARB Application No.150 of 2020. Leave to file substantive application for judicial review and for such leave to operate as stay was granted on 20th January 2021.

Mombasa High Court in Judicial Review No.E002 of 2021 found no basis to fault the Board's decision in PPARB No.150 of 2020 on extension of the validity period of the subject tender and refusal to uphold the termination of the subject tender on account of material governance issues (forgery of

documents) on 5th March 2021. The High Court further ordered the Respondents herein to comply with the Orders issued by the Board on 23rd October 2020 and 6th January 2021.

Aggrieved by the decision of the High Court, the Respondents herein filed an appeal at Mombasa Court of Appeal in Civil Appeal No.E11 of 2021. The Court of Appeal in Mombasa dismissed the Respondents' appeal and allowed the Applicant's cross appeal on 26th April 2021 while reserving the reasons for its decision to be delivered at a later date due to constraint of time. The reasons for the decision of the Court of Appeal were subsequently delivered on 9th July 2021.

Having lost both the judicial review at the High Court and the appeal at the Court of Appeal, the decision of the Board in PPARB No.150 of 2020 became final and binding to all parties thereto pursuant to section 175(1) of the Act.

In the circumstances, the Respondents ought to have proceeded with the procurement proceedings of the subject tender to its logical conclusion within 14 days from 26th April 2021 when the Court of Appeal in Mombasa dismissed their appeal. In other words, the Respondents ought to have proceeded with the procurement proceedings of the subject tender to its logical conclusion by 10th May 2021. Further, the Respondents ought to have furnished the Board with a status report on compliance with the Orders of the Board in PPARB 131 of 2020 within 21 days from 26th April 2021 which would be by 17th May 2021.

Instead, the Respondents waited until the 21st day of September 2021 and thereafter purported to terminate the procurement proceedings of the subject tender on account of operation of law since the tender validity period of the subject tender had expired. The excuse given by the Respondents for the delay in taking action to proceed with the procurement process to its logical conclusion by 10th May 2021 is that they, vide a letter dated 29th April 2021, wrote to the DCI to follow up on investigations and simultaneously requested the DCI for directions on the way forward.

At paragraph 27 of the Affidavit in Support of the Respondents' Memorandum of Response to the Request for Review, the deponent therein, one Mr. Cosmas Makori, depones that the DCI responded to the Respondents letter dated 29th April 2021 through a letter dated 17th May 2021, which letter was delivered to the 2nd Respondent on 21st September 2021. The said deponent further proceeds to annex the DCI's letter dated 17th May 2021 as an annexure to his Affidavit in Support of the Respondents' Memorandum of Response and marked CM-5.

The Board has carefully studied annexure marked CM-5 attached to the Affidavit in Support of the Respondents' Memorandum of Response to the Request for Review and notes the same is a letter dated 17th May 2021 from DCI to the 1st Respondent herein confirming that the 1st Respondent may proceed with his legal contractual obligations in respect to the Applicant herein within the laid out provisions of relevant laws.

The said CM-5 bears a received stamp of the Managing Director of Kenya Ports Authority dated 6th August 2021 and a received stamp of the Head of Procurement and Supplies of Kenya Ports Authority signifying that the 1st Respondent received the letter from the DCI dated 17th May 2021 on 6th August 2021 and Cosmas Makori received the same on 10th August 2021 and not on 21st September 2021 as deponed by Cosmas Makori. This is buttressed by the fact that Cosmas Makori, in his Professional Opinion dated 15th September 2021 which forms part of the confidential documents submitted to the Board by the Respondents, as the Head of Procurement and Supplies of the 2nd Respondent, recommended for cancellation/termination of the subject tender in line with section 63(1)(a)(i) of the Act on account of operation of law since the tender validity period had expired. The date of the said professional opinion is 15th September 2021. At paragraph 2.22 at page 5 of 6 of the said professional opinion, Cosmas Makori made reference to the DCI `s letter dated 17th May 2021 signifying the 2nd Respondent and himself had received the DCI's letter dated 17th May 2021 before 15th September 2021 when the said professional opinion was rendered and not 21st September 2021 as alleged.

If the Board were to consider the date of 6th August 2021, when the 1st Respondent received the DCI's letter dated 17th May 2021 advising him to proceed with his contractual obligations in respect of the Applicant , then the Respondents ought to have proceeded to conclude the procurement proceedings of the subject tender and furnish the Board with a status report on compliance with the Board's orders in PPARB No.131 of 2020 latest on

20th August 2021 and 27th August 2021 respectively. However, the Respondents only purported to terminate the procurement proceedings for the subject tender on 21st September 2021.

The 1st Respondent has to date not furnished the Board with any status report on compliance with its orders in PPARB No.131 of 2020 as ordered by the Board in PPARB No.150 of 2020.

In the circumstances, whichever way one looks at this issue it is inevitable to find the Respondents have not complied with the orders of the Board within the time frame stipulated in the orders of the Board in PPARB Application No.150 of 2020.

Accordingly, the Board finds the Respondents deliberately failed to comply with its Orders dated 6th January 2021 in Application No. 150 of 2021 within the time frame ordered therein.

On the fourth issue framed for determination, the Board on its own volition in PPARB Application No. 131 of 2020, directed the 1st Respondent to exercise its powers under section 88(1) of the Act and extend the tender validity period of the subject tender for a period of 30 days from the date of its expiry having noted that only 25 days of the tender validity period of the subject tender were remaining.

In PPARB Application No.150 of 2020 the Board observed that at the time the Applicant approached the Board for the 3rd time with respect to the subject tender, only 1 day of the tender validity period of the subject tender was remaining. The Board in PPARB No.150 of 2020 found the Respondents failed to comply with the Orders of the Board in PPARB No.131 of 2020 and in order for the 1st Respondent to comply with the Orders of the Board in PPARB No.131 of 2021, the Board extended the tender validity period of the subject tender for a further period of 30 days from 7th January 2021.

The effect of this is that the tender validity period of the subject matter was set to expire on 6th February 2021. However, the Respondents sought leave to file Judicial Review Application at the High Court in Mombasa in Judicial Review No.E002 of 2020. The High Court on 20th January 2021 granted leave and such leave was to operate as a stay of the orders of the Board in PPARB Application No.150 of 2020 . This stay had the effect of suspending the running of the tender validity period of the subject matter which by now had only 18 days of the 30 days extended by the Board in PPARB No.150 of 2020 remaining.

The Court in ***Judicial Review No. 540 of 2017, Republic v. Public Procurement Administrative Review Board & Others, Ex Parte Transcend Media Group Limited (2018) eKLR*** (hereinafter referred to as “the Transcend Media Case”) had occasion to interrogate the import of a stay with respect to time running for the tender validity period and held as follows:

"The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time-specific and time-bound.

Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point, at least for any deadlines defined by reference to a period of time, which in this case included the tender validity period. It would also be paradoxical and absurd to find that procurement proceedings cannot proceed, but that time continues to run for the same proceedings."

Even though the High Court in Mombasa Judicial Review No.E002 of 2021 dismissed the Respondents judicial review application, it granted the Respondents leave to appeal and stayed the execution of the orders of the Board in PPARB No.150 of 2020 on 5th March 2021. The effect of this stay further suspended the running of the tender validity period of the subject matter which by now only 18 days were remaining.

Dissatisfied with the decision of the High Court, the Respondents filed an appeal at the Court of Appeal on 12th March 2021 as can be deduced in the first paragraph of the decision of the Court of Appeal dated 26th April 2021 in Mombasa Civil Appeal No.E11 of 2021. It is not clear whether the Court of Appeal granted a stay of the decision of the High Court in Mombasa Judicial Review No.E022 of 2021 for the running of the tender validity period

of the subject matter to be suspended. Even if we assume there was a stay by the Court of Appeal with the effect of suspending the running of the tender validity period of the subject matter, the tender validity period of the subject matter resumed running a day after 26th April 2021 being the date the Court of Appeal rendered its decision. Going by the date of 26th April 2021 and noting only 18 days were remaining for the expiry of the tender validity period of the subject matter, the latest the tender validity period of the subject matter would expire was on 14th May 2021. Whichever way one looks at this issue, by the time the Applicant filed the instant Request for Review on 12th October 2021 seeking, inter alia, to have the tender validity period of the subject tender extended by the Board, the 30 days with which the tender validity period of the subject tender was extended by the Board from 7th January 2021 in PPARB Application No.150 of 2020 had expired.

The Respondents have admitted that the tender validity period of the subject tender has expired and is the reason that they purported to terminate the procurement proceedings of the subject tender. We note the Applicant has not controverted the assertion that the tender validity period of the subject tender has expired. In the circumstances, the Board finds it is common ground that at the time of filing the instant Request for Review, the tender validity period of the subject tender had expired.

The High Court in **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**

Ex Parte [2020] eKLR had an opportunity to address a similar issue where the tender validity was referred to as a bid validity as follows:

"64. Our Constitution and the procurement laws are heavily borrowed from the South African model. Accordingly, jurisprudence from South African Courts interpreting similar situation can offer useful guidance. Where the validity period of a tender had lapsed before the award of the tender, Southwood J held in Telkom SA Limited v Merid Training (Pty) Ltd and Others, Bihati Solutions (Pty) Ltd v Telkom SA Limited and Others[6] that:-

"As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete – albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award a tender within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender."

65. The judgment of Southwood J cited above was followed in Joubert Galpin Searle and Others v Road Accident Fund and Others[7] where the central issues to be decided were 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. The court held that once the tender validity period had expired, the tender process had been completed, albeit unsuccessfully. There were then no valid bids to accept, so the Respondent had no power to accept the expired bids. There is therefore nothing to extend and any award subsequent to the expiry date would be unlawful.

66. I am alive to the established jurisprudence that the tender validity period remains in abeyance until the request for review and judicial review applications are determined. This proposition of the law was authoritatively stated in the South African case of Trencon

Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another.[8] However, cases are context sensitive. The facts in this case are distinguishable. Request for Review No. 115 of 2018 was concluded and final orders were issued. For all purposes, the Respondent was functus officio. The proceedings before it had been concluded, hence, the proposition that the tender validity period remains in abeyance during the pendency of court proceedings cannot apply. Time continued to run the moment the Respondent pronounced its decision.

67. The Applicant who was the Respondent in the said Request for Review was unable to comply with the orders within the time directed by the Respondent and or during the tender validity period. The applicant long after the expiry of the tender validity period approached the court for extension of time and the Respondent entertained the application and granted the extension, thereby extending a tender validity period that had lapsed.

68. I am in agreement with the reasoning in the above South African decisions. As a result, it is my view that, in this case, once the tender validity period expired, the tender process was completed, albeit unsuccessfully. There was no valid tender process to extend as the time the Respondent purported to extend it. In any event, section 88 of the act provides that before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period. A reading of this provision leaves no doubt that it is for the accounting officer to extend the tender validity period and this can only be done prior to the expiry of the tender validity period.

69. Recognizing the persuasive nature of the above decisions, I find no cause to deviate from them. Because the applicant is an organ of State it is required in terms of Article 227 of the Constitution, when it contracts for goods and services, to do so in accordance with a system that is "fair, equitable, transparent, competitive and cost effective." These core principles of public procurement are given effect by a range of statutes, such as the Public Procurement and Asset Disposal Act, the Regulations made thereunder and the Public Finance Management Act, policies and guidelines.

Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework is thus legally required and that they are not merely internal prescripts that may be disregarded at whim. I am unable to fathom how both parties in this case and the Respondent failed to appreciate this basic requirement and necessity of a tender validity period and purport to extent an already expired tender. By so doing, the Respondent allowed itself to be driven by the parties to commit an illegality.

70. 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. 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."

The Board is bound by the decision of Justice John M. Mativo in 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 Ex Parte [2020] eKLR as quoted hereinbefore and is left with no option but to decline to extend the tender validity period of the subject tender because the subject tender is dead and incapable of being brought back to life.

In determining the appropriate reliefs to grant as the last issue framed for determination, the Board observes the Applicant prayed to be awarded the

subject tender. However, having noted the tender validity period of the subject tender expired and considering the decision of Justice John M. Mativo in 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 Ex Parte [2020] eKLR, the Board is not able to grant such a prayer on grounds that the subject tender is dead and any award subsequent to an expiry of the tender validity period would be a unlawful since an award of a tender is required to be made within the tender validity period of a tender as enshrined in section 87 of the Act.

The Board has hereinbefore held that the Respondents deliberately failed to comply with the orders of the Board in PPARB No.150 of 2020 within the time frame set by the Board even though the Respondents had 18 days to comply with the orders of the Board after delivery of the Decision of the Court of Appeal in Mombasa Civil Appeal No.E11 of 2021. In essence and by their conduct throughout the procurement process of the subject tender, the Respondents have succeeded in frustrating the subject tender and allowing the tender validity period of the subject tender to expire before complying with the orders of the Board in PPARB No150 of 2020. For this reason, the Board finds it necessary for the Director General of the Authority to take necessary action against the Respondents for contravening the lawful orders of the Board.

The Board notes the Applicant in PPARB Application No.150 of 2020 approached the Board a day before the expiry of the tender validity period of the subject tender seeking, inter alia, the extension of the tender validity period by the Board. In the instant Request for Review, the Applicant was indolent leading to failure to seek an extension of the tender validity before the same expired. For this reason, the Board is unable to grant prayer number b) and c) in the Applicant's Request for Review dated 12th October 2021.

Given that the Applicant has not succeeded with respect to prayer number b) and c) of its Request for Review dated 12th October 2021 and noting that the Board has found that the Respondents deliberately failed to comply with the Orders of the Board in PPARB Application No.150 of 2020 issued on 6th January 2020, each party to the instant Request for Review shall bear their own costs in the instant Request for Review.

FINAL ORDERS

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

- 1. The 1st Respondent's Letter of Termination dated 21st September 2021 with respect to Tender No. KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers, be and is hereby nullified and set aside.**
- 2. The Board directs its Secretary to furnish the Director General of the Public Procurement Regulatory Authority with this decision within a day of the making of this decision.**
- 3. The Board recommends for the Director General of the Public Procurement Regulatory Authority, as a Regulator, to take necessary measures against the Respondents herein provided in law, for deliberately failing to comply with the Orders of the Board in PPARB Application No.150 of 2020.**

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

Dated at Nairobi this 2nd day of October 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB