

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 26/2021 OF 17TH FEBRUARY 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 the Accounting Officer of Kenya Ports Authority in respect of Tender No. KPA/092/2020-21/TE for Design, Manufacture, Supply, Test and Commission of 4No. New Reachstackers.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Joseph Gitari | -Member |
| 3. Ms. Phyllis Chepkemboi | -Member |
| 4. Ms. Isabella Juma, CPA | -Member |
| 5. Eng. Mbiu Kimani, OGW | -Member |

IN ATTENDANCE

- | | |
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| 1.Mr. Philemon Kiprop | -Holding brief for the Ag. Board Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Kenya Ports Authority (hereinafter referred to as "the Procuring Entity") previously invited sealed tenders from eligible tenderers to bid for Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers through an advertisement published on MyGov Publication Website and the Lloyd's List on 14th January 2020 and 15th January 2020 respectively.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of nine (9) bids by the bid submission deadline of 7th May 2020. The same were opened shortly thereafter by a Tender Opening Committee and recorded as follows: -

No.	Firm
1.	Holman Brothers
2.	JGH Marine A/S
3.	ZPMC Engineering (Pty)
4.	Rhombus Construction Company Ltd
5.	Konecranes LiftTrucks AB
6.	CVS Ferrari
7.	Joh Achelis Soehne GmbH
8.	Neral Holdings
9.	Kalmar Reachstacker (in JV with Cargotech Finland Oy)

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids in Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers was undertaken in the following three stages: -

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

1. Preliminary Evaluation

At this stage, the Evaluation Committee applied the criteria under Clause 10 of Section III. Tender Data Sheet of the Tender Document. At the end of Preliminary Evaluation, the following tenderers were found responsive and thus eligible for Technical Evaluation: -

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

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause 30 of Section III. Tender Data Sheet of the Tender Document. Tenderers were also required to achieve a minimum technical score of 75% to proceed to Financial Evaluation. At the end of Technical Evaluation, the following tenderers achieved the minimum technical score required to proceed to Financial Evaluation: -

- M/s Rhombus Construction Company Limited; and
- M/s Kalmar Reachstacker.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criterion under Clause 10. Envelope B-Financial Proposal of Section III. Tender Data Sheet of the Tender Document.

According to the Statement of Professional Opinion dated 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 so as to award the tender on the basis of CIF Price Comparison because both bidders were required to quote CIF Prices. The same were recorded as follows: -

Item	Item to be compared	Cargotech 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 Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New

Reachstackers to M/s Rhombus Construction Company Ltd having determined that it was the lowest evaluated bidder at the price of USD 5,628,207.01 on the basis of CIF Price Comparison.

Professional Opinion

In a professional opinion dated 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 Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers 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 in **PPARB Application No. 1119 of 2020, Rhombus Construction Company Limited v. The Accounting Officer, Kenya Ports Authority & Another** (hereinafter referred to as Review No. 119/2020) directing as follows: -

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

In a Professional Opinion dated 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, upon including all the taxes and levies likely to be charged, the lowest bid price adds up to Kshs. 711,002,909.00 which was not within the Procuring Entity's budget of Kshs. 550,000,000. The Acting Head of Procurement and Supplies further stated that whereas the Board took the view that the Procuring Entity ought to have engaged in competitive negotiation with M/s Rhombus Construction Company Limited as stipulated in section 131 of the Act, the Procuring Entity had never used such method

before and that the time left was not sufficient for the procurement process to be carried out. He further stated that the bid by M/s Rhombus Construction Company Limited, despite being Delivery Duty Paid, did not indicate the VAT chargeable therefore, did not comply with the Procuring Entity's tender requirements requiring prices to be inclusive of all taxes and was thus incomplete, which incompleteness makes it a non-conformity and rules out the option of competitive negotiation. In conclusion, the Acting Head of Procurement and Supplies made the following recommendations to the Accounting Officer on the action required: -

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

On 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 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 in **PPARB Application No. 131 of 2020, Rhombus Construction Company Limited v. The**

Accounting Officer, Kenya Ports Authority & Another (hereinafter referred to as Review No. 131/2020) 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 bidders 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 Bids 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 Bids 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 Bids of M/s Rhombus Construction Company Limited and M/s Kalmar Reachstacker. The Evaluation Committee found that M/s Rhombus Construction Company Limited submitted the lowest evaluated bid and thus recommended the said bidder for award of the subject tender.

Professional Opinion

In a professional opinion dated 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 Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers to M/s Rhombus Construction Company Limited for submitting the lowest evaluated bid. Through handwritten comments on the face of the said professional opinion, the Acting Managing Director directed the Head of Procurement function to "*consider due diligence on governance issues raised and/or acknowledged by PPRA*" and thus did not approve the recommendation for award of the subject tender.

REQUEST FOR REVIEW NO. 150/2020

M/s Rhombus Construction Company Limited lodged a third Request for Review 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.*

In a decision rendered on 6th January 2021, the Board issued the following orders in **PPARB Application No. 150/2021, Rhombus Construction Company Limited v. The Accounting Officer, Kenya Ports Authority & Another** (hereinafter referred to as "Review No. 150/2021"): -

- 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.**

Tender Advertisement

The Procuring Entity invited sealed tenders for Tender No. KPA/092/2020-21/TE for Design, Manufacture, Supply, Test and Commission of 4No. New

Reachstackers (hereinafter referred to as "the subject tender") through a Tender Notice published in the Daily Nation Newspaper and the Procuring Entity's Website (www.kpa.co.ke) on 3rd December 2020 and on the Lloyd's list on 15th December 2020.

Judicial Review Application No. E002 of 2021, Republic v. Public Procurement Administrative Review Board & Another ex parte Kenya Ports Authority

The Procuring Entity lodged a Notice of Motion application through a Certificate of Urgency dated 19th January 2021 and filed on even date challenging the decision of the Board dated 6th January 2021 in Review No. 150/2020. Upon perusal of the Notice of Motion Application, the Honourable Justice E. Ogola issued the following orders on 20th January 2021 in **Judicial Review Application No. E002 of 2021, Republic v. Public Procurement Administrative Review Board & Another ex parte Kenya Ports Authority** (hereinafter referred to as "JR No. E002 of 2021"):

- 1. THAT this Chamber Summons is certified urgent.**
- 2. THAT leave is hereby granted to the Applicants to apply for Judicial Review Orders of Certiorari to remove into this Honourable Court for purposes of being quashed the entire Decision and Orders of the Public Procurement Administrative Review Board, the Respondent herein, made on 6th January 2021 under the Request for Review Application No. 150 of**

2020, Rhombus Construction Company Limited v. The Accounting Officer, Kenya Ports Authority & Kenya Ports Authority regarding Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers.

- 3. THAT the said leave granted to the Applicants to apply for the Judicial Review Orders of Certiorari in prayer 2 above, shall operate as a stay of the entire Decision and Orders issued by the Respondent in its decision in the Request for Review Application No. 150 of 2020, Rhombus Construction Company Limited v. The Accounting Officer, Kenya Ports Authority & Kenya Ports Authority pending the hearing and determination of the substantive application for judicial review orders in line with the express provisions of section 175 (1) of the Public Procurement and Asset Disposal Act.**
- 4. THAT the envisaged motion shall be filed within 7 days from the date hereof.**
- 5. THAT costs to abide in the substantive motion.**

REQUEST FOR REVIEW NO. 26 OF 2021

M/s Rhombus Construction Company Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 16th February 2021 and filed on 17th February 2021 together with a Supporting Affidavit sworn on 16th February 2021 and filed on 17th February 2021, through the firm of Sigano & Omollo LLP Advocates, seeking the following orders: -

a) An order annulling and setting aside the procurement proceedings in Tender No.KPA/092/2020-21/TE – Design, Manufacture, Supply, Test and Commission 4no. New Reach stackers) in their entirety;

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

c) An order awarding Costs of the Review to the Applicant.

In response, the 1st and 2nd Respondents lodged a Response to the Request for Review dated 22nd February 2021 and filed on 24th February 2021 together with a Supporting Affidavit sworn on 22nd February 2021 and filed on even date through M/s Addraya Dena Advocate.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board. The Applicant lodged Written Submissions dated 2nd March 2020 and filed on 3rd March 2021. The Respondents did not file written submissions.

BOARD'S DECISION

The Board has considered each of the parties' pleadings together with the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issue calls for determination: -

Whether the Accounting Officer of the Procuring Entity's Tender Notice of Tender No. KPA/092/2020-21/TE for Design, Manufacture, Supply, Test and Commission of 4No. New Reachstackers published on the Daily Nation Newspaper and the Procuring Entity's Website on 3rd December 2020 and on the Lloyd's List on 15th December 2020 is lawful.

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

At paragraphs 6 to 8 of its Request for Review, the Applicant outlined a brief background of Request for Review proceedings before this Board with respect to procurement of Reachstackers undertaken by the Procuring Entity. The Applicant avers that procurement of Reachstackers has been the subject of Request for Review proceedings before this Board through Review No. 119 of 2020, Review No. 131 of 2020 and Review No. 150 of 2020. The Applicant further states that the Procuring Entity advertised a tender and issued a Tender Document for the **Design, Manufacture, Supply, Test and Commission of 4 No. New Reachstackers** with a tender submission deadline of 18th February 2021. According to the Applicant, on 19th January 2021, the Procuring Entity challenged the Board's decision in Review No.

150/2020 through Mombasa High Court Judicial Review Application No. E002 of 2021. The Applicant contends that the Procuring Entity has acted contrary to the Board's decision in Review No. 119/2020, Review No. 131/2020 and Review No. 150/2020 in failing to complete the procurement proceedings of Reachstackers to its logical conclusion as ordered by the Board on several occasions. In the Applicant's view, the 1st Respondent undermined the responsibility vested upon him under section 44 of the Act to ensure the Procuring Entity complies with the Act. To that end, the Applicant urged the Board to grant the orders sought in the instant Request for Review in furtherance of the principles of natural justice and fair administrative action.

In response, the Respondents aver at paragraph 1 to 3 of their Response to the Request for Review that they advertised the subject tender on 3rd December 2020 and 15th December 2020, and upon issuance of an addendum, the tender submission deadline was scheduled for 18th February 2021. According to the Respondents, the procurement process for the **Design, Manufacture, Supply, Test and Commission of 4 No. New Reachstackers** emanated from the Procuring Entity's Annual Procurement Plan for the Financial Year 2020-2021 whereas, the procurement proceedings in respect of **Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers** handled by the Board in Review No 119/2020, Review No. 131/2020 and Review No. 150/2020 was procured in the Procuring Entity's Procurement plan and approved budget for the Financial Year 2019-2020. According to the Respondents, the procurement process in the subject tender (that is,

Tender No. KPA/092/2020-21/TE for Design, Manufacture, Supply, Test and Commission of 4No. New Reachstackers) is distinct from the procurement process in **Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers**. The Respondents affirm that it challenged the decision of the Board in Review No. 150/2020 through judicial review proceedings at the High Court in JR No. E002 of 2021.

Having considered parties' pleadings, the Board deems it necessary to point out that procurement of Reachstackers by the Procuring Entity through **Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers** (hereinafter referred to as "Tender No. 073") has been the subject of Request for Review proceedings before this Board in Review No. 119/2020, Review No. 131/2020 and Review No. 150/2020.

Briefly, in Review No. 119/2020, the Board was not persuaded by the Procuring Entity's termination of procurement proceedings of 12 New Reachstackers hence, annulled the termination because the Procuring Entity failed to provide real and tangible evidence of its alleged budget of Kshs. 550,000,000/-. Upon listing the circumstances under which competitive negotiations may be undertaken under section 131 of the Act, the Board held that termination ought to be a last resort only after the Procuring Entity has attempted available options under the Act if its approved budget is not sufficient to conclude a procurement process.

In Review No. 131/2020, the Board annulled the Procuring Entity's termination of the procurement proceedings for 12 New Reachstackers

having established that the Procuring Entity failed to comply with the orders of the Board in Review No. 119/2020. As was held by the Board, the Procuring Entity ignored the Board's findings on the manner in which competitive negotiations may be applied and failed to make reasonable steps to conduct competitive negotiations with the Applicant and M/s Kalmar Reachstacker.

In Review No. 150/2020, the Board found the 1st Respondent failed to comply with the orders of the Board issued in Review No. 131/2020. Having interrogated the reasons cited by the Respondents for such failure, the Board found that; (i) the Respondents did not challenge the Board's decision in Review No. 131/2020 and therefore, the same is final and binding to it pursuant to section 175 (1) of the Act; with this knowledge, the Respondents initiated competitive negotiations, (ii) the Respondents did not provide any justifiable basis for the unreasonable delay of 13 days after 23rd October 2020 when the decision in Review No. 131/2020 was issued and thus began competitive negotiations when the time provided by the Board was about to lapse, and this delay resulted in limited time remaining to comply with the orders of the Board, (iii) after realizing the time remaining was limited, the Respondents did not approach this Board seeking extension of time within which to comply with the Board's orders in Review No. 131/2020 (iv) the 1st Respondent did not furnish the Board with evidence of payment of the amount of Kshs. 305,000/- to the Applicant as directed through Order No. 4 of the Board's decision of 23rd October 2020 in Review No. 131 of 2020.

It has now emerged through the instant Request for Review proceedings that, the Procuring Entity invited sealed tenders for the procurement of 4No. New Reachstackers through the subject tender vide a Tender Notice published in the Daily Nation Newspaper and the Procuring Entity's Website on 3rd December 2020 and in the Lloyd's list on 15th December 2020. This advertisement was made before Review No. 150/2020 was filed before this Board on 16th December 2020. However, none of the parties to Review No. 150/2020 brought this fact to the attention of the Board. It is also worth noting that the procurement of 4 Reachstackers was made even before the Procuring Entity lodged Judicial Review proceedings at the High Court through **Judicial Review Application No. E002 of 2021, Republic v. Public Procurement Administrative Review Board & Another ex parte Kenya Ports Authority** (hereinafter referred to as "JR No. E002 of 2021") on 19th January 2021, but an Addendum issued by the Procuring Entity on 21st January 2021 extending the tender submission deadline to 18th February 2021, during the pendency of Judicial Review proceedings at the High Court through JR No. E002 of 2021.

Having noted the sequence of events related to the instant Request for Review proceedings, the Board observes that procurement of goods, works and services in this country must meet the threshold set by the Constitution, the Act and the regulations made pursuant to the Act, such as the Public Procurement and Asset Disposal Regulations, 2020. Article 227 (1) of the Constitution provides that: -

"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective."

Article 227 (1) of the Constitution uses the words "**contract for goods or services**" because the culmination of any procurement process (if the same has not been terminated in accordance with section 63 of the Act) ought to be a contract signed between a procuring entity (State organ or public entity) and supplier of the goods, works or services.

To support this position, the Board observes that section 2 of the Act defines the term "**procurement**" as: -

"the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system"

Further, "**a procurement contract**" is described in the same provision as:-

"an agreement concluded between the procuring entity and a contractor (or contractors) resulting from a tendering proceeding"

Section 44 (1) of the Act provides that an accounting officer of a public entity is primarily responsible for ensuring that the public entity complies with the Act. Further, section 2 of the Act defines the term **"user department"** as:-

"the unit of a procuring entity that requisitions the goods, works or services being procured"

On its part, the term **"requisition"** has several meanings in the Oxford Dictionary of English, 9th Edition. However, the definition that is relevant to procurement proceedings is provided therein as follows: -

"In procurement, a requisition is made when employees or departments from within a company require additional goods or services in order to maintain their business operations."

An accounting officer of a procuring entity is the custodian of a procurement process from the moment a requisition is made by a user department for the procurement of goods, works or services and once an approved procurement plan and budget for the procurement is made. Thereafter, preparation of tender documents, advertisement, submission of tenders, evaluation of tenders, award recommendation, notification to bidders and signing of a contract are the processes that follow to ensure the procurement process by a procuring entity comes to an end. Pursuant to section 135 (2) of the Act, an accounting officer of a procuring entity enters into a written contract with the successful tenderer based on the tender documents and any clarifications that emanate from the procurement proceedings. Thereafter, the procurement proceedings are complete and implementation of a contract

commences. In other instances, a procurement process can be concluded through termination provided the statutory preconditions for termination of a tender specified in section 63 of the Act are satisfied.

The Procuring Entity in this instance, did not complete the procurement proceedings in **Tender No. 073** because no contract was signed in respect of procurement of 12 Reachstackers or a lawful termination undertaken pursuant to section 63 of the Act. Even if the Procuring Entity terminated the said proceedings on two occasions, the said terminations were nullified by this Board in Review No. 119/2020 and in Review No. 131/2020 as already outlined hereinbefore.

Having studied the Tender Document issued in respect of the subject tender, the Board observes that the Procuring Entity herein is procuring for the Design, Manufacture, Supply, Test and Commission of 4No. New Reachstackers. According to Clause 2.0 of Section VI. Technical Specifications of the Tender Document, the Scope of Work of the subject tender is outlined as follows: -

2.0. Scope of Work

2.1. Design, manufacture, Supply, test and commission 4 No. New Reachstackers.

2.2. Supply with tools for Reachstacker repairs, including special tools as provided in the technical specifications.

- 2.3. Supply the Reachstackers with documentation and manuals as per the specifications.**
- 2.4. Each equipment to be installed with fire detection and suppression system as specified.**
- 2.5. Warranty period 6000Hrs or 24 months.**
- 2.6. Training and Pre-Shipment Inspection as specified in the technical specifications.**
- 2.7. Supply preventive maintenance spares as per table 2**
- 2.8. Supply of back up spares as per table 3**

On the other hand, the procurement proceedings for **Tender No. 073** has the following scope of work explained in Clause 2.0 of Section VI. Technical Specifications of the Tender Document: -

2.0. Scope of Work

- 2.1. Supply, test and commission 12 No. New Reach stackers.**
- 2.2. Supply with tools for Reach stacker repairs, including special tools.**
- 2.3. Supply with operation manuals, each machine 3 copies.**
- 2.4. Supply with maintenance manuals, each machine 3 copies.**
- 2.5. Supply with parts list manuals, each machine 3 copies.**
- 2.6. Each equipment to be installed with fire detection and suppression system.**
- 2.7. After sale service (24 months).**
- 2.8. Training.**

The Board observes that the scope of work for the subject tender and the scope of work for **Tender No. 073** are substantially similar, save that the Procuring Entity added an aspect of design and manufacture of the reachstackers and after sale services in the subject tender. Further, the subject tender was procured in the financial year 2020/2021 while the procurement process in **Tender No. 073** was procured in the financial year 2019/2020. Lastly, the Procuring Entity reduced the number of reachstackers to 4 in the subject tender, compared to the number of reachstackers in **Tender No. 073** which were 12 in number.

Having studied the pleadings and confidential documents submitted by the Procuring Entity pursuant to section 67 (3) (e) of the Act, the Board observes that no documentation was furnished by the Procuring Entity demonstrating that the procurement proceedings in respect of **Tender No. 073** have been concluded either by signing of a contract with a successful tenderer in accordance with section 135 of the Act or termination of the procurement proceedings in Tender No. 073 in accordance with section 63 of the Act, so as to pave way for a tender advertisement in respect of Reachstackers, having noted all previous attempts to terminate the procurement proceedings in Tender No. 073 were nullified by this Board in Review No. 119/2020 and Review No. 131/2020. Accordingly, the Board finds that the Procuring Entity did not complete procurement proceedings in **Tender No. 073**.

Despite its failure to complete procurement proceedings in **Tender No. 073**, the Procuring Entity went ahead to advertise the same services on 3rd and

15th December 2020. Thereafter, the Procuring Entity lodged Judicial Review proceedings challenging the decision of the Board of 6th January 2021 in Review No. 150/2020 through JR No. E002 of 2021. On 20th January 2021 the High Court granted leave to the Respondents to apply for judicial review orders and which leave, operated as a stay of the decision and orders of the Board in Review No. 150/2020.

This therefore raises the question whether the procuring entity's advertisement of the subject tender was lawful given the Procuring Entity's failure to complete the procurement proceedings of Reachstackers previously initiated through **Tender No. 073**, which tender, the Board has already found is similar to the subject tender.

In addressing this question, the Board observes that in its written submissions, the Applicant cited the decision of the Board in **PPARB Application No. 2 of 2015, Victoria Cleaning Services v. Kenya Medical Training College**, where the Board held as follows: -

"The Procuring Entity could not proceed to invite new quotations for the same services since the first tender process had not been extinguished.

The Board having determined that the first tender process was not terminated (even as the Procuring Entity embarked on the second process), holds that the second process cannot stand. To allow it to stand will amount to having two

processes running concurrently with both desiring a common outcome”

Having considered the finding in the foregoing case, it is the Board’s considered view that the Procuring Entity herein is desirous of having two procurement processes running concurrently for the procurement of 12 Reachstackers (which was never concluded through Tender No. 073) and the procurement of 4 Reachstackers in the subject tender yet the outcome of both procurement processes is the same, that is, to obtain a service provider who would **Design, Manufacture, Supply, Test and Commission Reachstackers.**

Having found the procurement process in Tender No. 073 was never concluded by the Procuring Entity, it therefore follows that the Procuring Entity cannot float the subject tender. The argument that the annual procurement plan and approved budget for Tender No. 073 was made in 2019/2020 while the annual procurement plan and approved budget for subject tender was made in 2020/2021 is mischievous and meant to frustrate the procurement process in Tender No. 073, which actions cannot be condoned by this Board.

We say so because, a procurement begins when a need is identified by a user department of a procuring entity and a requisition is made for a procurement, and ends when a contract is signed in accordance with section 135 of the Act or the procurement process is terminated in accordance with section 63 of the Act.

Further, the Board's view on the mischief by the Procuring Entity is buttressed by the conduct of the Procuring Entity in challenging the Board's decision in Review No. 150/2020 at the High Court, obtaining orders on 20th January 2020 staying the orders and decision of the Board in Review No. 150/2020 and a day later, issuing an addendum dated 21st January 2021 of the subject tender in the comfort of having obtained stay orders at the High Court.

The House of Lords of the United Kingdom in **R (H) vs Ashworth Special Hospital Authority (203) 1 WLR 127** held as follows on the effect of stay orders: -

"the purpose of a stay is to preserve the status quo pending the final determination of a claim for review, and to ensure that a party who is eventually successful in his or her challenge will not be denied the full benefit of his or her success."

Similarly, Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa High Court Miscellaneous Application. No. 158 of 2006** (hereinafter referred to as "the Taib Case") expressed himself on the issue of stay as follows:

"... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that

has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken.”

Having considered the finding in the Taib case, the Board observes that the elements of a stay order are as follows: -

- It prevents a decision maker from continuing with the decision making process (if the decision has not been made) or suspends the validity and implementation of a decision that has been made. This therefore means, the stay orders issued by the High Court in JR No. E002 of 2021 suspended the validity and implementation of the decision and orders issued in Review No. 151/2020;
- It is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body and the implementation of the decision of such a body if it has been taken.

The stay orders issued by the High Court in JR No. E002 of 2021 maintained a status quo pending the determination of Judicial Review No. E002 of 2021. This therefore means, no process could be undertaken by the Procuring Entity in respect of procurement of Reachstackers, such as issuance of an addendum on 21st January 2021, which was a day after the stay orders of the High Court.

Assuming the Procuring Entity would be the successful party in JR No. E002 of 2021 (if the decision of the Board in Review No. 150/2020 has been quashed by the High Court), then the Procuring Entity would not be required to implement the decision of the Board in Review No. 150/2020. If the Applicant herein was the successful party in JR No. E002 of 2021 (if the decision of the Board in Review No. 150/2020 has been upheld by the High Court), then the Procuring Entity would be required to comply with the orders of the Board in Review No. 150/2020.

It is evident that the Respondents are determined to not only undermine judicial processes at the High Court but have also abused the process of review before this Board while at the same time, disenfranchising bidders who participated in **Tender No. 073** such as the Applicant herein.

The signing of a contract in accordance with section 135 of the Act or termination of procurement proceedings in accordance with section 63 of the Act marks the conclusion of procurement proceedings. It was never the intention of the framers of the Constitution and the Act that a procuring entity would circumvent the manner in which a procurement process is initiated and concluded, by preparing another annual procurement plan and approved budget in a subsequent financial year yet the procurement process clearly emanates from an initial procurement process for the same goods, works or services advertised in an initial financial year. A mischievous procuring entity such as the 2nd Respondent herein would change the Tender Number, reduce the quantity of goods, works or services required and

advertise a subsequent tender in a different financial year to simply disenfranchise bidders.

It is the Board's considered finding that the Procuring Entity's actions were meant to circumvent the principles that guide public procurement under Article 227 (1) of the Constitution such as the principle of fairness which requires the Procuring Entity to act in a fair manner when procuring for Reachstackers, which we have found was never completed through **Tender No. 073**. Article 47 (1) of the Constitution further provides that: -

"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

The action of advertising the subject tender that clearly emanates from **Tender No. 73** which was never concluded, demonstrates the Procuring Entity's action lacks the attributes of fair administrative action cherished by Article 47 (1) of the Constitution and undermines the principles set out in Article 227 (1) of the Constitution.

One of the functions of the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") outlined in section 9 (a) of the Act is to monitor, assess and review the public procurement and asset disposal system to ensure that they respect the national values and other provisions of the Constitution, including Article 227 and make recommendations for improvements. This is a classic example that requires

the intervention of the Authority in exercising its mandate under section 9 (a) of the Act to ensure the procurement of Reachstackers by the Procuring Entity herein respects the national values and other provisions of the Constitution, including Article 227 thereof and to make recommendations for improvements.

The Board, being a party to JR No. E002 of 2021, is also mindful of the fact that on 4th March 2021, the Honourable Justice J. N Onyiego delivered a judgement in respect of JR No. E002 of 2021 dismissing the Notice of Motion Application dated 26th January 2021 filed by the Respondents herein. It therefore follows that the Respondents have an obligation to comply with the orders of the Board issued in Review No. 150/2020 because the decision of the Board was not quashed, thus, remains final and binding to the parties in Review No. 150/2020. This fact is reiterated by the decision of the High Court in JR No. E002 of 2021 at paragraph 61 thereof for the Procuring Entity to comply with the orders of the Board in Review No. 131/2020 and Review No. 150/2020.

In totality of the foregoing, the Board finds that the Procuring Entity's Advertisement of Tender No. KPA/092/2020-21/TE for Design, Manufacture, Supply, Test and Commission of 4No. New Reachstackers published on the Daily Nation Newspaper and the Procuring Entity's Website (www.kpa.co.ke) on 3rd December 2020 and on the Lloyd's list on 15th December 2020 including any process undertaken in respect of the subject tender is unlawful. To that end, the Board finds that the Procuring Entity's advertisement of the subject tender is null and void.

Accordingly, the Request for Review succeeds in terms of the following orders: -

FINAL ORDERS

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

- 1. The Accounting Officer of the Procuring Entity's Advertisement of Tender No. KPA/092/2020-21/TE for Design, Manufacture, Supply, Test and Commission of 4No. New Reachstackers published on the Daily Nation Newspaper and the Procuring Entity's Website on 3rd December 2020 and on the Lloyd's list on 15th December 2020 including any process undertaken in respect of the subject tender, be and is hereby cancelled and set aside.**
- 2. The Respondents shall bear the costs of this Request for Review amounting to Kshs. 95,000/- to be paid to the Applicant.**

Dated at Nairobi this 9th day of March 2021.



.....
CHAIRPERSON

PPARB



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SECRETARY

PPARB

