

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 159/2021 OF 23RD DECEMBER 2021

BETWEEN

DATASEC LIMITED APPLICANT

AND

**THE DIRECTOR GENERAL (ACCOUNTING OFFICER),
ENERGY & PETROLEUM REGULATORY AUTHORITY ... RESPONDENT**

Review against the decision of the Director General, Energy and Petroleum Regulatory Authority in relation to Tender No: EPRA/SCM/4/3/21-22/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management information system (including review of the adequacy of the existing ICT Strategies, Policies, Applications, Infrastructure and ICT skill sets at Energy and Petroleum Regulatory Authority.

BOARD MEMBERS

- 1. Ms. Faith Waigwa - Chairperson
- 2. Ms. Njeri Onyango - Vice Chairperson
- 3. Mr. Steven Oundo, OGW - Member
- 4. Dr. Paul Jilani - Member
- 5. Ms. Phyllis Chepkemboi - Member

IN ATTENDANCE

Philip Okumu - Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

Energy and Petroleum Regulatory Authority (hereinafter referred to as the 'Procuring Entity') through its Director General, the Respondent herein, invited sealed tenders from eligible firms for Tender No: EPRA/SCM/4/3/21-22/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management information system (including review of the adequacy of the existing ICT Strategies, Policies, Applications, Infrastructure and ICT skill sets at Energy and Petroleum Regulatory Authority (hereinafter referred to as the 'subject tender') using the Request for Proposal method of tendering. The same was advertised in the local daily newspapers, MyGov publication and the Procuring Entity's website (www.epra.go.ke) on 17th August 2021.

Addendum

The Procuring Entity issued Addendum 1 and subsequently Addendum 2 that extended the subject tender's submission deadline to 10th September 2021.

Tender Submission deadline and Opening of Tenders

The Procuring Entity received 14 tenders by the tender submission deadline of 10th September 2021 at 11:30hrs. The 14 tenders were opened shortly thereafter by a Tender Opening Committee appointed by the Respondent in the presence of tenderers' representatives present. The following tenderers were recorded as having submitted their respective tenders in good time as captured in the Tender Opening Minutes of 10th September 2021: -

1. Yellowstone Energy Limited & Cerberus Limited;

2. Viscar Industrial Capacity Limited & Cutting Edge TechNlogies Limited;
3. Netcom Information System Limited;
4. Techdroid Solutions Limited & Herufi Technologies Limited;
5. Grant Thornton;
6. Apex Organizational Solutions LLC & PAA Limited;
7. Osano & Associates;
8. Sentinel Africa;
9. Datasec Limited;
10. Revere Technologies Limited Kenya;
11. Corporate Consultants Limited & Habrin Consulting Limited;
12. Premium Strategies Limited & Microforce Solutions Limited;
13. UNES Limited; and
14. JKUATES Limited & PTI Consulting Limited

Evaluation of Tenders

An Evaluation Committee appointed by the Respondent conducted evaluation of tenders in the following three stages as captured in an Evaluation Report signed on 30th September 2021: -

- a. Preliminary Evaluation;
- b. Technical Evaluation; and
- c. Financial Evaluation.

Preliminary Evaluation

At this stage, the Evaluation Committee determined the completeness and responsiveness of tenders by applying the criteria outlined in Clause a) Mandatory Evaluation of Evaluation Criteria at page 82 of the Tender Document. At the end of evaluation at this stage, 8 tenders were found nonresponsive while 6 tenders including the Applicant's tender were found responsive, thus proceeded to the next stage of evaluation.

Technical Evaluation

At this stage, the Evaluation Committee weighted each tender against the criteria outlined in Clause b) of the Evaluation Criteria at page 83 to 86 of the Tender Document. Only tenders that attained a score equal to or above 70% at this stage of evaluation qualified to proceed for evaluation at the financial evaluation stage. At the end of evaluation at this stage, 3 tenders were found nonresponsive while 3 tenders including the Applicant's tender were found responsive, thus proceeded to the next stage of evaluation.

Financial Evaluation

At this stage, the Evaluation Committee applied the formula in the criteria outlined in Clause c) Financial Evaluation of the Evaluation Criteria at page 86 of the Tender Document. At the end of evaluation at this stage, the Applicant's tender was found to have attained the highest score arrived at by combining the technical and financial scores and at a quoted price of Kshs.13,620,000.00 inclusive of VAT.

Due Diligence

Pursuant to Section 83 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), the Evaluation Committee conducted due diligence on the Applicant as captured in the Due Diligence Report dated 6th October 2021 which confirmed the information provided by the Applicant was authentic.

Professional Opinion

In a Professional Opinion signed by the Manager - Supply Chain Management on 18th October 2021, the Manager of the Procuring Entity's Supply Chain Management opined that the procurement process complied with the Act and recommended for approval of award of the subject tender to the Applicant at a total price of Kshs.13,620,000.00 inclusive of VAT.

However, the Respondent declined to approve the award of the subject matter to the Applicant on various grounds jotted by hand on the same professional opinion.

Notification

In a letter dated 28th October 2021, the Respondent notified the Applicant that its tender was successful and that it had been awarded the subject tender subject to provisions of the Act. Further, the Applicant was notified that a contract will be signed within 30 days from 28th October 2021.

REQUEST FOR REVIEW NO.159 OF 2021

Datasec Limited, the Applicant herein, lodged a Request for Review dated 22nd December 2021 and filed on 23rd December 2021 together with a Statement in Support of Request for Review signed on 22nd December 2021 by Gladys Njiru, the Applicant's Managing Director, on 22nd December 2021 through the firm of A. E. Kiprono & Associates seeking the following orders:

- 1. An order directing the Respondent to execute with the Applicant the contract for Tender No. EPRA/SCM/4/3/21-22/012.**
- 2. An order extending the tender validity period to enable the Respondent to finalize the tendering process by executing the contract with the Applicant.**
- 3. An order awarding costs of the request for review to the Applicant.**
- 4. Any other relief that the Review Board deems fit to grant under the circumstances.**

Vide a Notification of Appeal and a letter dated 23rd December 2021, the Acting Board Secretary notified the Respondent of the existence of the Request for Review and suspension of procurement proceedings for the subject tender while forwarding to the Respondent a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020

detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 23rd December 2021.

On 30th December 2021, the Respondent filed his response dated 30th December 2021 through Leah Hadidah Jara, Advocate.

Vide letters dated 3rd January 2022, the Acting Board Secretary notified all tenderers in the subject tender of the existence of the Request for Review while forwarding to the tenderers a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020. Further, the tenderers were requested to submit any information and arguments with respect to the subject tender within three days from 3rd January 2022. None of the tenderers filed a response to the Request for Review.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 on 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. None of the parties filed written submissions.

APPLICANT'S CASE

The Applicant avers that it participated in the subject tender following the same being floated by the Procuring Entity on 17th August 2021 and subsequently attended the opening of tenders on 10th September 2021.

It is the Applicant's averment that it later on received a letter of award dated 28th October 2021 from the Procuring Entity via an email of 9th November 2021 and accepted the award on the same day vide its letter dated 9th November 2021, which acceptance letter was emailed to the Procuring Entity and hand delivered on 10th November 2021. However, to date, the Applicant alleges that no contract has been signed by the Applicant with respect to the subject tender despite the letter of award indicating that a contract will be signed within 30 days from the date of the letter of award. Despite enquiring on the status of the contract via an email dated 26th November 2021 and subsequent letter dated 8th December 2021, the Applicant alleges the Respondent has to date failed to respond to its queries. The Applicant avers there is no justifiable reason in law why a contract with respect to the subject tender cannot be executed between itself and the Respondent as provided for under the provisions of the Tender Document and the Act. It is for the foregoing reasons, that the Applicant alleges the Respondent is in breach of Sections 44 (1), 134(1), 135 (1), (2), (3) and (4) of the Act read with Clause 36 of the Tender Document and Article 227(1) of the Constitution and seeks the Board to compel the Respondent to sign a contract with it.

Further, the Applicant avers that the tender validity period for the subject tender is 120 days set to expire on 10th January 2022 the same having

started running on 10th September 2021. The Applicant is apprehensive that since the Respondent has not extended the tender validity period, it is likely to suffer loss and damage if the same expires and dies a natural death, because a procurement contract must be signed within tender validity and such procurement contract has not been signed. It is for this reason the Applicant seeks the Board to extend the tender validity period.

Finally the Applicant avers that the Request for Review has merit and it is only fair and just that the same be allowed with costs to the Applicant.

RESPONDENT'S RESPONSE

In Response to the Applicant's allegations, the Respondent objects to the jurisdiction of this Board to hear and determine the Request for Review on grounds that the Request for Review was filed after the lapse of 14 days of notification of award contrary to Section 167(1) of the Act and Regulation 203(2)(c)(i)-(iii) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as 'Regulations 2020'). The Respondent also opposes the Request for Review in its entirety and denies in toto all the allegations therein.

According to the Respondent, the subject tender was floated on 17th August 2021 and closed on 10th September 2021 following issuance of two addenda extending the tender submission deadline. Thereafter, tenders were opened on 10th September 2021 by a Tender Opening Committee appointed by the Respondent. The Respondent contends that he appointed an Evaluation

Committee which evaluated tenders in 3 stages (preliminary, technical and financial evaluation stages) within 21 days in accordance with Section 126(3) of the Act which resulted in the Evaluation Committee recommending award of the subject tender to the Applicant. The Respondent contends that the Head of Procurement Function in his professional opinion recommended award of the subject tender to the Applicant. However, it is the Respondent's contention that he rejected the recommendation of award with instructions to the Director of Corporate Services Directorate to address material pertinent facts in line with the business requirements of the Procuring Entity as provided by Section 84 of the Act. Thereafter, due to misrepresentation of facts by the Procuring Entity's member of staff, the Respondent signed a letter of notification of intention to enter into a contract on 9th November 2021 and as a result, the notification of intention to enter into a contract was erroneously communicated to the Applicant via email of 9th November 2021. According to the Respondent, upon receipt of the Procuring Entity's email of 9th November 2021, the Applicant notified the Procuring Entity via email of 9th November 2021 that it would prepare an acceptance letter and submit it to the Respondent. The Respondent alleges the misrepresentation gave rise to material governance issues under Section 63 of the Act following which the notification of intention to enter into a contract was recalled by the Respondent immediately via email dated 9th November 2021 advising the Applicant to ignore its contents and no notification of regret to unsuccessful tenderers as required under Section 87(3) of the Act were ever issued since pertinent material facts raised in the professional opinion had not been resolved. However, the Respondent

contends that the Applicant submitted its acceptance letter to the Respondent on 10th November 2021. The Respondent admits that it has not responded to the Applicant despite the Applicant requesting for a contract since it is still in the process of addressing the material facts raised in the professional opinion.

The Respondent contends that the subject tender is still within the tender validity period due to lapse on 10th January 2022 and he may extend the same as provided in Section 88 of the Act. According to the Respondent, once he finalizes with due diligence with respect to the material issues raised in the professional opinion as well as address the governance issues of misrepresentation that led to the notification of intention to be issued, he will formally respond and communicate to the Applicant. The Respondent alleges that it commenced disciplinary action against the member of staff who misrepresented the facts leading to issuance of the notification of an intention to enter into a contract with the Applicant.

The Respondent finalizes by denying that it is in breach of Section 134(1) and 135 (1), (2), (3), and (4) of the Act and Article 227 (1) of the Constitution as read with Clause 36 of the Tender Document and contends that it adhered to the law and the Tender Documents requirements as demonstrated in his response and any direction to award the orders prayed for by the Applicant or anything done or intended to be done in pursuance thereof would be prejudicial to the Respondent.

The Respondent contends the Request for Review is pre-mature, ill conceived, lacks merit and is based on speculation and misconception of the law since the tender validity period has not lapsed. Consequently, the Respondent prays for the Request for Review to be dismissed, costs for the same to be awarded to him and he be allowed to proceed with the procurement process.

BOARD'S DECISION

The Board has considered each of the parties' pleadings together with the confidential documents submitted to it by the Procuring Entity pursuant to Section 67 (3) (e) of the Act and finds the following issues call for determination: -

- 1. Whether the Request for Review was filed within 14 days of notification of award or date of occurrence of alleged breach of duty imposed on the Procuring Entity by the Act and Regulations 2020 in accordance with Section 167(1) of the Act and Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.**
- 2. Whether a Contract between the Procuring Entity and the Applicant should be executed by the Respondent and the Applicant with respect to the subject tender in line with Section 135 of the Act.**
- 3. Whether the Tender Validity period of the subject tender should be extended in line with Section 88 of the Act.**

The Board will now proceed to address the issues framed for determination.

Whether the Request for Review was filed within 14 days of notification of award or date of occurrence of alleged breach of duty imposed on the Procuring Entity by the Act and Regulations 2020 in accordance with Section 167(1) of the Act to invoke the jurisdiction of the Board.

At paragraph 17 of the Respondent's Response to the Applicant's Request for Review, the Respondent raises a preliminary objection that the Request for Review violates Section 167(1) of the Act and Regulation 203(2)(c)(i)-(iii) of Regulations 2020 for being brought before the Board after the lapse of 14 days of notification of award thus the Board has no jurisdiction to hear and determine the Request for Review.

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) eKLR**, Nyarangi, JA held that:

"..... I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of

proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..... "

Similarly, in the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

".....So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

The Supreme Court in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] eKLR** pronounced itself with respect to where the jurisdiction of a court or any other decision making body flows from when it held as follows at paragraph 68 of its Ruling:

"(68) 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 decision of the Supreme Court in *Samuel Kamau Macharia Case* is very critical in determining where the jurisdiction of this Board flows.

This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides for:

27. Establishment of the Public Procurement Administrative Review Board

(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board.

Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

28. Functions and powers of the Review Board

(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 above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific in Section 167 (1) of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 173 which provides for the Powers of the Board as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

(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)

(3)

(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. [Emphasis by the Board]

168.

169.

170.

171.

172.

173. Powers of Review Board

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.

Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Section 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before the Board.

It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act allows an aggrieved tenderer, such like the Applicant to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on the Procuring Entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

The manner in which an aggrieved tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

203. Request for a review

(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);

(b);

(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)

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

(4)

Regulation 203 prescribes an administrative review sought by an aggrieved tenderer under Section 167(1) will be by way of a request for review. Further, this request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms that an aggrieved tenderer invokes the jurisdiction of the Board by filing a request for review

with the Board Secretary within 14 days of (i) occurrence of breach complained of takes place before an award is made, (ii) notification under Section 87 of the Act; or (iii) occurrence of breach complained of takes place after making of an award to the successful tenderer.

Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

It is therefore clear from a reading of Section 167(1) & 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 allows an aggrieved tenderer to invoke the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of has taken place before an award is made, (ii) notification of intention to enter into a contract has been issued or (iii) occurrence of breach complained of takes place after making of an award to the successful tenderer. Simply put, an aggrieved tenderer, such like the Applicant, can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made. The option available for an aggrieved tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach.

Turning to the circumstances of this case, it is common ground that the notification of intention to enter into a contract, even though dated 28th October 2021, (hereinafter referred to as the 'letter of notification'), was received by the Applicant via email on 9th November 2021. The letter of

notification was prepared on the Procuring Entity's letterhead and signed by the Respondent reads as follows:

"Our ref: EPRA/SCM/4/3/21-22/012/LT/ca 28th October, 2021

The Managing Director

Datasec Limited

P.O. Box 22763-00505

Nairobi

Email: info@datasec.co.ke

Dear Sir/Madam,

RE: CONSULTANCY SERVICES TO ASSIST WITH THE REDESIGN AND IMPLEMENTATION OF AN IMPROVED, MORE EFFICIENT AND APPROPRIATE REGULATORY MANAGEMENT INFORMATION SYSTEM (INCLUDING REVIEW OF THE ADEQUACY OF THE EXISTING ICT STRATEGIES, POLICIES, APPLICATIONS, INFRASTRUCTURE AND ICT SKILL SETS AT ENERGY AND PETROLEUM REGULATORY AUTHORITY: TENDER NO.EPRA/SCM/4/3/21-22/012

The above mentioned tender refers.

We wish to inform you that your tender was successful. It is however subject to the following conditions:-

a) The Contract Price

The Contract amount shall be Kshs.13,620,000.00 inclusive of all taxes.

b) Notification of Award

This notification of award is subject to the provisions of the Public Procurement & Asset Disposal Act 2015; Contract will be signed within 30 days from the date of this letter.

Please acknowledge receipt of this letter of notification signifying your acceptance.

We hope for the very best of your services and good business relationship.

Yours faithfully,

Daniel Kiptoo Bargoria

DIRECTOR GENERAL

The Applicant is satisfied with the letter of notification and is not complaining on the same thus Regulation 203(2)(c)(i) & (ii) of Regulations 2020 are not applicable in these circumstances.

We understand the Applicant's main complain to be that the Respondent has failed to sign a contract with it in the subject tender despite having indicated in the letter of award that a contract will be signed within 30 days from the date of the letter of award, which 30 days started running on 9th November 2021 when the letter of award was received by the Applicant and not 28th

October 2021 being the date of the letter of award. Our interpretation is hinged on the fact that it would be absurd to have time indicated in a letter of award to start running when the recipient of such letter of award has not received the same.

We note at paragraph 27(b) of the Respondent's response to the applicant's request for review, the Respondent contends that the Request for Review is time barred because the letter of the award was sent to the Applicant on 9th November 2021 yet the Request for Review was filed on 23rd December 2021.

In our considered opinion, no breach occurred on 9th of November 2021 because the Applicant is not challenging the contents of the letter of award which it received on 9th November 2021. The breach complained of by the Applicant, is the lack of preparing and signing of the contract with respect to the subject tender by the Respondent. This breach could only occur after the time stipulated in the letter of award lapsed. The letter of award indicated a contract with respect to the subject tender was to be signed within 30 days and we have already indicated this time started running from the date when the Applicant received the letter of award being 9th November 2021.

In computing time the board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

57. Computation of time

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

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***
- (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.***

In the circumstances, the 9th of November 2021 is excluded being the day when the Applicant received the letter of award in accordance with Section 57(a) of IGPA. The 30 days from the 9th November 2021 when a contract in the subject tender was to be signed started running on 10th November 2021 and lapsed on 9th December 2021. In our considered view, the breach complained of by the Applicant occurred on 10th December 2021 which is a

day after the lapse of the 30 days within which a contract in the subject tender was to be signed.

In computing time within which the Applicant needed to file its request for review under Regulation 203(2)(c)(iii) of Regulations 2020 because the breach occurred way after issuance of the letter of award, the 10th December 2021 is excluded under Section 57(a) of IGPA being the date when the breach occurred. The 14 days from the 10th December 2021 within which the Applicant needed to file its request for review started running on 11th December 2021 and lapsed on 24th December 2021.

We note the Applicant had up to the 24th December 2021 within which to file its request being 14 days from the 10th December 2021 when the breach complained of occurred. The Applicant filed this Request for Review on 23rd December 2021 a day before the lapse of the 14 days from 10th December 2021 when the breach complained of occurred.

In the circumstances, we find the Request for Review was filed within 14 days of occurrence of alleged breach of duty imposed on the Procuring Entity by the Act and Regulations 2020 in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board and we find this Board has jurisdiction to determine the issues raised in the Request for Review.

Whether a Contract between the Procuring Entity and the Applicant should be executed by the Respondent and the Applicant with respect to the subject tender in line with Section 135 of the Act.

It is common ground that the Applicant was awarded the subject tender vide the letter of award dated 28th October 2021 which letter was received by the Applicant via an email of 9th November 2021. We have already construed the letter of award required a contract with respect to the subject tender to be signed by 9th December 2021 and it is common ground that to date, no contract has been prepared or signed by the Respondent on behalf of the Procuring Entity and the Applicant.

It is the Respondent's contention that upon receiving a professional opinion from the Head of Procurement Function of the Procuring Entity recommending an award of the subject tender to the Applicant he did not approve the recommendation of award of the subject tender to the Applicant on various grounds.

The Board has carefully studied the Professional Opinion signed by the Manager-Supply Chain Management on 18th October 2021, which forms part of confidential documents submitted to the Board by the Respondent, and notes that the Respondent did not approve the recommendation of award of the subject tender to the Applicant on 28th October 2021 but instead jotted down the following by hand on the professional opinion as reasons for not approving the same:

"Ag DCS, the consultancy duration of six months is too long, it should be three months max. Further, I note that the terms of reference for this task is similar to that of the independent information systems audit. We need to relook at the TOR's for the two consultancies and come up with a scope of work that does not have duplication. For purposes of expediting the RMIS review which is urgent, let us isolate and progress the redesign of the RMIS and deliver this within three months. The other scope of strategies and policies can be amalgamated with the other TOR's from the independent information systems audit and be led by ICT."

We understand the Respondent to mean that he declined to approve award of the subject tender to the Applicant on the basis that (i) the subject tender's consultancy duration of 6 months is too long and should instead be 3 months at the maximum, (ii) the subject tender's terms of reference are similar to another consultancy on independent information system audit (iii) there is need to relook at the terms of reference for the two consultancies to avoid duplication, (iv) there is need to isolate and progress the redesign of RMIS within 3 months while the scope of strategies and policies in the subject tender can be amalgamated with other terms of reference from the independent information systems to be led by ICT.

We have carefully studied all the confidential documents submitted to us by the Respondent and find no document whether in form of a tender or a contract with respect to a consultancy on independent information systems audit for us to compare the terms of reference with respect to independent information systems audit and those in the subject tender. The onus to prove that there is an overlap or a duplication with respect to the terms of reference contained in an independent information systems audit consultancy and the subject tender lies with the Respondent in line with the Latin maxim *affirmati non neganti incumbit probatio*, which means the burden of proof is upon him who affirms - not him who denies. In the absence of such proof, we find the Respondent has failed to substantiate its allegations that the terms of reference in the subject tender are similar to those in an independent information systems audit consultancy.

With respect to the duration of time for the implementation of the subject tender, the Respondent cannot arbitrarily decide to reduce the same from 6 months to 3 months when what was communicated to tenderers is 6 months under ITT Clause 14(b) of Section II – Tender Data Sheet at page 29 of the Tender Document. We say so because, the subject tender is one that was floated using a Request for Proposal tendering method as can be seen in Section 1 (A) – Request for Proposal (RFP) at page 5 of the Tender Document and contracts arising from requests for proposal method of tendering may not vary from the requirements of the request for proposal, and in this review the 6 months, since this is prohibited in Section 129 of the Act.

Section 129 of the Act provides as follows:

129. Contract requirements

(1) The contract may not vary from the requirements of the terms of reference, the request for proposals or the terms of the successful proposal except in accordance with the following—

(a) the contract may provide for a different price but only if there is a proportional increase or reduction in what is to be provided under the contract; and

(b) the variations shall be such that if the proposal, with those variations, was evaluated again under section 127, the proposal would still be the successful proposal.

(2) The contract, which shall be in writing, shall set out either—

(a) the maximum amount of money that can be paid under the contract; or

(b) the maximum amount of time that can be paid for under the contract.

It is therefore clear that none of the reasons given by the Respondent for not approving the recommendation of award to the Applicant is justifiable under the Act, because we have noted changing the duration for the implementation of the subject tender from 6 to 3 months arbitrarily by the

Respondent is not permissible in law and the Respondent failed to substantiate that the terms of reference for the subject tender are similar to those of an independent information systems audit whose documents were not submitted to the Board to make a comparison.

Moving forward, the Respondent has in its response to the applicant's request for review annexed and marked LJ2 a copy of a trail of emails between the Applicant's Managing Director, Galdys Njiru, and a staff member of the Procuring Entity one Alfred M. Mbaka between 9th November 2021 and 10th November 2021.

We note, Alfred N. Mbaka forwarded the letter of award to Gladys Njiru vide an email of 9th November 2021 at 3:09PM which reads as follows:

"Good day,

Kindly find the attached notification letter. Please respond with an Acceptance letter as soon as possible.

Kind regards."

Gladys Njiru responded via email of 9th November 2021 at 3:22PM as follows:

"Dear Alfred,

Thank you for the email.

On behalf of Datasec, I receive this notification with a lot of excitement and humility.

I will prepare an acceptance letter right away and send it back with the next email.

Kind Regards."

At 3.34PM on 9th November 2021, Alfred M. Mbaka communicated the following to Gladys Njiru via email:

Good day,

Kindly ignore the contents of this letter, Please bear with us we correct it.

Kind regards."

We note the Applicant on the other hand has attached and marked DL4, DL6 and DL7 to its statement in support of the request for review copies of email trail between Gladys Njiru and Alfred M. Mbaka between 9th November 2021 and 26th November 2021.

On 10th November 2021 at 11:47:58 +0300 Gladys Njiru forwarded to the Procuring Entity the Applicant's acceptance letter via email and which email reads as follows:

"Good Morning Alfred

I trust that you are well.

See attached the acceptance letter as requested.

Kind regards"

Alfred M. Mbaka via an email of 10th November 2021 at 12:00PM responded to Gladys Njiru while making reference to his email of 9th November 2021 at 3.34 PM as follows:

"We spoke Kindly note the email below as communicated yesterday.

Kind regards.

On 11th November 2021, Gladys Njiru responded via email at 12:36PM as follows:

"Good afternoon Alfred

Thanks for the email.

Kindly note that we already presented a hard copy of the acceptance letter at your office.

It was received as attached.

We look forward to signing of the contract and offering the best of our services.

Kind regards”

On 26th November 2021 at 09:23:11 +0300, Gladys Njiru wrote to Alfred M. Mbaka as follows:

"Good morning Alfred

I trust that you are doing well.

Following the recent award to Datasec as well as our acceptance of the above mentioned Tender, kindly let us know when we should avail ourselves for contract signing.

The Datasec Team is ready to execute the work.

Alternatively you can send a draft contract for our perusal and signing.

I look forward to hearing from you soon.

Kind Regards”

On 9th December 2021 at 13:12:55 +0300 Gladys Njiru wrote to the Procuring Entity’s Procurement Manager via email as follows:

”To Procurement Manager

Kindly see attached our official request for the contract of the above mentioned tender.

Please advise us on when we can sign the contract and embark on the implementation of the project.

A hard copy was received at your registry on 8th December 2021

Kind regards”

What we discern from the above mentioned emails is that the Procuring Entity purported to recall the letter of award after the same had been issued to the Applicant. It is worth noting that Section 87(1) of the Act requires a

letter of award to be issued by the Accounting Officer and not anyone else. It therefore follows that a cancellation or recall of such letter of award can only be done by its author and in this case, the Respondent.

In this review, the Respondent, who is the Accounting Officer of the Procuring Entity, issued the letter of award to the Applicant by his action of signing the same. However, one Alfred M. Mbaka emailed the letter of award dated 28th October 2021 to the Applicant on 9th November 2021 at 3:09PM. Subsequently, the same Alfred M. Mbaka purported to recall the letter of award by asking the Applicant to disregard the same as they correct it. There is no evidence that the Respondent wrote a letter to the Applicant, signed by him, recalling the letter of award with written reasons as the author of the letter of award. Instead, Mr. Alfred M. Mbaka, through an email purported to recall the said letter of award for correction yet he was not the author of the letter of award.

We find the purported recall of the letter of award is null and void for the following reasons. Alfred M. Mbaka is not the Accounting Officer of the Procuring Entity neither was he the author of the letter of award for him to recall the same. Secondly, the letter of award was purportedly recalled without informing the Applicant on what mistake the same had that required correction contrary to Article 47 (2) of the Constitution which requires the Applicant to be given written reasons for actions that are likely to adversely affect her right.

Article 47(2) of the Constitution states as follows:

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

To this extent, we find the letter of award dated 28th October 2021 issued to the Applicant was never recalled by the Respondent.

However, we have perused the confidential documents submitted to us by the Respondent and have not found any copies of letters of regret issued to unsuccessful tenderers in the subject tender. In fact, the Respondent has confirmed that it did not issue letters of regret to the unsuccessful tenderers. Section 87 of the Act read with Regulation 82 of Regulations 2020 require when a successful tenderer is notified that its tender has been accepted, the Accounting Officer should simultaneously notify the unsuccessful tenderers that their tenders were not successful, disclosing the successful tenderer and reasons thereof. This in our considered view, enables the stand still period of 14 days to start running at the same time for both the successful and unsuccessful tenderers within which an aggrieved tenderer can challenge the decision of an accounting officer of a procuring entity before the Board under Section 167(1) of the Act and the period within which a procurement contract cannot be signed under Section 135(3) of the Act.

Section 87 of the Act and Regulation 82 of Regulations 2020 provide as follows:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

82. Notification of intention to enter into a contract

(1) The notification to the unsuccessful bidder under section 87 (3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86(1) of the Act.

In the circumstances, it is fair and just that all the unsuccessful tenderers are notified of the outcome of evaluation of the subject tender simultaneously when the Applicant is notified that its tender has been accepted. To this extent and notwithstanding the foregoing, we find it fair and just to cancel and set aside the letter of award dated 28th October 2021 issued to the Applicant and direct the Respondent to issue a fresh letter of award to the Applicant and at the same time issue notifications of regret to the unsuccessful tenderers in the subject tender in accordance with Section 87 of the Act and Regulation 82 of the Act.

Consequently, we find that a contract between the Procuring Entity and the Applicant with respect to the subject tender will only be executed by the Respondent and the Applicant after 14 days have lapsed upon issuance of notification of the outcome of the evaluation of the subject tender is made to tenderers in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 if no tenderer challenges the decision of the Respondent with respect to the outcome of evaluation of the subject tender and provided such execution will be made within the tender validity period in accordance with Section 135(3) of the Act.

Whether the Tender Validity period of the subject tender should be extended in line with Section 88 of the Act.

It is common ground that the period within which the subject tender and tenderers' tenders should remain valid is 120 days from the date of tender submission deadline of 10th September 2021 as provided under ITT Clause 12.1 of Section II – Tender Data Sheet (TDS) at page 29 of the Tender Document.

Guided by Section 57 of IGPA as herein before explained, the tender validity period for the subject tender was set to lapse on 8th January 2022 having excluded the 10th September 2021 from computation of time in accordance with Section 57(a) of IGPA.

However, upon filing of the Request for Review at the Board on 23rd December 2021, the procurement proceedings of the subject tender were suspended. This suspension has been interpreted by the High Court to mean a stay of procurement proceedings and which stay operates to also stay (stop) the running of the tender validity period of a tender whose procurement proceedings have been stayed.

Justice Nyamweya in **Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company (Interested Party) Exparte Transcend Media Group Limited [2018]eKLR** held as follows:

" 51. The question that needs to be answered by this Court is whether the Respondent correctly interpreted the provisions of the law on the effect of the litigation before it on the tender validity period. The Respondent in this respect held that a notice by the Secretary of the Review Board and any stay order contained therein can only affect the procurement process from proceedings further but cannot act as an extension of the tender validity period, nor can it stop the tender validity period from running. It in this respect relied on its previous decisions on this interpretation, which are not binding on this Court, and which were decided before the Public Procurement and Asset Disposal Act of 2015 was enacted.

52. I find that this position is erroneous for three reasons, Firstly, section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. 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.

53. 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.

54. I am in this respect persuaded by the decision in UK Highways A 55 Ltd vs Hyder Consulting (Uk) Ltd (2012) EWHC 3505 (TCC) that proceedings had automatically continued from the point they left once a stay was lifted, and therefore time for service of particulars of a claim had expired in the interim period between when the initial stay expired and a second stay was agreed upon. It was also held in R (H) vs Ashworth Special Hospital Authority (203) 1 WLR 127 that 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. The relevant status quo that will determine a successful party's benefit in the instant case includes the tender validity period.

55. Secondly, section 135 of the Act provides for a standstill period of fourteen days between the notification of an award and the conclusion of a contract, to enable any party who wishes to challenge an award decision to do so. A plain interpretation of this section would therefore mean that as long as there is a challenge to an award decision, there is a standstill period, and no action can be taken on an award. In the event that there is no stay, there will then be a need for the Respondent or procuring entity to extend

the tender validity period if it becomes necessary to do so to conclude the procurement proceedings.”

Guided by the aforementioned decision of Justice Pauline Nyamweya and which decision is binding on us, we find that the tender validity period for the subject tender stopped running on 23rd December 2021. Consequently, 104 days for the tender validity period of the subject tender had been spent as at the time of filing this review on 23rd December 2021 leaving only 16 days of the tender validity period and which days will resume to run a day after the date of this decision.

Given we are directing the Respondent to issue fresh notification letters to tenderers of the outcome of evaluation, 16 days are just enough for purposes of factoring in the 14 days stand still period required for any aggrieved tenderer to challenge the decision of the Respondent with respect to the outcome of evaluation of the subject tender and sign a contract. However, to allow for any unforeseen circumstances that may delay the signing of a contract in the subject tender, we deem it fair and just to direct the Respondent to extend the tender validity period of the subject tender in accordance with Section 88 of the Act which provides as follows:

88. Extension of tender validity period

(1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.

(2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.

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

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

We therefore find that the tender validity period of the subject tender should be extended by the Respondent in accordance with Section 88 of the Act.

In totality of our findings in this review, the Request for Review succeeds only with respect to the following specific orders.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review dated 22nd December 2021:

- 1. The letter of notification of award dated 28th October 2021 issued to the Applicant by the Respondent in Tender No: EPRA/SCM/4/3/21-22/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management information system (including review of the adequacy of the existing ICT Strategies, Policies, Applications, Infrastructure and ICT skill sets at Energy and Petroleum Regulatory Authority be and is hereby cancelled and set aside.**
- 2. The Respondent is hereby directed to forthwith issue a letter of notification of award to the Applicant at the same time notify the unsuccessful tenderers that they were not successful in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 in Tender No: EPRA/SCM/4/3/21-22/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management information system (including review of the adequacy of the existing ICT Strategies, Policies, Applications, Infrastructure and ICT skill sets at Energy and Petroleum Regulatory Authority.**
- 3. The Respondent is hereby directed to complete the procurement process in Tender No: EPRA/SCM/4/3/21-22/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management information system**

(including review of the adequacy of the existing ICT Strategies, Policies, Applications, Infrastructure and ICT skill sets at Energy and Petroleum Regulatory Authority to its logical conclusion including executing a procurement contract within 30 days from the date of this decision but not earlier than 14 days from the date when tenderers will be notified of the outcome of evaluation of tenders subject to there being no review filed with the Board under Section 167(1) of the Act.

4. The Respondent is hereby directed to extend the tender validity period in Tender No: EPRA/SCM/4/3/21-22/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management information system (including review of the adequacy of the existing ICT Strategies, Policies, Applications, Infrastructure and ICT skill sets at Energy and Petroleum Regulatory Authority for a further period of 30 days from the date when the same is set to expire taking into account the Board's findings in this decision.

5. Given that the procurement proceedings in Tender No: EPRA/SCM/4/3/21-22/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management information system (including review of the adequacy of the existing ICT

Strategies, Policies, Applications, Infrastructure and ICT skill sets at Energy and Petroleum Regulatory Authority, are not complete, each party will bear its own costs.

Dated at Nairobi this 13th day of January 2022

**CHAIRPERSON
PPARB**

**SECRETARY
PPARB**