

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 13/2022 OF 11TH FEBRUARY, 2022

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 concerning 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. | Eng. Mbiu Kimani, OGW | -Member |
| 3. | Mr Nicholas Mruttu | -Member |
| 4. | Mrs Irene Kashindi | - Member |
| 5. | Ms Rahab Chacha | -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.

Addenda

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 Technologies 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 pages 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 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 noted 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. 159/2021

A Request for Review dated 17th December, 2021 was previously lodged by M/s DATASEC LIMITED (herein after referred to as the Applicant) on 23rd December, 2021 in the subject tender. The Applicant sought for 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 finalize with 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.***

The Board heard the matter (herein after referred to as Application No. 159 of 2021) and delivered its Decision dated 13th day of January 2022 in which it gave the following orders:-

- 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.

REQUEST FOR REVIEW NO. 13/2022

The Applicant lodged a Request for Review dated 10th February, 2022 and filed on 11th February 2022 together with a Statement in Support of the Request for Review signed by signed by the Applicant's Managing Director dated 10th February, 2022 and filed on 11th February 2022 through the firm of A.E Kiprono & Associates seeking the following orders;

- 1. A declaration that the Respondent's Decision to terminate Tender No. EPRA/SCM/4/3/21-22/012 is null and void;***
- 2. An order quashing and setting aside the termination of Tender No. EPRA/SCM/4/3/21-22/012;***
- 3. An order directing the Respondent to comply with the Board's Decision in Application No. 159 of 2021 by issuing the letter of award to the Applicant and execute the resultant contract with the Applicant;***
- 4. An order extending the tender validity period to enable the Respondent finalize with the tendering process by executing the contract with the Applicant;***

5. An order awarding costs of the Request for Review to the Applicant;

6. Any other relief that the Review Board deems fit to grant under the circumstances.

The Respondents on its part filed its response on 18th February 2022 and prayed that:-

a. The Request for Review be dismissed.

b. The procurement process be terminated

c. Costs of this Review be awarded to the Respondent.

SUBMISSIONS

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, detailing an administrative and contingency management plan to mitigate the effects of the COVID-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

None of the parties filed submissions.

THE APPLICANT'S CASE

The Applicant alleges that the Respondent breached the Board's decision rendered in Application No. 159 of 2021, in which the Board had directed the Respondent to *inter alia*:-

- a) Issue a Letter of Award to the Applicant forthwith; and
- b) Conclude the procurement process including signing the contract, within 30 days of the Board's decision.

The Applicant added that instead of complying with the Board's decision, the Respondent terminated the procurement proceedings under section 63(1)(e) of the Act by a letter dated 3rd February 2022. The Applicant contends that the termination is contrary to the provisions of section 63 of the Act and that it is null and void by dint of section 175(6) of the Act and Article 232(1)(f) of the Constitution.

The Applicant further avers that the question touching on material governance under section 63(1)(e) of the Act is *res judicata* having been addressed and determined by the Board in Application No. 159 of 2021.

The Applicant further asserts that the Respondent is in breach of section 44(1) of the Act for failing to comply with the decision of the Board, section 63 of the Act and Article 227 of the Constitution.

The Applicant also asserts that the Respondent's decision to terminate the tender without giving reasons and in light of the Board's decision in Application No. 159 of 2021 is without merit and ought to be quashed and set aside *ex-debito justitiae*.

THE RESPONDENT'S CASE

The Respondent denies the assertions by the Applicant and further avers that the tender validity period of the subject tender was initially meant to expire on 9th January, 2022, and that the Applicant filed Application No. 159 of 2021 on 23rd December 2021 and a Decision rendered on 13th January, 2022.

The Respondent further avers that section 168 of the Act provides for the suspension of procurement proceedings until the pending request for review at the Board is determined.

The Respondent states that the tender validity period had lapsed prior to the tender extension.

The Respondent further states that the Act under section 88 provides that the extension of tender validity period can only be done once, and can only be extended before the expiry of that period.

The Respondent adds that the decision of the Board directed the Respondent to extend the tender validity period for a further period of 30 days from the date when the tender was set to expire taking into account the Board's findings in the decision made in Application No. 159 of 2021. The Respondent further stated that as per the provisions of section 135(3) of the Act, he could not proceed to enter into a contract after the tender validity period had expired. The Respondent added that he had terminate the procurement process in the circumstances.

In light of the foregoing, the Respondent contends that the Applicant's Request for Review is devoid of merit and should fail since, according to the Respondent, the tender validity period already expired.

The Respondent further states that the termination of the tender was in compliance with section 63 of the Act and that pursuant to section 63(4) of the Act, the Respondent notified all the parties who had submitted tenders of the termination of the tender vide letters dated 3rd February 2022 and cited the reason for termination of the tender.

The Respondent further states that the Procuring Entity has been undertaking disciplinary proceedings against the officer who misrepresented the facts leading to the execution and issuance of the notification to the Applicant of an intention to enter into contract dated 28th October, 2021.

BOARD'S DECISION

The Board has considered each party's case, the pleadings and the written submissions filed before it, including the confidential documents submitted by the Procuring Entity pursuant to section 67(3) (e) of the Act and frames the issues for determination as follows;

- I. Whether the matter raised herein were determined by the Board in Application 159 of 2019 and are accordingly barred by the doctrine of res judicata.***
- II. Whether the tender validity period has expired.***
- III. Whether the termination of the procurement proceedings by the Respondent was valid.***
- IV. What are the orders to grant in the circumstances?***

Issue I

As noted above, the Board in its decision in Application 159 of 2021 *inter alia* nullified the award letter dated 28th October, 2021. The Respondent in its response filed in this matter stated that given the Board's nullification of this letter, it recalled the award letter by a letter dated 31st January, 2022. The Respondent adds that it thereafter proceeded with the procurement process and based on the material issues surrounding the tender, it decided to terminate the tender.

The termination letter dated 3rd February, 2022 issued by the Respondent to all the bidders stated as follows:

***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 EXSISTING ICT STRATEGIES, POLICIES,
APPLICATIONS, INFRASTRUCTURE AND ICT SKILL SETS AT
ENERGY AND PETROLEUM REGULATORY AUTHORITY (EPRA)
EPRA.SCM/4/3/21-22/012***

***We refer to the above mentioned tender, in which you
participated.***

***This is to notify you that the procurement process has been
terminated in line with section 63 (1) (e) of the Public
Procurement and Asset Disposal Act 2015.***

***We appreciate your interest in doing business with us and
wish you success in your future business endeavors.***

Yours Sincerely,

Daniel Bargaría Kiptoo
DIRECTOR GENERAL

Termination of procurement proceedings is governed by section 63 of the Act whose provisions are as follows;

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

(a);

(b);

(c);

(d);

(e) material governance issues have been detected;

(f);

(g);

(h);

(i);

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

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

(4) An accounting officer shall notify all persons who submitted tenders of the termination within

fourteen days of termination and such notice shall contain the reason for termination.

Looking at termination letter dated 3rd February 2022, it is evident that the Respondent purportedly terminated the procurement process on the ground of material governance issues.

The Applicant contends that the question touching on material governance issues under Section 63 (1) (e) of the Act as raised by the Respondent is barred by the doctrine of *res judicata* having been addressed and determined by the Board in Application No. 159 of 2021.

Res judicata is defined by the Black's law Dictionary as follows: -

"An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

The doctrine is therefore a method of preventing injustice to the parties to a case. It acts to avoid unnecessary waste of resources in the dispute adjudication system. Res judicata thus acts to prevent a court or any other adjudicating body reconsideration of a matter that has already been determined. It is thus a matter that touches on the Board's jurisdiction and the Board has to consider it at the onset.

Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya (hereinafter referred to as "the Civil Procedure Act"), which codifies the plea of *res judicata* in our laws, states as follows: -

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

In Civil Appeal No. 105 of 2017, ***Independent Electoral and Boundaries Commission v Maina Kiai & 5 others***, [2017] eKLR, (hereinafter referred to as 'the IEBC Case') the Court of Appeal addressed the components of the doctrine of *res judicata* as outlined in Section 7 of the Civil Procedure Act and in so doing held that: -

"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

a. The suit or issue was directly and substantially in issue in the former suit.

- b. That former suit was between the same parties or parties under whom they or any of them claim.***
- c. Those parties were litigating under the same title.***
- d. The issue was heard and finally determined in the former suit.***
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."***

In the IEBC Case, the Court of Appeal explained the role and the philosophical underpinnings of the doctrine as follows:

"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

Considering the foregoing, it is clear that for the doctrine of *res judicata* to apply to the issue in question, all of the following conditions have to be met;

- (i) That former suit (in this case Review Number 159/2021) was between the same parties or parties under whom they or any of them claim.
- (ii) Those parties were litigating under the same title.
- (iii) The judicial body that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
- (iv) The suit or issue was directly and substantially in issue in the former suit.
- (v) The issue was heard and finally determined in the former suit.

The foregoing have been met with respect to certain matters that were in issue in Application 159 of 2021 as elaborated below.

The Respondent's letter of 3rd February 2022 by which it terminated the procurement process refers to section 63(1)(e) of the Act which allows a procuring entity to terminate procurement proceedings if material governance issues are detected. The letter does not specify the material governance issues.

The Respondent has however, explained the basis of the termination of the process in its Response filed herein. It states at paragraph 24 of the Response that the Respondent has been undertaking disciplinary

proceedings against the officer who misinterpreted the facts leading to the issuance of the notification of an intention to enter into a contract dated 28th October, 2021. The Respondent had contended in Application 159 of 2021 that the letter of award of 28th October 2021 had been issued in error resulting to its recall. The Respondent stated as follows at paragraph 19 of its response dated 30th December 2019 filed in Application No. 159 of 2021:

"The Respondent states:

- a. THAT a notification of intention to enter into a contract was erroneously issued by the Respondent on 9th November 2021 and the bidder accepted the award on the same day.***
- b. THAT the notification of intention to enter into a contract was recalled on 9th November 2021 since a misrepresentation had occurred resulting in material governance issues."***

The Board considered the circumstances concerning the issuance of the letter of award dated 28th October 2021 and its subsequent recall in detail at pages 28 to 38 of its decision of 13th January 2022. The Board concluded that the purported recall of the letter of award was a nullity. The Board also held that the reasons given by the Respondent for not approving the recommendation of the award to the Applicant were not justifiable.

To the extent therefore, that the Board ruled on the circumstances leading to the Respondent's earlier decision to recall the award letter of 28th October 2022, the issues are barred by *res judicata* and are not up for determination by the Board.

The Respondent also asserted in its response filed herein that it terminated the procurement process since the tender validity period had expired and that the termination was necessary to avoid furthering an illegal procurement process which would be an excuse in futility. See paragraph 21 (c) of his Response. The Board ruled on the computation of the tender validity period covering the period up to the delivery of the decision on 13th January 2022. See pages 41 to 54 of the decision in at Application No 159 of 2021. In particular, the Board stated as follows:

"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.”
[Emphasis added]

As such, to the extent that the Respondent relies on the computation of tender validity period as at 13th January 2022, the issue was already determined by this Board and is also not up for determination on account of the doctrine of *res judicata*. Any other aspects of the validity of the tender after the decision was delivered on 13th January 2022 are new matters and are addressed under issue II below.

Issue II.

The Respondent contends that the tender validity period was initially meant to expire on 9th January, 2022 and that it extended this period for 30 days

by its letter of 3rd February 2022. The Respondent added that it proceeded with the procurement process and noted material governance issues and decided to terminate the procurement process by a letter which the Board noted is also dated the same 3rd February 2022. The Respondent contends that it had to terminate the tender to avoid an irregularity of awarding the tender outside the tender validity period.

Given the Board's decision on the computation of the tender validity as reproduced above, there were 16 days of the tender validity left as at the time the decision in Application 159 of 2021 was delivered on 13th January, 2022. One of the orders given by the Board was the extension of the tender validity period for 30 days from the date it was set to expire.

Computing 16 days from 13th January, 2022 the tender validity was set to expire on 29th January, 2022. Factoring in the 30 days extension as directed by the Board, the tender validity ought to have run up to 28th February 2022. Consequently, the tender validity was still running at the time the Respondent issued the termination letter dated 3rd February 2022.

The request for review was however, filed on 11th February, 2022 and this means that the tender validity period stopped running from that date. Only 12 days out of the extended 30 days validity (as computed from 29th January 2022) had run out by the time the Request for Review was filed on 11th February, 2022. This means that there is a balance of 18 days of tender validity that will resume running a day after delivery of this decision.

Noting that we by this decision directing the Respondent to issue fresh notification letters to tenderers of the outcome of evaluation as earlier directed in Application 159 of 2022, the remaining 18 days are just enough for purposes of factoring in the 14 days standstill 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. To allow room for entering into a contract and also to take care of any unforeseen circumstances that may delay the signing of a contract in the subject tender, we deem it necessary to extend the tender validity period for 30 days from the lapse of the tender validity of the subject tender per Section 88 of the Act. For the avoidance of any doubt, the tender validity shall be extended for 30 days from 22nd March 2022 which is the point at which the 18 remaining days are to lapse.

The justification for extending the tender validity is based on the recognition that the Respondent did not comply with the directions of the Board as set out in its decision of 13th January 2022. We have once directed the Respondent to once again strictly comply with the Board's orders. The Board's decisions in this case and in Application 159 of 2021 would be rendered nugatory if the tender validity period is not extended. It is thus reasonable and in interest of substantive justice that the period of validity of the tender is extended.

In extending the validity of the tender, the Board has considered the decision by the Court of Appeal in the case of ***Kenya Ports Authority & another v Rhombus Construction Company Limited & 2 others [2021] eKLR*** ("the KPA case") in which one of the issues for determination was whether the Board was bound by the provisions of section 88 of the Act which provides that the extension of a validity period by an Accounting Officer can only be done once and for not more than 30 days. The High Court in the primary proceedings in the ***KPA case*** had held that this section is not binding upon the Board. This position was upheld on appeal wherein the Court of Appeal held as follows:

"36. From its submissions, it is clear that the appellant faults the learned Judge's decision on grounds that he erred: by failing to find that the 2nd respondent acted ultra vires by extending the validity period of the subject tender as it had no powers to do so under the law. Further, that such power was a preserve of the 1st respondent as provided for under section 88 of the Act; by failing to find that the 2nd respondent's decision and resultant order was illegal as the extension of tender validity period was contrary to section 88 which only allowed for such extension to be done once; by failing to find that the 2nd respondent's decision was unreasonable as it disregarded the allegations of forgery levelled against the 1st respondent which were pertinent governance issues.

37. From a close perusal of the learned Judge's decision, it is clear that the learned Judge extensively expressed himself on the issue of the extension of the tender validity period as follows: -

37. From a close perusal of the learned Judge's decision, it is clear that the learned Judge extensively expressed himself on the issue of the extension of the tender validity period as follows: -

"39. The crux of the issue in controversy is whether the Respondent (Review Board) has powers in law to order or direct the Accounting officer of the Ex-parte Applicant as a procuring entity to extend the validity period of the subject tender more than once. Section 88 of the Act(PPADA) provides for the extension of the tender validity period.....

40. What was the intention of the drafters of this legislation and in particular the inclusion of Section 88? In my view, this provision was intended to guard against any possible mischief or abuse of office or power by accounting officers especially where uncontrolled timelines will give them a free hand to temper with the tendering process to favour their friends or closely related persons. In other words, once the already

extended validity period for a period of 30 days lapses, the tendering process in respect of that tender becomes moot or rather it extinguishes. Upon lapsing, the Procurement entity is at liberty to re-advertise for fresh tendering and the process then follows the full circle like it was never tendered for before.

....

47. Counsel for the I/Party contends that, Section 88(3) of the Act only limits the Accounting officer and not the Review board who have wide inherent powers under section 173 of the Act. The question begging for an answer is; whether the Review Board is bound by Section 88(3). Section 88(1) & (2) expressly refers to the powers of the Accounting officer in extending time but not the Review Board. Sub-section (3) refers to the accounting officer's powers of extension of validity period once and not beyond 30days pursuant to subsection (1).

48. From the plain reading of that Section, it is only applicable and binding on the accounting officer and nobody else. Nothing would have been easier than the legislators to include or provide the Review Board's mandate under that section. To that extent, I do agree with counsel for the I/Party that Section 88(3) of the Act does not bar the Review board from making decisions

that are deemed to be necessary for the wider attainment of substantive justice...."

39. From the above excerpts is apparent that the learned Judge extensively addressed the said issues and made pronouncements on the same. Therefore, for this Court to disturb the said pronouncements, the appellants have to demonstrate that the Judge misdirected himself in law; misapprehended the facts; took account of considerations of which he should not have taken account; failed to take account of considerations of which he should have taken account; or the decision, albeit a discretionary one, is plainly wrong. (See: United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs. East African Underwriters (Kenya) Ltd [1985] eKLR.)

40. However, from the arguments as canvassed by counsel for the appellants, it is clear that he has not demonstrated how the learned Judge erred in the exercise of his discretion, but merely exhibits dissatisfaction with the learned Judge's findings. We are satisfied that the learned Judge exercised his discretion judicially in dismissing the appellant's notice of motion and we find no basis to fault him. Further, as stated in our brief decision delivered earlier, the appellant was not able to demonstrate to us what their grievance was. The Court had just affirmed what the appellants initially wanted when they

***awarded the 1st respondent the tender in the first place.
[Emphasis added]***

Issue III

The validity and propriety of termination of procurement proceedings is governed by section 63 which has been reproduced above.

The termination of procurement proceedings shall only be valid if it adheres to the substantive and procedural requirements set out under section 63 of the Act. As such, a valid termination ought to be:

- a. Substantively compliant in that it has to be based on the reasons given under the various sub-sections of Section 63 (1) of the Act; and
- b. Procedurally compliant in terms of the requirements set out in sections 63(2), (3) and (4) of the Act. For the purposes of this matter, the relevant provision is section 63 (4) which requires bidders to be notified of the reasons for terminating the procurement proceedings.

In determining this issue, the Board has considered the High Court's decision in the case of ***Republic v Public Procurement Administrative Review Board; Leeds Equipment & Systems Limited (Interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR*** (hereinafter referred to as "***the Leeds Equipment case***") where it was held as follows: -

"in a nutshell therefore and based on the above-cited cases where the decision of a procuring entity to terminate

procurement process is challenged before the Board the procuring entity is to place sufficient reasons and evidence before the Board to justify and support the ground of termination of the procurement process under challenge. The procuring entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of Section 63 of the Act”.

Considering the ***Leeds Equipment case***, the Board finds that the mere reliance by the Procuring Entity of section 63(1)(e) of the Act in terminating the procurement process without more, was insufficient and did not meet the requirements of section 63 of the Act.

Looking at the Response filed herein, the Respondent stated that the material governance issues related to the expiry of the tender validity period. We have already held above that the tender validity period had not expired as contended by the Respondent and thus this does not amount to a valid reason to justify the termination of the tender.

The Respondent alluded in its response to material governance issues also having arisen from the circumstances which led to the recall of the letter of award dated 28th October 2021 which as noted above, were matters already decided and overruled in Application 159 of 2021 and cannot have equally constituted valid reasons to terminate the procurement proceedings.

The upshot of the above is that the termination of procurement proceedings was not substantively and procedurally compliant with section 63 of the Act.

Issue IV

Considering the Board's finding in Issue 1 to III above, it is evident that the Respondent did not comply with the Board's directions set out in the decision of 13th January 2022. The Respondent did not challenge the Board's decision to the High Court pursuant to section 175 (1) of the Act and as such the decision remains binding as per section this same section of the Act.

The orders that lend themselves to be granted are thus:

- (a) The nullification of the letter of termination dated 3rd February 2022.
- (b) The extension of the period of the validity of the tender.
- (c) Orders directing the Respondent to strictly comply with the orders set out in the decision of 13th January 2022 within the strict timelines set out below.

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:

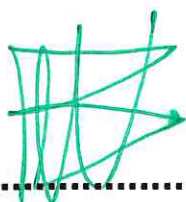
- 1. The letter of termination of the procurement process dated 3rd February 2022 issued by the Respondent all the bidders in Tender No: EPRA/SCM/4/3/21-22/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management 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 issue a letter of notification of award to the Applicant within 3 days of this decision and 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. Taking into account the Board's findings in this decision and the earlier decision dated 13th January 2022 rendered in PPARB Application Number 159 of 2021, 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 is hereby extended for a further period of 30 days from the date when the same is set to expire that is 22nd March 2021 and it shall run up to 21st April 2022.**
- 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 4th day of March 2022



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CHAIRPERSON
PPARB



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SECRETARY
PPARB