

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 60/2021 OF 27<sup>th</sup> APRIL 2021**  
**BETWEEN**

**CHINA GEZHOUBA GROUP  
COMPANY LIMITED ..... APPLICANT/2<sup>ND</sup> RESPONDENT**

**AND**

**THE ACCOUNTING OFFICER,  
NATIONAL WATER HARVESTING &  
STORAGE AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**CHINA JIANGXI INTERNATIONAL (K) LTD  
in JV with CHINA JIANGXI INTERNATIONAL  
ECONOMIC AND TECHNICAL COOPERATION  
CO. LTD ..... 2<sup>ND</sup> RESPONDENT/APPLICANT**

**BOARD MEMBER**

- |                                  |                      |
|----------------------------------|----------------------|
| <b>1. Ms. Faith Waigwa</b>       | <b>- Chairperson</b> |
| <b>2. Ms. Phyllis Chepkemboi</b> | <b>- Member</b>      |
| <b>3. Ms. Rahab Robi</b>         | <b>- Member</b>      |
| <b>4. Ms. Isabella Juma, CPA</b> | <b>- Member</b>      |

## **IN ATTENDANCE**

**Mr. Philip Okumu**

**- Acting Board Secretary**

## **BACKGROUND TO THE DECISION**

### **The Tendering Process**

National Water Harvesting and Storage Authority (hereinafter referred to as the 'Procuring Entity') invited sealed tenders for Tender No. NWHSA/OIT/002/2020-2021 for Construction of Soin-Koru Multipurpose Dam Water Project – Lot 1 (Dam Component) (hereinafter referred to as the 'subject tender') from eligible tenderers through an Open International Tender that was advertised through *MyGov* Kenya and appeared in the *Daily Nation* newspaper, the Procuring Entity's website ([www.waterauthority.go.ke](http://www.waterauthority.go.ke)) and Government of Kenya Tenders' website ([www.tenders.go.ke](http://www.tenders.go.ke)) on 9th March 2021.

### **Tender Submission Deadline and Opening of Tenders**

The Procuring Entity received a total of four (4) tenders by the tender submission deadline of 9<sup>th</sup> April 2021 at 9.00 am. Tenders were opened shortly thereafter by a Tender Opening Committee consisting of officers from the Procuring Entity appointed by the 1<sup>st</sup> Respondent and the following tenderers were recorded as having submitted their respective tenders: -

1. China Gexhouba Group Company Limited;
2. China Jiangxi International Kenya Ltd & China Jiangxi International Economic & Technical Cooperation Company Ltd;

3. Justnice Limited; and
4. SBI International Holdings AG

## **Evaluation of Tenders**

An Evaluation Committee appointed by the 1<sup>st</sup> Respondent evaluated tenders in the following stages: -

- i. Preliminary Responsiveness;
- ii. Mandatory Requirements;
- iii. Technical Evaluation; and
- iv. Financial Evaluation.

### **1. Preliminary Responsiveness**

At this stage, the Evaluation Committee assessed the responsiveness of tenders against six (6) requirements outlined in Part A of Section III. Evaluation and Qualification Criteria of the blank tender document issued to tenderers by the Procuring Entity (hereinafter referred to as the 'Tender Document').

### **2. Mandatory Requirements Evaluation**

At this stage, the Evaluation Committee subjected tenders to an evaluation against twenty five (25) requirements outlined in Part B of Section III. Evaluation and Qualification Criteria of the Tender Document.

At the end of Preliminary Responsiveness and Mandatory Requirements Evaluation, M/s China Jiangxi International Kenya Ltd & M/s China Jiangxi

International Economic & Technical Cooperation Co., Ltd (the Applicant herein) was found responsive, thus proceeded to the Technical Evaluation stage.

### **3. Technical Evaluation**

At this stage, the Evaluation Committee subjected the Applicant's joint venture tender to an evaluation against the requirements outlined in Part C of Section III. Evaluation and Qualification Criteria of the Tender Document.

Only tenders that achieved a score of 80% at the Technical Evaluation stage would proceed to the Financial Evaluation stage. At the end of Technical Evaluation stage, the Applicant's joint venture tender achieved an average technical score of 92% against a pass mark of 80%, thus proceeded to the Financial Evaluation stage.

### **4. Financial Evaluation**

At this stage, the Evaluation Committee applied the criterion outlined in Part D of Section III. Evaluation and Qualification Criteria of the Tender Document.

### **Recommendation**

The Evaluation Committee recommended award of the subject tender to the Applicant herein with the lead partner being China Jiangxi International Kenya Ltd at the Applicant's quoted price of Kshs.19,987,695,934.60 (Kenya Shillings Nineteen Billion, Nine Hundred and Eighty-Seven Million, Six Hundred and Ninety-Five Thousand, Nine Hundred and Thirty-Four and Sixty

Cents) only inclusive of VAT for having submitted the lowest evaluated tender price.

### **Due Diligence**

The Evaluation Committee undertook a due diligence exercise on the Applicant herein and found the Applicant was qualified and competent to be awarded the subject tender.

### **Professional Opinion**

In a professional opinion dated 14<sup>th</sup> April 2021, the Procuring Entity's Chief Procurement Officer reviewed the Evaluation Report executed on 13<sup>th</sup> April 2021 and concurred with the Evaluation Committee's recommendation on award of the subject tender. He thus advised the 1<sup>st</sup> Respondent to approve award of the subject tender to the Applicant herein at the quoted price of Kshs. 19,987,695,934.60 (Kenya Shillings Nineteen Billion, Nine Hundred and Eighty-Seven Million, Six Hundred and Ninety-Five Thousand, Nine Hundred and Thirty-Four and Sixty Cents ) only inclusive of VAT having submitted the lowest evaluated tender.

The 1<sup>st</sup> Respondent approved the said professional opinion on the same date of 14<sup>th</sup> April 2021.

### **Notification to Tenderers**

In letters dated 15<sup>th</sup> April 2021, the 1<sup>st</sup> Respondent notified all tenderers of the outcome of evaluation of their respective tenders.



## **REQUEST FOR REVIEW NO. 60/2021 of 27<sup>th</sup> April 2021**

Aggrieved by the decision of the 1<sup>st</sup> Respondent to award the subject tender to the Applicant herein, **China Gezhouba Group Company Limited** (the 2<sup>nd</sup> Respondent herein) filed a request for review with the Board Secretary on 27<sup>th</sup> April 2021 seeking the following orders:

1. ***THAT the Board be pleased to evaluate the Bid document of the 2<sup>nd</sup> Respondents (the Applicant herein) in accordance with Article 227 of the Constitution of Kenya, 2010 to ensure fairness, equitability, transparency, competitiveness, and cost-effectiveness of the subject tender process.***
2. ***THAT the decision by the Procuring Entity to the Applicant (the 2<sup>nd</sup> Respondent herein) contained in a letter dated 15<sup>th</sup> April, 2021 finding the Applicant's (the 2<sup>nd</sup> Respondent herein) tender as non-responsive and awarding TENDER NO. NWHSA/OIT/002/2020-2021 CONSTRUCTION OF SOIN-KORU MULTIPURPOSE DAM WATER PROJECT – LOT 1 (DAM COMPONENT) to the 2<sup>nd</sup> Respondents be set aside;***
3. ***THAT the Board be pleased to review all the records submitted in the procurement process including the form and substance of the Applicant's (the 2<sup>nd</sup> Respondent herein) tender document, and substitute and/or amend the decision of the Procuring Entity and award the TENDER NO. NWHSA/OIT/002/2020-2021 CONSTRUCTION OF SOIN-***

**KORU MULTIPURPOSE DAM WATER PROJECT – LOT 1 (DAM COMPONENT to the Applicant (the 2<sup>nd</sup> Respondent herein);**

4. ***THAT in alternative to prayer (2) above, the Procuring Entity be directed to progress the procurement process to its logical conclusion inclusive of the Applicant (the 2<sup>nd</sup> Respondent herein) and make an award within Seven (7) days; and***
5. ***THAT the 1<sup>st</sup> Respondent be ordered to pay the full costs of and incidental to these proceedings.***

After careful consideration of the parties pleadings and written submissions, the documents and authorities in support thereof and confidential documents submitted to the Board by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') the Board issued the following orders on 18<sup>th</sup> May 2021 in exercise of the powers conferred upon it by Section 173 of the Act:

1. **The Accounting Officer of the Procuring Entity's Letters of Notification of Outcome of Tender No. NWHSA/OIT/002/2020-2021 for Construction of Soin-Koru Multipurpose Dam Water Project- Lot 1 (Dam Component) dated 15<sup>th</sup> April 2021 and addressed to the Applicant (the 2<sup>nd</sup> Respondent herein) and all other bidders, be and are hereby cancelled and set aside.**



- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. NWHSA/OIT/002/2020-2021 for Construction of Soin-Koru Multipurpose Dam Water Project- Lot 1 (Dam Component) dated 15<sup>th</sup> April 2021 and addressed to the 2<sup>nd</sup> Respondent (the Applicant herein), be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to re-instate the Applicant's (the 2<sup>nd</sup> Respondent herein) tender and all other tenders back into the procurement process and conduct a re-evaluation only with respect to the following criterion:**
  - a. Preliminary Responsiveness (iv) of Section III. Evaluation and Qualification Criteria of the Tender Document; and**
  - b. Mandatory Requirement (iv) of Section III. Evaluation and Qualification Criteria of the Tender Document.**
- 4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to proceed with the subject procurement process to its logical conclusion including the making of an award to the lowest evaluated tenderer in accordance with Clause 28 of Section I. Instructions to Bidders of the Tender Document read together with section 86 (1) (a) of the Act within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this Review.**



- 5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

**NOTICE OF MOTION APPLICATION DATED 21<sup>ST</sup> JANUARY 2022**

The Applicant herein filed a Notice of Motion dated 21<sup>st</sup> January 2022 under certificate of urgency together with a Supporting Affidavit sworn by Wang Wei on 21<sup>st</sup> January 2021 through the firm of Mwaniki Gachoka & Co. Advocates seeking the following orders:

- 1. THAT this application be certified urgent and be heard exparte in the first instance.**
- 2. THAT pending the hearing and determination of this application interpartes, the Board be pleased to extend the Tender Validity period of Tender No.NWHSA/OIT/002/2020-21.**
- 3. THAT the Board be pleased to extend the Tender Validity Period for Tender No.NWHSA/OIT/002/2020-21 for another NINETY (90) DAYS from 25<sup>th</sup> January 2022.**
- 4. THAT the Board be pleased to direct the Accounting Officer of National Water Harvesting & Storage Authority (the Procuring Entity) to enter and/sign the contract with the Applicant arising from TENDER No.NWHSA/OIT/002/2020-21 herein within FORTY-FIVE (45) DAYS of the extended validity period.**

**5. THAT costs of this application be provided for.**

In a Notification and a letter dated 21<sup>st</sup> January 2022, the Acting Board Secretary notified the 1<sup>st</sup> Respondent of the existence of the Notice of Motion Application and the suspension of procurement proceedings for the subject tender while forwarding to the 1<sup>st</sup> Respondent a copy of the Notice of Motion Application together with the Board's Circular No.02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the 1<sup>st</sup> Respondent was requested to submit a response to the Notice of Motion Application together with confidential documents concerning the subject tender within 5 days from 21<sup>st</sup> January 2022.

The 1<sup>st</sup> Respondent filed a 1<sup>st</sup> Respondent's Replying Affidavit sworn by Sharon Obonyo on 26<sup>th</sup> January 2022 and filed on 28<sup>th</sup> January 2022 through the 1<sup>st</sup> Respondent's inhouse counsel, Denis Mollo Advocate.

Vide letters dated 28<sup>th</sup> January 2022, the Acting Board Secretary notified all tenderers in the subject tender of the existence of the Notice of Motion Application while forwarding to the tenderers a copy of the Notice of Motion Application together with the Board's Circular No.02/2020 dated 24<sup>th</sup> March 2020. Further, all tenderers were invited to submit to the Board any information and arguments about the subject tender within 3 days of 28<sup>th</sup> January, 2022.

Pursuant to the Board's Circular No.2/2020 dated 24<sup>th</sup> March 2020, the Board dispensed with physical hearings and directed all applications be canvassed by way of written submissions. Clause 1 on page 2 of the said Circular also stated that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

### **APPLICANT'S CASE**

The Applicant herein avers that pursuant to the Board's orders of 18<sup>th</sup> May 2021 in Request for Review No.60/2021 of 27<sup>th</sup> April 2021, which orders, *inter alia*, directed the 1<sup>st</sup> Respondent to proceed with the subject tender's procurement process to its logical conclusion including the making of an award to the lowest evaluated tenderer within 14 days from 18<sup>th</sup> May 2021, it was notified of having been awarded the subject tender at the Applicant's tender sum of Kshs.19,987,695,934.60 inclusive of VAT, vide a letter of notification dated 20<sup>th</sup> May 2021. According to the Applicant herein, it accepted the grant of award of the subject tender to it vide a letter dated 21<sup>st</sup> May 2021.

The Applicant avers that the initial tender validity period (including the stand still period of 21 days when the subject tender's procurement proceedings were suspended by the Board) was set to expire on 26<sup>th</sup> December 2021 but the 1<sup>st</sup> Respondent extended the same to 25<sup>th</sup> January 2022 in accordance with Section 88 of the Act vide a letter dated 17<sup>th</sup> December 2021 and the Applicant herein accepted the extension of the subject tender's validity period vide a letter dated 17<sup>th</sup> December 2021.

However, the Applicant herein alleges that despite it being ready and willing to sign the tender contract and despite inquiring on the signing of the contract vide a letter dated 11<sup>th</sup> January 2022, the 1<sup>st</sup> Respondent has neglected, delayed and/or refused to sign the same without any justifiable reason(s) being given to the Applicant.

With this, the Applicant herein is apprehensive that it may lose the subject tender given that the tender validity period of the subject tender is set to expire on 25<sup>th</sup> January 2022 and a procurement contract must be signed within the tender validity period in accordance with Section 135 of the Act. According to the Applicant herein, if the tender validity period expires, it will incur major and/or severe loss as a result of the 1<sup>st</sup> Respondent's actions and/or omissions given the time and resources expended by the Applicant herein in participating and eventually winning the subject tender.

It is for this reason that the Applicant herein prays for the orders sought in the Notice of Motion Application to be granted.

### **1<sup>ST</sup> RESPONDENT'S RESPONSE**

The 1<sup>st</sup> Respondent, the acting Chief Executive Officer of the Procuring Entity, confirms that the subject tender was awarded to the Applicant herein vide a letter of notification dated 20<sup>th</sup> May 2021 pursuant to the timelines ordered by the Board in Request for Review Application No.60/2021 of 27<sup>th</sup> April 2021 and that the Applicant herein accepted the award to it of the subject tender vide a letter dated 21<sup>st</sup> May 2021.



The 1<sup>st</sup> Respondent further confirms that no procurement contract has been signed with respect to the subject tender. According to the 1<sup>st</sup> Respondent, the procurement contract for the subject tender has not been signed because, she, vide a letter dated 21<sup>st</sup> May 2021, through the Procuring Entity's Parent Ministry, sought clearance by the Attorney-General before signing of the procurement contract as required under Section 134(2) of the Act, for contracts of a value exceeding Kenya Shillings Five Billion. However, vide a letter dated 10<sup>th</sup> June 2021 addressed to the Procuring Entity's Parent Ministry and copied to the Procuring Entity, the Solicitor General granted a conditional clearance of the procurement contract of the subject tender.

According to the 1<sup>st</sup> Respondent, the conditions stipulated by the Solicitor General that must first be met before a procurement contract of the subject tender is signed are as follows:

- a) A written commitment from the National Treasury that all the funds required for the implementation of the project including all monies required for the compensation of Project Affected Persons (PAPs). Implementation of the Resettlement Action Plan (RAP) and payment of all sums due to the Contractor under the advance payment are available prior to the Procuring Entity progressing with execution of the Contract.
- b) Confirmation to the Honourable Attorney-General, by furnishing his office with a copy of the Cabinet Directive, that the Soin-Koru Dam

project (being a new project) has obtained Cabinet approval in line with the prevailing Government Circulars;

c) Incorporation of the suggested amendments to the draft contract.

The 1<sup>st</sup> Respondent alleges that all suggested amendments have been incorporated in the draft procurement contract for the subject tender. However, the Procuring Entity is yet to get clearance from Ministry of Water, Sanitation and Irrigation (hereinafter referred to as the 'Parent Ministry') to proceed with the signing of the procurement contract of the subject tender in light of the outstanding conditions referenced a) and b) hereinbefore and which conditions were to be addressed by the Parent Ministry.

The 1<sup>st</sup> Respondent admits receiving a letter from the Applicant herein enquiring on the signing of the procurement contract for the subject tender and contends that vide a letter dated 12<sup>th</sup> January 2022, she notified the Parent Ministry of the imminent expiry of the validity period of the subject tender and sought guidance on the way forward on the premise of the conditional clearance from the Attorney-General.

With this, the 1<sup>st</sup> Respondent is not opposed to the Board considering extension of tender validity of the subject tender pending response to the 1<sup>st</sup> Respondent from the Parent Ministry.

### **BOARD'S DECISION**

After careful consideration of the parties' pleadings, documents including confidential documents submitted to the Board by the 1<sup>st</sup> Respondent pursuant to Section 67 (3) (e) of the Act, the Board finds the following issues crystalize for determination:

**Whether the Board should grant the orders sought in the Notice of Motion Application dated 21<sup>st</sup> January 2022.**

In addressing this issue, the Board will make a determination on the following sub-issues:

- a. Whether the Board should grant an order for signing of the resultant procurement contract of the subject tender; and**
- b. Whether the Board should grant an order for extension of the validity period of the subject tender.**

The Board will now proceed to determine the issues framed as follows:

**Whether the Board should grant an order for signing of the resultant procurement contract of the subject tender.**

It is common ground that despite an award of the subject tender having been made in favour of the Applicant herein by the 1<sup>st</sup> Respondent vide a letter of notification of award dated 20<sup>th</sup> May 2021 and which award was accepted by the Applicant herein vide a letter of acceptance dated 21<sup>st</sup> May

2021, the resultant procurement contract of the subject tender has to date not been signed.

The Applicant herein alleges that the 1<sup>st</sup> Respondent has refused/delayed the signing of the resultant procurement contract of the subject tender without any justifiable reason and prays for the Board to direct the 1<sup>st</sup> Respondent to enter and/sign the resultant procurement contract of the subject tender with the Applicant.

On her part, the excuse given for not signing of the resultant procurement contract of the subject tender by the 1<sup>st</sup> Respondent is that the resultant procurement contract of the subject tender, being one whose value exceeds Kenya Shillings Five Billion, requires the clearance of the Attorney-General before signing of the same and which clearance has been granted albeit with conditions. According to the Applicant some of the conditions given by the Attorney General have been met and others have not been met. It is those conditions that are yet to be met that have delayed the signing of the resultant procurement contract of the subject tender. To prove this, the 1<sup>st</sup> Respondent annexed to her Replying Affidavit a copy of a letter dated 21<sup>st</sup> May 2021 addressed to the Principal Secretary of the Parent Ministry by herself marked SOO3 and a letter dated 10<sup>th</sup> June 2021 from the Office of the Attorney General to the Principal Secretary of the Parent Ministry as SOO4. These letters read as follows in part:

***"Our Ref: NWHSA/TP&D/FIL 22 Vol III TY (138) 21<sup>st</sup> May, 2021***



**Mr. Joseph W. Irungu, CBS**  
**Principal Secretary,**  
**Ministry of Water, Sanitation and Irrigation,**  
**P.O. Box 49720-00100,**  
**NAIROBI**

**Dear Sir,**

**REQUEST FOR APPROVAL OF THE DRAFT CONTRACT FOR THE  
CONSTRUCTION OF SOIN-KORU MULTIPURPOSE DAM WATER  
PROJECT LOT 1 (DAM COMPONENT)- TENDER NO.  
NWHSO/OIT/002/2020-2021**

**We refer to the above matter.**

**BACKGROUND IN BRIEF**

.....

**PROCUREMENT PROCESS**

.....

**BUDGET**

.....

**REQUEST FOR APPROVAL OF THE DRAFT CONTRACT**

***Section 134(2) of the Public Procurement and Asset Disposal Act No.33 of 2015 Laws of Kenya provides that an Accounting Officer of a procuring entity shall ensure that all contracts of a value exceeding Kenya shillings five billion are cleared by the Attorney-General before they are signed.***

***Please find enclosed our draft contract for your kind attention and onward transmission to the Attorney General once the statutory appeal lapses on 2<sup>nd</sup> June, 2021***

***Yours faithfully,***

***CS. Sharon Obonyo***

***Ag. CHIEF EXECUTIVE OFFICER***

***Encl"***

***"Our Ref: AG/CONF/21/78/38 VOL II (14)***

***10<sup>th</sup> June, 2021***

***Your Ref: WD/3/3/1306 VOL, V/(94)***

***Mr. Joseph W. Irungu, CBS***

***Principal Secretary***

***Ministry of Water, Sanitation & Irrigation***

***NAIROBI***

***RE: REQUEST FOR CONTRACT CLEARANCE: CONSTRUCTION OF  
SOIN-KORU MULTI-PURPOSE DAM WATER SUPPLY PROJECT-LOT  
1-DAM***

***We refer to your letter dated the 7<sup>th</sup> June, 2021 with respect to the  
above referenced matter and hereby acknowledge receipt of the  
following documents:-***

.....

***Approval from the National Treasury***

.....

***Procurement Process***

.....

***Cabinet Approval and Funding of the Project***

.....

***Review of the Draft Contract***

.....

***Conclusion and Way Forward***

***23. The Ministry is advised to confirm in writing from the National  
Treasury that all the funds required for the implementation of***

***the project including all monies required for the compensation of Project Affected Persons (PAPs), implementation of the Resettlement Action Plan (RAP) and payment of all sums due to the Contractor under the advance payment are available prior to NWHSA progressing with execution of the Contract. In particular, the attention of NWHSA is drawn to Section 53(8) of the PPADA, 2015 which places an obligation on Accounting Officers of all procuring entities to ensure that they do not commence a procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are available.***

- 24. The Ministry is also requested to confirm whether the Soin-Koru Dam project has obtained Cabinet approval in line with the prevailing Government Circulars on ensuring that such approval is obtained for all new capital projects and if so are hereby requested to furnish this Office with a copy of the Cabinet Directive for our records.***
- 25. The Ministry and NWHSA (as procuring entity) is hereby advised to note that the responsibility of complying with all relevant laws including but not limited to the Public Finance and Management Act, 2012 and the Public Procurement and Asset Disposal Act, 2015 rests with the respective Accounting Officers.***



***26. In reliance on the assurances and confirmations as elucidated in the documents availed to this Office by the Ministry and the NWHSA (as the Procuring Entity) but subject to incorporation of the suggested amendments to the draft Contract; confirmation that all relevant approvals have been obtained; and funds are available for the successful implementation of the project, the parties may proceed to execute the Contract for the Soin-Koru Multi-purpose Dam Project. Kindly take note to furnish this Office with a copy of the duly executed Contract for our records.***

***Please be advised accordingly.***

***KENNEDY OGETO CBS  
SOLICITOR GENERAL***

***Copy to: Hon. P. Kihara Kariuki, EGH  
ATTORNEY GENERAL***

***Mrs. Sicily K. Kariuki, EGH  
Cabinet Secretary  
Ministry of Water, Sanitation & Irrigation  
NAIROBI***

***Hon. (Amb) Ukur Yatani, EGH***  
***Cabinet Secretary***  
***The National Treasury & Planning***  
**NAIROBI**

***Dr. Julius Muia, PhD, CBS***  
***Principal Secretary***  
***The National Treasury & Planning***  
**NAIROBI**

***CS Sharon Obonyo***  
***Ag. Chief Executive Officer***  
***National Water Harvesting & Storage Authority***  
***NAIROBI"***

Our deduction of the foregoing is that the 1<sup>st</sup> Respondent through the's Parent Ministry sought the clearance of the Attorney-General with respect to the resultant procurement contract of the subject tender as required under Section 134(2) of the Act. However, the Solicitor General, who is the accounting officer of the Office of the Attorney-General, cleared the resultant procurement contract of the subject tender subject to certain conditions being met by the Procuring Entity and the Parent Ministry while reminding both the Procuring Entity and the Parent Ministry that their respective accounting officers have a responsibility of complying with all relevant laws

including but not limited to the Public Finance and Management Act, 2012 and the Act.

The conditions required to be met by the Procuring Entity before signing the resultant procurement contract of the subject tender are as follows:

- a) Incorporation of amendments to the draft resultant procurement contract of the subject tender as suggested by the Solicitor General;

The conditions required to be met by the Parent Ministry before signing the resultant procurement contract of the subject tender are as follows:

- b) Obtaining a confirmation in writing from The National Treasury that all the funds required for the implementation of the Soin-Koru project are available prior to the Procuring Entity progressing with execution of the procurement contract of the subject tender;
- c) Confirmation of whether the Soin-Koru project has obtained Cabinet approval in line with the prevailing Government Circulars; and
- d) Furnishing the Office of the Attorney-General with a copy of the Cabinet Directive approving the Soin-Koru project;

The 1<sup>st</sup> Respondent contends that the Procuring Entity on its part has incorporated all the amendments to the draft resultant procurement contract of the subject tender as suggested by the Solicitor General. However, the 1<sup>st</sup> Respondent is still awaiting clearance by the Parent Ministry with respect to

the conditions required to be met by the Parent Ministry before signing of the resultant procurement contract of the subject tender.

We are aware that the 1<sup>st</sup> Respondent was under an obligation to satisfy herself that sufficient funds to meet the obligations of the resulting procurement contract of the subject tender are reflected in the Procuring Entity's approved budget estimates before commencing procurement proceedings for the subject tender in accordance with Section 53(8) of the Act. Proof of having complied with this obligation by the 1<sup>st</sup> Respondent has not been furnished to the Board. However, even assuming the 1<sup>st</sup> Respondent complied with this obligation, the subject tender's resultant procurement contract being one whose value exceeds Kenya Shillings Five Billion, requires clearance by the Attorney-General under Section 134(2) of the Act which provides as follows:-

#### **134. Preparation of contracts**

**(1) The accounting officer shall be responsible for preparation of contracts in line with the award decision.**

**(2) An accounting officer of a procuring entity shall ensure that all contracts of a value exceeding Kenya shillings five billion are cleared by the Attorney-General before they are signed.**



**(3) Each Cabinet Secretary shall regularly inform the Cabinet and national treasury of all government contracts exceeding Kenya shillings five billion.**

**(4) Notwithstanding the provision of subsection (3) above, any Cabinet Secretary may brief Cabinet on any other project of national importance irrespective of its value.**

**(5) This section shall not apply to contracts by Parliament and the Judiciary.**

It is common ground that the subject tender was awarded to the Applicant herein by the 1<sup>st</sup> Respondent at the Applicant's tender sum of Kshs.19,987,695,934.60 inclusive of VAT. It therefore follows that a resultant procurement contract of the subject tender will be a contract that is in line with the award decision and whose value exceeds Kenya Shillings Five Billion requiring clearance by the Attorney General in accordance with Section 134(2) of the Act and the Cabinet Secretary of the Procuring Entity's Parent Ministry is required to inform the Cabinet and The National Treasury of the resultant procurement contract of the subject tender.

We have established that the Attorney-General's clearance was granted albeit with conditions to be met by the Procuring Entity and the Parent Ministry. However, though the Procuring Entity claims to have met the conditions set, there is no evidence that the Parent Ministry met the conditions set in the Attorney-General's conditional clearance before the

resultant procurement contract for the subject tender can be signed. Without proof that the Parent Ministry met the conditions set, the clearance of the resultant procurement contract for the subject procurement cannot be said to have been granted by the Attorney-General. This is because, the Attorney-General's clearance was not absolute but subject to certain conditions being met.

Our understanding of a clearance that is subject to certain conditions being met means that if such conditions are not met, then no clearance has been granted. Simply put, the conditional clearance by the Attorney-General was dependent on the conditions set therein in order to be said to have been granted and if the conditions set therein are not met, such a clearance cannot be said to have been granted. If there is no clearance of the resultant procurement contract of the subject tender by the Attorney-General, the 1<sup>st</sup> Respondent cannot therefore sign the resultant procurement contract in line with Section 134(2) of the Act.

Given the foregoing, we are inclined not grant an order directing the 1<sup>st</sup> Respondent to sign the resultant procurement contract for the subject tender because doing so will contravene the provisions of Section 134(2) of the Act. We say so because the conditions set by the Attorney-General, prior to signing of the resultant procurement contract of the subject tender, and which conditions are to be met by the Parent Ministry, are yet to be met.

**Whether the Board should grant an order for extension of the validity period of the subject tender.**

The Applicant herein alleges that the tender validity period (including the standstill period of 21 days when the procurement proceedings were suspended by the Board) of the subject tender was set to expire on 26<sup>th</sup> December 2021 but the same was extended by the 1<sup>st</sup> Respondent for a further 30 days to 25<sup>th</sup> January 2022 pursuant to Section 88 of the Act. The Applicant herein is apprehensive that the tender validity period is set to expire on 25<sup>th</sup> January 2022 yet the resultant procurement contract of the subject tender has not been signed in accordance with Section 135 of the Act. It is for this reason that the Applicant herein prays for the Board to extend the tender validity period of the subject tender for a further 90 days to allow for the signing of the resultant procurement contract of the subject tender.

On her part and as already established, the 1<sup>st</sup> Respondent has confirmed no resultant procurement contract for the subject tender has been signed. Further the 1<sup>st</sup> Respondent does not object to the prayer by the Applicant herein for extension of the validity period of the subject tender by the Board. In fact, the 1<sup>st</sup> Respondent confirms that the Board may consider extension of the validity period of the subject tender pending response from the Parent Ministry.

Section 88 of the Act 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).**

From the foregoing provision of the law, an accounting officer of a procuring entity may exercise his or her discretion to extend the validity period of a tender. However, such discretion can only be exercised once and for a maximum period of 30 days.

We note the 1<sup>st</sup> Respondent vide a letter dated 17<sup>th</sup> December 2021, a copy of which is annexed to the Supporting Affidavit of Wang Wei and marked YN-6, extended the validity of the subject tender for a period of 30 days so as to expire on 25<sup>th</sup> January 2022 in exercise of her discretion under Section 88(1) and (3) of the Act and in compliance with Section 88(2) of the Act.



Further, we note the Applicant herein accepted the extension of the validity of the subject tender vide a letter dated 17<sup>th</sup> December 2021, a copy of which is annexed to the Supporting Affidavit of Wang Wei.

The question that now arises is whether the Board can extend the validity of the subject tender in light of the fact that the 1<sup>st</sup> Respondent has exhausted her option to extend the same having extended the same for a period of 30 days set to expire on 25<sup>th</sup> January 2022?

The High Court sitting in Mombasa had occasion to address this issue in **Judicial Review Case E002 of 2021 Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex parte Kenya Ports Authority & another [2021] eKLR** (hereinafter referred to as the JR Case No. E002 of 2021) where Justice J.N. Onyiego held 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.*

*41. Therefore, the foregoing provision permits extension of a tender validity period by an accounting officer only once and that that extension must be made before the expiry of the already stipulated tender validity period. ....*

*42. The Concise Oxford English Dictionary eleventh Edition defines extension inter alia as:*

*"An additional period of time given to someone to hold office or to fulfil an obligation."*

*43. Extension therefore, presupposes a period specified. It is not in dispute that the respondent in Review NO. 150/ 2021 extended the tender validity period for 30 days from the date of its expiry. ....*

*44. ....*

*45. .... The Board also extended the tender Validity period by 30 days. In compliance, the accounting officer did extend the validity period thereby inviting the interested party and the second*

*lowest bidder into competitive negotiation whereby the interested party emerged the lowest bidder (bidder) within the budgetary allocation.*

*46. .... Realizing that it was remaining one day to expiry of the validity period, the I/Party moved to the Board vide Request for Review No. 150/21 wherein the Board on 6/01/21 ordered the Exparte Applicant to comply with the orders of 23/10/20 and to submit status report on compliance. It further directed extension of the validity period for a further 30days. It is the legality of this further extension that the Exparte Applicant is challenging on grounds that it is illegal and amounts to an assault on Section 88(3) which caps extension of time to 30 days and only once.*

*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. These Residual powers can be derived from Section 173 of the Act which provides;**

***"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"***

***49. Under section 173(a)(b) & (c) of the Act, the Board has wide discretionary powers for the better management of tendering***



*system to direct the doing or not doing or redoing certain acts done or omitted from being done or wrongly done by the accounting officer. Although the Act does not expressly limit the powers of the Board from extending tender validity period more than once, one can imply that the powers conferred upon the Review board includes powers to extend validity period to avert situations where the accounting officer can misuse powers under Section 88 to frustrate tenderers or bidders not considered favourable.*

*50. ....*

*51. .... I do agree with the board's finding that, under section 173 of the Act, they have residual powers to direct extension of validity period more than once. Without those supervisory powers, the procuring entities can frustrate the tendering process. Since it was one day to the expiry, the I/party had to move with speed to avoid being trapped into the technicality of the validity period having expired hence nothing remaining to extend. Therefore, I do find that the extension of time was not illegal, unreasonable nor without jurisdiction.*

*52. It is worth noting that the Respondent acts as an appeal channel in the procurement process against decisions or complaints against the procuring entity hence the powers to exercise inherent jurisdiction to make decisions even where there is no express provision for the just determination of a matter in controversy by applying section 173. In Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte*

***Saracen Media Limited [2018] eKLR, Mativo J cited the case of Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd [2012] eKLR where the Court of Appeal opined that:***

***"The Review Board is a specialized statutory tribunal established to deal with all complains of breach of duty by the procuring entity. From the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal".***

In the JR Case No.E002 of 2021 this Board, as was then constituted, had extended the tender validity period of a tender more than once with each extension running for 30 days. It is this extension of the validity of a tender by the Board that the procuring entity therein challenged by way of judicial review at the High Court in Mombasa. Justice J.N. Onyiego at paragraph 49 and 51 of his decision held that although the Act does not expressly limit the powers of the Board from extending tender validity period more than once, one can imply that the residual powers conferred upon the Board under Section 173 of the Act includes powers to extend the validity period of a tender to avert situations where an accounting officer can misuse powers under Section 88 of the Act to frustrate tenderers not considered favourable. Ultimately, the Honourable Judge dismissed the judicial review (Notice of Motion application).

The High Court decision in JR Case No.E002 of 2021 was affirmed by the Court of Appeal sitting in Mombasa in **Civil Appeal E011 of 2021 Kenya Ports Authority & Anor v Rhombus Construction Company Limited & 2 Others [2021] eKLR** (hereinafter referred to Civil Appeal E011 of 2021) where the Court of Appeal held 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. .... 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. ....**"

Aggrieved by the decision of Justice J.N. Onyiego, the procuring entity in JR Case No.E002 of 2021 appealed to the Court of Appeal in Mombasa. The Court of Appeal in Civil Appeal E011 of 2021 while dismissing the procuring entity's appeal found no reason to interfere with Justice J.N. Onyiengo's discretion in finding that the Board had residual powers conferred upon it under Section 173 of the Act to extend the validity period of a tender to avert situations where an accounting officer may misuse powers under Section 88 of the Act to frustrate tenderers not considered favourable.

Having established that the Board has powers to extend the validity period of the subject tender, we note that there is no objection by the 1st Respondent for extension of the subject tender's validity period by the Board



for a further 90 days as prayed for by the Applicant herein. We also note for the resultant procurement of the subject tender to be signed, the validity period of the subject tender must be in existence. We say so because Section 135 of the Act provides as follows:

### **135. Creation of procurement contracts**

**(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.**

**(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.**

**(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.**

**(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.**

**(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.**

**(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—**

- 1. (a) Contract Agreement Form;**
- 2. (b) Tender Form;**
- 3. (c) price schedule or bills of quantities submitted by the tenderer;**
- 4. (d) Schedule of Requirements;**
- 5. (e) Technical Specifications;**
- 6. (f) General Conditions of Contract;**
- 7. (g) Special Conditions of Contract;**
- 8. (h) Notification of Award.**

**(7) A person who contravenes the provisions of this section commits an offence.**

With reference to Section 135(3) of the Act, a procurement contract must be signed within the tender validity period failure to which such a procurement contract is null and void and an accounting officer who signs a procurement contract after the lapse of the tender validity period will be doing so in contravention of Section 135(3) of the Act and will have committed an offence under the Act.

Given the foregoing and in the circumstances, we deem it just to extend the tender validity period of the subject tender for a further 107 days from 25th January 2022 to enable confirmation of all relevant approvals have been obtained, confirmation that funds are available for the successful implementation of the subject tender before the resultant procurement contract of the subject tender is signed within the tender validity period.

The upshot of our decision is that the Notice of Motion Application succeeds with respect to the following specific orders.

### **FINAL ORDERS**


In exercise of the powers conferred upon it by Section 173 of the Act, the Board issues the following orders in the Notice of Motion Application dated 21<sup>st</sup> January 2022: -

- 1. The tender validity period of Tender No. NWHSA/OIT/002/2020-2021 for Construction of Soin-Koru Multipurpose Dam Water Project – Lot 1 (Dam Component) be**

and is hereby extended for a further period of 107 days from 25<sup>th</sup> January 2022.

2. The Applicant herein be and is hereby directed to extend the validity period of its tender security to cover the period of validity of the subject tender and any period beyond the period of validity of the subject tender as provided in the Tender Document.
3. Each party shall bear its own costs in the Notice of Motion Application.

Dated at Nairobi this 11<sup>th</sup> day of February 2022

  
.....

**CHAIRPERSON**  
**PPARB**

  
.....

**SECRETARY**  
**PPARB**

