

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 148/2021 OF 7TH DECEMBER 2021

BETWEEN

CPF FINANCIAL SERVICES LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

THE PUBLIC SERVICE SUPERANNUATION SCHEME ... RESPONDENT

Review against the (in) decision of the Ag. Chief Executive Officer of the Public Service Superannuation Scheme in relation to Tender No: PSSS/003/2020-2021 for Procurement of Fund Administrator for the Public Service Superannuation Fund.

BOARD MEMBERS

- | | |
|--------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Steven Oundo, OGW | -Member |
| 3. Ms. Rahab Chacha | -Member |
| 4. Mr. Ambrose Ogeto | -Member |

IN ATTENDANCE

On 7th December 2021, CPF Financial Services Limited, the Applicant herein, lodged a Request for Review dated 7th December 2021 together with a Supporting Affidavit sworn on even date by Kimutai Hosea Kili, the Applicant's Managing Director, through the firm of Muthomi & Karanja Advocates, seeking the following orders verbatim:

- a. an order directing the Respondent to issue notification letters to the Applicant and the unsuccessful tenderers within seven days of the date of this Honourable Board's decision;***
- b. an order directing the Respondent to extend the tender validity period pending –***
 - (i) the issuance of notification letters to the Applicant and the unsuccessful tenderers;***
 - (ii) the award of the Tender to the Applicant; and***
 - (iii) the signing of the contract between the Respondent and the Applicant.***
- c. without prejudice to prayers (a) and (b) above, an order directing the Respondent to award the Tender to the Applicant;***
- d. an order directing the Respondent to reimburse the Applicant the costs of and incidental to this Request for Review; and***

e. such other, further, additional, incidental and/or alternative relief(s) as the Honourable Board may deem just and expedient.

Vide a Notification of Appeal dated 7th December 2021 and letter dated 7th December 2021, the Acting Board Secretary notified the Ag. Chief Executive Officer of the Public Service Superannuation Scheme, the Respondent herein, of the existence of the Request for Review and suspension of procurement proceedings for *Tender No: PSSS/003/2020-2021 for Procurement of Fund Administrator for the Public Service Superannuation Fund* (hereinafter referred to as the 'subject tender') while forwarding to the Respondent a copy of the Request for Review together with the Board's Circular No.2/2020 dated 24th March 2020. Further, the Respondent was requested to submit his response to the Request for Review together with confidential documents with respect to the subject tender within 5 days from 7th December 2021.

In response to the Acting Board Secretary's letter dated 7th December 2021, one Sarah Ngaru on behalf of the CEO - PSSS and vide a letter dated 10th December 2021, requested for five days on return of the Respondent, who was out of Nairobi and was expected back on 14th December 2021, to submit documents requested for in the Acting Board Secretary's letter dated 7th December 2021.

Vide a letter dated 20th December 2021, the Acting Board Secretary while making reference to Sarah Ngaru's letter of 10th December 2021 reminded the Respondent that the operations of the Board are time bound within which documents ought to be submitted. Further, the Acting Board Secretary brought to the attention of the Respondent the provisions of Regulation 205 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as Regulations 2020) and more so that it is an offense for an accounting officer of a procuring entity to fail to submit documents requested for by the Board Secretary under Regulation 205 (3) of Regulations 2020.

Vide a letter dated 16th December 2021 and received by the Board on 21st December 2021, one Dr. Eddyson H. Nyale, the Respondent herein, responded to the Request for Review while attaching letters dated 14th December 2021 requesting tenderers to extend tender validity.

Vide letters dated 21st December 2021, the Acting Board Secretary notified tenderers in the subject tender of the existence of the Request for Review and invited them to furnish the Board with any information and arguments touching on the subject tender. Further, the Acting Board Secretary furnished the tenderers in the subject tender with the Board's Circular No. 2/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review

applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

Only the Applicant filed written submissions on 20th December 2021.

APPLICANT'S CASE

The Applicant avers that it is a duly registered, licensed provider of administration services to retirement benefits schemes and a leading administrator of pension schemes, with extensive relevant knowledge, expertise and experience in administering (a) the County Pension Fund; (b) the Local Authorities Pensions Trust; and (c) the CPF Individual Pension Fund.

It's the Applicant's averment that the subject tender was advertised by the Respondent in newspapers of national circulation on 1st June 2021 and closed on the extended submission deadline of 23rd June 2021 at 11:00hrs following issuance of an addendum dated 15th June 2021 by the Respondent.

The Applicant avers it received a letter from the Respondent dated 19th July 2021 informing it, that it had passed the Technical Evaluation and inviting it for opening of financial proposals. The Applicant further avers that it was represented by Mr. Christopher Mitei at the opening of financial proposals held on 21st July 2021 where the chairman of the financial proposals opening

committee disclosed that only the Applicant managed to get to the financial opening having attained a technical score of 95.2%.

The Applicant avers that a due diligence exercise was conducted on it, on 22nd July 2021, when the Respondent visited the Applicant's offices as scheduled in the Respondent's letter dated 21st July 2021 and in accordance with Clause 39 of the Tender Document. It is the Applicant's belief that the legal implication of such due diligence being carried out on it, is that the Respondent is (a) deemed (under the doctrine of estoppel) to have represented/confirmed that the Applicant was a successful tenderer; (b) obliged to send notification letters to the Applicant and the unsuccessful tenderers; and (c) obliged to award the subject tender to the Applicant in the absence of a valid and cogent legal justification for a different course of action.

With this, the Applicant avers that it has a legitimate expectation that the Respondent will complete the tender proceedings by *inter alia* (a) issuing notification letters to the Applicant and the unsuccessful tenderers; (b) awarding the contract for the subject tender to the Applicant; and (c) executing the contract for the subject tender.

However, the Applicant alleges that the Respondent has deliberately and inexplicably delayed completing the subject tender's proceedings and that the Respondent's dilatory conduct has necessitated the Applicant to write to the Respondent vide a letter dated 16th September 2021, requesting for

communication of the outcome of the subject tender process and vide a letter dated 23rd November 2021, requesting for communication of the outcome of the subject tender within the tender validity period or for extension of the tender validity. In its submissions, the Applicant submits that the delay in completing the subject tender's proceedings is inordinate because Section 80(6) of the Act obliges a procuring entity to complete evaluation of tenders within a maximum period of 30 days from the date of opening/closing of tenders and in respect to the subject tender, from 23rd July 2021 and that such dilatory conduct has been classified as a criminal offence by Parliament under Sections 176(1)(j) and (k) of the Act.

It is the Applicant's allegation that the Respondent has deliberately ignored, omitted, neglected and/or otherwise refused to communicate the outcome of the subject tender or extend the tender validity period exposing the Applicant to (a) the risk of unfairly losing out on the subject tender by effluxion of time and, specifically, by expiry of the subject tender validity period; and (b) the risk of significant loss, harm and damage, directly attributable to being unfairly denied the economic opportunities embodied in the subject tender.

Given the foregoing, the Applicant alleges that the Respondent has breached Sections 86, 87 and 88 of the Act and Regulation 82 of Regulations 2020 by (a) refusing, omitting, neglecting and/or otherwise failing to issue notification letters to the Applicant and the unsuccessful, tenderers; (b) ignoring correspondence/concerns from the Applicant on the fast-

approaching expiry of the tender validity period; and (c) engaging in dilatory conduct so that it can later use the expiry of the tender validity period as a pretext for its unlawful refusal, omission, neglect and/or failure to award the subject tender to the Applicant. Further, that the Respondent has breached Articles 10, 47 and 227(1) of the Constitution and Section 3 of the Act and therefore seeks the Board to allow the prayers sought in the Request for Review.

The Applicant relies on five case laws to support its review in the following issues as follows; (a) at paragraphs 76, 80 and 81 of the *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR* on procuring entities being bound by the principles set out in Articles 10, 47, and 227(1) of the Constitution and Section 3 of the Act, (b) at paragraphs 41 to 45 of the *Republic v Public Procurement Administrative Review Board Ex parte Kenya Power & Lighting Company Limited; Energy Sectors Contractors Association & another (Interested Parties) [2020] eKLR* on a decision to award (or not to award) a tender constituting an administrative action making Article 47 of the Constitution and the Fair Administrative Action Act, 2015 applicable to such decision, (c) at paragraphs 52 and 53 of the *Consortium of H. Young & Co. (E.A.) Limited & Yantai Jereh Petroleum Equipment and Technologies Company Limited v Public Procurement Administrative Review Board & 2 others [2017] eKLR* on due diligence only being conducted on the candidate that has submitted the successful or lowest evaluated tender, (d) at paragraph 11 of the *Benjamin Ayiro Shiraku v Fozia Mohammed [2012] eKLR*

on the general rule of estoppel and (e) at paragraph 55 of the *Republic v Public Procurement Administrative Review Board; Principle Styles Limited & another (Interested Parties) Ex Parte Accounting Officer, Kenya Water Towers Agency & another [2020] eKLR* on there being a legitimate expectation that a procurement entity will comply with its tender conditions.

RESPONDENT'S RESPONSE

The Respondent contends that the subject tender's procurement process has not been finalized and confirms no letters of intention to award the subject tender and/or notification of award have been issued to any tenderer.

The Respondent further contends that the Public Service Superannuation Scheme (hereinafter referred to as the 'Procuring Entity') has requested for extension of tender validity period by tenderers. Further, the Respondent has furnished the Board with such letters dated 14th December 2021 issued to five tenderers requesting for extension of tender validity period to allow for further consultations to finalize the subject tender's procurement process.

Given the foregoing, it is the Respondent's contention that the Request for Review is premature as the Applicant has not received any letter of intention to award the subject tender and/or notification of award that may warrant a review and that the subject tender was still valid as at the time the Request for Review was filed. However, the Respondent has not furnished the Board with any confidential documents pursuant to Section 67(3)(e) of the Act as requested for vide a letter dated 7th December 2021 and a reminder letter

dated 20th December 2021 both issued to the Respondent by the Acting Board Secretary save for the letters requesting for extension of tender validity period.

According to the Respondent, the issues subject to review are administrative matters being addressed internally by the Procuring Entity, should not attract a review and the Board should allow the Procuring Entity to finalize the subject tender's procurement process to its logical conclusion since tenderers have been requested to extend their tender validity.

BOARD'S DECISION

The Board has considered the Applicant's Request for Review together with its appurtenant Supporting Affidavit, the annexures thereto, its written submissions, list and bundle of authorities and the Respondent's response together with the attachments thereto and finds the following issues call for determination: -

- 1. Whether the Request for Review is premature for having been filed before the Applicant receives a letter of intention to award the subject tender and/or notification of award;**

Depending on the outcome of the first issue;

- 2. Whether the Respondent has without explanation inordinately delayed the conclusion of the subject tender's procurement process;**
- 3. Whether there is need for the subject tender's tender validity period to be extended pursuant to Section 88 of the Act; and**
- 4. What are the appropriate reliefs to grant in the circumstances.**

Whether the Request for Review is premature for having been filed before the Applicant receives a letter of intention to award the subject tender and/or notification of award.

Vide his letter dated 16th December 2021, addressed to the Acting Board Secretary, copied to the Applicant and in response to the Request for Review, the Respondent contends that the Request for Review is premature as the Applicant has not received any letter of intention to award the subject tender and/or notification of award that warrants this review.

This issue is preliminary in nature and one that needs to be addressed at this earliest point in time. This is because, if we find the Request for Review is premature, the same will be struck out and there will be no basis for us to proceed to entertain and determine the substantive issues therein.

Section 167 of the Act provides the manner in which a tenderer, such like the Applicant, may seek administrative review as follows: -

167. Request for a review

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

(2).....;

(3).....;

(4))—

(a);

(b); and

c)

The import of section 167(1) of the Act with respect to the circumstances of this review is that a tenderer may seek administrative review within fourteen days of (i) notification of award or (ii) date of occurrence of the alleged breach of duty imposed on a procuring entity by this Act or Regulations 2020 at any stage of a procurement process.

Regulation 203 of Regulations 2020 prescribes the format a request for review should take, what should be contained in such request for review and when the same should be made as follows:-

203. Request for a review

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

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

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

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

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

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

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

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

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

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

The import of Regulation 203(2)(c) of Regulations 2020 is that a request for review may be made within fourteen days of (i) the occurrence of breach complained of before making of an award, (ii) notification of intention to enter into a contract and (iii) the occurrence of breach complained of after making of an award.

The Fourteenth Schedule of Regulations 2020 provides for a template of a request for review known as 'Form For Review' that guides tenderers on what should be captured or contained in a request for review before the Board.

It therefore follows that the import of Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 permits for a request for review to be made at any stage of a procurement process. This means, a tenderer who claims to have suffered or risks suffering loss due to breach of a duty imposed on a procuring entity by the Act and Regulations 2020 may file a

Request for Review within fourteen days of occurrence of the breach complained of. The occurrence of breach complained of may happen before a notification of intention to enter into a contract under section 87 of the Act has been issued. In this instance, it is permissible for a request for review to be filed within fourteen days of occurrence of such breach and before a notification of intention to enter into a contract is issued. In instances where the breach complained of occurs after notification of intention to enter into a contract under section 87 of the Act has been issued, then it is permissible for a request for review to be filed within fourteen days of occurrence of such breach and after a notification to enter into a contract is made under Section 87 of the Act.

By its own admission, the Respondent has confirmed that a notification to enter into a contract under Section 87 of the Act has not been issued to any tenderer. In fact, this is the reason why the Applicant is seeking the Board to compel the Respondent to issue such notification to enter into a contract while citing inordinate delay to do so on the part of the Respondent.

In our considered opinion, the Applicant exercised the option of filing a request for review prior to notification of intention to enter into a contract which we find is permissible in law and we do not see how the Applicant was supposed to wait for such notification to enter into a contract to be issued before it could file its Request for Review in these circumstances.

Given the foregoing, we find the Request for Review is not premature, in the circumstance, noting that the same was filed prior to a notification to enter into a contract under Section 87 of the Act and is permissible under Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020.

Whether the Respondent has without any explanation inordinately delayed the conclusion of the subject tender's procurement process.

The Applicant avers that the subject tender was opened/closed on 23rd July 2021. Subsequently, the Applicant received a letter from one W. A. Kituyi on behalf of the Respondent dated 19th July 2021 informing it that its tender qualified for Financial Evaluation Stage and proceeded to invite the Applicant for opening of its financial proposal slated for 21st July 2021. The said letter reads as follows in part:

".....

This is to notify you that your bid qualified for the Financial Evaluation Stage.

The purpose of this letter is to invite you for the opening of your Financial Proposals scheduled to take place on Wednesday, 21st July, 2021 at 12:00P.M.; at Treasury Building, 6th Floor, Conference Room No.603, Harambee Avenue-Nairobi.

.....”

The Applicant further avers that its representative, Mr. Christopher Mitei, attended the opening of financial proposals where the Applicant learnt from the Chairman of the financial proposals opening committee that it was the only tenderer that made it for financial evaluation having attained a technical score of 95.2%.

Thereafter, it is the Applicant's averment that vide a letter dated 21st July 2021, W. A. Kituyi on behalf of the Respondent, informed the Applicant that the National Treasury intends to conduct a due diligence exercise on the Applicant and that there will be a site visit to the Applicant's premises on 22nd July 2021. The said letter reads as follows in part:

".....

This is to notify you that the National Treasury intends to conduct due diligence on your firm to verify information you provided in your Technical Proposal as submitted in the tender document.

The purpose of this letter therefore is to inform you that there will be a site visit to your premises in which you will be required to provide information on the following:

a. The availability and capacity of the proposed staff.

- b. Selected staff for interview on issues regarding the firm.***
- c. A demonstration of all key aspects as covered in the Tender document.***
- d. Demonstration of pension software/Hardware systems.***
- e. Verification of Original Statutory documents.***
- f. Any other information that may be required.***

The site visit will take place on Thursday 22nd July, 2021 at 10:a.m.

.....”

Given the foregoing, the Applicant believes that it is the successful tenderer and ought to be granted the award of the subject tender but the Respondent is refusing, omitting, neglecting and /or otherwise refusing to issue the Applicant with a notification of award in the subject tender.

The Applicant submits that there is inordinate and unexplained delay on the part of the Respondent to issue notification letters to it and that the Procuring Entity is under obligation to complete evaluation of tenders within a maximum period of thirty days from the date of opening/closing of the subject tender as provided for under Section 80(6) of the Act. The Applicant further submits that it is a criminal offence for a person to knowingly withhold the notification of award to a successful tenderer and notification to an unsuccessful tenderer under Section 176(1)(j) and (k) of the Act.

Given the foregoing, the Applicant submits that the Respondent is in breach of Regulation 82 of Regulations 2020, Sections 3, 86 and 87 of the Act and Articles 10, 47 and 227(1) of the Constitution.

On its part, the Respondent contends that the subject tender's procurement process has not been finalized and confirms no letters of intention to award the subject tender and/or notification of award have been issued to any tenderer.

However, the board notes that no information is availed by the Respondent on what stage of the procurement process the subject tender is at.

We note that despite having been requested for various confidential documents under Section 67 of the Act, by the Acting Board Secretary pursuant to Regulation 205 of Regulations 2020 read with Section 168 of the Act vide a letter dated 7th December 2021 and a reminder dated 20th December 2021, the Respondent has failed to furnish the Board with such confidential documents which would have included all original tender documents as submitted by tenderers, a copy of an evaluation report capturing the evaluation process from preliminary to financial stage (if any), a copy of a due diligence report (if any), a copy of a professional opinion by the head of procurement function (if any) and all other confidential documents with respect to the subject tender.

We understand the Applicant to mean, since the opening/closing of tenders took place on 23rd July 2021, the Procuring Entity ought to have finalized evaluation of tenders latest on 22nd August 2021 and notified the Applicant that it was the successful tenderer and other tenderers in the subject tender notified of their unsuccessful tenders.

On the other hand, we understand the Respondent to mean, the procurement process of the subject tender has not been finalized and that the Board should allow the Procuring Entity to finalize the same.

Section 80 (6) of the Act provides for the period an evaluation of tenders should take as follows:

The evaluation shall be carried out within a maximum period of thirty days.

In addressing this issue, the Board is mindful that on several occasions in the past, it has addressed the meaning of the word “**evaluation**” so as to make a determination on the date from which the period of 30 days under section 80 (6) of the Act ought to start running. Having considered provisions of the Act and Regulations 2020, the Board observes there is no express provision therein stating the date from which the 30 days for evaluation ought to start running. In **PPARB Application No. 136 of 2020, Chania Cleaners Limited v. The Accounting Officer, National Social Security Fund & Another** (hereinafter referred to as the “Chania Cleaners Ltd

Case”), the Board considered the meaning of “**tender evaluation**” provided in paragraph 11 of the guidance notes on preparing the procurement plan of the Third Schedule of Regulations 2020 and held as follows: -

“Tender evaluation — is the process used to identify the most preferred bidder technically and financially. This process should not take more than 30 calendar days...”

Having established that evaluation is the process of identifying the most preferred bidder technically and financially, it means that the period of 30 days for evaluation ought to be the number of days taken by an evaluation committee to identify the most preferred bidder that is technically and financially responsive. Therefore, the number of days between commencement of evaluation and signing of the evaluation report would constitute the period taken to determine the preferred bidder that is both technically and financially responsive”

In the Chania Cleaners Limited Case, the Board held that that the period of 30 days ought to be the maximum number of days between commencement of evaluation and signing of the evaluation report which essentially are the number of days taken by an evaluation committee to identify the most preferred tenderer that is technically and financially responsive.

In most instances, the Tender Document does not specify the date from which evaluation ought to start running. In addition to this, the Act and Regulations 2020 are both silent on the issue, save for the Third Schedule to Regulations 2020 which states that evaluation shall take 30 calendar days. Turning to the circumstances of the subject tender, the Board studied the Tender Document and notes there is no provision therein specifying the date from which evaluation would commence in the subject procurement proceedings. In such a case, the Board can only be guided by information provided by the Procuring Entity on when evaluation of tenders commenced which information would probably be captured in a tender evaluation report. However, as earlier noted, such information and documentation has not been availed to the Board by the Respondent despite the Acting Board Secretary requesting the same from the Respondent.

Be that as it may, we note from the aforementioned definition of evaluation, post qualification evaluation or what is known as due diligence provided under section 83 of the Act does not form part of evaluation of tenders required to be conducted within a maximum period of thirty days.

At this juncture it is incumbent on us to highlight several provisions of the Act and Regulations that provide for how an evaluation of tender exercise is conducted, how other procurement processes are carried out and the players involved in the tendering process from evaluation to conclusion of procurement proceedings.

Section 80 of the Act provides for evaluation of tenders by an evaluation committee appointed by an accounting officer as follows:

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.

(2)

(3)

(a)

(b)

(4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.

(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations

(6)

(7)

Regulations 74(1), 75(1), 76 and 77(1) & (3) of Regulations 2020 breaks down the main stages of evaluation to be undertaken during evaluation of tenders and provide as follows:-

74. Preliminary evaluation of open tender

(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—

.....

75. Non-responsiveness to tender

(1) A procuring entity shall reject all tenders, which are not in conformity to the requirements of section 79 of the Act and regulation 74 of these Regulations.

.....

76. Technical evaluation

(1) Upon completion of the preliminary evaluation under regulation 74, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the goods, works or services in the tender document.

(2) The evaluation committee shall reject tenders which do not satisfy the technical requirements under paragraph (1).

77. Financial evaluation

(1) Upon completion of the technical evaluation under regulation 76 of these Regulations, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

(2)

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act.

Section 83 of the Act and Regulation 80 of Regulations 2020 provide for a post qualification due diligence exercise to be conducted on a tenderer who submitted the lowest evaluated responsive tender and has been recommended for award by the Evaluation Committee as follows:

Section 83. Post-qualification

- (1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.***
- (2) The conduct of a due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***
- (3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall-***
 - (a) Initial each page of the report; and***
 - (b) Append his or her signature as well as their full name and designation.***

Regulation 80. Post-qualification

- (1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified***

to be awarded the contract in accordance with sections 55 and 86 of the Act.

(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—

(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or

(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method.

Section 84 of the Act provides for the head of procurement function of a procuring entity to review an evaluation report, render his/her opinion and forward his/her opinion to the accounting officer of a procuring entity for the accounting officer of a procuring entity to take into account the views of the head of procurement function when making an award as follows:

(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a

signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.

(2)

(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).

Section 85 of the Act and Regulation 78 of Regulation 2020 provide for the evaluation committee to make recommendations for award to the accounting officer through the head of procurement function as follows:

Section 85. Recommendation for contract awards

Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers.

Regulation 78. Evaluation report and professional opinion

(1) An evaluation report prepared under section 80(4) of the Act shall include—

(a)

(b)

(c)

(d)

e)

(f)

(g)

(h) a recommendation to award the contract to the successful tenderer in accordance with section 86 of the Act; and

(i)

(2) The evaluation report under paragraph (1), shall be reviewed by the head of the procurement function and forwarded to the accounting officer together with the professional opinion referred to in section 84 of the Act within a day upon receipt of the evaluation report.

.....

Section 86 of the Act and Regulation 79 of Regulations 2020 provide for ways of determining a successful tenderer as follows:

Section 86. Successful tender

(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

(c) the tender with the lowest evaluated total cost of ownership; or

(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges.

(2)

Regulation 79. Approval of the accounting officer

(1) Upon receipt of the evaluation report and professional opinion, the accounting officer shall take into account the contents of the professional opinion and shall within a day, in writing—

(a) approve award to the successful tenderer;

(b) seek clarification from the head of the procurement function or the evaluation committee prior to approving or rejecting the award; or

(c) reject the recommendations.

(2) Where the accounting officer rejects the recommendations under paragraph (1)(c), the accounting officer shall give reasons and provide further directions to the head of the procurement function, in writing.

(3) Pursuant to section 68(2)(g) of the Act, any further directions, approval or rejection by the accounting officer shall form part of the procurement records.

Section 87 of the Act and Regulation 82 of Regulations 2020 provide for notification to tenderers of the outcome of their tenders as follows:

Section 87. Notification of intention to enter into a contract

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

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

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

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

Regulation 82. Notification of intention to enter into a contract

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

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

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

Section 135 (3) of the Act provides for the period within which a successful tenderer and an accounting officer of a procuring entity is barred from entering into a procurement contract as follows:-

135. Creation of procurement contracts

(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.

We can summarize the aforementioned provisions of the Act and Regulations 2020 as follows.

First, an accounting officer appoints members of an evaluation committee to evaluate tenders. Once tenders are opened, the evaluation committee embarks on evaluation and comparison of tenders in three main stages namely (a) preliminary evaluation stage, (b) technical evaluation stage, and (c) financial evaluation stage. A tender that fails to satisfy the criteria under preliminary evaluation stage is rejected by the evaluation committee and does not proceed for evaluation at the technical evaluation stage. Only tenders that are responsive at the preliminary evaluation stage proceed for evaluation at the technical evaluation stage. A tender that fails to satisfy the criteria for evaluation at technical evaluation stage is equally rejected by the evaluation committee and does not proceed for evaluation at the financial evaluation stage. Only tenders that are responsive at the technical evaluation stage proceed for evaluation at the financial evaluation stage. The evaluation committee then ranks tenders based on their evaluated tender prices at the financial evaluation stage and proceeds to recommend award of a tender to the lowest evaluated responsive tender. All these processes of evaluation are captured in an evaluation report signed by members of an evaluation committee who conducted the evaluation process. It is this preliminary, technical and financial evaluation that is required to be carried out for a maximum period of thirty days.

Secondly, at the discretion of the evaluation committee and subject to the provision of a tender document, a due diligence exercise is carried out on the tenderer whose tender the evaluation committee recommended for

award for purposes of confirming and verifying such tenderer's qualifications. In the event such tenderer is not qualified after due diligence, its tender is rejected by the members of the evaluation committee conducting the due diligence exercise. Thereafter, a similar due diligence exercise is conducted on the tenderer whose tender was the next responsive tender as recommended by the evaluation committee. This exercise is repeated until the tenderer with the most responsive tender is determined, if necessary. All these processes of due diligence are captured in an evaluation report signed by all members of the evaluation committee who participate in the due diligence exercise. In our considered opinion this process has no time frame attached to it but must be conducted within a reasonable period to enable conclusion of other processes before an award of a tender is made within a timeframe when tenders are valid.

Thirdly, both the evaluation report and the due diligence report (if any) are submitted by the evaluation committee to the head of procurement function. The head of procurement function then reviews the evaluation report and the due diligence report (if any), gives his opinion on the evaluation process and the due diligence exercise (if any) to the accounting officer of a procuring entity with his/her recommendations. The head of procurement function is required to give his signed professional opinion and recommendations to the accounting officer within a day of receipt of the evaluation report and due diligence report (if any) from the evaluation committee.

Fourth, in awarding a tender, an accounting officer takes into consideration the opinion of the head of procurement function and may approve or reject the recommendations contained in the professional opinion by the head of procurement function. Where the accounting officer rejects the recommendations he/she will do so in writing with reasons and provide further directions to the head of procurement function. Where the accounting officer approves the recommendations, he/she awards the successful tenderer and simultaneously notifies both the successful and unsuccessful tenderers of such an award, the reasons thereof and the reasons why the unsuccessful tenderers were unsuccessful. The accounting officer is required to approve award to a successful tenderer or seek clarification from the head of procurement function or the evaluation committee or reject the recommendations within a day of receipt of the evaluation report, due diligence report (if any) and professional opinion from the head of procurement function.

Fifth, the successful tenderer then accepts the award. If no administrative review has been filed before the Board and after the lapse of 14 days from notification of all tenderers of the outcome of evaluation of their tenders, the accounting officer is at liberty to sign a procurement contract with a successful tenderer.

What is clear is that a procurement process is time bound and every stage of procurement has specific timelines save for the post qualification evaluation process or what is known as due diligence. This is perhaps because, due diligence may entail a procuring entity obtaining confidential references from persons with whom a tenderer has had prior engagement (third parties) and a procuring entity may not be able to enforce any timelines within which such confidential references can be made by third parties.

Turning to the circumstances of this review, it is evident that the subject tender process reached the post qualification/due diligence stage but the procurement process has not been concluded. We say so because (i) the letter dated 19th July 2021 issued on behalf of the Respondent and addressed to the Applicant confirms the Applicant's tender qualified for financial evaluation set for 21st July 2021 meaning, technical evaluation had been concluded because only tenders that are found responsive at technical evaluation stage proceed for financial evaluation; (ii) the letter dated 21st July 2021 issued on behalf of the Respondent and addressed to the Applicant confirms that the subject tender reached the due diligence stage and further a site visit of the Applicant's premises was set for 22nd July 2021 meaning, evaluation of tenders at the financial evaluation stage had been concluded and the Applicant's tender emerged the most responsive evaluated tender because due diligence is only conducted to confirm and verify the qualification of the tenderer who submitted the lowest evaluated responsive

tender and one that has been recommended for award by the evaluation committee (iii) by his own admission, the Respondent confirms that the tender process has not been finalized and letters of intention to award and/or notification of award have not been issued to any tenderer.

There is no information as to what has been happening since 22nd July 2021, when a site visit was expected at the Applicant's premises by staff members of the Procuring Entity, and 7th December 2021 when the request for Review was filed before the Board and suspension of proceedings of the subject tender took effect pursuant to Section 168 of the Act. The Board has not had the benefit of seeing whether there is a due diligence report and whether or not the Applicant qualified for award of the subject tender after the due diligence exercise in accordance with Section 83 of the Act read with Regulation 80 of Regulations 2020.

Be that as it may, taking into consideration that procurement proceedings and processes are time bound and the Respondent has failed to offer any explanation why more than four months down the line from when a site visit of the Applicant's premises was scheduled, no award of the subject tender has been made and no notification of the outcome of tenders has been made to any tenderer, the Board holds that the Respondent has inordinately delayed this procurement process without any explanation.

An award of a tender and signing of its attendant contract is required to be done within the tender validity period as provided under section 87(1) and 135(3) of the Act. Section 135 (3) of the Act further provides for the earliest time a procurement contract can be signed as the 15th day from the date of receipt by tenderers of notification to enter into a contract to allow dissatisfied tenderers to challenge the decision of an accounting officer to award a tender. What this means is that it is only reasonable that an award of a tender is made at the very least 15 days before the expiry of tender validity period.

The tender validity period of the subject tender is 180 days from the date of tender submission deadline (23rd June 2021) as provided in Clause ITT 20.1 Section II – Tender Data Sheet (TDS) at page 29 of 126 of the Tender Document read with Clause 20.1 of Section I – Instructions To Tenderers at page 17 of 126 of the Tender Document. In computation of time, Section 57(a) of the Interpretation and General Provisions Act directs that the first day of the happening of an event should not be reckoned in the computation of time. This means, in computing time when the tender validity period of the subject tender started running, this Board ought to start counting the 180 days period from 24th June 2021 (and not 23rd June 2021 the date for tender submission deadline). Therefore, the tender validity period for the subject tender was set to lapse on 21st December 2021.

The Applicant filed this Request for Review on 7th December 2021 when only 14 days of the tender validity period of the subject tender were remaining. It therefore follows that the Respondent without an explanation unreasonably failed to award and or conclude the subject tender within a reasonable time because by the time the Applicant filed its Request for Review, only 14 days of the tender validity period of the subject tender was remaining contrary to the Board's recommendation that award and/or conclusion of tender proceedings should be done at least 15 days before expiry of the time within which tenders are valid.

Whether there is need for the subject tender's tender validity period to be extended pursuant to Section 88 of the Act.

We have hereinbefore held that the tender validity period of the subject tender was set to expire on 21st December 2021. However, following the suspension of procurement proceedings pursuant to Section 168 of the Act, time stopped running with respect to tender validity period. Section 168 of the Act provides as follows:-

168. Notification of review and suspension of proceedings

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 High Court has had occasion to interrogate the provisions of Section 88 of the Act and its effect on proceedings before the Board in ***Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR*** (hereinafter referred to as the 'KPLC Case') at paragraphs 51 to 57 where Justice P. Nyamweya held that:

"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.

56.

57. I thus find that the interpretations by the Respondent of the applicable provisions on the tender validity period, in light of the proceedings before it, was erroneous for the foregoing reasons."

The KPLC case gave guidance on the suspension of procurement proceedings upon filing a request for review as provided under Section 168 of the Act to operate as a stay of procurement proceedings which includes

a stay on the running of time for tender validity period. What this means is that on 7th of December 2021, when this Request for Review was filed before the Board, time stopped running for purposes of tender validity period of the subject tender. As at the 7th of December 2021, 14 days were remaining for the tender validity period of the subject tender to lapse and which time we have hereinbefore held is not reasonable enough to enable a procuring entity make an award and sign a procurement contract with a successful tenderer on the 15th day after making such an award. This therefore warrants extension of tender validity period of the subject tender.

Section 88 of the Act provides as follows:

"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).

Given the provisions of Section 88 of the Act, an accounting officer has only one chance to extend a tender validity period and for a maximum period of 30 days. However, such an extension of tender validity period must be done before expiry of the initial tender validity period.

In the circumstances of this review, the Applicant wrote to the Respondent seeking feedback with respect to the subject tender's evaluation process within tender validity period and in the alternative, an extension of the subject tender's tender validity period for a further 30 days vide a letter dated 23rd November 2021 which reads as follows in part:

".....

We await your response to our letter dated 16th September 2021 requesting for feedback on above tender which CPF Financial Service Ltd participated in.

We note that although your office is yet to release official communications on the same, all indications, as captured in various newspapers are that CPF Financial Services Ltd won the said Tender. We have since commenced preparatory works in anticipation including planning for the requisite staff, systems,

equipment, and facilities. We are however left in dilemma since official communication on the same has not reached us.

In the foregoing, we would appreciate if you could provide us with feedback within the tender validity period. In the alternative, the tender validity period could be extended for a further 30 days albeit without change of prices as we await communication on the outcome of the said tender process.

.....”

At the time of filing the Request for Review, the Respondent had not responded to the Applicant’s letter of 23rd November 2021.

However, after filing of the Request for Review and notification of its existence and suspension of procurement proceedings to the Respondent, the Respondent purported to extend the tender validity period of the subject tender for a further period of 30 days from 20th December 2021 vide letters issued to tenderers by the Respondent dated 14th December 2021. At this point, procurement proceedings of the subject tender had been suspended by dint of Section 168 of the Act following the filing of the Request for Review and notification of suspension of procurement proceedings to the Respondent vide a letter of the Acting Board Secretary dated 7th December 2021. It therefore follows that the letter issued to tenderers by the

Respondent dated 14th December 2021 was issued contrary to the provisions of Section 168 of the Act and are therefore null and void *ab initio*.

We note suspension of procurement proceedings by dint of Section 168 of the Act will at most last for 21 days from the date of such suspension. We say so because, the Board is required to complete a review within 21 days after receiving a request for review as stipulated under Section 171 of the Act. In this review, the suspension of the subject tender's procurement proceedings commenced on 7th December 2021 and is set to lapse on 28th December 2021 or any other earlier date set for delivery of our decision. What this means is that the remaining 14 days of the tender validity period of the subject tender will continue running a day after we deliver our decision in this review and at most up to and including the 11th day of January 2022. We therefore find there is need to have the tender validity period of the subject tender extended in order for the Respondent to complete the procurement process of the subject tender and give room to any tenderer dissatisfied with the decision of the Respondent on conclusion of the subject tenders' proceedings in anyway, to challenge the same.

What are the appropriate orders to grant in the circumstances.

The Applicant has sought to be awarded the subject tender as the lowest evaluated most responsive tenderer who has also undergone a due diligence exercise. We have considered this prayer by the Applicant against the fact that the Board has not had sight of any evaluation report, due diligence

report (if any), professional opinion and recommendations of the head of procurement function and approval or rejection of award of the subject tender by the Respondent and find we cannot allow this prayer because of the uncertainty of the outcome of due diligence exercise on the Applicant and the pending procurement processes that are required before an award is made to a tenderer.

We have already held that the Respondent has without explanation inordinately delayed the conclusion of the subject tender's procurement proceedings and that there is need for the tender validity period of the subject tender to be extended for a further period of 30 days beyond 11th January 2022.

In the circumstances, we find it is just for the Board to order the Respondent to complete the procurement proceedings and to extend the tender validity period of the subject tender for a further 30 days beyond the last date of the expiry of the initial tender validity i.e. 11th January 2022.

As we conclude, we note that despite a request from the Acting Board Secretary vide a letter dated 7th December 2021 followed by a reminder dated 20th December 2021, the Respondent flatly declined to submit all documents requested for in the letter dated 7th December 2021 and which documents form part of confidential documents under Section 67 (1) of the Act and are required to be submitted to the Board in accordance with Section

67(3)(e) of the Act. The Acting Board Secretary's letter dated 7th December 2021 addressed to the Applicant reads as follows in part:

".....

Please submit your response in 8 bound copies within 5 days from the date of this letter, including a soft copy of the response on the Review, background to the tender evaluation report and procurement officer's professional opinion. Your response should be filed separately from the confidential reports which should not be availed to other parties except as guided by Section 67 of the public Procurement and Asset Disposal Act 2015.

Please ensure that all documents submitted to the Review Board are properly paginated. You are required to complete the mandatory declarations in Part A of Schedule 1 Form 5 attached and submit the documents listed in Part D of the same Schedule. In addition, you are required to immediately submit to the undersigned the contact addresses of those who participated in this tender which should include their Postal address, Physical address, Email, Telephone and Fax numbers.

Please note that according to the Public Procurement and Asset Disposal Act 2015, the procurement process should be suspended and no contract subject to the regulations can be signed between

the Procuring Entity and the successful tenderers until the appeal has been finalized.

.....”

We note, attached to the said letter of 7th December 2021 is Schedule 1 Form 5 containing a list of documents and information required from the Procuring Entity with mandatory declarations under Part A, mandatory items under Part B, Pre-qualification documents under Part C, Open tender and other procurement methods documentation under Part D thereof.

In response to the Acting Board Secretary’s letter dated 7th December 2021, one Sarah Ngaru on behalf of the CEO - PSSS and vide a letter dated 10th December 2021, requested for five days on return of the Respondent, who was out of Nairobi and was expected back on 14th December 2021, to submit documents requested for in the Acting Board Secretary’s letter dated 7th December 2021.

Vide a letter dated 20th December 2021, the Acting Board Secretary while making reference to Sarah Ngaru’s letter of 10th December 2021 reminded the Respondent that the operations of the Board are time bound within which documents ought to be submitted. Further, the Acting Board Secretary brought to the attention of the Respondent the provisions of Regulation 205 of the Public Procurement and Asset Disposal Regulations, 2020 and more so that it is an offense for an accounting officer of a procuring entity to fail

to submit documents requested for by the Board Secretary under Regulation 205 (3) of Regulations 2020.

Vide a letter dated 16th December 2021 and received by the Board on 21st December 2021, one Dr. Eddyson H. Nyale, the Respondent herein, responded to the Request for Review while attaching letters dated 14th December 2021 requesting tenderers to extend tender validity.

Vide a letter dated 21st September 2021 and in response to the Acting Board Secretary's letter dated 20th December 2021, the Respondent referred the Acting Board Secretary to his letter of response to the Request for Review dated 16th December 2021 which reads as follows in part:

"Reference is made to application No.148 of 2021 dated 7th December 2021 between CPF Financial Services Limited, the Applicant and the Accounting Officer, The Public Service Superannuation Scheme as the Respondent.

The Tender for Procurement of a Fund Administrator for the Public Service Superannuation Fund has not been finalized and that the letters of intention to award the tender and/or Notification of award have not been issued to any Tenderer. The Procuring Entity has requested for extension of the Tender validity period by the Tenderer as per the attached letters to allow for further consultations to finalize the procurement process.

The application to the Public Procurement Administrative Review Board is therefore premature as the Applicant has not received any letter of intention to award the tender and/or Notification of award that may warrant such appeal. The tender was still valid at the time the appeal was filed.

These are administrative matters that are being addressed internally without necessarily attracting an application for review. Kindly allow the Scheme to finalize the procurement process accordingly.

The purpose of this letter is therefore to request the procurement process to be allowed to proceed to its logical conclusion since the Procuring Entity has requested the Tenderers to extend their Tender validity.

It is clear from the excerpts of the response by the Respondent dated 16th December 2021 and received by the Board on 21st December 2021 no documentation requested for by the Acting Board Secretary in his letter of 7th December 2021 was submitted to the Board by the Respondent.

We find this kind of impunity from the Respondent should not be allowed and cite the Respondent to be in breach of Regulation 205(3) of Regulations 2020 to the extent that the Respondent did not submit such documentation as specified in the Acting Board Secretary's letter dated 7th December 2021

which is an offence under Regulation 205 (4) of Regulations 2020 and in breach of Section 44(2)(j) for not complying with his responsibility assigned by Regulations 2020 in so far as Regulation 205 of Regulations 2020 is concerned. In the circumstances, we direct the Acting Board Secretary to furnish the Director General of the Public Procurement Regulatory Authority with a copy of this decision for her to take any necessary action under the law with respect to our finding that the Respondent is in breach of Regulation 205(3) of Regulations 2020 and Section 44(2)(j) of the Act.

The upshot of our findings in this review is that the Request for Review succeeds only with respect to the following orders.

FINAL ORDERS

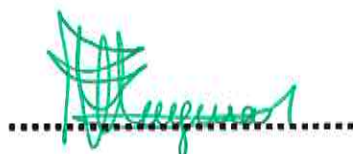
In exercise of the powers conferred upon it under Section 173 of the Act, the Board makes the following orders with respect to the Request for Review dated 7th December 2021:

- 1. The Respondent is hereby ordered to ensure the procurement proceedings of Tender No. PSSS/003/2020-2021 for Procurement of Fund Administrator for the Public Service Superannuation Fund proceeds to its logical conclusion within fourteen (14) days from the date of this decision taking into consideration the Board's findings herein.**

2. The Respondent is hereby ordered to extend the tender validity period of Tender No. PSSS/003/2020-2021 for Procurement of Fund Administrator for the Public Service Superannuation Fund for a further thirty (30) days from 11th January 2022.

3. Given that the procurement proceedings are not complete, each party shall bear its own costs in this Request for Review.

Dated at Nairobi this 28th Day of December 2021



**CHAIRPERSON
PPARB**



**SECRETARY
PPARB**