

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO.16/2022 OF 24<sup>TH</sup> FEBRUARY2022**

**BETWEEN**

**CPF FINANCIAL SERVICES LIMITED..... APPLICANT**

**VERSUS**

**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 a 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**

Mr. Philemon Kiprop - Holding brief for the Acting Board Secretary

## **BACKGROUND TO THE DECISION**

### **The Tendering Process**

The Public Service Superannuation Scheme (hereinafter referred to as the 'Procuring Entity') through the Respondent invited sealed tenders from eligible candidates for Tender No:PSSS/003/2020-2021 for Procurement of a Fund Administrator for The Public Service Superannuation Fund (hereinafter referred to as the 'subject tender') by way of open tendering method advertised on MyGov Newspaper, the National Treasury's website ([www.treasury.go.ke](http://www.treasury.go.ke)) and at [www.tenders.go.ke](http://www.tenders.go.ke) on 1<sup>st</sup> June 2021 with an initial closing date of 18<sup>th</sup> June 2021 at 11:00hrs.

### **Addenda**

The Procuring Entity issued Addendum I dated 15<sup>th</sup> June 2021 following a virtual pre-bid meeting held on 10<sup>th</sup> June 2021 addressing clarifications sought by prospective tenderers while extending the tender submission deadline to 23<sup>rd</sup> June 2021 at 11:00hrs. The Procuring Entity further issued Addendum II dated 21<sup>st</sup> June 2021 addressing further clarifications sought by prospective tenderers while maintaining the tender submission deadline of 23<sup>rd</sup> June 2021.

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

At the extended tender submission deadline of 23<sup>rd</sup> June 2021 at 11:00hrs, the Procuring Entity received five (5) tenders and which tenders were opened shortly thereafter in the presence of tenderers' representatives present. The Procuring Entity's Tender Opening Committee

appointed by the Respondent recorded the following tenderers as having submitted their respective tenders in the Tender Opening Register:

1. ICEA Lion Trust Company
2. Liason Group
3. CPF
4. OCTA On Africa
5. ZamaraMinet

### **Evaluation of Tenders**

The Procuring Entity's Tender Evaluation Committee appointed by the Respondent (hereinafter referred to as the 'Evaluation Committee') evaluated the tenders in the following three stages as captured in the Tender Evaluation Report dated 13<sup>th</sup> July 2021 and the undated Financial Evaluation Report signed by only two (2) of the eight (8) members of the Evaluation Committee:

- i. Preliminary Examination and determination of responsiveness (mandatory requirements);
- ii. Detailed Technical Evaluation; and
- iii. Financial Evaluation

### **Preliminary Examination and determination of responsiveness (mandatory requirements)**

At this stage, the Evaluation Committee was required to apply the criteria outlined as Mandatory Requirements of Clause 2. Preliminary examination

for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 33 to 34 of 126 of the blank tender document issued by the Procuring Entity to prospective tenderers (hereinafter referred to as the 'Tender Document'). Tenders were to be evaluated on a yes/no basis and only tenders that satisfied all the criteria for evaluation under this stage of evaluation would proceed to the next stage of evaluation.

At the end of evaluation of tenders at this stage, the Evaluation Committee found three tenders non-responsive hence did not qualify to proceed to the next stage of evaluation. However, the Evaluation Committee found two tenders, which included the Applicant's tender, responsive thus qualified to proceed to the next stage of evaluation.

### **Detailed Technical Evaluation**

At this stage, the Evaluation Committee was required to apply the criteria outlined as 1.4 Detailed Tender Evaluation (ITT 35) of Section III – Evaluation and Qualification Criteria at page 34 to 39 of 126 of the Tender Document. Tenders required to attain a minimum score of 75% to qualify to proceed to the next stage of evaluation.

At the end of evaluation of tenders at this stage, the Evaluation Committee only found the Applicant's tender qualified to proceed to the next stage of evaluation having attained a score of 95.2%.

## **Financial Evaluation**

At this stage, the Evaluation Committee was required to apply the criteria outlined as Price evaluation in addition to criteria listed in ITT 35.2 (a)-(c) of Section III – Evaluation and Qualification Criteria at page 39 of 126 of the Tender Document read with S/No.4 of Addendum I of 15<sup>th</sup> June 2021.

The Evaluation Committee determined the financial score of the Applicant's tender using a formulae provided in Addendum I, weighted the Applicant's technical and financial tenders and determined the Applicant's total combined technical and financial score as 96.16%.

The Evaluation Committee recommended that a post qualification be undertaken on the Applicant to determine Interpretation of TOR's/Understanding the scope of work, Methodology of implementing the assignment and a work plan to incorporate all the activities to be undertaken as per the Terms of Reference. According to the Evaluation Committee, this was to assist the Procuring Entity to verify and determine to its satisfaction whether the tenderer that was selected as having submitted the lowest evaluated responsive tender was qualified to perform the contract satisfactorily.

## **REQUEST FOR REVIEW NO.148 OF 2021**

On 7<sup>th</sup> December 2021, the Applicant herein lodged a Request for Review dated 7<sup>th</sup> 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:

- 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.***

The Board considered the Applicant's Request for Review No.148 of 2021 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 framed the following issues for determination in its decision of 28<sup>th</sup> December 2021: -

**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.**

In determining each of the issues framed for determination, the Board analyzed the facts, gave its reasons for its determination and held as follows in its decision of 28<sup>th</sup> December 2021:

1. At page 16 of its decision, the Board found the Request for Review No.148 of 2021 was not premature noting that the same was filed

prior to issuance of a notification to enter into a contract under Section 87 of the Act and was permissible under Section 167(1) of the Public Procurement and Asset Disposal Act, 2015 (herein after referred to as the 'Act') read with Regulation 203(2)(c) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') and the Fourteenth Schedule of Regulations 2020.

2. At page 38 of its decision, the Board took into consideration that procurement proceedings and processes were time bound and the Respondent had 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 had been made and no notification of the outcome of evaluation of tenders had been made to any tenderer while holding that the Respondent had inordinately delayed this procurement process without any explanation.
3. At page 47 of its decision, the Board noted the suspension of procurement proceedings by dint of Section 168 of the Act would at most last for 21 days from the date of such suspension because, the Board was required to complete a review within 21 days after receiving a request for review as stipulated under Section 171 of the Act. The Board found the suspension of the subject tender's procurement proceedings commenced on 7<sup>th</sup> December 2021 and was set to lapse on 28<sup>th</sup> December 2021 or any other earlier date set for delivery of its decision and that the remaining 14 days of the

tender validity period of the subject tender were to continue running a day after the Board delivered its decision and at most up to and including the 11<sup>th</sup> day of January 2022. Further, the Board found there was 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.

4. At page 47 to 48 of its decision, the Board noted that the Applicant sought to be awarded the subject tender as the lowest evaluated most responsive tenderer who had undergone a due diligence exercise. However, the Board upon considering this prayer by the Applicant, against the fact that the Board had 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, found it could not 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. Further, the Board having found the Respondent had without explanation inordinately delayed the conclusion of the subject tender's procurement proceedings and that there was need for the tender validity period of the subject tender to be extended, found it just 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. 11<sup>th</sup> January 2022.

In conclusion, the Board issued the following orders with respect to Request for Review No.148 of 2021 in its decision of 28<sup>th</sup> 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 11<sup>th</sup> January 2022.**
- 3. Given that the procurement proceedings are not complete; each party shall bear its own costs in this Request for Review.**

**REQUEST FOR REVIEW NO.16 OF 2022**

The Applicant lodged a Request for Review dated 24<sup>th</sup> February 2022 (hereinafter referred to as the 'instant Request for Review') and filed on even date together with a Supporting Affidavit sworn by Kimutai Hosea Kili, the Applicant's Managing Director on 24<sup>th</sup> February 2022 and filed on even date and an Applicant's Supplementary Affidavit sworn by Kimutai Hosea Kili on 17<sup>th</sup> March 2022 and filed on even date through the firm of Muthomi & Karanja Advocates, seeking the following orders:

- a) an order awarding the Tender to the Applicant pursuant to section 173 (c) of the Act (and based on the uncontested depositions at paragraphs 11 to 15 of the Affidavit in Support of this Request for Review);**
- b) an order directing the Respondent to reimburse the Applicant, on indemnity basis, the costs of and incidental to this Request for Review;**
- c) an order directing the Respondent to show cause why he, and the Trustees of the Public Superannuation Scheme, should not be referred to relevant law enforcement agencies for appropriate criminal sanctions; and**
- d) such other, further, additional, incidental and/or alternative relief(s) as the Honourable Board may deem just and expedient.**

In a Notification of Appeal and a letter dated 24<sup>th</sup> February 2022, the Acting Board Secretary notified the Respondent of the existence of the

instant Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the Respondent a copy of the instant Request for Review 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 Respondent was requested to submit a response to the instant Request for Review together with confidential documents concerning the subject tender within 5 days from 24<sup>th</sup> February 2022.

On 16<sup>th</sup> March 2022, Alice K. Nyariki, the Ag. Chief Executive Officer of the Procuring Entity, the Respondent herein, filed her Statement of Response dated 15<sup>th</sup> March 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 requests for review applications be canvassed by way of written submissions. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

On 8<sup>th</sup> March 2022, the Applicant filed Applicant's Written Submissions dated 4<sup>th</sup> March 2022 together with Applicant's List and Bundle of Authorities dated 4<sup>th</sup> March 2022. The Respondent did not file any written response.

## **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 1<sup>st</sup> June 2021, closed and opened on the extended tender submission deadline of 23<sup>rd</sup> June 2021 at 11:00hrs following issuance of an addendum dated 15<sup>th</sup> June 2021 by the Respondent.

The Applicant avers it received a letter from the Respondent dated 19<sup>th</sup> 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 21<sup>st</sup> 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 22<sup>nd</sup> July 2021, when the Respondent visited the Applicant's offices as scheduled in the Respondent's letter dated 21<sup>st</sup> 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 necessitated the Applicant to write to the Respondent vide a letter dated 16<sup>th</sup> September 2021, requesting for communication of the outcome of the subject tender process and vide a letter dated 23<sup>rd</sup> November 2021, requesting for communication of the outcome of the subject tender within the tender validity period or for extension of the tender validity.

The Applicant avers that on 16<sup>th</sup> December 2021, the Respondent sent a letter urging the Board to (a) treat the Applicant's complaint in Request for

Review No.148 of 2021 as premature; and (b) notably, to desist from exercising jurisdiction to allow 'further consultations' to finalize the procurement process. According to the Applicant, this letter by the Respondent indicates the Respondent is succumbing to improper external influence and specifically that (a) the Act and Regulations 2020 do not provide for 'further consultations' as part of the tender evaluation and award processes; (b) the purported tender processing stage is alien and extrinsic to the procedures set out in the Tender Document and thus cannot be invoked, especially ex post, as a valid answer to the Applicant's complaint of dilatory conduct; and (c) the Respondent's letter of 16<sup>th</sup> December 2021 indicates that the Respondent is hell-bent on introducing opaqueness in the tender award process by holding 'further consultations' with undisclosed persons and entities.

The Applicant avers that after the Board rendered its decision on 28<sup>th</sup> December 2021 in Request for Review No.148 of 2021, on 7<sup>th</sup> January 2022, it sent the Respondent a letter extending the Applicant's own tender validity period for 30 days from 11<sup>th</sup> January 2022 in accordance with the Board's decision of 28<sup>th</sup> December 2021 and on 10<sup>th</sup> January 2022, the Respondent sent a letter requiring the Applicant to extend the Applicant's tender validity period for 30 days from 20<sup>th</sup> January 2022 necessitating the Applicant to extend the Applicant's tender validity period by 30 days from 20<sup>th</sup> January 2022 vide a letter dated 11<sup>th</sup> January 2022 addressed to the Respondent by the Applicant. Further, the Applicant avers that on 15<sup>th</sup> February 2022, the Respondent sent a letter requiring the Applicant to

extend the Applicant's tender validity yet again for a period of 30 days from 19<sup>th</sup> February 2022 necessitating the Applicant to extend the Applicant's tender validity period by 30 days from 19<sup>th</sup> February 2022 to 30<sup>th</sup> March 2022 vide a letter dated 18<sup>th</sup> February 2022 addressed to the Respondent by the Applicant.

According to the Applicant it later on concluded that the Respondent was just taking it in circles and buying time through dilatory tactics and extensions of the tender validity period and on 21<sup>st</sup> February 2022, it instructed its advocates to file the instant Request for Review, which Request for Review was filed on 24<sup>th</sup> February 2022.

It is the Applicant's allegation that the Respondent (a) adjudged the Applicant's tender as the successful tender as evidenced by the due diligence exercise held on 22<sup>nd</sup> July 2021, (b) has deliberately refused, omitted, neglected and/or otherwise failed to issue notification letters to the Applicant and unsuccessful tenderers (c) has ignored the Applicant's and the Board's concerns regarding the Respondent's inexplicable dilatory conduct (d) is deliberately engaging in dilatory conduct so that it can frustrate the Applicant and evade a legally crystallized obligation to award the subject tender to the Applicant; (e) Respondent's conduct constitutes a breach of the Constitution, the Act and the Regulations, in the manner outlined in the Request for Review No.148 of 2021 and the instant Request for Review; and (f) Respondent's breaches of the law and dilatory conduct have exposed the Applicant to (i) the risk of unfairly losing out on the

subject tender yet it emerged the successful tenderer, (ii) the risk of significant loss, harm and damage, directly attributable to being unfairly denied the economic opportunities embodied in the subject tender and (iii) the costs of and incidental to litigation and extension of tender validity.

Given the foregoing, the Applicant alleges that the Respondent has breached Sections 86, 87, 88 and 176(1)(c) 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) engaging in dilatory conduct to frustrate the Applicant and evade a legally crystallized obligation to award the Tender to the Applicant; and (c) neglecting, ignoring, disobeying and/or otherwise failing to comply with the decision and orders of the Board of 28<sup>th</sup> December 2021 in Request for Review No.148 of 2021.

The Applicant alleges that the Respondent has breached Sections 44 (1), 44 (2) (f), 44 (2) (j), 175 (6), 176 (1) (m) of the Act by neglecting, ignoring, disobeying and/or otherwise failing to comply with the ruling and orders of the Board of 28<sup>th</sup> December 2021 in Request for Review No.148 of 2021.

The Applicant alleges that the Respondent has breached Sections 5(2) and 45 of the Act by, *inter alia*, (a) citing a purported need to hold 'further consultations' with undisclosed persons/entities, in its letter to the Board

dated 16<sup>th</sup> December 2021, as a basis for its inexplicable delay in processing the tender to conclusion; and (b) accepting and orchestrating a purported complaint letter from a notorious legal mercenary to create misleading aspersions about the Applicant and its emergence as the successful tenderer.

The Applicant alleges that the Respondent has breached Articles 10, 47 and 227(1) of the Constitution of Kenya, 2010 (hereinafter referred to as the 'Constitution') and Section 3 of the Act given the dilatory conduct of the Respondent.

The Applicant relies on the following case law to support the instant Request for Review in the following issues as follows;

- (a) 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) 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 CASE**

The Respondent, Alice K. Nyariki, confirms that the subject tender was advertised on 1<sup>st</sup> June 2021 by way of open tendering method and that the Applicant submitted its tender among other tenderers.

According to the Respondent, the Applicant's tender attained a score of 95.2% at the technical evaluation thus qualifying to proceed to the

financial evaluation stage and that at the opening of the Applicant's financial tender, the Applicant's prices/tender sum inclusive of VAT were read out as follows: Year 1: 0.17%; Year 2: 0.16% and Year 3: 0.15%. Thereafter, it is the Respondent's contention that the Procuring Entity commenced a due diligence exercise on the Applicant.

The Respondent denies having breached the Board's orders of 28<sup>th</sup> December 2021 in Request for Review No.148 of 2021 because (a) the due diligence procurement process could not be logically concluded within the stipulated period because of background checks being conducted on the Applicant and that the Respondent had extended the tender validity period from 20<sup>th</sup> January 2022 for a further 30 days which days lapsed on 19<sup>th</sup> February 2022; and (b) as at the time the instant Request for Review was filed on 24<sup>th</sup> February 2022, the tender validity period had expired and the Respondent could not award the subject tender in accordance with Section 87 of the Act nor enter into a contract in accordance with Section 135(3) of the Act.

The Respondent denies having breached Sections 86, 87, 88 and 176(1)(c) of the Act and Regulations 82 of Regulations 2020 since letters of intention to award the subject tender had not been issued due to background checks being done on the Applicant.

The Respondent denies having breached Sections 44(1), 44(2)(f), 44(2)(j), 175(6) and 176(1)(m) of the Act since the Respondent adhered to all requirements of the Act.

The Respondent denies having breached Section 3, 5(2) and 45 of the Act, Articles 10, 47 and 227(1) of the Constitution.

Instead, the Respondent alleges that the Applicant is in breach of Section 66(1) of the Act for trying to coerce the Procuring Entity to award it the subject tender yet the procuring process has not been completed and further, that the Applicant is in breach of Section 176(1)(d) and (f) of the Act for trying to force the Procuring Entity to take a particular action in its favour.

In view of the foregoing, the Respondent contends that the Procuring Entity cannot proceed to award the subject tender or enter into a contract with respect to the subject tender due to the fact that the tender validity period has lapsed and prays for dismissal of the instant Request for Review with costs.

### **APPLICANT'S REJOINDER**

In response to the Respondent's Statement of Response, the Applicant pointed out to the Board to the following matters (a) that the Applicant's tender was responsive, the lowest evaluated and the successful tender,

which admissions were made by the Respondent and are solid factual foundation for grant of an order to award the subject tender to the Applicant given the Respondent's undeniable history of dilatory conduct, intransigence and/or unwillingness to abide by the Orders of the Board of 28<sup>th</sup> December 2021; (b) the High Court has rejected the defence of not completing the subject tender's procurement process because of background checks being conducted and because of tender validity expiring in Judicial Review No.E002 of 2021 whose facts were identical to the facts of the instant dispute; (c) due diligence was completed on 22<sup>nd</sup> July 2021 which dispels the claim that the Respondent could not complete 'background checks' within the time ordered by the Board; (d) a party to litigation cannot base its claim or defence on deliberate breach of valid court orders; and (e) the Respondent cannot eat its cake and have it because it did extend the tender validity period of the subject tender to 20<sup>th</sup> March 2022 and now turns around to claim that the tender validity period expired on 19<sup>th</sup> February 2022.

## **BOARD'S DECISION**

The Board has considered the parties pleadings, documents, written submissions, list and bundle of authorities together with the confidential documents submitted by the Respondent to the Board pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

- 1. Whether the Respondent complied with the Orders of the Board as contained in the Decision of the Board dated 28<sup>th</sup> December 2021 in Request for Review No.148 of 2021 CPF Financial Services Limited v The Accounting Officer, The Public Service Superannuation Scheme;**
- 2. Whether the tender validity period of the subject tender has expired; and**
- 3. What are the appropriate orders the Board should grant in the circumstances.**

We note that this is the second time the procurement proceedings of the subject tender is subject to review before the Board and between the same parties. The first time the procurement proceedings of the subject tender was an issue before the Board was in Request for Review No.148 of 2021 which was filed before the Board on 7<sup>th</sup> December 2021. The Board rendered its decision in Request for Review No.148 of 2021 having considered the facts and evidence before it on 28<sup>th</sup> December 2021.

We further note that none of the parties to the Request for Review No. 148 of 2021 (which parties are the same in the instant Request for Review) sought judicial review of the decision of the Board of 28<sup>th</sup> December 2021 by the High Court in accordance with Section 175(1) of the Act. In the circumstances, the decision of the Board of 28<sup>th</sup> December 2021 became binding and final to all parties in Request for Review No.148 of 2021.

The Board having pronounced itself on matters raised before it in Request for Review No.148 of 2021 on 28<sup>th</sup> December 2021, shall not address those issues raised in the instant Request for Review which are the same with issues the Board already pronounced itself on, in Request for Review No.148 of 2021. Put otherwise, we shall only proceed to determine any new issue raised in the instant Request for Review whose occurrence took place after we rendered our decision in Request for Review No.148 of 2021 on 28<sup>th</sup> December 2021.

**Whether the Respondent complied with the Orders of the Board as contained in the Decision of the Board dated 28<sup>th</sup> December 2021 in Request for Review No.148 of 2021 CPF Financial Services Limited v The Accounting Officer, The Public Service Superannuation Scheme.**

At page 53 to 54 of its Decision of 28<sup>th</sup> December 2021 in Request for Review No.148 of 2021, the Board in exercise of the powers conferred upon it under Section 173 of the Act made the following orders:

"

- 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 11<sup>th</sup> January 2022.***

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

We understand the Applicant's allegation to be that the Respondent did not comply with the orders of the Board of 28<sup>th</sup> December 2021 in Request for Review No.148 of 2021 because the Applicant has not yet been notified of the outcome of evaluation of the subject tender as at the date of filing the instant request for review despite the Board having ordered the Respondent to proceed with the procurement proceedings of the subject tender to its logical conclusion within 14 days from 28<sup>th</sup> December 2021.

On the otherhand, we understand the Respondent's defence to the Applicant's aforementioned allegation to be that,the Respondentcould not logically conclude the due diligence procurement process within the stipulated period because it was conducting background checks on the

Applicant and that the Respondent did extend the tender validity period from 20<sup>th</sup> January 2022 for a further 30 days and which days lapsed on 19<sup>th</sup> February 2022.

It is common ground that as at 11<sup>th</sup> of January 2022, the 14<sup>th</sup> day from the date of the Board's Decision of 28<sup>th</sup> December 2021 in Request for Review No.148 of 2021, the Respondent had not notified the Applicant of the outcome of evaluation of the subject tender. Infact, the Respondent has admitted that the due diligence procurement process could not be logically concluded within the stipulated period because of background checks being conducted on the Applicant.

We note the Respondent never approached the Board to seek for more time to comply with the first order (Order No.1) of the Board's Decision of 28<sup>th</sup> December 2021 in Request for Review No.148 of 2021neither has the Respondent furnished the Board with evidence of the particulars of the background checks the Respondent alleges to be conducting on the Applicant.

We have perused the confidential documents submitted by the Respondent pursuant to Section 67(3)(e) of the Act and note that the Respondent purported to extend the tender validity period of the subject tender for a period of 30 days with effect from 20<sup>th</sup> January 2022 to 18<sup>th</sup> February 2022

vide a letter dated 10<sup>th</sup> January 2022 addressed to the Applicant by the Respondent.

It is common ground that the Respondent did not extend the tender validity period of the subject tender from 11<sup>th</sup> January 2022 as directed by the Board in the second order (Order No.2) of the Board's Decision of 28<sup>th</sup> December 2021.

From the foregoing and in the circumstances, we find that the Respondent did not comply with the Orders of the Board as contained in the Decision of the Board dated 28<sup>th</sup> December 2021 in Request for Review No.148 of 2021; CPF Financial Services Limited v The Accounting Officer, The Public Service Superannuation Scheme.

**Whether the tender validity period of the subject tender has expired;**

We understand the Respondent's allegation to be that the tender validity period of the subject tender expired on 19<sup>th</sup> February 2022 following extension of the same by the Respondent for a period of 30 days from 20<sup>th</sup> January 2022 and with this, the Respondent is not able to award the subject tender in accordance with Section 87 of the Act neither is it able to enter into a contract with respect to the subject tender in accordance with Section 135(3) of the Act.

On the other hand, we understand the Applicant to negate the Respondent's aforementioned allegation in that, the Applicant purports to have extended its own tender for a period of 30 days from 11<sup>th</sup> January 2022 pursuant to the second order (Order No.2) of the Board's Decision of 28<sup>th</sup> December 2021. The Applicant also contends that the Respondent extended the tender validity of the subject tender twice with the second extension set to lapse on 20<sup>th</sup> March 2021, therefore, the Respondent cannot now turn around and claim that the tender validity period of the subject tender expired on 19<sup>th</sup> February 2022.

Section 88 of the Act provides as follows with respect to extension of tender validity:

***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 of a procuring entity 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 the instant Request for Review, the Board had, in the second order (Order No.2) of the Board's Decision of 28<sup>th</sup> December 2021, directed the Respondent to extend the tender validity of the subject tender for a further period of 30 days from the 11<sup>th</sup> of January 2022. The Board arrived at the date of 11<sup>th</sup> January 2022 by taking into consideration that the tender validity period of the subject tender was 180 days from 23<sup>rd</sup> June 2021 (as provided in Clause ITT 20.1 of 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 and S/No 2. of Addendum I dated 15<sup>th</sup> June 2021). The Board further took into consideration that filing of Request for Review No.148 of 2021, on 7<sup>th</sup> December 2021, suspended the running of the

tender validity period of the subject tender pursuant to Section 168 of the Act (as held by Justice Nyamweya at paragraphs 51 to 57 of her judgment in ***Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited [2018]eKLR***) and only 14 days of the tender validity period of the subject matter were remaining valid as at the time of filing of the Request for Review No.148 of 2021 on 7<sup>th</sup> December 2021. The Board also took into consideration that the remaining valid 14 days of the tender validity period of the subject tender would continue running a day after 28<sup>th</sup> December 2021 and expire on 11<sup>th</sup> January 2022. It is for this reason that the Board directed the Respondent to extend the tender validity period of the subject tender for a further 30 days from 11<sup>th</sup> January 2022.

However, the Respondent did not comply with the second order (Order No.2) of the Board's Decision in Application No.148 of 2021 because the Respondent did not extend the tender validity period of the subject tender for a further period of 30 days from 11<sup>th</sup> January 2022. The effect of this is that the tender validity period of the subject tender expired on 11<sup>th</sup> January 2022.

In breach of the provisions of Section 88 of the Act (which requires the Respondent to extend the tender validity of the subject tender before the expiry of the initial tender validity, once and for a maximum period of 30 days) and contrary to the second order (Order No.2) of the Board's Decision of 28<sup>th</sup> December 2021 (that directed the Respondent to extend

the tender validity period for a further 30 days from 11<sup>th</sup> January 2022), the Respondent purportedly attempted to extend the tender validity period twice for 30 days on each purported extension, after the initial tender validity period of the subject tender had expired vide letters dated 10<sup>th</sup> January 2022 and 15<sup>th</sup> February 2022 addressed to the Applicant.

The said Respondent's letter dated 10<sup>th</sup> January 2022 reads as follows:-

**"REF: TNT/003/2020-2021 TY (13) 10<sup>th</sup> January,  
2022**

***The Managing Director,  
M/s. CPF Financial Services Limited  
P.O. Box 28938-00200,  
Nairobi***

***RE :TENDER FOR PROCUREMENT OF A FUND  
ADMINISTRATOR FOR  
THE PUBUC SERVICE SUPERANNUATION FUND  
TENDER NO. PSSS/003/2020-2021***

***Reference is made to the Ruling delivered by the Public  
Procurement Administrative Review Board in Application No.  
148 of 2021 on 28th December, 2021 on the above subject.***

***The tender was opened on 23<sup>rd</sup> June, 2021 and it was valid for  
a period of 180 days from the tender opening date which***

*expires on 19<sup>th</sup> December. 2021. The Tender Validity was extended for a period of Thirty (30No) days from 20<sup>th</sup> December, 2021 to 19<sup>th</sup> January, 2022.*

*Pursuant to Section 88 (1), (2) & (3) of the Public Procurement and Asset Disposal Act, 2015.*

*You are hereby requested to extend your tender validity period for a period of Thirty (30No) days with effect from 20<sup>th</sup> January, 2022 to 18<sup>th</sup> February, 2022 and at the same time extend your bid security validity for an additional Thirty (30No) days beyond the extended tender validity period.*

*The extension of both your tender validity and bid security period should be received by Wednesday 12<sup>th</sup> January, 2022 at 16.00Hrs East African Time, at the Supply Chain Management Services Office, situated on 6<sup>th</sup> Floor Room No 619, Treasury Building, Harambee Avenue-Nairobi.*

*Late submission shall not be accepted and shall be treated as invalid.*

***DR. EDDYSON H. NYALE, OGW  
AG. CHIEF EXECUTIVE OFFICER,  
THE PUBLIC SERVICE SUPERANNUATION SCHEM"***

The said Respondent's letter dated 15<sup>th</sup> February 2022 reads as follows:-

**"REF: TNT/003/2020-2021 TY (33)**

**15<sup>th</sup>**

**February, 2022**

***The Managing Director,***

***M/s. CPF Financial Services Limited***

***P.O. Box 28938-00200.***

***Nairobi***

**RE :TENDER FOR PROCUREMENT OF A FUND  
ADMINISTRATOR FOR  
THE PUBLIC SERVICE SUPERANNUATION FUND  
TENDER NO. PSSS/003/2020-2021**

***Reference is made to the Ruling delivered by the Public Procurement Administrative Review Board in Application No. 148 of 2021 on 28th December, 2021 on the above subject.***

***The tender was opened on 23<sup>d</sup> June, 2021 and it was valid for a period of 180 days from the tender opening date which expired on 19<sup>th</sup> December, 2021. The Tender Validity was extended for a period of period of Thirty (30No) days from 20<sup>th</sup> December, 2021 to 19<sup>th</sup> January, 2022 and was further extended for another thirty (30 No.) days from 20th January, 2022 to 18th February, 2022.***

***Pursuant to Section 88 (1), (2) & (3) of the Public Procurement and Asset Disposal Act, 2015.***

***You are hereby requested to extend your tender validity period for a period of Thirty (30No) days with effect from 19<sup>th</sup> February, 2022 to 20<sup>th</sup> March, 2022 and at the same time extend your bid security validity for an additional Thirty (30No) days beyond the extended tender validity period.***

***The extension of both your tender validity and bid security period should be received by Wednesday 12<sup>th</sup> January, 2022 at 16.00Hrs East African Time, at the Supply Chain Management Services Office, situated on 6<sup>th</sup> Floor Room No 619, Treasury Building, Harambee Avenue-Nairobi.***

***Late submission shall not be accepted and shall be treated as invalid.***

***W. AKITUYI***

***FOR: AG. CHIEF EXECUTIVE OFFICER,***

***THE PUBLIC SERVICE SUPERANNUATION SCHEME"***

In our considered opinion, the tender validity period of the subject tender expired on 11<sup>th</sup> January 2022 and the purported extension of the tender validity period of the subject tender for a period of 30 days from 20<sup>th</sup>

January 2022 and a further period of 30 days from 19<sup>th</sup> February 2022 by the Respondent were illegal, null and void for having been made by the Respondent after the initial tender validity period of the subject tender had expired on 11<sup>th</sup> January 2022 in breach of Section 88(1) of the Act, contrary to the second order (Order No.2) of the Board's Decision of 28<sup>th</sup> December 2021 and for being made twice by the Respondent in breach of Section 88(3) of the Act.

We note the Applicant accepted the illegal, null and void two purported extensions of the tender validity by the Respondent vide the Applicant's letters dated 11<sup>th</sup> January 2022 and 18<sup>th</sup> February 2022:

The said Applicant's letter dated 11<sup>th</sup> January 2022 reads as follows:-

***"Our Ref: CPF/Tenders/1/1/4***

***11<sup>th</sup> January, 2022***

***Ag. Chief Executive Officer  
Public Service Superannuation Scheme  
Treasury Building, Harambee Avenue  
P.O. Box 30007-00100  
NAIROBI***

***Dear Sir,***

**RE: TENDER FOR PROCUREMENT OF A FUND ADMINIRATOR FOR  
THE PUBLIC SERVICE SUPERANNUATION FUND TENDER NO.  
PSSS/003/2020-2021**

***We refer to your letter dated 10<sup>th</sup> January 2022 (Your Ref: TNT/003/2020-2021 TY (13)).***

***We hereby extend the tender validity period for a period of 30 days with effect from 20<sup>th</sup> January 2022 to 18<sup>th</sup> February 2022. We also extend our bid security for an additional 30 days beyond the extended tender validity period as per the attached duly executed bank guarantee.***

***H.K KILI, OGW  
GROUP MANAGING DIRECTOR/CEO"***

The said Applicant's letter dated 18<sup>th</sup> February 2022 reads as follows:-

***"Our Ref: CPF/Tenders/1/1/4***

***18<sup>th</sup> February, 2022***

***Ag. Chief Executive Officer  
Public Service Superannuation Scheme  
Treasury Building, Harambee Avenue  
P.O. Box 30007-00100  
NAIROBI***

*Dear Sir,*

**RE: TENDER FOR PROCUREMENT OF A FUND ADMINISTRATOR  
FOR THE PUBLIC SERVICESUPERANNUATION FUND TENDER  
NO.PSS/003/2020- 2021**

*Reference is made to the above tender and your letter dated 15th February 2022 (Your Ref: TNT/003/2020-2021 TY (33)).*

*We hereby confirm acceptance to extend the tender validity period for a period of 30 days with effect from 19<sup>th</sup> 2022 to 20<sup>th</sup> March 2022. We also extend our bid security for an additional 30 days beyond the extended tender validity period as per the attached duly executed bank guarantee.*

***H.K KILI, OGW***

***GROUP MANAGING DIRECTOR/CEO"***

In our considered opinion, the Applicant acquiesced the illegality by the Respondent with respect to the aforementioned two times the Respondent purported to extend the tender validity period of the subject tender after the initial tender validity period of the subject tender had expired on 11<sup>th</sup> January 2022. We say so because, the Applicant being a party to the

Request for Review No.148 of 2021 was well aware from the Board's Decision of 28<sup>th</sup> December 2021 that the person mandated to extend the tender validity period of the subject tender is the Respondent once and for a maximum period of the 30 days and that the Board had directed the Respondent to extend the tender validity period of the subject tender for a further period of 30 days from 11<sup>th</sup> January 2022.

In the circumstances, we are of the considered opinion that the purported acceptance for extension of the tender validity period as contained in the Applicant's letters of 11<sup>th</sup> January 2022 and 18<sup>th</sup> February 2022 are equally null and void for accepting illegal extensions of the tender validity period.

We also note that vide a letter dated 7<sup>th</sup> January 2022, the Applicant purported to extend its own tender validity period for a period of 30 days with effect from 11<sup>th</sup> January 2022 while referring to the Board's Decision of 28<sup>th</sup> December 2021.

The said Applicant's letter dated 7<sup>th</sup> January 2022 reads as follows:-

***"Our Ref: CPF/Tenders/1/1/4***

***7<sup>th</sup> January, 2022***

***Ag. Chief Executive Officer***

***Public Service Superannuation Scheme***

***Treasury Building, Harambee Avenue***

***P.O. Box 30007-00100***

***NAIROBI***

***Dear Sir,***

***RE: TENDER FOR PROCUREMENT OF A FUND ADMINISTRATOR  
FOR THE PUBLIC SERVICE SUPERANNUATION FUND TENDER  
NO. PSS/003/2020-2021***

***Reference is made to the Ruling delivered by the Public  
Procurement Administrative Review Board in Application No.  
148 of 2021 on 28th December 2021 on the subject tender.***

***In line with this Ruling, we hereby extend the tender validity  
period for a period of 30 days with effect from 11th January 2022.  
We also extend our bid security for an additional 30 days beyond  
the extended tender validity period as per the attached duly  
executed bank guarantee.***

***H.K. KILI, OGW***

***GROUP MANAGING DIRECTOR/CEO"***

In our considered view, the Applicant has no powers to extend the tender validity period of the subject tender under Section 88(1) of the Act since such powers are vested in the Respondent but the Applicant has discretion to accept an extension of the tender validity period of the subject tender

under Section 88 of the Act. In legal parlance, the Applicant's letter of 7<sup>th</sup> January 2022 has no force of law and is therefore null and void. Even if we were to consider the Applicant's purported extension of tender validity has force of law, then such extension of tender validity expired on 10<sup>th</sup> February 2022.

The Applicant had previously approached the Board in Request for Review No.148 of 2021 to extend the tender validity period of the subject tender before the expiry of the initial tender validity period and which the Board directed the Respondent to extend the tender validity period of the subject tender for a further period of 30 days from 11<sup>th</sup> January 2022. It is not clear why the Applicant, this time round, opted not to approach the Board for extension of the tender validity period of the subject tender before the expiry of the initial tender validity period of the subject tender and instead opted to acquiescence to the Respondent's illegality as aforementioned.

From the foregoing and in the circumstances, we find that the subject tender's tender validity period expired on 11<sup>th</sup> January 2022.

**What are the appropriate orders the Board should grant in the circumstances.**

We have held that the Respondent failed to comply with the orders of the Board as contained in the Board's Decision of 28<sup>th</sup> December 2021 in

Request for Review No.148 of 2021. In other words, the Respondent has contravened the orders of the Board as contained in the Board's Decision of 28<sup>th</sup> December 2021 in Request for Review No.148 of 2021 which is an offence under Section 176 (1) (m) of the Act that attracts a penalty of a fine not exceeding Kshs. 4,000,000/= or imprisonment for a term not exceeding 10 years, or to both upon conviction under Section 176(2)(a) of the Act. In addition to the aforementioned penalty, the Respondent would be subjected to internal disciplinary action in accordance with Section 176(3) of the Act.

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 the Director General of the Public Procurement Regulatory Authority as the Regulator of procuring entities in matters public procurement and asset disposal to take any necessary action under the law with respect to our finding that the Respondent failed to comply with the orders of the Board as contained in the Board's Decision of 28<sup>th</sup> December 2021 in Request for Review No.148 of 2021.

The Applicant has sought to be awarded the subject tender, by the Board substituting its decision for the (in)decision of the Respondent in the subject tender's procurement proceedings, pursuant to Section 173(c) of the Act.

However, Section 87(1) of the Act only provides for the Respondent to notify in writing the person submitting the successful tender that its tender has been accepted before expiry of the tender validity period. Even assuming that Section 87(1) of the Act is binding to the Respondent alone and not the Board, the contract to be entered into with respect to the subject tender must be signed within the existence of the tender validity period as prescribed in Section 135(3) of the Act.

The Board has already held that the tender validity period of the subject tender expired on 11<sup>th</sup> January 2022 following the failure by the Respondent to extend the same before the expiry of the initial tender validity. The Applicant contends that if the Board condones the actions of the Respondent, the Board will create the perverse incentive of encouraging procuring entities to ignore the decisions of the Board while awaiting expiry of the tender validity period safe in the knowledge that this Board would eventually reward contempt of court, intransigence and dilatory tactics. The Applicant says all this forgetting that it had an option of approaching the Board for extension of tender validity period before expiry of the same, like it did in Request for Review No.148 of 2021 but elected not to this time round. In fact we have held that the Applicant elected to acquiesce the illegalities of the Respondent with respect to extension of the tender validity of the subject tender as explained hereinbefore. The Board shall not allow to be used as a tool to perpetuate an illegality by the Applicant with respect to extension of the tender validity period of the subject tender after expiry of the same on 11<sup>th</sup> January 2022.

Furthermore, in a plethora of decisions of the High Court, jurisprudence has been set around this issue to the effect that once a tender validity period has expired, the tender whose validity period has expired extinguishes and nothing remains to be extended.

Justice J. N. Onyiego in Mombasa High Court **Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex parte Kenya Ports Authority & another [2021] eKLR** held as follows with respect to expiry of the tender validity period:

***"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. ...."***

In **Kenya Ports Authority & another v Rhombus Construction Company & 2 others [2021] eKLR**, the Court of Appeal sitting in Mombasa had this to say while referring to the Judgment of the Justice J. N. Onyiego in **Republic v Public Procurement Administrative Review**

**Board; Rhombus Construction Company Limited (Interested Party) Ex parte Kenya Ports Authority & another [2021] eKLR :**

***"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...."**

**38.....**

**39.....**

***40. However, from the arguments as canvassed by counsel for the appellants, it is clear that he has not demonstrated how the learned Judge erred in the exercise of his discretion, but merely exhibits dissatisfaction with the learned Judge's findings. We are satisfied that the learned Judge exercised his discretion judicially in dismissing the appellant's notice of motion and we find no basis to fault him. Further, as stated in our brief decision delivered earlier, the appellant was not able to demonstrate to us what their grievance was. The Court had just affirmed what the appellants initially wanted when they awarded the 1st respondent the tender in the first place."***

Having noted that an award of the subject tender ordinarily would be made by the Respondent during the existence of the tender validity period under Section 87(1) of the Act and that the contract with respect to the subject tender has to be signed within the existence of the tender validity period of the subject tender, we are inclined not to award the subject tender to the Applicant because doing so will be an action in futility because the tender validity period of the subject tender expired on 11<sup>th</sup> January 2022 and no contract with respect to the subject tender, which is now extinguished, can be signed as required under Section 135(3) of the Act.

## **FINAL ORDERS**

In exercise of the powers conferred upon it under Act, the Board makes the following orders with respect to the Request for Review dated 24<sup>th</sup> February 2022:

- 1. The Acting Board Secretary of the Public Procurement Administrative Review Board is hereby directed to furnish the Director General of the Public Procurement Regulatory Authority with this decision for purposes of taking lawful action against the Respondent with respect to the Respondent's failure to comply with the orders of the Board as contained in the Decision of the Board of 28<sup>th</sup> December 2021 in Request for Review No.148 of 2021.**
- 2. Given that the findings of the Board in this decision, each party shall bear its own costs in this Request for Review.**

**Dated at Nairobi this 17<sup>th</sup> Day of March 2022.**



.....  
**CHAIRPERSON**  
**PPARB**



.....  
**SECRETARY**  
**PPARB**

