

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

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

**VERSUS**

**THE ACCOUNTING OFFICER,**

**THE PUBLIC SERVICES SUPERANNUATION SCHEME...RESPONDENT**

**M/S JOINT VENTURE OF ZAMARA ACTUARIES,**

**ADMINISTRATORS AND CONSULTANTS LIMITED**

**AND MINET KENYA FINANCIAL SERVICES**

**LIMITED ..... INTERESTED PARTY**

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. Zamara Minet

### **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 found only 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 formula 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.*

The Board considered the Applicant's Request for Review No.16 of 2022 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 17<sup>th</sup> March 2022: -

- 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.*

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 17<sup>th</sup> March 2022:

- 1. At page 27 of its decision, the Board found 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.*
- 2. At page 40 of its decision, the Board found that the subject tender's tender validity period expired on 11<sup>th</sup> January 2022.*
- 3. At page 46 of its decision, the Board 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 was to be signed within the existence of the tender validity period of the subject tender. With this, the Board found that it was inclined not to award the subject tender to the Applicant because doing so would 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 was then extinguished, could be signed as required under Section 135(3) of the Act.*

In conclusion, the Board issued the following orders with respect to Request for Review No.16 of 2022 in its decision of 17<sup>th</sup> March 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.*

### **JUDICIAL REVIEW APPLICATION NO.E37 OF 2022**

Aggrieved by the Decision of the Board of 17<sup>th</sup> March 2022 in Request for Review No.17 of 2022 (hereinafter referred to as the 'Decision of the Board of 17<sup>th</sup> March 2022'), the Applicant successfully sought judicial review by the High Court at Nairobi before Hon. Justice A. K. Ndungu (hereinafter referred to as the 'Judicial Review Court') in ***JR Application No.E037 of 2022 Republic v Public Procurement Administrative Review Board & 2 others Ex Parte CPF Financial Services Limited***(hereinafter referred to as JR Application No.E037 of 2022).

The Judicial Review Court in JR Application No.E037 of 2022, at paragraph 24 of its Decision of 6<sup>th</sup> May 2022, found the broad issue for determination was whether the Applicant (who is the Applicant herein) had established a case for the Judicial Review Court's review by way of judicial review pursuant to Section 175(1) of the Act of the Decision of the Board of 17<sup>th</sup> March 2022. In answering this main issue for determination in the affirmative, the Judicial Review Court held at paragraph 41 of its Decision of 6<sup>th</sup> May 2022, that the blame heaped on the Applicant by the 2<sup>nd</sup> Respondent (the Respondent herein) was not only unfair but unreasonable and irrational and the attempt to blame the Applicant for expiry of the validity period of the tender stood out as a sore thumb. Further, that the failure to exercise the jurisdiction and powers under Section 173, was in the view of the Judicial Review Court based on a misapprehension of the law and therefore the Decision of the board of 17<sup>th</sup> March 2022 was amenable to judicial review.

The Judicial Review Court, at paragraph 45 of its Decision of 6<sup>th</sup> May 2022 issued the following orders in JR Application No.E037 of 2022:

- i. An order of certiorari be and is hereby issued to bring into this Honourable Court, to be quashed, the 1<sup>st</sup> Respondent's decision delivered on 17<sup>th</sup> March 2022 in Public Procurement Administrative Review Board Application No.16 of 2022: CPF Financial Services Limited v The Accounting Officer, Public Services Superannuation Scheme.

- ii. An order of Mandamus be and is hereby issued to compel the 1<sup>st</sup> Respondent to re-hear/re-consider Public Procurement Administrative Review Board Application No.16 of 2022: CPF Financial Services Limited v The Accounting Officer, Public Services Superannuation Scheme taking into account the findings herein within 30 days.
- iii. Pending re hearing and determination in (ii) above, an order of prohibition do issue precluding the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and their officers, servants and/or agents from terminating, re-advertising and/or awarding the tender for the administration of the Public Service Superannuation Fund to any external administrator other than the Applicant.
- iv. Pending re hearing and determination in (ii) above an order of prohibition do issue precluding the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and their officers, servants and/or agents from resorting to the internal administration of the Public Service Superannuation Fund.
- v. Each Party to bear its own costs.

### **RE-HEARING OF 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.

On 25<sup>th</sup> May 2022, M/S Joint Venture of Zamara Actuaries, Administrators and Consultants Limited and Minet Kenya Financial Services Limited (hereinafter referred to as the 'Interested Party') filed Interested Party's Replying Affidavit sworn by Anthony Wambua Kilavi, the Head, Consulting & Advisory Services of Zamara Actuaries, Administrators and Consultants Limited on 24<sup>th</sup> May 2022 and a Further Replying Affidavit sworn by Daniel Mainga, the General Manager, Life & Pension of Minet Kenya Financial Services Limited on 24<sup>th</sup> May 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 submissions. On 25<sup>th</sup> May 2022, the Interested Party filed its Written Submissions dated 25<sup>th</sup> May 2022.

### **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; Princciple 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 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.

## **INTERESTED PARTY'S RESPONSE**

The Interested Party contends that it is a Joint Venture between Zamara Actuaries, Administrators And Consultants Limited And Minet Kenya Financial Services Limited for purposes of participating in the subject tender and that it learnt of the Decision of the Board of 17<sup>th</sup> March 2022 through the Decision of the Judicial Review Court of 6<sup>th</sup> May 2022 in JR Application No.E037 of 2022 through which it became aware of the subject proceedings herein.

The Interested Party describes itself as Pension Administrators re-known for its professional expertise in the Pension Schemes Administrative Services Industry and that it holds more than 50% of the market share for pension administration in Kenya through its collective resources, experience and expertise believes that it had the capacity to provide the services under the subject tender.

The Interested Party contends that it was motivated by the realization that the subject tender entailed the deployment of extensive pension administration experience as unparalleled depth of human capital and IT infrastructure. The tender requirements were unprecedented in terms of scope as it encompassed coverage of the entire civil service workforce comprising of about 500,000 persons which was (and still is) more than three times the current member population administered by Zamara and Minet; the two largest pension businesses in Kenya. It is the Interested Party's contention that it procured the Tender Document for the subject tender as per the instructions in the advertisement, prepared its tender and

submitted the same at the extended tender submission deadline of 23<sup>rd</sup> of June 2021.

The Interested Party contends that on 14<sup>th</sup> December 2021, it received a letter from the Respondent requesting it to extend its tender validity period for a period of Thirty Days (30 days) with effect from 20<sup>th</sup> December 2021 to 19<sup>th</sup> January 2022 and at the same time extend our tender security validity for an additional 30 days beyond the extended tender validity period which it did extend. Further, that the Respondent vide a letter dated 10<sup>th</sup> January 2022 requested extension of its tender validity period for a period of 30 days with effect from the 20<sup>th</sup> January 2022 to 18<sup>th</sup> February 2022 and at the same time to extend its tender security validity for an additional 30 days beyond the extended tender validity period which it once again did. Once again, the Respondent vide a further letter dated 15<sup>th</sup> February 2022 requested extension of the Interested Party's tender validity period for a period of 30 days with effect from 19<sup>th</sup> February 2022 to 20<sup>th</sup> March 2022 and at the same time to extend the tender security validity for an additional 30 days beyond the extended tender validity period which the Interested Party extended.

According to the Interested Party, it from the onset believed that the extensions were all made in good faith and in accordance with the law in a bid to ensure completion of the procurement process. However, upon advise by its advocates on record which advise it verily believes to be true, the said extensions were null and void.

The Interested Party contends that it is dissatisfied with the manner in which the Respondent conducted the tender opening, as it contravened the provisions of **Section 78 (6)** of the Act for failure to announce the financial proposals of each of the tenderers, in this case being the annual fees quoted by each tenderer and as a consequence, the Procuring Entity failed to uphold and promote the principles of fairness, equitability, transparency and competitiveness in procurement proceedings as stipulated under Article 227(1) of the Constitution rendering the tender opening process an illegality on account of the Respondent's failure to adhere to the provisions of Section 78(6) of the Act wherein other than the name of the person submitting the tender together with the tender security, the price of each tender needed to have been quoted. According to the Interested Party, the lack of disclosure of the annual fees quoted by each tenderer creates room for manipulation which goes against the principle of fair competition in procurement processes.

The Interested Party contends that they were surprised by the existence of the subject proceedings, starting with the Application Number 168 of 2021 filed by the Applicant herein and affirm that it never received a notification of the said appeal from the Board. However, from the reading of the judgement of the Board, it believes that the same was on account of the Respondent's failure to submit confidential documents to the Board in accordance with the provisions of Regulation 205(3) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to

as the "Regulations").

The Interested Party contends that a reading of the judgement of the High Court in Judicial Review Application No. E037 of 2022, cannot help but for it to note the illegality occasioned by the Board of Trustees of the Public Service Superannuation Scheme who through its affidavit sworn on the 11<sup>th</sup> of April 2022 deponed that the National Treasury and Planning presented to it the Applicant herein as the successful tenderer and after consideration **approved** the appointment of the Applicant.

According to Interested Party, the Act together with the attendant regulations provides the process of evaluation of tenders, in particular who is responsible for evaluation of tenders, approval and awarding of tenders. Section 85 of the Act in particular provides that;

*Subject to the 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 the contract to the successful tenderers.*

The Interested Party contends that the Board of Trustees of the Scheme, apart from requesting for assistance in administration of the scheme, had absolutely no role under law to play in the procurement process and as a

consequence its supposed approval of the appointment of the Applicant as the successful tenderer in its Board Meeting held on the 12<sup>th</sup> of August 2021 amounts to an illegality and the Board should equally take the same into account in the re-hearing as the same only came to light through the judgement of the High Court.

The Interested Party align itself with the decision of the Board dated and delivered on the 17<sup>th</sup> of March 2022 with respect to the lapse of the tender validity period with respect to the tender herein. From the reading of the decision, the Board gave directions in its decision in the Applicant's first application (Application Number 148 of 2021) that the Respondent concludes the procurement proceedings within 14 days from the date of the decision (dated and delivered on the 28<sup>th</sup> of December 2021) and was further ordered to extend the tender validity period of the tender herein for a further (30) days from the 11<sup>th</sup> of January 2022, which the Board determined to be date the validity of the subject tender was expiring.

The Interested Party does not contest the Board's powers to extend the validity of a tender as many times as it deems fit to guarantee a fair, equitable, transparent and competitive process. However, extensions must be done before the lapse of the tender validity period. The Respondent having failed to extend the same by the 11<sup>th</sup> of January 2022 rendered the tender extinguished and no extension after its expiry can be made. In simple terms, one cannot breathe life to an expired tender. The Interested Party disagrees with the Honourable court's decision that the Board ought

to have exercised its powers under Section 173 of the Act to find a remedy considering the Respondent's non-compliance with its orders.

According to the Interested Party, courts have found that the only alternative when the tender validity period of a tender has lapsed and the same hasn't been extended before its expiry is to commence a fresh procurement process and believe that it is the route that the subject tender ought to take considering that it's getting to almost a year since the subject tender was advertised and that there are lawful actions that can be taken against the Respondent for failure to comply with the Board's directions, one being through the Board's orders that the Director General of the Public Procurement Regulatory Authority takes lawful action against the Respondent.

The Interested Party contends that the Applicant's persistence to be awarded the subject tender despite letters of notification of award and regret yet to be released by the Respondent casts doubt on the integrity of the process. In addition, the Board of Trustees of the Public Service Superannuation Fund involvement in the procurement process, as deponed in their affidavit casts even more doubt on the fairness and competitiveness of the process.

The Interested Party contends that it had a responsive tender and it is also aggrieved by the Respondent's delay in releasing the outcome of the evaluation process and if for any reason that its tender was to be declared

non-responsive, it has a right to contest the same under Section 167(1) of the Act. However, the Interested Party believes that a fresh procurement process is best in the circumstances, considering *inter alia* the lapse of the tender validity period.

## **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;**
- 3. Whether the Board can extend an expired tender validity period;and**
- 4. What are the appropriate orders the Board should grant in the circumstances.**

After filing of a Replying Affidavit, a Further Replying Affidavit and Written Submissions by the Interested Party, the Applicant's lawyers, acting on the Applicant's instructions, protested to the filing of the same by the Interested Party vide a letter dated 25<sup>th</sup> May 2022 addressed to the Board Secretary. Subsequently, vide a letter dated 27<sup>th</sup> May 2022 addressed to the Board Secretary, the Interested Party's lawyers, acting on the Interested Party's instructions, responded to the aforementioned protest letter by the Applicant's lawyers. However, we note, none of the protests raised by the Applicant's lawyers were filed before the Board in a formal manner. In the circumstances, we shall not comment on the same.

This is a re-hearing of Request for Review No. 16 of 2022 pursuant to Order ii. Of the Judicial Review Court in JR Application No.E37 of 2022 in which an order of mandamus was issued compelling the Board to re-hear/re-consider Request for Review No.16 of 2022 while taking into account the findings of the Judicial Review Court in its Decision of 6<sup>th</sup> May 2022 in JR Application No.E37 of 2022 within 30 days.

The Black's Law Dictionary, 6<sup>th</sup> Edition defines rehearing as follows:

***"Second consideration of a cause for sole purpose of calling to court's attention any error, omission, or oversight in first consideration. A re-trial of issues and presumes notice to parties entitled thereto and opportunity for them to be heard."***

Our understanding of the word re-hearing is in tandem with the definition assigned by the Black's Law Dictionary, 6<sup>th</sup> Edition which we understand to mean that we are obligated to look at, and consider all facts, evidence and circumstances surrounding the subject tender for a second time with respect to Request for Review No.16 of 2022 while taking into consideration the findings in the Decision of the Judicial Review Court of 6<sup>th</sup> May 2022 in JR Application No.E37 of 2022. Consequently, any party who participated in the tendering process of the subject tender is a relevant and necessary party to the subject proceedings. We shall therefore, consider all pleadings filed, to enable us arrive at a determination from an informed point of view. Even if we are wrong in our definition of rehearing, we observe that the Applicant did not file any further written submissions and did not formally object to filing of a Replying Affidavit, a Further Replying Affidavit and Written Submissions by the Interested Party.

The Black's Law Dictionary, 9<sup>th</sup> Edition at page 1232 defines an interested party as follows:

***"A party who has a recognizable stake (and therefore standing) in a matter."***

The Interested Party herein participated in the subject tender as a joint venture tenderer and has submitted proof that at all material times when the Respondent purported to extend the tender validity period of the subject tender and the validity of tender security, the Interested Party was

notified of the same and acted as directed by the Respondent. To us, the moment one participates in a tender, such a person assumes a recognizable stake in such a tender and any decision made with respect to such a tender would in one way or the other affect such a person. It is for this reason that it is the practice for the Board to invite all persons who participated in a tender in issue before the Board (tenderers), once it receives addresses of such tenderers from a procuring entity. To this end, such tenderers need no leave of the Board to join as interested parties. However, the Board has severally held that such interested parties role is limited to supporting or opposing a request for review filed with the Board. In supporting a request for review, such an interested party would be in support of an applicant's case while in opposing a request for review, more often than not, such an interested party would be in support of an accounting officer of a procuring entity's case against a request for review. At no point is such an interested party allowed to raise new issues that have not been raised by either an applicant or an accounting officer of a procuring entity in a request for review.

Given the foregoing, it is our considered view that the new issues(issues not raised by either the Applicant or the Respondent herein) raised by the Interested Party on alleged breach by the Respondent of Section 78 (6) of the Act for failure to announce the financial proposals of each of the tenderers at the opening of financial tenders on 21<sup>st</sup> July 2021 and on allegation of illegal approval of the successful tenderer by the Board of Trustees of the Procuring Entity are issues the Interested Party should

have canvassed through filing of its own request for review within 14 days of learning of the alleged breach in accordance with Section 167(1) of the Act which request for review would then be consolidated with the instant Request for Review and be heard by the Board as one request for review. Since the Interested Party did not file its own request for review, it cannot use a backdoor to file the same without paying the requisite filing fees by bringing these issues as an Interested Party and in any event, the Interested Party is time barred from raising the allegation of breach of Section 78(6) of the Act.

We note that the subject tender's procurement proceedings was an issue before the Board for the first time in Request for Review No.148 of 2021 filed 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 save for the Interested Party) sought judicial review by the High Court with respect to the Decision of the Board of 28<sup>th</sup> December 2021 in Request for Review No.148 of 2021 in accordance with Section 175(1) of the Act. In the circumstances, the Decision of the Board of 28<sup>th</sup> December 2021 in Request for Review No.148 of 2021 is 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 those 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 is yet to be 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 Respondent could not logically conclude the due diligence procurement process within the stipulated period because of pending background checks that were being

conducted 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 undisputed 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 it 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 undisputed 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.

At paragraph 35 and 36 of the Decision of the Judicial Review Court of 6<sup>th</sup> May 2022 in JR Application No.E37 of 2022, the Judicial Review Court held as follows:

***"35. ....As observed by the Board above, the delay allegedly occasioned by the due diligence is not substantiated....."***

***36. Suffice it to note that compliance with the Board's orders was not subject to conditions..... "***

From the foregoing, we note that the Judicial Review Court did not at any one time hold that our finding on this issue was illegal, irrational or was arrived at through procedural impropriety.

In the circumstances and taking into consideration the findings in the Decision of the Judicial Review Court of 6<sup>th</sup> May 2022 in JR Application No.E37 of 2022, 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 period of the subject tender for a further period of 30 days from 11<sup>th</sup> 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 tender 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 Decision of the Board of 28<sup>th</sup> December 2021 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 period 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 Decision of the Board of 28<sup>th</sup> December 2021 in Request for Review No.148 of 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 28<sup>th</sup> 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 28<sup>th</sup> 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 expired on 19<sup>th</sup> December, 2021. The Tender Validity was extended for a period of Thirty (30 No) 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 20<sup>th</sup> January, 2022 to 18<sup>th</sup> 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 (30 No) 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 (30 No) 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, and 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"***

At paragraph 41 of the Decision of the Judicial Review Court of 6<sup>th</sup> May 2022 in JR Application No.E37 of 2022, the Judicial Review Court held as follows:

***"41. ....The attempt to blame the Applicant for the expiry of the validity period of the tender stands out as a sore thumb....."***

From the foregoing, we note that the Judicial Review Court did not at any one time hold that our finding that the subject tender's tender validity period expired on 11<sup>th</sup> January 2022 was illegal, irrational or was arrived at through procedural impropriety. What the Judicial Review Court faulted us on, was apportioning blame on the Applicant for the expiry of the tender validity period.

In the circumstances and taking into consideration the findings in the Decision of the Judicial Review Court of 6<sup>th</sup> May 2022 in JR Application

No.E37 of 2022, it is our considered opinion, which the tender validity period of the subject tender expired on 11<sup>th</sup> January 2022.

**Whether the Board can extend an expired tender validity period;**

We have re-read the Decision of the Judicial Review Court of 6<sup>th</sup> May 2022 in JR Application No.E37 of 2022 and note that the Judicial Review Court did not address or speak to whether the Board can extend the tender validity period of the subject tender having already noted that the same expired on 11<sup>th</sup> January 2022. The reason for not addressing this issue by the Judicial Review Court would be perhaps the because the same was not framed as an issue for determination in the Decision of the Board of 17<sup>th</sup> March 2022 in Request for Review No.16 of 2022.

At paragraph 39 of the Decision of the Judicial Review Court of 6<sup>th</sup> May 2022 in JR Application No.E37 of 2022, the Judicial Review Court held as follows:

***"39. ....The Board should not be held ransom by a rogue procurement entity who deliberately runs the clock to ensure that the validity of a tender expires. It retains the power to order as many extensions of the validity to achieve a procurement that is compliant to the constitution and the law. Notably, under section 88 of the Act, there is no limitation on extensions by the Board."***

From the foregoing, we understand the Judicial Review Court to mean that the Board has powers to extend a tender validity period many times and Section 88 of the Act, hereinbefore outlined, has no capping on such extensions by the Board. We fully agree with the Judicial Review Court on the Board's powers to extend tender validity period for unlimited number of times. This in our view has been a position taken by the High Court in ***Judicial Review Case E002 of 2021 Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex parte Kenya Ports Authority & Another [2021] eKLR*** (hereinafter referred to as the High Court Rhombus Case) where Justice J. N. Onyiego held as follows with respect to the Board re-extending validity period of a tender:

***"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. The provision stipulates that;***

***(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 attender*

*(3) An extension under subsection (1) shall be restricted to not more than 30days and may only be done once*

*40. What was the intention of the drafters of this legislation and in particular the inclusion of Section 88? In my view, this provision was intended to guard against any possible mischief or abuse of office or power by accounting officers especially where uncontrolled timelines will give them a free hand to temper with the tendering process to favour their friends or closely related persons. In other words, once the already extended validity period for a period of 30 days lapses, the tendering process in respect of that tender becomes moot or rather it extinguishes. Upon lapsing, the Procurement entity is at liberty to re-advertise for fresh tendering and the process then follows the full circle like it was never tendered for before.*

*41. Therefore, the foregoing provision permits extension of a tender validity period by an accounting officer only once and that extension must be made before the expiry of the already stipulated tender validity period. It is common knowledge that one cannot extend time that has already lapsed. See Administrative Review board; Consortium of GBM Projects Limited and ERG Insaat vs Sanayi A.S(interested party); Exparte*

**Applicant National Irrigation Board Judicial Miscellaneous Application No. 103 of 2019(2019)eKLR in which the court held that;**

**"The Respondent fell into jurisdictional error by extending the Validity period of a lapsed tender which was non-existent"**

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

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

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

**.....**

**44.....**

**45.....The Board also extended the tender Validity period by 30 days. In compliance, the accounting officer did extend the validity period thereby inviting the interested party and the second lowest bidder into competitive negotiation whereby the interested party emerged the lowest bidder (bidder) within the budgetary allocation.**

**46. However, the Accounting Officer did not give the award notification letter claiming that governance issues affecting the credibility of the I/Party had emerged through the Regulatory**

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

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

*48. From the plain reading of that Section, it is only applicable and binding on the accounting officer and nobody else. Nothing would have been easier than the legislators to include or provide the Review Board's mandate under that section. To that extent, I do agree with counsel for the I/Party that Section 88(3) of the Act*

**does not bar the Review board from making decisions that are deemed to be necessary for the wider attainment of substantive justice. These Residual powers can be derived from Section 173 of the Act which provides;**

**"Upon completing a review, the Review Board may do any one or more of the following;**

**a. annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;**

**b. give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;**

**c. substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;**

**d. order the payment of costs as between parties to the review in accordance with the scale as prescribed; and**

**e. order termination of the procurement process and commencement of a new procurement process"**

**49. Under section 173(a)(b) & (c) of the Act, the Board has wide discretionary powers for the better management of tendering system to direct the doing or not doing or redoing certain acts**

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

50. ....

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

Our understanding of the holding of Justice J. N. Onyiego in the High Court Rhombus case is that, (i) Section 88 of the Act is applicable and binding to an Accounting Officer of a Procuring Entity and no one else, (ii) under Section 173 of the Act, the Board has residual powers to direct extension of validity period more than once, (iii) a tender validity period can be

extended by an accounting officer and/or the Board prior to expiry of the initial tender validity period, (iv) once a tender validity period expires, the tendering process with respect to such a tender becomes moot/extinguishes and (v) upon expiry of a tender validity period, a procuring 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.

We note that the Court of Appeal in ***Civil Appeal E011 of 2021 Kenya Ports Authority & another v Rhombus Construction Company Limited & 2 others [2021] eKLR*** (hereinafter referred to as the Court of Appeal Rhombus case) did not fault the Decision of Justice J. N. Onyiego in the High Court Rhombus case on extension of a tender validity period when it held as follows:

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

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

***40. What was the intention of the drafters of this legislation and in particular the inclusion of Section 88? In my view, this provision was intended to guard against any possible mischief or abuse of office or power by accounting officers especially where uncontrolled timelines will give them a free hand to temper with the tendering process to favour their friends or closely related persons. In other words, once the already extended validity period for a period of 30 days lapses, the tendering process in respect of that tender becomes moot or rather it extinguishes. Upon lapsing, the Procurement entity is at liberty to re-advertise for fresh tendering and the process then follows the full circle like it was never tendered for before.***

***....***

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

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

**38.....**

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

**40. However, from the arguments as canvassed by counsel for the appellants, it is clear that he has not demonstrated how the learned Judge erred in the exercise of his discretion, but merely**

**exhibits dissatisfaction with the learned Judge’s findings. We are satisfied that the learned Judge exercised his discretion judicially in dismissing the appellant’s notice of motion and we find no basis to fault him. ....”.[Emphasis ours]**

The Court of Appeal in ***Civil Appeal 132 of 2018 Kivuku Agencies v Kenya Airport Authorities Accounting Office & another [2020] eKLR***(hereinafter referred to as the Court of Appeal Kivuku case) found no need to fault Justice Ogola J’s decision in Mombasa Judicial Review Case No.60 of 2017 when it held as follows with respect to an expired tender validity period:

**“4. The matter was heard by Ogola, J. who in a well-reasoned opinion found that the appellant filed the review application on 10<sup>th</sup> August, 2017 and the decision of the Board was issued on 31<sup>st</sup> August, 2017 thus the tender validity which was for ninety (90) days had already lapsed. This is what the learned Judge stated in his own words: -**

**“This court has found that the respondents would not reinstate the ex-parte applicant to the tender process as the validity period of the tender had already lapsed. Therefore the decision by the respondents to this effect cannot be said to be unreasonable and with “wednesbury’s unreasonableness”. ....”**

***5. Unrelenting, the appellant has appealed against the above decision raising six grounds of appeal. Some grounds are repetitive, therefore we summarize them to wit; - that the learned Judge erred in law and fact for holding that tender no. KAA/338/2017-2017 had lapsed and could not be reinstated;***

***.....***

***6. .... The respondents purported to cancel the tender and advertised afresh while arguing that the tender validity period of ninety (90) days had lapsed. ....***

***7.....***

***8. We have considered the appeal, the rival submissions and authorities cited from which we discern two issues; whether the Judge should have ordered the appellant to be re-instated to the tender process and its tender subjected to an evaluation alongside other tenders that had made it past the preliminary evaluation stage, and .....***

***9. The impugned orders were made pursuant to the Judge's exercise of judicial discretion in determining whether there was illegality or irregularities in the manner the respondents decided to cancel the tender. The decision by the Judge as he posited was hinged on the orders made by the Board that annulled the award of the tender to the interested party but gave orders in the alternative. We find that the orders made by the Board were***

*central in the determination of the suit before the court below and we therefore produce them here below verbatim once more;-*

*"4. the procuring entity, having regard to the tender validity, is instructed to:-*

*d) Reinstate the applicant in the tender process and evaluate its tender alongside other tenders that made it past the preliminary evaluation stage and complete the process, including the making of an award, within fourteen days from the date of this decision, or,*

*e) If the evaluation committee of the procuring entity finds that the tender validity period of the subject tender lapsed and the same was not extended the procuring entity to start the procurement afresh within fourteen days of this decision.*

*f) Since the applicant will have another opportunity at the subject tender the Board orders that each party shall bear its own costs of this request for review"*

*Instead of complying with the first segment of the order, the respondents went for the alternative that was directing them to start the whole process afresh. The respondent's reasons for re-starting the process was based on the alternative order and they also argued the subject tender validity period had lapsed.*

*.....*

**10. In dealing with this issue, the learned trial Judge properly guided his mind on the Wednesbury's principle of unreasonableness.....**

**11. That said, the question still remains whether the respondents committed an illegality by calling a fresh tender. The Board gave the orders in the alternative because it must have been aware of the validity period of the tender. .... In answering this question, the learned Judge stated as follows in a pertinent paragraph of the judgement: -**

**"This court has found that the validity period of the tender was 90 days which lapsed on 4<sup>th</sup> August, 2017. The decision by the Board was issued on 31<sup>st</sup> August, 2017. It is therefore clear to this court that the respondents would not have reinstated the ex-parte applicant to the tender process and considered his tender alongside those of others that had made it past the preliminary stage as the tender period had already lapsed. I should think that the Review Board had envisioned this situation and that is the reason the board ordered that if the evaluation committee of the procuring entity found that the validity period of the subject matter had lapsed and had not been extended the procuring entity should start the procurement process afresh....."**

**12. .... Whereas Section 88 provides for an extension of tender validity, the provision is not couched in mandatory terms;**

*it leaves it to the discretion of the accounting officer to decide whether to extend the validity. This is what it states: -*

*Section 88 (1) of the Act;*

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

*Just like the trial Judge, we cannot fault the respondents for not extending the period of validity or for not construing the period of validity was from 26<sup>th</sup> July, 2017 given that the tender document indicated it was valid for ninety (90) days from the date of issue.*

*..... So, we do not have any reasons to fault the respondent for opting for a fresh tender.*

*13. ....*

*14.....*

*15.....*

*16.....*

*17. We find no merit in this appeal and dismiss it, ....."*

Our understanding of both the Court of Appeal Rhombus case and Court of Appeal Kivuku case is that the Court of Appeal could not fault the findings of Justice J. N. Onyiego and Justice Ogola J respectively on a tender validity period being incapable of being extended once the same has

expired. Simply put, the Court of Appeal agreed with Justice J. N. Onyiego and Justice Ogola that a tender validity period that has expired cannot be extended.

We note the Judicial Review Court did not address whether a tender validity period that has expired is capable of being extended in its Decision of 6<sup>th</sup> May 2022 in JR. Application No.E37 of 2022. What the Judicial Review Court held is that the Board retains the power to order as many extensions of the validity to achieve a procurement that is compliant to the constitution and the law. Notably, we believe the Judicial Review Court did not address whether a tender validity period that has expired is capable of being extended because, the same was not an issue framed for determination in the Decision of the Board of 17<sup>th</sup> March 2022.

In the circumstances and taking into consideration the findings in the Decision of the Judicial Review Court of 6<sup>th</sup> May 2022 in JR Application No.E37 of 2022, it is our considered opinion, that the tender validity period of the subject tender having expired on 11<sup>th</sup> January 2022, the same was incapable of being extended and neither the Respondent nor the Board could extend the expired tender validity period of the subject tender after 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.

The Judicial Review Court in its Decision of 6<sup>th</sup> May 2022 in JR Application No.E37 of 2022 held as follows with respect to powers of the Board under Section 173 of the Act:

***"36. .... Public procurement is a matter of great public interest. No wonder the people in the making of their Constitution 2010 found a place for it in Article 227 in which it is provided that when any state organ or any other public entity contracts for goods and services, it shall do so in a system that is fair, equitable, transparent, competitive and cost effective. No procuring entity should get away with any malfeasance in a public procurement. Neither should a tenderer be exposed to unfair process.***

***37. As held in IEBC v National Super Alliance Kenya & 6 others [2017] eKLR, procuring entities are bound by Articles 10, 47 and 227 of the Constitution. I hasten to add that in the same breadth, the Board is no exception. It is the first line of defence when threats of breach or actual breach of these constitutional values and principles occur. The Board must rise to the occasion and rein in any entity inclined to breach the principles of procurement provided in the Constitution and the law. The powers and jurisdiction of the board are wide. In the case of Kenya Pipeline co Ltd v Hyosung Ebara Co. Ltd and Others [2012] eKLR, the Court of Appeal described the Board as follows;***

***.....***

***38. The powers are wide and enormous. Section 173 provides;***

***....***

***39. Faced with the circumstances in this case, the Board shirked its duty to supervise public procurement. It proceeded to lament helplessly yet had it taken into account its powers and jurisdiction and considered the options provided by section 173 of the Act, it may have reached a different finding. The Board ended up throwing the baby with the bath water blaming the applicant whose only fault was submitting a responsive tender and who had a legitimate expectation that the procuring entity would observe the constitutional and legal principles governing public procurement and that in default the Board would be a safe refuge***

*for redress. This is demonstrated by the applicant's unrelenting approach to the board twice for a remedy. In my view, once there was default by the 2<sup>nd</sup> Respondent and the Board gave orders and directions on completion of the procurement process, the onus was on the Board to ensure compliance in the completion process and in the absence of compliance apply its jurisdiction and powers fully to guarantee a fair, equitable, transparent and competitive process. The Board should not be held at ransom by a rogue procurement entity who deliberately runs the clock to ensure that the validity of a tender expires. It retains the power to order as many extensions of the validity to achieve a procurement that is compliant to the constitution and the law. Notably, under section 88 of the Act, there is no limit on extension by the Board.*

*40.....*

*41. In this case, the blame heaped on the Applicant, a hapless tenderer whose legitimate expectation and fair treatment were already breached by the 2<sup>nd</sup> Respondent is not only unfair but unreasonable and irrational. The attempt to blame the Applicant for the expiry of the validity period of the tender stands as a sore thumb. The failure to exercise the jurisdiction and powers under Section 173, was in my view based on a misapprehension of the law. In this context therefore, the decision of the Board is amenable to judicial review.....*

***42. I concur with the holding of the court in Republic v Public Procurement Administrative Review Board, Rhombus Construction Company Limited (Interested Party) Exparte Kenya Ports Authority & another [2021] eKLR where it was stated;***

***"It is worth noting that the Respondent acts as an appeal channel in the procurement process against decisions or complaints against the procuring entity hence the powers to exercise inherent jurisdiction to make decisions even where there is no express provision for the just determination of a matter in controversy by applying section 1733".***

***This is what the Board ought to have done in the instant case."***

Taking into consideration the findings in the Decision of the Judicial Review Court of 6<sup>th</sup> May 2022 in JR Application No.E37 of 2022 on the powers of the Board under Section 173 of the Act with respect to a rogue procuring entity, noting that we have found the tender validity of the subject tender expired on 11<sup>th</sup> January 2022, and that the same was incapable and is still incapable of being extended by the Board or even by the Respondent after 11<sup>th</sup> January 2022, our hands are tied because the tender proceedings of the subject tender died a natural death on 11<sup>th</sup> January 2022 when the same became moot/extinguished. Consequently, any order with respect to a moot procurement proceedings or a non-existent proceedings is incapable of being enforced and would be an exercise in futility.

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 in 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 noting that the Public Procurement Regulatory Authority has powers to ensure compliance under Section 9 of the Act and Part IV of the Act.

Our aforementioned finding is anchored on a High Court decision in ***Judicial Review Miscellaneous Application E044 & E176 of 2021 (Consolidated) Republic & another v Chairperson, Public Procurement Administrative Review Board & 2 others; Authority & another (Exparte); Rhombus Construction Company Limited (Interested Party); Rhombus Construction Company Limited (Exparte) (Judicial Review Miscellaneous Application E044 & E176 of 2021 (Consolidated)) [2022]KEHC 1 (KLR) (11 January 2022)(Judgment)*** where Justice John M. Mativo held as follows:

***"68. With regard to order (c), the core issue as I see it is whether the Review Board acted without jurisdiction or in excess of jurisdiction in granting the said order in which it recommended the Director General of the Public Procurement Regulatory Authority, as a Regulator, to take necessary measures against the***

***Procuring Entity as provided in law, for deliberately failing to comply with the Orders of the Board in PPARB Application No. 150 of 2020.***

***69.....***

***70.....***

***71.....***

***72.....***

***73. Section 28 of the act provides for functions of the Review Board as (a) reviewing, hearing and determining tendering and asset disposal disputes; and (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law. Section 8 of the PPAD Act gives the PPRA a wide mandate, the only limitation being it cannot investigate matters which are subject to administrative review. The Review Board having rendered its final decision, the matters cannot be said to have been subject to administrative review. ....***

***74. Here is a situation whereby the Review Board (we believe he meant Procuring Entity) flouted orders issued by the Review Board. Here is a case whereby the Review Board directs the body which is statutorily ordained to perform the functions in section 9 of the PPAD Act to perform a matter within the ambit of its mandate. A holistic and purposive reading of the Act leaves no doubt that there is no bar, legal, equitable, or otherwise preventing the Review Board from recommending the investigations. It would be an absurdity and an unfaithful interpretation of the law to suggest***

*otherwise. The invitation to find otherwise amounts to what I call unnecessary straining the language and intent of a statute without due regard to the intention of Parliament. I decline the invitation to subscribe to such unfaithful interpretation of the law. In the words of Baroness Helena Kennedy QC, a woman activist and chair of the British Council: Published in Just Law {2004}. "Law is the bedrock of a nation, it tells who we are, what we are, what we value...almost nothing else has more impact on our lives. The law is entangled with everyday existence, regulating our social relation, and business dealings, controlling conduct which could threaten our safety and security, establishing the rules by which we live. It is the baseline."*

*75. In several of my decisions I have stated that law is the bloodline of every nation. The end of Law is justice. It gives justice meaning. It is by yielding Justice that law is able to preserve order, peace and security of lives and property, make the society secure and stable, regulate and shape the behaviour of citizens, safe guard expectations, function as a means of governance, a device for the distribution of resources and burdens, a mechanism for conflict resolution and a shield or refuge from misery, oppression and injustice. Through the discharge of these functions, the law has today assumed a dynamic role in the transformation and development of societies. It has become an instrument of social change. I am unable to fault*

***the Review Board's decision in issuing prayer (c). Also, I find no merit in the grounds cited by the 1<sup>st</sup> applicant.***

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.

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 M. Mativo of the High in ***Judicial Review Miscellaneous Application E044 & E176 of 2021 (Consolidated) Republic & another v Chairperson, Public Procurement Administrative Review Board & 2 others; Authority & another (Exparte); Rhombus Construction Company Limited***

*(Interested Party); Rhombus Construction Company Limited (Exparte) (Judicial Review Miscellaneous Application E044 & E176 of 2021 (Consolidated)) [2022] KEHC 1 (KLR) (11 January 2022) (Judgment) held as follows:*

*"77. I now turn to the 2<sup>nd</sup> application. To me, the core issue is whether the tender validity period had lapsed. ....*

*78.....*

*79. After meticulously and admirably analyzing the facts, the Review Board extensively cited Republic v Public Procurement Administrative Review Board; Consortium of GBM Projects Limited and ERG Insaat Ticaret Ve Sanayi A.S (interested party); National Irrigation Board Ex Parte and concluded that the subject tender is dead and incapable of being brought back to life. It also held (and correctly so), that any award subsequent to an expiry of the tender validity period would be unlawful since an award of a tender is required to be made within the tender validity period of a tender as enshrined in section 87 of the Act.*

*80.....*

*81.....*

*82.....*

*83.....*

*84.....*

*85.....*

*86. The other reason why the 2<sup>nd</sup> application collapses is that as the Review Board correctly held, the tender is dead and any*

*award subsequent to an expiry of the tender validity would be unlawful because an award of a tender is required to be made within the tender validity period as articulated in section 87 of the PPAD Act. This being the position, it would serve no salutary purpose to discuss any of the other grounds argued in the 2<sup>nd</sup> application.*

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 the findings of the Board in this decision, each party shall bear its own costs in this Request for Review.

Dated at Nairobi this 3<sup>rd</sup> Day of June 2022.



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



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

