

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 68 OF 2022 OF 29TH JULY, 2022

BETWEEN

MINET KENYA INSURANCE BROKERS LIMITED APPLICANT

AND

ACCOUNTING OFFICER

COUNTY GOVERNMENT OF TANA RIVER 1ST RESPONDENT

THE COUNTY GOVERNMENT OF TANA RIVER 2ND RESPONDENT

M/S SCORELINE INSURANCE

BROKERS LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer of the County Government of Tana River with respect to Tender Number TRCG/OT/ADM/49/2021-2022 for provision of Medical Insurance Cover to the County Government of Tana River's County Staff.

BOARD MEMBERS PRESENT

- | | |
|-------------------------|---------------------------------|
| 1. Ms. Njeri Onyango | -Vice Chairperson (Panel Chair) |
| 2. Mrs Irene Kashindi | -Member |
| 3. Mr. Steven Oundo OGW | -Member |

IN ATTENDANCE

1. Mr Philip Okumu

-Acting Board Secretary

BACKGROUND OF THE AWARD

The Tendering Process

The County Government of Tana River (hereinafter after referred to AS "the Procuring Entity") invited sealed tenders from eligible tenderers with respect to Tender Number TRCG/OT/ADM/49/2021-2022 for provision of Medical Insurance Cover for the Procuring Entity's County Staff (the subject tender) on 25th April, 2022 via the Standard Newspaper. The subject tender was also uploaded on the Procuring Entity's website, www.tanarivercounty.go.ke. The subject tender's closing date was set at 4th May, 2022.

On 25th April, 2022, the Procuring Entity placed a further advertisement on the same Newspaper informing the public and all interested bidders of further changes that had been made on the initial advertisement and tender document. The change made was with regard to the objective and extension of the subject tender closing date to 13th May, 2022.

Submission of Tender and Tender Opening

The following seven (7) firms submitted their bids on the submission deadline:

| S/No. | Name of Tenderer |
|-------|-----------------------------|
| 1. | Amana Insurance Brokers Ltd |

| | |
|----|---|
| 2. | Scoreline Insurance Brokers Limited |
| 3. | Paladin Insurance Brokers Limited |
| 4. | Minet Kenya Insurance Brokers Limited |
| 5. | Zamara Risk and Insurance Company Limited |
| 6. | Trident Insurance Company Limited |
| 7. | Jubilee Health Insurance Limited |

The tenders were opened on 13th May, 2022.

Evaluation

The Chief Officer of the Procuring Entity appointed a Tender Evaluation Committee to undertake evaluation in the following stages:

- i. Preliminary Evaluation;
- ii. Tender Evaluation; and
- iii. Financial Evaluation.

i. Preliminary Evaluation

The Evaluation Committee subjected the bidders to Preliminary Evaluation to determine their "responsiveness" or "non-responsiveness" to the mandatory requirements as outlined by the tender document. Two (2) bidders, "2" and "7", were found to be responsive therefore, they proceeded to the Technical Evaluation Stage.

ii. Technical Evaluation

The two (2) firms were thereafter subjected to the Technical Evaluation stage based on the criteria outlined in the tender document at a scale of 0 to 100 with the pass mark as 80%.

Financial evaluation

The Evaluation Committee thereafter subjected the two (2) bidders to Financial Evaluation by ranking them as per the tender sums quoted which are outlined below:-

| Bidder No. | Name of Bidder | Sum Quoted (Kshs.) | Rank |
|-------------------|---------------------------------|---------------------------|-------------|
| 7 | Jubilee Health Insurance Ltd | 187,563,024.00 | 2 |
| 2 | Scoreline Insurance Brokers Ltd | 162,041,278.00 | 1 |

Evaluation Committee's Recommendation

The Evaluation Committee recommended the lowest responsive evaluated bidder, **M/s Scoreline Insurance Brokers Limited**, to be awarded the subject tender for their quoted sum of **Kshs. 162,041,278.00 (One Hundred and Sixty-Two Million, Fourty One Thousand, Two Hundred and Seventy-Eight Kenya Shillings Only)**.

Professional Opinion

By a Professional Opinion dated 27th May 2022, the Procuring Entity's Principal-Supply Chain Management Officer concurred with the Recommendation of the Evaluation Committee, citing that the process and criteria was set in accordance with section 80 (3) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and that the award was within the prevailing matrix.

Letters of Notification

Vide letters dated 30th May 2022, the Chief Officer of the Procuring Entity notified the bidders of the outcomes of their respective bids.

REQUEST FOR REVIEW IN APPLICATION NO. 49 OF 2022

M/s Minet Kenya Insurance Brokers Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated and filed on 13th June 2022 Application No. 49 (herein after "Application No. 49 of 2022" seeking the following prayers: -

- I. A declaration that the Procurement Entity breached the provisions of Article 227(1) of the Constitution and Section 79(1) of the Public Procurement and Disposal Act;***
- II. The decision of the Procuring Entity to award the Tender to the Interested Party be annulled and set aside;***
- III. The Board be pleased to order a re-evaluation of Tender No TRCG/OT/ADM/49/2021-2022 FOR THE PROVISION OF MEDICAL INSURANCE COVER FOR COUNTY STAFF, and***

award the tender to the Applicant who strongly believes it has the lowest competitive bid;

- IV. The Board be pleased to annul any contract that may have been entered into by the Respondents and the Interested Party before the lapse of the 14-day period within which tenderers may seek administrative review;*
- V. The Board be pleased to stop any implementation of any such contract entered into between the Respondents and Interested Party;*
- VI. The Respondents be compelled to pay the costs to the Applicant arising from/and incidental to this Application;*
- VII. The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.*

In its decision rendered on 4th July 2022, the Board made the following orders:

- 1. The 1st Respondent's Letter of Notification dated 30th May 2022 with respect to Tender No. TRCG/OT/ADM/49/2021-2022 For The Provision of Medical Insurance Cover for County Government of Tana River's County Staff, issued to the Interested Party be and is hereby cancelled and set aside;*
- 2. The 1st Respondent's letters dated 30th May 2022 with respect to Tender No. TRCG/OT/ADM/49/2021-2022 For The Provision of Medical Insurance Cover for County Government*

- of Tana River's County Staff, issued to the Applicant and all other tenderers be and are hereby cancelled and set aside;*
- 3. The 1st Respondent is hereby ordered to direct the 2nd Respondent's Evaluation Committee to admit the Applicant's Tender to the Technical Evaluation stage, and conduct a re-evaluation at the Technical Evaluation stage of all tenders that were responsive at the Preliminary Evaluation stage including the Applicant's tender, and if responsive, to conduct a re-evaluation at the Financial Evaluation stage;*
- 4. Further to Order 3, the 1st Respondent is hereby ordered to ensure that the procurement processes of Tender No. TRCG/OT/ADM/49/2021-2022 For The Provision of Medical Insurance Cover for County Government of Tana River's County Staff, proceeds to its logical conclusion including the making of an award to the lowest evaluated responsive tenderer whilst taking into account the findings made in this decision within 14 days from the date hereof;*
- 5. Given that the proceedings of the subject tender are not complete; each party will bear its own costs.*

REQUEST FOR REVIEW NO 68 OF 2022

This Applicant subsequently lodged the instant Request for Review dated and lodged on 29th July 2022 with the Support Affidavit sworn by one Edwin Macharia thereof dated 26th July 2022 and lodged on 29th July 2022 through the firm of Chepkuto Advocates seeking for the following prayers: -

- I. The Procuring Entity be compelled to award the tender to the Applicant who strongly believes it was the lowest evaluated bidder;***
- II. In the alternative, an order directing the Respondents to complete and release the outcome of the procurement process in regard to the subject tender and issue an award to the lowest evaluated bidder forthwith;***
- III. The Respondents be compelled to pay the costs to the Applicant arising from/and incidental to this Application;***
- IV. The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***

In a Notification of Appeal and letter dated 29th July 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board") notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No. 02/20 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 29th July 2022.

The Respondents opposed the Request for Review vide an Affidavit in Response dated and filed on 4th August 2022 signed by the Chief Officer, Finance and Economic Planning and the Acting Chief Officer, Public Service Management, Administration & ICT, through the firm of Ann Kowido & Associates.

The Applicant subsequently filed Further Affidavit sworn on 5th August, 2022. Vide letters dated 29th July 2022, the Acting Board Secretary notified all the tenderers in the subject tender, via their respective addresses as provided by the Respondents, of the existence of the Request for Review while forwarding to the tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. Further, all tenderers were invited to submit to the Board any information and arguments about the subject tender within three days from 29th July 2022.

None of the other bidders filed responses.

~~Pursuant to the Board's Circular No. 02/2020 dated 24th March 2020, detailing an administrative and contingency management plan to mitigate the effects of the COVID-19 pandemic, the Board dispensed with physical hearings and directed that all Request for Review applications shall be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.~~

The Applicant filed its submissions on 16th August 2022.

THE APPLICANT'S CASE

The Applicant case is that the Respondents are in breach of the Board's decision dated 4th July 2022 in Application No. 49 of 2022, in that they failed to ensure that the subject tender proceeded to its logical conclusion including the making of an award to the lowest evaluated responsive tenderer within 14 days from the date of the decision, which lapsed on **18th of July 2022**. The Applicant further asserts that the Respondents failed to award the tender to the Applicant as required by law in view of the responsiveness of the Applicant's bid.

The Applicant further states that it was not served with any Judicial Review Application envisioned under Section 175(3) of the Act or any stay orders that may have been issued against the decision of the Board to inform the Respondents' actions not to comply with the Board's orders.

The Applicant further states that their advocates vide a letter dated the **19th of July 2022** asked the Respondents to immediately release of the outcome of the procurement process as per the orders of the Board, and that on the **19th July 2022**, the Respondents reverted on the status of the re-evaluation of the tender and confirmed that they were yet to conclude the re-evaluation of the tenders as directed by the Board and requested for more time to comply.

In the Further Affidavit, the Applicant states that it subsequently received a letter dated 25th July 2022 from the Procuring Entity on 3rd August 2022

terminating the procurement proceedings. The Applicant asserts that the termination is improper as further expounded below.

THE RESPONDENTS' CASE

In their Response to the Request for Review, the Respondents state that by the time the Board made its decision on 4th July 2022, the Government's Financial year, 2021-2022 (*both National and County*) lapsed on 30th June 2022.

The Respondents further stated that the Tana River County Appropriations Act, 2021 and the Tana River County Supplementary Appropriation Act 2022 also lapsed on the same date. They added that the said Acts authorize the issue of certain sums of money out of the County Revenue Fund and their application for the year ending **30th June 2022**.

The Respondents further submit that all funds that had been appropriated for use within the financial year, and has not been spent at the end of the Financial Year for which it was appropriated lapses immediately at the end of that Financial year. This is in accordance with Section 136 of the Public Finance Management Act, 2012, the Respondents state.

The Respondents submit that it is a general procurement principle contained under Section 53 (8) of the Act that an Accounting Officer shall not commence any procurement proceedings until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates. To do the contrary amounts to an offence under the Act.

The Respondents state that the procurement officer advised that the Procurement Process for the subject tender could not proceed and that they would have to wait for the new County Assembly to pass the budget for the 2022-2023 financial year and to advertise the tender if funds would be allocated for the particular item.

The Respondents further submit that they proceeded to terminate the Tender process pursuant to the provisions of Section 63(1) (a) (i) & (b) of the Act, 2015 due to inadequate budgetary provision caused by the expiry of the Appropriation Act for financial year 2021-2022 and communicated the same to the Tenderers, and that the termination was also reported to the Public Procurement Regulatory Authority on 29th July 2022.

BOARD'S DECISION

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

- I. Whether the Procuring Entity complied with the Board's orders issued in its decision in Application No. 49 of 2022?***
- II. Whether the termination of the procurement proceedings is valid?***
- III. What are the appropriate orders to grant in the circumstances?***

Issue 1: Whether the Procuring Entity complied with the Board's decision issued in Application No. 49 of 2022?

This Board issued orders on 4th July 2022 in Application No 49 of 2022 and *inter alia* directed the Respondents, by Order No. 3 to admit the Applicant's tender to the technical evaluation stage, and conduct a re-evaluation at that stage of all tenders that were responsive at the Preliminary Evaluation stage including the Applicant's tender, and if responsive, to conduct a re-evaluation at the Financial Evaluation stage.

By Order No 4 of the decision of 4th July 2022, the Board directed the 1st Respondent to ensure that the procurement processes of the subject tender proceeds to its logical conclusion including the making of an award to the lowest evaluated responsive tenderer whilst taking into account the findings made in this decision within 14 days from the date thereof.

The Board notes from the documents exhibited by the Applicant, which have not been controverted by the Respondents, that the Respondents had not taken any action in compliance with the Board's decision at the expiry of the 14 days, which lapsed on **18th July 2022**. In particular, the Board notes that the Applicant through their advocates wrote to the Respondents a letter on the 19th July 2022, which states in part that: -

"... we note that the 14 days aforementioned lapsed yesterday and our client is yet to receive any information with respect to the outcome of the procurement process through either a notification of letter of award or regret..."

In response to this letter, the Respondent through its advocates on record replied on 19th July 2022 and that letter read in part as follows:

"...our client encountered unforeseen pitfalls as the County Government has been undertaking various treasury and audit requirements by the National Treasury and Auditor General's office respectively following the end of the financial year.

It has however set up an Evaluation Committee, who are undertaking the re-evaluation. The results shall be communicated to your client and the other tenderers in due course but in any case not later than next week..."

From the documents exhibited by the Respondents, the Board notes that there was an exchange between the Procuring Entity's officers as particularized below.

A letter dated 15th July from the 2nd Respondent's Chief Officer for Public Service Management, Administration and ICT addressed to the Principal Supply Chain Management Officer, states as follows: -

"I am advised by our Advocate that the Public Procurement Administrative Review board has issued an order requiring the re-evaluation of TENDER NO. TRCG/OT/ADM/49/2021-2022. Due to the ongoing audit process, I am having some challenges in getting staff to appoint to the evaluation committee. I am also concerned about the implications of

setting up the committee, paying allowances and issuing an award yet we are in a new financial year.

In light of the above, please advise whether or not we have funds to proceed with this tender”

The Supply Chain Management Officer replied to the foregoing by a letter dated 21st July 2022. This was two days after the reply to the Applicant through their advocates as noted above. The letter of 21st July 2022 reads in part as follows

“...it is my opinion that the procurement process cannot proceed in line with the provisions of the Public Procurement and Asset Disposal Act 2015. We will have to wait for the new county assembly to pass the budget for the 2022-2023 financial year and re-advertise the tender if funds shall be allocated for this item...”

Subsequently, the Procuring Entity wrote to the tenderers on 25th July 2022 terminating the procurement proceedings which letter states in part as follows: -,

“... this is to notify you that the tender for provision of medical insurance cover for county staff- tender no. TRCG/OT/ADM/49/2021-2022 has been terminated pursuant to the provision of Section 63 (1)(a)(i) & (b) of the Public Procurement and Asset Disposal Act, 2015 due to inadequate budgetary provision caused by the expiry of the

Appropriation Act for financial year 2021-2022 and return of underutilised funds to the National Treasury...

The Procuring Entity produced to the Board a report dated 29th July 2022 on the termination of the tender which report is addressed to the Public Procurement Regulatory Authority (herein after referred to as "the Authority"). The Respondents have however, not shared any forwarding letter or any other form of evidence to confirm that the report was indeed submitted to the Authority.

The chronology of events detailed above is key to the determination of the question as to whether the Respondent complied with the decisions of the Board dated 4th July 2022. The correspondence outlined above and the averments in the Respondents' Replying Affidavit leave the Board with one conclusion. The Procuring Entity did not comply with the orders of the Board.

Having found as such based on the factual statements that are not controverted, the Board turns to the law.

The Board's directions of 4th July 2022 to the effect that the Respondents were required to complete the tender proceedings to the logical conclusion within 14 days, would in the circumstances, have included the termination of the procurement proceedings, now that the Respondents chose that route but this should have been within strict compliance of the applicable law. The validity or otherwise of the termination is addressed under Issue 2 below. A valid and proper termination of tender proceedings should have been done within the timelines directed by the Board in its decision of 4th July 2022.

Having considered the sequence of events undertaken by the Respondents, and the Board having found that the Respondents did not comply with the Board's Orders issued on 4th July 2022 in Review 49 of 2022 and in utter disregard to the Board's findings in the said Review and having proceeded to terminate the procurement proceedings of the subject tender outside the timelines ordered by the Board; the actions of the Procuring Entity amount to disobedience of the Orders of issued by this Board which were never challenged within the statutory period of fourteen days set out in Section 175(1) of the Act.

In *Judicial Review Miscellaneous Application No. 154 of 2016, Republic v Public Procurement Administrative Review Board Ex Parte Kenya Electricity Generating Company Limited (KENGEN) & 3 others [2016] eKLR*, the court held that:

"In this case, the finality of the Board's decision as affirmed by this Court was that the procuring entity was at liberty to proceed with the procurement process to its logical conclusion in accordance with the law. If in the course of purporting to proceed with the procurement the applicant made a decision which was contrary to the law, an aggrieved party was of course at liberty to challenge the same as the interested party did in this matter... A failure to comply with a decision of the Review Board or to appeal from such decision leads to blatant disobedience of the orders of a decision making body established by law"

Issue II: Whether the termination of the procurement proceedings was valid

The Applicant submitted that the termination of procurement proceedings was null and void having been undertaken in disobedience of the Board's orders. The Applicant in this regard relies on Section 175(6) of the Act which states as follows: -

"175(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void."

The Applicant added that the termination did not comply with section 63 of the Act. The Applicant asserted that the termination of the tender proceedings should in the circumstances, not be allowed to stand.

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

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

(a) the subject procurement has been overtaken by—

- (i) operation of law; or*
 - (ii) substantial technological change;*
 - (b) inadequate budgetary provision;*
 - (c) no tender was received;*
 - (d) there is evidence that prices of the bids are above market prices;*
 - (e) material governance issues have been detected;*
 - (f) all evaluated tenders are non-responsive;*
 - (g) force majeure;*
 - (h) civil commotion, hostilities or an act of war; or*
 - (i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.*
-

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

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

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination." [Emphasis by the Board]

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

"in a nutshell therefore and based on the above-cited cases where the decision of a procuring entity to terminate procurement process is challenged before the Board the procuring entity is to place sufficient reasons and evidence before the Board to justify and support the ground of termination of the procurement process under challenge. The procuring entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of Section 63 of the Act". [Emphasis added]

Given the foregoing, it is trite law that for a termination of procurement proceedings to pass legal muster, a procuring entity must demonstrate compliance with both the substantive and procedural requirements under section 63 of the Act in that;

- a. There must be demonstrable reasons under section 63(1)(a) to (i) of the Act. This is the substantive requirement.
- b. An accounting officer is required to give the Authority a written report on the termination outlining the reasons and notify all tenderers, in writing, of the termination with reasons within

fourteen (14) days of termination. This are the procedural requirements.

It is therefore important for the Board to determine the legality, or lack thereof, of the Respondents' decision of terminating the procurement proceedings with the foregoing in mind.

Substantive requirements for termination of tender proceedings

The Respondents cited the reason of inadequate budgetary allocation as the justification for termination of the procurement proceedings. They relied on inter alia the lapse of the County Appropriation Act. This leads us to determine this question: What is the effect of lapse of a County Appropriation Act on tenders? Does it automatically terminate the tenders? What does a Procuring Entity need to demonstrate apart from simply alleging that a Financial year has lapsed and that funds underutilized have reverted to the National Treasury?

Section 136 of the Public Finance Management Act, 2012 states as follows:-

"Appropriation of money for county government purpose to lapse if unspent

(1) Subject to any other legislation, an appropriation that has not been spent at the end of the financial year for which it was appropriated lapses immediately at the end that financial year.

(2) If, at the end of a financial year, a county government entity is holding appropriated money that was withdrawn from the County Exchequer Account but has not been spent, it shall repay unspent money to the County Exchequer Account and prepare a refund statement which shall be forwarded to the Controller of Budget.

The foregoing was pleaded by the Respondents in their Replying Affidavit sworn on 23rd June 2022 at paragraph 26(ii) in Application No. 49 of 2022. The Respondent has re-produced this assertion in its Replying Affidavit filed herein at paragraph 14 and wherein it is stated as follows: -

"... the budget for this procurement was budgeted for in the current financial year [read 2021-2022] that is set to end on 30th June 2022. If the award is not upheld and payment made before the end of the current financial year, the funds for the medical insurance cover shall be considered as underutilization of funds and returned to the National Treasury. The County will thus not have any funds to pay for the medical cover as it was not budgeted for in the next financial years. The ripple effect is that the County Staff and their family members shall not have medical cover for a further one year."

The Public Finance Management Act No. 18 of 2012 provides for procurement by County Government entities and stipulates under **Section 121** that:

"For the purposes of this Act, all procurement of goods and services and disposal of assets, required for the purposes of the county government or a county government entity are to be carried out in accordance with Article 227 of the Constitution and the Public Procurement and Disposal Act"

Article 224 of the Constitution provides for County Appropriation Bills and states:

"On the basis of the Division of Revenue Bill passed by Parliament under Article 218, each county government shall prepare and adopt its own annual budget and appropriation Bill in the form, and according to the procedure, prescribed in an Act of Parliament."

The Public Finance Management Act No. 18 of 2012 provides under **Section 130** that the County Executive Committee Member for Finance is responsible for submitting budget documents to the county assembly in respect of the budget for every financial year.

Section 130(2) (3) and (4) states that:

"(2) In preparing the annual Appropriation Bill to put before the County Assembly, the County Executive Committee

member for finance shall ensure that the expenditure appropriations in the Bill are in a form that-

(a) is accurate, precise, informative and pertinent to budget issues; and

(b) clearly identifies the appropriations by Vote and programme.

(3) In preparing the annual appropriation Bill under subsection (2), the county executive committee member responsible for finance shall include, in the allocation to the county assembly any unspent funds that had been appropriated to the county assembly in the immediate preceding financial year. [Emphasis ours]

(4) Where an Appropriation Bill is passed before the beginning of the financial year to which it relates and does not contain unspent funds allocated to the county assembly in the immediate preceding financial year, the county executive committee member for finance shall prepare and submit to the county assembly a Supplementary Appropriation Bill allocating the unspent funds.

Bearing the above provisions in mind, the Board notes that the Respondents availed to the Board their Appropriation Acts being the Tana River County Appropriations Act, 2021 and the Tana River County Supplementary

Appropriation Act 2022 which were to lapse as at 30th June 2022. The Respondents have however not availed the budget for the financial year 2021-2022. Nor have they presented as evidence, a refund statement forwarded to the Controller of Budget in line with Section 136 (2) of the Public Finance Management Act, 2012.

The Respondents have simply stated that the funds that had been budgeted for the subject tender have reverted to the National Treasury but have not shown that this was indeed done, and have also not shown under what legal provision this would be done.

Section 136(2) Public Finance Management Act, 2012 set out above, speaks to the lapse of the financial year and the underutilized funds being repaid to the **County Exchequer Account** and **not the National Treasury** as averred by the Respondents.

The Board is of the view that section 136(2) of this Act has two imports; a repayment of the withdrawn but unspent funds to the County Exchequer Account and a preparation of a refund statement for purposes of forwarding the same to the Controller of Budget. In our view, the refund statement is to confirm that the unspent funds have been repaid to the County Exchequer and therefore safely kept for possible allocation pursuant to Section 130 (2)(3)(4) of the Act which provide for allocation in the subsequent year, of unspent funds that had already been appropriated but remained unspent in the preceding financial year.

In the upshot, the Board is not convinced that the Respondents have demonstrated that the funds allocated are no longer budgeted or available for the subject tender and that the funds have reverted to the National Treasury and therefore no accessible to it.

As such, the Respondents have not fulfilled the substantive requirements for the termination of procurement proceedings as required by section 63 of the Act.

For the avoidance of doubt, in the event that the Respondents are able to demonstrate that the funds have indeed reverted back to the National Treasury and that there is legal basis for that, then it would be open for the Procuring Entity to terminate the subject tender on the basis of inadequate funds, subject to strict compliance with the provisions of section 63 of the Act.

Procedural Requirements for the termination of the tender

The procedural aspects of Section 63 of the Act are easy to dispense with. We note that the termination was communicated to the tenderers including the Applicant, by a letter dated **25th July 2022**. The Applicant states in its Further Affidavit that it received this letter by email on **3rd August 2022**. This fact was not controverted by the Respondents. That being the case, the present Request for Review had already been filed on **29th July 2022** by the time the Applicant was notified of the termination of the procurement

proceedings. Pursuant to section 168 of the Act, all procurement processes stood automatically suspended upon the filing of the Request for Review. As such, the communication of the termination of procurement proceedings on **3rd August 2022** was of no effect.

We have also seen a report dated 29th July 2022 which is addressed to the Authority but as noted above, there is no evidence that it was indeed submitted. As such, the Respondents have not demonstrated that the Authority was duly notified.

A more fundamental question is whether it was open for the Procurement Entity to terminate the tender proceedings, assuming that there were valid reasons for doing so, outside the timelines ordered by the Board in its decision of 4th July 2022. A simple answer to this is found in Section 175 (6) of the Act, already cited above. An action in contravention of the Board's orders is a nullity and we need not say more.

Given the above, the termination of the procurement proceedings by the Procuring Entity was unlawful both on the substantive and procedural fronts as envisaged under section 63 of the Act.

Issue 3: What are the appropriate Orders to grant

This Board held in ***PPARB Application No. 94 of 2016, Lyape Investments V Kenya Marine & Fisheries Research Institute & Another***, that:

"The procuring entity having failed to follow the orders of the Board in Review No. 83 of 2016, this Board cannot fold its

hands when faced with a situation where the procuring entity fails to obey the orders made by it. The Board will employ the powers conferred upon it by Section 173 of the Act and make such orders as will meet the ends of justice in any matter pending before it.”

The Board will not condone deliberate disobedience of its orders and will uphold its responsibility to deal firmly with a party that acts in disobedience. It is the obligation of every person against, or in respect of whom, an order has been made to obey it unless and until that order is discharged. Disobedience of Board orders offends the rule of the law and undermines the dignity and authority of the Board.

With the above in mind, the Board reiterates its previous orders made in Application Number 49 of 2022 as particularized in the final orders set out below. The Procuring Entity must proceed with the tender process to its logical conclusion within the given timelines, bearing in mind the findings and holdings made in this decision and in Application No. 49 of 2022.

Having found that the termination of the procurement proceedings for the subject tender was unlawful, the decision communicating the impugned termination shall stand quashed.

The Applicant will also be awarded the costs of this Request for Review, considering the circumstances of the case.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review: -

- 1. The Procuring Entity's Letter dated 25th July 2022 communicating the decision to terminate the procurement proceedings with respect to Tender No. TRCG/OT/ADM/49/2021-2022 For The Provision Of Medical Insurance Cover For County Government of Tana River's County Staff be and is hereby quashed and set aside.**

- 2. The 1st Respondent is hereby ordered to ensure that the procurement process with respect to Tender No. TRCG/OT/ADM/49/2021-2022 For The Provision Of Medical Insurance Cover For County Government of Tana River's County Staff, proceeds to its logical conclusion within 14 days from the date hereof, whilst taking into account the findings made in the Board's decision of 4th July 2022 in Application No 49 of 2022 and in this decision,**

- 3. In view of the Board's findings and orders above, we order that the Procuring Entity shall bear the Applicant's costs of this Request for Review amounting to Kshs. 221,363/- (Kenya**

Shillings Two Hundred and Twenty-One Thousand, Three Hundred and Sixty-Three only)

Dated at Nairobi, this 19th Day of August 2022



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VICE CHAIRPERSON (Panel Chair)
PPARB



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SECRETARY
PPARB