

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO.55/2022 DATED 29TH JUNE 2022

BETWEEN

RENTCO AFRICA LIMITED APPLICANT

AND

**THE ACCOUNTING OFFICER,
KENYA ELECTRICITY TRANSMISSION CO. LTD ... 1ST RESPONDENT**

KENYA ELECTRICITY TRANSMISSION CO. LTD ... 2ND RESPONDENT

Review against the (in) decision of the Accounting Officer of Kenya Electricity Transmission Co. Ltd with respect to Tender No KETRACO-ST-009-2021 for Request for Proposal for Design, Construction and Commercial Operation of Tier IV Data Centre on a Revenue Share Model.

BOARD MEMBERS PRESENT

1. Ms. Faith Waigwa - Chairperson
2. Mrs. Irene Kashindi - Member
3. QS. Hussein Were - Member

IN ATTENDANCE

Philemon Kiprop - Acting Secretary to the Board

BACKGROUND TO THE DECISION

The Respondents invited interested candidates to submit their Expression of Interest for Provision of a Commercial Tier IV Data Centre Solution and five (5) firms submitted their responses. These were;

- i. Canovate Electronics
- ii. El Sewedy Technology-Egypt
- iii. MTN Business (K) Limited
- iv. RENTO Africa Limited in Partnership with China Mobile Limited, China Communication Services and iXAfrica Data Centre.
- v. Sterling and Wilson Pvt Limited

The Respondents only determined two (2) tenderers/firms as being responsive to the Expression of Interest (EOI). These were El Sewedy Technology-Egypt and RENTCO Africa Limited in Partnership with China Mobile Limited, China Communication Services and iXAfrica Data Centre. The Respondents subsequently issued the two (2) tenderers/firms with blank tender documents for Tender No KETRACO-ST-009-2021 for Request for Proposal for Design, Construction and Commercial Operation of Tier IV Data Centre on a Revenue Share Model (hereinafter referred to as the 'subject tender') and only RENTCO Africa Limited in Partnership with China Mobile Limited, China Communication Services and iXAfrica Data Centre responded to the Request for Proposal.

REQUEST FOR REVIEW NO.55 OF 2022

Rentco Africa Limited, the Applicant herein, lodged the Request for Review No.55 of 2022 with respect to the subject tender seeking for the Board to:

1. Extend the tender validity period which expires on 29th June 2022 and to extend the same for a further Sixty (60) days from 29th June 2022 to enable the Applicant undertake the subject tender according to the criteria set out in the Tender Document, the Public Procurement and Asset Disposal Act 2015, the Regulations thereunder and the Constitution.

2. Make no order as to costs.

The Board considered the parties' pleadings, documents, written submissions, the list and bundle of authorities together with the confidential documents submitted by the Respondents to the Board pursuant to Section 67(3) (e) of the Public Procurement Asset and Disposal Act, 2015 (hereinafter referred to as the 'Act') and found the following issues called for determination:

- 1. Whether the Respondent terminated the subject tender's procurement proceedings in accordance with Section 63 of the Act on account that material governance issues were detected to divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act;**
- 2. Whether the Board could extend the tender validity period;**
- 3. Whether the Applicant had locus to file the instant Request for Review having submitted its Tender in a partnership.**

Depending on the determination of the first issue;

4. Whether the tender validity period of the subject tender had expired; and

5. What were the appropriate orders the Board should grant in the circumstances.

On the first issue framed for determination, this Board found the substantive and procedural statutory pre-conditions under Section 63(1) (e), (3) and (4) of the Act were not satisfied when terminating the procurement proceedings of the subject tender thus the termination was not proper and could not oust the Board's jurisdiction by dint of Section 167(4) (b) of the Act.

On the second issue framed for determination, this Board found it had wide powers under Section 173 of the Act and could extend the tender validity period as many times as possible and could not therefore shy away from extending validity period where it is due rightly, and before the tender validity had lapsed.

On the third issue framed for determination, this Board noted that the 2nd Respondent apart from raising a Preliminary Objection on locus, did not support its Preliminary Objection and therefore, in the absence of such proof the Board proceeded to disallow the preliminary objection.

On the fourth issue framed for determination, this Board found the tender validity period for the subject tender lapsed on 28th May 2022 and any subsequent extension was null and void.

On the fifth issue framed for determination, this Board having found that the tender validity had expired declined to extend an already expired tender validity.

On 20th July 2022 and in exercise of the powers conferred upon it under the Act, the Board made the following orders with respect to the Request for Review No.55 of 2022 dated 29th June 2022:

- 1. The Request for Review dated 29th June 2022 in regard to the subject tender is hereby dismissed.***
- 2. Given the findings of the Board in this decision, each party shall bear its own costs in this Request for Review.***

**NAIROBI HIGH COURT JUDICIAL REVIEW MISCELLANEOUS
APPLICATION NO.E100 OF 2022**

Dissatisfied with the Decision of the Board dated 20th July 2022, the Applicant sought judicial review by the High Court in Nairobi wherein Justice A.K. Ndungu allowed the same while making the following orders on 21st September 2022:

- 1) An order of certiorari be and is hereby issued to bring to the Honourable court for purposes of quashing the decision of the 1st Respondent (the Board) dated 20th July 2022 and issued on 2nd August 2022 dismissing the Applicant's Request for Review in PPARB NO.55 of 2022.***
- 2) An Order of Mandamus to compel the 1st Respondent to exercise its powers under Section 173(b) to extend the tender validity period of the subject tender for a period of 60 days or such period that it deems necessary for the 2nd Respondent to conclude the subject tender process.***
- 3) A declaration be and is hereby issued that the 2nd Respondent's failure to conclude the due diligence and award the contract is an abuse of the procurement process and their power thus in contravention of the provisions of Article 227(1) of the Constitution and the Public Procurement and Asset Disposal Act NO.33 OF 2015.***
- 4) Each Party to bear their own costs.***

FINAL ORDER BY THE BOARD DATED 27TH SEPTEMBER 2022 IN REQUEST FOR REVIEW NO.55 OF 2022

Pursuant to the order of mandamus compelling this Board to exercise its powers under Section 173(b) of the Public Procurement and Asset Disposal Act, 2015, to extend the tender validity period of Tender No KETRACO-ST-009-2021 for Request for Proposals for Design, Construction and Commercial Operation of Tier IV Data Centre on a Revenue Share Model for a period of

60 days or such period that the Board deems necessary for the 1st Respondent to conclude the tender process, issued by Judge A.K. Ndungu as Order 2) in Judicial Review Miscellaneous Application No.E100 of 2022 Republic v Public Procurement Administrative Review Board and The Accounting Officer, Kenya Electricity Transmission Company Limited; Ex Parte Rentco Africa Limited the Board, on 27th September 2022, **ORDERED**;

1. THAT the tender validity period of Tender No KETRACO-ST 009-2021 for Request for Proposals for Design, Construction and Commercial Operation of Tier IV Data Centre on a Revenue Share Model be and was thereby extended for a period of 182 days from 28th May 2022.

NAIROBI COURT OF APPEAL CIVIL APPEAL NO.E755 OF 2022

Dissatisfied with the Decision of Justice A. K. Ndungu of 21st September 2022, the 1st Respondent appealed to the Court of Appeal in Nairobi wherein Justices D. K. Musinga, Dr. K. I. Laibuta and M. Gachoka struck out the appeal for being incompetent on 21st December 2022.

NOTICE OF MOTION DATED 3RD JANUARY 2023

On 3rd January 2023, Rentco Africa Limited, the Applicant herein, filed before the Board a Notice of Motion Application dated 3rd January 2023 (hereinafter referred to as the 'Notice of Motion application') together with a Supporting Affidavit sworn on 3rd January 2023 by Robert Nyasimi, the Managing

Director of the Applicant, through the firm of Caroline Oduor & Associates Advocates seeking the following orders:

1. ***THAT this Honourable Review Board be pleased to extend the tender validity period of Tender No.KETRACO-ST-009-2021 for Request for Proposal for Design, Construction and Commercial Operation of Tier IV Data Centre on a Revenue Share Model for a period of 30 days or such period that it deems necessary for the conclusion of the subject procurement process.***
2. ***THAT this Honourable Review Board be pleased to direct and compel the 1st Respondent to issue the Applicant with a letter of award and a procurement contract in respect of Tender No.KETRACO-ST-009-2021 for Request for Proposal for Design, Construction and Commercial Operation of Tier IV Data Centre on a Revenue Share Model within 7 days of the date of Review Board decision.***
3. ***THAT this Honourable Review Board be pleased to issue such other or further relief as it may deem just and expedient to grant.***
4. ***THAT the costs of and incidental to this application be provided for.***

In letters dated 3rd January 2023, the Acting Board Secretary, Mr. James Kilaka, notified the Respondents of, *inter alia*, the existence of the instant

Notice of Motion application while forwarding to the Respondents a copy of the instant Notice of Motion application together with the Board's Circular No.02/2020 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 instant Notice of Motion application together with confidential documents concerning the subject tender within 5 days from 3rd January 2023.

On 6th January 2023, Samwel Rambo, Advocate, an inhouse lawyer of the 2nd Respondent, filed a Respondents' Replying Affidavit sworn on 5th January 2023 by Eng, (CPA) Anthony Wamukota, OGW, the 1st Respondent herein.

On 10th January 2023, the Applicant filed a Supplementary Affidavit sworn on 10th January 2023 by Robert Nyasimi.

Pursuant to the Board's Circular No.2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 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 16th January 2023, the Applicant filed Applicant's Written Submissions dated 16th January 2023 together with the Applicant's List & Bundle of

Authorities dated 16th January 2023. On 24th January 2022, the 1st and 2nd Respondents' filed 1st and 2nd Respondents Submissions dated 23rd January 2023 and 1st and 2nd Respondents List of Authorities dated 23rd January 2023.

APPLICANT'S CASE

The Applicant, on behalf of the consortium of Rentco Africa Limited in Partnership with China Mobile Limited, China Communication Services and ixAfrica Data Centre, states that it participated in the subject tender in which it was the only tenderer that responded to the subject tender.

The Applicant states that the 1st Respondent and itself agreed upon the terms of due diligence which was conducted in Singapore based on the agenda and objectives set by the 1st Respondent and at the full cost of the Applicant in which the Applicant incurred a total cost of Kshs.5,108,248/= towards flight costs, accommodation and per diem allowances paid to each employee of the 2nd Respondent forming part of the team that conducted the said due diligence exercise in Singapore as duly evidenced in the record of proceedings.

It is the Applicant's case that on conclusion of the due diligence, the 1st Respondent extended the tender validity period of the subject tender twice for a period of 30 days in each extension.

According to the Applicant, the conclusion of the tender evaluation process, conduct of the post qualification due diligence exercise and extension of the tender validity period created a legitimate expectation that the 1st Respondent would proceed to the next stage of the procurement process and issue the Applicant with a notification of award and to sign the tender contract in as much as he was equally under a legal obligation to act accordingly.

The Applicant proceeds to narrate the legal battles that ensued thereafter more specifically that the 1st Respondent's failure to act as required in law prompted it to approach the Board in Application No.55 of 2022 in which the Board dismissed the same. Aggrieved by the Decision of the Board, the Applicant successfully obtained an order of certiorari quashing the Decision of the Board by the High Court in Nairobi having sought judicial review and further obtained an order of mandamus compelling the Board to exercise its powers under Section 173(b) of the Act to extend the tender validity period of the subject tender for a period of 60 days or such other period that is necessary to conclude the subject tender. Further, the Applicant, at the High Court, obtained a declaration that the 2nd Respondent's failure to conclude the due diligence and award the contract was an abuse of the procurement process and their power thus in contravention of Article 227(1) of the Constitution and the Act. Aggrieved by the Decision of the High Court, the 1st Respondent unsuccessfully appealed to the Court of Appeal in Nairobi where the Court of Appeal struck out the Appeal for being incompetent. Pursuant to the order of mandamus issued at the High Court, the Board

extended the tender validity period for the subject tender for a period of 182 days from 28th May 2022.

It is the Applicant's case that despite reminders vide its advocate's letters dated 14th November 2022 and 21st November 2022, todate, the Respondents have failed to conclude and award the subject tender to it despite the High Court's finding that the 2nd Respondent's failure to conclude the due diligence and award the contract is an abuse of the procurement process and their power thus in contravention of Article 227(1) of the Constitution and the Act.

From the foregoing, the Applicant states that it has made a compelling case for the prayers sought.

RESPONDENTS' CASE

The 1st Respondent contends that the Board is *functus officio* having dismissed Request for Review No.55 of 2022 in its Decision of 20th July 2022 and thus the Board has no jurisdiction to entertain the Applicant's Notice of Motion Application since the proceedings herein were wholly determined in July 2022.

Without prejudice to the foregoing, the 1st Respondent contends that the Respondents have no objection to the request for extension of time to enable the conclusion of the tender process.

The 1st Respondent admits that the Decision of the Board of 20th July 2022 was overturned by the High Court in Judicial Review Misc. Application No.E100 of 2022 and that their appeal against the High Court decision was struck out by the Court of Appeal on 21st December 2022.

According to the 1st Respondent, he could not implement the decision of the High Court in Civil Appeal E755 of 2022 to avoid rendering his appeal to the Court of Appeal an academic exercise by completing the tendering process.

The 1st Respondent contends that the Applicant was requested to consent to stay of the Orders of the High Court pending determination of the 1st Respondent's appeal to the Court of Appeal to prevent the lapse of the tender validity period which lapsed on 27th November 2022 to no avail.

The 1st Respondent contends that the Respondents oppose the grant of prayer no.2 in the Notice of Motion application on the following grounds:-

- i. *The Board under Section 173(b) of the Act can only issue directions to the Respondents if the tender validity period was still valid and as it stands, the tender validity period expired on 27th November 2022.*
- ii. *The 1st Respondent detected material governance issues in the tendering process to wit, the process should have been undertaken under the Public Private Partnership Act and not the Act owing to the fact that the 2nd Respondent is a State Corporation and the*

nature of the engagement between the Applicant and Respondents fell under the purview of the Public Private Partnership Act i.e. the Applicant was to provide financing and the Respondent was to provide land for construction of Tier IV Data Centre.

- iii. The Respondent on 2nd September 2021, wrote to the National Treasury for advice and/or approval to proceed with the tendering process and is yet to receive the National Treasury's Approval to date. To support this, the 1st Respondent annexed letters dated 25th August 2021, 2nd September 2021, 9th September 2021, 6th December 2022 and 9th December 2022.*
- iv. Being a State Corporation, wholly owned by the government of Kenya, the Respondent has to abide by the laws, rules, regulations as passed by Parliament and policies, regulations and guidelines as issued by the Executive Arm of Government.*
- v. The Public Private Partnership Act requires approval of the National Treasury to be obtained prior to commencing any form of Public Private Partnership engagement with private parties.*

The 1st Respondent summed up his response by contending that the Notice of Motion application is frivolous, vexatious, an abuse of the court process and ought to be dismissed with costs to the extent that any prayer sought therein is not consented to by the Respondent.

APPLICANT'S REJOINDER

In a rejoinder to the Respondents' Replying Affidavit, the Applicant avers that the Board has wide discretionary powers under Section 173 (a),(b) and (c) of the Act to ensure better management of tendering systems to direct the doing, not doing or redoing of certain acts done, omitted from being done or wrongly done by an accounting officer and which position was upheld by the Court of Appeal in ***Civil Appeal No.510 of 2022: Chief Executive Officer, The Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others***. Further, that the Board has the requisite jurisdiction to issue any further orders as may be necessary to meet the interest of justice and in any event the Respondents have stated at paragraph 5 of their Replying Affidavit that they have no objection to the extension of time.

According to the Applicant, filing an appeal against any decision does not operate as a stay of such decision and in any event, the 1st Respondent filed a record of appeal on 3rd November 2022 which date was more than a month after the Respondents were served with the decision of the Board which had complied with the High Court decision the 1st Respondent was seeking to overturn thus the appeal was an academic exercise.

According to the Applicant, the Board has no jurisdiction to deal with the issue raised by the Respondents on material governance and Public Private Partnership because the same were raised by the Respondents to justify a purported termination of the subject tender and in respect of which the Board delivered its final decision on 20th July 2022.

Lastly, the Applicant avers that the letter dated 25th August 2021 is with respect to Tender Number KETRACO/PT/015/2021 which is different from the subject tender.

BOARD'S DECISION

The Board has considered the parties' pleadings, documents, written submissions, the list and bundle of authorities and finds the following issues call for determination:

- 1. Whether the Board is *functus officio* and bereft of jurisdiction to entertain the Notice of Motion Application on grounds that in its Decision dated 20th July 2022, it dismissed Request for Review No.55 of 2022 and the proceedings herein was wholly determined in July 2022 respectively;**

Depending on the determination of the first issue;

- 2. Whether the Board should grant the orders sought in the Notice of Motion application.**

Before we proceed to address the first issue framed for determination, we note the Respondents submitted that there is no provision of law that was

relied upon by the Applicant for filing the application nor does any law support the filing of such an application in a concluded matter making such an application a nullity *ab initio* and ripe for striking out. This issue was not pleaded by the Respondents in the Respondents' Replying Affidavit sworn by Eng. (CPA) Anthony Wamukota, OGW, the 1st Respondent herein, on 5th January 2023 but was rather introduced for the first time in the 1st and 2nd Respondents Submissions dated 23rd January 2023 and filed on 24th January 2023 being the 21st day from the date the Notice of Motion application was filed and after the Applicant had filed its Supplementary Affidavit and the Applicant's Written Submissions on 16th January 2023. To this end, we are constrained not to entertain and make a determination on the allegation of failure by the Applicant to rely on a law in filing the application nor there being no law that supports filing of such an application because doing so would contravene the rules of natural justice that require the Applicant to be heard on the same before the Board makes a determination.

Whether the Board is *functus officio* and bereft of jurisdiction to entertain the Notice of Motion Application on grounds that in its Decision dated 20th July 2022, it dismissed Request for Review No.55 of 2022 and the proceedings herein were wholly determined in July 2022 respectively;

At paragraph 4((i) and (ii) of the Respondents' Replying Affidavit, the 1st Respondent depones that the Board is *functus officio* and has no jurisdiction

to entertain the Notice of Motion Application on grounds that the Board in its Decision dated 20th July 2022, dismissed Request for Review No.55 of 2022 and the proceedings herein was wholly determined in July 2022 respectively.

The Respondents in the 1st and 2nd Respondents submissions dated 23rd January 2023 submit that the Applicant cannot seek a merit-based review of the Board's decision on different facts and that litigation on similar facts would be res-judicata as demonstrated through the Affidavit of Mr. Nyasimi. Further, the Respondents submit that the Applicant's recourse was to file another request for review seeking extension of time and any decision based on the application would amount to the Board sitting on appeal of its decision which is contrary to law. To support this submissions, the Respondents relied on the High Court in Mombasa decision in ***John Gilbert Ouma v Kenya Ferry Services Limited [2021]eKLR*** where the court held:

"It is clear that the doctrine of functus office does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued, as is the case herein. It is my finding that the Trial Court misdirected itself when it went ahead to hear the application on whether or not it had jurisdiction to entertain the suit which it had already rendered its judgment on. It is evident that the Trial Court sat on appeal of its

own decision, a practice that is frowned upon by the law and is meant to be barred by the doctrine of functus officio.”

On its part, the Applicant did not respond to the issue raised by the Respondents in paragraph 4(i) and (ii) of the Respondents’ Replying Affidavit to the effect that the Board is *functus officio* and has no jurisdiction to entertain the Notice of Motion Application on grounds that the Board in its Decision dated 20th July 2022 dismissed Request for Review Application No.55 of 2022 and the proceedings herein was wholly determined in July 2022 respectively. We say so because neither the Supplementary Affidavit sworn by Robert Nyasimi, the Managing Director of the Applicant, on 10th January 2023 nor the Applicant’s Written Submissions dated 16th January 2023 addressed these issues.

The Board is established as a central independent procurement appeals review board and its jurisdiction flows from, *inter alia*, Section 28 of the Act that provides the functions and powers of the Board to, *inter alia*, review, hear and determine tendering and asset disposal disputes.

It is not in contention that the Decision of the Board dated 20th July 2022 in Request for Review No.55 of 2022 was quashed by Justice A.K. Ndungu in Nairobi Judicial Review Miscellaneous Application No.E100 of 2022. Further, it is not in contention that the 1st Respondent unsuccessfully appealed

against the Decision of the Justice A. K. Ndungu at the Court of Appeal in Nairobi Civil Appeal No.E755 of 2022 where the Court of Appeal struck out the 1st Respondent's appeal for being incompetent. It is also not in contention that the Board extended the tender validity period for the subject tender for a period of 182 days from 28th May 2022 having been compelled to do so by an order of mandamus issued by Justice A.K. Ndungu in Nairobi Judicial Review Miscellaneous Application No.E100 of 2022. The effect of this, is that the Decision of the Board dated 20th July 2022 in Request for Review No.55 of 2022 is non-existent whilst the Decision of Justice A.K. Ndungu dated 21st September 2022 in Nairobi Judicial Review Miscellaneous Application No.E100 of 2022 and complied with in the Decision of the Board dated 27th September 2022, is inforce.

Our understanding of the Notice of Motion application is that it seeks a further extension of tender validity period to enable for the conclusion of the subject tender's procurement process and award of the subject tender to the Applicant. We say further extension because, on 27th September 2022, the Board extended the tender validity period for the subject tender for a period of 182 days from 28th May 2022 in compliance with the order of mandamus compelling the Board to exercise its powers under Section 173(b) of the Act to extend the tender validity period of the subject tender for a period of 60 days or such period that it deems necessary for the 2nd Respondent to conclude the subject tender process issued by Justice A.K. Ndungu on 21st

September 2022 in Nairobi Judicial Review Miscellaneous Application No.E100 of 2022.

As to whether the Board is *functus officio* and has no jurisdiction to entertain the Notice of Motion Application on grounds that it dismissed Request for Review No.55 of 2022 and the proceedings herein were wholly determined in July 2022 as noted in its now non-existent Decision dated 20th July 2022, the Board is guided by the High Court decision in Meru, in ***Silvanus Kizito vs Edith Nkirote Mwiti [2021]eKLR*** where Justice P. J. Otieno held as follows:

"11. The court does not become *functus officio* merely because it has delivered a final decision in civil proceedings. The court retains its power to undertake several actions including but not limited to stay, review, execution proceedings and such other acts and steps towards the closure of the file. In ***Leisure Lodge Ltd Vs Japhet Asige and another (2018) EKLR*** the court said and held:

"On the question that this court is functus officio, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a

decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act. In Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others [2018] eKLR, this court said of the doctrine of functus officio:-

"I understand the doctrine, like its sister, the res-judicata rule to seek to achieve finality in litigation. It is a way of a court saying, 'I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level'. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.

It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.

As was held by the court of Appeal in Telkom Kenya Ltd vs John Ochanda, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.

Put in the context of the application before me, I do not consider the Decree/holder to ask the court to rehear and make a decision about the disputes in the file on the merits.

I understand the decree-holder /applicant to be saying that the judgment of the court that gave timelines for compliance remains unattended by the judgment debtor. That is not merit based decision on the dispute that has been determined in the suit. The decree holder is merely asking the court to remind the judgment -debtor that they have a judgment debt to settle as far as delivery of share certificates is concerned. That has more to do with moving the file towards closure and making the judgment final rather than re-opening the dispute for determination on the merits. I decline to hold that the court has become functus officio. This is because I consider that there are several proceedings that can only be undertaken after judgment and not before.

The following are just but examples:

- .. Application for stay***
- .. Application to correct the decree***
- .. Application for accounts***
- .. Application for execution including garnishee applications***
- .. Applications for review***

· · Application under section 34 of the Act

If one was to accede to the position taken by the judgment debtor that the court is functus officio then it would mean that the provisions of law providing for such proceedings are otiose or just decorative and of no substance to the administration of justice. As far as the application before the court is concerned, the court is well seized of power and jurisdiction to entertain and determine same on the merit and based on materials availed”.

This court has not changed its views on the point and reiterates that here it has become functus officio as far as application for review is concerned. In any event a Court of Law cannot shut its eyes to an impropriety or indeed injustice just because it has rendered a judgment. To do that would be an abdication of duty and a license for parties to do the unimaginable then shout from rooftops that the court is functus officio because there is a final judgment”.

Similarly, in our considered view, the Notice of Motion application in seeking an extension of tender validity period of the subject tender by the Board and award of the subject tender to the Applicant is geared to ensuring that the Applicant is not left with an impotent Decision of Justice A.K. Ndungu dated

21st September 2022 as complied with by the Board vide the Decision of the Board dated 27th September 2022 requiring extension of the subject tender's tender validity period for the 2nd Respondent to conclude the subject tender's procurement proceedings having found the 2nd Respondent's failure to conclude the due diligence and award of the subject tender as an abuse of the procurement process and the 2nd Respondent's power in contravention of the provisions of Article 227(1) of the Constitution and the Act.

In our considered view, the Notice of Motion application seeks to realize the closure of Request for Review No.55 of 2022 and we understand the Applicant to be saying that the Decision of Justice A.K. Ndungu dated 21st September 2022 as complied with by the Board vide the Decision of the Board dated 27th September 2022 that gave timelines for conclusion of the subject tender's procurement proceedings, remains unattended by the Respondents. To us, this is not merit based decision on the dispute that was determined in the now non-existent Decision of the Board dated 20th July 2022 in Request for Review No.55 of 2022. The Applicant is merely asking the Board to remind the Respondents that they have an order to conclude the subject tender's procurement proceedings by awarding the subject tender to the Applicant as the only tenderer who participated in the subject tender and that their failure to conclude the same and award the subject tender is an abuse of the procurement process and the Respondents' powers in contravention of Article 227(1) of the Constitution and the Act. This has more to do with moving the file towards closure and making the Decision of

Justice A.K. Ndungu dated 21st September 2022 as complied with by the Board vide the Decision of the Board dated 27th September 2022 final rather than re-opening the dispute for determination on the merits.

To this end, we decline to hold that the Board is *functus officio* or bereft of jurisdiction to entertain the Notice of Motion application on grounds that the Board in its now non-existent Decision dated 20th July 2022 dismissed Request for Review No.55 of 2022 and the proceedings herein were wholly determined in July 2022 respectively.

Whether the Board should grant the orders sought in the Notice of Motion application.

At paragraph 1 of the Notice of Motion application, the Applicant seeks for an order of extension of the subject tender's tender validity for a period of 30 days or such other period that the Board deems necessary for the conclusion of the subject tender's procurement proceedings. The Applicant submits that notification of a successful tenderer can only be undertaken during the tender validity period in terms of the provisions of Section 87(1) of the Act. The Applicant relies on a decision of Court of Appeal in ***Civil Appeal No.510 of 2022: Chief Executive Officer, The Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others*** where the honourable judges while addressing themselves to the issue of a procuring entity that deliberately frustrated a

tendering process by running down the clock on the tender validity period to arbitrarily deny a successful tenderer award, held that this Board had power to extend the tender validity period.

On their part and at paragraph 5 of the Respondents' Replying Affidavit, the 1st Respondent deposes that the Respondents have no objection to the request for extension of time to enable conclusion of the tender process. In explaining why the 1st Respondent could not conclude the subject tender process, the 1st Respondent at paragraph 8 of the Respondents' Replying Affidavit deposed that completing the tendering process would have rendered his appeal against the Decision of Justice A.K. Ndungu at the Court of Appeal an academic exercise. According to the Applicant the subject tender's tender validity lapsed on 27th November 2022 after the Applicant declined an invitation by the 1st Respondent to consent to stay of the Decision of Justice A.K. Ndungu that would have otherwise prevented the tender validity from lapsing.

Though not pleaded by the Respondents' in the Respondents' Replying Affidavit, the Respondents submit in the 1st and 2nd Respondents Submissions that the Applicant failed to submit for extension of time before the lapse of the tender validity period, the Applicant negated to file an application for contempt or one to compel the Respondents to proceed with the tender process and that the Board cannot extend a tender validity period

which has lapsed. In support of this submission, the Respondents relied on ***Kenya Ports Authority & another v Rhombus Construction Company Limited & 2 others [2021]eKLR.***

We are alive to paragraph 56 of the Decision of Justice A.K. Ndungu dated 21st September 2022 in Nairobi Judicial Review Miscellaneous Application No.E100 of 2022 where the 2nd Respondent was found to have acted malafides necessitating Justice A. K. Ndungu to compel the Board to extend the subject tender's tender validity.

Guided by the holding of Justice A.K. Ndungu dated 21st September 2022 in Nairobi Judicial Review Miscellaneous Application No.E100 of 2022 and noting that the Respondents do not object to the Applicant's request for extension of time to enable the conclusion of the subject tender's procurement proceedings, we find that it is just and fit that we grant a further extension of the subject tender's tender validity to enable the Respondents to conclude on the subject tender's procurement proceedings.

At paragraph 2 of the Notice of Motion application, the Applicant seeks for the Board to direct the 1st Respondent to issue the Applicant with a letter of award and a procurement contract in respect of the subject tender within 7 days of the date of this decision. The Applicant submits that the Respondent

have through their conduct made a mockery of the provisions of Articles 10 and 227(1) of the Constitution as well as the guiding principles of procurement set out under Section 3 of the Act. It is for this reason that the Applicant submits that it has approached the Board for redress against violation of its rights as an innocent tenderer, being unlawfully denied a much deserved tender award. It is the Applicant's submissions that the Board is bestowed with inherent jurisdiction to make decisions even where there is no express provision for the just determination of a matter in controversy by applying Section 173 as was held by Justice J. N. Onyiego in ***Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex Parte Kenya Ports Authority & Another (2021)eKLR*** and which position a three judge bench at the Court of Appeal in ***Kenya Ports Authority v Rhombus Construction Company Limited & 2 others (2021)eKLR*** upheld. The Applicant relies on a decision of Court of Appeal in ***Civil Appeal No.510 of 2022: Chief Executive Officer, The Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others*** where the honourable judges while addressing themselves to the issue of a procuring entity that deliberately frustrated a tendering process by running down the clock on the tender validity period to arbitrarily deny a successful tenderer award, held that this Board had power to award the tender to the successful tenderer.

On their part and at paragraph 10 of the Respondents' Replying Affidavit, the 1st Respondent depones that the Respondents oppose the grant of an order directing the 1st Respondent to issue the Applicant with a letter of award and a procurement contract within 7 days from the date of this decision for the following reasons that, as it stands the tender validity period expired and the Board can only issue directions to the Respondents if the tender validity period is still valid, the 1st Respondent detected material governance issues in the tendering process which ought to have been undertaken through the Public Private Partnerships Act and not the Act, the Respondents on 2nd September 2021 wrote to the National Treasury for advice and/or approval to proceed with the tendering process and is yet to receive the National Treasury's approval which is required under the Public Private Partnership Act prior to commencing any form of Public Private Partnership engagement with private parties.

In their Respondents' Submissions, the Respondents submit that the Board has no jurisdiction to direct the 1st Respondent to award the tender as it is a sole preserve of the Evaluation Committee and the 1st Respondent to complete the tender process within a period.

It is not in contention that the Applicant in Partnership with China Mobile Limited, China Communication Services and ixAfrica Data Centre was the only tenderer in the subject tender. It is also not in contention that a post

qualification evaluation was conducted on the Applicant in Sinagpore and no known negative response of such post qualification was ever made known to any party to these proceedings or to this Board at all material times. Under Section 83 of the Act, a post qualification exercise is only conducted after tender evaluation and on the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract. By the mere fact that a post qualification exercise was conducted on the Applicant, and in the absence of a negative outcome of the post qualification evaluation, this conotes that the Applicant is the tenderer that submitted the lowest evaluated responsive tender to be awarded the contract.

We note that Justice A. K. Ndungu in his Decision dated 21st December 2021 made a declaration that the 2nd Respondent's failure to conclude the due diligence and award of the contract is an abuse of the procurement process and the Respondents power in contravention of the provisions of Article 227(1) of the Constition and the Act. The purposive reading and interpretation of Justice A. K. Ndungu's orders in his Decision dated 21st September 2022 leaves no doubt that to make good the injustice occasioned to the Applicant by the failure of the Respondents to conclude the subject tender's procurement proceedings, a further extension of the tender validity of the subject tender needs to be made and an award of the subject tender needs to be made in favour of the Applicant and a contract needs to be signed to conclude the subject tender's procurement proceedings. If for

nothing else, we are bound by the decision of Justice A. K. Ndungu dated 21st September 2022.

We have herein before held that this Board is bestowed with inherent jurisdiction to make decisions even where there is no express provision for the just determination of a matter in controversy by applying Section 173 as was held by Justice J. N. Onyiego in ***Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex Parte Kenya Ports Authority & Another (2021)eKLR*** and which position a three judge bench at the Court of Appeal in ***Kenya Ports Authority v Rhombus Construction Company Limited & 2 others (2021)eKLR*** upheld.

In view of the circumstances herein we are inclined to grant the orders directing the 1st Respondent to award the subject tender to the Applicant and issue a contract for the same to the Applicant. Accordingly, the Notice of Motion application succeeds in terms of the final orders issued hereinafter.

To ensure the orders of the Board herein are complied with by the Respondents, a copy of this decision will be shared with the Director General of the Authority for that purpose.

FINAL ORDERS

In exercise of the powers conferred upon it under the Act, the Board grants the following orders in the Notice of Motion application dated 3rd January 2023 :-

- 1. The tender validity period of Tender No.KETRACO-ST-009-2021 for Request for Proposal for Design, Construction and Commercial Operation of Tier IV Data Centre on a Revenue Share Model be and is hereby extended for a further period of 90 days from 26th November 2022 to enable the Respondents conclude the subject tender's procurement proceedings taking into account the findings of the Board in this decision.**
- 2. The 1st Respondent be and is hereby directed to award and notify the Applicant of such an award of Tender No.KETRACO-ST-009-2021 for Request for Proposal for Design, Construction and Commercial Operation of Tier IV Data Centre on a Revenue Share Model in accordance with Section 86 and 87 of the Act respectively within 7 days of the date of this decision.**
- 3. The Respondents be and are hereby directed to enter into a procurement contract with the Applicant with respect to Tender No.KETRACO-ST-009-2021 for Request for Proposal for Design, Construction and Commercial Operation of Tier IV Data Centre on a Revenue Share Model in accordance**

with Section 135 of the Act and before the expiry of the tender validity that has been further extended for a period of 90 days from 26th November 2022.

4. Given the findings of the board in this decision, each party shall bear its own costs in the Notice of Motion application dated 3rd January 2023.

Dated at Nairobi this 24th Day of January 2023.



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CHAIRPERSON
PPARB



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SECRETARY
PPARB