

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 04/2023 OF 13th JANUARY 2023

BETWEEN

BIZGAH LIMITED APPLICANT

AND

KISII COUNTY ASSEMBLY 1ST RESPONDENT

THE ACCOUNTING OFFICER,

KISII COUNTY ASSEMBLY 2ND RESPONDENT

Review against the decision of the Accounting Officer, Kisii County Assembly in relation to Tender No. KCA/S/002/2022-2023 for Structured Cabling and Wireless Network Installation at Kisii County Assembly, Block C.

BOARD MEMBERS PRESENT

- | | |
|-------------------------|-------------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mrs. Njeri Onyango | -Vice Chairperson |
| 3. Eng. Mbiu Kimani,OGW | -Member |

IN ATTENDANCE

Ms. Sarah Ayoo - Holding brief for Acting Board Secretary

BACKGROUND OF THE DECISION

The Tendering Process

Kisii County Assembly, the Procuring Entity and the 1st Respondent herein, invited sealed tenders from interested eligible tenderers in response to Tender No. KCA/S/002/2022-2023 Structured Cabling and Wireless Network Installation at Kisii County Assembly, Block C (hereinafter referred to as the "subject tender") using an open national method of tendering and by way of an advertisement on 26th October 2022 on the 1st Respondent's website www.kisiiassembly.go.ke. The 1st Respondent used an electronic-procurement system referred to as IFMIS E-PROCUREMENT NEGOTIATION NUMBER 1106122 (hereinafter referred to as "IFMS portal") to manage the tendering process. The subject tender's submission deadline was on 3rd November 2022 at 11.00 a.m.

Submission of Tenders and Tender Opening

According to the Tender Opening Minutes of 3rd November 2022 signed by members of the Tender Opening Committee, the committee members and a representative of one of the tenderers present at the tender opening witnessed the opening of the tenders by logging in to the IFMIS portal, opening the tenders and downloading submitted tenders. A total of four (4) tenderers submitted their tenders through the IFMIS portal. As indicated in MIN 02/03/11/2022 OPENING OF TENDERS of the Tender Opening Minutes, the tenderer's name, amount quoted and bid bond amount were

read out loud and recorded in the Tender Opening Register. The following four (4) tenderers were recorded in the Tender Opening Minutes as having submitted their tenders in response to the subject tender:

Assigned Tender No.	Company's Name	Number of Pages	Amount Quoted	Bid Amount	Bond
T1	Javarise Technologies Limited	Not well paginated	16,536,679	349,000	
T2	Lyca Women Enterprises Limited	179	15,963,920	500,00	
T3	Bizgah Limited	278	16,386,660	327,733	
T4	Afriwise Enterprises Limited	Up to page 58	16,614,933	358,845	

Evaluation of Tenders

Evaluation of the subject tender was to be undertaken in three stages using the criteria set out under Section III-Evaluation and Qualification Criteria at pages 24 to 34 of the blank tender document issued to prospective tenderers by the 1st Respondent (hereinafter referred to as "the Tender Document") as follows:

- i. Preliminary Evaluation;

- ii. Technical Evaluation; and
- iii. Economic Evaluation.

Preliminary evaluation

At this stage of evaluation, tenders were required to satisfy the 10 mandatory requirements set out under clause 3 Preliminary Evaluation of Section III-Evaluation and Qualification Criteria at page 24 to 26 of the Tender Document. A Tender Evaluation Committee (hereinafter referred to as "the Evaluation Committee") appointed by the 1st Respondent pursuant to section 46 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') was required to evaluate the submitted tenders and ensure that tenderers met the mandatory requirements to qualify to proceed for evaluation at the Technical Evaluation stage.

Technical Evaluation

At this stage of evaluation, tenders were to be scored using the IT Technical evaluation criteria set out under clause 3.1 Technical Evaluation of Section III-Evaluation and Qualification Criteria at page 25 to 26 of the Tender Document. The Evaluation Committee was required to evaluate the submitted tenders against this criteria and determine which tenders qualified to proceed for evaluation at the Economic Evaluation stage.

Economic Evaluation

At this stage of evaluation, the Evaluation Committee was required to evaluate responsive tenders using the criteria outlined under clause 3.2

Economic Evaluation of Section III-Evaluation and Qualification Criteria at page 26 to 28 of the Tender Document.

REQUEST FOR REVIEW

On 13th January 2023, the Applicant filed a Request for Review dated 12th January 2023 together with a Statement in Support of the Request for Review signed by Joshua Getate, its Chief Executive Officer, on 12th January 2023 through the firm of Mose Nyambega & Co. Advocates seeking the following orders from the Board in verbatim:

- a) Annul and/or quash the decision of the procuring entity terminating the procurement proceedings on Tender No. KCA/S/002/2022-2023.***
- b) Compel the procuring entity to conclude the procurement process within the next 14 days or any reasonable period as you deem fit as Tender No. KCA/S/002/2022-2023 is within the parameters of the 90 days tender validity period.***
- c) Stop and/or quash any procurement proceedings on Tender No. KCA/S/004/2022-2023 which purports to re-advertise Tender No. KCA/S/002/2022-2023.***

d) The procuring entity be condemned to pay costs of this request for Review to the Applicant.

e) Such other, additional, further, incidental and/or alternative orders as the Honorable Board may deem just and expedient in the circumstances.

In a Notification of Appeal and a letter dated 13th January 2023, Mr. James Kilaka, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board"), notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review 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 1st and 2nd Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 13th January 2023.

In opposition to the Request for Review, Mr. Jacob M. Onkeo, the Acting Clerk/ Accounting Officer of the 1st Respondent, filed on 26th January 2023 a Response to the Request for Review dated 19th January 2023 on behalf of the 1st and 2nd Respondents together with confidential documents pursuant to section 67(3)(e).

On 24th March 2020, the Board issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all requests for review applications be canvassed by way of written submissions. The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with Section 171 of the Act. 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.

The Applicant filed its written submissions on 26th January 2023.

APPLICANT'S CASE

The Applicant avers that following advertisement of the subject tender by the 1st Respondent, it participated in the same as a tenderer.

The Applicant avers that pursuant to section 80 of the Act, it anticipated communication would be made in writing, within 30 days of the subject tender's submission deadline, on the outcome of the subject tender's evaluation through the 2nd Respondent. It however failed to receive any official communication from the 2nd Respondent on the progress of the

procurement proceedings or on termination of the subject tender as envisioned in section 63(4) of the Act hence considered the subject tender as still active.

The Applicant avers that out of abundant caution, it sought information vide letter dated 20th December 2022 from the 1st Respondent on progress of the procurement proceedings and that on the same date, the Head of Procurement of the 1st Respondent responded and informed it that following a review application appealing the subject tender wherein the Board issued a decision on 28th November 2022, only three(3) days were left for evaluation, prompting the 1st Respondent to cancel the subject tender and re-advertise in due process. It is the Applicant's case that the letter from the Head of Procurement of the 1st Respondent refers to Tender No. KCA/S/001/2022-2023 which was a distinct and separate procurement matter distinguishable from the subject tender and as such the 1st Respondent was not supposed to extend the order relating to Tender No. KCA/S/001/2022-2023 to the subject tender.

The Applicant further avers that the purported cancellation by the Head of Procurement and not by the 2nd Respondent violates section 63 of the Act and presents a serious procedural and substantive error as the purported termination does not fall within any of the set grounds for termination envisioned in section 63 of the Act.

The Applicant avers that it has no information pertaining to any tender review in the subject tender, and is not seized of any justifiable reasons for suspension/cancellation/termination of the procurement proceedings. The Applicant further avers that there is sufficient time to process the subject tender to conclusion noting that the tender validity period as per Information to Tenderers (hereinafter referred to as "ITT") 21.1 was ninety (90) days.

The Applicant avers that the 1st Respondent has purported to re-advertise the subject tender as Tender No. KCA/S/004/2022-2023 in violation of Article 227 of the Constitution.

Consequently, the Applicant prays that the Board grants the orders sought in its Request for Review.

RESPONDENTS' CASE

In response, the Respondents contend that the need for provision of structured cabling and wireless network to Block C of the 1st Respondent was raised by the 1st Respondent's officer in charge of ICT through a requisition dated 21st July 2022 in compliance with section 73 of the Act and Regulation 71 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020").

The Respondent contend that an appeal was lodged with the Board relating to the subject tender being Application No. 94 of 2022 and that the Board issued its decision in the said application on 28th November 2022. The Respondent further contends that on receiving the Notification of Appeal in Application 94 of 2022, it was instructed to suspend all the procurement proceedings until a verdict was reached.

It is the Respondents' case that the Board's decision having been issued and communicated on 28th November 2022 left it with only three (3) days to evaluate the subject tender. Consequently, the 1st Respondent took the step of re-advertising the subject tender which it believes prompted the Applicant to file the instant Request for Review.

BOARD'S DECISION

The Board has considered each of the parties' cases, documents, pleadings, together with confidential documents submitted to the Board by the 2nd Respondent pursuant to Section 67(3)(e) of the Act and finds that the following issues call for determination.

- 1. Whether the procurement proceedings of the subject tender were terminated in accordance with Section 63 of the Act read with Article 227(1) of the Constitution;**
- 2. What orders should the Board grant in the circumstances?**

Whether the procurement proceedings of the subject tender were terminated in accordance with Section 63 of the Act read with Article 227(1) of the Constitution;

The Board notes that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

"227. Procurement of public goods and services

- (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.***

- (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –***
 - a)***
 - b)***
 - c) and***
 - d)"***

Further to the above provision, the national values and principles of governance under Article 10 of the Constitution apply to State organs and

public entities contracting for goods and services. Article 10 provides as follows:

"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a)

(b)

(c) good governance, integrity, transparency and accountability" [Emphasis ours].

Efficient good governance in public procurement proceedings provides tenderers with an assurance that public procurement and asset disposal processes are operating effectively and efficiently. Such processes are also underpinned by broader principles such as the rule of law, integrity, transparency and accountability amongst others.

The Applicant in the instant Request for Review is aggrieved by the communication addressed and sent to it by Mr. Edward Ondieki, Principal Supply Chain Management Officer of the 1st Respondent in a letter dated 20th December 2022, stating as follows:

".....

RE: COMMUNICATION ON PROVISION OF STRUCTURED CABLING AND WIRELESS NETWORK INSTALLATION SERVICES AT KISII COUNTY ASSEMBLY-BLOCK C:TENDER NO.KCA/S/002/2022-2023

The above cited tender was appealed at the Public Procurement Administrative Review Board on 7/11/2022. It was initially advertised on 22/8/2022 and one M/S Eco Oryx Solutions Limited who was the sole applicant failed to pass the preliminary evaluation process. The company appealed to PPARB on 7/11/2022 and subsequently the Board gave notice of appeal and pursuant to section 168 of the PPADA, 2015, suspended the procurement proceedings until a verdict was reached. The assembly complied with this directive and stopped any further processing of the said tender.

The verdict of the review was reached on 28/11/2022(refer to Notice no. 94/2022), hence a clearance to process the tender. With only three (3) left for evaluation to take place,

the assembly cancelled the tender and re-advertisement is in due process.

We want to thank you for showing interest to work with the county assembly of Kisii and encourage you to re-submit your tender when it will come up for re-advertisement.

.....”

The Board notes that the Applicant challenges the purported termination of the subject tender and argues that the subject tender is still active and there is sufficient time to evaluate tenders before the tender validity period of ninety (90) days’ lapses.

The Board notes that the Tender Document submitted as part of the confidential documents by the Respondent notes that ITT 21.1 of Section II-Tender Data Sheet at page 21 of the Tender Document provides: ***“The Tender validity period shall be 90 days from tender opening days.”*** In essence, the subject tender having been opened on 3rd November 2022 was due to lapse on 31st January 2023.

The Board having studied the Applicant’s pleadings and Bundle of Documents filed together with the Request for Review on 13th January 2023 notes that the 1st Respondent on 10th January 2023 invited interested eligible tenderers to submit tenders in response to Tender No.

KCA/S/004/2022-2023 for Structured Cabling and Wireless Network Installation at Kisii County Assembly, Block C as follows:

".....DATE:10/01/2023

INVITATION FOR TENDER

The Kisii County Assembly hereby invites interested, registered and eligible service providers to submit bids for the following tender.

TENDER NO	DESCRIPTI ON OF SERVICE	NEGOTIATION NUMBER	CLOSING DATE	CLOSI NG TIME
KCA/S/004/2 022-2023	STRUCTUR ED CABLING AND WIRELESS NETWORK INSTALLAT ION AT KISII COUNTY ASSEMBLY, BLOCK C	KCA/QT/116182 3/22-23	17/01/2 023	11:00 A.M

Interested and eligible candidates may obtain copies of the tender documents from our website www.kisiiassembly.go.ke

Tenders are to be submitted via IFMIS

AG CLERK, JACOB ONKEO

KISII COUNTY ASSEMBLY

P.O.BOX 4552-40200"

From the foregoing, the Applicant submits that the Respondents unlawfully terminated the procurement proceedings and failed to issue sufficient reasons for terminating the subject tender pursuant to section 63 of the Act.

Termination of procurement proceedings is governed by Section 63 of the Act and the Board notes that where the procurement proceedings have been terminated in accordance with Section 63 of the Act, the Board is divested of its jurisdiction by dint of Section 167(4)(b) of the Act. The provisions of Section 167(4)(b) of the Act are conditional on such termination being in accordance with Section 63 of the Act.

Section 63 of the Act provides 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."

Section 63 (1) of the Act stipulates that termination of procurement proceedings is only done prior to award of a tender and when any of the pre-conditions listed in sub-section (a) to (i) exist. Additionally, Section 63(2), (3), and (4) outlines the procedure to be followed by a procuring entity when terminating a tender. It is trite law that for the termination of procurement proceedings to pass the legal muster, a procuring entity must demonstrate compliance with both the substantive and procedural requirements under Section 63 of the Act.

In essence, Section 63 of the Act is instructive on termination of procurement proceedings being undertaken by an Accounting Officer of a procuring entity at any time before notification of award is made and such termination must only be effected if any of the pre-conditions enumerated in Section 63(1) (a) to (i) of the Act are present. This is the substantive statutory pre-condition that must be satisfied before a termination of procurement proceedings is deemed lawful. Further, following such termination, an accounting officer is required to give the Authority a

written report on the termination with reasons and notify all tenderers, in writing, of the termination with reasons within fourteen (14) days of termination. These are the procedural statutory pre-conditions that must be satisfied before a termination of procurement proceedings is deemed lawful.

It is therefore important for the Board to determine the legality, or lack thereof, of the Respondents' decision to terminate the procurement proceedings of the subject tender which then will inform the legality or lack thereof of the Respondent's decision to re-advertise the subject tender.

We note that the Respondents failed to submit all the requisite confidential documents relating to the subject tender to enable the Board have a clear understanding of the subject tender's procurement proceedings. Nevertheless, the Board has carefully studied parties' filed pleadings and the confidential documents submitted by the Respondent pursuant to section 67 of the Act and notes that the Respondents in their Response to the Request for Review admit that the 1st Respondent took a step to re-advertise the subject tender following receipt of this Board's decision in PPARB Application 94 of 2022 on 28th November 2022 since it had only three (3) days left to carry out evaluation of the subject tender.

The Board observes that the referenced PPARB Application 94 of 2022 was a review against the decision of the Accounting Officer, Kisii County Assembly in relation to Tender No. KCA/S/001/2022-2023 for Structured

Cabling and Wireless Network Installation at Kisii County Assembly, Block C while the instant request for Review is for review of the decision of the Accounting Officer, Kisii County Assembly in relation to Tender No. KCA/S/002/2022-2023 for Structured Cabling and Wireless Network Installation at Kisii County Assembly, Block C. Therefore, the decision of the Board in PPARB Application 94 of 2022 was only in regard to Tender No. KCA/S/001/2022-2023 and the Board rendered its decision on 28th November 2022 and ordered as follows:

"1. The Request for Review filed on 7th November 2022 by the Applicant with respect to Tender No. KCA/S/001/2022-2023 Structured Cabling and Wireless Network Installation at Kisii County Assembly, Block C be and is hereby dismissed.

2. Further to Order No. 1 above, the Respondents are at liberty to terminate the procurement process in accordance with Section 63 of the Act taking into consideration the Board's findings in this Request for Review.

3. Given the findings herein, each party shall bear its own costs in the Request for Review."

Order No. 2 above in essence required the Respondents to consider the Board's deliberations on provisions of section 63 of the Act on termination of procurement proceedings and obliged the Respondents to adhere to both the substantive statutory pre-condition and the procedural statutory

pre-condition when terminating the procurement process in Tender No. KCA/S/001/2022-2023.

In view of the foregoing, the Respondents ought to have proceeded to terminate Tender No. KCA/S/001/2022-2023 in accordance with section 63 of the Act and Tender No. KCA/S/002/2022-2023 ought to have proceeded to fruition.

The Board notes that the reason issued by the 1st Respondent in justification of termination of the subject tender does not fall under any of the pre-conditions stipulated under section 63 (1)(a) to(i) of the Act. As such, the Respondents have not fulfilled the substantive requirements for the termination of procurement proceedings as required by section 63 of the Act.

The Board further notes that the Respondents have not adduced any evidence in this Request for Review to prove that the 2nd Respondent issued a written report to the Director General of the Public Procurement Regulatory Authority on the termination of the subject tender within fourteen (14) days outlining the reasons why the subject tender was terminated. Neither have the Respondents adduced any evidence to prove that they notified, in writing and within fourteen (14) days, all the four (4) tenderers who had submitted their tenders of termination of the subject tender and reasons for the termination. As such, the Respondents have not

fulfilled the procedural statutory pre-conditions for the termination of procurement proceedings as required by section 63 of the Act.

This Board in **PPARB Application 94 of 2022** referred to the holding in **Republic v Public Procurement Administrative Review Board & another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR**, where the court held that:

"In a nutshell therefore, the procuring entity is under a duty to place sufficient reasons and evidence 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 Public Procurement and Asset Disposal Act, 2015."
[Emphasis ours]

Having found that the Respondents did not satisfy both the substantive and procedural statutory pre-conditions of termination of procurement proceedings outlined in section 63 of the Act, the Board finds and holds that the purported termination of procurement proceedings of the subject tender and re-advertisement of the subject tender on 10th January 2023 as Tender No. KCA/S/004/2022-2023 for Structured Cabling and Wireless

Network Installation at Kisii County Assembly, Block C by the 1st Respondent was unlawful and illegal.

Accordingly, we find that the termination of the subject tender's procurement proceedings by the 1st Respondent was not effected in accordance with section 63 of the Act and the same is therefore null and void.

What orders should the Board grant in the circumstances?

The Board has found that the decision of the 2nd Respondent to terminate the subject tender's procurement proceedings is null and void. We find it just to nullify and set aside, which we hereby do, the decision of the 1st Respondent to terminate the procurement proceedings of the subject tender together with the Invitation for Tender dated 10th January 2023 advertised by the 1st Respondent which was a consequence of the nullified termination.

We have established that the subject tender's validity period is due to lapse on 31st January 2023. Section 173 of the Act donates wide discretionary powers to the Board and being guided by the holding of 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 [2022] KECA 982 eKLR** which referred to the decision of **Onyiego, J. in Republic v Public Procurement Administrative Review Board; Rhombus**

Construction Company Limited (Interested Party) Ex Parte Kenya Ports Authority & Another [2021] in addressing the power of the Board to direct a procuring entity to extend the validity period of the tender, the court held 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 (PPDA) 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 (sic). 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...*
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 [for] 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...*
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.”[Emphasis ours]

The import of the aforementioned Court of Appeal case is that the Board has the powers to extend the tender validity period to avert situations where an accounting officer of a procuring entity misuses the powers under section 88 of the Act to frustrate tenderers or to frustrate the procurement process. As such, to enable the Respondents comply with orders of the Board in the instant Request for Review, we find that there is need for extension of the subject tender’s validity period.

Having carefully perused the Tender Document submitted to the Board pursuant to section 67(3)(e) of the Act, we note that the subject tender’s validity period was due to lapse on 31st January 2023. The instant Request for Review was filed on 13th January 2023 which was nineteen (19) days before the lapse of the subject tender’s validity period. Upon filing the instant Request for Review, the procurement proceedings of the subject tender stood suspended by virtue of section 168 of the Act which reads:

“168. Notification of review and suspension of proceedings

Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting

officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed.”

The Board’s Acting Secretary issued via email a Notification of Appeal of the subject tender dated 13th January 2023 to the Respondents which reads in part as follows:

“.....

You are hereby notified that on the 13th January 2023, a Notice of Motion was filed with the Public Procurement Administrative Review Board in respect of the above-mentioned tender.

Under Section 168 of the Public Procurement and Asset Disposal Act 2015, the procurement proceedings are hereby suspended and no contract shall be signed between the Procuring Entity and the tenderer awarded the contract unless the Appeal has been finalized.....”

The import of the above Notification of Appeal dated 13th January 2023 is that procurement proceedings in the subject tender were immediately suspended on filing of the instant Request for Review by the Applicant and the tender validity period effectively stopped running on 13th January 2023. The Board is guided by the holding of Justice Nyamweya in **HC Judicial**

Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR where the Learned Judge held as follows:

"..... the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound.

53. Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point “[Emphasis ours]

Consequently, the procurement proceedings in the subject tender will resume at the point they were once the Board renders its decision in the instant Request for Review. In light of the foregoing, we hereby extend the subject tender’s validity period by a further thirty (30) days from 3rd February 2023. Effectively, the 2nd Respondent is hereby directed to issue written notifications to tenderers in the subject tender notifying them of extension of the subject tender’s validity period for a further thirty (30) days from 3rd February 2023.

Having carefully perused the confidential documents submitted to the Board by the Respondents pursuant to section 67(3)(e) of the Act, the Board notes that opening of tenders was done on 3rd November 2023. However, the Respondents did not submit an Evaluation Report as part of the confidential documents submitted to the Board.

The Board has herein before established that Article 227 of the Constitution requires procurement of goods and services to be undertaken in a system that is fair, equitable, transparent, competitive and cost-effective and provides for a legislation that governs public procurement and asset disposal framework. The legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

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

- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this***

Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."

Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity.

Once the subject tender was opened, submitted tenders were required to be evaluated by an ad hoc evaluation committee appointed pursuant to section 46 of the Act by the 2nd Respondent. Failure to submit an evaluation report by the Respondents herein leadsthe Board to infer that evaluation of submitted tenders in the subject tender if at all conducted, was not concluded within the maximum statutory period of thirty (30) days provided under section 80 (6) of the Act which reads:

"(6) The evaluation shall be carried out within a maximum period of thirty days."

The Board in **PPARB Application No. 62 of 2017, Parity Performance & Compliance Limited v. Ministry of Devolution and Planning, State Department of Devolution** held that:

"The Board has considered the decision of the High Court in Republic v. Public Procurement Administrative Review Board and Kenya Revenue Authority (2008) eKLR which is binding on it and finds based on the above decision that failure to evaluate a tender and make an award within the period provided in statute is fatal"

We note that the 2nd Respondent failed to comply with the timelines for evaluation stipulated in section 80(6) of the Act offending the provisions of section 176 (1)(c) of the Act which makes it an offence to delay evaluation of tenders. Section 176(1)(c) of the Act provides:

"(1) A person shall not-

(a)

(b)

(c) delay without justifiable cause the opening or evaluation of tenders, the awarding of contract beyond the prescribed period or payment of contractors beyond contractual period and contractual performance obligations"

In essence, a procuring entity should take reasonable steps to ensure that an evaluation committee is available to commence evaluation immediately after tender opening in order to meet the maximum period of thirty (30) days provided under section 80 (6) of the Act. In view of the foregoing, we deem it fit and just to order the 2nd Respondent to ensure that the evaluation of tenders in the subject tender and the procurement proceedings of the subject tender proceed to its logical conclusion within fourteen (14) days from the date of this decision.

The upshot of our decision is that the Request for Review dated 12th January 2023 and filed on 13th January 2023 succeeds with respect to the following specific orders:

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 dated 12th January 2023 and filed on 13th January 2023:

- 1. The decision to terminate the procurement proceedings of Tender No. KCA/S/002/2022-2023 for Structured Cabling and Wireless Network Installation at Kisii County Assembly, Block C be and is hereby nullified and set aside.**

- 2. The Invitation for Tender dated 10th January 2023 with respect to Tender No. KCA/S/004/2022-2023 Negotiation Number KCA/QT/1161823/22-23 for Structured Cabling and Wireless Network Installation at Kisii County Assembly, Block C closing on 17th January 2023 be and is hereby cancelled and set aside.**
- 3. The tender validity period of Tender No. KCA/S/002/2022-2023 for Structured Cabling and Wireless Network Installation at Kisii County Assembly, Block C be and is hereby extended for a further thirty (30) days from 31st January 2023.**
- 4. Further to Order No. 3 above, the 2nd Respondent is hereby directed to issue written notifications to tenderers in the subject tender notifying them of extension of the tender validity period of Tender No. KCA/S/002/2022-2023 for Structured Cabling and Wireless Network Installation at Kisii County Assembly, Block C for a further thirty (30) days from 3rd February 2023.**
- 5. The 2nd Respondent is hereby ordered to ensure that the evaluation of tenders in the subject tender and the procurement proceedings of Tender No. KCA/S/002/2022-2023 for Structured Cabling and Wireless Network**

Installation at Kisii County Assembly, Block C proceed to its logical conclusion within fourteen (14) days from the date of this decision taking into consideration the Board's findings herein.

6. Given that the procurement proceedings of the subject tender are not complete, each party shall bear its own costs in the Request for Review

Dated at NAIROBI, this 3rd Day of February, 2023.



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CHAIRPERSON

PPARB



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SECRETARY

PPARB