

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 10/2023 OF 24TH FEBRUARY 2023

**CONSOLIDATED WITH APPLICATION NO. 11 OF 2023 OF 24TH
FEBRUARY 2023**

BETWEEN

RENTCO AFRICA LIMITED..... 1ST APPLICANT

ETRADE COMPANY LIMITED AND

SICHEY AUTOMOTIVE EAST AFRICA LIMITED..... 2ND APPLICANT

AND

THE ACCOUNTING OFFICER,

NATIONAL METROPOLITAN AREA TRANSPORT AUTHORITY

(NaMATA) 1ST RESPONDENT

NATIONAL METROPOLITAN AREA TRANSPORT

AUTHORITY..... 2ND RESPONDENT

SIMBA CORPORATION LIMITED 1ST INTERESTED PARTY

OPI-BUS LIMITED 2ND INTERESTED PARTY

Review against the decision of the Accounting Officer, National Metropolitan Area Transport Authority in relation to Tender No. MoTIH&UD/NaMATA/VHS-

01/2021-2022 for Leasing of BRT Buses for the Road Based Rapid Transport Operations.

BOARD MEMBERS PRESENT

- 1. Mrs. Njeri Onyango - Panel Chairperson
- 2. Mr. Jackson Awele - Member
- 3. Eng. Mbiu Kimani, OGW - Member

IN ATTENDANCE

Mr. Philemon Kiprop - Holding Brief for Acting Board Secretary

PRESENT BY INVITATION IN APPLICATION NO. 10/2023

APPLICANT

RENTCO AFRICA LIMITED

Mr. Limo

- Advocate, Limo & Njoroge Advocates

RESPONDENT

THE ACCOUNTING OFFICER, NATIONAL METROPOLITAN AREA TRANSPORT AUTHORITY (NaMATA) & NATIONAL METROPOLITAN AREA TRANSPORT AUTHORITY

Ms. Connie Ngachu

-Advocate, Nairobi Metropolitan Area Transport Authority

**3RD INTERESTED PARTY SICHEY AUTOMOTIVE EAST AFRICA
LIMITED**

Ms. Kimani -Advocate, Kimani & Komu Advocates

PRESENT BY INVITATION IN APPLICATION NO. 11/2023

**APPLICANT ETRADE COMPANY LIMITED AND
SICHEY AUTOMOTIVE EAST AFRICA
LIMITED**

Ms. Kimani -Advocate, Kimani & Komu Advocates

**RESPONDENT THE ACCOUNTING OFFICER, NATIONAL
METROPOLITAN AREA TRANSPORT
AUTHORITY (NaMATA) & NATIONAL
METROPOLITAN AREA TRANSPORT
AUTHORITY**

Ms. Connie Ngachu -Advocate, Nairobi Metropolitan Area Transport
Authority

Ms. Joan Waithera - Nairobi Metropolitan Area Transport
Authority

BACKGROUND OF THE DECISION

The Tendering Process

Nairobi Metropolitan Area Transport Authority, the Procuring Entity and 2nd Respondent herein, through International Competitive Bidding (ICB) invited sealed tenders from original bus manufacturers, motor vehicle dealers, leasing companies, financial institutions and interested firms in response to Tender No. MoTIH&UD/NaMATA/VHS-01/2021-2022 for Leasing of BRT Buses for the Road Based Rapid Transport Operations (hereinafter referred to as the "subject tender"). The buses were to be considered in 3 options based on propulsion technology as (i) Biodiesel; (ii) Hybrid; (iii) Electric and the options would be for sale or a proposed lease tenure covering a 3, 7, and 12 years' period. The invitation was by way of an advertisement in MyGov Newspaper on 1st February 2022, the Procuring Entity's website www.namata.go.ke and on the Public Procurement Information Portal (PPIP) (www.tenders.go.ke). The subject tender's submission deadline was Tuesday, 22nd March 2022 at 10.00 a.m. Eastern Africa Time.

Addenda

The 2nd respondent issued two addenda namely (a) Addendum No. 1 issued on MyGov Newspaper on 1st March 2022 (hereinafter referred to as "Addendum No. 1") invited tenderers to a tenderer's conference which was held on 8th March 2022 via Zoom platform and the proceedings recorded; and (b) Addendum No. 2 issued on the local dailies, Nation and Standard Newspaper on 3rd March 2022 notifying tenderers that additional information

and responses to clarifications sought could be found in the said addendum available on the Procuring Entity's website www.namata.go.ke.

Submission of Tenders and Tender Opening

According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 22nd March 2022, a total of nine (9) tenderers submitted their tenders. The said nine (9) tenders were opened in the presence of tenderers' representatives who attended the tender opening session and were recorded as having submitted their respective tenders in response to the subject tender within the tender submission deadline as follows:

No.	Name of Tenderer
1.	Simba Corporation Limited
2.	Basigo Limited
3.	Tata Africa Holdings (Kenya) Limited
4.	Tunasco Insaat Anonim Sirketi
5.	Opibus Limited
6.	Quip Bank Limited
7.	Tunasco Insaat Anonim Sirketi
8.	RentCo Africa Ltd
9.	E trade in joint venture with Sichey Automotive East Africa

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the six (6) tenders as captured in an Evaluation Report signed by members of the Evaluation Committee on 4th April 2022 and 22nd April 2022 (hereinafter referred to as the "Evaluation Report") in the following stages:

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

Preliminary Evaluation (Mandatory)

The Evaluation Committee determined the substantial responsiveness of tenders using the evaluation criteria laid out in Clause 2.20.1 of the Appendix To Instructions To Tenderers of Section II- Instruction To Tenderers at page 20 to 21 of the blank tender document issued to prospective tenderers by the 2nd Respondent (hereinafter referred to as "the Tender Document").

At the end of evaluation, two (2) tenders were determined non-responsive while seven (7) tenders were determined responsive and proceeded to Technical Evaluation.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out in Clause 2.22.1 b) Technical Evaluation of the Appendix To Instructions To Tenderers of Section II- Instruction To Tenderers at page 20 to 22 of the Tender Document. Tenders

were required to score a minimum of 80% to be considered for financial proposal opening.

At the end of evaluation at this stage, two (2) tenders were determined non-responsive while four (4) tenders, having attained the minimum technical score were determined responsive and the Evaluation Committee recommended that their financial proposals be opened.

Professional Opinion on Technical Evaluation of the subject tender

In a Professional Opinion dated 4th April 2022 (hereinafter referred to as the "Professional Opinion"), the Acting Head/ Supply Chain Management Unit, Mr. John Maina, reviewed the manner in which the Preliminary Evaluation and Technical Evaluation was undertaken and concurred with the recommendations of the Evaluation Committee with respect to opening the financial proposals of tenderers determined as responsive at the Technical Evaluation stage.

Thereafter, Eng. Francis Gitau, the Acting Director General of the 2nd Respondent and the 1st Respondent herein, approved the Professional Opinion.

Financial Proposals Opening

On 6th April 2022, the Evaluation Committee opened the financial tenders of tenderers who had scored above the 80% pass mark at the Technical

Evaluation stage in the presence of tenderer's representatives invited to attend the opening of financial proposals.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 2.22.1 (c) Financial Evaluation of the Appendix To Instructions To Tenderers of Section II- Instruction To Tenderers at page 22 of the Tender Document.

The Evaluation Committee conducted comparison of prices of the tenderers whose tenders qualified at the Technical Evaluation stage and subsequently ranked the tenderers taking into account the following critical categories:

(a) Price; (b) Availability of buses – Vehicle Deliveries in line with Schedule of Deliveries following the clarifications issued to tenderers during the tenderer's conference emphasizing on immediate delivery of buses & their quality; (c) Lease period i.e. 3,7, & 12 years; (d) Manufacturing process i.e. FBU, SKD or CKD; (e) Propulsion technology i.e. Electric or Biodiesel and; (f) Current global supply chain challenges as can be discerned from page 45 to 53 of the Evaluation Report submitted to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to section 67(3)(e) of the Public Procurement Asset and Disposal Act, 2015 (hereinafter referred to as the 'Act').

Upon completion of financial evaluation, the Evaluation Committee found it untenable to make a recommendation based solely on the lowest evaluated tenderer considering the critical parameters taken into account and

submitted the rankings of the various categories for award consideration as can be discerned at pages 49 to 53 of the Evaluation Report which were to be subjected to a Post-Qualification evaluation.

Due Diligence

The Evaluation Committee was required to verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender for the various categories by using the criteria set out under Clause 2.24 c) Post-Qualification Evaluation of the Appendix To Instructions To Tenderers of Section II- Instruction To Tenderers at page 22 of the Tender Document.

An affirmative determination would be a prerequisite for award of the contract to the tenderer while a negative determination would result in rejection of the tenderer's tender in which event the 2nd Respondent would proceed to the next lowest evaluated tender to make a similar determination of that tenderer's capabilities to perform satisfactorily.

The scope of due diligence can be discerned from page 56 to 60 of the Post Qualification Report forming part of the 2nd Respondent's Evaluation Report furnished to the Board by the Respondents under confidential file pursuant to Section 67(3)(e) of the Act.

Evaluation Committee's Recommendation

The Evaluation Committee found it untenable to make a recommendation based solely on the lowest evaluated tenderer and submitted rankings of the various categories for award consideration.

Professional Opinion B

In a Professional Opinion B dated 11th May 2022 (hereinafter referred to as the "Professional Opinion B"), the Acting Head/ Supply Chain Management Unit, Mr. John Maina, reviewed the manner in which the Preliminary Evaluation and Technical Evaluation was undertaken and concurred with the recommendations of the Evaluation Committee which considered various combinations arising from the subject tender making it impractical to make a one off recommendation. Mr. John Maina opined that the award of the subject tender be based in the format of a Framework Contract to all technically qualified tenderers since this would ensure that the Government meets the objective of value for money especially on infrastructure that had been put in place in addition to pertinent issues listed at page 9 and 10 of the Professional Opinion B.

Thereafter, Eng. Francis Gitau, the Acting Director General of the 2nd Respondent and the 1st Respondent herein, approved the Professional Opinion B on 11th May 2022.

Notification to Tenderers

Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award and Regret Letters dated 16th May 2022 signed by the 1st Respondent.

CONSOLIDATION OF REQUEST FOR REVIEW NO. 10/2023 OF 24th FEBRUARY 2023 AND REQUEST FOR REVIEW NO. 11/2023 OF 24TH FEBRUARY 2023

The Board observes that the tender in issue in Request for Review Applications No. 10/2023 of 24th February 2023 and Request for Review No. 11/2023 of 24th February 2023 is the same subject tender.

Regulation 215 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") provide as follows:

Where two or more requests for review are instituted arising from the same tender or procurement proceedings, the Review Board may consolidate the requests and hear them as if they were one request for review.

The two request for review applications are instituted with respect to the subject tender with the Respondents being the same and the grounds for review around the same subject tender. The Board is satisfied the two

request for review applications meet the requirement for consolidation under Regulation 215 of Regulations 2020.

Accordingly, the Board hereby consolidates Request for Review Application No. 10/2023 of 24th February 2023 and Request for Review No. 11/2023 of 24th February 2023 and proceeds to determine them as one Request for Review Application with the following parties:

RENTCO AFRICA LIMITED..... 1ST APPLICANT

ETRADE COMPANY LIMITED AND

SICHEY AUTOMOTIVE EAST AFRICA LIMITED..... 2ND APPLICANT

AND

THE ACCOUNTING OFFICER,

NATIONAL METROPOLITAN AREA TRANSPORT AUTHORITY

(NaMATA) 1ST RESPONDENT

NATIONAL METROPOLITAN AREA TRANSPORT

AUTHORITY..... 2ND RESPONDENT

SIMBA CORPORATION LIMITED 1ST INTERESTED PARTY

OPI-BUS LIMITED 2ND INTERESTED PARTY

REQUEST FOR REVIEW NO. 10/2023

On 24th February 2023, the 1st Applicant filed a Request for Review dated 22nd February 2023 together with a Supporting Affidavit sworn on 22nd February 2023 by Robert Kanda Nyasimi, its Group Chief Executive Officer (hereinafter referred to as the '1st Applicant's Request for Review') through the firm of Limo & Njoroge Advocates seeking the following orders from the Board in verbatim:

- a) The Request for Review be allowed.***

- b) The Board be pleased to extend the tender validity period for TENDER NO. MoTIH&UD/NaMATA/VHS-01/2021-2022 for a period of one hundred and eighty (180) days from 27th February 2023.***

- c) The Board be pleased to direct the Accounting Officer of the National Metropolitan Area Transport Authority (NaMATA), the respondent, to sign the contract with the applicant for TENDER NO. MoTIH&UD/NaMATA/VHS-01/2021-2022 within the extended tender validity period.***

- d) Costs of the proceedings be provided for.***

e) Any other relief that this Honourable Board will deem fit to grant.

In a Notification of Appeal and a letter dated 24th February 2023, Mr. James Kilaka, the Acting Board Secretary of 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 Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 24th February 2023.

On 3rd March 2023, in response to the Request for Review, the Respondents, through Connie Ngachu Advocate filed a Respondent's Replying Affidavit sworn by Eng. Francis Gitau on 28th February 2023, together with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.

The Board Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic was issued on 24th March 2020. 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 it 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.

However, vide a Hearing Notice dated 7th March 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the 1st Applicant's Request for Review as amended slated for 9th March 2023 at 12:00 noon, through the link availed in the said Hearing Notice.

On 8th March 2023 the Applicant filed written submissions dated 8th March 2023 together with a Case Digest dated 8th March 2023 and the listed Authorities.

REQUEST FOR REVIEW NO. 11/2023

On 24th February 2023, the 2nd Applicant filed a Request for Review dated 24th February 2023 together with a Supporting Affidavit sworn on 24th February 2023 by Vincent Komu Kibiro, its Managing Director and proposed joint venture leader (hereinafter referred to as the 2nd Applicant's Request

for Review') through the firm of Kimani & Komu Advocates seeking the following orders from the Board in verbatim:

- a) A declaration that the Respondents breached the provisions of Article 227(1) of the Constitution and Section 135(3) of the Public Procurement and Asset Disposal Act;**
- b) The Respondents be compelled to sign the contract with the Applicant in line with the Notification of Award with respect of TENDER NO. MoTIH&UD/NaMATA/VHS-01/2021-2022; Leasing of buses for the Bus Rapid Transit (BRT) operations.**
- c) The tender validity period for the tender TENDER NO. MoTIH&UD/NaMATA/VHS-01/2021-2022; Leasing of buses for the Bus Rapid Transit (BRT) operations be extended for a further 180 days to enable the Respondents to finalize the procurement process.**
- d) The Respondents be compelled to pay the costs of this review to the Applicant.**
- e) The Honourable Board be pleased 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 a letter dated 24th February 2023, Mr. James Kilaka, the Acting Board Secretary of 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 Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 24th February 2023.

On 3rd March 2023, in response to the Request for Review, the Respondents, through Connie Ngachu Advocate filed a Respondent's Replying Affidavit sworn by Eng. Francis Gitau on 28th February 2023, together with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.

The Board Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic was issued on 24th March 2020. 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 it 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.

However, vide a Hearing Notice dated 7th March 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the 2nd Applicant's Request for Review slated for 9th March 2023 at 12:00 noon, through the link availed in the said Hearing Notice.

On 8th March 2023 the Applicant filed written submissions dated 7th March 2023 together with a List of Authorities dated 7th March 2023.

PARTIES' SUBMISSIONS IN REQUEST FOR REVIEW NO. 10/2023

1st Applicant's Submissions

During the online hearing, Counsel for the Applicant, Mr. Limo relied on the 1st Applicant's Request for Review and Supporting Affidavit sworn on 22nd February 2023 by Robert Kanda Nyasimi, Written Submissions dated 8th March 2023 and Applicant's Case Digest dated 8th March 2023 and Bundle of Authorities that were all filed before the Board and prayed for the orders to be granted as prayed.

Mr. Munene submitted that the 1st Applicant's Request for Review sought to have the Board extend the tender validity period of the subject tender for a

further 180 days to enable parties sign the procurement contract pursuant to section 135 of the Act.

Mr. Limo submitted that the 1st Applicant's Request for Review application had been filed within time since it was filed on 24th February 2023 yet the validity period was due to expire on 27th February 2023. He further submitted that the reason for delay in signing the procurement contract was that the Respondent needed clearance from the Attorney General before signing the contract since it exceeded Kenya Shillings 5 Billion which evidence was annexed in the Request for Review application.

Mr. Limo argued that great prejudice would be faced if the tender validity period was not extended and prayed for the Board to order the contract to be signed within the further 180 days per the provisions of the Tender Document. Mr. Limo submitted that the Board is clothed with power to extend the tender validity period per section 173 of the Act and further submitted that section 134 of the Act provided for approval of the Attorney General before contracts exceeding Kshs. 5 Billion were signed.

Respondents' submissions

Counsel for the Respondents, Ms. Ngachu, relied on the 1st and 2nd Respondents Replying Affidavit sworn on 28th February 2023 by Eng. Francis Gitau and filed before the Board.

Ms. Ngachu submitted that the Respondents were not aggrieved by the orders sought by the 1st Applicant so far as the Board has jurisdiction to extend the tender validity period.

In regard to the order sought to compel the Respondents to sign the contract in the subject tender, Ms. Ngachu prayed for the Board to exercise restraint because the form of tender received by tenderers were above Kshs. 5 Billion and it is a legal requirement for the Attorney General to issue clearance before signing such contract above Kshs. 5 Billion.

Upon enquiry by the Board on why the Respondents were of the view that the contract in the subject tender would amount to Kshs. 5 Billion yet from the Notification of Intention to Award, orders were to be issued on a need basis and the value of contract would vary from time to time, Ms. Ngachu submitted that tenderers were to tender for either 3, 7, or 12 lease period and the forms of tenders received from tenderers put together were above Kshs. 5 Billion hence the need to go through the Attorney General and National Treasury to clear such contracts and that was what guided the Respondent in seeking clearance from the Attorney General.

Ms. Ngachu further submitted that even if the orders were to be issued from time to time, Government practice requires budgeting for the whole contract price, failure to which one cannot proceed and noting that majority tenderers tendered for the 7-year period, the total lease cost would be above Kshs. 5 Billion making the contract price to be above Kshs. 5 Billion hence need for

clearance from the Attorney General and National Treasury as they were considering the entire figure entirely and also the need to be cautious and to err on the side of caution rather than have audit queries at a later date.

2nd Applicant's/Interested Party's Submissions

Counsel for the Interested Party, Ms. Kimani supported the submissions by the 1st Applicant and added that her client was in the same predicament and had equally filed Request for Review Application No. 11 of 2023.

1st Applicant's Rejoinder

In a rejoinder, Mr. Limo submitted that a lot of time had been expended since the subject tender was awarded and it would not be too much trouble for the Board to issue orders sought. He further submitted that the Respondents had not given any good reason as to why the Attorney General hadn't given a greenlight to proceed and sign the contract in the subject tender hence the order to compel to sign the said contract was justifiable.

Upon enquiry by the Board on why the prayer for 180 days, Mr. Limo submitted that the Applicant was of the view that 180 days would be sufficient time though the Board could give any other period.

PARTIES' SUBMISSIONS IN REQUEST FOR REVIEW NO. 11/2023

2nd Applicant's Submissions

Counsel for the 2nd Applicant, Ms. Kimani relied on the 2nd Applicant's Request for Review and Supporting Affidavit sworn on 24th February 2023 by Vincent Komu Kibiro, Written Submissions dated 7th March 2023 and List and Bundle of Authorities dated 7^h March 2023 that were all filed before the Board and prayed for the orders to be granted as prayed.

Ms. Kimani submitted that they associated with Mr. Limo's submissions in Request for Review No. 10/2023 and prayed for extension of the tender validity period by 180 days.

Ms. Kimani submitted that the Board has power to extend the validity period pursuant to section 173(b) of the Act and referred the Board to various authorities quoted in its written submissions in support of her argument.

Respondents' Submissions

Counsel for the Respondents, Ms. Ngachu submitted that the Respondent was not aggrieved by the orders sought in so long as the Board has jurisdiction to extend the tender validity period.

Upon enquiry by the Board on the justification for granting 180 days, Ms. Ngachu submitted that she was not aware why the Applicant sought 180 days but was certain that within that period, the Respondents would have got a response from the Attorney General.

2nd Applicant's Rejoinder

In a rejoinder, Counsel for the Applicant, Ms. Kimani submitted that the justification for seeking further 180 days was because the 2nd Applicant believed that would be ample time for finalization of the procurement process and would allow the Respondents get the consent needed from the Attorney General.

At the conclusion of the online hearing in Request for Review No. 10/2023 and Request for Review No. 11/2023, the Board informed parties that the Requests for Review having been filed on 24th February 2023 were due to expire on 16th March 2023 and that the Board would communicate its decision on or before 16th March 2023 to all parties to the instant Requests for Review via email.

BOARD'S DECISION

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

Whether the Board should extend the subject tender's validity period as prayed in Request for Review No. 10/2023 and Request for Review No. 11/2023.

Whether the Board should extend the subject tender's validity period as prayed in Request for Review No. 10/2023 and Request for Review No. 11/2023.

The 1st and 2nd Applicants seek, *inter alia*, for an order of extension of the tender validity period of the subject tender for a period of one hundred and eighty days from 27th February 2023. The 1st and 2nd Applicants confirm that they were successful tenderers in the subject tender having been issued by the Respondents with Notifications of Intention to Award the subject tender dated 16th May 2022.

The 1st and 2nd Applicants state that prior to the lapse of the subject tender's validity period, the 1st Respondent extended the tender validity period by a further thirty (30) days pursuant to Section 88 of the Act to allow for finalization of the procurement process. However, despite the extension, the tender validity period of the subject tender was set to expire on 27th February 2023 before the contract in the subject tender was signed and the reason for delay in signing the contract has been attributed to the 2nd Respondent's need to comply with section 134(2) of the Act which requires an accounting

officer to seek clearance from the Attorney General before signing any contract exceeding Kenya Shillings Five (5) Billion.

The 1st and 2nd Applicants additionally seek for an order directing/compelling the Respondents to sign the contract in the subject tender with them within the extended tender validity period.

We note that the Respondents are not opposed to extension of the tender validity period by the Board as requested by the Applicants. However, Counsel for the Respondents was opposed to the granting of an order compelling/directing the 1st Respondent to sign the contract in the subject tender with the Applicants within the extended validity period. The Respondents at paragraph 5 of the 1st and 2nd Respondent's Replying Affidavit sworn by Eng. Francis Gitau deponed that the form of tenders from the various tenderers would require a lease payment cost that would be above Kenya Shillings Five (5) billion and the consequent project contract would require clearance from the Office of the Attorney General as per section 134(2) of the Act. Further at paragraph 6, the Respondents depone that the 2nd Respondent, through the office of the Principal Secretary Transport and in compliance with section 134(2) of the Act, forwarded a copy of the project contract to the Office of the Attorney General seeking clearance vide ref. no. NaMATA/C/ADM/2VOL.IV dated 17th November 2022.

The gist of the 1st and 2nd Applicants' Request for Review is on extension of the tender validity period for a further period of 180 days for the finalization of the procurement process in the subject tender.

Section 88 of the Act provides for extension of tender validity period and reads:

"88. Extension of tender validity period

- (1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.***
- (2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.***
- (3) An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.***
- (4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1).***

In essence, the Accounting Officer of a Procuring Entity (a) may extend the tender validity period before expiry of such period;(b) give a written notice to tenderers of the extension of the tender validity period; (c) is restricted

to extending the tender validity period for not more than thirty (30) days; and (d) is restricted to only extending the tender validity period once.

Turning to the instant Requests for Review, the subject tender had a tender validity period of 280 days which was due to expire on 28th January, 2023. The 1st Respondent extended the tender validity period for 30 days to 27th January 2023 prior to lapse of the tender validity period pursuant to section 88(1) and (3) of the Act. Noting that the 1st Respondent is restricted to only extend the tender validity period once, it is important for us to determine whether parties have advanced sufficient reasons for the Board to grant the order for extension of the tender validity period of the subject tender.

We note that the delay in signing the contract in the subject tender has been attributed to a delay by the Attorney General in giving clearance for the signing of the said contract in compliance with section 134(2) of the Act. Section 134(2) of the Act provides:

"(2) An accounting officer of a procuring entity shall ensure that all contracts of a value exceeding Kenya shillings five billion are cleared by the Attorney-General before they are signed."

During the hearing of the instant Requests for Review, Counsel for the Respondents, Ms. Connie Ngachu submitted that even if the successful tenderers would sign different contracts, it was apparent that the total lease cost for the individual tenderer would be above Kenya Shillings five (5) Billion

which would have to be budgeted for and required clearance from the Office of the Attorney General and the National Treasury. Ms Ngechu however did not provide the Board with any information as to when the Respondent made effort to seek the said approvals, noting that the Notifications on the outcome of the Evaluation process were issued on 16th May,2022.

Counsel for the 2nd Applicant submitted that the further 180 days sought for extension of the tender validity period was ample time for finalization of the procurement process and would allow the Respondents get the consent needed from the Attorney General.

We are cognizant of provisions of section 173 of the Act which donates wide discretionary powers to the Board and provides:

"173. Powers of Review Board

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

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

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

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

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

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

We are alive to the fact that the Court of Appeal in **Civil Appeal No. 510 of 2022 Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees =Vs= CPF Financial Services Limited & 2 others [2022] KECA 982 eKLR** referred to the decision of **Onyiego, J. in Republic =Vs= 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 and held that:

"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 power 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.

Further, the High Court in **Republic =Vs= Public Procurement Administrative Review Board & another Exparte Rentco Africa Limited Judicial Review Misc. Application No. E100 of 2022** made reference to the above Court of Appeal case at page 11 and 12 and in its

orders, compelled 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 deemed necessary for the procuring entity to conclude the subject tender process.

We note that the tender validity period of the subject tender was supposed to expire on 27th February 2023. Both Requests for Review having been filed on 24th February 2023 were filed three (3) days before expiry of the tender validity period of the subject tender. Additionally, the prayer to extend the tender validity period has not been opposed by the Respondents. Having established that the Board has powers to extend a tender validity period and having considered the reasons leading to lapse of the subject tender's tender validity period, we deem it just and fair to extend the subject tender's validity period for a further one hundred and Eighty (180) days to enable the Respondents conclude the procurement process by signing a contract with the Applicants in line with provisions of section 135 of the Act.

A consideration for extension of time needs to put weigh the benefit that will accrue from the exercise of the power granted to the Board to the wider Public and the parties involved in the bidding. In the words of the Court of Appeal in the above referenced **Rentco** Case the Board is empowered to make "decisions that are deemed to be necessary for the wider attainment of substantive justice."

From the reasons advanced by the Respondent in regard to the need to comply with Section 134 of the Act, this is an apt case for the Board to exercise its powers under section 173 of the Act. In the circumstance, and in light of the provisions of section 88 and 173 of the Act, we are satisfied that it is just for all parties concerned, to exercise the Board's power and in that regard, to extend the subject tender's validity period by a further One Hundred and Eighty (180) days from 27th February 2023 and to direct the 1st Respondent to issue written notifications to tenderers in the subject tender notifying them of extension of the subject tender's validity period for a further One Hundred and Eighty (180) days from 27th February 2023.

Mr Limo asked the Board to issue an order directed at the 1st Respondent to execute the Contract in favour of his client. We decline that invite. It is the Board's considered view that to do so at this stage, before the Respondent exhausts the mechanisms for protection of Public Procurement set out at Section 134(2) of the Act would be injudicious and in haste. The Board is satisfied, that it is prudent to allow the process to find approval before proceeding to its final determination. in any event, it has not been claimed or shown that the 1st Respondent has in any way, deliberately or otherwise declined to sign the Contracts, but for the reasons advanced by the Respondents herein.

Accordingly, the Request for Review No. 10/2023 and Request for Review No. 11/2023 succeeds in terms of the final orders issued hereinafter.

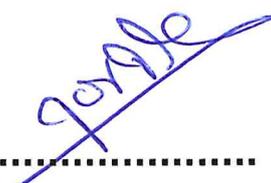
FINAL ORDERS

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 No. 10/2023 dated 24th February 2023 and Request for Review No. 11/2023 dated 24th February 2023:

- 1. The tender validity period of Tender No. MoTIH&UD/NaMATA/VHS-01/2021-2022 for Leasing of BRT Buses for the Road Based Rapid Transport Operations be and is hereby extended for a further period of 180 days from 27th February 2023 to enable the Respondents conclude the subject tender's procurement proceedings taking into account the findings of the Board in this decision.**
- 2. Given that the procurement process for the subject tender is not complete each party shall bear its own costs in the Request for Review No. 10/2023 dated 24th February 2023 and Request for Review NO. 11/2023 dated 24th February 2023.**

Dated at Nairobi this 16th Day of March 2023.


.....
VICE CHAIRPERSON
PPARB


.....
SECRETARY
PPARB