REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 62/2023 OF 30TH AUGUST 2023

BETWEEN

SHEMAX CONSULT LIMITED ..... APPLICANT

AND

THE ACCOUNTING OFFICER,

NATIONAL HEALTH INSURANCE FUND..... RESPONDENT

Review against the decision of the Accounting Officer, National Health Insurance Fund in relation to re-advertisement of Tender No. NHIF/001/2023-2024 for Provision of Insurance Brokerage Services; Tender No. RFP/NHIF/001/2023-2024 for Provision of Consultancy on Actuarial Services; and Tender No. NHIF/002/2023-2024 for Provision for Emergency Road Evacuation Services for National Health Insurance Fund Scheme Members.

BOARD MEMBERS PRESENT

1. Mr. Jackson Awele - Panel Chairperson
2. CPA Isabella Juma - Member
3. Mr. Daniel Langat - Member
4. Dr. Susan Mambo - Member

5. Ms. Alice Oeri - Member

IN ATTENDANCE

Ms. Sarah Ayoo - Secretariat

PRESENT BY INVITATION

APPLICANT - SHEMAX CONSULT LIMITED

Mr. Aluoch - S.K. Kyengo & Company Advocates

RESPONDENT -THE ACCOUNTING OFFICER, NATIONAL HEALTH INSURANCE FUND

Mr. Wachira - Kipkenda & Company Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. National Health Insurance Fund, the Procuring Entity and Respondent herein, invited sealed tenders in response to Tenders No. (RFP) NHIF/002/2022-2023; for Provision for consultancy to provide Actuarial Services; NHIF/032//2022-2023; NHIF/033//2022-2023; NHIF/035/2022-2023;Provision for Supply, Delivery and Implementation of endpoint solution and email security; NHIF/033/2022-2023; Provision for Insurance and Brokerage Services; NHIF/035/2022-2023; Provision for Co-Insurance and facultative insurance services for Group Personal Accident and WIBA Insurance

Services (consortium) for Civil Servants and National Youth Service; NHIF/036/2022-2023; Provision for Co-Insurance and facultative insurance services for Group Life & Last Expense Insurance Services (consortium) for Civil Servants and National Youth Service; NHIF/037/2022-2023; Provision for emergency road evacuation services for National Health Insurance Fund Scheme Members using the open competitive method. The invitation was by way of an advertisement published on the Procuring Entity's website www.nhif.or.ke and the Public Procurement Information Portal www.tenders.go.ke as well as in My Gov Publication of 30th May 2023. The subject tender submission deadline was scheduled for Wednesday, 14th June 2023 at 10:00 a.m.

Addenda

2. The Procuring Entity issued multiple Addenda in response to multiple clarifications that were sought by candidates who wished to participate in the subject tenders.

Termination of the tenders

3. On 9th June 2023 the Director General, Public Procurement Regulatory Authority (hereinafter interchangeably "PPRA) or "the Authority") wrote a letter of even date to the Procuring Entity raising concerns with the tender documents the Procuring Entity was using in the subject tenders, specifically the eligibility requirements and evaluation criteria in the tender documents.

4. Subsequently on 13th June 2023 the Acting CEO of the Procuring Entity wrote a letter to the Director General of the Authority confirming that the Procuring Entity had arrived at a decision to cancel the subject tenders.

Notification to Tenderers

5. Tenderers were notified of the termination of the subject tender vide notification letters dated and signed on 13th May 2023, by the Respondent.

REQUEST FOR REVIEW NO. 43 OF 2023

6. On 16th June 2023, EBM Africa Insurance Agency Company Ltd filed a Request for Review No. 43 of 2023 dated 15th June 2023 together with a Supporting Affidavit in support of the Request for Review sworn on 15th June 2023 by Christopher Simbi Onguolo, against the decision of the Respondent in relation to Tenders No. (RFP) NHIF/002/2022-2023; for Provision for consultancy to provide Actuarial Services; NHIF/032//2022-2023; NHIF/033//2022-2023; NHIF/035/2022-2023;Provision for Supply, Delivery and Implementation of endpoint solution and email security; NHIF/033/2022-2023; Provision for Insurance and Brokerage Services; NHIF/035/2022-2023; Provision for Co-Insurance and facultative insurance services for Group Personal Accident and WIBA Insurance Services (consortium) for Civil Servants and National Youth Service; NHIF/036/2022-2023; Provision for Co-Insurance and facultative insurance services for Group Life & Last Expense Insurance Services (consortium) for Civil Servants and

National Youth Service; NHIF/037/2022-2023; Provision for emergency road evacuation services for National Health Insurance Fund Scheme Members, seeking the following orders from the Board in verbatim:

a) ***An order prohibiting further extension of contracts by service providers in respect of/in relation to services for which Tenders No. rep NHIF/002/20222-2023; NHIF/032/2022-2023; NHIF/033//2022-2023; NHIF/035//2022-2023; NHIF. 036/ NHIF 037//2022-2023 is procured.***

b) ***An order quashing the decision published on 13th June 2023 cancelling Tenders No. rep NHIF/002/20222-2023; NHIF/032/2022-2023; NHIF/033//2022-2023; NHIF/035//2022-2023; NHIF. 036/ NHIF 037//2022-2023***

c) ***An order prohibiting the procuring entity from re-issuing the purportedly cancelled Tender No. rep NHIF/002/20222-2023; NHIF/032/2022-2023; NHIF/033//2022-2023; NHIF/035//2022-2023; NHIF. 036/ NHIF 037//2022-2023***

d) ***An order compelling the procuring Entity to continue with Tender No. rep NHIF/002/20222-2023; NHIF/032/2022-2023; NHIF/033//2022-2023; NHIF/035//2022-2023; NHIF. 036/ NHIF 037//2022-2023 to its conclusion.***

e) ***The Respondent be ordered to pay the costs of and incidental to these proceedings***

f) For any other relief that the Review Board deems fit to grant, having regard to the circumstances of this case in order to give effect to the Board's Order.

6. The Board considered the parties' pleadings, documents, written and oral submissions, the list and bundle of authorities together with the confidential documents submitted by the Respondent to the Board pursuant to Section 67(3) (e) of the Act and found the following issues called for determination in the Request for Review No. 43 of 2023:

    a. Whether Ms. Irene Kashindi is conflicted to hear this Application.
    b. Whether the subject tender was terminated in compliance with section 63 of the Act.
    c. Whether the letter dated 9th June 2023 is a confidential document.
    d. Final orders.

7. On the first issue framed for determination, the Board found that EBM Africa Insurance Agency Company Ltd had failed to prove the allegation of conflict of interest and bias to warrant the recusal of the Board Member from hearing and determining the instant Request for Review.

8. On the second issue framed for determination, the Board found that the Respondent failed to terminate the subject procurement process in accordance with Section 63 of the Public Procurement and Asset

Disposal Act, 2015 (hereinafter referred to as the 'Act') read together with Section 5 and 6 of the Fair Administrative Actions Act, 2015 and Article 10, 47, 73, 227, and 232 of the Constitution given its failure to provide specific and sufficient information to EBM Africa Insurance Agency Company Ltd that would have demonstrated real and tangible evidence of the material governance issue detected in the subject procurement process.

9. On the third issue framed for determination, the Board found that the letter dated 9th June 2023 did not constitute confidential information and was not protected from disclosure under Section 67 of the Act.

10. On 7th July 2023, and in exercise of the powers conferred upon it under the Act, the Board made the following final orders with respect to Request for Review No. 43 of 2023:

a) A declaration be and is hereby issued that the termination of Tenders No. NHIF/002/20222-2023; NHIF/032/2022-2023; NHIF/033//2022-2023; NHIF/035//2022-2023; NHIF. 036/ NHIF 037//2022-2023 was not in accordance with section 63 of the Act and is accordingly null and void.

b) An order quashing the decision published on 13th June 2023 terminating Tenders No. NHIF/002/20222-2023; NHIF/032/2022-2023; NHIF/033//2022-2023;

NHIF/035//2022-2023; NHIF. 036/ NHIF 037//2022-2023.

c) The Respondent is directed to proceed with the procurement process in strict compliance with the Applicable law taking into considerations the findings of the Board made in this decision

d) As the procurement process is still ongoing, each party to bear its costs.

11. No evidence was tendered by any party in Request for Review No. 62 of 2023 demonstrating that a party to the Request for Review No.43 of 2023 sought judicial review by the High Court of the Board's Decision dated 7th July 2023 in Request for Review No. 43 of 2023. In the event, the Board's Decision dated 7th July 2023 in Request for Review No. 43 of 2023 was final and binding to all parties to Request for Review No. 43 of 2023 after the lapse of 14 days from 7th July 2023 in accordance with Section 175(1) of the Act.

12. Vide letter dated 10th July 2023, the Procuring Entity wrote to the Director General PPRA seeking an advisory opinion on implementation of the Board's Decision in Request for Review No. 43 0f 2023 citing that it was unable to implement the Board's orders given that no tender had been received at the point of cancellation of the aforementioned six (6) tenders to proceed with opening and evaluation and that the

initial tender documents could not be used due to the gaps identified by tenderers, the media, and PPRA.

13. Vide letter dated 20th July 2023, the Director General PPRA responded to the Procuring Entity's request for an advisory opinion on implementation of the Board's Decision in Request for Review No. 43 of 2023 and noted that the Board's decision did not obligate the Procuring Entity to proceed with the initial tender process more so after establishing that the initial tender documents could not be used due to the identified gaps and that emphasis was on the need to ensure that the Procuring Entity acted in accordance with the Act. He further observed that from the Board's decision, the Procuring Entity could not proceed to re-tender before procedurally terminating the said tenders in accordance with Section 63 of the Act.

14. The Director General PPRA proceeded to note that in the event that the Procuring Entity elected to terminate the aforementioned tenders, (a) it ought to consider communicating the termination to all tenderers that had sought clarifications and/or acquired the tender documents and forwarded their details to it, (b) it ought to further place a termination notice on the PPIP and on its website, (c) it ought to provide or outline the specific reasons for termination as guided by the Board in its decision in Request for Review No. 43 of 2023, and (d) termination of the aforementioned tenders should be reported to PPRA through PPIP in conformity with the PPRA Circular No. 04/2022 of 1st July 2022 on Mandatory Reporting Requirements by procuring entities.

Notification of Termination of Tenders

15. Vide letters dated 24th July 2023, the Procuring Entity notified various candidates of termination of Tenders No. (RFP) NHIF/002/2022-2023; for Provision for consultancy to provide Actuarial Services; NHIF/032//2022-2023; NHIF/033//2022-2023; NHIF/035/2022-2023;Provision for Supply, Delivery and Implementation of endpoint solution and email security; NHIF/033/2022-2023; Provision for Insurance and Brokerage Services; NHIF/035/2022-2023; Provision for Co-Insurance and facultative insurance services for Group Personal Accident and WIBA Insurance Services (consortium) for Civil Servants and National Youth Service; NHIF/036/2022-2023; Provision for Co-Insurance and facultative insurance services for Group Life & Last Expense Insurance Services (consortium) for Civil Servants and National Youth Service; NHIF/037/2022-2023; Provision for emergency road evacuation services for National Health Insurance Fund Scheme Members (hereinafter referred to as "the six (6) tenders") and further informed tenderers that the said tenders would be re-advertised in due course.

16. The evidence before the board shows that the termination letter dated 24th July 2023 was specifically sent to tenderers. The Applicant did not receive the said letter.

17. On 22nd August 2023, the Procuring Entity advertised three (3) tenders being Tender No. NHIF/001/2023-2024 for Provision of Insurance Brokerage Services; Tender No. RFP/NHIF/001/2023-2024

for Provision of Consultancy on Actuarial Services; and Tender No. NHIF/002/2023-2024 for Provision for Emergency Road Evacuation Services for National Health Insurance Fund Scheme Members.

REQUEST FOR REVIEW NO. 62 OF 2023

18. On 30th August 2023, dissatisfied with the decision of the Procuring Entity to re-advertise Tender No. NHIF/001/2023-2024 for Provision of Insurance Brokerage Services; Tender No. RFP/NHIF/001/2023-2024 for Provision of Consultancy on Actuarial Services; and Tender No. NHIF/002/2023-2024 for Provision for Emergency Road Evacuation Services for National Health Insurance Fund Scheme Members, Shemax Consult Limited, the Applicant herein, filed a Request for Review No. 62 of 2023 dated 29th August 2023 together with an Affidavit in Support sworn on 29th August 2023 by Shadrack Munyambu, its Managing Director (hereinafter referred to as "the instant Request for Review") through S. K. Kyengo & Company Advocates seeking the following orders:

a) An order quashing the procurement process of the re-advertised Tender No. NHIF/RFP/001/2023-2024; NHIF/001/2023-2024; NHIF/002/2023-2024 by the Procuring Entity.

b) An order compelling the Procuring Entity to re-upload/ proceed/ progress with the procurement process of Tender Nos. NHIF/002/2022-23; NHIF/032/2022-2023; NHIF/033/2022-2023; NHIF/035/2022-2023;

NHIF/033/2022-2023; NHIF/035/2022-2023; NHIF/036/2022-2023; and NHIF/037/2022-2023 to its conclusion in line with the Ruling of Application No. 43 of 2023.

c) ***The Respondent be ordered to pay the costs of and incidental to these proceedings.***

d) ***For any other relief that the Review Board may deem fit to grant, having regard to the circumstances of this case in order to give effect to the Board's orders.***

19. In a Notification of Appeal and a letter dated 30th August 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent and the Procuring Entity of the filing of the instant 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 Respondent and Procuring Entity were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 30th August 2023.

20. On 7th September 2023, the Respondent through Kipkenda & Company Advocates filed a Notice of Appointment of Advocates dated 6th September 2023 together with a Memorandum of Response sworn by Pamela Marendi on 6th September 2023.

21. Vide a Hearing Notice dated 11th September 2023, the Acting Board Secretary, notified parties in the subject tender that the hearing of the instant Request for Review would be by online hearing on 13th September 2023 at 12.00 noon, through the link availed in the said Hearing Notice.

22. On 12th September 2023, the Applicant through its advocates on record filed a Replying Affidavit to the Respondent's Memorandum of Response sworn by Shadrack Munyambu on 12th September 2023.

23. On the morning of 13th September 2023, the Respondent through its advocates on record filed a Memorandum of Response sworn on 12th September 2023 by Dr. Samson Kuhora, the Procuring Entity's Ag. Chief Executive Officer, Written Submissions dated 13th September 2023 and a List and Bundle of Authorities dated 13th September 2023.

24. During the hearing on 13th September 2023, the Board assigned each party 10 minutes to advance their case with the Applicant being assigned an extra 5 minutes for a rejoinder, if any. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Case

25. In his submissions, counsel for the Applicant, Mr. Aluoch, submitted that there was a cover up by the Procuring Entity and urged the Board to strike out the documents filed by the Respondent on the morning of

13th September 2023. He indicated that Pamela Marende who had signed the initial Memorandum of Response was not authorized to sign any document on behalf of the Procuring Entity and referred the Board to a court order issued on 27th July 2023 in ELRC Petition No. E135 of 2023. Mr. Aluoch pointed out that the Respondent tried to cover up what Pamela had done in the procurement process and that pursuant to the aforementioned court order, everything she had done in the instant procurement proceedings was an illegality and was being circumvented by the Affidavit by Dr. Samson Kuhora. Counsel contended that the said Pamela had no mandate to spearhead the procurement process and referred the Board to Exhibit marked SM-3 in the Applicant's Replying Affidavit to the Respondent's Memorandum of Response sworn on 12th September 2023 by Shadrack Munyambu.

26. Counsel submitted that the Applicant had approached the Board due to cancellation of the six (6) tenders leading to the Board's decision in Request for Review No. 43 of 2023 where the Procuring Entity was directed to proceed with the procurement process of the said tenders.

27. Mr. Aluoch submitted that on 22nd August 2023, the Procuring Entity advertised three (3) tenders instead of the six (6) tenders and that the Applicant having downloaded the tender documents noted that there was an alteration and modification of the tender documents aimed at benefiting some tenderers and locking out others. Counsel argued that once there was a decision of the Board in Request for Review No. 43 of 2023, the Procuring Entity ought to have proceeded with the

procurement proceedings yet this was not the case and is what is being challenged by the Applicant in the instant Request for Review.

28. Mr. Aluoch took issue with the letter dated 10th July 2023 annexed in the Respondent's Memorandum of Response and argued that the Director General PPRA cannot challenge the decision of the Board and did not tell the Procuring Entity to disobey the orders of the Board. Counsel submitted that the material governance issues referred to by the Respondent were dealt with in the addendums and pointed out that the Applicant has suffered great loss and damage since it had lost considerable time in the tendering process.

The Respondent's Case.

29. In his submissions, Counsel for the Respondent, Mr. Wachira relied on the Respondent's Memorandum of Response sworn on 12th September 2023 by Dr. Samson Kuhora and annexures therein, Written Submissions dated 13th September 2023 and List and Bundle of Authorities dated 13th September 2023 filed before the Board.

30. Mr. Wachira submitted that when the Board rendered its decision in Request for Review No. 43 of 2023, it did not take away the powers of the CEO of the Procuring Entity to terminate procurement proceedings and that the Board merely directed the Procuring entity to proceed with the procurement process in strict compliance with the law.

31. Counsel further submitted that the Procuring Entity became aware that it was legally untenable to proceed as ordered and that it could

not meet the provisions of Article 227(1) of the Constitution so it sought an opinion from PPRA. He pointed out that the Procuring Entity identified the material governance issues that led to cancellation of the six (6) tenders on 13th June 2023 before the tender submission deadline of 14th June 2023 and there was no cure on the material governance issues even post issuance of the Board's decision on 7th July 2023.

32. On the issue of whether the Applicant had suffered loss and damage as pleaded, counsel pointed out that all the Applicant had done was to download the tender documents and it hadn't indicated whether it had participated in the tenders. Counsel submitted that no prejudice was suffered since in addition to having no evidence of having submitted a tender, cancellation was done after the tender submission deadline and referred to Section 167(1) of the Act.

33. Mr. Wachira submitted that the Board did not have the power to issue an order of mandamus as pleaded by the Applicant. He further submitted that there was need for re-advertisement of the tenders to enable the Respondents comply with Article 227(1) of the Constitution, pointed out that a solution does not lie in imposing on the Procuring Entity an order for them to comply in light of the material governance issues which could not be remedied by an addendum and referred the Board to the holding in *Republic v County Government of Lamu & 2 others Ex Parte Superserve Limited [2021] eKLR.*

34. Mr. Wachira conceded that the Procuring Entity may not *per se* have complied with the Board's orders given the advisory by PPRA and reiterated that all the six (6) tenders were terminated and there had not been a second termination.

Applicant's Rejoinder

35. In a brief rejoinder, Mr. Aluoch submitted that there was no second termination and that new material on material governance cannot be brought after the decision of the Board. He pointed out to the Board that only three (3) tenders had been re-advertised and that the direct procurement of the remaining tenders ought to be annulled as it was null and void.

36. Mr. Aluoch submitted that the decision of the Board was for the Procuring Entity to comply with it. He further submitted that the Applicant was waiting for submission of its tender when the tenders were cancelled a day before submission. At this juncture, Mr. Wachira objected to the submission by Mr. Aluoch contesting that counsel was giving evidence from the bar. When asked by the Board on whether the Applicant had tendered any evidence to this effect, Mr. Aluoch submitted that there were large documents to be submitted.

37. Mr.Aluoch further submitted that the response by Pamela who wasn't to take part in the procurement proceedings admitted at paragraph 14 that the Procuring Entity did not comply with the Board's orders. He concluded by urging the Board to grant the orders sought in the instant Request for Review.

CLARIFICATIONS

38. The Board sought a clarification from the Applicant on its understanding of Section 167(4) of the Act and Mr. Aluoch submitted that in a tendering process, once communication was made to bidders the procuring entity cannot make alterations that do not accrue to all bidders in that process.

39. When asked by the Board to expound on what exactly was new in the re-advertisement that had prejudiced the Applicant, Mr. Aluoch submitted that the mentioned alterations and modifications had affected the Applicant and that the act of non-compliance with the Board's decision given that the Applicant was participating in the initial tendering process.

40. The Board sought to know from the Applicant on which communication had not been done since it had claimed that few bidders were communicated to and Mr. Aluoch submitted that communication was made only to people who had sought clarifications only yet the tenders were open nationally.

41. The Board sought a clarification form the Respondent on whether all tenders were cancelled and which tenderes were re-advertised. Mr. Wachira submitted that all the six (6) tenders were terminated and this information was on the public domain and advertised on PPIP. Counsel further submitted that only three (3) tenders of the six were advertised and that the remaining three (3) would be advertised in due course.

42. Upon enquiry by the Board on whether the Procuring Entity complied with the Board's orders issued in Request for Review No. 43 of 2023, Mr. Wachira submitted that the Procuring Entity in its response had demonstrated that while it was willing to comply, it was unable to comply due to material governance issues leading it to seek the advise of PPRA whereupon on that advice, it issue termination letters dated 24th July 2023 to all candidates and tenderers who had downloaded the tender documents and forwarded details to the Procuring Entity. Mr. Wachira further submitted that in light of what had been advertised, and with benefit of hindsight, it would have been a better option for the Procuring Entity to extend the tender submission deadline and evaluate if it was possible to proceed in light of the material governance issues and if not possible to proceed to terminate the procurement proceedings in line with Section 63 of the Act.

43. At this juncture, based on submissions presented before the Board, parties agreed to attempt to engage each other, on a without prejudice basis, with the aim of reaching a compromise and recording a consent before the Board.

44. Subsequently, the Board directed for parties to attempt alternative dispute resolution by 12 noon on 14th September 2023 and if parties would agree to record a consent, the same was to be filed with the Board by 1.00 p.m. on 14th September 2023. The matter was thus adjourned to 14th September 2023 and slated for mention at 3.00 p.m. on 14th September 2023 to adopt the consent, if any, and/or to take further directions.

45. When the matter came up for mention on 14th September 2023 at 3.00 p.m. parties informed the Board that they were not able to agree hence no consent had been recorded by parties before the Board.

46. At the conclusion of the online mention on 14th September 2023, the Board informed parties that the instant Request for Review having been filed on 30th August 2023 was due to expire on or before 20th September 2023 and that the Board would communicate its decision on or before 20th September 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

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

A. Whether the Board has jurisdiction to hear and determine the instant Request for Review:

In determining the first issue, the Board will make a determination on whether the instant Request for Review was instituted within the statutory period stipulated under Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board;

Depending on the determination of the first issue;

B. Whether the Procuring Entity complied with the orders of the Board issued in Request for Review No. 43 of 2023;

C. What orders should the Board grant in the circumstances.

48. Before addressing the issues framed for determination, the Board would like to dispense with a preliminary aspect arising from the proceedings before it.

49. During the hearing of the instant Request for Review, counsel for the Applicant, Mr. Aluoch, made an application challenging filing of the Respondent's Memorandum of Response sworn on 12th September 2023 by Dr. Samson Kuhora and filed on the morning of 13th September 2023. On the other hand, Counsel for the Respondent, Mr. Wachira informed the Board that the Respondent had on 7th September 2023 filed a Memorandum of Response sworn on 6th September 2023 by Pamela Marendi but now wished to rely on the response filed on the 13th September 2023 since an issue arose on the maker of that response.

50. A question arises as to whether the Respondent's Memorandum of Response sworn on 12th September 2023 by Dr. Samson Kuhora and

filed on the morning of 13th September 2023 ought to be struck out by the Board.

51. The Board is cognizant of provisions of Regulation 205 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which provides that:

"(1) The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.

(2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the Review Board Secretary

(3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified.

(4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.

(5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3)."

52. In essence, the Board's Secretary serves a notice to the accounting officer of a procuring entity in accordance with Section 168 of the Act upon receipt of a request for review. Upon service of the notice of the request for review, the accounting officer is under an obligation to file a response together with all confidential documents in the procurement proceedings within five days of the notice or such lesser period as may be specified. Failure by the accounting officer to submit a response and documents requested within the stipulated time is an offence which attracts a fine not exceeding four million shillings or imprisonment for a term not exceeding ten years or both.

53. Turning to the circumstances in the instant Request for Review, we note that on 7th September 2023, the Respondent filed its response to the Request for Review vide a Respondent Memorandum of Response sworn on 6th September 2023 by one Pamela Marendi, the Procuring Entity's Ag. Head, Supply Chain Management Department.

54. However, the Applicant at paragraph 2 of its Replying Affidavit to the Respondent's Memorandum of Response filed on 12th September 2023 and sworn by Shadrack Munyambu on even date objected to the Respondent's response terming it as fatally defective deserving to be struck out for having been sworn by Pamela Marendi contrary to orders

issued on 27th July 2023 by Hon. Justice Byram Ongaya in ELRC No. e135 of 2023.

55. As a result of the objection by the Applicant, the Respondent filed the Memorandum of Response sworn on 12th September 2023 by Dr. Samson Kuhora on the morning of 13th September 2023. A close analysis of the Memorandum of Response sworn on 12th September 2023 by Dr. Samson Kuhora by the Board reveals that the is identical to the Memorandum of Response filed on 7th September 2023 and sworn on 6th September 2023 by Pamela Marendi and it is our considered view that this was essentially an amendment of a pleading filed before the Board.

56. We are alive to the fact that the Act and Regulations 2020 do not expressly provide for amendment of pleadings filed before the Board by either an Applicant, a Respondent or an Interested Party neither do they (the Act and Regulations 2020) prohibit amendments of pleadings. We are also cognizant of the provisions of Article 159(2)(d) of the Constitution which provide that justice shall be administered without undue regard to procedural technicalities and though this provision should not be used to abuse court process, it has been reiterated that courts should not pay undue attention to procedural technicalities and requirements at the expense of substantive justice. The Supreme Court of Kenya in the case of **Raila Odinga v I.E.B.C & Others (2013) eKLR,** underscored this principle thus:

> ***"Article 159(2)(d) of the Constitution simply means that a Court of Law should not pay undue attention to***

procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."

57. This Board has a duty to do substantive justice to parties while at the same time considering whether a matter before it has been properly filed. We are cognizant of the need for a court to exercise its discretion with utmost care when faced with an application to strike out pleadings as striking out pleadings has the draconian consequence of slamming the door of justice on the face of one party without a hearing. We are also cognizant that the power to strike out a pleading is a discretionary one as held in ***Crescent Construction Co Ltd V Delphis Bank Limited, [2007] eKLR,*** where the Court of Appeal stated as follows:

"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."

58. The Court of Appeal in the case of **Ochieng & Others v First National Bank of Chicago Civil Appeal No. 147 of**

1991 (unreported) as cited with approval in St Patrick's Hill School Ltd v Bank of Africa Kenya Ltd [2018] eKLR set out the principles governing amendment of pleadings as follows:

> ***"a) The power of the court to allow amendments is intended to determine the true substantive merits of the case.***
>
> ***b) The amendments should be timeously applied for;***
>
> ***c) Power to amend can be exercised by the court at any stage of the proceedings.***
>
> ***d) That as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side.***
>
> ***e) The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation."***

59. Further in **Harrison C. Kariuki v Blueshield Insurance Company Ltd [2006]eKLR** the High Court referred to the Court of Appeal decision in **Central Kenya Ltd v Trust Bank Ltd [2000] EALR 365** and held that:

> ***"The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be***

occasioned to the opposite party. There will normally be no justice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main thing is that it be in the interests of justice that the amendments sought be permitted in order for the real question in controversy between the parties to be determined."

60. In view of the holdings in the above cited cases, and having hereinbefore established that no provision of the Act or Regulations 2020 bars amendments of pleadings while taking into consideration the practice before the Board to allow reasonable amendments of pleadings to accommodate all parties and only to disallow the same where prejudice is shown to have been occasioned to the other party by the amendment. Noting that the amendment herein was merely by way of substitution of the deponent in the memorandum of response we deem it fair and just to allow the filing by the Respondent made on 13th September 2023 of the Memorandum of Response sworn on 12th September 2023 by Dr. Samson Kuhora replacing the Memorandum of Response Memorandum of Response filed on 7th September 2023 and sworn on 6th September 2023 by Pamela Marendi. The Applicant did not demonstrate the prejudice, if any, that it suffered or would likely to suffer with the amended response, albeit sworn by a different person.

61. Accordingly, this ground of objection by the Applicant challenging the filing of the Respondent's Memorandum of Response sworn on 12th

September 2023 by Dr. Samson Kuhora and filed on the morning of 13th September 2023 fails.

Whether the Board has jurisdiction to hear and determine the instant Request for Review

62. The Respondent at paragraph 39 of the Memorandum of Response sworn on 12th September 2023 by Dr. Samson Kuhora and filed on the morning of 13th September 2023 contends that the instant Request for Review does not disclose a single ground for quashing of the re-advertisement as published on 22nd August 2023 and urge the Board to invoke the provisions of Section 167(4)(b) of the Act by finding that it lacks jurisdiction to entertain a review that touches on termination of procurement proceedings done in accordance with Section 63 of the Act.

63. On its part, the Applicant at paragraph 7 of the Replying Affidavit to the Respondent's Memorandum of Response sworn on 12th September 2023 by Shadrack Munyambu contends that the purported termination and subsequent re-advertisement of the tenders by the Respondent acting on the opinion of PPRA is against and in contravention of the Board's decision and its consequential orders.

64. It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and where jurisdictional question arises from the pleadings or is raised by a party to the proceedings, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before taking any further steps in the matter.

65. Black's Law Dictionary, *8th Edition,* defines jurisdiction as:

> ***"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."***

66. In his book, "Words and Phrases Legally Defined", Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

> ***"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court [or other decision making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its***

decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

67. The celebrated Court of Appeal decision in **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989]eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

68. The Supreme Court added its voice on the source of jurisdiction of a court or other decision making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only

exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

69. In the persuasive authority from the Supreme Court of Nigeria in the case of **State v Onagoruwa [1992] 2 NWLR 221 – 33 at 57 – 59** the Supreme Court held:

"Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based."

70. In the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR,** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

> ***"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."***

71. Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR,** that:

> ***"whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter." Emphasis ours.***

72. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

73. This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides:

> ***"(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."***

74. Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

> ***"(1) The functions of the Review Board shall be—***
> ***(a)reviewing, hearing and determining tendering and asset disposal disputes; and***
> ***(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

75. The jurisdiction of the Board is provided for and also limited under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

> ***PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS***
> ***167. Request for a review***
> ***(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk***

suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed. *[Emphasis by the Board]*

(2) .....

(3) .....

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act."

.....

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.

76. Given the forgoing provisions of the Act, the Board is a creature of the Act and its jurisdiction flows from and is circumscribed under Section 28 and 167 of the Act.

77. It therefore follows, that an applicant who seeks to invoke the jurisdiction of the Board must do so within the four corners of the aforesaid provisions. Section 167(1) of the Act allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

78. Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specifically under Regulation 203

of Regulations 2020 read with the Fourteenth Schedule of Regulations 2020 prescribes the format of the request for review as follows:

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

203. Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a) .....;

(b) .....;

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

(d) .....

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

(4) .....

79. A reading of the above provisions shows that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

80. The option available for an aggrieved candidate or tenderer in the aforementioned three instances determines when time starts running for purposes of section 167(1) of the Act

81. This Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches. This was the holding by this Board in recent decision in **PPARB Application No. 40 of 2023 Iansoft Technologies Ltd v Accounting Officer, National Cereals & Produce Board & others** which was upheld by the High Court in

Nairobi Judicial Review E073 of 2023 R v Public Procurement Administrative Review Board & Others Ex Parte Iansoft Technologies Ltd eKLR .

82. We are further guided by the holding in **Republic v Public Procurement Administrative Review Board & 2 others Ex-ParteKemotrade Investment Limited [2018] eKLR** where the High Court at paragraphs 65, 66 and 67 noted that to determine when time starts to run, such determination can only be made upon an examination of the alleged breach and when the aggrieved tenderer had knowledge of the said breach and held:

> ***The answer then to the question when time started to run in the present application can only be reached upon an examination of the breach that was alleged by the 2nd Interested Party in its Request for Review, and when the 2nd Interested Party had knowledge of the said breach. The said Request for Review was annexed as "Annexure CO4" to the 2nd Interested Party's replying affidavit. Paragraphs 2 to 4 of the said Request address the first breach that the 2nd Interested Party 's representative, one Charles Obon'go noted and notified the Chairman of the tender opening committee about at the tender opening, namely that the Applicant had not supplied the sample of 3m of the sleeve and mill certificate and had not been issue with a delivery note, and that the said Applicant sought to introduce the sample after the commencement of the tender opening.***

67. It is not in dispute that the tender opening was on 10th November 2017 at 10.00am, which all the parties attest to in their various affidavits. It is therefore evident that for this particular breach the 2nd Interested Party had knowledge of the same and admits to notifying the 1st Interested Party's tender opening committee of the same on 10th November 2017. Therefore, time for filing a review against this particular alleged breach started to run on 10th November 2017, and the Respondent had no jurisdiction to consider the alleged breach when it was included in the Request for Review filed on 21st February 2017, as the statutory period of filing for review of 14 days had long lapsed. Any decisions by the Respondent on the alleged breach were therefore ultra vires and null and void.

83. Having considered parties' pleadings, submissions, and the confidential documents submitted by the Respondent to the Board pursuant to section 67(3)(e) of the Act, the issue that calls for determination by this Board is what were the circumstances in the instant Request for Review that should determine the period when the Applicant ought to have approached the Board?

84. We note that the Applicant in the instant Request for Review is aggrieved by the decision of the Respondent to re-advertise three (3) of the tenders being Tender No. NHIF/001/2023-2024 for Provision of Insurance Brokerage Services; Tender No. RFP/NHIF/001/2023-2024

for Provision of Consultancy on Actuarial Services; and Tender No. NHIF/002/2023-2024 for Provision for Emergency Road Evacuation Services for National Health Insurance Fund Scheme Members. According to the Applicant, it lodged the instant Request for Review as a candidate and it contends that the re-advertisement of the said three (3) tenders is malicious and prejudices the decision of the Board rendered in Request for Review No. 43 of 2023. The Applicant further contends that by terminating the six (6) tenders, the Procuring Entity contravened provisions of Articles 10(2) and 227(1) of the Constitution and Sections 3, 60, 72, and 78 of the Act read with Regulation 77 of Regulations 2020.

85. We note that the Board in its Decision dated 7th July 2023 in Request for Review No. 43 of 2023 made the following final orders:

a) A declaration be and is hereby issued that the termination of Tenders No. NHIF/002/20222-2023; NHIF/032/2022-2023; NHIF/033//2022-2023; NHIF/035//2022-2023; NHIF. 036/ NHIF 037//2022-2023 was not in accordance with section 63 of the Act and is accordingly null and void.

b) An order quashing the decision published on 13th June 2023 terminating Tenders No. NHIF/002/20222-2023; NHIF/032/2022-2023; NHIF/033//2022-2023; NHIF/035//2022-2023; NHIF. 036/ NHIF 037//2022-2023.

c) The Respondent is directed to proceed with the procurement process in strict compliance with the Applicable law taking into considerations the findings of the Board made in this decision

d) As the procurement process is still ongoing, each party to bear its costs.

86. We further note from the Respondent's Exhibit marked "DSK 7" that the Procuring Entity wrote to the Director General, PPRA vide a letter dated 10th July 2023 seeking an advisory on implementation of the Board's Decision issued in Request for Review No. 43 of 2023 which reads in part:

"……

However, after the cancellation, MEBM Africa Insurance Agency Company Ltd contested the decision before the Review Board that heard the application and made orders that uplifted the cancellation decision and directed the Fund to proceed with the procurement process.

As a procuring entity, we are unable to implement these orders given that no tenders had been received at the point of cancellation, to proceed for opening and evaluation that will be processed. Additionally, the initial tender documents cannot be used as there were several

gaps identified by bidders themselves, the media and even the Authority itself.

This is therefore to request your guidance on how to implement these orders.....”

87. According to the Respondent's Exhibit marked "DSK 8", the Director General PPRA responded to the Procuring Entity vide a letter dated 20th July 2023 and advised as follows in part:

"..... 12. With regard to your comment that NHIF is unable to implement the Board's orders on proceeding with the procurement process since 'the initial tender documents cannot be used as there were several gaps identified', we find this to be a misinterpretation of the Board's order on your part. This is so because, in our view, the Board's order as captured under paragraph 11(c) above is for NHIF '...to proceed with the procurement process in strict compliance with the applicable law...' Further, we refer you to the Board's consideration as captured in paragraph 10(d) above where the Board noted that it (the Board) 'cannot issue an order whose effect would be to tie down the Respondent to the current process in any event.'

13. Consequently, our view is that it is incumbent upon NHIF to review the circumstances you are in and make

the appropriate decision on the way forward. The Board's decision does not in our opinion, obligate NHIF to proceed with the initial tender process more so after establishing that the initial tender documents cannot be used as there were several gaps identified by the bidders. The emphasis is on the need to ensure that the decisions made by NHIF are in accordance with the Act.

14. The above notwithstanding and having observed the foregoing, we note the Board's comment that the termination of the said tenders was not done in accordance with the Act. It is therefore, our understanding that the Respondent (NHIF) could not proceed to re-tender the subject tenders before procedurally terminating the initial tender in compliance the Act. In the event, NHIF elects to procedurally terminate the initial tenders in compliance with the provisions of Section 63 of the Act and while noting your comment that no tender had been received at the point of termination, our considered view is that your procuring entity should consider communicating the termination to all the bidders that had sought clarifications and/or tenders acquired tender documents (in the event bidders provided details at the point downloading document from your website) and place a termination/cancellation notice on the Public Procurement Information Portal (PPIP) and your

website and as guided by the Board, provide/outline the specific reasons for termination. Subsequently, the termination should be reported to this Authority through PPIP in conformity with the PPRA Circular No. 04/2022 of 1st July,2022 on Mandatory Reporting Requirements by Procuring entities

We trust that the above advisory will assist you in making an informed decision on the way forward.

....."

88. We note from the Respondent's exhibit marked "DSK 9" that subsequent to the advisory by the Director General PPRA, the Procuring Entity made the decision to terminate the six (6) tenders on 24th July 2023 and issued letters of notification of its decision to terminate the said tenders dated 24th July 2023 to various bidders. Section 63(4) of the Act mandates an accounting officer to notify all persons who submitted tenders of termination of procurement proceedings within 14 days of termination and such a termination notice shall contain the reason for termination. It is this termination of the six (6) tenders that the Applicant objects to. The said letters of termination read in part:

"*.....*

This is to inform you that the National Health Insurance Fund has formally cancelled the above tender that was advertised in the Print Media, Public Procurement Information Portal (PPIP) and NHIF website on 30th May

2023 and was to be opened on 14th June 2023. The tender was terminated vide communication posted on the NHIF Website on 13th June 2023 and the PPIP. The cancellation was also advertised in the newspapers on 20th June 2023.

The cancellation was mainly due to several gaps that were identified by the interested bidders, the Media and PPRA in the bid document that would not be comprehensively addressed through several addendums that were issued.

This follows the Public Procurement Administrative Review Board Decision on Application No. 43/2023, delivered on 7th July 2023, between EBM Africa Insurance Agency Company Limited nad National Health Insurance Fund, and the PPRA Advisory on the implementation of the Review Board Orders of the same case vide letter Ref. PPRA/6/1/1VOL.V(27) dated 20th July 2023.

The Fund has comprehensively addressed all the gaps and will in due course repeat the procurement proceedings. You are therefore encouraged to apply when the notice is published.

.....”

89. It is our considered opinion that the above letter triggered the re-advertisement that the Applicant complains of and was therefore the the 'breach', if at all, that ought to have been challenged by the Applicant or any other aggrieved party (candidate or tenderer) to the procurement proceedings. The procuring entity's letter dated 24th July 2023 clearly communicated the termination decision and the intention to re-advertise. It is this letter that ought to have been challenged to arrest the intended re-advertisement. once 14 days lapsed from the 24th July 2023, the re-advertisement of 30th August 2023 amounted to fresh procurement proceedings which any candidate or tenderer can only challenge independent of any issue anchored on the previous/related proceedings culminating with the letter of 24th of July 2023. Granted, the Applicant was not among those notified of the termination and it may very well be the case that it was not aware of the same and could not have challenged that which it was not aware of. We are however cognisant that a procurement entity is only required to notify tenderers (which the Applicant was not) of a termination decision. We note however that this appears not to be an issue for the Applicant and we accordingly hold that it elected not to challenge the said termination for these reasons.

90. From the foregoing, and in view of the provisions of Section 167(1) of the Act read with Regulation 203 (2)(c) of Regulations 2020 as analyzed hereinabove, it is our considered view that the breach of duty by the Respondent, if any, occurred on 24th July 2023. As such, the Applicant ought to have lodged the instant Request within 14 days from the said date.

91. In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter referred to as "the IGPA") which provides as follows:

> ***"57. Computation of time***
>
> ***In computing time for the purposes of a written law, unless the contrary intention appears—***
>
> ***(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
>
> ***(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
>
> ***(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***
>
> ***(d) where an act or proceeding is directed or allowed to be done or taken within any time not***

exceeding six days, excluded days shall not be reckoned in the computation of the time."

92. Turning to the circumstances in the instant Request for Review, in computing time when the Applicant ought to have sought administrative review before the Board, the decision to terminate the six (6) tenders having been issued on 24th July 2023 and the Applicant having been aggrieved by the same ought to have moved the Board by way of an administrative review by virtue of Regulation 203(2)(c)(i) of Regulations 2020. In computing time, the 24th July 2023 is excluded pursuant to Section 57(a) of IGPA. This means that 14 days started running from 25th July 2023 and lapsed on 7th August 2023. In essence, the Applicant had between 25th July 2023 and 7th August 2023 to seek administrative review before the Board with respect to its allegation that the Respondent had failed to comply with the Board's orders in Request for Review No. 43 of 2023 following the decision to terminate the six (6) tenders. We are guided by the holding of the High Court in **Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR,** where Mativo, J (as he then was) stated:

"99. The Respondent's wide powers under section 173 of the Act can only be invoked if there is a competent Request for Review before it. Invoking powers under section 173 where there is no competent Request for Review or where the Request for Review is filed outside

the period prescribed under the law is a grave illegality and a ground for this court to invoke its Judicial Review Powers. As earlier stated, the act prescribes very rigid time frames and since the substance of the Notification was clear, the Interested Party knew at that point in time that its bid had been rejected."

93. In the circumstances, we find and hold that the instant Request for Review is time barred having been raised outside the statutory period of 14 days of occurrence of alleged breach of duty imposed on the Respondent by the Act in accordance with Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020 thus ousting the jurisdiction of the Board to hear and determine the same.

94. It is trite law that once a court or tribunal is divested of jurisdiction, it must down its tools forthwith as we hereby do.

What orders should the Board grant in the circumstances?

95. It therefore follows that the instant Request for review is struck out for want of jurisdiction.

96. Consequently, the Procuring Entity is at liberty to proceed with the procurement proceedings in the three (3) tenders being Tender No. NHIF/001/2023-2024 for Provision of Insurance Brokerage Services; Tender No. RFP/NHIF/001/2023-2024 for Provision of Consultancy on Actuarial Services; and Tender No. NHIF/002/2023-2024 for Provision

for Emergency Road Evacuation Services for National Health Insurance Fund Scheme Members and any candidate or tenderer who may be aggrieved by the procurement proceedings in the same is free to approach this Board for redress in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020.

FINAL ORDERS

97. 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 29th August 2023 and filed on 30th August 2023:

a) The Applicant's Request for Review dated 29th August 2023 and filed on 30th August 2023 is hereby struck out for want of jurisdiction.

b) Given our findings herein, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 20th Day of September 2023.

.....	.....
PANEL CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**