

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 66/2023 OF 29<sup>TH</sup> SEPTEMBER 2023**

**BETWEEN**

**THE GARDEN AND WEDDINGS CENTRE LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**NAKURU COUNTY GOVERNMENT- THE RIFT VALLEY**

**PROVINCIAL GENERAL HOSPITAL.....1<sup>ST</sup> RESPONDENT**

**THE RIFT VALLEY**

**PROVINCIAL GENERAL HOSPITAL.....2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer, Nakuru County Government- The Rift Valley Provincial General Hospital in relation to Tender No. NCG/MOH/PGH/T/6/2019-2021 for the Provision of Comprehensive Cleaning Services; NCG/MOH/PGH/T/5/2019-2021 for Maintenance of Grounds; and NCG/MOH/PGH/T/4/2019-2021 for the Provision of Sanitary Cleaning.

**BOARD MEMBERS PRESENT**

- |                                 |   |             |
|---------------------------------|---|-------------|
| 1. Mrs. Irene Kashindi, FCI Arb | - | Panel Chair |
| 2. Q.S. Hussein Were            | - | Member      |
| 3. Dr. Paul Jilani              | - | Member      |
| 4. Eng. Lilian Ogombo           | - | Member      |

5. Mr. Daniel Langat - Member

### **IN ATTENDANCE**

Ms. Sarah Ayoo - Secretariat

### **PRESENT BY INVITATION**

**APPLICANT - THE GARDEN AND WEDDINGS CENTRE LIMITED**

Mr. Karugu Mbugua - Advocate, Karugu Mbugua & Co. Advocates

**RESPONDENTS THE ACCOUNTING OFFICER, NAKURU COUNTY GOVERNMENT- THE RIFT VALLEY PROVINCIAL GENERAL HOSPITAL THE RIFT VALLEY PROVINCIAL GENERAL HOSPITAL**

Ms. Maureen Litunda - Advocate, Nakuru County Attorney's Office

Dr. James Munene - Medical Superintendent, Nakuru County

### **BACKGROUND OF THE DECISION**

#### **The Tendering Process**

1. Nakuru County Government-Rift Valley Provincial General Hospital, the Procuring Entity together with the 1<sup>st</sup> Respondent herein, invited sealed tenders in response to Tenders No. NCG/MOH/PGH/6/2019-21 for Comprehensive Cleaning; NCG/MOH/PGH/T/5/2019-2021 for

Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers; NCG/MOH/OGH/T/4/2019-2021 FOR Provision of Cleaning Services for Sanitary Accommodation Facilities collectively referred to as the "subject tenders".

### **Evaluation of Tenders**

2. The Evaluation Committee subjected the tenders submitted in response to the subject tenders to evaluation and letters of award were issued to the successful tenderers in each of the subject tenders. The Applicant's submitted tenders were found unresponsive in all the subject tenders and this prompted the Applicant to challenge the awards made in each of the subject tenders.
3. Subsequently, the subject tenders have been the subject of litigation in multiple cases both before this Board and the High Court as detailed below.

### **1<sup>st</sup> Set of Requests for Review**

4. On 2<sup>nd</sup> August 2019, the Applicant filed Requests for Review Nos. 83, 84, and 85 of 2019 challenging the initial decision of the Procuring Entity that it had been unsuccessful in each of the subject tenders. The Board considered the said Requests for Review and rendered a decision canceling the letters of award in each of the subject tenders and directed the Evaluation Committee to conduct a re-evaluation of the tenders submitted in the said tenders.

### **2<sup>nd</sup> Set of Requests for Review**

5. Upon the re-evaluation of the tenders, the Procuring Entity once again found the Applicant unsuccessful in each of the subject tenders. The Applicant filed a second set of Requests for Review being Requests for Review No. 107, 108, 109 of 2019. Upon considering the said Requests for Review, the Board set aside the letters of award that had been issued and directed the Evaluation Committee to conduct a fresh re-evaluation of the Applicant's tender documents in each of the subject tenders.

### **3<sup>rd</sup> Set of Requests for Review**

6. The Procuring Entity's Head of Supply Chain Management considered the Board's decision in PPARB Applications Nos. 107, 108, and 109 and recommended the termination of the subject tenders due to lack of clarity in the tender documents in the subject tenders. Accordingly, vide letters dated 17<sup>th</sup> October 2019, the 1<sup>st</sup> Respondent terminated the subject tenders.

7. The Applicant challenged the cancellation of the tenders before this Board in Requests for Review No. 122, 123, and 124 of 2019. The Board faulted the termination of the subject tenders and directed the Respondents to re-evaluate the Applicant's tender documents as previously directed.

### **4<sup>th</sup> Set of Requests for Review**

8. The Evaluation Committee conducted a re-evaluation of the Applicant's tender and found the Applicant as the lowest evaluated tender in each of the subject tenders. However, the Evaluation Committee found that the Applicant failed a due diligence test which prompted the Procuring Entity to terminate tenders on the grounds that none of the tenderers was responsive.

9. The foregoing prompted the Applicant to file before this Board a new set of Requests for Review Nos. 139, 140, and 141 of 2019. The Board considered the said Requests for Review and faulted the termination of the said tenders as well as the due diligence that was carried out. The Board directed the Respondents to conduct a fresh due diligence in respect of the subject tenders.

### **5<sup>th</sup> Set of Requests for Review**

10. The Respondents did not take any steps to comply with this Board's directions on the conduct of fresh due diligence and award of the subject tenders. This once again prompted the Applicant to file a 5<sup>th</sup> set of Requests for Review i.e. Requests for Review Nos. 6,7 and 8 of 2020 seeking that the Board compel the Respondents to conclude the procurement processes in the subject tender. At the conclusion of the matters, the Board directed the Respondents to award the subject tenders to the lowest evaluated tenderer under each tender within 7 days from 5<sup>th</sup> February 2020.

### **Nakuru High Court Judicial Review No. 4 of 2020.**

11. Aggrieved by the findings of the Board, on 12<sup>th</sup> February 2020 the Respondents challenged the said decision by way of judicial review proceedings at the High Court i.e. ***Nakuru High Court Judicial Review No. 4 of 2020.***

12. On 25<sup>th</sup> February 2020, the High Court granted leave to the Respondents to bring the judicial review proceedings with directions that the Respondents were to file their substantive motion within 2 days. It would, however, appear from the documents submitted before this Board,

that the Respondents never filed the substantive motion which culminated in the High Court deeming the proceedings at being at an end as set out in a ruling dated 18<sup>th</sup> September 2023 delivered in ***Nakuru High Court Judicial Review Application No. 4 of 2020*** pursuant to an application filed by the Applicant seeking to dismiss the judicial review application.

### **REQUEST FOR REVIEW NO. 66 OF 2023**

13. On 29<sup>th</sup> September 2023, the Applicant filed a Request for Review dated 29<sup>th</sup> September 2023 supported by an Affidavit sworn on 29<sup>th</sup> September 2023 by Daniel Gathogo Mugo, the Applicant's Director, seeking the following orders from the Board:

***a) The tender validity period be extended;***

***b) The procuring Entity be directed to award the subject tenders, that is in the matters of the provision of Comprehensive Cleaning (NCG/MOH/PGH/T/6/2019-2021), Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers (NCG/MOH/PGH/T/5/2019-2021) and Provision of Sanitary Cleaning (NCG/MOH/PGH/T4/2019-2021);***

***c) Costs of the application be awarded to the Applicant; and***

***d) Any other orders that the Honourable Board may deem just and fit.***

14. In a Notification of Appeal and a letter dated 29<sup>th</sup> September 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the

Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 29<sup>th</sup> September 2023.

15. On 6<sup>th</sup> October 2023 in response to the Request for Review, Dr. James Waweru, a Medical Superintendent at Nakuru County Referral & Teaching Hospital filed a letter dated 5<sup>th</sup> October 2023. In the said letter, Mr. Waweru sought 30 working days for the Respondents to file their Response.
16. On the same day of 6<sup>th</sup> October 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 12<sup>th</sup> October 2023 at 12.00 noon. through the link availed in the said Hearing Notice.
17. On 11<sup>th</sup> October 2023, the Secretariat wrote an email to Dr. Waweru seeking to confirm if the Respondents would be filing a response to the Request for Review. Dr. Waweru responded confirming that he would be in attendance during the online hearing as earlier scheduled.
18. On the morning of the hearing, the Respondents filed a Notice of Appointment of Advocates appointing the County Attorney, Nakuru County Government as their Counsel in the matter. Later on the same day but just before the hearing the parties filed a written consent dated 12<sup>th</sup> October 2023 ("the Consent") which is hereinafter reproduced:

***"Kindly record the following consent:***

- 1. That the First Respondent shall award the Applicant the following tenders in compliance with the orders issued by the Public Procurement Administrative Review Board in PPARB Applications Numbers 6,7 and 8 of 2020 The Gardens and Weddings Centre Limited v The Accounting Officer, Nakuru County Government-The Rift Valley Provincial General Hospital and Nakuru County Government- The Rift Valley Provincial General Hospital by Nakuru County Government-Rift Valley Provincial General Hospital (The Procuring Entity):***
  - a) Tender for Provision of Comprehensive Cleaning (Tender No. NCG/MOH/PGH/T/6/2019-2021***
  - b) Tender for the Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers (NCG/MOH/PGH/T/5/2019-2021); and***
  - c) Tender for the Provision of Sanitary Cleaning (Tender No. NCG/MOH/PGH/T/4/2019-2021.***
- 2. That the First Respondent shall issue a contract for the above said tenders and which contract shall commence 1<sup>st</sup> November, 2023;***
- 3. That the said contract shall last for a duration of two years as envisaged in the subject tenders subject however to fulfilment of the terms and conditions of the contract by the parties;***
- 4. That the Applicant shall retain the casual workers currently working for the Procuring Entity; and***
- 5. Each party to bear its own costs***



***Dated at Thika this 12<sup>th</sup> day of October 2023***

***Signed***

***KARUGU MBUGUA & COMPANY ADVOCATES  
ADVOCATES FOR THE APPLICANT-THE GARDENS AND  
WEDDINGS CENTRE LIMITED***

***Signed***

***THE COUNTY ATTORNEY  
NAKURU COUNTY GOVERNMENT  
FOR THE FIRST AND SECOND RESPONDENTS  
THE ACCOUNTING OFFICER, NAKURU COUNTY GOVERNMENT-  
THE RIFT VALLEY PROVINCIAL GENERAL HOSPITAL (1<sup>ST</sup>  
RESPONDENT) AND NAKURU COUNTY GOVERNMENT THE RIFT  
VALLEY PROVINCIAL GENERAL HOSPITAL (2<sup>ND</sup> RESPONDENT)***

19. During the online hearing, all the parties herein were represented by their respective Advocates. The parties appraised the Board that they had filed the Consent which they wished to be adopted.
  
20. Considering that the Consent had been filed moments before the hearing, the Board adjourned the session for it to consider the terms of the Consent that had been filed. When the Board resumed its sitting, it invited Counsel appearing for the parties, if they were ready to do so, to offer oral submissions on (i) whether the subject tenders were the same tenders that were subject to the previous proceedings before both the Board and the High Court; (ii) the tender validity period for the subject tenders; (iii) the reasoning behind the starting date of the subject tenders being 1<sup>st</sup> November 2023 and (iv) the reasoning behind the 2-year period for the contract to be awarded to the Applicant as per the terms of the Consent.

21. Counsel for the Applicant, Mr. Mbugua notified the Board that since the subject tenders had a lengthy litigation history before both this Board and the High Court, the Applicant needed more time to offer comprehensive submissions on the areas identified by the Board.
22. Counsel for the Respondents, Ms. Litunda also sought for more time to gather information on the subject tenders.
23. In view of the foregoing, the Board deferred the hearing of the instant Request for Review to 16<sup>th</sup> October 2023 at 12:00 noon. The Board further directed parties to file their Written Submissions as well as submit the Tender Documents in the subject tenders on or before 13<sup>th</sup> October 2023.
24. On 15<sup>th</sup> October 2023 the Applicant filed Written Submissions dated 15<sup>th</sup> October 2023. Thereafter, on the morning of 16<sup>th</sup> October 2023, the Applicant forwarded to the Board the Blank Tender Documents in respect of each of the subject tenders.
25. The Respondent did not file any document subsequent to the hearing session of 12<sup>th</sup> October 2023.
26. During the online hearing of 16<sup>th</sup> October 2023 at 12:00 noon, all parties were represented by their respective Counsel. Accordingly, the Board assigned each Counsel 10 minutes to argue their submissions on the 4 areas, the Board had had identified on 12<sup>th</sup> October 2023.

## **PARTIES SUBMISSIONS**

### **Applicant's Case**

27. During the online hearing, Counsel for the Applicant, Mr. Mbugua confirmed that the subject tenders in the present review were the very

tenders that were also the subject of the court proceedings in ***Nakuru High Court Judicial Review Application No. 4 of 2020.***

28. Counsel further submitted that as at the time of filing the instant Request for Review, the tender validity period for the subject tenders was yet to lapse. He referred the Board to its Decision in Applications No. 6, 7 and 8 of 2020 on pages 40 and 41 where the Board found that 21 days were remaining as of 5<sup>th</sup> December 2020 when the said decisions were rendered. He added that since the Judicial Review proceedings commenced on 12<sup>th</sup> December 2020, only 6 days of the 21 days were spent prior to the filing of the judicial review proceedings. According to Counsel, the filing of the judicial review proceedings halted the running of the validity period until the delivery of the Ruling by the High Court on 18<sup>th</sup> September 2023.
29. He added that since the present Request for Review was filed on 29<sup>th</sup> September 2023, only 10 days of the previous 15 days had been spent leaving 5 days whose running was suspended upon the filing of the instant Request for Review.
30. Mr. Mbugua submitted that the 2-year contractual period in the consent was informed by the period provided for in the tender documents of each of the subject tenders:
  - a. For the Tender No. NCG/MOH/PGH/T/6/2019 -2021 Comprehensive Cleaning Services he directed the Board to look up page 28 of the Tender Document.

- b. For Tender No. NCG/MOH/PGH/Q/4/2019 -2020 Provision of Cleaning Services for Sanitary Accommodation Facility he directed the Board to page 27 of the Tender Document.
- c. For Tender No. NCG/MOH/PGH/T/5/2019 -2021 Maintenance of Grounds, Hedges, Flower Beds and Fences he directed the Board to page 26 of the Tender Document

31. Mr. Mbugua urged the Board to allow the Request for Review as per the terms of the consent.

### **Respondent's Case**

32. Counsel for the Respondent, Ms. Litunda confirmed that the subject tenders also being the subject review before the Board and High Court.

33. She also submitted that as per the Decision of the Board in Requests for Review Nos. 7,8 and 9 of 2020, the Respondents were directed the award each of the subject tenders to the Applicant.

34. On the tender validity period, Counsel concurred with the submissions made on behalf of the Applicant that as of the filing of the instant Request, 5 days were still remaining.

35. Counsel further explained that the 2-year contractual period in the Consent was informed by the time span of the original tenders which were meant to run for 2 years. Accordingly, Counsel sought the Board to adopt the Consent as filed by the parties.

## Clarifications

36. The Board sought clarity on why the Consent contained a clause on the Applicant engaging casuals for purposes of the subject tender and whether the use of the said casuals was provided for in the tender documents. Ms. Litunda informed the Board that during the pendency of the proceedings before the Board and the High Court, the Respondents engaged the services of casuals who the Applicant was ready to absorb in the execution of the subject tenders.
37. The Board also sought to know the basis of the parties' argument that time in respect of the tender validity period stopped running for the period, the subject tenders were a subject of the proceedings in ***Nakuru High Court JR No. 4 of 2020***. Mr. Karugu referred the Board to the decision by the High Court in Nairobi High Court ***Judicial Review Application No. 540 of 2017; R v PPARB; Kenya Power and Lighting Company Limited Ex parte Transcend Media Group*** for the proposition that once judicial review proceedings are commenced the tender validity period is held in abeyance. Ms. Litunda equally supported this position.
38. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 29<sup>th</sup> September 2023 had to be determined by 23<sup>rd</sup> October 2023 since the statutory timeline of 21 days was ending on 20<sup>th</sup> October 2023 which was a public holiday. Therefore, the Board would communicate its decision to all parties on or before 23<sup>rd</sup> October 2023 via email.

## **BOARD'S DECISION**

39. The Board has considered all documents, pleadings, oral submissions, and authorities together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

***I. Whether the Board should adopt the terms of the Consent dated 13<sup>th</sup> October 2023 between the parties herein?***

***II. What orders should the Board issue in the circumstance?***

### **Whether the Board should adopt the Consent dated 13<sup>th</sup> October 2023 as filed by the parties herein.**

40. On 12<sup>th</sup> October 2023 this Board isolated 4 areas for which it sought the parties address arising from the terms of the consent, namely (i) whether the subject tenders were the same tenders that were also the subject of the previous proceedings before both the Board and the High Court; (ii) the status of tender validity period for the subject tenders bearing in mind that the Applicant sought its extension but the Consent was silent on the issue; (iii) the reasoning behind the starting date of the subject tenders being proposed as 1<sup>st</sup> November 2023 and (iv) the reasoning behind the 2-year period for the contract to be awarded to the Applicant as per the terms of the Consent.

41. On the first issue, Counsel for the Applicant and Respondents were in consensus that the subject tenders were the same tenders forming the subject of determination before both this Board and the High Court in Nakuru High Court Judicial Review Application No. 4 of 2020. The Board

has independently, reviewed, the tender documents as well as the documents filed in the instant Request for Review and notes that the subject tenders were the same ones that were also the subject of proceedings before this Board and the High Court.

42. On the tender validity of the subject tender, both Counsel for the Applicant and Respondents were unanimous that 5 days were remaining as of the time of filing the instant Request for Review. They also argued that the period the Board's decision in Requests for Review No. 6,7 and 8 of 2020 was the subject of judicial review proceedings, the tender validity period froze and only resumed running at the conclusion of the judicial review proceedings on 18<sup>th</sup> September 2023.
43. It was important for the Board to ascertain the status of the tender validity period of the subject tenders given that Section 135 of the Act provides that public procurement contracts can only be executed within the tender validity period:

***135. Creation of procurement contracts***

***(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.***

***(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.***

***(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period***

44. The Board remains alive to the holding of the Court of Appeal in **Kivuku Agencies v Kenya Airport Authorities Accounting Office & another [2020] eKLR** where the appellate Court held that no procurement proceedings can be undertaken outside the tender validity period:

***"4. The matter was heard by Ogola, J. who in a well-reasoned opinion found that the appellant filed the review application on 10th August, 2017 and the decision of the Board was issued on 31st August, 2017 thus the tender validity which was for ninety (90) days had already lapsed. This is what the learned Judge stated in his own words: -***

***"This court has found that the respondents would not reinstate the ex-parte applicant to the tender process as the validity period of the tender had already lapsed. Therefore the decision by the respondents to this effect cannot be said to be unreasonable and with...***

***...Just like the trial Judge, we cannot fault the respondents for not extending the period of validity or for not construing the period of validity was from 26<sup>th</sup> July, 2017 given that the tender document indicated it was valid for ninety (90) days from the date of issue. Furthermore, there was no request made by the appellant following the decision of the Board to the accounting officer to extend the validity period. So, we do not have any reasons to fault the respondent for opting for a fresh tender."***



45. This Board in its Decisions in Requests for Review Nos. 6,7 and 8 of 2020 at page 41 noted that as of the time of delivery of the Decisions on 5<sup>th</sup> February 2020 only 21 days of the tender delivery period remained unspent:

***"At this point, the Board would like to address its mind on the tender validity period of the subject tender.***

***When the Board rendered its decision in PPARB Application No. 139 of 2019, the Board found that the tender validity period of the subject tender of 70 days had 46 days remaining.***

***When the Applicant lodged this review application on 17th January 2020, the tender validity period had run for another 25 days and a total of 21 days were remaining, noting that the tender validity period remains suspended until the conclusion of these review proceedings.***

***In this regard, therefore, the Board is of the view that the tender validity period is still running and sufficient for the Procuring Entity to award and complete the subject procurement process."***

46. The Respondent commenced the judicial review proceedings Nakuru High Court Judicial Review Application No. 4 of 2020 on 12<sup>th</sup> February 2020 and thus as of 12<sup>th</sup> February 2020 the unspent days had dropped from 21 days to 14 days.

47. Counsel appearing for the parties were in unison that the filing of the judicial review proceedings halted the running of the unspent days of the tender validity period.
48. Section 175 of the Act provides for the right to challenge a decision of the Board in a Request for Review by way of judicial review in the following terms:

***175. Right to judicial review to procurement***

***(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.***

***(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.***

***(3) The High Court shall determine the judicial review application within forty-five days after such application.***

***(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.***

***(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.***

***(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall***

***be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.***

***(7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.***

49. Both counsel for the Applicant and the Respondent relied on the case of ***Judicial Review Application No. 540 of 2017; R v PPARB; Kenya Power and Lighting Company Limited Ex parte Transcend Media Group*** (herein after “the **Transcend Media case**”) to assert that the period as authority for the position that the tender validity period froze during the pendency of the judicial review at the High Court.

50. The Board however notes that the ***Transcend Media case***, which the Board has had occasion to consider in several of its previous decisions, addressed the freezing of the validity period during the pendency of proceedings before the Board and not the courts. The court held as follows:

***51. The question that needs to be answered by this Court is whether the Respondent correctly interpreted the provisions of the law on the effect of the litigation before it on the tender validity period. The Respondent in this respect held that a notice by the Secretary of the Review Board and any stay order contained therein can only affect the procurement process from proceedings further but cannot act as an extension of the tender validity period, nor can it stop the tender validity period from running. It in this respect relied on***

*its previous decisions on this interpretation, which are not binding on this Court, and which were decided before the Public Procurement and Asset Disposal Act of 2015 was enacted.*

**52. I find that this position is erroneous for three reasons, Firstly, section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound.**

**53. Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point, at least for any deadlines defined by reference to a period of time, which in this case included the tender validity period. It would also be paradoxical and absurd to find that procurement proceedings cannot proceed, but that time continues to run for the same proceedings.”**  
**(Emphasis added)**

51. As noted in the foregoing excerpt, the High Court in the Transcend Media case held that the period of tender validity is frozen given the automatic statutory stay of tender proceedings under section 168 of the Act when a request for review is filed before this Board.

52. There are no equivalent statutory provisions for stay of tender proceedings during the pendency of judicial review proceedings. In fact, the High Court has discretion under the applicable law including Order 53 of the Civil Procedure Rules, as to whether or not leave granted to institute judicial review proceedings should operate as stay.
53. Given the foregoing, it's the Board considered view that the pendency of judicial review proceedings at the High Court does not automatically freeze the tender validity period.
54. For the present case, the parties herein did not address the Board on whether the High Court issued stay orders in respect of the subject tenders. The Board, however, has noted from the ruling of 18<sup>th</sup> September that the court confirmed that no stay orders were issued in the judicial review proceedings. In particular, the court stated at paragraph 7 of the ruling as follows

*"Accordingly, it was not necessary to file the present application. It would only have sufficed if a substantive application had been filed, **or if there were stay orders. There are none.**" (Emphasis added)*

55. As such, we do not agree with the parties contention that the period of the tender validity remained frozen during the pendency of the proceedings at the High Court.
56. Notwithstanding the above, the Board is, however, aware that the superior courts have decreed that the Board has power under Section 173 of the Act to extend the tender validity period in the interest of justice even in instances where the tender validity period has lapsed. One such

decision was by the Court of Appeal in the case of ***Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others (Civil Appeal E510 of 2022) [2022] KECA 982 (KLR) (9 September 2022) (Judgment)*** in which it was stated that:

***"42. The 2nd respondent (the Board) is an independent quasi-judicial creature of statute, and its broad powers are set out in sections 28 and 173 of the PPAD Act. It has power to give directions to accounting officers of procuring entities with respect to anything to be done or redone in procurement or disposal proceedings. In our view, its power may even include power to extend validity of a tender in situations where an accounting officer for no good reason fails to adhere to statutory timelines or disobeys the Board's directions so as to frustrate tenderers or bidders, even if the stated tender validity period has expired. This is akin to the power exercised by the High Court or this Court to extend time to appeal in appropriate circumstances, notwithstanding that the stipulated time for instituting such appeal may have already expired.***

***43. The appellant was in violation of the Constitution, the PPAD Act, public policy, and principles of public finance under Article 201 of the Constitution. In such a situation, the Board had power to extend the tender validity period and even direct the appellant to award the tender to the 1st respondent. The 2nd respondent in declining to order further extension of tender validity when it was clear that the appellant was acting with impunity and contemptuously did not promote the***

***principles and values in public procurement as required under Article 227 of the Constitution and section 3 of the PPAD Act. Accordingly, the ground of appeal that the 2nd respondent did not have such power is without merit and subsequently fails.”***

57. In the present case, as of the time the Respondent moved to the High Court in Nakuru High Court Judicial Review Application No. 4 of 2020, the tender validity period was unspent by 14 days. Further, from the litigious history involving the subject tenders, the Respondents bear the blame for the prolonged litigation and before the High Court as they failed to comply with the Court’s directions on filing the substantive motion in the matter.
  
58. Taking guidance from **Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others (Civil Appeal E510 of 2022) [2022] KECA 982 (KLR) (9 September 2022) (Judgment) (supra)** the Board is satisfied that the present matter, given the circumstances of the case, is one in which the Board should extend the tender validity period to allow the conclusion of the procurement proceedings in respect of the subject tenders
  
59. On the 2-year contractual period, Counsel for the Applicant and Respondents were unanimous that this period was informed by the original period in the tender documents. The Board has keenly studied each of the tender documents and noted that the period for the duration of the tenders is expressed in the same words. Each of the clauses in the subject tenders reads:

***"The contract shall be reviewed after every 6 months and renewable after one year subject to an acceptable level of service delivery."***

60. For the Tender No. NCG/MOH/PGH/T/6/2019 -2021 Comprehensive Cleaning Services, the above words are Clause 21 on page 28 of the Tender Document.
61. For Tender No. NCG/MOH/PGH/Q/4/2019 -2020 Provision of Cleaning Services for Sanitary Accommodation Facility, the above words are at Clause 19 on page 27 of the Tender Document.
62. For Tender No. NCG/MOH/PGH/T/5/2019 -2021 Maintenance of Grounds, Hedges, Flower Beds and Fences, the above words are at Clause 13 on page 26 of the Tender Document.
63. Given the above, the Board is satisfied with the submissions made on behalf of the parties on this point.
64. On the start date of the contracts under the subject tenders, the Respondents' Counsel, Ms. Litunda attributed the date to budgetary allocation.
65. On the absorption of the casuals currently engaged by the Respondents by the Applicant in the delivery of the services under the subject tender, Ms. Litunda pointed out that the Applicant was amenable to this. Since this Board is not in the business of re-writing agreements entered into by suppliers and Procuring Entities, and has no jurisdiction to determine the propriety of the terms and conditions of such contracts, it shall not make



orders in respect of the contract. The Board shall leave such matters to the liberty of the parties as guided by the terms of the tender documents and the applicable law.

66. In the result, the Board finds in favour of adopting the terms of the Consent dated 13<sup>th</sup> October 2023 between the parties herein in terms of the final orders set out below.

**What orders the Board should grant in the circumstances?**

67. The upshot of our finding is that the Request for Review dated 29<sup>th</sup> September 2023 in respect of Tenders Nos. NCG/MOH/PGH/T/6/2019 - 2021 Comprehensive Cleaning Services; NCG/MOH/PGH/Q/4/2019 -2020 Provision of Cleaning Services for Sanitary Accommodation Facility and NCG/MOH/PGH/T/5/2019 -2021 are compromised in the following specific terms:

**FINAL ORDERS**

68. 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 29<sup>th</sup> September 2023:

- a. The tender validity periods for each of the subject tenders, namely, Tender for Provision of Comprehensive Cleaning (Tender No. NCG/MOH/PGH/T/6/2019-2021), Tender for the Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers (NCG/MOH/PGH/T/5/2019-2021); and Tender for the Provision of Sanitary Cleaning (Tender No. NCG/MOH/PGH/T/4/2019-2021 be and are hereby enlarged**

and extended for a period of 21 days from the date of this decision to facilitate the conclusion of the procurement proceedings in the subject tenders.

- b. The 1<sup>st</sup> Respondent shall award the Applicant the following tenders in compliance with the orders issued by the *Public Procurement Administrative Review Board in PPARB Applications Numbers 6, 7 and 8 of 2020 The Gardens and Weddings Centre Limited v The Accounting Officer, Nakuru County Government-The Rift Valley Provincial General Hospital and Nakuru County Government- The Rift Valley Provincial General Hospital by Nakuru County Government-Rift Valley Provincial General Hospital (The Procuring Entity)*:
- i) Tender for Provision of Comprehensive Cleaning (Tender No. NCG/MOH/PGH/T/6/2019-2021
  - ii) Tender for the Maintenance of Grounds, Flowers, Hedges and Planting of Trees and Flowers (NCG/MOH/PGH/T/5/2019-2021); and
  - iii) Tender for the Provision of Sanitary Cleaning (Tender No. NCG/MOH/PGH/T/4/2019-2021).
- c. The 1<sup>st</sup> Respondent shall conclude the procurement processes for the subject tenders including the entering into contracts within the enlarged and extended tender validity period.

**d. In view of the Consent entered into by the parties in this Request for Review each party shall bear its own costs of review**

**Dated at NAIROBI, this 21<sup>st</sup> Day of October 2023.**

*J. Kashindi*

*Amama.*

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**PANEL CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**