

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 113/2023 OF 20TH DECEMBER 2023

BETWEEN

WESTLANDS FOREX BUREAU EXCHANGE LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA AIRPORTS AUTHORITY 1ST RESPONDENT

KENYA AIRPORTS AUTHORITY 2ND RESPONDENT

AND

NAMAGA FOREX BUREAU LTD INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Airports Authority in relation to Tender No. KAA/OT/MBD/0172/2022-2023 for the Development and Management of Currency/Forex Outlets at Jomo Kenyatta International Airport Terminal 1C.

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb - Chairperson
2. CPA Alexander Musau - Member
3. Dr. Susan Mambo - Member

IN ATTENDANCE

- 1. Mr. Philemon Kiprof - Holding Brief for Board Secretary
- 2. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT **WESTLANDS FOREX BUREAU EXCHANGE LIMITED**

- 1. Mr. Vincent Tama - Advocate, Alex & Amersi LLP
- 2. Mr. George Ochieng - Advocate, Alex & Amersi LLP

RESPONDENTS **THE ACCOUNTING OFFICER, KENYA AIRPORTS AUTHORITY**
KENYA AIRPORTS AUTHORITY

Mr. Daniel Moss -Advocate, Kenya Airports Authority

INTERESTED PARTY **NAMANGA FOREX BUREAU LIMITED**

Mr. George Gilbert -Advocate, George Gilbert Advocates

BACKGROUND OF THE DECISION

The Tendering Process

- 1. Kenya Airports Authority, the Procuring Entity and the 2nd Respondent herein, invited qualified and interested tenderers to submit sealed tenders in response to Tender No. KAA/OT/MBD/0172/2022-2023 for the

Development and Management of Currency Forex Outlets at Jomo Kenyatta International Airport Terminal 1C (hereinafter referred to as the "subject tender"). Tendering was conducted under Open Tendering method and the invitation was by way of an advertisement on 13th June 2023 in My Gov publication, on the Procuring Entity's website www.kaa.go.ke and on the Public Procurement Information Portal (PPIP) (www.tenders.go.ke) where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. Completed tender documents and its attachments would be submitted online before the subject tender's initial submission deadline of 28th June 2023 at 11:00 a.m.

Addenda

2. On various dates between 27th June 2023 and 25th July 2023, the Procuring Entity issued a total of 7 Addenda providing clarifications sought by interested participants in the subject tender while variously changing the tender submission deadline. According to Addendum No.7, the tender submission deadline was finally extended to 25th July 2023 at 3:00 p.m.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Register for 25th July 2023 and which Tender Opening Register was part of the confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of four (4) tenders were submitted in response to the subject tender and were recorded as follows:

No.	Name of Tenderer
1.	Westlands Forex Bureau Exchange Limited
2.	Simba Forex Bureau Limited
3.	Travel Point Forex Bureau Limited
4.	Namanga Forex Bureau Limited

Evaluation of Tenders

4. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the four (4) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee (hereinafter referred to as the "Evaluation Report") in the following stages:

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

Preliminary Evaluation

5. At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Clause 2. Preliminary examination for Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA at pages 20 to 22 of the Tender Document.

6. The evaluation was to be on a Yes/No basis and tenderers who failed to meet any criteria at the Preliminary Evaluation Stage would be disqualified from further evaluation at the Technical Evaluation Stage.
7. At the end of the evaluation at this stage, only one (1) tender was found unresponsive with the other three (3) tenders including that of the Applicant and the Interested Party qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Part II: Evaluation of Tenderer's Technical Requirements under Section III – QUALIFICATION CRITERIA AND REQUIREMENTS at pages 22 to 23 of the Tender Document.
9. In order to qualify for further evaluation at the Financial Evaluation Stage, tenderers were required to meet all the technical requirements outlined under the Tender Document.
10. At the end of the evaluation at this stage, all the three (3) tenderers met all the technical requirements and thus qualified for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

11. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Part III: Tenderer's Financial Proposal and Statement of Financial Compliance under Section

III– QUALIFICATION CRITERIA AND REQUIREMENTS at page 24 of the Tender Document.

12. The financial evaluation was to be based on payment of proposed Minimum Annual Guarantee (MAG) of not less than USD 20,000 payable quarterly in advance with a concession rate of 10% based on gross gains/receipts/sales as captured by the management accounts and/or EPOS.
13. The Evaluation Committee would then compare the prices quoted by the tenderers and establish the tender that offered the highest evaluated income.
14. Following the conclusion of the evaluation at this stage, the Evaluation Committee determined the tender by M/s Westlands Forex Bureau Exchange Limited to be the successful tenderer at its tender price of **USD. 41,500.00** being the highest evaluated tender price in the subject tender.

Evaluation Committee's Recommendation

15. Accordingly, the Evaluation Committee recommended the award of the subject tender to M/s Westlands Forex Bureau Exchange Limited at **USD. 41,500.00 (United States Dollars Forty-One Thousand and Five Hundred only)** inclusive of taxes with a concession rate of 10% based on gross gains/receipts/sales as captured by management accounts and/or EPOS.

Due Diligence

16. According to a Due Diligence Report dated and signed on 4th October 2023, the Evaluation Committee conducted due diligence on M/s Westlands Forex Bureau Exchange Limited through the Procuring Entity's Acting General Manager, Procurement and Logistics vide a letter dated 28th September 2023 to Central Bank of Kenya seeking confirmation whether or not M/s Westlands Forex Bureau Exchange Limited reference letter submitted of intent of acquiring space for an additional outlet at JKIA was from the regulator.
17. Central Bank of Kenya confirmed that M/s Westlands Forex Bureau Exchange Limited is duly licensed by it and that the reference letter as submitted had been duly issued.

First Professional Opinion

18. In a Professional Opinion dated 9th October 2023 (hereinafter referred to as the "First Professional Opinion"), the Procuring Entity's Acting General Manager, Procurement and Logistics, Ms. Lilian Okidi, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to M/s Westlands Forex Bureau Exchange Limited. She thus requested the 1st Respondent to approve the award of the subject tender as per the recommendation of the Evaluation Committee.
19. Thereafter, the 1st Respondent approved the said Professional Opinion on 9th October 2023.

Notification to Tenderers

20. Tenderers were notified of the outcome of the evaluation of the subject tender vide letters dated 9th October 2023.

REQUEST FOR REVIEW NO. 82 OF 2023

21. On 25th October 2023, Namanga Forex Bureau Limited, the Interested Party herein, filed a Request for Review No. 82 of 2023 dated 25th October 2023 supported by a Supporting Affidavit sworn on 25th October 2023 by Mugo Kimani, its Director with respect to the subject tender (hereinafter referred to as "Request for Review No. 82 of 2023") seeking the following orders:

- a. Kenya Airports Authority breached the provisions of the Public Procurement and Disposal Act (sic) by awarding the tender to Westlands Forex Bureau Exchange Limited despite the discrepancy on its tender bid documents;*

- b. The letter of award issued to Westlands Forex Bureau Exchange Limited and arising from tender no. KAA/OT/MBD/0172/2022-2023 for the development and management of currency/Forex outlets at Jomo Kenyatta International Airport terminal 1C and all its consequential actions and or contracts entered into between Westlands Forex Bureau Exchange Limited and Kenya Airports Authority as a result of the aforesaid tendering process and or award be and is hereby quashed and set aside;*

- c. A declaration be and is hereby issued that Namanga Forex Bureau Limited won the tender by Kenya Airports Authority*

- for the development and management of currency/Forex outlets at Jomo Kenyatta International Airport terminal 1C and referenced as KAA/OT/MBD/0172/2022-2023;*
- d. A letter of award arising from tender no. KAA/OT/MBD/0172/2022-2023 for the development and management of currency/Forex outlets at Jomo Kenyatta International Airport terminal 1C be and is hereby ordered to Namanga Forex Bureau Limited by Kenya Airport Authority;*
- e. The Procuring entities (sic) decision contained in its letter dated 9.10.23 and addressed to Namanga Forex Bureau Limited communicating its unsuccessful bid, be annulled, cancelled and set aside;*
- f. In the alternative to prayer (c) above, the four (4) bids submitted in the tender advertised on 13.0623 by Kenya Airports Authority for the development and management of currency/Forex outlets at Jomo Kenyatta International Airport terminal 1C and referenced as KAA/OT/MBD/0172/2022-2023 be evaluated and assessed afresh by the procuring entity within 14 days from the date of this board's decision;*
- g. The cost of this review be awarded to the Applicant.*

22. 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 Respondents 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. 82 of 2023:

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

In determining this issue, the Board will determine whether the instant Request for Review was filed with the 14 days' statutory timeline under Section 167(1) of the Act as read with Regulation 203(1) of the Regulations 2020.

Depending on the finding on the first issue:

b) Whether the Respondents extended the tender submission deadline in respect of the subject as per the provisions of the Tender Document and Section 75 of the Act?

c) Whether the Procuring Entity's Evaluation Committee properly evaluated the tenders submitted in response to the subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document?

d) What orders should the Board issue in the circumstance?

23. On the first issue framed for determination, the Board found that Request for Review No. 82 of 2023 was not time barred and that the grounds of objection in the Preliminary Objection dated 2nd November 2023 raised by Westlands Forex Bureau Exchange Limited did not constitute pure points of law that would be properly argued as a preliminary objection.
24. On the second issue framed for determination, the Board found that the Respondents extended the tender submission deadline in respect of the subject tender from 25th July 2023 at 11.00 a.m. to 25th July 2023 at 3.00 p.m. in accordance with the provisions of the Tender Document read with Section 75 of the Act.
25. On the third issue framed for determination, the Board found that the Procuring Entity's Evaluation Committee did not evaluate the tenders submitted in response to the subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document.
26. On 15th November 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. 82 of 2023:

a) The Interested Party's Notice of Preliminary Objection dated 2nd November 2023 be and is hereby dismissed.

b) The Letter of Notification of Intention to Award dated 9th October 2023 and addressed to the Interested Party as the successful tenderer in respect of Tender No. KAA/OT/MBD/0172/2022-2023 for the Development and Management of Currency/Forex Outlets at Jomo

Kenyatta International Airport Terminal 1C be and is hereby cancelled.

c) The Letters of Notification of Intention to Award dated 9th October 2023 and addressed to the Applicant and other unsuccessful tenderers in respect of Tender No. KAA/OT/MBD/0172/2022-2023 for the Development and Management of Currency/Forex Outlets at Jomo Kenyatta International Airport Terminal 1C be and are hereby cancelled.

d) The 1st Respondent be and is hereby directed to reconvene the Procuring Entity's Evaluation Committee for purposes of re-evaluating the tenders that qualified for evaluation at the Financial Evaluation Stage in respect of Tender No. KAA/OT/MBD/0172/2022-2023 for the Development and Management of Currency/Forex Outlets at Jomo Kenyatta International Airport Terminal 1C, which re-evaluation process should be concluded within 10 days from the date of this Decision.

e) The tenders that passed the Technical Evaluation Stage in respect of Tender No. KAA/OT/MBD/0172/2022-2023 for the Development and Management of Currency/Forex Outlets at Jomo Kenyatta International Airport Terminal 1C be and are hereby re-admitted for re-evaluation at the Financial Evaluation Stage taking

into consideration of the Board's findings in this Decision.

f) Given the Board's finding above, each party shall bear its own costs.

27. No evidence was tendered by any party in the instant Request for Review demonstrating that a party to the Request for Review No.82 of 2023 sought judicial review by the High Court of the Board's Decision dated 15th November 2023 in Request for Review No. 82 of 2023. In the absence of such evidence, it is just to hold that the Board's Decision dated 15th November 2023 in Request for Review No. 82 of 2023 became final and binding to all parties to Request for Review No. 82 of 2023 after the lapse of 14 days from 15th November 2023 in accordance with Section 175(1) of the Act.

FINANCIAL RE-EVALUATION OF TENDERS

28. According to the Financial Re-Evaluation Report signed on 24th November 2023 by members of the Evaluation Committee (hereinafter referred to as "the Financial Re-Evaluation Report") and pursuant to the orders of the Board of 15th November 2023, the 1st Respondent reconvened the Evaluation Committee and the Evaluation Committee re-admitted tenders that had been rendered responsive at the Technical Evaluation stage for re-evaluation at the Financial Evaluation stage.

29. The Evaluation Committee was required to carry out a financial evaluation based on payment proposed Minimum Annual Guarantee (MAG) of not less than USD 20,000.00 with a concession rate of 10%

based on gross gains/receipts/sales as captured by management accounts and/or EPOS and the subject tender was to be awarded to the highest evaluated bidder.

30. The Evaluation Committee noted that M/s Westlands Forex Bureau Exchange Limited had a discrepancy in the amount quoted in words and in figure and upon review of ITT 30(2)(c) of Section I- Instructions to Tenderers at page 12 to 13 of the Tender Document, the Evaluation Committee found that the amount by M/s Westlands Forex Bureau Exchange Limited is Thirty-Six Thousand Five Hundred USD and not USD 41,500.00.

Second Evaluation Committee's Recommendation

31. Accordingly, the Evaluation Committee recommended the award of the subject tender to M/s Namanga Forex Bureau Limited at **USD. 41,160.00 (United States Dollars Forty-One Thousand One Hundred and Sixty only)** inclusive of taxes with a concession rate of 10% based on gross gains/receipts/sales as captured by management accounts and/or EPOS subject to due diligence.

Second Due Diligence

32. According to a Due Diligence Report dated and signed on 28th November 2023 (hereinafter referred to as "the Second Due Diligence"), the Evaluation Committee conducted due diligence on M/s Namanga Forex Bureau Limited from Central Bank of Kenya on the authenticity of the letter of no objection from the Bank provided by the recommended

bidder. Central Bank of Kenya on 27th November 2023 confirmed that indeed the letter of no objection came from them.

33. Based on the confirmation by Central Bank of Kenya, the Evaluation Committee recommended the award of the subject tender to M/s Namanga Forex Bureau Limited at **USD. 41,160.00 (United States Dollars Forty-One Thousand One Hundred and Sixty only)** inclusive of taxes with a concession rate of 10% based on gross gains/receipts/sales as captured by management accounts and/or EPOS being the highest evaluated bidder.

Second Professional Opinion

34. In a Professional Opinion dated 6th December 2023 (hereinafter referred to as the "Second Professional Opinion"), the Procuring Entity's Acting General Manager, Procurement and Logistics, Ms. Lilian Okidi, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and re-evaluation of tenders at the Financial Evaluation stage and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to M/s Namanga Forex Bureau Limited. She thus requested the 1st Respondent to approve the award of the subject tender as per the recommendation of the Evaluation Committee.
35. Thereafter, the 1st Respondent approved the said Professional Opinion on 6th December 2023.

Notification to Tenderers

36. Tenderers were notified of the outcome of the re-evaluation of the subject tender vide letters dated 6th December 2023.

REQUEST FOR REVIEW NO. 113 OF 2023

37. On 20th December 2023, being dissatisfied with the decision of the Procuring Entity on award of the subject tender, M/s Westlands Forex Bureau Exchange Limited filed Request for Review No. 113 of 2023 dated 20th December 2023 together with a Supporting Affidavit sworn on 20th December 2023 by Mohammed Shajeel Mughal, its Manager, (hereinafter referred to as "the instant Request for Review") through the firm of Alex and Amersi LLP Advocates seeking the following orders from the Board:

a) A Declaration do issue that the Respondents were in breach of the provisions of the Public Procurement Act by awarding the tender to Namanga Forex Bureau Exchange Limited despite being non-responsive.

b) A Declaration do issue that the Respondents were in breach of Public Procurement Review Board's decision in Review Application No. 82 of 2023, specifically failing to observe the directions given by the Board in re-evaluation of the tender.

c) The Letter of Award to Namanga Forex Bureau Exchange Ltd resulting from the re-evaluation of tender no KAA/OT/MBD/0172/2022-2023 for the development and management of forex outlets at Jomo Kenyatta International Airport Terminal 1C, along with all

consequential actions and contracts arising from the aforementioned tendering process and award, be quashed and set aside.

d) The decision of the Respondents, as conveyed in the letter dated 6th December, 2023, addressed to Westlands Forex Bureau Exchange Limited, communicating the rejection of its bid, should be annulled, canceled, and set aside.

e) A Declaration be issued, affirming that Westlands Forex Bureau Exchange Limited emerged as the winner of tender no KAA/OT/MBD/0172/2022-2023 for the development and management of forex outlets at Jomo Kenyatta International Airport Terminal 1C.

f) Costs of the review to be awarded to the Applicant.

38. In a Notification of Appeal and a letter dated 20th December 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent 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 Respondent 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 was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 20th December 2023.

39. In response to the Request for Review, on 22nd December 2023, the Respondents filed a Reply by the Procuring Entity dated 22nd December 2023 together with the confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
40. Vide email dated 28th December 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days.
41. On 29th December 2023, the Interested Party filed through George Gilbert Advocates a Notice of Appointment dated 29th December 2023, a Memorandum of Response dated 29th December 2023 and an Affidavit in Support of the Response sworn on 29th December 2023 by Mugo Kimani.
42. *Vide* a Hearing Notice dated 29th December 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 3rd January 2024 at 3.30 p.m., through the link availed in the said Hearing Notice.
43. On 3rd January 2024, the Interested Party filed Written Submissions dated 3rd January 2024 together with a List of Authorities dated 3rd January 2024.
44. On the same day of 3rd January 2024, the Applicant filed Written Submissions dated 3rd January 2023

45. When the matter came up for hearing on 3rd January 2024, the Board read out to the parties the documents that had been filed in the instant Request for Review and sought for parties' confirmation that those were the documents that had been filed and served upon them. Counsel for the Respondents, Mr. Moss made an application for adjournment citing that he was not ready to proceed since he had just been served with both the Applicant's and Interested Party's Written Submissions and List of Authorities and requested for time to file the Respondents Written Submission in the matter. There being no objection to the application to adjourn the matter, the Board directed (a) that the application for adjournment by the Respondent be allowed, (b) the Respondents to file and serve their written submissions by 2.00 p.m. on 4th January 2024, (c) the Interested Party and the Applicant are granted leave to file and serve their rejoinder by 10.00 a.m. on 5th January 2024, (d) that hearing of the instant Request for Review to proceed on 5th January 2024 at 2.00 p.m. Parties were cautioned to adhere to the strict timelines as specified in the Board's directions since the Board would rely strictly on the documentation filed before it in rendering its decision.
46. On 4th January 2024, the Respondents filed their Written submissions together with a List of Authorities.
47. On 5th January 2024, the Interested Party filed Interested Party's Submissions in Rejoinder dated 4th January 2024.
48. On 5th January 2024, the Applicant filed Applicant's Further Submissions dated 5th January 2024.

49. At the hearing of the instant Request for Review on 5th January 2024 at 2.00 p.m., parties confirmed compliance with the Board's previous orders and upon the Board reading out pleadings filed in the matter, counsel for the Applicant, Mr. Tama made an application to strike out from the record the Interested Party's Submissions in Rejoinder dated 4th January 2024 and submitted that the same were bad in law and have no basis in law.
50. In his rejoinder, counsel for the Interested Party, Mr. Gilbert pointed out that Interested Party's Submissions in Rejoinder dated 4th January 2024 had been filed pursuant to the Board's directions of 3rd January 2024 and submitted that despite the Applicant being the movers of the matter, the Interested Party had filed its written submissions earlier and it was only fair that they filed a rejoinder.
51. On his part, counsel for the Respondents, Mr. Moss submitted that the Board had directed on 3rd January 2023 for both the Applicant and the Interested Party to file a rejoinder upon being served with the Respondents' written submissions.
52. Having considered submissions made by parties on the Applicant's application to strike out the Interested Party's Submissions in Rejoinder dated 4th January 2024, the Board sought to know whether counsel for the Interested party was willing to withdrawal the same from record. Mr. Gilbert in response was agreeable to withdrawing the same and the Board ordered that the Interested Party's Submissions in Rejoinder dated 4th January 2024 be marked as withdrawn. Thus the matter proceeded for

virtual hearing as scheduled and parties were allocated time to highlight their respective cases.

PARTIES SUBMISSIONS

Applicant's submissions

53. In his submissions, counsel for the Applicant, Mr. Tama relied on the pleadings filed before the Board i.e the instant Request for Review and written submissions filed before the Board.
54. Mr. Tama submitted that the subject tender was previously before the Board in PPARB Application No. 82 of 2023 where the Board directed in its ruling on 15th November 2023 that the 2nd Respondent re-evaluates tenders that had passed the initial evaluation in the subject tender within 10 days. He pointed out that in defiance with the Board's directive, the 2nd Respondent and its officers purposefully and unlawfully chose not to re-evaluate the tenders within the designated timeframe and that the only averment that re-evaluation was completed within the 10 days as ordered is the averment in the Response by the Respondents which has not been supported by any evidence and the only document filed was the letter of notification dated 6th December 2023 which was outside the 10 day period.
55. It is the Applicant's case that pursuant to Section 175 of the Act, it is evident that Parliament explicitly aimed to limit the time taken for the filing, hearing, and resolution of public procurement disputes, aligning with the Acts' overarching objective of promptly resolving such disputes. The Applicant contends that the re-evaluation of the subject tender suffered from irregularities and illegalities deviating from both the legal

framework and the directives outlined by the Board in its Decision of 15th November 2023 in Request for Review No. 82 of 2023. Further, the Applicant contends that the Respondents changed the Secretary of the Evaluation Committee without notice to the parties and this position was assumed by a newly appointed individual who had no prior involvement in the contested tender.

56. Mr. Tama referred the Board to ITT 17.1 of the Tender Document providing for the tender validity period of 126 days from the tender closing date and submitted that the tender having been opened on 25th July 2023, the 126 tender validity period lapsed on 28th November 2023. As such, it was Mr. Tama's position that any decision by the Respondent relating to the tender outside the tender validity period and the timelines prescribed by the Board was contrary to Section 87(1) of the Act and a nullity and void ab-initio since there was no valid tender to award.
57. In support of his argument, counsel relied on the holding in *Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR* and *ADK Technologies Ltd in Consortium with Computer Technologies Ltd v Public Procurement Administrative Review Board & 4 others (Civil Appeal E598 of 2021) [2022] KECA 407 Eklr* (hereinafter referred to as "the ADK Technologies case").
58. On the issue raised regarding completeness of the Interested Party's Form of Tender, counsel submitted that the Interested Party failed to fully complete the tender form as mandated by the Tender Document which clearly provided that tenderers shall complete the form of tender by

inserting both figures and words and the Interested Party failed to fill any of the aforementioned amounts in its form of tender and the Applicant is at a loss as to how the Respondents came up with the bid price of USD 41,500.

59. Counsel submitted that the Decision of the Board in Request for Review No. 82 of 2023 mandated the Respondents to re-evaluate responsive tenders at the Financial Evaluation Stage and it was oddly suspicious that the reconvened Evaluation Committee came up with a figure that was not included in the Interested Party's tender document. Counsel further submitted that failure to complete the tender documents has been admitted by the Interested Party under paragraph 6 of its response dated 29th December 2023 and as such, the Interested Party's bid ought to be invalidated since it was obligatory to express the amount in words and in figures.
60. With regard to how the Applicant obtained the Interested Party's form of tender, Mr. Tama submitted that it had been served with a copy of the Interested Party's tender document in Request for Review No. 82 of 2023 which formed part of the Interested Party's Bundle in Request for Review No. 82 of 2023 at pages 42 to 149 and as such, the document was not illegally obtained. Mr. Tama submitted on the question of evidence adduced that the Board is excluded from the stringent laws of evidence and can determine on its own the probative value of the evidence before it.
61. Counsel reiterated that none of the parties in the instant Request for Review have contested that the Interested Party filled an incomplete

tender document and the same ought to be considered as an undisputed fact by the Board. He further pointed out that the Board in Request for Review No. 82 of 2023 at page 40 of its Decision dated 15th November 2023 took cognizance of the Applicant's tender document despite the same form of tender not being filled by any of the other parties.

62. In conclusion, Mr. Tama urged the Board to allow the Request for Review as prayed.

Respondents' submissions

63. In his submissions, counsel for the Respondents, Mr. Moss, relied on the Reply by the Procuring Entity dated 22nd December 2023 together with the confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act and Written Submissions and List of Authorities filed before the Board.

64. On whether the re-evaluation of the subject tender was done outside the mandatory 10 days' period as ordered by the Board in its Decision dated 15th November 2023 in Request for Review No. 82 of 2023, Mr. Moss submitted that re-evaluation of the subject tender was completed on 24th November 2023 which was within the 10 days' period stipulated by the Board in its ruling and this assertion is substantiated by the Financial Re-Evaluation Report annexed in the Procuring Entity's Bundle of Documents. Counsel argued that the communication sent to all participating bidders on 6th December 2023 was not an act of defiance but instead was a necessary step in the tendering process.

65. Mr. Moss submitted that following the re-evaluation on 24th November 2023, due diligence was conducted on the bidder recommended for award of the subject tender, a process that involved verifying the authenticity of the successful tenderer's letter of intent from Central Bank of Kenya (CBK) and upon receipt of the confirmation, a Due Diligence Report was prepared on 28th November 2023 to facilitate award.
66. Counsel submitted that the tender validity period froze during the pendency of the proceedings before the Board in Request for Review No. 82 of 2023 and referred the Board to the holding in *Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Ex parte Transcend Media Group Limited [2018] eKLR* and the Decision in *PPARB Application No.66 of 2023*.
67. With regard to the ADK Technologies case cited by the Applicant, Mr. Moss in support of the submissions by the Interested Party argued that it was immaterial and lacks relevance to issues before the Board given the Applicant's reliance on Section 175 of the Act for a jurisdictional claim pertaining to Judicial Review and the Board not being a Judicial Review Court does not have the jurisdiction to address issues under Section 175 of the Act.
68. Counsel submitted that the Applicant has failed to substantiate its claim that the award of the subject tender was made beyond the specified timelines set by the Board or the 126-day period designated as the tender validity period.

69. On the issue of completeness of the Interested Party's form of tender, counsel submitted that the Applicant has not demonstrated by way of pleadings and/or evidence on the provision of the Tender Document is relying upon and thus the Board is estopped from making decisions on issues not pleaded. He associated himself with the submissions by the Interested Party and argued that the Applicant's annexure MSM3 cannot form the subject of the instant Request for Review as it is part of the confidential documents under Section 67(1)(b)(c)(d) of the Act and the Procuring Entity is unaware of how the Applicant obtained the same.

70. Counsel pressed on that the issue regarding the amount in words and figures, if any, was previously brought up by the Applicant in paragraphs 14 and 15 of its Reply to Request for Review No. 82 of 2023 and since the Applicant did not appeal the Decision dated 15th November 2023 in Request for Review No. 82 of 2023, any issues related to this matter are Res Judicata.

71. On the issue of change of the secretary of the Evaluation Committee, counsel submitted that the replacement/change of the secretary was occasioned by the first secretary's retirement from service prior to the Decision of the Board in Request for Review No. 82 of 2023 and that all the other members of the Evaluation Committee carried out the re-evaluation process and the presence of a new secretary could not affect the outcome of the re-evaluation since the secretary is not an evaluator.

72. In conclusion, he urged the Board to dismiss the Request for Review with costs.

73. When asked by the Board to clarify when re-evaluation was completed, counsel submitted that it was completed on 24th November 2023 as evidenced by the Financial Re-Evaluation Report submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act. He further submitted that the Due Diligence, Professional Opinion and notification of award was done after the 10 days.

74. Upon enquiry by the Board on how the Applicant came to the information on re-constitution of members of the Evaluation Committee, Mr. Moss submitted that they may have been aware from the reply in response to the Request for Review and this information was not shared by any of the Procuring Entity's staff/employees to either the Applicant or the Interested Party.

Interested Party's submissions

75. In his submissions, counsel for the Interested Party relied on the Memorandum of Response dated 29th December 2023, Affidavit in Support of the Response sworn on 29th December 2023 by Mugo Kimani, Written Submissions and List of Authorities filed before the Board in the instant Request for Review.

76. Mr. Gilbert submitted that the gravamen of the Applicant's case is based on the allegation that re-evaluation of tenders was not done within 10 days as ordered by the Board in Request for Review No. 82 of 2023 which he argued to be a hypothesis since the Applicant does not know the date of re-evaluation of the subject tender. He pointed out that it was the Applicant's burden to prove that the Respondents went beyond the date of re-evaluation of tenders in the subject tender and that the same

Applicant who submits that the tender period had lapsed still wants to benefit from such illegality as evidenced by the orders sought.

77. Counsel argued that the Applicant relied upon its notification letter date of 6th December 2023 as the day of evaluation and having not expressly stated the date of the said re-evaluation to warrant a claim that re-evaluation was done outside the stipulated timelines, the Board cannot make a determination on unpleaded issues. He further argued that the Procuring Entity has confirmed that it did not violate any of the orders of the Board and re-evaluated tenders within the required period of 10 days.

78. Counsel submitted that disobedience of judicial orders if any, cannot form a subject of a fresh suit but a subject of contempt proceedings and the Board as currently constituted is not a contempt institution. He further submitted that the Applicant has relied on Section 175 of the Act to make a jurisdictional claim yet the said provision donates powers of judicial review to the High Court and this section is irrelevant and immaterial to the issues before the Board in the instant Request for Review as the Board is not a judicial review court and has no jurisdiction to deal with any issues under Section 175 of the Act.

79. On the issue that the Interested Party failed to quote the amounts in its form of tender in words, counsel argued that the Applicant did not demonstrate by way of pleadings and/or evidence, the provision of the tender document relied upon for this ground and the Board is therefore estopped from making decisions on unpleaded issues.

80. On without prejudice basis, he questioned where the Applicant obtained the Interested Party's tender documents as they are part of the confidential documents stipulated in Section 67(1)(b)(c)(d) of the Act hence the annexure marked MSM 3 is an illegally and a fraudulently obtained evidence which cannot form the subject of the instant Request for Review. In support of his arguments, counsel relied on the holding in *Okiya Omtatah Okoito & 2 others v Attorney General & 4 others [2020] eKLR* cited with approval in the Supreme Court in *Njonjo Mue & Another v Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR*.

81. Mr. Gilbert submitted that Order No. 4 of the Decision in Request for Review No. 82 of 2023 was specific that reevaluation be done for the tenders that had qualified for evaluation at the financial evaluation stage hence it was quite obvious that the technical evaluation stage was long gone. He further submitted that the Board's Decision of 15th November 2023 remained unchallenged and it was neither appealed or reviewed pointing out that the Applicant raised the same issue at paragraph 14 and 15 in its Reply to Request for Review No. 82 of 2023 stating that the Applicant's bid ought to be struck out as it was mandatory to enter the amount in words in the form of tender and having not appealed the decision dated 15th November 2023, the issue is therefore *res judicata*.

82. Counsel referred the Board to the legal provisions guiding the Evaluation Committee on evaluation of tenders at Regulations 74 to 78 of Regulations 2020 and submitted that the Applicant is asking the Procuring Entity to violate orders and start evaluation at a stage not ordered and as such, its claim has been overtaken by events.

83. Counsel submitted that Section 79(2)(a)&(b) of the Act provides that a responsive tender shall not be affected by minor deviations that do not materially depart from the requirements set out in the Tender Document or errors or oversights that can be corrected without affecting the substance of the tender. He further submitted that the quotation by the Interested Party was never considered a major deviation to warrant disqualification unlike the Applicant's tender which was noted as a discrepancy. He pressed on that the price quoted by the Interested Party was not ambiguous at USD 41,160 and no prejudice has been demonstrated to have been suffered by the Applicant.

84. Counsel pressed on that the Applicant has used the opportunity in the instant Request for Review to re-argue the same case brought before the Board in Request for Review No. 82 of 2023 and that litigation cannot exist by way of instalment and piecemeal. In support of his argument, he referred to the holding in *Magawi Maxwell Odhiambo v University of Nairobi [2021] eKLR* and *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229* as cited with approval in *Republic v County Government of Kiambu Ex parte Richard Kagiri & 399 others [2015] eKLR*.

85. On the issue of change of the Evaluation Committee Secretary, counsel submitted that the Procuring Entity being an institution with perpetual existence, its officers can change from time to time as circumstances demand and referred to the provisions of Section 46(1) of the Act on composition of members of the Evaluation Committee.

86. In conclusion. Counsel urged the Board to dismiss the instant Request for Review with costs.

Applicant's Rejoinder

87. In a rejoinder, Mr. Tama submitted that the instant Request for Review is not an appeal and does not raise any old issues but brings out new issues of law. He pointed out that the tendering process was an illegality and the directions issued in Request for Review No. 82 of 2023 were clear and concise and were not followed by the Procuring Entity leading to the instant Request for Review.

88. He submitted that the Financial Evaluation involves evaluation of the responsiveness of a tender based on the bid amount and the Procuring Entity having relied on the findings of the Board in establishing the amount in the Applicant's form of tender, it would be discriminatory if the same was not applied to the Interested Party's form of tender.

89. He pointed out that the Applicant was never served with the trial bundle by the Procuring Entity and was not aware of the same leading the matter to be a trial by ambush. He pressed on that the burden of proof cannot shift to the Applicant since in civil claims, the burden of proof shifts depending on the circumstances of each case and in the instant Request for Review, the burden of proof shifts to the Procuring Entity and the Interested Party.

90. On the issue of whether the Procuring Entity adhered to the stipulated timelines, counsel submitted that the Applicant, in computation of time,

relied on the date of the Board's Decision of 15th November 2023 for re-evaluation and the set timelines were not met by the Procuring Entity.

91. He urged that if there were any minor deviations in the subject tender, the same ought to have been presented to the Board by way of minutes of the Evaluation Committee.

92. On the issue of tender validity period, he reiterated that the Procuring Entity relied on bad law and referred the Board to *Application No. 123 of 2019* which provided that the timelines for tendering does not stop hence the 126-day period did not stop time during the pendency of Request for Review No. 82 of 2023.

93. He urged the Board to allow the Request for Review as prayed.

94. When asked by the Board to clarify on how the Applicant obtained a copy of the Interested Party's tender document, counsel submitted that the same was served upon the Applicant from the Interested Party's bundle of documents in Request for Review No. 82 of 2023 filed at pages 40 to 149.

95. Upon enquiry by the Board if the Applicant's tender price had the highest concession, Mr. Tama submitted that the Interested Party having not completed the mandatory requirements of the Tender Document ought to be struck out and the Applicant having submitted a bid of USD 36,500.00 as held in Decision of 15th November 2023 in Request for Review No. 82 of 2023 and per this amount, the Applicant was hence the highest responsive bidder. He further submitted that the Procuring Entity

did not comply with the Board's decision in Request for Review No. 82 of 2023 in that the 10 days stipulated timelines were not met and there having been no extension of the tender validity period of 126 days, the decision was null and the Board failed to consider responsiveness of the Interested Party's form of tender and neither did the Evaluation Committee consider the findings of the Board in Request for Review No. 82 of 2023 on responsiveness of the Interested Party's form of tender.

96. When asked by the Board to clarify, following his submissions that the Board in Request for Review No. 82 of 2023 failed to consider the non-responsiveness of the Interested Party's tender, on the avenues available for redress upon the Applicant realizing that the Board failed to consider the failure to meet the mandatory requirement by the Interested Party, counsel submitted that before a judicial review application is presented at the High Court, a party must exhaust all other remedies and that the only available remedies on matters of public procurement is seeking an administrative review before the Board.

97. When asked if the Board can re-open and re-consider an issue that ought to have been addressed in Application No. 82 of 2023, counsel submitted that the said issue stems out from the Decision of the Board of 15th November 2023 in Request for Review No. 82 of 2023 where the Board directed for responsive tenders to be re-admitted at the Financial Re-evaluation stage hence the Evaluation Committee ought to have done due diligence and failed to consider that the Interested Party's tender was not responsive.

98. Counsel confirmed that the Applicant had the Interested Party's copies of tender documents in the proceedings in Request for Review No. 82 of 2023 and was aware of the alleged non-responsiveness during proceedings in Request for Review No. 82 of 2023 and prior to the Board's Decision of 15th November 2023 and that the issue of responsiveness was raised but never addressed in the Board's Decision of 15th November 2023.

99. When asked by the Board to clarify on how the Applicant came about information on the changes in the Procuring Entity's Evaluation Committee, counsel submitted that he was not privy on how the Applicant came to know that the constitution of the Evaluation Committee had been changed and asked the Board to consider that this is an issue of public record and is not a confidential issue. He pointed out that the Applicant did not contest the same and was satisfied with the submissions given by the Procuring Entity on retirement of the said committee member.

100. When asked by the Board to clarify whether time stops running following filing of an administrative review before the Board, counsel submitted that it does not stop running.

101. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 20th December 2023 was due to expire on 9th January 2024 and that the Board would communicate its decision on or before 9th January 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

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

- a) Whether the issue raised regarding the Interested Party's form of tender in the instant Request for Review is barred by the doctrine of Res Judicata as to divest the Board of jurisdiction to hear and determine the same;**

- b) Whether the 1st and 2nd Respondents complied with the orders of the Board as contained in the Decision of the Board dated 15th November 2023 in Request for Review No. 82 of 2023;**

- c) Whether the subject tender's validity period is valid and if so, is there a need for extension of the same;**

- d) What orders should the Board issue in the circumstance?**

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

104. Both the Procuring Entity and the Interested Party objected to the Applicant's annexure marked "MSM 3" and argued that the same cannot be the subject of the instant Request for Review as it is part of the confidential documents under Section 67(1)(b)(c)(d) of the Act. The Procuring Entity questioned how the Applicant obtained the said annexure while the Interested Party argued that the said annexure was illegally and fraudulently obtained evidence.

105. In response, the Applicant submitted that it is a stranger to the fact that the annexure in question is a private and confidential document since it considered the same as a public record open to the general public. Further, the Applicant submitted that it was served with a copy of the annexure in question comprising the Interested Party's tender document in Request for Review No. 82 of 2023 as part of the bundle of documents produced by the Interested Party in Request for Review No. 82 of 2023 at pages 42 to 149 and is awe struck by the argument that the said document was illegally obtained.

106. The Board is cognizant of the provisions of Section 67 of the Act which provides for confidentiality of procurement documents and proceedings by the procuring entity subject to disclosures permitted in law and the same ought to be read with Section 68(2)(d)(iii) of the Act on procurement records.

107. Section 67 of the Act on confidentiality reads as follows:

"(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no

employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following-

- (a) Information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;***
- (b) Information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;***
- (c) Information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or***
- (d) The contents of tenders, proposals or quotations.***

(2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee or the procuring entity shall sign a confidentiality declaration form as prescribed.

(3) This section does not prevent the disclosure of information if any of the following apply-

- (a) the disclosure is to an unauthorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;***

(b) the disclosure is for the purpose of law enforcement;

(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d) the disclosure is pursuant to a court order; or

(e) the disclosure is made to the Authority or Review Board under this Act.

(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 68(2)(d)(iii).

(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years."

108. Section 68(2)(d)(iii) of the Act reads:

"(2) The records for a procurement shall include –

.....

(d)

(iii) a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed;"

109. From the foregoing, a person submitting a tender is entitled to be furnished with a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed. However, this entitlement only crystalizes when such a person submitting a tender makes a request to the Procuring Entity to be furnished with the same.

110. Notably, all communication and enquires between parties in procurement proceedings must be in writing as provided under Section in 64(1) of the Act. It follows that a tenderer must request an accounting officer, in writing, to be furnished with a summary of the proceedings of the evaluation and comparison of the tenders, *inter alia*, being procurement records which can only be disclosed by a procuring entity if such a tenderer is an applicant seeking administrative review of procurement proceedings by the Board. This therefore means that a candidate or tenderer is not entitled to disclosure by the procuring entity of a summary of the proceedings of the evaluation and comparison of the tenders unless he or she has filed a request for review before the Board.

111. Having carefully studied the confidential documents submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act, we have not come across any written communication by the Applicant addressed to the Respondents requesting for any summary of proceedings or any information pertaining to the procurement proceedings in the subject tender including constitution of the Procuring Entity's Evaluation Committee or the Interested Party's tender documents submitted in the subject tender for purposes of filing the instant Request for Review.

112. It is therefore our considered view that for purposes of filing the instant Request for Review, the Applicant ought to have adhered to the provisions of Section 67(1), (3) and (4) of the Act on confidentiality of procurement documents and proceedings read with Section 68(2)(d)(iii) of the Act on the records of procurement in lodging the instant Request for Review as any reliance on confidential information which has not been disclosed as permitted in law is in breach of the Act.

Whether the issue raised regarding the Interested Party's form of tender in the instant Request for Review is barred by the doctrine of Res Judicata as to divest the Board of jurisdiction to hear and determine the same;

113. Counsel for the Respondents, Mr. Moss and counsel for the Interested Party, Mr. Gilbert separately assailed the issue raised by the Applicant regarding non-completeness of the Interested Party's form of tender in that, it did not properly fill in the amount of its tender price in words and this being a mandatory requirement rendered it non-responsive, and pointed out that this issue as raised in the instant Request for Review was previously raised by the Applicant in its Reply to Request for Review No. 82 of 2023 and was therefore res judicata.

114. In response, counsel for the Applicant submitted though the said issue was brought up in the Applicant's Reply to Request for Review No. 82 of 2023 where it was an Interested Party, the Board did not delve into the issue of failure to comply with the mandatory requirement by the Interested Party herein and the said issue stems out from the Decision of the Board of 15th November 2023 in Request for Review No. 82 of 2023

where the Board directed for responsive tenders to be re-admitted at the Financial Re-evaluation stage hence the Evaluation Committee ought to have done due diligence and failed to consider the Interested Party's tender as responsive. Counsel confirmed that the Applicant being in receipt of the Interested Party's copies of tender documents in the proceedings in Request for Review No. 82 of 2023 was aware of the alleged non-responsiveness during the proceedings in Request for Review No. 82 of 2023, prior to the Board's Decision of 15th November 2023 and following the Board's Decision of 15th November 2023.

115. We understand the doctrine of *res judicata* to be a Common Law principle of law which ousts the jurisdiction of a court to try any legal dispute which had been determined by a court or decision-making organ of competent jurisdiction in a former suit involving the same party or parties litigating under the same title. This doctrine is founded on the fundamental belief that there should be an end to litigation. It also safeguards the use of judicial time so that a court or judicial body will not be engaged in a repeat action on a matter it has already pronounced itself upon. The doctrine is meant to protect public interest so that a party is not endlessly dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction and also save on precious time and public resources that go into funding courts, tribunals, quasi-judicial bodies and administrative bodies that are funded by the tax payer.

116. This Board is cognizant of the fact that the decision to award a tender constitutes an administrative action and as such, the provisions of Article 227(1) of the Constitution apply to the tendering process of a state organ

or public entity. The objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides:

"227. Procurement of public goods and services

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

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

- a)**
- b)**
- c) and**
- d)"**

117. A cause of action for review of a procuring entity's administrative action and decision may arise at any stage of the tendering process. We note that the legislation contemplated in Article 227(2) of the Constitution is the Act and Regulations 2020. We have hereinbefore established that this Board is a creature of statute tracing its establishment under Section 27(1) of the Act. The Act has clearly provided for efficient management of public procurement disputes by ensuring that members of the Board have the required qualifications to discharge its functions under Section

28 of the Act, being to review, hear, and determine procurement disputes as can be discerned from the composition of the Board under Section 29 read with Section 30 of the Act.

118. A detailed exposition of the doctrine of Res Judicata is set out in **Nathaniel Ngure Kihiu v Housing Finance [2018] eKLR**, by Lady Justice Njuguna L. as follows:

"14. The plea of res judicata is provided for in section 7 of the Civil Procedure Act (CPA) which reads.....

15. Justice Richard Kuloba (as he then was) set out the definition and essentials of res judicata as a thing or a matter adjudged; a thing judicially acted upon or decided; a thing or a matter settled by judgment. He further observes that, in that expression is found the rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. To be applicable, the rule requires identity in thing sued for as well as identity of cause of action, of persons and parties for or against whom claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided....

17. A cursory reading of Section 7 of the Civil Procedure Act reveals that there are clear conditions which must be satisfied before Res judicata can successfully be pleaded namely;

(i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit.

(ii) The former suit must have been a suit between the same parties or between the same parties under whom they or any of them claim.

(iii) Such parties must have been litigating under the same title in the former suit.

(iv) The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.”

119. Similarly, the Court of Appeal in ***Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR*** outlined the ingredients of a successful plea of the doctrine of *res judicata* in the following words:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

120. Further, in the case of **Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958 [1958] EA 450** the former East African Court of Appeal stated as follows:

"Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every

piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved....”

121. In essence, and the Board's take from these decisions is that, to successfully plead the bar of *res judicata*, whether litigating under the Civil Procedure Act or other quasi-judicial process, a party must prove that (a) the suit or issue under consideration is directly or substantially in issue in a former suit; (b) the former suit was between the same parties or parties claiming through them; (c) the parties were litigating under the same title; (d) the issue was heard and determined in a former suit; and (e) the court that determined the former suit was competent.

122. Turning to the instant Request for Review, it is not in dispute that the parties in the instant Request for Review are the same parties as those that litigated in Request for Review No. 82 of 2023. The Applicant, Respondents and Interested Party in the instant Request for Review were the same Applicant, Respondents and Interested Party respectively in Request for Review No. 82 of 2023. The procurement proceedings of the subject tender in the instant Request for Review was the same procurement proceedings of the tender in Request for Review No. 82 of 2023. The Board hearing the instant Request for Review heard and determined Request for Review No. 82 of 2023. However, the above similarities between the instant Request for Review and Request for Review No. 82 of 2023 are not enough to prove that the instant Request for Review is barred by the doctrine of *res judicata*.

123. To successfully plead the bar of *res judicata*, one must equally establish that the issues under consideration by the Board in the instant Request

for Review are directly or substantially in issue with the ones the Board considered in Request for Review No. 82 of 2023 and that the Board heard and determined such issues in Request for Review No. 82 of 2023. We say so because, all the elements for the bar of *res judicata* must be rendered conjunctively and not disjunctively. If one element is not available or is missing, then a bar of *res judicata* cannot be sustained.

124. In order to establish whether the issue in the instant Request for Review regarding non-completeness of the Interested Party's form of tender having not been properly filled by indicating the amount of the tender price in words rendering it non-responsive due to non-compliance with a mandatory requirement was brought up in Request for Review No. 82 of 2023 and that the same were heard and determined by this Board in Request for Review No. 82 of 2023, we have carefully studied the pleadings, documents and the Board's Decision in the Request for Review No. 82 of 2023 and note that the Applicant, being the Interested Party in Request for Review No. 82 of 2023 filed on 3rd November 2023 a Reply by the Interested Party together with a Supporting Affidavit sworn on 3rd November 2023 by Mohammed Shajeel Mughal, its manager and pleaded as follows:

a. In the Reply by the Interested Party, the Applicant pleaded at paragraphs 14 and 15 as follows:

"14. Further, the Interested Party is reasonably informed that Applicants bid did not have an amount stated in words as was mandatory under the tender document and that from the 2nd Respondents pleadings it is clear that the system generated an amount of USD 1 as was the case with Travel Point Forex Bureau.

15. From the foregoing, the Interested Party opines that the Applicants bid ought to be struck out as it was mandatory to enter the amount in words."

b. In the Supporting Affidavit sworn on 3rd November 2023 by Mohammed Shajeel Mughal, its manager, he deponed at paragraph 21 as follows:

"21. THAT it was a mandatory requirement under the tender document that parties enter the figures in both words and figures in line with Section IV of the tender forms under clause f.

(Annexed herein and marked AA2 is a copy of the tender document)"

125. In essence, the Applicant as the Interested Party in response to Request for Review No. 82 of 2023 contended that the Interested Party's bid, being the Applicant in Request for Review No. 82 of 2023, ought to have been struck out for failing to state its tender amount in words in its form of tender being a mandatory requirement in the Tender Document.

126. Having carefully studied the pleadings and documents in the instant Request for Review, we note that the Applicant prays for the following orders:

a) A Declaration do issue that the Respondents were in breach of the provisions of the Public Procurement Act by awarding the tender to Namanga Forex Bureau Exchange Limited despite being non-responsive.

- b) A Declaration do issue that the Respondents were in breach of Public Procurement Review Board's decision in Review Application No. 82 of 2023, specifically failing to observe the directions given by the Board in re-evaluation of the tender.***
- c) The Letter of Award to Namanga Forex Bureau Exchange Ltd resulting from the re-evaluation of tender no KAA/OT/MBD/0172/2022-2023 for the development and management of forex outlets at Jomo Kenyatta International Airport Terminal 1C, along with all consequential actions and contracts arising from the aforementioned tendering process and award, be quashed and set aside.***
- d) The decision of the Respondents, as conveyed in the letter dated 6th December, 2023, addressed to Westlands Forex Bureau Exchange Limited, communicating the rejection of its bid, should be annulled, canceled, and set aside.***
- e) A Declaration be issued, affirming that Westlands Forex Bureau Exchange Limited emerged as the winner of tender no KAA/OT/MBD/0172/2022-2023 for the development and management of forex outlets at Jomo Kenyatta International Airport Terminal 1C.***
- f) Costs of the review to be awarded to the Applicant.***

127. The above prayers are premised on the grounds set out in the instant Request for Review and *inter alia*, paragraphs 13 to 18 of the instant Request for Review where the Applicant pleads as follows:

"13. The Interested Party failed to fully complete the tender form, as mandated by the Tender Document, the Public Procurement and Asset Disposal Regulations, 2016, the Public Procurement and Asset Disposal Act, 2015, and the principles of public procurement.

14. Specifically, the Interested Party neglected to submit a properly filled tender form. The Applicant reasonably believes that the Interested Party's bid lacked a mandatory statement of the amount in words, a critical requirement according to the tender document. As a result, the Applicant contends that the Interested Party's bid should be invalidated since it was obligatory to express the amount in words.

15. The tender document outlined provisions in mandatory terms, using the term "shall", making the failure to fully complete the tender form a fatal flaw in the Interested Party's bid. The Evaluation Committee, however, overlooked this crucial non-compliance which was contrary to the decision of the review board on the 15th November, 2023.

16. The Review Board in the aforementioned decision under Para 119 and 120 stipulated that the tender document stated that the amount in words takes precedence over the amount stated in figures.

17. The respondent failed to take the decision by the Public Procurement Review Board in Review Application No. 82 of 2023, into account while resubmitting the bids and thus the same ought to be nullified.

18. With the irregularities in the Interested Party's bid, the applicants bid of USD 36,500/- remains the highest responsive bid and should be rightfully awarded the tender."

128. It is quite clear from the above that the issue in contention is premised on invalidation of the Interested Party's tender for failure to express its tender amount in its form of tender in words.

129. From the foregoing, it is evident that the Board is being called upon to review and determine in the instant Request for Review an issue that was brought up by the Applicant as an Interested Party in Request for Review No. 82 of 2023.

130. In its determination in the Decision delivered on 15th November 2023 in Request for Review No. 82 of 2023, we note that under the issues framed for determination, the Board at pages 36 to 47 of its Decision considered 'Whether the Procuring Entity's Evaluation Committee evaluated the tenders submitted in response to the subject tender in compliance with the provisions of Section 80 of the Act and the Tender Document' and found at paragraph 121 as follows:

"The Tender Document provided that the successful tenderer at the Financial Evaluation Stage would be one that would

offer the highest evaluated income i.e. the highest Minimum Annual Guarantee. From the Tender Opening Register above it is clear that the Interested Party's tender price of USD 36,500 was not the highest tender price and thus it cannot pass as the successful tenderer in the subject tender when compared to the two other tenderers that qualified for evaluation at the Financial Evaluation Stage....."

131. A reading of paragraph 121 of the Board's Decision of 15th November 2023 confirms that the Board was satisfied that three tenderers, amongst them being the Applicant and the Interested Party herein had qualified for evaluation at the Financial Evaluation Stage in the subject tender. We take this to mean that the Board addressed its mind to the issue in contention being with regard to evaluation of tenders at the Financial Evaluation stage and not the Preliminary Evaluation stage where the issue of non-compliance in the Interested Party's Form of Tender being a mandatory requirement lies. As such, the Order No. 5 at page 48 of the Board's Decision of 15th November 2023 in Request for Review No. 82 of 2023 directed for tenders that passed the Technical Evaluation stage in the subject tender be re-admitted at the Financial Evaluation Stage taking into consideration the Board's findings in the said decision.

132. Subsequently, the Board having rendered itself in its Decision of 15th November 2023 and the Applicant being in receipt of the same would have been expected to take any necessary action upon any dissatisfaction with the findings of the Board therein. This is in view of the fact that Section 175(1) of the Act provides an avenue for a party aggrieved by the

decision of the Board to seek judicial review if the same by the High Court and reads:

"175 (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."

133. In view of the above, the Board has satisfied itself that none of the parties in the instant Request for Review have demonstrated that a party to the Request for Review No.82 of 2023 sought judicial review by the High Court of the Board's Decision dated 15th November 2023 in Request for Review No. 82 of 2023. In the absence of such evidence, it is just to hold that the Board's Decision dated 15th November 2023 in Request for Review No. 82 of 2023 became final and binding to all parties to Request for Review No. 82 of 2023 after the lapse of 14 days from 15th November 2023 in accordance with Section 175(1) of the Act.

134. Consequently, it is our considered view that the issue in contention premised on invalidation of the Interested Party's tender for failure to express its tender amount in its form of tender in words raised in the instant Request for Review is barred by the doctrine of *res judicata*. In saying so, we are guided by the holding in **Civil Appeal No. 42 of 2014, John Florence Maritime Services Ltd v. Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR** (hereinafter referred to as "Civil Appeal No. 42 of 2014") where it was held that:

".....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.....

The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter.

Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of

action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue."

135. The plea of *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. As rightly observed in Civil Appeal No. 42 of 2014 that:

"...Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence."

136. The Board is inclined to adopt the position of the Court of Appeal in Civil Appeal No. 42 of 2014 and will therefore resist the invitation to address an issue governing the same parties, litigating under the same title, in the same tender, with respect to an issue which was raised by the

Applicant as an Interested party in Request for Review No. 82 of 2023 where a Decision was rendered on 15th November 2023 which is final and binding upon parties herein. In doing so, the Board has asked itself whether it can engage in a fresh discussion of the parties' pleadings herein and possibly come to a different decision and in doing so would it not be sitting on Appeal on its own decision in Review No 82 of 2023? Does this Board have powers to sit in Review or Appeal on matters it has already pronounced itself upon? The answer in both instances is in the negative. To do what the Board is being asked to do in the instant Request for Review would entail a revisit of its discussions, findings and determinations in Review for Review No. 82 of 2023. That is the exact action that the doctrine of *Res Judicata* aims to curb.

137. In the circumstance, the Board finds and holds that the issue raised regarding the Interested Party's form of tender in the instant Request for Review is barred by the doctrine of *Res Judicata* as to divest the Board of jurisdiction to hear and determine the same.

Whether the 1st and 2nd Respondents complied with the orders of the Board as contained in the Decision of the Board dated 15th November 2023 in Request for Review No. 82 of 2023;

138. The Applicant contends that the Respondents failed to comply with the Decision of the Board dated 15th November 2023 in Request for Review 82 of 2023 since they failed to adhere to the mandatory 10-day period for re-evaluation tenders at the Financial Evaluation stage and that instead the procurement process was concluded on 6th December 2023

which was nearly 21 days beyond the stipulated timeframe for the tendering process.

139. On the other hand, the Respondents contend that they complied with the Board's orders and that all tenders that proceeded for Financial Evaluation were re-evaluated by the Evaluation Committee at the Financial Evaluation stage within the stipulated 10 days' period having completed the re-evaluation on 24th November 2023. The Interested Party aligned itself with the submissions of the Respondents on this issue.

140. We note that Order No. 4 at page 48 of the Board's Decision of 15th November 2023 in Request for Review No. 82 of 2023 reads:

"4. The 1st Respondent be and is hereby directed to reconvene the Procuring Entity's Evaluation Committee for purposes of re-evaluating the tenders that qualified for evaluation at the Financial Evaluation Stage in respect of Tender No. KAA/OT/MBD/0172/2022-2023 for the Development and Management of Currency/Forex Outlets at Jomo Kenyatta International Airport Terminal 1C, which re-evaluation process should be concluded within 10 days from the date of this Decision."

141. In essence, the 1st Respondent was required to reconvene the Evaluation Committee for purposes of re-evaluation of tenders that qualified for evaluation at the Financial Evaluation stage in the subject tender and the said re-evaluation process at the Financial Evaluation stage ought to have been concluded within 10 days from the date of the Board's Decision of 15th November 2023.

142. It is imperative to note that the Board did not order for the Respondents to proceed with the procurement process to its logical conclusion including the making of an award to the successful tenderer within 10 days from the date of the Boards Decision of 15th November 2023 but instead directed that re-evaluation of tenders that qualified for evaluation at the Financial Evaluation stage be concluded within 10 days of 15th November 2023.

143. Having carefully perused the confidential documents submitted by the 1st Respondent to the Board pursuant to Section 67(3)(e) of the Act, we note that from the Financial Re-Evaluation Report at pages 175 to 176 of the confidential bundle that the 1st Respondent complied with the orders of the Board by (a) re-convening the Evaluation Committee, (b)proceeding with re-evaluation of all tenders that qualified for evaluation at the Financial Evaluation stage, and (c) completing the re-evaluation process on 24th November 2023 which was within the 10 days timelines ordered by the Board.

144. In the circumstances, the Board finds and holds that the Respondents complied with the orders of the Board dated 15th November 2023 in Request for Review No. 82 of 2023.

Whether the subject tender’s validity period is valid and if so, is there a need for extension of the same;

145. During the hearing, counsel for the Applicant, Mr. Tama submitted that the tender validity period of 126 days provided under ITT 17.1 of the Tender Document lapsed on 28th November 2023 and that any decision

by the Respondent relating to the subject tender outside the tender validity period is a nullity.

146. We note that ITT 17.1 of Section II- Tender Data Sheet (TDS) at page 18 of the Tender Document provided that ***the tender shall be valid for 126 days from the closing/opening date.*** It is not in contention that the subject tender closed on 25th July 2023 at 3.00 p.m.

147. We note that Request for Review No. 82 of 2023 was lodged with the Board on 25th October 2023 and subsequently, on the same date of 25th October 2023, the Acting Board Secretary, Mr. James Kilaka notified the Respondents of the same vide a Notification of Appeal dated 25th October 2023 and a letter dated 25th October 2023 wherein the Respondents were cautioned to note the provisions of Section 168 of the Act which provides for suspension of procurement proceedings as follows:

***"168. Notification of review and suspension of proceedings
Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed."***

148. The abovementioned Notification of Appeal to the Respondents dated 25th October 2023 reads in part:

".....

You are hereby notified that on the 25th October 2023, a Request for Review was filed with the Public Procurement

Administrative Review Board in respect of the above-mentioned tender.

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

A copy of the Request for review is forwarded herewith to the Procuring Entity and the PPARB Circular No. 02/2020 of 24th March 2020.

.....”

149. It is therefore clear from the above Notification of Appeal that once a Request for Review is filed, the procurement proceedings are immediately suspended and as such time stops running with regard to the validity period of a tender. Any action taken by a procuring entity in furtherance of the procurement proceedings before a request for review has been heard and the Board rendered its decision is null and void. This was explained by the Honourable Justice Nyamweya in **Judicial Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR** as follows:

“...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”

150. This Board in **PPARB Application No. 13 of 2021 Five Blocks Enterprises Limited v Managing Director KEBS & Another** held that:

“...upon filing of a request for review application, an automatic stay of proceedings takes effect which suspends all procurement proceedings and prevents any further steps from being taken in the tender in question. Further, procurement proceedings shall resume at the point they were, when the stay comes to an end, once the request for review has been heard and determined by the Board.”

151. Evidently, procurement proceedings resume at the point they were, when a stay comes to an end, once a request for review has been heard and determined by the Board. As such, time in the subject tender stopped running on 25th October 2023 upon filing of Request for Review No. 82 of 2023 and the tender validity period had not lapsed.

152. The Board is cognizant of the provisions of section 88 of the Act which provides for extension of tender validity period as follows:

"88. Extension of tender validity period

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

153. In essence, the accounting officer of a procuring entity (a) may extend the tender validity period before expiry of such period;(b) give a written notice to tenderers of the extension of the tender validity period; (c) is restricted to extending the tender validity period for not more than thirty (30) days; and (d) is restricted to only extending the tender validity period once.

154. In view of the above, the question that now calls for our determination is whether the Board has powers to order for extension of a tender validity period.

155. Section 173 of the Act donates wide discretionary powers to the Board and in considering whether the Board has the power to extend the tender

validity period, we are guided by the holding of the Court of Appeal in **Civil Appeal No. 510 of 2022 Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others [2022] KECA 982 eKLR** which referred to the decision of **Onyiego, J. in Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex Parte Kenya Ports Authority & Another [2021]** in addressing the power of the Board to direct a procuring entity to extend the validity period of the tender and held as follows:

"39. The crux of the issue in controversy is whether the Respondent (Review Board) has powers in law to order or direct the accounting officer of the Ex-parte Applicant as a procuring entity to extend the validity period of the subject tender more than once. Section 88 of the Act (PPDA) provides for the extension of the tender validity period..."

40. What was the intention of the drafters of this legislation and in particular the inclusion of Section 88? In my view, this provision was intended to guard against any possible mischief or abuse of office or power by accounting officers especially where uncontrolled timelines will give them a free hand to temper with the tendering process to favour their friends or closely related persons. In other words, once the already extended validity period for a period of 30 days lapses, the tendering process in respect of that tender becomes moot or rather it extinguishes (sic). Upon lapsing, the Procurement entity is at liberty to re-advertise for fresh tendering and the

process then follows the full circle like it was never tendered for before.

41. Therefore, the foregoing provision permits extension of a tender validity period by an accounting officer only once and that extension must be made before the expiry of the already stipulated tender validity period. It is common knowledge that one cannot extend time that has already lapsed...

48. From the plain reading of that Section, it is only applicable and binding on the accounting officer and nobody else. Nothing would have been easier than [for] the legislators to include or provide the Review Board's mandate under that section. To that extent, I do agree with counsel for the I/Party that Section 88(3) of the Act does not bar the Review board from making decisions that are deemed to be necessary for the wider attainment of substantive justice...

49. Under section 173(a)(b) & (c) of the Act, the Board has wide discretionary powers for the better management of tendering system to direct the doing or not doing or redoing certain acts done or omitted from being done or wrongly done by the accounting officer. Although the Act does not expressly limit the powers of the Board from extending tender validity period more than once, one can imply that the powers conferred upon the Review board includes powers to extend validity period to avert situations where the accounting officer can

misuse powers under Section 88 to frustrate tenderers or bidders not considered favourable.”[Emphasis ours]

156. The import of the aforementioned Court of Appeal case is that the Board has the powers to extend the tender validity period to avert situations where an accounting officer of a procuring entity may misuse the powers under section 88 of the Act to frustrate tenderers or to frustrate the procurement process.

157. Consequently, to enable the Respondents to proceed with the procurement proceedings in the subject tender to its logical conclusion including signing a contract within the timelines stipulated under the Act and in light of the provisions of Section 88 and 173 of the Act, we find that there is a need to extend the subject tender’s validity period.

158. As such, we deem it fit and just to extend the subject tender’s validity period by a further thirty (30) days from the date of the decision in the instant Request for Review to enable the Respondents comply with the orders of the Board herein and direct the 1st Respondent to issue written notifications to tenderers in the subject tender notifying them of extension of the subject tender’s validity period for a further thirty (30) days from 9th January 2024.

What orders the Board should grant in the circumstances?

159. We have found that the issue raised regarding the Interested Party’s form of tender in the instant Request for Review is barred by the doctrine

of *Res Judicata* as to divest the Board of jurisdiction to hear and determine the same.

160. We have also found that the Respondents complied with the orders of the Board dated 15th November 2023 in Request for Review No. 82 of 2023.

161. We have deemed it fit and just to extend the subject tender's validity period with a further thirty (30) days from 9th January 2024 and to direct the 1st Respondent to issue written notifications to tenderers in the subject tender notifying them of extension of the subject tender's validity period for a further thirty (30) days from 9th January 2024.

162. The upshot of our findings herein is that the instant Request for Review fails.

FINAL ORDERS

163. 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 20th December 2023 and filed on even date:

A. The Request for Review dated 20th December 2023 and filed on even date be and is hereby dismissed.

B. The tender validity period of Tender No. KAA/OT/MBD/0172/2022-2023 for the Development

and Management of Currency/Forex Outlets at Jomo Kenyatta International Airport Terminal 1C be and is hereby extended for a further thirty (30) days from 9th January 2024.

C. The Respondent is hereby directed to proceed with the procurement proceedings of Tender No. KAA/OT/MBD/0172/2022-2023 for the Development and Management of Currency/Forex Outlets at Jomo Kenyatta International Airport Terminal 1C to its lawful and logical conclusion in accordance with the Tender Document, the Act, and the Constitution.

D. Each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 9th Day of January 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB

