

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 6/2024 OF 26TH JANUARY 2024

BETWEEN

RGIS KENYA LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA POWER AND LIGHTING COMPANY PLC.....RESPONDENT

Review against the decision of the Accounting Officer, Kenya Power and Lighting Company plc in relation to Tender No. KP1/9A.2/OT/030/PJT/23-24 for Provision of Labour and Transport Construction Services.

BOARD MEMBERS PRESENT

1. Ms. Alice Oeri - Panel Chairperson
2. Eng. Lilian Ogombo - Member
3. Dr. Susan Mambo - Member

IN ATTENDANCE

- Ms. Sarah Ayoo - Holding Brief for the Board Secretary
- Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT

RGIS KENYA LIMITED

Ms. Kayugira

-Advocate, Munyao-Kayugira & Company
Advocates

RESPONDENT

ACCOUNTING OFFICER, KENYA POWER AND LIGHTING COMPANY PLC

Ms. Kihara

-Advocate, Kenya Power and Lighting Company
plc.

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Power and Lighting plc, the Procuring Entity together with the Respondent herein, invited submission of sealed tenders in response to Tender No. KP1/9A.2/OT/030/PJT/23-24 for Provision of Labour and Transport Construction Services using an open competitive tender method. The subject tender's submission deadline was Thursday, 9th November 2023 at 10.00 a.m.

Addenda

2. The Procuring Entity issued multiple addenda in respect of the tender while offering clarifications on inquiries being made by prospective candidates in the subject tender and equally variously extended the tender submission deadline. According to the last issued Addendum i.e.

Addendum No. 5, the tender submission deadline was set as Friday, 15th January 2024.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Minutes for 15th January 2024, submitted under the Confidential File submitted by the Procuring Entity, 559 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline. The said tenders were in the process of evaluation as at the time of bringing the instant Request for Review.

REQUEST FOR REVIEW

4. On 11th January 2024, the Applicant through the firm of Munyao-Kayugira & Company Advocates, filed a Request for Review dated 26th January 2024 supported by an affidavit sworn on 10th January 2023 by Duncan Kiragu Ndegwa, a Director at the Applicant, seeking the following orders from the Board in verbatim:
 - i. **Respondent's Tender No. KP1/9A.20T/030/PJT/23-24 for Provision of Labour & Transport Construction Services as amended through the various addenda be annulled in its entirety for failing to comply with the mandatory provisions of the law and the Respondent directed to re-tender in compliance with the law;**
 - ii. **The Respondent be ordered to cater for the costs of this Application; and**
 - iii. **Such other orders as the Board may deem fit and just.**

5. In a Notification of Appeal and a letter dated 26th January 2024, 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 26th January 2024.
6. In response to the Request for Review, on 2nd February 2024, the Respondent through Ms. N. Kihara-Advocate, filed a Notice of Appointment of Advocates and a Memorandum of Response, both dated 2nd February 2024.
7. Vide letters dated 2nd February 2024, 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 from 2nd February 2024.
8. On various dates between 3rd and 4th February 2024 the 134 tenderers who submitted their tender documents in response to the subject tender wrote letters to the Board majority of whom termed the tender process

as having been fairly conducted as at the time of dispatching their respective letters.

9. The Board Secretary, sent out to all the parties a Hearing Notice notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 8th February 2024 at 12.00 noon through the link availed in the said Hearing Notice.
10. Despite the Hearing Notice having been sent to all parties, on 8th February 2024, at 12.00 p.m. only the Advocates representing the Applicant and the Respondent joined the online.
11. The Board read through the documents that had been filed in the matter and asked parties to confirm having filed or been served upon the said documents as well to indicate their readiness to proceed with the scheduled hearing. The parties' respective Advocates indicated that they were ready to proceed with the hearing.
12. Accordingly, the Board directed that each party would have 15 minutes to present their respective cases with the Applicant getting an extra 5 minutes to offer a rejoinder on the Respondent's response.

PARTIES SUBMISSIONS

Applicant's Submissions

13. Counsel for the Applicant, Ms. Kayugira submitted that the Request for Review was brought under Section 167 of the Act. She argued that

Section 78 of the Act and Regulation 57 of the Regulations 2020 outline mandatory provisions that a Procuring Entity must comply with when floating a tender.

14. Ms. Kayugira referred to page 243 of the Applicant's Request for Review exhibiting what she indicated to be the Tender Opening Minutes in respect of the subject tender. She pointed out that the Applicant took issue with the manner in which the tender was opened.
15. According to Counsel, Regulation 57(2) of the Regulations 2020 requires that electronic tender boxes to have 3 passwords that are time-activated and assigned to different tender opening committee members. She argued that the Respondent herein did not show how the passwords were secured and that access was only during the tender opening.
16. Further, that the Regulations require that a record of the tender opening be maintained but the Respondent did not attach any such record to its response to the instant Request for Review
17. She further submitted that Section 78(6) of the Act required the following to be read out and recorded in the tender opening register during tender opening: name of tenderers; their tendered price and their offered tender security, if any.
18. Counsel further contended that page 20 of the Tender Document at clause 27.8 required the Procuring Entity to prepare minutes that would contain as a minimum: the names of participating tenderers; their tender

prices; presence or absence of a tender security and the number of pages if each tender. According to Counsel, the Procuring Entity did not furnish any of the above.

19. Ms. Kayugira further submitted that bidders would be assessed on area of work, category of works as well as the tender price. Additionally, the tenderers would attend the tender opening for purposes of establishing who their competition in the tender was as well their competition's tender price. Accordingly, it was crucial for the above information to be read out during tender opening.
20. Counsel indicated that the Respondent in its response simply glossed over issues by citing that the Applicant was a past beneficiary of a tender that was opened in a similar manner. She argued that any breach of the law should not be overlooked as there existed a possibility of sneaking figures subsequent to tender opening.
21. She argued that the Applicant provided its Bill of Quantities and that the Procuring Entity should be concerned about the final price constituting a tenderer's tender price.

Respondent's Submissions

22. Counsel for the Respondent, Ms. Kihara submitted that the subject tender constituted multiple items attracting numerous tenderers and therefore it would be a tedious exercise for the Procuring Entity to compile record of

the tenderers, their tendered prices and statements on offering of tender security on all the tenderers.

23. Ms. Kihara pointed out that the Applicant despite submitting its tender never sent a representative to attend the tender opening session of the subject tender and was in the instant Request for Review relying on hearsay.
24. She equally argued that the instant Request for Review was calculated at delaying the tender process in the subject tender as the Applicant was forum shopping as it had also challenged the subject tender in ***Nairobi High Court Constitutional Petition No. E007 of 2024; Power Transmission Line Contractors Association v Kenya Power and Lighting Company plc***.
25. Based on the above, Ms. Kihara argued that the Applicant was abusing the court process and that it lacked locus to bring the present proceedings in view of the proceedings in the High Court.
26. She also affirmed that the Applicant has no basis to claim that there were no security checks in place to safeguard the subject tender.

Applicant's Rejoinder

27. In brief rejoinder, Counsel for the Applicant, Ms. Kayugira submitted that the Petition before the High Court was filed before the tender opening and is not in relation to the matter before the Board.

28. She equally refuted the submission that the Applicant lacked locus to bring the instant Request for Review citing that the Applicant was a tenderer in the subject tender.
29. Additionally, she pointed out that the Procuring Entity is the custodian of statutory records of public procurement processes and that where a dispute such as the present one arose, it was incumbent upon the Procuring Entity to supply these records.

CLARIFICATIONS

30. The Board sought clarity from the Applicant whether it was present during tender opening to which Ms. Kayugira responded in the negative. However, she made the case that though absent from the tender opening, the Applicant got hold of the tender opening minutes.
31. The Board further questioned the Applicant on how it accessed the tender opening minutes. In response, Ms. Kayugira indicated that the minutes were filed by the Procuring Entity as part of its response to the Petition in the related High Court proceedings in Nairobi High Court Constitutional Petition No. E007 of 2024.
32. The Board further inquired from the Applicant on whether the Minutes were accessed before or after the filing of the Request for Review. Ms. Kayugira told the Board that the minutes were accessed on 24th January 2024 which was 2 days before the filing of the instant Request for Review.

33. The Board also sought to understand how the Procuring Entity opened the tender box and whether the Procuring Entity opened the individual tenders. Ms. Kihara told the Board that the Procuring Entity only opened the tender Box and identified the tenderers that submitted their tenders in response to the subject tender.
34. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 26th January 2024 was due to expire on 16th February 2024 and that the Board would communicate its decision on or before 16th February 2024 to all parties via email.

BOARD'S DECISION

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

I. Whether the instant Request for Review offends the legal doctrine of sub judice as to divest the Board the jurisdiction over it?

Depending on the Board's finding on the first issue above;

- II. Whether the Procuring Entity properly conducted the Tender Opening of the subject tender in accordance with Sections 78 of the Act, Regulation 57 of the Regulations 2020 and the provisions of the Tender Document?***
- III. What orders should the Board issue in the circumstance?***

Whether the instant Request for Review offends the legal doctrine of sub judice as to divest the Board the jurisdiction over it?

36. The Respondent filed before the Board a Memorandum of Response whose paragraph 34 challenged the jurisdiction of the Board over the instant Request for Review which according to it offended the principle of sub judice.
37. During hearing, Counsel for the Respondent, Ms. Kihara argued that the Applicant was forum shopping as it had also challenged the subject tender in ***Nairobi High Court Constitutional Petition No. E007 of 2024; Power Transmission Line Contractors Association v Kenya Power and Lighting Company plc***
38. On the flip side, Counsel for the Applicant, Ms. Kayugira contended that the Petition before the High Court was filed before the tender opening and did not relate to the matter before the Board.
39. This Board is therefore called upon to determine as a preliminary issue, whether it has jurisdiction over the instant Request for Review.
40. The Board acknowledges the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

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

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

42. On its part, Halsbury's Laws of England (4th Ed.) Vol. 9 defines jurisdiction as:

"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

43. The locus classicus case on the question of jurisdiction is the celebrated case of ***The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1*** where Nyarangi J.A. made the oft-cited dictum:

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

A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

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

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

45. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

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

46. Further, Section 28 of the Act provides for the functions of the Board as:

"The functions of the Review Board shall be—

reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."

47. Whereas Section 167(1) of the Act grants jurisdiction to this Board to hear and determine Requests for Review in respect public procurement processes, Section 167(4) of the Act specifically excludes certain subject matters from the jurisdiction of the Board:

"167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review...

(2)...

(3)...

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

(a) the choice of a procurement method;

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

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

48. The Respondent is challenging the competency of the instant Request for Review for violating the doctrine of sub judice which is provided for in our legal system under Section 6 of the Civil Procedure Act, 2010.

49. Section 6 of the Civil Procedure Act provides as follows:

6. Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

50. From the above, the doctrine of sub judice precludes courts and tribunals from proceeding with the trial of any suit where the matter in issue is also the subject of trial in previously commenced proceedings between the same parties or parties under whom any of them claim.

51. Section 6 of the Civil Procedure Act has also been the subject of interpretation by superior courts in this country.
52. In *Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 others [2022] eKLR ; Nairobi ELC Case No. E246 of 2021* the Environment and Land Court struck out a suit underscoring the position that a multiplicity of suits over the same issue between the same parties only serves to clog the justice system and is frowned upon as an abuse of the court process:

"30. The point to underscore is that a litigant has no right to pursue paripassu more than once processes which will have the same effect at the same time or at different times with a view of obtaining victory in one of the process or in both. I have in previous decisions stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. Litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

31. Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to

harass, irritate, and annoy the adversary and interfere with the administration of justice

32. Abuse of court process is an obstacle to the efficient administration of justice. Tinkering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistent with the good order of society.

34. Accordingly, I find that the issues in this suit have a nexus with Nairobi ELC No. E258 of 2020 to the extent that they relate to the same suit property NAIROBI/BLOCK 97/2347 and equally similar parties.

53. In ***Kinatwa Co-operative Savings & Credit Society Limited v Kinatwa Prestige Ltd [2021] eKLR; Kitui High Court Civil Suit No. 3 of 2021*** the High Court while staying proceedings before it reiterated that the doctrine of sub judice serves to prevent instances of the issuance of conflicting decisions over the same subject:

31. The rationale behind sub-judice rule is to prevent situation of having conflicting orders emanating from two or more different courts over the same subject matter. That situation has obtained in this instance because, court issued injunctive orders on 22nd April, 2021 unbeknown to it that a different court had issued a conflicting order vide Nairobi

Chief Magistrate's Court Civil Case Number E7816 of 2020, Kinatwa Prestige Limited Versus Kinatwa Coop Savings and Credit Society Limited & National Transport & Safety Authority & Another. That is exactly the mischief Section 6 of the Civil Procedure Act is supposed to cure by providing for a stay of suit or proceedings. In the case of David Ndi & others versus Attorney General & Others 2021 eKLR, a bench of five Judges inter alia stated;

"The rationale behind this provision (Section 6 of the Civil Procedure Act) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will...."

32. This court finds no reason at all why the parties and the Plaintiff in particular, cannot finalize or pursue to conclusion the suits filed in Nairobi Chief Magistrate's Court Civil Case Number E034 of 2021 and further to that, set aside or vary the conflicting orders issued vide Nairobi Chief Magistrate's Court Civil Case Number E7816 of 2020. It has stated that, the said orders lapsed on 20th April, 2021, but he should supply this court with the orders specifically stating that the orders have lapsed by operation of or through an order from the said court. Of course the Applicant has also failed to demonstrate what Nairobi Chief Magistrate's Court Civil Case Number 7816 of 2020 between it and the Respondent herein, is all about.

The Applicant was obligated to at least exhibit copy of pleadings filed in that court to enable this court interrogate whether the issues before this court are similar to those obtaining in the Chief Magistrate's Court. It is granted that the Applicant has only exhibit a copy of an order from that Lower Court which as observed above appears on the face of it to be in conflict with the orders issued by this court on 22nd April, 2021. In the absence of the pleadings the only presumption this court can safely make is that, the application giving rise to the temporary orders probably addressed the same issues with the Respondent's Notice of Motion dated 30th March, 2021 filed in this court. It is safe therefore, to find that on the basis of evidence presented before me, the provisions of Section 6 of Civil Procedure Act also applies to this suit until the determination of application dated 23rd December, 2020 filed in Chief Magistrate's Court Civil Suit Number E7816 of 2020.

33. In the premises and the reasons advanced above, this court finds merit in the Notice of Motion dated 26th April, 2021 and makes the following orders namely:

(i) The orders issued by this court on 22nd April, 2021 are hereby set aside.

(ii) The suit pending / proceedings herein, is hereby stayed under Section 6 of Civil Procedure Act, pending determination of Nairobi Chief Magistrate's Court Civil Case Number E037 of 2021 Kinatwa Cooperative Savings and Credit Society Limited

versus Kinatwa Prestige limited and 4 Others and the application dated 23^d December, 2020 vide Nairobi Chief Magistrate's Court Civil Case Number E7816 of 2020. This court, owing to the nature of this matter, I shall make no order as to costs at this stage. Each party to bear its own costs.

54. In view of the contest between the parties herein, the Board shall examine the pleadings in both the proceedings before it side by side with those before the High Court in Nairobi Constitutional Petition No. E007 of 2024 to see if they offend the principle of sub judice:
55. In terms of the parties involved in the two proceedings, the Board has made the following observation:
- i. The parties in the instant Request for Review are RGIS Kenya Limited and the Accounting Officer, Kenya Power and Lighting Company Plc.
 - ii. The parties in Nairobi Constitutional Petition No. E007 of 2024 are Power Transmission Line Contractors Association.
56. At surface level the two proceedings appear to involve different parties but a different picture emerges when the affidavits supporting the separate proceedings are examined:
- i. The instant Request for Review is supported by an affidavit sworn on 26th January 2024 by Duncan Ndegwa Kiragu who is designated as a Director at RGIS Kenya Limited.

- ii. The Petition in Nairobi Constitutional Petition No. E007 of 2024 is supported by 2 affidavits both sworn on 8th January 2024 i.e. one by Daniel Magu Ngage and the other by Duncan Ndegwa Kiragu.
- iii. Daniel Magu Ngage's affidavit in support of Nairobi Constitutional Petition No. E007 of 2024 identifies him as the CEO and National Coordinator of Power Transmission Line Contractors Association, a registered association of contractors involved in the installation and maintenance of power lines in Kenya.
- iv. Duncan Ndegwa Kiragu's affidavit in support of Nairobi Constitutional Petition No. E007 of 2024 identifies him as a Director at RGIS Kenya Limited, which is a member of Power Transmission Line Contractors Association.

57. From the affidavits above it is apparent that the Applicant though not a party in Constitutional Petition No. E007 of 2024, the said Petition is being litigated on its behalf by the Petitioner therein, Transmission Line Contractors Association by virtue of the Applicant's membership in the Petitioner. Further, its Director, Duncan Ndegwa Kiragu has even deposed an affidavit in support of the Constitutional Petition, which is presently pending before the High Court.

58. The Board has keenly examined the issues raised in the separate proceedings and observed that:

- i. The instant Request for Review challenges the tender process in respect of Tender No. KP1/9A.2/OT/030/PJT/23-24 for Provision of Labour and Transport Construction Services.
- ii. Constitutional Petition No. E007 of 2024 equally challenges the tender process in respect of Tender No. KP1/9A.2/OT/030/PJT/23-24 for Provision of Labour and Transport Construction Services.
- iii. Both the instant Request for Review and Constitutional Petition No. E007 of 2024 seek in their respective reliefs section that the subject tender be cancelled and for it to be retendered.

59. For completeness of the record, the reliefs sought by Power Transmission Line Contractors Association in Constitutional Petition No. E007 of 2024 are hereinafter reproduced verbatim:

a) That as prayed in the motion filed herewith, the Procurement by the Respondent under tender no KP1/9A.2/OT/030/PJT/23-24 FOR PROVISION OF LABOUR AND TRANSPORT CONSTRUCTION SERVICES, OCTOBER 2023 be stayed until this Petition is heard and determined;

b) That a declaration be issued that the respondent's tender no. KP1/9A.2/OT/030/PJT/23-24 FOR PROVISION OF LABOUR AND TRANSPORT CONSTRUCTION SERVICES, OCTOBER 2023, as framed and by its necessary implications is unconstitutional for being discriminatory and failing to adhere to the Constitutional Principles set out

- under Articles 10, 27, 55, 56, 201 and 227 of the Constitution of Kenya, 2010;*
- c) That tender no. KP1/9A.2/OT/030/PJT/23-24 FOR PROVISION OF LABOUR AND TRANSPORT CONSTRUCTION SERVICES, 2023 and any processes undertaken in respect of the tender including the addendum dated 18/12/2023 be declared as a nullity for the attempt to extend the tender on 18/12/2023 after the closing date on 15/12/2023 contrary to section 75 of the Public Procurement and Disposal Act, 2015;***
- d) That categorization of the Contractors by the Respondent as Central Office Contractors and FBU Contractors be declared discriminatory and unconstitutional;***
- e) An order to bring to the High Court for purposes of quashing the tender no. KP1/9A.2/OT/030/PJT/23-24 for Provision of Labour and Transport Construction Services, October 2023 and any processes and proceedings taken pursuant thereto;***
- f) That the Respondent be ordered to reserve at least 30% of the slots of contractors to qualified companies owned and run by Women, Youth, disabled and other disadvantaged groups to ensure compliance with Articles 55,56 and 227 of the Constitution;***
- g) That in any event, the Respondent be ordered to reframe the tender in an equitable manner that will ensure continuity of business for FBBU contractors by allocating***

Central Office Design works and 66KV Line works to Central Office Contractors and all other works at FBBU level to FBBU Contractors exclusively including streetlight works within any FBBU as has been the practice since 2018;

h) That in the alternative the Respondent be directed to abolish the existing categorization and contract all qualified contractors under framework agreements and open up major projects from central office design for competitive bidding amongst all contractors to ensure maximization of value for money and avail opportunities to all contractors without discrimination;

i) Costs of this petition be awarded to the Petitioner.

60. The reliefs sought in the instant Request for Review are also once again hereinafter reproduced verbatim:

- i. Respondent's Tender No. KP1/9A.20T/030/PJT/23-24 for Provision of Labour & Transport Construction Services as amended through the various addenda be annulled in its entirety for failing to comply with the mandatory provisions of the law and the Respondent directed to re-tender in compliance with the law;**
- ii. The Respondent be ordered to cater for the costs of this Application; and**
- iii. Such other orders as the Board may deem fit and just.**

61. From the reliefs above, it is clear that both the instant Request for Review and Constitutional Petition No. E007 of 2024 seek the cancellation of the subject tender. Prayer (i) of the Request for Review seeks the annulment of the subject tender. Prayer (e) of Constitutional Petition No. E007 of 2024 seeks the High Court to quash the subject tender
62. The Board has agonized over the potential confusion that is likely to arise if the High Court were to grant the relief for cancellation of the subject tender and this Board separately declines to grant the relief or vice-versa. The result would be administrative chaos in the country's justice system in so far as the subject tender is concerned, which is the very thing that the doctrine of sub judice seeks to remedy.
63. Though parties did not appraise the Board on the actual date when Constitutional Petition No. E007 of 2024 was filed, it became apparent during the clarification session that it was filed earlier in time compared to the instant Request for Review. Guided by the decisions in ***Kinatwa Co-operative Savings & Credit Society Limited v Kinatwa Prestige Ltd [2021] eKLR*** and Ephraim ***Miano Thamaini v Nancy Wanjiru Wangai & 2 others [2022] eKLR*** above, this Board finds that Constitutional Petition No. E007 of 2024, which was filed earlier in time, should be allowed to proceed and determine the fate of the subject tender. This will avert a situation where there are conflicting decisions on the fate of the tender.

64. The proceedings before Constitutional Petition No. E007 of 2024 and the instant Request for Review involve similar parties and parties claiming through them. Further, the issues to be determined in both matters concern the fate of the same tender i.e. the subject tender on whether it should be cancelled or not.
65. The Board therefore finds that the instant Request for Review offends the legal doctrine of sub judice as to divest the Board the jurisdiction over it. Accordingly, the Board lacks jurisdiction and therefore downs its tools in the matter.

Whether the Procuring Entity properly conducted the Tender Opening of the subject tender in accordance with Sections 78 of the Act, Regulation 57 of the Regulations 2020 and the provisions of the Tender Document?

66. Having found that the Board lacks jurisdiction over the instant Request for Review, this issue as framed shall not be analysed.

What orders the Board should grant in the circumstances?

67. The Board has found that that the instant Request for Review offends the legal doctrine of sub judice as to divest the Board the jurisdiction over it.
68. Ordinarily, following a finding that a matter is sub judice under Section 6 of the Civil Procedure Act, a court stays the latter proceedings but the instant case is unique. This Board has a statutory time limit of 21 days to

determine a Request for Review filed before it and for purposes of the instant Request for Review, the time limit expires on 16th February 2024. Staying the proceedings would be of no consequence to the case as the time limit will have lapsed by the time Constitutional Petition No. E007 of 2024 and thus the Board would be divested of jurisdiction over the Request for Review. The Respondent disclosed at paragraph 34 of its Memorandum of Response that the Constitutional Petition No. E007 of 2024 is scheduled for highlighting of submissions on 9th May 2024.

69. The upshot of our finding is that the Request for Review dated 26th January 2024 in respect of Tender No. KP1/9A.2/OT/030/PJT/23-24 for Provision of Labour and Transport Construction Services fails in the following specific terms:

FINAL ORDERS

70. 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 26th January 2024
- 1. The Request for Review dated 26th January 2024 be and is hereby struck out;**
 - 2. Given the Board's finding above, each party shall bear its own costs.**

