

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 21/2024 OF 7TH MARCH 2023

BETWEEN

SINOPEC INTERNATIONAL

PETROLEUM SERVICE LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA ELECTRICITY GENERATING

COMPANY PLC.....RESPONDENT

AND

H YOUNG & COMPANY (E.A) LTD.....1ST INTERESTED PARTY

JV LEX OIL FIELD SOLUTIONS LIMITED &

EPCM CONSULTANTS SA (PTY) LIMITED.....2ND INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Electricity Generating Company Plc in relation to Tender No. KGN-GDD-056-2023 for the Connection of Make-Up Wells OW-50A, OW-50B and OW-50C Olkaria 1AU Power Plant

BOARD MEMBERS PRESENT

1. Mr. Joshua Kiptoo - Panel Chairperson
2. Ms. Alice Oeri - Member
3. Eng. Lilian Ogombo - Member

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT **SINOPEC INTERNATIONAL PETROLEUM SERVICE LIMITED**

Mr. Hezron Mogire -Advocate, Mogire Hezron & Co. Advocates

RESPONDENTS **THE ACCOUNTING OFFICER, KENYA ELECTRICITY GENERATING COMPANY PLC**
KENYA ELECTRICITY GENERATING COMPANY PLC

Mr. Mogaka -Advocate, Mogaka Omwenga & Mabeya Advocates

1ST INTERESTED PARTY **H YOUNG & COMPANY LIMITED**

N/A N/A

2ND INTERESTED PARTY **JV LEX OIL FIELD SOLUTIONS LIMITED & EPCM CONSULTANTS SA (PTY) LIMITED**

Mr. Anthony Kiprono Advocate, A.E. Kiprono & Associates Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Electricity Generating Company Plc, the Procuring Entity together with the 1st Respondent herein, invited an electronic submission of tenders in response to Tender No. KGN-GDD-056-2023 for the

Procurement of Connection of Make-Up Wells OW-50A, OW-50B and OW-50C Olkaria 1AU Power Plant using an open international competitive tender method. The subject tender's initial submission deadline was Wednesday, 12th April 2023 at 10:00 a.m.

Addenda.

2. On various the tender submission deadline was extended with the final directions extending the deadline to 13th June 2023.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Register for 13th June 2023 under the Confidential File submitted by the Procuring Entity, the following 4 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

No.	Name of Tenderer
1.	Elite Builders Company Limited
2.	Lex Oilfield Solutions Limited
3.	Sinopec International Petroleum Service
4.	H Young & Co (E.A.) 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 4 tenders in the following 3 stages as captured in the Evaluation Report
 - i. Preliminary Stage

- ii. Technical Stage
- iii. Financial Stage

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 37 to 39 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, 2 tenders were found unresponsive with the other 2 tenders including that of the Applicant and the 2nd 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 Stage 2: Technical Evaluation on Capacity to Deliver the Contract under Section III – QUALIFICATION CRITERIA AND REQUIREMENTS at pages 40 to 44 of the Tender Document.

9. In order to qualify for further evaluation at the Financial Evaluation Stage, tenderers were required to garner at least 75 marks under the criteria outlined at this stage of evaluation.
10. At the end of the evaluation at this stage, both the Applicant's and 2nd Interested Party's tenders surpassed the 75 marks at the Technical Stage 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 Stage 3: Financial Evaluation under Section III– QUALIFICATION CRITERIA AND REQUIREMENTS at page 45 of the Tender Document.
12. The financial evaluation was to be based on the application of a margin of preference for local and open international tenders and thereafter comparison of tender prices to establish the lowest evaluated tender.
13. The 2nd Interested Party had quoted 2 amounts, one in Kshs and the other in USD. For purposes of establishing its tender price the Evaluation Committee converted the amount quoted in USD to Kenya Shillings and thereafter summed it up with other one already in Kenya Shillings.
14. The Applicant's tender was ranked the lowest of the two tenders prior to the application of the margin of preference. However, following the application of the margin of preference, the Evaluation Committee determined the 2nd Interested Party's tender price of **Kshs. 1,138,200,012.34** as the lowest evaluated tender price in the subject tender.

Evaluation Committee's Recommendation

15. Accordingly, the Evaluation Committee recommended the award of the subject tender to the 2nd Interested Party at its tender price of **Kshs. 1,138,200,012.34 (Kenya Shillings One Billion, One Hundred and Thirty-Eight Million, Two Hundred Thousand and Twelve and Thirty-Four Cents only) inclusive of taxes.**

Professional Opinion

16. In a Professional Opinion dated 21st July 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's General Manager, Supply Chain, Mr. Philip Yego, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and recommended the award of the subject tender to the 2nd Interested Party as proposed by the Evaluation Committee.
17. On 27th July 2023, the Respondent approved the Professional Opinion subject to the Evaluation Committee relooking into the provisions of Clause 17.1 and 34.1 under currency provisions in the Instructions to Tenderers.
18. Vide a Report dated and signed on 4th August 2023, the Evaluation Report observed that the Tender Document was laden with inconsistencies on the applicable currency. Whereas certain provisions of the Tender Document insisted on tenderers using Kenyan Shillings only others permitted the use of foreign currencies.

Notification to Tenderers

19. Tenderers were notified of the outcome of the evaluation of the subject tender vide letters dated 16th October 2023.

REQUEST FOR REVIEW NO. 84 OF 2023

20. On 27th October 2023, the Applicant filed a Request for Review dated 27th October 2023 supported by a Supporting Affidavit sworn on 27th October 2023 by JiaWei He, a Project Manager at the Applicant, seeking the following orders from the Board in verbatim:

- a. The Procuring Entity's decision contained in its Letter of Regret dated 16th October 2023, Tender No. KGN-GDD-056-2023, for Connection of Makeup Wells OW-50A, OW-50B and OW-50C to Olkaria 1AU Power Plant, notifying the Applicant that its bid was unsuccessful be set aside and/or nullified.***
- b. The Procuring Entity's decision dated 16th October, 2023 purporting to award Tender No. KGN-GDD-056-2023, for Connection of Makeup Wells OW-50A, OW-50B and OW-50C to Olkaria 1AU Power Plant, to the Interested Party be set aside, vacated and/or nullified.***
- c. The Public Procurement Administrative Review Board reviews the scores entered by the Procuring Entity, the tender documents and awards the Tender No. KGN-GDD-056-2023, for Connection of Makeup Wells OW-50A, OW-50B and OW-50C to Olkaria 1AU Power Plant, to the Applicant.***

- d. In the alternative, the Procuring Entity be ordered to sign a contract with the Applicant in accordance with the tender documents and the decision of The Public Procurement Administrative Review Board.***
- e. The Public Procurement Administrative Review Board substitutes the decision by the Procuring Entity made on 16th October, 2023 with a decision awarding the Tender No. KGN-GDD-056-2023, for Connection of Makeup Wells OW-50A, OW-50B and OW-50C to Olkaria 1AU Power Plant, to the Applicant.***
- f. The Applicant be awarded costs for this Review application.***
- g. Such other or further reliefs as the Review Board shall deem fit and just to grant.***
- h. The cost of this review be awarded to the Applicant.***

21. The Board heard parties' Counsel on the said Request for Review and on 17th December 2023 it delivered its Decision in the matter giving the following orders:

- A. The Interested Party's Notice of Preliminary Objection dated 6th November 2023 be and is hereby upheld only in so far as the Applicant lacks the locus standi to bring the Request for Review does not conform to Regulation 203(1) of the Regulations 2020.***
- B. The Respondents' Notice of Preliminary Objection dated 8th November 2023 be and is hereby upheld only to the extent that the Applicant lacks locus standi to bring the instant Request for Review and that the Request for Review is time-barred.***

C. The Request for Review dated 27th November 2023 be and is hereby struck out.

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

22. In exercise of its right under Section 175(1) of the Act, the Applicant challenged the Decision of the Board in ***Nairobi High Court Judicial Review Misc. Application No. E128 of 2023***. On 4th January 2024, the High Court delivered its Judgment dismissing the judicial review application.
23. The Applicant once again in exercise of its right under Section 175(4) of the Act, appealed against the Judgment of the High Court in ***Nairobi Court of Appeal Civil Appeal No. E012 of 2024***. On 23rd February 2024, the Court of Appeal delivered its Judgment allowing the appeal and setting aside the award of the subject tender to the 2nd Interested Party herein.

REQUEST FOR REVIEW NO. 21 OF 2024

24. On 7th March 2024, the Applicant through the firm of Mogire Hezron & Company Advocates, filed a Request for Review dated 7th March 2024 supported by a Supporting Affidavit sworn on 7th March 2024 by JiaWei He, a Project Manager at the Applicant, seeking the following orders from the Board in verbatim:
- a. The Respondent's decision to re-advertise the tender, Tender No. KGN-GDD-056-2023, For Connection of Makeup Wells OW-50A, OW-50B and OW-50C to Olkaria 1AU Power Plant, communicated to the Applicant through the***

Respondent's Advocates letter dated 26th February 2024 be set aside and/or nullified;

b. The Public Procurement Administrative Review Board to exercise its powers under Section 173(b) and extend tender validity period of the subject tender for a period of 120 days or such other period as it deems necessary to allow for sufficient time for the Respondent to conclude the subject tender process.

c. The Respondent be directed to issue the Applicant with a Letter of Award and procurement contract in respect of Tender No. KGN-GDD-056-023, For Connection of Makeup Wells OW-50A, OW-50B and OW-50C to Olkaria 1AU Power Plant;

d. Such other or further relief as the Review Board shall deem fit and just to grant.

e. Costs of this Request for Review.

25. In a Notification of Appeal and a letter dated 7th March 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 7th March 2024.

26. In response to the Request for Review, on 11th March 2024, the Respondent filed a Notice of Appointment of Advocates, Notice of Preliminary Objection and a Memorandum of Response, all dated dated 11th March 2024 together with a Replying Affidavit sworn on 11th March 2024 by Philip Yego, the Procuring Entity's General Manager, Supply Chain. The Respondent also submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.
27. Vide letters dated 12th March 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 12th March 2024.
28. On 18th March 2024, the 1st Interested Party through the firm of Okubasu & Munene Advocates filed a Notice of Appointment of Advocates and Memorandum of Response, both dated 15th March 2024.
29. On 20th March 2024, the 1st Interested Party through the firm of A.E. Kiprono Advocates filed a Notice of Appointment of Advocates and Memorandum of Response, both dated 19th March 2024 together with a Replying Affidavit sworn on 20th March 2024 by Emmanuel Kitusa, the Managing Director at the Interested Party.
30. On 22nd March 2024, the Acting Board Secretary, sent out to 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 25th March 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.

31. On 25th March 2024, the Applicant filed its Written Submission and List of Authorities of even date.
32. On the same day, 25th March 2024, the Respondent filed their Written Submissions and List of Authorities of even date.
33. During the online hearing on 25th March 2024 at 11:00 a.m., parties were represented by their respective Advocates. The Board noted that since the Respondent had filed a Notice of Preliminary Objection; this would be heard as part of the substantive Request for Review. This was in line with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of the substantive Request for Review and render one decision.
34. The Board read out to the parties the documents that had been filed in the Request for Review and sought for parties' confirmation that those were the documents that had been filed and served upon them. Parties confirmed having filed and been served with the said documents.
35. The Board also gave directions on the order of address directing that the Applicant would go first, followed by the Respondent and thereafter the Interested Parties. After all parties had addressed the Board, the Applicant would get an opportunity to offer a rejoinder.

PARTIES SUBMISSIONS

Applicant's Submissions

36. Counsel for the Applicant, Mr. Mogire, gave a background of the case highlighting that the Board previously disallowed the Request for Review No. 84 on a Preliminary Objection. He pointed out that the Decision was upheld by the High Court, whose Judgment was then vacated by the Court of Appeal.
37. Mr. Mogire argued that subsequent to the delivery of the Judgment of the Court of Appeal in ***Nairobi Court of Appeal Civil Appeal No. E012 of 2024***, the Applicant wrote to the Procuring Entity requesting to be awarded the subject tender but the Procuring Entity did not respond. Instead the Applicant received a letter from the Procuring Entity's Counsel on record advising that the subject tender would be re-advertised.
38. Mr. Mogire argued that the Applicant was challenging the decision by the procuring Entity to re-advertise the subject tender and was also seeking an extension of the tender validity period to allow for the logical conclusion of the said tender. He argued that by the time the Respondent previously issued the Letter of Award to the 2nd Interested Party herein, 125 of the 126 days tender validity period had since lapsed.
39. Counsel argued that the Board was not functus officio in respect of the subject tender since the Request for Review was not heard on its merits having been previously dismissed on preliminary points. Further that before the Board were also new issues i.e. the cancellation of the subject tender as well as an extension of the tender validity period in the subject tender.

40. Counsel placed reliance on ***Silvanus Kizito v Edith Nkirote Mwiti [2021]eKLR*** arguing that a court does not become functus officio just because a decision has been rendered. Further that a court still has the powers to entertain stay, review and execution proceedings post judgment.
41. Mr. Mogire equally disputed that the Applicant was seeking to review or vary the Court of Appeal decision in ***Nairobi Court of Appeal Civil Appeal No. E012 of 2024*** through the instant Request for Review.
42. Further, that the Respondent was mixed up on whether the tender was terminated or not. He argued that the ground raised by the Respondent that the Board lacked jurisdiction in the matter by virtue of Section 167(4) of the Act suggested that the Respondent had in fact terminated the subject tender. Mr. Mogire while relying on ***Public Procurement Administrative Review Board v Four M Insurance Brokers Limited & 3 Ors, Civil Appeal No. E1009 of 2023;*** argued that any such termination must be in accordance with the law and that the Board does not lack jurisdiction simply because a matter involves termination of a tender. He argued that the Board is duty-bound to inquire in to whether the termination was in accordance with the law.
43. Counsel argued that the Procuring Entity should not cancel the tender since the Court of Appeal only nullified the award to the 2nd Interested Party but never nullified the subject tender. According to the Applicant, the tender was still open.

44. Further that Section 63 of the Act was not available to the Procuring Entity since an award had already been issued and the said section applies where an award has not been issued.
45. Relying on ***PPARB Application No. 77 of 2023; Sedgwick Kenya Insurance Brokers Limited v Managing Director, Kenya Pipeline Company Limited & Ors*** and ***Civil Appeal No. 510 of 2022; Chief Executive officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2Ors [2022]KECA 982 eKLR***, Mr Mogire sought the extension of the tender validity period in the subject tender.
46. He equally argued that under Section 170 of the Act the Accounting Officer was the proper party to the Request for Review and not the Procuring Entity as misapprehended by the 2nd Interested Party in their Replying Affidavit.
47. Counsel argued that the it was not a must for the Court of Appeal to refer back the subject tender to the Board for it to have jurisdiction over the instant Request for Review. He therefore urged the Board to allow the Request for Review as prayed.

Respondent's Submissions

48. Counsel for the Respondent, Mr. Mogaka, urged the Board to disregard all arguments by Counsel for the Applicant that were made from the bar and not contained in the Applicant's filed documents.
49. He equally pointed out that the Applicant's Counsel, Mr. Mogire had admitted to unethical communication when he addressed his letter

dated 26th February 2024 to the Procuring Entity despite knowledge of its Counsel in the proceedings before the Court of Appeal.

50. Mr. Mogaka argued that this Board operates within a specified framework and that the Court of Appeal did not refer the subject tender back to this Board for consideration.
51. Counsel argued that it was common ground between the parties that the tender validity period in respect of the subject tender lapsed on 17th October 2024, which date should be the checkpoint for computing any statutory timeline on filing Requests for Review on tender validity period in respect of the subject tender. According to Counsel, the instant Request for Review was time-barred as far as the relief for extension of tender validity was concerned and that it was not even raised in Request for Review No. 84 of 2024.
52. He further argued that an issue that could have been raised at a previous request for Review cannot be raised in the present Request for Review as this would amount to an abuse of the Board's processes. Accordingly, the Applicant could not be seen pleading for extension of the tender validity period when this was not sought in the earlier Request i.e. Request No.84 of 2023.
53. Mr. Mogaka argued that the Applicant had produced in their Bundle of Authorities in the present Request for Review, authorities from the High Court and Court of Appeal where the superior courts while overturning the decision of the Board made specific directions for the Board to rehear the matter. Further that in the present case, the Court of Appeal did not give any such directions.

54. Additionally, that a decision in respect of a procurement process must be done by the Accounting Officer or an officer with such delegated authority . He therefore argued that the Respondent's Counsel's letter cannot be imputed as an action of the Accounting Officer. In fact, the Accounting Officer had not terminated the tender process in the subject tender.
55. Counsel questioned why the Applicant had despite admitting that Request for Review had not been heard on merit still proceeded to file the instant Request for Review. He surmised this as an abuse of the Board's processes.

1st Interested Party's Submissions

56. The 1st Interested Party despite filing its Memorandum of Response in the matter had no representation during the hearing. The Board has nonetheless considered its filed Memorandum and the following appears to be its case in the matter:
57. According to the 1st Interested Party, there was no ongoing procurement process capable of a challenge following the quashing of the award to the 2nd Interested Party and that only when a new invitation to tender would be sent that the procurement process would be initiated. Therefore, the proceedings were premature as no procurement process had been initiated.
58. It was brought out in their documents that the Applicant was seeking to have the subject tender awarded to it irregularly.

59. Further that the award of the subject tender to the 2nd Interested Party having been quashed by the Court of Appeal, without any further orders, the Board cannot purport to assume jurisdiction for purposes of extending the tender validity.

2nd Interested Party's Submissions

60. Counsel for the 2nd Interested Party, Mr. Kiprono, indicated that the 2nd Interested Party would be relying on its filed documents in the matter i.e. Replying Affidavit sworn on 20th March 2024 by Emmanuel Kitusa.
61. Counsel equally associated the 2nd Interested Party with the submissions that had been made on behalf of the Respondent.
62. Mr. Kiprono submitted that the Board was functus officio and that the Court of Appeal did not direct a further review of the subject tender by the Board. Further that prayer (c) is similar to that in Request for Review No. 84 of 2023
63. Counsel pointed out that at the High Court, the Applicant had sought orders of Mandamus compelling the Procuring Entity to award it the subject tender but this was disallowed by the Court. Counsel argued that since the Court of Appeal did not remit the instant Request for Review for hearing before the Board, the Board lacked jurisdiction to hear and determine it.
64. Counsel further argued that the Request for Review was premature since neither the Accounting Officer nor the Procuring Entity had not taken any decision on the subject tender. The letter by the Respondent's

Counsel was merely an opinion of Counsel on his reading of the Judgment by the Court of Appeal.

65. He argued that the Board cannot at this stage make a decision for the award of the tender as the process is not complete and in any event an award was subject to due diligence as provided for under clauses 42.1 to 42.6 of the Tender Document.

Applicant's Rejoinder on the Request for Review

66. Counsel for the Applicant, Mr. Mogire, informed the Board that he was not being unethical in writing directly to the Respondent herein since the Respondent is the one vested with the power to issue an award and not the Respondent's Counsel.
67. Counsel argued that his letter to the Accounting Officer was responded to by the Respondent's Counsel on record, a fact that confirms that the Respondent came across the said letter.
68. Counsel equally argued that the Applicant was not the author of the Judgment in the Court of Appeal and thus could not comment on why the appellate court never referred the subject tender back to the Board.
69. Mr. Mogaka argued that lapse of a tender validity period does not per se constitute a breach on the part of a Procuring Entity as to warrant the Applicant to commence Request for Review proceedings and the running of the 14 days statutory timeline.

CLARIFICATIONS

70. The Board inquired from the Respondent how fare the tender process was at the time the Request for Review was filed. Counsel for the

Respondent, Mr. Mogaka informed the Board that letters of Award had been issued before the Request for Review No. 84 of 2023 had been filed.

71. The Board asked the Applicant to give its understanding on the orders that the Court of Appeal had issued in its Judgment in the proceedings before it. Counsel for the Applicant, Mr. Mogire indicated that the Appellate Court faulted the Board's and High Court's interpretation of Section 167(1) of the Act and further that the Evaluation Committee erred in awarding the subject tender to the 2nd Interested Party.
72. The Board asked the Applicant to indicate the reason for its disqualification from the subject tender as indicated in its letter of regret. Counsel for the Applicant indicated that the Applicant was disqualified on account of its tender not being found as the lowest evaluated tender upon the application of a margin of preference.
73. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 7th March 2024 had to be determined by 28th March 2024. Therefore, the Board would communicate its decision on or before 28th March 2024 to all parties via email.

BOARD'S DECISION

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

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

In determining this issue, the Board will determine:

- i. Whether the Board has jurisdiction to hear and determine the instant Request for Review on the subject tender absent specific directions by the Court of Appeal in Civil Appeal No. E012 of 2024?
- ii. Whether the Board has jurisdiction to extend the tender validity in respect of the subject tender?
- iii. Whether the Board has jurisdiction to entertain the subject matter of termination of a tender ?

Depending on the finding on the first issue:

II. What should be the fate of the subject tender?

III. What orders should the Board issue in the circumstance?

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

75. When the instant Request for Review was filed, the Respondent in addition to its Memorandum of Appearance filed a Notice of Preliminary Objection dated 11th March 2024 to wit:

- i. The Board was functus officio and lacked the jurisdiction to vary amend, review the orders of the Court of Appeal
- ii. Lack of jurisdiction to extend the tender validity in the subject tender
- iii. lack of jurisdiction to entertain matters under Section 63 of the Act

76. This Board appreciates 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.

77. 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."

78. 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."

79. 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."

80. 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...."

81. 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."

82. 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.”

83. The Board shall now separately interrogate the Grounds appearing in the Notices of Preliminary Objection as urged by the Respondent to establish whether it has jurisdiction over the instant Request for Review:

- i. Whether the Board has jurisdiction to hear and determine the instant Request for Review on the subject tender absent specific directions by the Court of Appeal in Civil Appeal No. E012 of 2024?**

84. Counsel for the Respondent, Mr. Mogaka, argued that this Board operates within a specified framework and that the Court of Appeal in its Judgment in ***Civil Appeal No, E012 of 2024*** did not refer the subject tender back to this Board for consideration. He pointed out that the situation obtaining in the circumstance was different from those in the Applicant’s Bundle of Authorities where the superior courts while overturning the decision of the Board made specific directions for the Board to reconsider the tenders in question. He therefore took the view that this Board was functus officio lacked jurisdiction to hear the instant Request for Review.

85. Counsel further argued that the Applicant was abusing this Board’s processes by seeking to have the tender validity period extended when the same could have been raised in Request for Review No. 84 of 2023

but was not. He equally questioned why the Applicant had despite admitting that Request for Review No. 84 of 2023 had not been heard on merit still proceeded to file the instant Request for Review. He surmised this as an abuse of the Board's processes.

86. The 2nd Interested Party concurred with the Respondent that the Board was functus officio and that the Court of Appeal did not direct a further review of the subject tender by the Board. Further that prayer (c) is similar to that in Request for Review No. 84 of 2023
87. Counsel pointed out that at the High Court, the Applicant had sought orders of Mandamus compelling the Procuring Entity to award it the subject tender but this was disallowed by the Court. Counsel argued that since the Court of Appeal did not remit the instant Request for Review for hearing before the Board, the Board lacked jurisdiction to hear and determine it.
88. On the flip side, the Applicant was emphatic that its Request for Review was properly before the Board Counsel argued that the Board was not functus officio in respect of the subject tender since the Request for Review was not heard on its merits having been previously dismissed on preliminary points. Further, that before the Board were also new issues i.e. the cancellation of the subject tender as well as an extension of the tender validity period in the subject tender. Additionally, that it was not a must for the Court of Appeal to refer back the subject tender to the Board for it to have jurisdiction over the instant Request for Review.
89. According to Counsel for the Applicant, Mr. Mogire, a court does not become functus officio just because a decision has been rendered.

Further, that a court still has the powers to entertain stay, review and execution proceedings post judgment.

90. Mr. Mogire equally disputed that the Applicant was seeking to review or vary the Court of Appeal decision in ***Nairobi Court of Appeal Civil Appeal No. E012 of 2024*** through the instant Request for Review.

91. The Board is therefore invited to interrogate the appropriateness of the instant proceedings.

92. Previously, on 27th October 2023, the Applicant filed before the Board Request for Review No. 84 of 2023 challenging the Respondent's award of the subject tender to the 2nd Interested Party herein.

93. The Board heard parties' Counsel on the said Request for Review and on 17th December 2023 it delivered its Decision in the matter giving the following orders:

A. The Interested Party's Notice of Preliminary Objection dated 6th November 2023 be and is hereby upheld only in so far as the Applicant lacks the locus standi to bring the Request for Review does not conform to Regulation 203(1) of the Regulations 2020.

B. The Respondents' Notice of Preliminary Objection dated 8th November 2023 be and is hereby upheld only to the extent that the Applicant lacks locus standi to bring the instant Request for Review and that the Request for Review is time-barred.

C. The Request for Review dated 27th November 2023 be and is hereby struck out.

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

94. Dissatisfied with the Board's decision, the Applicant filed judicial review proceedings challenging the Decision of the Board through ***Nairobi High Court Judicial Review Misc. Application No. E128 of 2023.*** On 4th January 2024, the High Court delivered its Judgment dismissing the judicial review application.
95. The Applicant once again appealed against the Judgment of the High Court in ***Nairobi Court of Appeal Civil Appeal No. E012 of 2024.*** On 23rd February 2024, the Court of Appeal delivered its Judgment allowing the appeal and setting aside the award of the subject tender to the 2nd Interested Party herein. The dispositive paragraph of the Judgment of the Court of Appeal is instructive and the same is hereinbelow reproduced:

58. For the reasons discussed above, we find merit in this appeal to the extent that both the Review Board and the High Court failed to appreciate the proper meaning of Section 167(1) of the Act, in that there was no breach by the procuring entity at the Tender Opening Stage. Further, the Review Board and the High Court fell in to a grave error by failing to appreciate that the Tender Evaluation Committee violated Section 79 of the Act by declaring as responsive the 4th respondent's bid which clearly had failed to comply with a mandatory bid term. The ensuing award of the tender to the 4th respondent is founded on an illegality. It would be unconscionable and a dereliction of

duty for this Court to endorse the award of the tender to the 4th respondent on the face of the manifest violation of section 79. Accordingly, reverse the High Court decision and set aside the award of the subject tender to the 4th respondent in its entirety for the reasons herein above stated. Each party shall bear its own costs of the appeal."

96. In its dispositive paragraph above, the Court of Appeal allowed the appeal to the limited extent that (i) the Judgment of the High Court was set aside; and (ii) the award of the award of the subject tender to the 2nd Interested Party was equally set aside.
97. Notably, the Court of Appeal in the above case did not offer any specific directions including the remission of the subject tender back to this Board for determination on any issue.
98. The Board has equally looked at the decisions of the High Court and Court of Appeal in ***Republic v Public Procurement Administrative Review Board & Anor; Rentco Africa Limited (Ex parte) (Judicial Review Miscellaneous Application E100 of 2022) [2022]KEHC12978(KLR)*** and ***Civil Appeal No. 510 of 2022; Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 Ors [2022]KECA 982*** respectively where the court remitted the tenders in question back to the Board for determination.
99. Section 175 of the Act is instructive as follows:

175. Right to judicial review to procurement

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

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

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

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

100. Section 145 of the Act above, specifies the levels at which the decision of the Board can be challenged, the period within which the challenge should be made and the finality of each level of challenge. A party aggrieved by the decision of the Board can challenge the same by way of judicial review at the High Court within 14 days; (ii) A party aggrieved by the decision of the High Court can then challenge the same at the Court of Appeal within 7 days; and (iii) The decision of the Court of Appeal shall be final.

101. In terms of hierarchy in the dispute resolution mechanism for public procurement disputes, this Board ranks lower than the Court of Appeal

and the High Court. This informs why decisions by the Board can be challenged at the High Court while decisions of the High Court can then be challenged at the Court of Appeal. In deference to the doctrine of stare decisis, it would therefore stand to logic that this Board cannot be legally seen as entertaining any proceedings that in any way seek a variation of the directions issued by the Court of Appeal.

102. The Court of Appeal in its Judgment in ***Civil Appeal No. E012 of 2024*** did not remit the subject tender back for consideration by this Board. The Court simply set aside the Judgment of the High Court and the letter of award previously issued to the 2nd Interested Party.

103. Appreciating that Section 175(4) provides that the Judgment of the Court of Appeal on a procurement dispute is final, this Board ought to exercise great caution when a party invites it to look into a tender process that has already been adjudicated on and final orders issued by the Court of Appeal. In the present case, the Board holds that it is functus officio and it would be inappropriate for it to open up an interrogation on the subject tender without an express direction by the Court of Appeal.

104. Accordingly, the Board finds that it lacks jurisdiction to hear and determine the instant Request for Review on the subject tender absent specific directions by the Court of Appeal in Civil Appeal No. E012 of 2024.

ii. Whether the Board has jurisdiction to entertain the subject matter of termination of a tender ?

105. Counsel for the Respondent, Mr. Mogaka argued that a decision in respect of a procurement process must be done by the Accounting Officer or an officer with such delegated authority . He therefore argued that the Respondent's Counsel's letter cannot be imputed as an action of the Accounting Officer as to form the basis of the instant Request for Review which was imputing that the Accounting Officer had terminated the subject tender when in fact no such termination had happened.

106. According to the 1st Interested Party, there was no ongoing procurement process capable of a challenge following the Court of Appeal's quashing of the award to the 2nd Interested Party and that only when a new invitation to tender would be sent that the procurement process would be initiated. Therefore, the proceedings were premature as no procurement process had been initiated.

107. Counsel for the 2nd Interested Party, Mr. Kiprono argued that the Request for Review was premature since neither the Accounting Officer nor the Procuring Entity had not taken any decision on the subject tender. The letter by the Respondent's Counsel was merely an opinion of Counsel on his reading of the Judgment by the Court of Appeal.

108. He argued that the Board cannot at this stage make a decision for the award of the tender as the process is not complete and in any event an award was subject to due diligence as provided for under clauses 42.1 to 42.6 of the Tender Document.

109. On his part, Counsel for the Applicant, Mr. Mogire, argued that subsequent to the delivery of the Judgment of the Court of Appeal in Nairobi Court of Appeal **Civil Appeal No. E012 of 2024**, the Applicant wrote to the Procuring Entity requesting to be awarded the subject tender but was responded to by the Procuring Entity's Counsel on record advising that the subject tender would be re-advertised.
110. According to Counsel, the Respondent was mixed up on whether the tender was terminated or not. He argued that the ground raised by the Respondent that the Board lacked jurisdiction in the matter by virtue of Section 167(4) of the Act suggested that the Respondent had in fact terminated the subject tender. He argued that any such termination has to be in accordance with the law and that the Board is duty-bound to inquire in to legality of the termination.
111. Counsel argued that the Procuring Entity should not cancel the tender since the Court of Appeal only nullified the award to the 2nd Interested Party but never nullified the subject tender. According to the Applicant, the tender was still open. Further that Section 63 of the Act was not available to the Procuring Entity since an award had already been issued and the said section applies where an award has not been issued.
112. From the foregoing rival positions, the Board is invited to determine whether the subject tender was terminated and this calls to question the jurisdiction of the Board under Section 167(4).
113. Section 167(4) of the Act exempts termination of tender from the jurisdiction of the Board in the following terms:

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

(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. [Emphasis by the Board]

114. This Board has in a long strand of decisions including ***PPARB Application No. 29 of 2023; Craft Silicon Limited v Accounting Officer Kilifi County Government & anor; PPARB Application No. 50 of 2020; Danka Africa (K) Limited v Accounting Officer, Kenya Ports Authority and PPARB Application No. 9 of 2022; and PPARB Application No. 5 of 2021; Daniel Outlet Limited v Accounting Officer Numeric Machines Complex Limited*** held that the Board has to first establish whether the intended termination was lawful before downing it tools. We therefore agree with the Counsel for

the Applicant that a termination has to be valid before the Board can down its tools in respect of a Request for Review before it.

115. However, the instant case requires the Board's interrogation on whether there has a termination in the first place in view of the rival positions on whether there is any termination. It is only after the Board establishes that the subject tender has been terminated that the lawfulness of the said termination will be interrogated.

116. For purposes of context, on 23rd February 2024 the Court of Appeal delivered its Judgment in **Civil Appeal No. E012 of 2024**. Thereafter on 26th February 2024 the Applicant addressed a letter of even date to the Respondent. The contents of this letter are herein after reproduced:

Our Ref: MH/74/11/23

Your Ref: T.B.A.

26th February 2024

The accounting Officer,

Kenya Electricity Generating Company PLC

Stima Plaza, Kolobot Road

Parklands

Nairobi

Dear Sir,

RE: CIVIL APPEAL No. E012 OF 2024;

***SINOPEC INTERNATIONAL PETROLEUM SERVICE
CORPORATION VS PUBLIC PROCUREMENT***

ADMINISTRATIVE REVIEW BOARD & THE ACCOUNTING OFFICER, KENYA ELECTRICITY GENERATING COMPANY PLC AND JV LEX OIL FIELD SOLUTIONS LTD & EPCM CONSULTANTS SA (PTY) LTD

We refer to the above matter.

This matter arose out of Tender No. KGN-GDD-056-2023 for the Procurement of Connection of Makeup Wells OW-50A, OW-50B and OW-50C to Olkaria 1AU Power Plant (hereinafter "the Tender")

- 1. The Court of Appeal delivered its judgment on 23rd February, 20224 and found as follows: \Both the Review Board and the High Court failed to appreciate the proper meaning of section 167(1) of the Public Procurement and Asset Disposal Act (the Act)*
- 2. The Review Board and the High Court fell in to grave error by failing to appreciate that the Tender Evaluation Committee violated section 79 of the Act by declaring as responsive the 4th respondent's bid (JV Lex Oil Field Solutions Limited & EPCM Consultants SA(PTY) Limited is founded on an illegality.*
- 3. It would be unconscionable and a dereliction of duty for this Court to endorse the award of the tender to the 4th respondent (JV Lex Oil Field Solutions Limited & EPCM Consultants SA (PTY) Limited) on the face of the manifest violation of section 79*
- 4. Accordingly, reverse the High Court decision and set aside the award of the subject tender to the 4th respondent (JV*

Lex Oil Field Solutions Limited & EPCM Consultants SA (PTY) Limited) in its entirety for reasons herein above stated"

We enclose a copy of the Judgment of the Court of Appeal dated 23rd February 2024 for your perusal.

Therefore, the award of the tender to the 4th respondent (JV Lex Oil Field Solutions Limited & EPCM Consultants SA (PTY) Limited) was set aside. Accordingly, we write to notify you of this development and that you immediately issue our client, Sinopec International Petroleum Service Corporation, with a letter of award for the subject tender preferably within the next 7 days.

Kindly let us have your response.

Yours faithfully,

MOGIRE HEZRON & COMPANY ADVOCATES

Signed

Mogire Hezron.

Cc: Client

117. In this letter, the Applicant's Counsel on record gave his account of the dispute resolution stages in respect of the subject tender from this Board all the way to the Court of Appeal. Counsel was seeking that the subject tender be awarded to the Applicant within 7 days.

118. On the same day, 26th February, 2024 the Respondent's Counsel on record, wrote back to the Applicant's Counsel a letter whose contents are equally herein reproduced for completeness of the record:

Your Ref: Mh/74/11/23

Our Ref: KGN/1/24/WM-ea

Date: 26th February 2024

Mogire Hezron & Company

Advocates, (Details withheld)

Nairobi

Dear Sir,

RE: CIVIL APPEAL NO. E012 OF 2024

***SINOPEC INTERNATIONAL PETROLEUM SERVICE
CORPORATION VERSUS***

***PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD & THE ACCOUNTING OFFICER, KENYA
ELECTRICITY GENERATING COMPANY PLC AND JV LEX
OIL FIELD SOLUTIONS LIMITED AND EPCM
CONSULTANTS SA (PTY) LTD***

***We refer to your letter dated today addressed to our
clients. Kindly note the following:-***

- 1. The Public Procurement Administrative Review Board's
Decision of 17th November 2023 disallowed the Request for
Review Application on the basis of a Preliminary Objection.
The matter was never considered on merits.***

- 2. The High Court in the Decision of 4th January 2024 upheld the Review Board's Decision of 17th November 2023.***
- 3. The Court of Appeal disagreed with the Review Board and High Court's Decision's aforementioned and thus allowed your client's Appeal.***
- 4. There is no order in the Court of Appeal Judgment directing that your clients be awarded the subject tender and hence your letter is misconceived.***
- 5. Indeed, the Memorandum of Appeal on record did not seek any order that your client be awarded the Tender which explains why the Court of Appeal did not suo moto make such directions. The judgment nullifies the Award and therefore the lawful option for our client is to re-advertise the Tender.***

Yours faithfully,

MOGAKA OMWENGA & MABEYA

Signed

W.O MOGAKA

CC: Company Secretary & General Manager, Legal Affairs

KenGen

Kenya Electricity Generating Company PLC

Nairobi- Yr Ref: LO/COA/01/24/go

119. In the above letter, the Respondent's Counsel equally gives his account of the ramifications of the various decisions by the Board, the High Court

and the Court of Appeal in respect of the subject tender. According to the Respondent's Counsel, the subject tender ought to be re-advertised.

120. The Applicant challenged what it termed as the termination of the subject tender through the above letter by Counsel for the Respondent. Arising from this, the Board has to determine whether the Respondent's Counsel's letter dated 26th February 2024 constituted a termination of the subject tender.

121. Section 167 of the Act grants room to challenge the decision of a Procuring Entity where the Procuring Entity is shown to have breached a provision of the Act. A Procuring Entity's decision on the fate of any public tender lies with its Accounting Officer. It is the Accounting Officer who ultimately gives the Procuring Entity's decision on the award or termination or any other thing to be done in respect of the tender. However, the decision of the Accounting Officer should be anchored in law and that is why provision is made for in the Act for dissatisfied parties by any decision by the Procuring Entity are subject to the dispute resolution mechanism, running all the way from this Board to the Court of Appeal.

122. Section 63 of the Act particularly places various obligations on the part of the Accounting Officer in any termination of a public procurement process:

63. Termination or cancellation of procurement and asset disposal proceedings

(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel

procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement have been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.

123. Section 63 of the Act above requires that (i) the Accounting Officer is the official to spearhead the termination of a procurement process, if there exists any of the justifiable grounds outlined in the section; (ii) the Accounting Officer should file a report with the Public Procurement

Regulatory Authority on any such termination; and (iii) The Accounting Officer should notify the tenderers of the reasons for the termination of any such tender.

124. Turning to the letter dated 26th February 2024 by Counsel for the Respondent, can the same be said to constitute the Accounting Officer's termination of the subject tender? We think not for at least 3 reasons:

125. First, the letter is by the Respondent's Counsel and not the Respondent. The Act places the obligation on the part of the Accounting Officer to oversee the termination process of a public procurement exercise and not anyone else.

126. Second, the Applicant did not lead any evidence to demonstrate that the Respondent had delegated the responsibility of termination of the subject tender to its Counsel. Accordingly, an argument cannot be made that the Accounting Officer had in the circumstance delegated this function to Counsel.

127. Third, even assuming that the Respondent had delegated the role of communicating the termination of the subject tender to its Counsel on record, such termination would be unlawful as the contents of the said letter run afoul section 63 of the Act. The letter for instance does not list any of the grounds for termination listed under Section 63(1) of the Act.

128. The Board is therefore inclined to take the view that the Respondent's Counsel's letter dated 26th February 2024 does not amount to a termination of the subject tender but was part of the correspondence exchanged between parties on the subject tender.

129. Having established that the subject tender was not terminated it would therefore stand to logic that a Request for Review can only be commenced to challenge a decision made by the Accounting Officer. In the instant case, the Board is unable at this stage to identify any decision that has been made by the Accounting Officer through the Respondent's Counsel's letter of 26th February 2024.

130. Further, Counsel for the respective parties appear to be in agreement that the burden of overseeing that a public procurement process is compliant with the Act lies with the Accounting Officer. That is why Counsel for the Applicant, told the Board that the reason why he never addressed his letter dated 26th February to the Respondent's Counsel was because the ultimate decision of awarding the subject tender lies with the Accounting Officer and not the Respondent's Counsel.

131. The letter by the Respondent's Counsel does not constitute a decision by the Accounting Officer and therefore the same cannot form a basis of a competent subject for review by this Board.

iii. Whether the Board has jurisdiction to extend the tender validity in respect of the subject tender?

132. Counsel Mogaka argued that it was common ground between the parties that the tender validity period in respect of the subject tender lapsed on 17th October 2024, which date should be the checkpoint for computing any statutory timeline on filing Requests for Review on the tender validity period in respect of the subject tender. According to Counsel, the instant Request for Review was time-barred as far as the

relief for extension of tender validity was concerned and that it was not even raised in Request for Review No. 84 of 2024.

133. Mr. Mogire argued that the Applicant was seeking an extension of the tender validity period to allow for the logical conclusion of the said tender. He argued that by the time the Respondent previously issued the Letter of Award to the 2nd Interested Party herein, 125 of the 126 days tender validity period had since lapsed.

134. It was the 1st Interested Party's case that the Applicant was seeking to have the subject tender awarded to it irregularly. Further that the award of the subject tender to the 2nd Interested Party having been quashed by the Court of Appeal, without any further orders, the Board cannot purport to assume jurisdiction for purposes of extending the tender validity

135. This Board is therefore invited to interrogate on whether in the circumstances obtaining in the matter, it would be appropriate to extend the tender validity of the subject tender.

136. The powers of the Board to extend the tender validity period of any tender is since been settled in law. The Board has powers to extend the validity period for good reasons even in instances where the tender validity period has expired.

(See *Republic v Public Procurement Administrative Review Board & Anor; Rentco Africa Limited (Ex parte) (Judicial Review Miscellaneous Application E100 of 2022)* [2022]KEHC12978(KLR) and *Civil Appeal No. 510 of 2022; Chief*

Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 Ors [2022]KECA 982)

137. However, the circumstances of the instant Request for Review are unique. This Board previously pronounced itself on the subject tender in Request for Review No. 84 of 2023 and the decision therefrom was the subject of court processes both at the High Court and Court of Appeal. The Court of Appeal in its Judgment was silent on the question of the tender validity period.

138. Accordingly, in appreciating the import of Section 175(4) on the finality of the Judgment of the Court of Appeal on a procurement dispute, it would be inappropriate for this Board to make any finding on whether the tender validity period in the subject tender should be extended.

139. In light of the foregoing analysis, the Board finds that it lacks jurisdiction over the instant Request for Review.

What should be the fate of the subject tender?

140. The Board having found that it lacks jurisdiction over the instant Request for Review, it shall not delve into an analysis of this issue as previously framed for determination.

What orders should the Board issue in the circumstance?

141. The Board has found that it lacks jurisdiction over the instant Request for Review.

142. The upshot of our finding is that the Request for Review dated 7th March 2024 in respect of Tender No. KGN-GDD-056-2023 for the Connection of Make-Up Wells OW-50A, OW-50B and OW-50C Olkaria 1AU Power Plant fails in the following specific terms:

FINAL ORDERS

143. 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 7th March 2024:

- 1. The Respondent's Notice of Preliminary Objection dated 11th March 2024 be and is hereby upheld only in so far the Board is functus officio and that it lacks the jurisdiction to vary, amend, review in any way adjust the final decision in Civil Appeal No. E012 of 2024.**
- 2. The Request for Review dated 7th March 2024 be and is hereby struck out.**
- 3. Given the Board's finding above, each party shall bear its own costs.**

Dated at NAIROBI, this 28th Day of March 2024.

.....

PANEL CHAIRPERSON

PPARB

.....

SECRETARY

PPARB

