REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 108/2024 OF 25TH OCTOBER2024

BETWEEN

AGILE BUSINESS SOLUTIONS LIMITED.....APPLICANT

AND

THE CHIEF EXECUTIVE OFFICER,
NATIONAL GOVERNMENT
CONSTITUENCIES DEVELOPMENT FUND.....1ST RESPONDENT

NATIONAL GOVERNMENT
CONSTITUENCIES DEVELOPMENT FUND.....2ND RESPONDENT

Review against the decision of the Accounting Officer, National Government Constituencies Development Fund in respect of Tender No. NG-CDFB/RFP/02/2023-2024- Request for Proposal to Undertake Supply, Installation, Implementation, Testing, Training, Commissioning, and Maintenance of an Integrated NG-CDF Board Enterprise Resource Planning (ERP) Solution.

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCIArb & IP - Chairperson
2. CPA Alexander Musau - Member
3. Mr. Daniel Langat - Member

IN ATTENDANCE

Ms. Sarah Ayoo	-	Secretariat
Mr. Anthony Simiyu	-	Secretariat

PRESENT BY INVITATION

APPLICANT	**AGILE BUSINESS SOLUTIONS LIMITED**
Mr. Sisule Musungu	Advocate, Sisule & Associates LLP
Mr. Andrew Mwango	Advocate, Sisule & Associates LLP
RESPONDENTS	**THE CHIEF EXECUTIVE OFFICER, NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND**
Mrs. Irene Kashindi	Advocate, Munyao, Muthama & Kashindi Advocates
Ms. Mellap Wataka	Advocate, Munyao, Muthama & Kashindi Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. The National Government Constituencies Development Fund Board, the Procuring Entity together with the 1st Respondent herein, vide an advert in the MyGov Publication, PPIP Portal and NG-CDF website, PPIP Portal and NG-CDF website (www.ngcdf.go.ke) , invited interested suppliers to submit their bids in response to Tender No. NG-CDFB/RFP/02/2023-2024

Request for Proposal to Undertake Supply, Installation, Implementation, Testing, Training, Commissioning and Maintenance of an Integrated NG-CDF Board Enterprise Resource Planning (ERP) Solution (herein "the subject tender"). The advert set the bid submission deadline as Friday, 7th June 2024 at 10:00 a.m.

Addendum

2. Subsequently, on 5th June 2024 the Procuring Entity issued an addendum offering clarifications in respect various inquiries that were made by various suppliers who had expressed interest in participating in the tender. However, the bid submission deadline was retained as Friday, 7th June 2024 at 10:00 a.m.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Minutes dated 7th June 2024, submitted under the Confidential File submitted by the Procuring Entity, the following five (5) bidders were recorded as having submitted in response to the subject tender by the tender submission deadline:

#	**Name of Bidder**
1.	Impax Business Solutions Limited
2.	Agile Business Solutions Limited
3.	Attain Enterprise Solutions Limited
4.	Green Com Enterprise Solutions Limited
5.	Kingsway Business Systems 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 received bids in the following 4 stages as captured in the Evaluation Report

   i. Preliminary Evaluation

   ii. Technical Compliance Evaluation

   iii. Technical Capacity Evaluation

   iv. Financial Evaluation

5. At the end of the evaluation, the Evaluation Committee established that the Applicant's bid was the lowest evaluated bid and therefore the successful bid at its tender price of Kshs. 854,752,678.40.

Evaluation Committee's Recommendation

6. The Evaluation Committee through a signed Evaluation Report forming part of the Confidential File, recommended the award of the subject tender to the Applicant, at its tendered price of **Kenya Shillings Eight Hundred and Fifty-Four Million, Seven Hundred and Fifty-Two Thousand, Six Hundred and Seventy-Eight and Forty Cents (Kshs. 854,752,678.40**) inclusive of taxes.

Professional Opinion

7. In a Professional Opinion dated 14th June 2024 (hereinafter referred to as the "Professional Opinion") the Procuring Entity's Manager Supply Chain, Mr. Shafee Yaqub Mohamed, 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 Applicant.

8. Subsequently on the same day, 14th June 2024, the 1st Respondent, Mr. Yusuf Mbuno, concurred with the Professional Opinion.

Notification to Tenderers

9. Accordingly, the tenderers was notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 14th June 2024.

REQUEST FOR REVIEW NO. 66 OF 2024

10. On 12th July 2024, Green Com Enterprises Limited, a bidder in the subject tender, filed before the Board a Request for Review dated 12th July 2024 challenging the award of the subject tender to the Applicant. The Board heard parties in the matter and through a Decision delivered on 2nd August 2024 dismissed the Request for Review with the following dispositive orders:

    1. **The Request for Review dated 12th July 2024 be and is hereby dismissed.**
    2. **The Respondent be and is hereby directed to proceed with Tender No. NG-CDFB/RFP/02/2023-2024 Request for Proposal to Undertake Supply, Installation, Implementation, Testing, Training, Commissioning and Maintenance of an Integrated NG-CDF Board Enterprise Resource Planning (ERP) Solution to its lawful and logical conclusion.**
    3. **Each party shall bear its own costs in the Request for Review.**

REQUEST FOR REVIEW NO. 92 of 2024

11. On 25th September 2024, the Applicant herein, through the firm Sisule & Associates LLP, filed a Request for Review dated 25th September 2024. However the Applicant withdrew this Request for Review through a Notice of Withdrawal of Request for Review dated 2nd October 2024.

REQUEST FOR REVIEW NO. 108 OF 2024

12. Subsequently, on 25th October 2024, the Applicant through the firm of Sisule & Associates LLP filed a Request for Review dated 25th October 2024 supported by an affidavit sworn on 25th October 2024 by Peter Macharia the Applicant's Tenders and Bids Executive, seeking the following orders from the Board in verbatim:

a) That the tender validity period in respect of Tender No. NG-CDFB/RFP/2023-2024 REQUEST FOR PROPOSAL TO UNDERTAKE SUPPLY, INSTALLATION, IMPLEMENTTAION, TESTING, TRAINING, COMMISSIONING AND MAINTENANCE OF AN INTREGRATED NG-CDF BOARD ENTERPRISE RESOURCE PLANNING (ERP) SOLUTION, is extended by a period not exceeding 30 days to enable the Procuring Entity to satisfy the provision of Section 134 and 135 of the Public Procurement and Asset Disposal Act, 2025 by preparing the contract in line with the award decision, and thereafter securing execution of the contract with the Applicant who remains the successful candidate in the award decision dated June 14, 2024;

b) That the Accounting Officer to the Procuring Entity, the 1st

Respondent herein, is directed to ensure the lawful and logical conclusion of Tender No. NG-CDFB/RFP/2023-2024 REQUEST FOR PROPOSAL TO UNDERTAKE SUPPLY, INSTALLATION, IMPLEMENTTAION, TESTING, TRAINING, COMMISSIONING AND MAINTENANCE OF AN INTREGRATED NG-CDF BOARD ENTERPRISE RESOURCE PLANNING (ERP) SOLUTION, by preparing the contract in line with the award decision, and thereafter securing execution of the contract with the Applicant who remains the successful candidate in the award decision dated June 14, 2024;

c) That the Accounting Officer of the Procuring Entity, the 1st Respondent herein is directed to ensure timely compliance with the orders issued herein, within the tender validity period, and in any case within Fourteen (14) Days upon issuance of the Orders of the Review Board; and

d) That the Applicant be awarded costs of the present Request for Review Application.

13. In a Notification of Appeal and a letter dated 25th October 2024, Mr. James Kilaka, the Ag. Board Secretary of the Board notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondents were requested to submit a

response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 25th October 2024.

14. On 4th November 2024, the Respondents herein, through the firm of Muthama, Munyao & Kashindi Advocates filed a Notice of Appointment of Advocates, Memorandum of Response and List and Bundle of Documents, all dated 4th November 2024. The said Respondents equally forwarded to the Board the Confidential Documents under Section 67(3) of the Act.

15. On 4th November 2024, the Ag. Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 7th November 2024 at 3:00 p.m. through the link availed in the said Hearing Notice.

16. On 7th November 2024, the Applicant filed Written Submissions of even date.

17. Later on the same day, 7th November 2024 the Respondents filed Written of even date.

18. On 7th November 2024 at 3:00 p.m., when the Board convened for the online hearing, all parties were present and represented by their respective Advocates. The Board's Chairperson, Mr. Murugu, issued a disclosure that stemming from his professional career he had worked alongside both Mr. Sisule Musungu who was now appearing for the Applicant and Mrs. Irene Kashindi who was now appearing for the Respondents. The Board therefore inquired from the parties if there was any objection to Mr. Murugu's presiding over the present Request for

Review. Both Mr. Sisule and Mrs. Kashindi indicated that they had no objection to Mr. Murugu presiding over the Request for Review.

19. The Board read through a list of the documents filed in the matter and asked parties to confirm having filed and been served the said documents, to which Counsel responded in the affirmative.

20. The Board therefore gave the following directions on the order of address:
    i. The Applicant would start by arguing the Request for Review within 10 minutes.
    ii. The Respondents would then offer a response within 10 minutes;
    iii. The Applicant would then close by way of rejoinder in 1 minute.

PARTIES SUBMISSIONS

Applicant's Submissions

21. Counsel for the Applicant, Mr. Sisule, indicated that the Applicant would be relying on its filed documents in the matter. He discounted the Respondents' suggestion through their response that the present Request for Review was an abuse of process. According to Counsel, though the Applicant had previously filed Request for Review No. 92 of 2024, this was withdrawn *suo moto* at the earliest opportunity before a response was filed to afford parties an opportunity to resolve the matter. He indicated that since the outstanding matters had not been resolved, the Board was being invited through the present proceedings to adjudicate over the matter.

22. Mr. Sisule decried that despite the Applicant having accepted the award of the subject tender, the Procuring Entity had neglected to avail the contract for execution despite numerous follow up. He indicated that the Applicant withdrew ***Request for Review No. 92 of 2024*** to allow resolution of the matter since at the time, the tender validity period had not run out. According to Counsel, the Procuring Entity had deliberately run down the tender validity period in breach of Articles 47 and 227 of the Constitution of Kenya, 2010 as well as the Applicant's legitimate expectation. Further that it was only through the Memorandum of Response that was served upon the Applicant on the eve of the hearing that the reasons for the delay were communicated.

23. Relying on ***Republic vs. Principal Secretary Ministry of Mining Ex parte Airbus Helicopters Southern Africa (PTY) Limited (2017) eKLR*** Counsel urged that the action of the Procuring Entity running down the tender validity period could not be countenanced.

24. Counsel indicated that though the Respondents indicated that the subject tender was under investigations by the Public Procurement Regulatory Authority (herein **"the Authority"**) under Section 34 of the Act, this was not a good reason to delay the execution of the contract. Mr. Sisule contended that there was no order by the Authority barring the conclusion of the contract and that following the response by the Procuring Entity on 10th September 2024 and interviews on 12th September 2024 there have been no further proceedings by the Authority. He argued that the Applicant as the successful bidder had not been required by the Authority to make a representation before it pursuant to Section 38 of the Act.

25. Mr. Sisule emphasized that procurement matters are time-sensitive and being that the Authority had not invited it to make a representation before it, there appeared to be no adverse action that the Authority wished to take against the Applicant in respect of the investigations on the subject tender.

26. Counsel further pointed out that though the Procuring Entity cited austerity measures and rationalization of the budget, no evidence was led in this regard and any assertion on this would be evidence from the Bar. Furthermore, that the law contemplates termination on account in inadequate budgetary allocation before notification of award and not after award since the award is itself informed by adequacy of budget.

27. He further pointed out that the High Court finding in ***Constitutional Petition No. 178 of 2016; Wanjiru Gikonyi & Anor v The National Assembly & 8 Others***, that the enacting statute National Government Constituencies Development Fund Act as unconstitutional did not affect the subject tender. He argued this was because the Court gave a structural interdict allowing the procuring Entity to continue its operations until 30th June 2026 with the understanding that it has engagements with third parties and ongoing projects that it would not be in public interest for them to be brought to an abrupt halt.

28. Further that nothing barred parties from taking to account this new development in to account for the remainder period that the Procuring Entity is considered to be operational, and that under Section 139 of the Act contracts can be varied to take this contingency in to account.

29. Mr. Sisule contended that the reason of a pre-approval by the Ministry of Information, Communication and Digital Economy (MIC&DE) was inapplicable to the subject tender since this requirement came about after the award of the subject tender. Further it was the responsibility of the Procuring Entity to seek such approval and that there was nothing to indicate that such approval would be denied.

30. In sum the Applicant contended that the Respondents were unjustifiably evading to execute the contract.

Respondents' Submissions

31. Counsel for the Respondents, Ms. Wataka, indicated that the Respondents were relying on their filed documents as well as the documents under the Confidential File.

32. Relying on ***Ahmad & Another v Kadhi Mombasa; Khalifa & Another [2021] eKLR*** and ***Satya Bhama Gandhi v Director of Public Prosecutions & 3 Others [2018] eKLR*** she argued that the Applicant in bringing Request for Review 92 of 2024 and thereafter withdrawing it only to bring identical proceedings in the form of the present Request for Review constituted an abuse of the process.

33. Counsel indicated that the subject tender was the subject of an ongoing investigation by the Public Procurement Regulatory Authority, which began after the decision of the Board. That the Applicant being aware of the ongoing investigations ought to have invoked its right to make representations before the Board under Section 38(2) of the Act instead of filing the present proceedings.

34. She contended that the conclusion of the contract had also been frustrated by the recently implemented austerity measures and rationalization of budget. Counsel submitted that after the decision of the Board, the National Treasury directed the 1st Respondent to rationalize its budget by removing all capital expenditure including the subject tender as a consequence of the rejection of the Finance Bill 2024.

35. Relying on Section 3 of the Act and Article 201 of the Constitution of Kenya, 2010 on prudent use of public resources, Counsel submitted that rationalization of the budget is outside its control and the subject tender had since become frustrated.

36. She further highlighted that the High Court in ***High Court Constitutional Petition No. 178 of 2016*** had since declared the NGCDF Act unconstitutional and the Procuring Entity's operations were scheduled to cease on 30th June 2026. Further that though an appeal had been filed at the Court of Appeal, the same was still pending determination.

37. She contended that the ERP system intended for procurement was meant to be utilized for a prolonged period but given the High Court finding, the conclusion of the contract was frustrated in the circumstance. Relying on ***Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR***, counsel urged for the Respondents to be excused from concluding the contract.

38. Additionally, Counsel indicated that by a Circular issued on 13th September 2024 the Chief of Staff and Head of Public Service had directed all public

bodies, including the Procuring entity to obtain approval of any new projects including the ERP System under the subject tender. She indicated that the approval has not been sought due to the ongoing investigations by the Authority, the austerity measures and budget rationalization. It was pointed out that this directive was made after the decision of the Board and was binding on the Respondents.

39. Relying on ***Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd [2014] eKLR***, the Applicant indicated that the subject tender was frustrated and could not be logically concluded in the circumstance.

40. Mrs. Kashindi, equally appearing for the Respondents, submitted that the Act does not provide a time limit for conclusion of investigations and it was not in the place of this Board to interrogate the appropriateness of the pending investigations.

41. On the Circular on ICT projects, she submitted that the subject tender was not an ongoing project noting that it was yet to start. Counsel urged the Board not to issue orders that are incapable of compliance . she therefore urged the Board to dismiss the Request for Review.

Applicant's Rejoinder

42. In a brief rejoinder, Counsel for the Applicant, Mr. Sisule clarified that the Applicant had not received any response to the withdrawn Request for Review No. 92 of 2024.

43. Further that under Section 38 of the Act, the Authority is required to offer the Applicant an opportunity to be heard only where an adverse decision

is contemplated. Accordingly, the Applicant could not just insist on appearing before the Authority in the circumstance.

CLARIFICATIONS

44. The Board sought clarity from the Respondents on how the austerity measures affect the conclusion of the contract in respect of the subject tender. Counsel for the Respondents, Ms. Wataka indicated that the rationalized the NGCDF Board's budget had resulted in some of the previously approved expenses removed from the budget.

45. The Board also inquired how the investigations by the Public Procurement Regulatory Authority affected the conclusion of the contract. Counsel for the Respondents, Ms. Wataka, indicated that under Section 40 of the Act, the Authority has powers to investigate any public procurement process.

46. The Board inquired from the Respondents on why they had not terminated the subject tender. Counsel for the Respondents, Ms. Wataka, indicated that termination could not have been done when the subject tender was still under active investigation by the Authority and that one of the issues under investigation has to do with budgetary allocation for the subject tender.

47. The Board inquired from the Respondents whether there was evidence that funds meant for the subject tender were channeled to other operations. Counsel for the Respondents, Mrs. Kashindi indicated that the National Treasury had issued a directive that capital expenditure should not be undertaken.

48. Counsel equally indicated that the Procuring Entity's Head of Procurement was present on the platform to offer better clarity. The Board cautioned against introduction of new evidence at this stage of the proceedings. Counsel for the Applicant, Mr. Sisule equally submitted that evidence could not be adduced at clarification stage.

49. The Procuring Entity's Head of Procurement, Mr. Shafee indicated that the Procuring Entity had a proposed budget of Kshs. 3Billion, out of which only 1.2 Billion was approved. He indicated that with the cuts in the approved budget various operations of the Procuring Entity had been affected. Specific to the subject tender, the same was to be a multi-year projected and that though the proposed expenditure for the year 2023-2024 was Kshs. 1.8 Billion but only Kshs. 466 Million was approved. For the year 2024-2025 the previously projected Kshs. 500 Million was removed in entirety.

50. The Board asked the Respondents whether the clarification on the cuts in the approved budget could be discerned from the documents in the Confidential File. Mr. Shafee indicated that this information could be traced in the Public Procurement Information Portal.

51. The Board inquired from the Applicant the usefulness of the ERP system forming the subject of the subject tender in view of the High Court's finding that the NGCDF Act was unconstitutional. Counsel for the Applicant, Mr. Sisule indicated that the High Court had found the projects implemented under the NGCDF to be important and that under Section 139 of the Act, matters arising could be taken in to account and the contract to be entered into varied accordingly. Further that when a

government entity ceases to exist its assets are to be transferred to its successor or equivalent entity that takes up its functions. Counsel for the Respondents, Ms. Wataka chimed in stating that under paragraph 196 of the Judgment the Procuring Entity's role would remain with the Members of the National Assembly who change every electoral year and thus there would be no successor body to the Procuring Entity. Mr. Sisule countered arguing that paragraph 196 of the Judgment was a minority opinion and that paragraph 198 which constituted the majority opinion contemplated that the Procuring Entity's programs would continue.

52. The Board inquired from the Applicant on whether there was a follow up on the reasons for the delay in conclusion of the contract and whether there was any evidence in this regard. Counsel for the Applicant, Mr. Sisule, indicated that there was follow up both through letters and telephone calls. Mr. Mwango, equally appearing for the Applicant referred the Board to the Letter annexed as PMW to the Request for Review and indicated that though the letter was addressed to the Procuring Entity and copied to the Public Procurement Regulatory Authority, none of these entities responded to the Letter.

53. The Board inquired from the Applicant on how it envisaged that the payments for services under the subject tender was to be made in view of the Procuring Entity's representation that there was a cut in their approved expenditure. Counsel for the Applicant, Mr. Sisule indicated that the funds for the 1st financial year had been confirmed as available and that for the subsequent years there was no evidence that there were no funds.

54. The Board inquired from the Respondents on how they intended to proceed in the event the investigations by the Authority do not result in cancellation of the subject tender. Counsel for the Respondents, Mrs. Kashindi indicated that it would be speculative at this stage on how the Respondents were to proceed but nonetheless they would consider all the options available to them.

55. The Board inquired from the Respondents on whether the Accounting Officer deemed it proper to extend the tender validity period in respect of the subject tender. Counsel for the Respondents, Mrs. Kashindi indicated owing to the pending investigations by the Authority, the Procuring Entity could not take any step in the procurement process, including the extension of the tender validity period.

56. The Board inquired from the Applicant on why it did not proceed to enforce the orders of the Board. Counsel for the Applicant, Mr. Sisule indicated that the Applicant approached the present procurement process in good faith and that if the Procuring Entity saw no viability in the subject tender they ought to have terminated it.

57. The Board then invited the parties to address it on their interpretation of whether the Circular dated 13th September 2024 was applicable to the subject tender. Counsel for the Respondents, Ms. Wataka indicated that the Circular was applicable to all public bodies, including the Procuring Entity herein since the ERP System under the subject tender was a new project that was yet to start. Equally appearing for the Respondents, Mrs. Kashindi, indicated that since no contract had been signed this was a new project for which the Circular applied. Counsel for the Applicant, Mr.

Sisule, agreed that the Circular was applicable only in respect of the reporting requirement for continuing projects. He argued that the Circular could not apply retrospectively from a natural justice stand point citing that it was not tenable for a Procuring Entity to seek approval for a tender that has already been awarded.

58. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 25th October 2024 had to be determined by 15th November 2024. Therefore, the Board would communicate its decision on or before 15th November 2024 to all parties via email.

BOARD'S DECISION

59. The Board has considered all documents, 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 present Request for Review constitutes an abuse of process?***

II. ***Whether the Board should direct the parties to execute the contract in respect of the subject tender?***

III. ***Whether the tender validity period in the subject tender should be extended?***

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

Whether the present Request for Review constitutes an abuse of process?

60. Following the filing of the present Request for Review, the Respondents assailed the proceedings citing that they constituted an abuse of the

process. Counsel for the Respondents, Ms. Wataka argued that the Applicant in bringing Request for Review 92 of 2024 and thereafter withdrawing it only to bring identical proceedings in the form of the present Request for Review constituted an abuse of the process.

61. In contrast, the Applicant discounted the Respondents' suggestion that the present Request for Review was an abuse of process. According to Counsel for the Applicant, the Applicant had previously filed Request for Review No. 92 of 2024, but this was withdrawn *suo moto* at the earliest opportunity before a response was filed to afford parties an opportunity to resolve the matter. He indicated that since the outstanding matters had not been resolved, the Board was being invited through the present proceedings to adjudicate over the matter.

62. The High Court in ***Ahmad & another v Kadhi Mombasa; Khalifa & another (Interested Party) (Judicial Review 4 of 2020) [2021] KEHC 133 (KLR) (21 October 2021) (Ruling)*** offered guidance on what constitutes abuse of judicial process in the following terms:

> ***34.Abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. Abuse of process can also mean abuse of legal procedure or improper use of the legal process. Abuse of court process creates a factual scenario where litigants are pursuing the same matter by two court process. In other words, a litigant by the two-court process are involved in some gamble, a game of chance to get the best in the judicial process.***

63. From the above it would appear that a litigant would be said to be abusing the process if they misuse the legal process through pursuing multiple cases over the same issue.

64. Turning to the case at hand, the Applicant filed before this Board Request for Review No. 92 of 2024 against the Respondents seeking identical reliefs as to the reliefs in the present proceedings. However, the Applicant withdrew Request for Review No. 92 of 2024 and has offered an explanation that the withdrawal of the said proceedings was in good faith to facilitate negotiations around the execution of the contract in the subject tender. Further that the present proceedings were instituted after the Respondents failed to avail the contract for execution.

65. We find no mala fides on the part of the Applicant in bringing the instant proceedings as the Respondents have not identified how the Applicant in bringing the instant Request for Review is exercising its right to harass, irritate and annoy them. The Applicant cannot thus be said to be abusing this Board's processes.

66. In view of the foregoing, we find that the present Request for Review does NOT constitute an abuse of process.

Whether the Board can direct the parties to execute the contract in respect of the subject tender?

67. The Applicant brought the present Request for Review seeking that the Respondents prepare a contract and thereafter secure execution of the same with the Applicant as the successful bidder in the subject tender.

On their part the Respondents contended that there were intervening circumstances that had frustrated the conclusion of the contract. Specifically, the Respondents attributed the delay in execution of the contract to :

i. Pending investigations in the subject tender by the Public Procurement Regulatory Authority
ii. Budget constraints following the rejection of the Finance Bill 2024
iii. High Court Declaration of the NGCDF Act as unconstitutional
iv. Chief of Staff and Head of Public Service Circular on ICT Projects

68. Whereas the Respondents contend that the intervening circumstances have frustrated the procurement process to the extent that it was not viable to proceed with the execution of the contract, the Applicant is of the view that the Respondents were unnecessarily being evasive over the conclusion of the contract. The Board is therefore being invited to determine at this stage whether it should direct the parties herein to execute the contract in respect of the subject tender.

69. It is undisputed that the Respondents issued a Letter of Notification of Award awarding the subject tender to the Applicant at a tender price of **Kshs. 854,752,678.40.** The Applicant's award was unsuccessfully challenged before this Board by Green Com Enterprises Limited in Request for Review No. 66 of 2024. This Board through a decision delivered on 2nd August 2024 dismissed the said Request for Review with directions that the subject tender proceeds to its lawful and logical conclusion. The said decision was never challenged at the High Court and thus under Section 175(1) of the Act, the decision was final and enforceable in law.

70. However, it would appear that following the Board's decision of 2nd August 2024, a number of issues are said to have arisen affecting the signing of the pertinent contract post award and this Board's decision in no.66/24.The Respondents contend that the subject tender became and still remains the subject of investigations by the Authority; there were budgetary cuts in the funds that had been previously budgeted to finance the subject tender; the High Court declared the NGCDF Act unconstitutional and that the Procuring Entity was to cease operations on 30th June 2026. Further that the Chief of Staff and Head of Public Service issued a Circular requiring all public bodies to seek clearance from the Ministry of Information, Communications and the Digital Economy in respect of any new ICT Project.

71. From the foregoing, it would be important for the Board to interrogate the propriety of each of the reasons as advanced by the Respondents:

Pending Investigations by Public Procurement Regulatory Authority

72. Counsel for the Respondents, Ms. Wataka, indicated that the subject tender was the subject of an ongoing investigation by the Public Procurement Regulatory Authority, which began after the decision of the Board. That the Applicant being aware of the ongoing investigations ought to have invoked its right to make representations before the Board under Section 38(2) of the Act instead of filing the present proceedings. Mrs. Kashindi, equally appearing for the Respondents submitted that the Act does not provide a time limit for conclusion of investigations and it was

not in the place of this Board to interrogate the appropriateness of the pending investigations.

73. Counsel for the Applicant, Mr. Sisule , argued that this was not a good reason to delay the execution of the contract urging that the Authority had not issued any order barring the conclusion of the contract. Further that following the response by the Procuring Entity on 10th September 2024 and interviews on 12th September 2024 there have been no further proceedings by the Authority. Additionally, that the Applicant as the successful bidder has not been required by the Authority to make a representation before it pursuant to Section 38 of the Act.

74. For starters, Section 8 of the Act establishes the Authority as one of the corporate bodies in the public procurement and asset disposal space. The functions of the Authority are listed under Section 9 of the Act and these include the carrying out of investigations in respect of public procurement and asset disposal processes on matters that are not the subject of administrative review:

9. Functions of Authority

(1) The functions of the Authority shall be to—

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ..

(g) ..

(h) to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review;

75. Under Section 38 of the Act, the Director General of the Authority can where the investigation yield a breach of the law, direct a Procuring Entity to take remedial action; terminate a procurement or asset disposal process, prepare a report to the relevant authorities for action or require a Procuring Entity to transfer it procuring responsibilities to another Procuring Entity:

38. Order by the Director-General

(1) If, after considering the report of an investigator, the Director-General is satisfied that there has been a breach of this Act, the Regulations or any directions of the Authority, the Director-General may, by order, do any one or more of the following—

(a) direct the procuring entity to take such actions as are necessary to rectify the contravention;

(b) terminate the procurement or asset disposal proceedings;

(c) prepare and submit a summary of the investigator's findings and recommendations to the relevant authorities for action; or

(d) require the procuring entity to transfer procuring responsibilities of the subject procurement to another procuring entity.

(2) Before making an order under subsection (1), the Director-General shall give the following persons an opportunity to make representations—

(a) the procuring entity; and

(b) any other person whose legal rights the Director-General believes may be adversely affected by the order.

76. However, Section 38(2) of the Act contemplates that before making any such order the Director General shall allow the Procuring Entity or anyone who stands to be adversely affected by the order an opportunity to make representations

77. The Board is also alive to Section 40 of the Act which gives the Authority power to commence investigations in respect of matters that have not been addressed before the Board:

40. No investigation of issue before Review Board

(1) No investigation shall be commenced or continued under this Part, and no order shall be made under this Part, in relation to an issue that the Review Board is reviewing or has reviewed under the relevant provisions of this Act.

(2) Subsection (1) ceases to apply if, after the Review Board has completed its review, information comes to the attention of the Director-General that was not brought before the Review Board in the course of its review.

78. Drawing from the above, it is apparent that the Authority is a distinct entity that carries out various functions including the conduct of investigations into public procurement and asset disposal processes.

79. Turning to present Request for Review, the Respondents have produced at page 4 to 5 of the Respondents' List and Bundle of Documents, a Letter dated 5th August 2024 from the Authority which bears reproducing:

5th August 2024

Chief Executive Officer
National Government Constituencies development Fund Board
Harambee Sacco Building
Haile Selassie Avenue
P.O. Box 46682-00100
NAIROBI

RE: REQUEST FOR PROPOSAL TO UNDERTAKE SUPPLY, INSTALLATION, IMPLEMENTATION, TESTING, TRAINING, COMMISSIONING AND MAINTENANCE OF AN INTEGRATED NG-CDF BOARD ENTERPRISE RESOURCE PLANNING (ERP) SOLUTION TENDER NO. NG-CDFB/RFP/02/2023-2024

The Public Procurement and Asset Disposal Act, 2015 (the Act) established the Public Procurement Regulatory Authority (the Authority) which is mandated under Section 9 of the Act to inter alia, monitor the public procurement system; report on its overall functioning, and recommend areas of improvement.

We have noted the concerns of Kenyan citizens in the social media relating to the processing of the above subject tender as follows:

1. ***The tender has been awarded at a total cost of Kshs. 854,000,000 (Eight Hundred and Fifty Four Million) and***
2. ***That the cost above is unrealistic, exaggerated and it's a case of budgeted corruption scheme.***

Pursuant to the provisions of Section 34 of the Public Procurement and Asset Disposal Act, 2015, you are required to provide a response to the above concerns, further you are required to prepare and upload the following documents in the Public Procurement Information Portal (PPIP) and email to info@ppra.go.ke by Monday 12th August, 2024.

1. ***Approved budget extract for the procurement;***
2. ***Approved procurement plan;***
3. ***User requisition for the procurement;***
4. ***The invitation notice/invitation letters;***
5. ***Appointment of tender opening committee;***
6. ***Tender opening minutes and tender opening register;***
7. ***Letters of appointment to the tender evaluation committee;***
8. ***All bid documents submitted by the bidders;***
9. ***Evaluation Report;***
10. ***Signed Professional opinion;***
11. ***License of the Head of Supply Chain Management Officer who signed the professional opinion and all procurement professionals who were involved in the procurement proceedings;***
12. ***Letters of notification of intention to award;***
13. ***Acceptance letter from the successful bidder;***

14. Performance Bond from the successful bidder (if applicable)

15. Any other document that may be necessary for the audit.

Note that as an accounting officer you have a duty to safeguard public resources and therefore any action taken on the tender should not result to loss of public funds and should adhere to the provisions of article 227(1) of the Constitution of Kenya, 2010. Further we invite your attention to the provision of section 44(1) of the Act which vests the entire responsibility of ensuring compliance to you as the accounting officer.

The authority looks forward to your full support and cooperation on the above subject matter

Signed

Patrick K. Wanjuki

DIRECTOR GENERAL

80. From the above letter, it is apparent that as at 5th August 2024, the Authority had commenced investigations into the subject tender citing that the tender price at which it was awarded was unrealistic and exaggerated and possibly under a corrupt scheme.

81. The Board has spotted the Procuring Entity's response to the above letter at page 6 to 17 of the Respondents' List and Bundle of Documents.

82. The Board is also satisfied that the issues forming the subject of the investigations were not raised before the Board under Request for Review No. 66 of 2024.

83. In view of the above, the Board finds that it would be inappropriate on its part to make any comments on the merits of the active investigations by Authority understanding that the Authority is an independent entity discharging its statutory obligation.

Budget constraints following the rejection of the Finance Bill 2024

84. Counsel for the Respondents, Ms. Wataka contended that the conclusion of the contract had also been frustrated by the recently implemented austerity measures and rationalization of its budget following the rejection of the Finance Bill 2024. Counsel submitted that after the decision of the Board, the National Treasury directed the 1st Respondent to rationalize its budget by removing all capital expenditure including the subject tender.

85. Counsel for the Applicant, Mr. Sisule, submitted that though the Procuring Entity cited austerity measures and rationalization of the budget, no evidence was led in this regard. Furthermore, that the law contemplates termination on account in inadequate budgetary allocation before notification of award and not after award since the award is itself informed by adequacy of budget.

86. The Applicant's objection to the Respondents' alleged reduced budget as being unsupported by evidence called for the Respondents to offer

evidence demonstrating that the Procuring Entity suffered budgetary cuts that affected the subject tender. This is in line with the established legal principle that he who alleges must prove.

87. The Respondents did not present before the Board any document on the budget rationalization that affected the subject tender. However, during the clarification session, the Board inquired from the Respondents whether there was any evidence of rationalization of its budget that affected the subject tender and the Procuring Entity's Head of Procurement affirmed that the evidence was available on the Public Procurement Information Portal. Unfortunately, when the Board accessed the Public Procurement Information Portal (PPIP) there was no document that the Respondents had uploaded on the budget reduction or removal with respect to the subject tender. Absent evidence of the reduction or removal of the line item on the subject tender, the Board is not convinced that this constituted a good reason for the delay in execution of the subject contract.

High Court Declaration of the NGCDF Act as unconstitutional

88. Counsel for the Respondents, Ms. Wataka, submitted that the High Court in ***High Court Constitutional Petition No. 178 of 2016*** had since declared the NGCDF Act unconstitutional with the Procuring Entity's operations scheduled to cease on 30th June 2026. Further that though an appeal had been filed at the Court of Appeal, the same was still pending determination. According to Counsel, the procurement process stood frustrated as the ERP system being procured was initially meant to be utilized over a longer period beyond 30th June 2026.

89. Counsel for the Applicant, Mr. Sisule contended that the High Court Judgment did not affect the subject tender since the Procuring Entity was allowed to continue its operations until 30th June 2026. Further that nothing barred parties from taking to account this new development in to account for the remainder period that the Procuring Entity is considered to be operational; and that under Section 139 of the Act contracts can be varied to take this contingency in to account.

90. The Board has perused the Judgment delivered on 20th September 2024 by the High Court in ***Constitutional Petition No. 178 of 2016; Wanjiru Gikonyi & Anor v The National Assembly & 8 Others*** and whose dispositive orders are hereinafter reproduced:

    1. ***That the National Government Constituencies Development Fund Act 2015 as amended in 2022 and 2023 is hereby declared unconstitutional.***
    2. ***That the National Government Constituencies Development Fund and all its programmes, projects and activities shall cease to operate at the stroke of midnight on 30th June 2026.***
    3. ***That this Petition having been filed in the public interest, each party shall bear their own costs.***

91. From the above it is apparent that the High Court declared the NGCDF Act, the legislation establishing the Procuring Entity herein, as unconstitutional and its operations are set to lapse on 30th June 2026. We were also informed by the Respondents counsel that the decision is presently the subject of Appeal before the Court of Appeal, though the case number of the appeal was not disclosed.

92. Counsel for the Applicant adverted to paragraph 194 of the Judgment on the majority opinion to make an argument that the decision did not affect the subject tender. On the flip side, Counsel for the Respondents adverted to paragraph 196 of the Judgment on the minority opinion to make an argument that the decision did in fact affect the subject tender. However, having already established that the Judgment of the High Court is pending active litigation before the Court of Appeal, it would be inappropriate for this Board make comments on the appropriateness of any of the positions as this would be offending the doctrine of sub judice.

93. The Board finds that the appropriate thing would be to allow the Court of Appeal to consider the appeal and return a verdict on the Judgment of the High Court.

Chief of Staff and Head of Public Service Circular on ICT Projects

94. Counsel for the Respondents, Ms. Wataka contended that the Chief of Staff and Head of Public Service had issued a circular requiring all public bodies to seek clearance from the Ministry of ICT & Digital Economy for all new ICT. Equally appearing for the Respondents, Mrs. Kashindi submitted that the subject tender was not an ongoing project noting that it was yet to start.

95. Counsel for the Applicant, Mr. Sisule contended that this reason was inapplicable to the subject tender since this requirement came about after the award of the subject tender. Further it was the responsibility of the Procuring Entity to seek such approval and that there was nothing to indicate that such approval would be denied.

96. The Board is therefore invited to consider the applicability of the said Circular, if any.

97. For starters, we have hereinbelow reproduced the Circular which also appears on pages 84 to 87 of the Respondents' List and Bundle of Documents:

EXECUTIVE OFFICE OF THE PRESIDENT

CHIEF OF STAFF AND HEAD OF PUBLIC SERVICE

13th September 2024

The Solicitor General

All Principle Secretaries/ Accounting Officers

All Chief Executive Officers of State Corporations

GUIDANCE AND CLEARANCE FOR IMPLEMENTTAION OF INFORMATION AND COMMUNICATION TECHNOLOGY (ICT) PROJECTS

The Executive Order No. 2 of 2023 established the Ministry of Information, Communications and Digital Economy (MIC&DE) with a mandate to lead the Government's Digital Transformation Agenda, including implementing the Kenya Digital Masterplan (2022-2032). This initiative aims to digitize Government services, secure data, and bridge the digital divide through the Digital Superhighway program, ensuring nationwide internet connectivity and supporting the digital economy.

Over time, the acquisition, management and support of ICT goods and services have become fragmented and uncoordinated. This has led to difficulties in data sharing, business continuity, and disaster recovery within the public services. Key issues include project duplication, non-compliance with standards, inadequate post-implementation support, underutilized resources, and missed opportunities for economies of scale and cost savings.

To address these challenges and foster a coordinated approach to digitization, the following directives are hereby issued:

1. ***Compliance with Guidelines: All Ministries, Departments, and Agencies (MDAs) must adhere to MIC&DE's guidelines for implementing ICT projects, including systems, software, security, infrastructure, and licensing. These guidelines are available online at www.ict.go.ke***
2. ***ICT Initiatives Reporting: MDAs are required to report all existing and ongoing ICT initiatives via the system accessible at egov initiatives.ict.go.ke***
3. ***Project Clearance: Any new ICT project, whether Government or donor-funded must receive clearance from MIC&DE. Submissions should include a concept note and technical requirements.***
4. ***Coordination of Cross-Government ICT Projects: Projects intended for implementation across MDAs and Counties will be coordinated by MIC&DE to ensure uniformity and impact.***

5. ***Hosting and Data Centre Clearance: Any MDAs intending to acquire hosting environments, internet services, or establish data centers must seek clearance from MIC&DE***
6. ***Utilization of MIC&DE Resources: Ministries proposing the establishment of ICT agencies must first consult and utilize MIC&DE's resources and expertise. Clearance for new agencies will be granted only after these resources are deemed insufficient.***
7. ***Donor/Development Partner Support: All requests for technical support or ICT funding from donors/development partners must be channeled through MIC&DE.***

The Ministry has strengthened its capacity by establishing a new organizational structure and recruiting senior officers, including three (3) Secretaries and 48 Directors to support MDAs in their ICT initiatives. All ICT Units in State Departments have also been upgraded to Directorates, headed by a Director ICT, as approved by the Cabinet, to ensure robust support and oversight of ICT Projects.

All Accounting Officers are directed to ensure that the contents of this Circular are brought to the attention of all institutions and persons under their purview or supervision; as well as ensure full implementation and compliance with the same.

Signed

FELIX K. KOSKEI, EGH

CHIEF OF STAFF & HEAD OF THE PUBLIC SERVICE

Copy To: The Attorney General

All Cabinet Secretaries

All Chairpersons, State Corporations

The Principal Administrative Secretary, Executive Office of the President

98. From the above Circular, which is applicable to all public bodies there are reporting directions and project clearance directions:
    i. Directive No.2 under the Circular requires all existing and ongoing ICT initiatives to be reported to Ministry of Information, Communications and Digital Economy (MIC&DE).
    ii. Directive No. 3 under the Circular requires project clearance from Ministry of Information, Communications and Digital Economy (MIC&DE) for **any new** ICT project, whether Government or donor-funded.

99. Turning to the subject tender, the Letter of award was issued to the Applicant on 14th June 2024. A few months later on 13th September 2024, the Chief of Staff and Head of Public Service issued the above Circular. In the Board's view, Directive No. 2 in the Circular on reporting of existing and ongoing ICT initiatives finds application in the present case noting that the award in the subject tender preceded the Circular and thus cannot be said to be a new project. Further Directive No. 3 in the Circular on new projects requires a public body to offer concept notes and technical requirements for scrutiny before approval yet the subject tender is way past evaluation stage noting that an award has been made.

100. Barring the subject tender being the subject of active investigations by the Authority, the Respondents should note that compliance with the

Circular dated 13th September 2024 would call for a reporting of the subject tender and not seeking project clearance.

Whether the tender validity period in the subject tender should be extended?

101. Central to the present Request for Review is the Applicant's prayer for the Board to extend the tender validity period to allow the conclusion of the contract in the subject tender. Counsel for the Applicant, Mr. Sisule decried that despite the Applicant having accepted the award of the subject tender, the Procuring Entity had neglected to avail the contract for execution with the result that the tender validity period had lapsed.

102. Conversely, the Respondents denied having deliberately run down the tender validity period. Ms. Wataka and Mrs. Kashindi contended that there were legitimate reasons behind the delay in the execution of the contract. The said reasons have been explored in the foregoing parts of this Decision.

103. Section 88 of the Act gives an Accounting Officer the power to extend the tender validity period in the following terms:

88. Extension of tender validity period
(1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.

(2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.

(3) An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.

(4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of biding period under subsection (1).

104. From the above, it is apparent that the Accounting Officer of a Procuring Entity has power to extend the tender validity for a period not exceeding 30 days and that this can only be done once.

105. Equally this Board has power to extend the tender validity period of a tender and this power has been extensively discussed by appellate courts in our jurisdiction:

106. In ***Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others (Civil Appeal E510 of 2022) [2022] KECA 982 (KLR) (9 September 2022) (Judgment)*** **the** Court of Appeal affirmed this Board's power to extend the tender validity period for good reason even in instances where a request for such extension comes after the period has lapsed:

42.The 2nd respondent (the Board) is an independent quasi-judicial creature of statute, and its broad powers are set out in sections 28 and 173 of the PPAD Act. It has power to give

directions to accounting officers of procuring entities with respect to anything to be done or redone in procurement or disposal proceedings. In our view, its power may even include power to extend validity of a tender in situations where an accounting officer for no good reason fails to adhere to statutory timelines or disobeys the Board's directions so as to frustrate tenderers or bidders, even if the stated tender validity period has expired. This is akin to the power exercised by the High Court or this Court to extend time to appeal in appropriate circumstances, notwithstanding that the stipulated time for instituting such appeal may have already expired.

See also Kenya Ports Authority & another v Rhombus Construction Company Limited & 2 others [2021] eKLR; CIVIL APPEAL NO. E011 OF 2021

107. From the above decisions it is apparent that this Board has power to extend the tender validity for good reasons even in instances where the tender validity period has already expired.

108. The Board has keenly perused the blank Tender Document forming part of the Confidential File, which is also produced as Annexure PM2 to the Request for Review and noted that ITT 12.1 under Section 2 (B) Data Sheet at page 21 provided that the tender validity period was for 120 days from the bid submission deadline. The bid submission deadline having been on 7th June 2024, the tender validity period lapsed on 5th October 2024.

109. ITC 12 (b) under Section 2. Instructions To Consultants and Data Sheet at page 10 of the Tender Document provides for the Extension of Tender Validity period in the following terms:

12...

(b) Extension of Validity Period

12.4 The Procuring Entity will make its best effort to complete the negotiations within Proposal's validity period. However, should the need arise, the Procuring Entity may request, in writing, all Consultants who submitted Proposals prior to the submission deadline to extend the Proposal.

12.5 If the Consultant agrees to extend the validity of its Proposal, it shall be done without any change in the original Proposal and with the confirmation of the availability of Key experts, except as provided in ITC 12.7

12.6 The Consultant has the right to refuse to extend the validity of its Proposal in which case such Proposal will not be further evaluated.

110. From the above, the Tender Document contemplated that it was permissive on the part of the Procuring Entity to extend the tender validity period.

111. Noting the Board's orders in 66/24, and that the subject procurement process is alive for all legal intents and purposes and is the subject of investigations by the Authority, the Board finds it would be lawful for the tender validity period to remain valid so that no single Party's legal rights in this procurement process shall be affected due to effluxion of the tender validity period.

112. In view of the foregoing we find that the tender validity period in the subject tender should be extended.

What orders the Board should grant in the circumstances?

113. The Board has found the present Request for Review does NOT constitute an abuse of process.

114. The Board has also found that the tender validity period in the subject tender should be extended.

115. The upshot of our finding is that the Request for Review dated 25th October 2024 in respect of Tender No. NG-CDFB/RFP/02/2023-2024- Request for Proposal to Undertake Supply, Installation, Implementation, Testing, Training, Commissioning, and Maintenance of an Integrated NG-CDF Board Enterprise Resource Planning (ERP) Solution partially succeeds in the following specific terms:

FINAL ORDERS

116. 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 25th October 2024:

1. **The tender validity period in respect of Tender No. NG-CDFB/RFP/02/2023-2024- Request for Proposal to Undertake Supply, Installation, Implementation, Testing, Training, Commissioning, and Maintenance of an Integrated NG-CDF Board Enterprise Resource Planning**

(ERP) Solution be and is hereby extended for a period of 30 days from the date of this decision to allow for its lawful and logical conclusion.

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

Dated at NAIROBI, this 15th Day of November 2024.

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