

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 113/2024 OF 13TH NOVEMBER 2024

BETWEEN

EASA ENTERPRISES LIMITED.....APPLICANT

AND

**THE CHIEF EXECUTIVE OFFICER,
NATIONAL WATER HARVESTING**

& STORAGE AUTHORITY.....1ST RESPONDENT

NATIONAL WATER HARVESTING

& STORAGE AUTHORITY.....2ND RESPONDENT

Review against the decision of the Accounting Officer, National Water Harvesting and Storage Authority in respect of Tender No. NWHSA/ONT/015/2023-2024 for Construction of Iresaboru Centre in Isiolo County

BOARD MEMBERS PRESENT

- | | | |
|----------------------|---|-------------|
| 1. Qs Hussein Were | - | Panel Chair |
| 2. Mr. Joshua Kiptoo | - | Member |
| 3. Dr. Susan Mambo | - | Member |

IN ATTENDANCE

- | | | |
|---------------------|---|-------------|
| Mr. Philemon Kiprop | - | Secretariat |
| Mr. Anthony Simiyu | - | Secretariat |



PRESENT BY INVITATION

APPLICANT

EASA ENTERPRISES LIMITED

Ms. Mutai

Advocate, CK Advocates

Mr. Kiprono

Advocates, CK Advocates

RESPONDENTS

**ACCOUNTING OFFICER, NATIONAL
WATER HARVESTING & STORAGE
AUTHORITY**

**NATIONAL WATER HARVESTING &
STORAGE AUTHORITY**

Ms. Sharon Adhiambo

In-House Counsel, National Water Harvesting
and Storage Authority

Mr. Mollo

In-House Counsel, National Water Harvesting
and Storage Authority

BACKGROUND OF THE DECISION

The Tendering Process

1. National Water Harvesting & Storage Authority, the Procuring Entity together with the 1st Respondent herein, vide an advert in the Procuring Entity's website (www.waterauthority.go.ke) and the PPIP Portal (www.tenders.go.ke) invited interested suppliers to submit their bids in response to Tender No. NWHSA/ONT/015/2023-2024 for Construction of Iresaboru Centre in Isiolo County through an Open Tender method. The tender submission deadline was set as 17th June 2024 at 08:30 a.m.



Addenda

2. The Respondents issued 2 Addenda offering clarifications on various aspects of the subject tender, with the 2nd Addendum extending the tender submission deadline to 19th June 2024 at 09:00 a.m.

Submission of Bids and Tender Opening

3. According to the Tender Opening Minutes dated 19th June 2024 under the Confidential File submitted by the Procuring Entity, the following ten (10) bidders were recorded as having submitted their bids in response to the subject tender by the tender submission deadline:

#	Name of Bidder
1.	Hawaye Agencies Ltd
2.	Zamzam Construction Ltd
3.	Fahimyasın Company Ltd
4.	Ambit Energy Company Ltd
5.	EASA Enterprises Ltd
6.	Kris Synergies Ltd
7.	Benma Technical Services Ltd
8.	Crossland Construction and General Supplies Ltd
9.	Gurey Africa Ltd
10.	Shamim Investment Ltd



Evaluation of Tenders

4. An Evaluation Committee of the Procuring Entity evaluated the received bids in the following 3 stages:
 - i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Financial Evaluation

Preliminary Evaluation

5. At this stage of the evaluation, the bids were to be examined using the criteria set out as Clause 2. Preliminary examination for Determination of Responsiveness at page 22 of the Tender Document.
6. At the end of the evaluation at this stage, 9 bids were established as being unresponsive with only 1 bid, that is, the Applicant's bid qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

7. At this stage of the evaluation, the bids were to be examined using the criteria set out as Technical Evaluation at pages 22 to 23 of the Tender Document.
8. The bids were to be evaluated against the requirements that carried a cumulative score of 100 marks. Bids were required to score a minimum of 80 marks in order to qualify for evaluation at the Financial Evaluation Stage.



9. At the end of the evaluation at this stage, the Applicant's bid surpassed the 80 marks threshold and thus qualified for evaluation at the Financial Evaluation Stage.

Financial Evaluation

10. The Evaluation Committee was required at this stage to examine bids using the criteria set out as 3. Tender Evaluation (ITT 35) Price evaluation at page 23 of the Tender Document.
11. The evaluation was to be on the basis of a comparison of tender prices and the successful bid would be the one with the lowest cost.
12. At the end of the evaluation at this stage, the Applicant's bid was established as having the lowest evaluated tender price noting that it was the only bid evaluated at the Financial Evaluation Stage.

Evaluation Committee's Recommendation

13. The Evaluation Committee recommended the award of the subject tender to the Applicant at its tender price of **Kenya Shillings Twenty-Six Million, One Thousand, Nine Hundred and Eighty (Kshs. 26,001,980) inclusive of taxes**, subject to due diligence.

1st Professional Opinion

14. In a Professional Opinion dated 8th July 2024 (hereinafter, "the 1st Professional Opinion") the Procuring Entity's Manager Supply Chain, Mr.



John Musyoka recommended the rejection of the Evaluation Committee's proposal for award of the subject tender.

15. On 9th July 2024, the 1st Respondent directed the Evaluation Committee to re-evaluate the bids bearing in mind the observations by the Manager Supply Chain.

Re-Evaluation Of Bids


16. The Evaluation Committee re-evaluated the bids through preliminary, technical and financial stages of evaluation. The result at every stage was the same as in the first evaluation. At the end of the evaluation the evaluation committee *vide* Evaluation Report dated 22nd July 2024 (hereinafter, "the 2nd Evaluation Report") indicates that the Evaluation Committee recommended the award of the subject tender to the Applicant at its tender price of **Kenya Shillings Twenty-Six Million, One Thousand, Nine Hundred and Eighty (Kshs. 26,001,980) inclusive of taxes**, subject to the bidder being subjected to due diligence.

Due Diligence

17. The 2nd Evaluation Report indicates that the Evaluation Committee conducted due diligence on the Applicant and the Applicant passed the due diligence test.

2nd Professional Opinion

18. In a Professional Opinion dated 25 July 2024 (hereinafter, "the 2nd Professional Opinion") the Procuring Entity's Manager Supply Chain, Mr.



John Musyoka once again recommended the rejection of the Evaluation Committee's proposal for award of the tender to the Applicant.

19. Through a letter dated 9th September 2024, the 1st Respondent sought guidance from the Public Procurement Regulatory Authority (PPRA) on how to proceed with the tender noting the divergence of views between the Manager Supply Chain and the Evaluation Committee.

Extension of the tender validity period

20. Vide Letters dated 13th September 2024, the Respondents notified bidders of the extension of the tender validity period by 30 days from 19th September 2024.
21. PPRA, through a letter dated 25th September 2024, advised the 1st Respondent to ensure that the evaluation of the bids was done in compliance with the requirements stipulated in the Tender Document.

Decision to award

22. It would appear that there were changes in the office bearers in the 1st Respondent. Subsequent to the assumption of the new office bearer, the 1st Respondent directed the award of the tender to the Applicant as per the recommendations of the Evaluation Committee.

Notification to Bidders

23. Accordingly, the bidders were notified of the outcome of the evaluation of the tenders *vide* letters dated 11th October 2024.



24. On 16th October 2024, the 1st Respondent wrote a letter to the Authority (PPRA) seeking an extension of the tender validity period to allow the conclusion of the subject tender. Unknown to the Authority that the Respondents had previously extended the tender validity period, the Authority advised the Respondents to extend the tender validity pursuant to Section 88 of the Public Procurement and Asset Disposal Act (hereinafter, "the Act").

REQUEST FOR REVIEW

25. On 13th November 2024, the Applicant, through the firm of CK Advocates filed a Request for Review dated 12th November 2024 supported by an affidavit sworn on 12th November 2024 by Umur Guyo Ungaye, the Applicant's Managing Director, seeking the following orders from the Board in verbatim:

a) Pending hearing of this Request for Review inter partes, the Board be pleased to issue an interim order extending the tender validity period for Tender for Construction of Iresaboru Flood Control Works located in Isiolo County Tender No. NWHSA/ONT/015/2023-2024 (hereafter, "the subject tender") for such a reasonable period it will deem fit.

b) The Board be pleased to extend the tender validity period for Tender for Construction of Iresaboru Flood Control Works located in Isiolo County Tender No. NWHSA/ONT/015/2023-2024 for such a reasonable period it will deem fit.

c) The Board be pleased to direct the Chief Executive Officer/Accounting Officer of National Water Harvesting



and Storage Authority, to sign the contract with the Applicant for Tender for Construction of Iresaboru Flood Control Works located in Isiolo County Tender No. NWHSA/ONT/015/2023-2024 within the next seven (7) days.

d) Costs of the proceedings be provided for.

e) Any other relief that this Honourable Board will deem fit to grant.

26. In a Notification of Appeal and a letter dated 13th November 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 13th November 2024.

27. Vide letters dated 15th November 2024, the Acting Board Secretary notified all the bidders who participated in the subject tender via email, of the existence of the subject Request for Review while forwarding to them a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. The bidders were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 15th November 2024.



28. On 19th November 2024, the Respondents herein, through Sharon Obonyo-Advocate, filed a Notice of Appointment date 18th November 2024 as well as a Replying Affidavit sworn on 18th November 2024 by Eng. Julius K Mugun, the Ag. CEO of the 2nd Respondent. The said Respondents equally forwarded to the Board the Confidential Documents under Section 67(3) of the Act.
29. On 21st November 2024, the Ag. Board Secretary sent out to the parties a Hearing Notice notifying parties that the hearing would be by online hearing on 27th November 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
30. On 26th November 2024, the Applicant filed Written Submissions and a Digest of Authorities, both dated 25th November 2024.
31. On 27th November 2024 at 11:00 a.m., when the Board convened for the online hearing, all parties were represented by their respective Advocates.
32. The Board therefore 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 save for Ms. Adhiambo who indicated that she was yet to receive the Applicant's Written Submissions.



33. Counsel for the Applicant, Ms. Mutai indicated that she did not have information on whether the Applicant's Written Submissions were served upon the Respondents but she undertook to serve them. Accordingly, the Board directed Ms. Mutai to immediately serve the Written Submissions by way of email.
34. It would appear that Counsel for the Applicant, Ms. Mutai lost her connection to the online session but her colleague Mr. Kiprono, equally appearing for the Applicant, indicated that he would take over from Ms. Mutai.
35. The Board thereafter invited the Advocates to confirm the time they would need to prosecute their Client's cases and Mr. Kiprono and Ms. Adhiambo requested for 5 minutes each. Accordingly, Counsel were each assigned 5 minutes.

PARTIES SUBMISSIONS

Applicant's Case

36. Counsel for the Applicant, Kiprono indicated that the Applicant was fully placing reliance on its filed Written Submissions.
37. The Applicant contended that under Section 88 of the Act, the Accounting Officer has power to extend the tender validity period for a period not exceeding 30 days and that this extension can only be done once. Further relying on Section 173 of the Act and ***Republic v Public Procurement Administrative Review Board; Rhombus***



Construction Company Limited (Interested Party) Ex parte Kenya Ports Authority & another [2012]eKLR and Kenya Ports Authority & another v Rhombus Construction Company Limited & 2 others [2021]eKLR; Civil Appeal No. E011 of 2021 the Board can extend the tender validity period.

38. The Board was urged not to reckon the 25 days spent in the correspondence between the Respondents and the Authority as well as the stand still period in the computation of the tender validity period in respect of the subject tender. Additionally that following the filing of the present Request for Review the Board Secretary issued a letter staying the procurement proceedings.
39. Reliance was made ***Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Ex parte Transcend Media Group Limited [2018] eKLR*** for the proposition that no action can be taken during the stand still period and therefore where it is necessary for tender validity period to be extended to conclude a procurement process, the same should be granted.
40. The Applicant submitted that the procurement contract could only be concluded within the tender validity period but in the instant case the Respondents had deliberately exhausted the tender validity period and thus there was need to extend the same to allow conclusion of the subject tender. It was argued that the Respondents were also in support of the extension of the tender validity period.



Respondents' Submissions

41. Counsel for the Respondents, Ms. Adhiambo equally indicated that the Respondents were fully adopting the filed Replying Affidavit of Eng. Julius Mugun as their submissions in the matter.
42. The Respondents contended that following the Evaluation Committee's release of the Evaluation Report dated 1st July 2024 recommending the award of the subject tender to the Applicant, the Head of Procurement issued a Professional Opinion recommending the rejection of the Report. Accordingly, the 1st Respondent directed the Evaluation Committee to re-evaluate the bids taking in to consideration the comments of the Head of Procurement.
43. The Evaluation Committee re-evaluated the bids and released an Evaluation Report dated 22nd July 2024 still recommending the award of the tender to the Applicant. The Head of Procurement once again recommended to the 1st Respondent to reject the Report.
44. It was argued that an advisory was sought from the Authority on 9th September 2024 and this was only offered by the Authority on 26th September 2024. In the intervening period, on 13th September, the 1st Respondent extended the tender validity period for 30 days up to 19th October 2024.
45. Additionally there was a change in the office bearers in the office of the 1st Respondent with the result that when the new office bearer took



over, it took a while to acquaint himself with the subject tender but eventually on 11th October 2024 he issued an award to the Applicant who accepted the same through a letter dated 15th October 2024.

46. Further that on 16th October 2024 the 1st Respondent sought approval from the Authority to extend the tender validity period for a further 91 days to allow for conclusion of the subject tender.
47. In sum, the Respondents sought guidance on whether the 21 days spent corresponding with the Authority would be reckoned in the computation of the tender validity period and whether by applying Section 88 of the Act and ITT 20 they could extend the tender validity period for a further 30 days. All in all, they were for the extension of the tender validity period for such reasonable time to allow for the conclusion of the tender.

Applicant's Rejoinder

48. Counsel for the Applicant, Mr. Kiprono waived the Applicant's right to a rejoinder.

CLARIFICATIONS

49. The Board sought the Applicant to comment on the applicability of the Rhombus Case in the present proceedings, noting that in the Rhombus case the tender validity period had not expired at the time of filing of the Request for Review. Counsel for the Applicant Mr. Kiprono indicated that the Rhombus case was applicable in the present case as the Applicant held the view that the tender validity in the subject tender had



equally not expired as at the time of filing the Request for Review. Counsel indicated that in the event the tender validity had expired then the decision would be inapplicable.

50. The Board equally inquired from the Respondents on whether the Authority had the power to extend the tender validity period in the matter. Counsel for the Respondents, Ms. Adhiambo, indicated that the Respondents were under the belief that it had such power under Section 88 of the Act.
51. The Board inquired from the Respondents on whether prudence dictated that they move the Board prior to 19th October 2024 when the tender validity was scheduled to expire. Counsel for the Respondents, Ms. Adhiambo indicated that she stood guided on this.
52. The Board equally asked the parties to confirm how much more time they would require to conclude the procurement process in the subject tender. Whereas Counsel for the Applicant, Mr. Kiprono indicated they needed 30 days, Counsel for the Respondents, Ms. Adhiambo, indicated they needed 60 days.
53. The Board sought confirmation from the Respondents on whether they still had a budget for the tender, noting that the procurement process had delayed. Counsel for the Respondents, Ms. Adhiambo indicated that she did not have information on this but would need to consult.



54. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 13th November 2024 had to be determined by 4th December 2024. Therefore, the Board would communicate its decision on or before 4th December 2024 to all parties via email.

BOARD'S DECISION

55. 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 correspondence between the Procuring Entity and the Public Procurement Regulatory Authority in regard to the subject tender amounted to suspension of proceedings of the tender under Section 168 of the Act.*
- ii. *Whether the subject tender is still valid after extensions of tender validity period pursuant to Sections 88 and 168 of the Act*
- iii. *Whether the Board has powers to extend the tender validity period of the subject tender pursuant to Section 173 of the Act.*
- iv. *What orders should the Board issue in the circumstance?*

As to whether the correspondence between the Procuring Entity and the Public Procurement Regulatory Authority in regard to the subject tender amounted to suspension of proceedings of the tender under Section 168 of the Act.

56. During the hearing the Respondents attributed the delay in the conclusion of the subject tender to a delay of about 25 days when they



sought an advisory from the Public Procurement Regulatory Authority ("the Authority"). Through a letter dated 4th September 2024, the Respondents sought an advisory on how to deal with the opposing views between the Head of Procurement and the Evaluation Committee regarding the recommendation of award of the subject tender. *Vide* a second letter dated 16th October 2024, the Respondents sought a further extension of the tender validity period.

57. It is not in doubt that the letter dated 16th October 2024 has raised the question of whether the correspondence between the Procuring Entity and the Authority is sufficient trigger to suspension of procurement proceedings of the subject tender under Section 168 of the Act and whether the Authority is conferred with the power to extend the tender validity period.

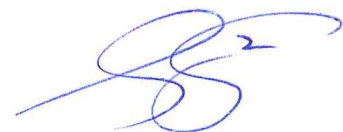
58. To address this issue the Board first looks at the statute under which the Authority is formed. Section 8 of the Act establishes the Authority in the following terms:

Section 8 - The Public Procurement Regulatory Authority

(1) There is established an authority to be known as the Public Procurement Regulatory Authority which shall be a body corporate with perpetual succession and a common seal and shall in its corporate name, be capable of—

(a) suing and being sued;

(b) acquiring, safeguarding, holding, charging and disposing of moveable and immoveable property; and



(c) doing or performing all such other things or acts for the proper discharge of its functions under this Act, which may be lawfully done by a body corporate.

(3) The Authority may for the purposes of ensuring access to its services in accordance with Article 6 of the Constitution establish such offices in regional locations as it may deem necessary for its operations.

59. Section 9 of the Act outlines the functions of the Authority as follows:

Section 9 - Functions of Authority

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

(a) monitor, assess and review the public procurement and asset disposal system to ensure that they respect the national values and other provisions of the Constitution, including Article 227 and make recommendations for improvements;

(b) monitor the public procurement system and report on the overall functioning of it and present to the Cabinet Secretary and the county executive member for finance in each county, such other reports and recommendations for improvements;

(c) enforce any standards developed under this Act;


(d) monitor classified procurement information, including that of specific items of security organs and make recommendations to the Cabinet Secretary;

(e) monitor the implementation of the preference and reservation schemes by procuring entities;

(f) prepare, issue and publicise standard public procurement and asset disposal documents and formats to be used by public entities and other stakeholders;



- (g) provide advice and technical support upon request;***
- (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;***
- (i) research on the public procurement and asset disposal system and any developments arising from the same;***
- (j) advise the Cabinet Secretary on the setting of standards including international public procurement and asset disposal standards;***
- (k) develop and manage the State portal on procurement and asset disposal and ensure that it is available and easily accessible;***
- (l) monitor and evaluate the preference and reservations provided for under this Act and provide quarterly public reports;***
- (m) create a central repository or database that includes—***
 - (i) complaints made on procuring entities;***
 - (ii) a record of those prohibited from participating in tenders or those debarred;***
 - (iii) market prices of goods, services and works;***
 - (iv) benchmarked prices;***
 - (v) State organs and public entities that are non-compliant with procurement laws;***
 - (vi) statistics related to public procurement and asset disposal;***
 - (vii) price comparisons for goods, services and works; and***



- (viii) any information related to procurement that may be necessary for the public;***
- (n) inform, as applicable, the Cabinet Secretary, Parliament, the relevant County Executive member for finance, the relevant County Assembly or Auditor-General on issues of non-compliance with procurement laws once the relevant State organ or public entity ignores the written directives of the Authority, including material breaches of the measures established under this Act;***
- (o) generally report to Parliament and the relevant county assembly;***
- (p) develop a code of ethics to guide procuring entities and winning bidders when undertaking public procurement and disposal with State organs and public entities;***
- (q) in undertaking its functions, cooperate with state and non-state actors with a view to obtaining recommendations on how public procurement and disposal can be improved;***
- (r) ensure the procurement entities implement the preference and reservations and provide data to the Authority disaggregated to indicate the number of disadvantaged groups that have benefitted;***
- (ra) develop, promote and support the training and capacity development of persons involved in procurement and asset disposal;***
- (s) perform such other functions and duties as are provided for under this Act and any other relevant law.***

(2) If in the course of monitoring in accordance with section 9(1)(a), the Authority is of the opinion that civil or criminal proceedings ought to be preferred against a State Organ,



public entity, state officer or public officer, the Authority shall refer the matter to the relevant authorities.

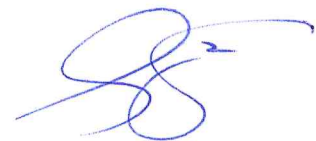
60. From the wide range of the functions of the Authority set out under Section 9 of the Act, none confers the Authority with powers to extend the validity period of a tender.

61. Section 168 of the Act on suspension of procurement proceedings states as follows:

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

62. The wording of Section 168 of the Act is clear that suspension of the procurement proceedings (read "standstill period") are announced by the Board Secretary to the accounting officer of a procuring entity upon a request for review being filed. To put it differently, there is no envisioning in the Act of the suspension of procurement proceedings and, with it, the stalling of the running of the tender validity except by way of a Request for Review.

63. The Board borrows from the Supreme Court decision on the source of jurisdiction of a court or other decision-making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;



"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law..."

64. To paraphrase the decision of the Supreme Court in the Samuel Kamau Macharia case, *"the Authority can only exercise jurisdiction as conferred by the Constitution or the Act. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.* The Board has carefully studied the Act and observes that the Public Procurement and Asset Disposal Act, 2015 has not bestowed the Public Procurement Regulatory Authority with powers to extend the validity period of a procuring entity's tender. To its credit, the Authority in its advisory to the 1st Respondent herein did not purport to extend the validity period of the subject tender.
65. In view of the foregoing, the Board respectfully finds that the 25 days the Procuring Entity and the Authority corresponded in regard to the subject tender did not amount to suspension of the procurement proceedings and hence there was no standstill period for purposes of the running of the validity period of the tender. The Board further holds that the Public Procurement Regulatory Authority does not have power to extend the validity period of a Procuring Entity's tender.
66. Accordingly, this ground of the Request for Review fails and is disallowed.



As to whether the subject tender is still valid after extension of tender validity period pursuant to Sections 88 and 168 of the Act.

67. The Applicant, while urging the Board to extend the validity period of the subject tender, maintained that the period had not expired as at the time of filing this Request for Review. The Applicant urged the Board not to reckon the 25 days spent in the correspondence between the Respondents and the Authority as well as the standstill period in the computation of the tender validity period. Further, that following the filing of the Request for Review the Board Secretary issued a letter staying the procurement proceedings. The Respondents, on their part, took a back seat and indicated that they would seek guidance on the same.
68. The Board understands that it is being invited to offer guidance on the expiry of the tender validity period of the subject tender and the way forward.
69. For a start, tender validity period refers to the period within which a bidder agrees to keep its bid legally binding and available for award and should the bidder withdraw the bid or decide not to sign the contract, if awarded the tender, the bidder forfeits the tender security. The tender validity period therefore serves to keep bidders committed not to modify or withdraw their bids for a specified period.



70. Section 135(3) of the Act places a premium on the tender validity period by specifying that procurement contracts can only be entered into before the lapse of the tender validity period.

Section 135 - Creation of procurement contracts

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

71. It is clear from Section 135 (3) of the Act that contract execution done outside the tender validity period would be void.

72. In the subject tender, ITT 20.1 under Section II at page 20 of the Tender Document specified that the subject tender would be valid for 91 days.

<i>ITT Reference</i>	<i>PARTICULARS OF APPENDIX TO INSTRUCTIONS TO TENDERERS</i>
<i>20.1.</i>	<i>The tender validity period shall be [91] days</i>

73. The tender submission deadline was 19th June 2024 which forms the benchmark date from which the tender validity period is computed.



74. In computing the 91 days contemplated under the Tender Document, the Board takes guidance from Section 57 of the Interpretation and General Provisions Act, which states as follows:

Section 57 - Computation of time

"In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time."

75. As per Section 57(a) of the IGPA, when computing tender validity period, 19th June 2024 is excluded being the day of tender submission.

This means time started running on 20th June 2024 2023 and lapsed on



18th September 2024. Essentially, the tender validity was scheduled to lapse on 18th September 2024.

76. Section 88 of the Act permits the Accounting Officer of a Procuring Entity to extend the tender validity period.

Section 88 - Extension of tender validity period,

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

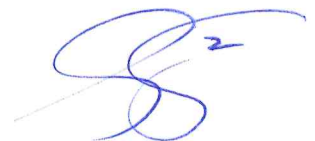
(2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.

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

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

77. The Board has sighted letters by the Procuring Entity dated 13th September 2024 addressed to the bidders in the subject tender advising them on the extension of the tender by 30 days from 19th September 2024 so as to expire on 19th October 2024, which the Applicant acknowledged having received.

78. From the foregoing it is apparent that the tender validity period was extended before the lapse of the tender validity period and the new expiry date became 19th October 2024.



79. In the Board's view, the intervening period that the Procuring Entity engaged the Authority did not stall time for purposes of computing the tender validity period. Equally, the standstill period after the award of the tender did not stall time for tender validity from running. The tender valid period continued to run and it lapsed on 19th October 2024.
80. In view of the foregoing analysis, the tender validity period in the subject tender has since expired, on 19th October, 2024, rendering the tender unavailable for the execution of a contract. The filing of the Request for Review on 13th November 2024 came after the expiry of the tender validity period.
81. Accordingly, this ground Review fails and is disallowed.

As to whether the Board has powers to extend the tender validity period of the subject tender pursuant to Section 173 of the Act.

82. It was the Applicant's submission that this Board has power under Section 173 of the Act to extend the tender validity period of the subject tender provided that the extension is sought prior to the lapse of the tender validity period. The Respondents elected to sit back on the issue as they indicated that they would be seeking guidance from the Board on the same.
83. The Board having determined herein that the tender validity period of the tender subject of this Request for Review has expired would the



same Board turn around and extend the validity period of the same tender? The Board, just like the Authority, is a creature of statute and thus any power it exercises must be anchored on the establishing statute.

84. Section 28 of the Act establishes the Board in the following terms:

28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.

85. On its part, Section 173 of the Act provides the powers of the Board in the following terms:

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;



***(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
(e) order termination of the procurement process and commencement of a new procurement process.***

86. The powers of the Board under Section 173 of the Act have been the subject of determination before superior courts.

87. In ***Kenya Ports Authority & another v Rhombus Construction Company Limited & 2 others [2021] eKLR; CIVIL APPEAL NO. E011 OF 2021*** the Court of Appeal had occasion to consider an appeal against the decision of the High Court which had held that the Board has power under Section 173 of the Act to extend the tender validity period of a tender. In affirming the holding of the High Court and dismissing the appeal, the Court of Appeal held that:

From its submissions, it is clear that the appellant faults the learned Judge's decision on grounds that he erred: by failing to find that the 2nd respondent acted ultra-vires by extending the validity period of the subject tender as it had no powers to do so under the law. Further, that such power was a preserve of the 1st respondent as provided for under section 88 of the Act; by failing to find that the 2nd respondent's decision and resultant order was illegal as the extension of tender validity period was contrary to section 88 which only allowed for such extension to be done once; by failing to find that the 2nd respondent's decision was unreasonable as it disregarded the allegations of forgery



levelled against the 1st respondent which were pertinent governance issues.

37. From a close perusal of the learned Judge's decision, it is clear that the learned Judge extensively expressed himself on the issue of the extension of the tender validity period as follows: -

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

40. What was the intention of the drafters of this legislation and in particular the inclusion of Section 88? In my view, this provision was intended to guard against any possible mischief or abuse of office or power by accounting officers especially where uncontrolled timelines will give them a free hand to temper with the tendering process to favour their friends or closely related persons. In other words, once the already extended validity period for a period of 30 days lapses, the tendering process in respect of that tender becomes moot or rather it extinguishes. Upon lapsing, the Procurement entity is at liberty to re-advertise for fresh tendering and the process then follows the full circle like it was never tendered for before.



....

47. Counsel for the I/Party contends that, Section 88(3) of the Act only limits the Accounting Officer and not the Review board who have wide inherent powers under section 173 of the Act. The question begging for an answer is; whether the Review Board is bound by Section 88(3). Section 88(1) & (2) expressly refers to the powers of the Accounting officer in extending time but not the Review Board. Sub-section (3) refers to the accounting officer's powers of extension of validity period once and not beyond 30 days pursuant to subsection (1).

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

39. From the above excerpts is apparent that the learned Judge extensively addressed the said issues and made pronouncements on the same. Therefore, for this Court to disturb the said pronouncements, the appellants have to demonstrate that the Judge misdirected himself in law; misapprehended the facts; took account of considerations of which he should not have taken account; failed to take account



of considerations of which he should have taken account; or the decision, albeit a discretionary one, is plainly wrong.

42. We are not persuaded on the merits of this appeal. Accordingly, we dismiss it with costs to the 1st respondent.

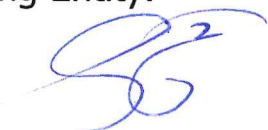
88. Equally in *Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others (Civil Appeal E510 of 2022) [2022] KECA 982 (KLR) (9 September 2022) (Judgment)* the Court of Appeal affirmed this Board's power to extend the tender validity 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 ***PPARB Application No. 95 of 2024 Tinsta Enterprises JV Peesam Limited v The Accounting Officer Kenya Airports Authority & another.***

89. Drawing from the above authorities, it is clear that this Board has powers under Section 173 of the Act to extend the tender validity period for good reasons even where such a request for extension has been made after the lapse of the tender validity period. Accordingly, the Board has to ask itself whether good reasons exist in the present circumstances that warrant its intervention for the extension of the tender validity period.
90. The Board notes various circumstances surrounding this issue, as follows:
- i. The Board has already established above that the Authority has no powers to extend the tender validity period of a Procuring Entity's tender. Considerable time was lost in the subject tender when the Respondent purported to seek an extension of the tender validity period from the Authority. This loss of time was not the making of the Applicant but rather the action of a procuring that chose to misdirect itself on the question of the extension of tender validity.
 - ii. Additionally, considerable time was also lost in the correspondence between the Respondents and the Authority over the differences of opinions between the Head of Procurement and the Evaluation Committee on the award of the tender. This loss of time was once against of no fault on the part of the Applicant. It emanated from a back and forth between officers of the Procuring Entity.



- iii. The Office of the Accounting Officer experienced a change of office bearers during the lifetime of the subject tender. From the arguments made before the Board some time was lost in the course of the new office bearer familiarizing himself with the subject tender before issuing an award to the Applicant.
- iv. Unwarranted rejection of evaluation committee recommendation by the head of Supply Chain despite the advisory from the Director General, Public Procurement Regulatory Authority on the question of Engineer Estimate which was the initial reason for rejection of the evaluation committee's recommendation.

91. Section 84 of the act provides that:-

(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.

(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.

(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).



92. The above provision of the Act does not confer the head of procurement function, the leeway to reject evaluation report of the evaluation committee since they are better placed to apply the Evaluation criteria on the tenders received. He can however give an opinion in the event of dissenting opinions among the evaluation committee members which was not the case in the evaluation of the subject tender.
93. From the forgoing, the Board is convinced that the Procuring Entity in the subject tender set out to frustrate the Applicant by deliberately stalling the tender process with the aim of running the tender out of the tender validity period and then turn around and plead expiry of the validity period as reason for not entering into contract with the Applicant who had already been awarded. The Board will not be on the side of procuring entities that deliberately misapply the law to defeat the overall objective of public procurement as enunciated under the guiding principles of public procurement stated at Section 3 of Act.
94. The Board is of the considered view that the subject tender is deserving of the Board's intervention to extend the tender validity period that had otherwise lapsed to avail an opportunity to the Procuring Entity to right a wrong it had committed against the Applicant.
95. For all of the foregoing, the Board finds that it has power under Section 173 of the Act to extend the tender validity period of the subject tender and will proceed to do so in its final orders in this Request for Review, noting that the only remaining activity is for the Procuring Entity to execute the procurement contract.



96. Accordingly, this ground of the Request for Review succeeds and is allowed.

What orders the Board should grant in the circumstances

97. The Board has equally found that the Public Procurement Regulatory Authority has no power to extend the tender validity period of a Procuring Entity's tender.

98. The Board has further found that the tender validity period of tender subject of this Request for Review lapsed.

99. The Board has found that it has a variant of power under Section 173 of the Act to extend the tender validity period of a Procuring Entity's tender in special circumstances where there is justifiable reason as is the case in the instant Request for Review.

100. The upshot of the finding is that the Request for Review dated 12th November 2024 and filed on 13th November 2024 in respect of Tender No. NWHSA/ONT/015/2023-2024 for Construction of Iresaboru Centre in Isiolo County succeeds in the following terms:

FINAL ORDERS

101. 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 this Request for Review:



1. The Request for Review dated 12th November 2024 and filed with the Board on 13th November 2024 in respect of Tender No. NWHSA/ONT/015/2023-2024 for Construction of Iresaboru Centre in Isiolo County be and is hereby allowed.
2. The tender validity period of Tender No. NWHSA/ONT/015/2023-2024 for Construction of Iresaboru Centre in Isiolo County be and is hereby extended for 30 days from the date of this Decision.
3. The 1st and 2nd Respondents are hereby directed to pick up the procurement process of the subject tender from the notification of intention to award stage and proceed with it to its logical and lawful conclusion, within 21 days from the date of this Decision.
4. This Request for Review was not opposed and as such each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 4th day of December 2024.



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**PANEL CHAIRMAN
PPARB**



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**SECRETARY
PPARB**

