

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 119 /2024 OF 2<sup>ND</sup> DECEMBER 2024**

**BETWEEN**

**SUMMA TURIZM YATIMCILIGI ANONIM SIRKETI.....APPLICANT**

**AND**

**THE PRINCIPAL SECRETARY/ ACCOUNTING OFFICER**

**MINISTRY OF DEFENCE.....1<sup>ST</sup> RESPONDENT**

**MINISTRY OF DEFENCE.....2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer, Ministry of Defence in respect of Direct Tender No. DHQINFRAS/004/23-24 for Proposed Design, Build and Equip the Bomas International Convention Complex in Nairobi.

**BOARD MEMBERS PRESENT**

Ms. Jessica M'mbetsa                      Panel Chair

Mr. Jackson Awele                      Member

Mr. Stanslaus Kimani                      Member

**IN ATTENDANCE**

Mr. Philemon Kiprop                      Secretariat

Mr. Anthony Simiyu                      Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT**

**SUMMA TURIZM YATIMCILIGI ANONIM  
SIRKETI**

Mr. Paul Nyamodi

Advocate, V.A. Nyamodi & Company Advocates

### **RESPONDENTS**

**THE PRINCIPAL SECRETARY/  
ACCOUNTING OFFICER, MINISTRY OF  
DEFENCE  
MINISTRY OF DEFENCE**

Ms. Nyonje

Special State Counsel, Ministry of Defence

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. The Ministry of Defence, the Procuring Entity together with the 1<sup>st</sup> Respondent herein, vide an invitation to the Applicant, invited the Applicant to submit its bid in response to Direct Tender No. DHQINFRAS/004/23-24 for Proposed Design, Build and Equip The Bomas International Convention Complex in Nairobi through the Direct Tendering method. The tender submission deadline was set as 7<sup>th</sup> September 2023 at 10:00 a.m.

### **Submission of Bids and Tender Opening**

2. According to the Tender Opening Minutes dated 15<sup>th</sup> September 2023 under the Confidential File submitted by the Procuring Entity, the

Applicant being the only firm that was invited to participate in the tender, was recorded as having submitted its bid in response to the subject tender by the tender submission deadline.

### **Evaluation of the Applicant's Bid**

3. The 1<sup>st</sup> Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the Applicant's bid in the following 3 stages as captured in the Evaluation Report
  - i. Preliminary Evaluation
  - ii. Technical Evaluation
  - iii. Financial Evaluation

### **Preliminary Evaluation**

4. At this stage of the evaluation, the Applicant's bid was to be examined using the criteria set out as Clause 2. Preliminary examination for Determination of Responsiveness under Section III- Evaluation and Qualification Criteria at page 27 of the Tender Document.
5. The evaluation was to be on a Yes/No basis and a bid that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.

6. At the end of the evaluation at this stage, the Applicant's bid was established as responsive and thus qualifying for further evaluation at the Technical Evaluation Stage.

### **Technical Evaluation**

7. At this stage of the evaluation, the responsiveness of the bid at the Preliminary Evaluation Stage was to be examined using the criteria set out as Clause 3. Evaluation of the Technical Proposal under Section III- Evaluation and Qualification Criteria at page 27 of the Tender Document.
8. The bid was to be evaluated against requirements that carried a cumulative score of 100 marks.
9. According to the Evaluation Committee's Evaluation Report dated 5<sup>th</sup> October 2023 forwarded to the Board as part of Confidential Documents, the Applicant's bid was established as responsive and thus qualifying for further evaluation at the Financial Evaluation Stage.

### **Financial Evaluation**

10. At this stage of the evaluation, the responsiveness of the bid at the Technical Evaluation Stage was to be examined using the criteria set out as Clause 39, Comparison of Tender Prices under Section I- Instructions To Tenderers at page 19 of the Tender Document.

11. The Evaluation Committee was to compare bids evaluated at this stage so as to determine the lowest evaluated bid.
12. According to the Evaluation Committee's Evaluation Report the Applicant's bid was established as responsive at its tender price of USD 245,514,517.00.

### **Evaluation Committee's Recommendation**

13. Satisfied that the Applicant's bid was responsive, the Evaluation Committee in the Evaluation Report recommended the award of the subject tender to the Applicant at its bid price of **United States Dollars Two Hundred and Forty-Five Million, Five Hundred and Fourteen Thousand, Five Hundred and Seventeen (USD 245,514,517.00.)** subject to contract negotiation with the Applicant noting that the subject procurement process was a direct tender.

### **Professional Opinion**

14. In a Professional Opinion dated 14<sup>th</sup> November 2023 (hereinafter referred to as the "the Professional Opinion") the Procuring Entity's Principal Supply Chain Management Officer, D.O. Mukolwe reviewed the manner in which the subject procurement process was undertaken and recommended the award of the subject tender to the Applicant at a negotiated price of USD 245,000,000.
15. The Professional Opinion was subsequently approved by the 1<sup>st</sup> Respondent, Dr. Patrick Mariru, on the same day, 14<sup>th</sup> November 2023.

### **1<sup>st</sup> Notification to the Applicant**

16. Accordingly, the Applicant was notified of its award of the subject tender vide a letter dated 22<sup>nd</sup> November 2023.

### **2<sup>nd</sup> Notification to the Applicant**

17. It would appear that for close to a year, no procurement contract was signed as between the parties in respect of the subject tender. Instead, vide a letter dated 16<sup>th</sup> October, 2024 transmitted to the Applicant on 14<sup>th</sup> November 2024, the Respondents notified the Applicant that the subject tender had been terminated.

### **REQUEST FOR REVIEW**

18. On 2<sup>nd</sup> December 2024, the Applicant herein through the firm of V.A. Nyamodi & Company Advocates filed a Request for Review of even date supported by a Statement by Ahmet Envar Sayan the Applicant's Chief Executive Officer, seeking the following orders:

- a) Annul and/or quash the decision of the Procuring Entity terminating the Tender Proceedings which decision is contained in the 1<sup>st</sup> Respondent's letter dated 16<sup>th</sup> October 2024, which was transmitted to the Applicant by the 1<sup>st</sup> Respondents letter dated 14<sup>th</sup> November 2024 and received by the Applicant on 18<sup>th</sup> November 2024;**
- b) Direct the Accounting Officer of Ministry of Defence, to sign the contract with the Applicant for the Design, Build and**

**Equipping of The Bomas International Convention Complex  
In Nairobi within the next sixty (60) days.**

**c) The Procuring Entity be condemned to pay costs of this request for this Review to the Applicant.**

**d) Such other, additional, further, incidental and/or alternative orders as the Honorable Board may deem just and expedient.**

19. In a Notification of Appeal and a letter dated 2<sup>nd</sup> December 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 24<sup>th</sup> 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 2<sup>nd</sup> December 2024.
20. On 9<sup>th</sup> December 2024, the Respondents filed a Memorandum of Response of even date and equally forwarded to the Board the Confidential Documents under Section 67(3) of the Public Procurement and Asset Disposal Act (hereinafter "the Act").

21. On 11<sup>th</sup> December 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 16<sup>th</sup> December 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
22. On 13<sup>th</sup> December 2024, the Applicant filed a Further Statement, Written Submissions and a Bundle of Authorities, all dated 12<sup>th</sup> December 2024.
23. On the morning of 16<sup>th</sup> December 2024 the Board sent out a fresh Hearing Notice notifying parties that the hearing time for the present Request for Review had been rescheduled to 2:00 p.m. on the same day.
24. Later on the same day, 16<sup>th</sup> December 2024 at 2:00 p.m. when the Board convened for the hearing, the parties were represented by their various Advocates. 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. Counsel present equally confirmed their readiness to proceed with the online hearing
25. The Board equally asked Counsel to give an indication of the time they would utilize to present their respective cases. Counsel for the Applicant Mr. Nyamodi sought to be assigned 20 minutes while Counsel for the Respondents sought 10 minutes. Accordingly, the Board then gave the following directions on the order of address:



- i. The Applicant would start by arguing the Request for Review within 20 minutes.
- ii. The Respondents would then offer a response within 15 minutes;
- iii. Thereafter the Applicant would close by way of rejoinder in 5 minutes.

## **PARTIES SUBMISSIONS**

### **Applicant's Submissions**

26. Counsel for the Applicant, Mr. Nyamodi indicated that the Applicant was placing reliance on its filed documents. According to Counsel, the Applicant was invited to participate in the subject tender for which it emerged successful but for unknown reasons the Respondents purported to terminate the tender under Section 63(1)(a)(ii) and (b) of the Act.
27. Relying on **Asphalt Works Investment Limited v Kenya Ports Authority (Judicial Review Application E022 of 2023) [2023]** he argued that termination under Section 63 of the Act could only avail to the Respondents before issuance of the award and not after the issuance of the award as was the case at hand.
28. Mr. Nyamodi contended that even assuming that Section 63 of the Act was applicable, the Respondents had not through their response demonstrated the change of scope of works as to justify termination of the subject tender. For this reliance was made on **Republic v Public**

**Procurement Administrative Review Board Exparte Nairobi City & Sewerage Company; Webtribe Limited t/a Jambopay Limited (Interested Party) [2019] KEHC 4757 (KLR)**

29. According to Counsel, under Section 52(1) of the Act, the power to transfer the procuring responsibility of a Procuring Entity to another Procuring Entity lies with the Director General of the Public Procurement Regulatory Authority. Further that Regulation 39(2) of the Regulations 2020 appeared to suggest that the Accounting Officer of the Procuring Entity transferring the procuring responsibility remained accountable with respect to the procurement process forming the subject of transfer. Mr. Nyamodi submitted that Regulation 39(2) was at cross-purposes with Section 52(1) of the Act as he contended that the transfer of “procuring responsibility” under the Act entailed also any liability that accrued from that responsibility. Therefore, a transfer of the procuring responsibility under the Act could not feasibly entail a residual responsibility of liability on the Procuring Entity transferring such procuring responsibility as suggested by Regulation 39(2) of the Regulations 2020.
30. Relying on **Republic v Kenya School of Law & Council of Legal Education Ex Parte Daniel Mwaura Marai [2017] KEHC 2571 (KLR)** Counsel contended that subsidiary legislation could not override the provisions of any statute

31. Mr. Nyamodi pointed out that although the Respondents had highlighted in their Memorandum of Response that the tender validity period in the subject tender had since lapsed, any such delay as to occasion the lapse of the period before conclusion of the subject tender was wholly attributable to the Respondents. According to Counsel, the Respondents failed to have the procurement contract prepared despite the Applicant's best efforts and therefore the Respondents could not be allowed to benefit from their own indolence.
  
32. Relying on this Board's decision in **PPARB Application No. 113 of 2024: EASA Enterprises Limited v The Chief Executive Officer, National Water Harvesting & Storage Authority & Others**, the Applicant maintained that the case at hand was deserving of an extension of the tender validity period under Sections 28 and 173 of the Act
  
33. Mr. Nyamodi submitted that even though the Respondents contend in their Memorandum of Response that absent of an agreement on the terms of consideration, a contract cannot exist, consideration was not a relevant consideration as the Applicant is asserting a statutory right and not a contractual right. Further, that in the event that consideration were relevant, the consideration for the procuring entity is clearly set out in the letter of award where the Respondent states that it will pay the sum of USD 245,000,000.

34. Mr. Nyamodi urged the Board to allow the Request for Review while pointing out that the fact that there was an award to the Applicant was testament to the fact that the Applicant's bid was responsive to the requirements under the Tender Document.

### **Respondents' Submissions**

35. Counsel for the Respondents, Ms. Nyonje, indicated that the Respondents would be placing reliance on their filed documents.
36. Counsel referred to Exhibit 1 to the Memorandum of Response and indicated that the Public Procurement Regulatory Authority had authorized the transfer of the procuring responsibility from the State Department for Culture and Heritage to the State Department of Defence under Section 52 of the Act
37. She therefore contended that a principal-agent relationship arose between the State Department for Culture and Heritage and the State Department of Defence. According to Counsel, under Regulation 39(2) which gave effect to Section 52(2) of the Act, the responsibility for financing and supervising the project lay with the State Department for Culture and Heritage and not the Respondents herein. She contended that subsequent to the issuance of the award, the State Department for Culture and Heritage indicated that it did not have funds to finance the subject tender.

38. Ms. Nyonje urged the Board not to redraft the Regulation 39(2) of the Regulations 2020 on the responsibility of the transferring Procuring Entity.
39. Counsel equally questioned the recourse available to a Procuring Entity in respect of a procurement process where it becomes apparent that a procurement is no longer tenable after a notification of award had been issued. She submitted that the Respondents in the present case could not proceed to enter in to a contract without knowledge of where the funds for the project were to be sourced from.
40. Ms. Nyonje submitted that Section 173 of the Act does not give the power to the Board power to extend the tender validity period where it has expired. Further that under section 88 of the Act, the power for extension of the tender validity period lies with the Accounting Officer and even then the same could only be exercised before the lapse of the tender validity period.
41. She urged the Board to dismiss the Request for Review.

### **Applicant's Rejoinder**

42. In a brief rejoinder, Counsel for the Applicant, Mr. Nyamodi submitted that it was a principle in law that when one is an agent of an undisclosed principal, the agent cannot seek indemnity from its principal. He contended that if there existed any principal-agent relationship between the State Department of Culture and Heritage and the State Department

of Defence, the same was not disclosed in the invitation to tender as well as the notification of award.

43. Further, he invited the Board to find that the definition "procuring responsibility" under Section 52 of the Act included any liability arising in the procurement process.
44. He argued that under Section 53, a Procuring entity ought to satisfy itself that it has adequate funds before commencing any procurement process. Accordingly, the Respondents could not purport to suggest that there were no funds to finance the subject tender after issuing a notification of award to the Applicant.
45. In response to the Respondents inquiry on the available recourse to a Procuring entity, Mr. Nyamodi opined that the Respondents ought to have engaged in negotiations with the Applicant over the arising matters.
46. He contended that the Board had power to extend the tender validity period.

### **CLARIFICATIONS**

47. The Board sought clarity from the Respondents as to whether there was any negotiation with the Applicant over the arising matters subsequent to the issuance of the letter of award. Counsel for the Respondent, Ms. Nyonje confirmed that there had been no negotiations.

48. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 2<sup>nd</sup> December 2024 had to be determined by 23<sup>rd</sup> December 2024. Therefore, the Board would communicate its decision on or before 23<sup>rd</sup> December 2024 to all parties via email.

### **BOARD'S DECISION**

49. 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 Board has jurisdiction over the present Request for Review?**

In answering this, the Board will consider whether the Respondents terminated the subject tender in accordance with Section 63 of the Act?

II. **Whether in the circumstances obtaining, the Board should extend the tender validity of the subject tender?**

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

### **Whether the Board has jurisdiction over the present Request for Review?**

50. Notwithstanding the fact that none of the parties addressed the Board on its jurisdiction over the present Request for Review, it is important for the

Board at the earliest to satisfy itself that it is clothed with the jurisdiction to hear and the determine the present Request for Review which concerns the termination of a procurement process. This is in keeping up with the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction. It is only upon satisfying itself to have the requisite jurisdiction will the Board proceed to pronounce itself on the merits of the Request for Review as filed.

51. For starters, the Black's Law Dictionary, 8<sup>th</sup> Edition, defines jurisdiction as:

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

52. On its part, Halsbury's Laws of England (4<sup>th</sup> Ed.) Vol. 9 defines jurisdiction as:

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

53. The locus classicus case on the question of jurisdiction is the celebrated case of **The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil**



**Kenya Ltd (1989) KLR 1** where Nyarangi J.A. made the oft-cited dictum:

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

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

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

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

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

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

**The functions of the Review Board shall be—  
reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.”**

57. The jurisdiction of the Board is set out under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the powers the Board can exercise upon completing a review as follows:

**PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS**

**167. Request for a review**

**(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring**

**entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.**

**(2) .....**

**(3) .....**

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

**(a) the choice of a procurement method;**

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

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

**...**

**169. ....**

**170. ....**

**171. ....**

**172. ....**

**172. Dismissal of frivolous appeals**

**Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or**

**performance of a contract and the applicant shall forfeit the deposit paid.**

### **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.**

58. Section 167 of the Act above, extends an opportunity to candidates and bidders disgruntled with a public tender process to approach the Board for redress. However, subsection (4) of the Section divests the Board jurisdiction on a myriad of subject matters including the termination of a

procurement process. Termination of public procurement proceedings is governed by Section 63 of the Act.

59. Superior Courts of this country have on numerous occasions offered guidance on the interpretation of Section 167(4)(b) of the Act and the ousting of the Board's jurisdiction on account of the subject matter relating to termination of tenders:

60. In **Nairobi High Court Judicial Review Misc. Application No. 390 of 2018; R v Public Procurement Administrative Review Board & Ors Ex parte Kenya Revenue Authority**, the High Court considered a judicial review application challenging the decision of this Board. The Board had dismissed a preliminary objection that had cited that it lacked jurisdiction to hear a Request for Review before it on account of the fact that it related to the termination of a procurement process under section 63 of the Act. In quashing the Board's Decision, the Court affirmed that the Board has jurisdiction to first establish whether the preconditions for termination under section 63 of the Act have been met before downing its tools:

**"33. A plain reading of Section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of**

**the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted...**

See also **Nairobi High Court Judicial Review Misc. Application No. 117 of 2020; Parliamentary Service Commission v Public Procurement Administrative Review Board & Ors v Aprim Consultants**

61. The above judicial pronouncements mirror the position of this Board in its previous decisions in **PPARB Application No. 14 of 2024; Emkay Construction Limited v Managing Director, Kenya reinsurance Corporation Limited; PPARB Application No. 29 of 2023; Craft Silicon Limited v Accounting Officer Kilifi County Government & anor; PPARB Application No. 9 of 2022; PPARB Application No. 5 of 2021; Daniel Outlet Limited v Accounting Officer Numeric Machines Complex Limited; PPARB Application No. 18 of 2024; Infinity Pool Limited v The Accounting Officer, Kenya Wildlife Services and PPARB Application No. 40 of 2024 Marl Mart Enterprises Limited v The Accounting Officer Independent and Electoral Boundaries Commission & Ors .**
62. Drawing from the above judicial pronouncements, this Board is clothed with jurisdiction to first interrogate whether the preconditions for termination of a tender under Section 63 of the Act have been satisfied. It is only upon satisfying itself that the said preconditions have been met

that the Board can down its tools in the matter. However, where any precondition has not been met, the Board will exercise its jurisdiction to hear, and determine the Request for Review.

63. Section 63 of the Act speaks to termination of public procurement and asset disposal proceedings in the following terms:

**“63. Termination or cancellation of procurement and asset disposal Proceedings**

**(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—**

**(a) the subject procurement have been overtaken by—**

**(i) operation of law; or**

**(ii) substantial technological change;**

**(b) inadequate budgetary provision;**

**(c) ...**

**(d) ...**

**(e) ...**

**(f) ...**

**(g) ...**

**(h) ...**

**(i) ...**

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

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

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

64. From the foregoing, for an Accounting Officer of a Procuring Entity to validly terminate a procurement or asset disposal proceedings (i) the termination should be at any time prior to award; (ii) the termination must be based on any of the grounds under section 63(1) (a) to (f) of the Act; (iii) the Accounting Officer should give a Written Report to the Public Procurement Regulatory Authority within 14 days of termination giving reasons for the termination; and (iv) the Accounting Officer should within 14 days of termination give a Written notice to the tenderers in the subject tender communicating the reasons for the termination.

65. Effectively, the termination should be done before award and an Accounting Officer is under a duty to provide sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Accounting Officer must also demonstrate that they have complied with the substantive and procedural requirements set out under the provisions of Section 63 of the Act.



66. On the one hand, the substantive requirements relate to a Procuring Entity outlining the specific ground under section 63(1) of the Act as to why procurement proceedings have been terminated and the facts that support such termination.
67. On the other hand, the procedural requirements include the requirements under Section 63(2), (3), and (4) of the Act i.e. (i) the submission of a Written Report to the Authority on the termination of a tender within 14 days of such termination and (ii) the issuance of notices of termination of tender to tenderers who participated in the said tender outlining the reasons for termination within 14 days of such termination.
68. The Board shall now interrogate the circumstances under which the subject procurement proceedings were terminated.
69. For starters it is not disputed that the Respondents through a letter dated 22<sup>nd</sup> November 2023 awarded the subject tender to the Applicant and this is acknowledged by the Respondents at paragraph 7 of the Memorandum of Response:

**“7.The MoD embarked on the direct procurement for the said project from the Applicant herein vide Direct Tender No. DHQINFRAS/00423-24 and awarded the same vide letter dated 22 November 2023.”**

70. Several months later after the award, the Applicant sent a letter dated 6<sup>th</sup> November 2024 following up on the subject tender only for the Respondents to inform the Applicant vide a letter dated 14<sup>th</sup> November 2024 that the subject tender had been terminated. The letter dated 14<sup>th</sup> November 2024 is hereinafter reproduced for ease of reference:

**Envar Sayan**  
**Chief Executive Officer**  
**Summa Construction**  
**(Address details withheld)**

**PROPOSED PROCUREMENT OF DESIGN, BUILD AND EQUIP  
BOMAS INTERNATIONAL CONFERENCE CENTRE  
TENDER NUMBER: DHQ/INFRAS/004/23/24**

**Reference is made to your letter No. BDT-OTH-2024/021  
dated 6<sup>th</sup> November, 2024 on the above subject.**

**This is to inform you that the procurement proceedings for  
Design, Build and Equip Bomas International Conference  
Centre was terminated due to significant change in scope of  
works as well as the applicable funding model as  
communicated to you in our letter dated 16<sup>th</sup> October 2024  
(copy attached)**

**We however look forward to other possible opportunities in  
the future.**

**Thank you for showing interest in working with us.**

**Signed**

**Dr. Patrick Mariru, PhD, CBS**

**Copy to:**

**Ms. Ummi Mohamed Bashir, CBS**

**Principal Secretary**

**State Department for Culture, The Arts & Heritage**

**NAIROBI**

71. From the above letter, the Respondents communicated that the subject procurement proceedings had been terminated on account of significant change in the scope of work as well as an applicable funding model. The letter equally enclosed another letter dated 16<sup>th</sup> October 2024 which is reproduced for ease of reference:

**M/S SUMMA OF SUMMA PLAZA  
(ADDRESS DETAILS WITHHELD)**

**Dear Sir/Madam,**

**TERMINATION OF PROCUREMENT PROCEEDINGS FOR  
DIRECT PROCUREMENT OF DESIGN, BUILD AND EQUIPP THE  
BOMAS INTERNATIONAL CONFERENCE CENTRE (BICC) FROM  
M/S SUMMA OF SUMMA PLAZA ...**

**Reference is made to this above. This is to inform you that the  
tendering process for the above has been terminated due to a  
significant change in the scope of work pursuant to Section**

**63(1)(a)(ii) and (b) of the Public Procurement and Asset Disposal Act, 2015.**

**Thank you for showing interest in working with us.**

**Signed.**

**WILLIS O. OLWALO**

**For: Principal Secretary**

72. From the above letter it would appear that the Respondents terminated the subject procurement proceedings on the basis of:
- i. Significant change in scope of work (expressed to be under Section 63(1)(a)(ii) of the Act; and
  - ii. Change in applicable funding model (expressed to be under Section 63(1)(b) of the Act)
73. It is equally noteworthy that both letters dated 16<sup>th</sup> October 2024 and 14<sup>th</sup> November 2024 postdate the Notification letter dated 22<sup>nd</sup> November 2023, which awarded the subject tender to the Applicant. Essentially, the Respondents were terminating the subject procurement proceedings after an award had already been made to the Applicant.
74. The High Court in **Asphalt Works Investment Limited v Kenya Ports Authority (Judicial Review Application E022 of 2023) [2023] KEHC 27253 (KLR)** considered a judicial review application in which the Ex-parte Applicant challenged a Procuring Entity's decision to terminate a public tender that had been awarded to the Ex-parte Applicant, who had

even gone to the lengths of executing the procurement contract. In finding for the Ex-parte Applicant, the High Court opined that termination of a public tender could only be done before and not after an award had been issued.

**“In the circumstances, there was no justification for the ostensible termination of the initial contracts by the respondent. Moreover, Section 63 of the PPADA recognizes That the respondent could only terminate the procurement proceedings before, and not after notification of tender award.”**

75. Guided by the above decision of the High Court which is binding on this Board on account of the judicial doctrine of stare decisis, we equally affirm that under the Act, a public tender can only be terminated prior to an award being made.
76. In the present case, it is apparent that the Respondents terminated the subject tender 329 days after issuing an award to the Applicant. It would therefore follow that on that account alone the termination of the subject tender was irregular and in breach of the Act.
77. Turning to the reasons cited for the termination i.e. significant change in the scope of work and funding model, these have to be examined from the lens of the grounds for termination expressed under Section 63(1) of

the Act. Sections 63(1) (a)(ii) and (b) of the Act which are the provisions cited in the Respondent's letter of termination recognize both a procurement process being overtaken by substantial technological change and inadequate budgetary provision as grounds under which an Accounting Officer can invoke for the termination of tender proceedings. However, as this Board has always held, for one to satisfy the substantive requirement under Section 63, they must go beyond a mere restating of the statutory language on the grounds for termination, they must demonstrate by way of evidence that the circumstances embodying the ground relied upon actually exist. In the present case, the Respondents shouldered the burden of leading evidence demonstrating the grounds they attributed for the termination of the subject tender.

78. We shall now review these 2 grounds for terminating the subject tender as urged by the Respondents, in turn:

**Substantial change in technology**

79. The Respondents letters of termination dated 16<sup>th</sup> October 2024 and 14<sup>th</sup> November 20024, indicated that the subject tender was terminated on account of change of scope of the works under Section 63(1)(a)(ii). Notably, Section 63(1)(a)(ii) of the Act lists the subject procurement having been overtaken by substantial technological change and not change of scope of works as a ground for terminating a public tender.

80. Change in Scope of work is different from substantial technological change. Whereas change in scope of work entails a change in the description of the expected tasks, deliverables and timelines for delivery, a substantial technological change would encompass a significant change in the technology in the area of the subject of procurement.
81. Accordingly, change in scope of work is not provided for as a ground for termination of public tenders under Section 63 of the Act. It would therefore follow that this ground for termination does not have any merit. Matters are compounded by the fact that even during the hearing, the Respondents did not point the Board to the alleged changes in the scope of work. Equally, the Confidential Documents forwarded to the Board do not speak to any changes in the scope of work that possibly informed the termination.
82. Additionally, the Respondents neither addressed nor tabled evidence before the Board on any substantial change in technology in respect of the subject tender. The Confidential Documents are also silent on any changes in technology in respect of the works forming the subject of procurement. Therefore, we find no hesitation in finding that the Respondents failed to demonstrate the substantial requirement for the ground under section 63(1)(a)(ii) .

### **Inadequate budgetary provision**

83. Turning to the related ground of change in funding model, which the Respondents expressed as being anchored under Section 63(1)(b) of the Act, the Respondents were expected to demonstrate that there was inadequate budget to finance the subject tender.

84. The Board acknowledges that the Respondents did plead at paragraph 13 of their Memorandum of Response that they had difficulty in securing funding for the project:

**13. The Applicant remained fully apprised of the challenges in securing funding prompting a courtesy call to the Respondents on 14<sup>th</sup> December 2023 where the Applicant offered to assist in sourcing 80% of the financing required for the project (Annexed hereto and marked "Exhibit 4" is a copy of the Applicant's letter dated 6<sup>th</sup> November 2024)**

85. The letter at Exhibit 4 is hereinafter reproduced for ease of reference:

**Nov 6, 2024**

**To: Hon Patrick Mariru  
Principal Secretary  
Ministry of Defence**

**Cc: Ms. Umami Bashir  
Principal Secretary  
Ministry of Gender, Culture, the Arts and Heritage**



**Subject: Bomas International Conference Complex Project  
(DHQ INFRAS/004/23/24)**

**Honorable PS Mariru,**

**I trust this correspondence finds you in good health.**

**We would like to kindly inform you that the formal submission of our commercial and technical proposal for the Bomas International Conference Complex Project was done on the 13<sup>th</sup> of September 2023. Subsequent to this submission, we were honored to receive the Notification of Award Letter on the 22<sup>nd</sup> of November 2023. In continuation, negotiations for the contract transpired on the 14<sup>th</sup> of December 2023 with the committee in the Ministry of Defence offices.**

**As of today, we have not received additional feedback from your side on the aforementioned matters.**

**Throughout our recent efforts, we have engaged with reputable international financial institutions to arrange financing for the successful implementation of this prestigious project. We are pleased to inform you that we are able to secure financing of upto 80% of the contract amount upon confirmation from the Ministry of Defence.**

**We appreciate your support on this matter and look forward to your response.**

**Yours respectfully**

**Signed & Stamped**

**Envar Sayan**

## **CEO**

### **SUMMA CONSTRUCTION**

86. From the above letter, as at 6<sup>th</sup> November 2024, the Applicant informed the Respondents that it had secured financing for upto 80% of the contract and was waiting for confirmation. This gives a sense that the Applicant and the Respondents were in communication on the subject of the funding of the project under the subject tender.
87. Notwithstanding the above, the Board is equally alive to the provisions of Section 53 of the Act on the funding of public tenders. Specifically Section 53(8) and (9) of the Act provide as follows:

#### **53. Procurement and asset disposal planning**

**(1)...**

**(8) Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.**

**(9) An accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offence under this Act.**

88. From the above, the Accounting Officer of any Procuring Entity is forbidden from commencing any procurement process without satisfying himself that there is an adequate budget to finance the subject of procurement. The Act goes a step further in imposing criminal liability on the part of an Accounting Officer who breaches this requirement.
89. Turning to the case at hand, the Respondents at paragraph 8 of the Memorandum of Response suggested that the subject tender was to be financed off-budget through African Export-Import Bank (Afrexim) financing on the advice of the National Treasury:

**“8. The project implementation was earmarked to be funded off-budget through African Export-Import Bank (Afrexim) financing on advice of the National Treasury. Accordingly, contract terms could only be finalized upon securing financing.”**

90. However, the Respondents did not tender any evidence showing that the subject tender was to be financed by funds sourced from African Export-Import Bank. The closest the Respondents came in disclosing the source of funds is the agreement between the Ministry of Gender, Culture the Arts and Heritage and the Ministry of Defence dated 21<sup>st</sup> November 2023 whose clause 4.2 places an obligation on the Ministry of Gender, Culture, the Arts and Heritage to provide adequate funding for the project and liaison with the National Treasury prior to project implementation.

91. Absent evidence of inadequate budgetary allocation for the subject tender, the Board finds great difficulty in finding that there were no funds to finance the subject tender. It was the responsibility of the Respondent to lead evidence on the alleged inadequate budgetary allocation but they failed to discharge this burden. Accordingly, we equally find that the Respondents failed to demonstrate the substantial requirement for the ground under section 63(1)(b).

92. Turning to the procedural requirements on notification to the Applicant and preparation of a Report to the Public Procurement Regulatory Authority, we equally find that the Respondents failed to demonstrate these:

- i. The Respondents did not lead any evidence to show that they sent the termination letter dated 16<sup>th</sup> October 2024, within 14 days from the date of that letter as required under Section 63(4) of the Act.
- ii. The Respondent did not lead any evidence to show that they sent a report to the Public Procurement Regulatory Authority on the termination of the subject tender as required under Section 63(3) of the Act. Nonetheless, the Board independently accessed the Public Procurement Information Portal (PPIP) on the website [www.tenders.go.ke](http://www.tenders.go.ke) and the subject tender is not among the tenders reported to the Authority as having been terminated.

93. In view of the above, the Respondents failed to discharge both the substantive and procedural requirements contemplated under Section 63 of the Act. Accordingly, the termination of the subject tender was in breach of Section 63 of the Act with the result that this Board is clothed with the requisite jurisdiction to hear and determine the present Request for Review.

94. Before concluding on this issue, the Board wishes to address the related question of which Procuring Entity between Ministry of Defence and the Ministry of Culture, the Arts and Heritage is responsible for the subject tender.

95. We are alive to Section 52 of the Act which permits the transfer of procurement responsibility in the following terms:

**52. Transfer of procuring responsibility to another public entity or procuring agent**

**(1) The Authority shall have power to transfer the procuring responsibility of a procuring entity to another procuring entity or procuring agent in the event of delay or in such other circumstances as may be prescribed.**

**(2) Subject to the approval of the governing body of the organ or entity, where applicable or upon recommendation of the Authority, an accounting officer shall make arrangements to enable another procuring entity to carry out the procurement**

**or part of the procurement, on behalf of a procuring entity, in accordance with this Act.**

**(3) A procuring entity may use the register list of another State organ or public entity whenever the procuring entity's list does not suffice.**

**(4) The procuring entity shall obtain the whole list of relevant category from the State organ or entity, and together with its own relevant list, subject the list to this Act.**

96. Regulation 39(2) of the Regulations 2020 retains the accountability for the procurement process on the Procuring Entity transferring its procuring responsibility.

**39. Transfer of procuring responsibility to another public entity**

**(1) ...**

**(2) The accounting officer or the head of the procuring entity who requests the Authority to transfer its function shall remain accountable for all decisions taken by the procuring entity to which the function is transferred.**

**...**

97. Turning to the subject tender, it would appear that the Ministry of Tourism, Wildlife and Heritage sought the Public Procurement Regulatory Authority's approval to transfer its procurement responsibility in respect of the subject tender to the Respondents:

- i. The Board has spotted a letter dated 14<sup>th</sup> August 2023 through which the Authority acknowledges receipt of a letter dated 9<sup>th</sup> August 2023 from the Ministry of Tourism, Wildlife and Heritage sought permission from the Public Procurement Regulatory Authority. This letter was neither produced during the hearing nor was it part of the Confidential Documents.
- ii. The Authority's letter of 14<sup>th</sup> August 2023, approves the Ministry of Tourism, Wildlife and Heritage's request to transfer its procuring responsibility in respect of the subject tender to the Respondents pursuant to Section 52(1) of the Act.
- iii. The said letter also reminds the Accounting Officer of the Ministry of Tourism, Wildlife and Heritage that under Regulation 39(2) of the Regulations 2020, that her office remains accountable for all decisions that shall be taken in the subject tender.
- iv. Additionally, the letter requires the Ministry of Tourism, Wildlife and Heritage and the Ministry of Defence to furnish the Authority a written Agreement between them with respect to the transfer of the procuring responsibility. In this regard, the Ministry of Tourism, Wildlife and Heritage and Ministry of Defence subsequently concluded an Agreement dated 21<sup>st</sup> November 2023, which forms part of the Confidential File.
- v. Clause 4.1 of the Agreement between the Ministry of Tourism, Wildlife and Heritage and Ministry of Defence indicates that the Ministry of Tourism, Wildlife and Heritage retained accountability

with respect to all decisions taken by the Ministry of Defence in the subject tender.

98. Flowing from the above, we are convinced that the ultimate liability arising from the tender process in the subject tender lies with the Ministry of Tourism, Wildlife and Heritage:
- i. The works forming the subject of the procurement are being procured on behalf of the Ministry of Tourism, Wildlife and Heritage.
  - ii. Regulation 39(2) of the Regulations 2020 retains accountability on the part of the Procuring Entity transferring its procurement responsibility and in the present case this is the Ministry of Gender, Culture, the Arts and Heritage.
  - iii. The Public Procurement Regulatory Authority's letter dated 14<sup>th</sup> August 2023 authorized the transfer of the procuring responsibility to the Ministry of Defence with a caution on the Ministry of Gender, Culture, the Arts and Heritage that it remained accountable for all decisions taken by the Ministry of Defence.
  - iv. Clause 4.1 of the Agreement for transfer of procurement responsibility between the Ministry of Gender, Culture, the Arts and Heritage and the Ministry of Defence dated 21<sup>st</sup> November 2023 cements the agreement that the Ministry of Gender, Culture, the Arts and Heritage retained the ultimate accountability for the actions taken in the subject tender.



99. Notwithstanding the above, the subject tender presents a unique scenario where it is apparent that the Ministry of Defence only disclosed to the Applicant that it was undertaking the subject procurement process on behalf of the Ministry of Gender, Culture, the Arts and Heritage in its Response to the current Request for Review. The question that begs is then how was the Applicant to know the place of Ministry of Gender, Culture, the Arts and Heritage in the subject tender for purposes locating the Procuring Entity that shouldered ultimate responsibility with respect to the subject tender. Absent any evidence of such disclosure to the Applicant, the Ministry of Defence shouldered all obligations with respect to the conduct of the tender process in the subject tender. In any event, the blank Tender Document indicates the Ministry of Defence as the Procuring Entity in the subject tender. Further there was no evidence before the Board to show that the Respondents herein at any point in time during the procurement process communicated to the Applicant that they were carrying out the subject tender as agent of the Ministry of Gender, Culture, the Arts and Heritage. Therefore it would be unfair for the Respondents to purport to shift liability for the procurement proceedings arising out of this Request for Review to a party who for all intents and purposes had not been revealed to the Applicant and would be to agree with counsel for the Applicant, an undisclosed principal. This is in line with the established principle in the law of agency that an agent of an undisclosed principal can be sued for acts done on behalf of the principal as if he was the principal.

**Whether in the circumstances obtaining, the Board should extend the tender validity of the subject tender?**

100. The Applicant sought for an extension of the tender validity period in the subject tender while blaming the Respondents for the lapse of the tender validity period before the subject tender was concluded. Counsel for the Applicant, Mr. Nyamodi contended that the Respondents failed to have the procurement contract prepared despite the Applicant's best efforts and therefore the Respondents could not be allowed to benefit from their own indolence. He therefore urged that this was a deserving case for an extension of the tender validity period under Sections 28 and 173 of the Act.
101. On the flip side, the Respondents argued against the extension of the tender validity in the subject tender which expired on 15<sup>th</sup> March 2024. According to the Respondents, the lapse of the tender validity period left no valid tender to substantiate any further procurement proceedings with the Applicant. Counsel for the Respondents, Ms. Nyonje was emphatic that Sections 28 and 173 of the Act do not grant power to the Board to extend the tender validity period.
102. The Board is therefore invited to pronounce itself on the place of extension of tender validity period and its application to the present tender.

103. For starters, Section 88 of the Act permits the Accounting Officer of a Procuring Entity to extend the tender validity period of a tender 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 bidding period under subsection (1).**

104. From Section 88 of the Act above:

- i. The extension of the tender validity period should be done prior to its expiry;
- ii. The extension of the tender validity period can only be for a period not exceeding 30 days.
- iii. The extension of the tender validity period can only be exercised once.

105. It also bears reproducing the powers of the Board as donated under Section 173 of the Act:

**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.**

106. The powers of the Board under Section 173 of the Act have been the subject of determination before both this Board and the superior courts of this country:

107. 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:

**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.**

108. 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 Timesta Enterprises JV Peesam Limited v The Accounting Officer Kenya Airports Authority & another** and **PPARB Application No. 113 of 2024; EASA Enterprises Limited v The Chief Executive Officer, National Water Harvesting & Storage Authority & another.**

109. 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. However before such an extension is granted the Board must satisfy itself that there exists good reasons for such extension.
110. Turning to the present case, it is not in dispute that the subject tender was valid for 182 days which ended on 15<sup>th</sup> March 2024. The dispute appears to be whether the tender validity period can be extended. We have already pointed out that the Board has power to extend the tender validity period where good reasons exists.
111. In the present case, we are satisfied that there are several reasons warranting such an extension because in our considered opinion, the Respondent on several occasions conducted itself in a manner to suggest that it was deliberately stalling the tender process with the aim of running it out of the tender validity period as follows:

- i. The Respondents did not offer an explanation as to why the Accounting Officer never exercised his powers under Section 88 of the Act to extend the tender validity period in the subject tender prior to its expiry on 15<sup>th</sup> March 2024. The inaction on the part of the Accounting Officer extending the tender validity period is suspicious in light of the fact that the Respondents had on 22<sup>nd</sup> November 2023 issued an award letter to the Applicant and were aware that as at 15<sup>th</sup> March 2024, the procurement contract was yet to be signed.
  
- ii. The general conduct of the Respondents speaks to a deliberate attempt to frustrate the conclusion of the subject tender, specifically:
  - a) The Respondents did not offer any good reason to explain the delay in the conclusion of the subject tender for over 300 days since issuance of a letter of award to the Applicant.
  
  - b) The Respondents did not serve the letter dated 16<sup>th</sup> October 2024 terminating the subject tender within the 14 days contemplated under Section 63 of the Act. It would appear that it is only the Applicant's letter of 6<sup>th</sup> November 2024 that prompted the Respondents to notify the Applicant of the termination of the subject tender.

c) The Respondents made no attempt at notifying the Applicant of the reasons as to why there was a delay in the conclusion of the subject tender.

iii. The Respondents did not present before the board any evidence that would substantiate the delay on its part to proceed with the tender to its logical conclusion within the statutory timelines pointing to a deliberate attempt on its part to frustrate the Applicant by ensuring that the procurement proceedings become moot before conclusion of the said proceedings.

iv. Throughout the proceedings before the Board, there was no imputation on the Applicant that it was responsible for any delay that occasioned the running out of the tender validity period before the subject tender was concluded. On the other hand, the Respondents have been responsible for the delay in concluding the subject tender within the tender validity period in what was explained as a change in scope of works and funding model. In all this, the Applicant is not to blame and thus cannot be held responsible for the lapse of the tender validity period.

112. In the Board's view, the above point to a deliberate attempt by the Respondents to frustrate the Applicant by deliberately stalling the tender process with the aim of running it out of the tender validity period and then turn around and plead expiry of the validity period as reason for not

entering into a contract with the applicant who had already been awarded. Just like this Board had found in **PPARB Application No. 113 of 2024; EASA Enterprises Limited v The Chief Executive Officer, National Water Harvesting & Storage Authority & another** this 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 the Act.

113. Where a Procuring Entity is in doubt as to how to proceed with a procurement process as was contended by the Counsel for the Respondents, the proper cause of action would be to seek guidance from the Public Procurement Regulatory Authority in line with its function of providing advice and technical support upon request as set out in section 9 (g) of the Act and not to stall the process, as has been the case in the subject tender.
  
114. From the above, the Board finds it appropriate in the current circumstances to extend the tender validity period that had already lapsed to avail an opportunity to the procuring entity to write the wrongs it has committed against the Applicant. This will afford an opportunity to the Respondents to proceed with the subject procurement proceedings to their logical conclusion in accordance with our findings herein.

115. Consequently, the Board finds that it has power under section 173 of the Act to extend the tender validity period for the subject tender and will proceed to do so in its final orders in this Request for Review.

**What orders the Board should grant in the circumstances?**

116. The Board has found that the Board is clothed with jurisdiction over the subject tender noting that it was not terminated in accordance with the provisions of the Act.

117. The Board equally found that it was appropriate in the circumstance to extend the tender validity period to allow for the conclusion of the subject tender.

118. The upshot of our finding is that the Request for Review dated 2<sup>nd</sup> December 2024 in respect of Direct Tender No. DHQINFRAS/004/23-24 for Proposed Design, Build and Equip the Bomas International Convention Complex in Nairobi succeeds in the following specific terms:

**FINAL ORDERS**

119. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2025, the Board makes the following orders in the Request for Review dated 2<sup>nd</sup> December 2024:

- 1. The Request for Review dated 2<sup>nd</sup> December 2024 in respect of Direct Tender No. DHQINFRAS/004/23-24 for Proposed**

**Design, Build and Equip the Bomas International Convention Complex in Nairobi be and is hereby allowed.**

- 2. The Letter of termination dated 16<sup>th</sup> October 2024 as well as the letter dated 14<sup>th</sup> November 2024 in respect of Direct Tender No. DHQINFRAS/004/23-24 for Proposed Design, Build and Equip the Bomas International Convention Complex in Nairobi be and are hereby set aside.**
- 3. The tender validity period of Direct Tender No. DHQINFRAS/004/23-24 for Proposed Design, Build and Equip the Bomas International Convention Complex in Nairobi be and is hereby extended for a period of 90 days from the date of this Decision.**
- 4. The 1<sup>st</sup> Respondents be and is hereby directed to proceed with the procurement process in respect of Direct Tender No. DHQINFRAS/004/23-24 for Proposed Design, Build and Equip the Bomas International Convention Complex in Nairobi to its logical and lawful conclusion within 90 days from the date of this Decision, noting this Board's findings in this Decision**

5. . Each party shall bear its own costs.

Dated at NAIROBI, this 23<sup>rd</sup> day of December 2024.

.....

**PANEL CHAIRPERSON**  
**PPARB**

.....

**SECRETARY**  
**PPARB**