

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 16/2025 OF 24TH FEBRUARY 2025

BETWEEN

POWER PARTS (KENYA) LIMITED APPLICANT

AND

ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY 1ST RESPONDENT

KENYA PORTS AUTHORITY..... 2ND RESPONDENT

Review against the decision of the Accounting Officer Kenya Ports Authority in relation to Tender No. KPA/115/2024-25/TE for Rewinding, Servicing, Repair, and Condition Monitoring of Rotating Electromechanical Machines

BOARD MEMBERS PRESENT

- | | |
|----------------------|------------------------------------|
| 1. Ms. Alice Oeri | - Vice Chairperson and Panel Chair |
| 2. Mr. Jackson Awele | - Member |
| 3. Dr. Susan Mambo | - Member |

IN ATTENDANCE

- | | |
|------------------------|--|
| 1. Mr. Philemon Kiprop | - Holding brief for Acting Board Secretary |
| 2. Ms. Evelyn Weru | - Secretariat |
| 3. Mr. Ericson Nani | - Secretariat |

PRESENT BY INVITATION

APPLICANT

Mr. Justus Omollo

POWER PARTS (KENYA) LIMITED

- Advocate, Sigano & Omollo LLP Advocates

1ST & 2ND RESPONDENT

ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY & KENYA

PORTS AUTHORITY

1. Mr. Paul Munyao

- Advocate, Munyao, Muthama & Kashindi
Advocates

2. Mr. Sydney Amakobe

- Advocate, Munyao, Muthama & Kashindi
Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Ports Authority, the Procuring Entity and 2nd Respondent herein, invited sealed tenders in response to Tender No. KPA/115/2024-25/TE for Rewinding, Servicing, Repair, and Condition Monitoring of Rotating Electromechanical Machines (hereinafter both referred to as "the subject tenders"). Tendering was under the Restricted Tendering Method and the subject tender's submission deadline was scheduled on 19th February 2025 at 10.30 a.m.

Submission of Tenders and Tender Opening

2. According to the Tender Opening Minutes which were part of the confidential documents furnished to the Public Procurement

Administrative Review Board (hereinafter referred to as the 'Board' pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), six (6) bidders submitted bids in in the subject tender and were recorded as follows:

Bid No.	Name Of The Firm
1.	Calinois Enterprises
2.	Diamond Gate
3.	Infinitum Company Limited
4.	Port Rio Limited
5.	Delvania Technologies
6.	Vissionairese General Supplies

3. The procurement proceedings in the subject tender were suspended pursuant to Section 168 of the Act when a Request for Review No. 16 of 2025 dated 21st February 2025 was filed on 24th February 2025 before the Board.

REQUEST FOR REVIEW NO. 16 OF 2025

4. On 24th February 2025, Power Parts (Kenya) Limited, the Applicant herein, filed through Sigano & Omollo LLP Advocates a Request for Review dated 21st February 2025 together with a Supporting Affidavit sworn by Vishal Soni on 21st February 2025 seeking the following orders from the Board:

a) The procurement proceedings in Tender No. KPA/115/2024-25/TE Rewinding, Servicing, Repair, and

Condition Monitoring of Rotating Electromechanical Machines be and are hereby annulled in their entirety and set aside.

b) The Accounting Officer of Kenya Ports Authority be and is hereby directed to refrain from commencing new procurement proceedings in respect of goods, works and/or services which are subject of ongoing procurement contracts executed between POWER PARTS (KENYA) LIMITED and KENYA PORTS AUTHORITY.

c) Any other relief that the Board may deem fit and just to grant.

d) Costs of the Review.

5. In a Notification of Appeal and a letter dated 24th February 2025, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to the said Procuring Entity 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 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 24th February 2025.

6. On 3rd March 2025, the Respondents filed through Munyao, Muthama & Kashindi Advocates a Notice of Appointment dated 28th February 2025 and a Memorandum of Appearance dated 28th February 2025.
7. On 5th March 2025, the Respondents, through Mr. Daniel Amuyunzu forwarded the confidential documents concerning the subject tender in line with Section 67(3)(e) of the Act.
8. On the same day of 5th March 2025, the Acting Board Secretary notified all tenderers in the subject tenders via email, of the existence of the Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the tender within three (3) days.
9. On 6th March 2025, the Respondents filed through their advocates a Memorandum of Response dated 5th March 2025, an Affidavit in Support of Memorandum of Response sworn by Captain William Ruto on 6th March 2025 and an Index of Documents Annexed to the Affidavit in Support of the Respondents' Memorandum of Response dated 3rd March 2025
10. *Vide* a Hearing Notice dated 7th March 2025, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 11th March 2025 at 11:00 a.m. through the link availed in the said Hearing Notice.

11. When the matter first came up for hearing on 11th March 2025 at 11:00 a.m., both Mr. Omollo counsel for the Applicant and Mr. Munyao counsel for the Respondents informed the Board that they were unaware that the matter was coming up for hearing having not received a copy of the Hearing Notice.

12. In view of the circumstances, the Board directed parties to file and exchange written submissions by Wednesday, 12th March 2025 and appear for highlighting of their submissions on Thursday, 13th March 2025 at 11.00 a.m. Additionally, Mr. Omollo was granted leave to file a rejoinder to the response filed by the Respondents while Mr. Munyao was granted leave to respond to any new issues raised by the Applicant and directed to file with the Board and also serve Mr. Omollo with the ruling delivered by the High Court at Mombasa in Commercial Case No. E070 of 2025 between Powerparts (Kenya) Limited Limited v Kenya Ports Authority that he had made reference to for Mr. Omollo's perusal prior to filing of his rejoinder to enable him respond conclusively on all issues raised.

13. On 11th March 2025, the Respondents filed and served the ruling delivered by the High Court at Mombasa in Commercial Case No. E070 of 2025 between Powerparts (Kenya) Limited v Kenya Ports Authority.

14. On 12th March 2025, the Applicant filed a Supplementary Affidavit sworn by Vishal Soni on 12th March 2025.

15. On the same 12th March 2025, the Respondents filed Written Submissions dated 12th March 2025.
16. On 13th March 2025, the Applicant filed Applicant's List of Authorities dated 13th March 2025.
17. At the hearing on 13th March 2025 the Board read out the pleadings filed by parties in the matter and allocated time for parties to highlight their respective cases. Thus the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's submissions

18. In his submissions, Mr. Omollo for the Applicant relied on the documents filed by the Applicant before the Board in the instant Request for Review.
19. Counsel submitted that the instant Request for Review raised allegations of breach of the obligations imposed upon the Respondents in relation to conducting procurement proceedings in the subject tender. He further submitted that the gravamen of the Applicant's case is that the Respondents had commenced these procurement proceedings in breach of the binding principle of rule of law under Article 10 of the Constitution and Section 3(1) of the Act.
20. Mr. Omollo stated that the Respondents have disobeyed the orders issued by the High Court at Mombasa in Commercial Case No. E070 of

2025 between Powerparts (Kenya) Limited v Kenya Ports Authority whereby the High Court had issued an order stopping the Respondents from procuring anything that falls under the existing procurement contracts between the Applicant and the Respondents.

21. He indicated that the Applicant had recourse in filing for contempt proceedings which it has pursued and that it ought to be noted that Section 174 of the Act gives the right of administrative review as an additional right to any other right that an Applicant may have. Counsel pointed out that in addition to pursuing the contempt of court proceedings at the High Court in Mombasa, the Applicant lodged the instant Request for Review to challenge the conduct of the procurement proceedings of the subject tender. He reiterated that the rule of law obligates the Respondents to comply with binding orders of the Court and that under Article 159 of the Constitution, the Board has the power to uphold and give effect to the orders of the High Court.

22. Counsel submitted that the conduct of the procurement proceedings in the subject tender offend the national values and principle of governance and that parties cannot operate in lawlessness where there are binding orders of the Court that ought to be complied with. He pointed out that the Respondents had defiantly initiated and conducted the procurement proceedings in the subject tender in disobedience of the High Court Orders.

23. He referred the Board to the documents which purportedly initiated the procurement proceedings in the subject tender and pointed out that there was a sequence by the Head of Procurement Function indicating that there was a requisition from the Manager Container Terminal Engineering vide memo dated 9th August 2024.
24. Counsel submitted that the initiation of procurement proceedings and the choice of the method of procurement to be undertaken is well defined by the law and that such procurement proceeding is to be initiated on the basis of an existing procurement plan and not on the basis of an internal memo. He indicated that the choice of procurement method is not to be defined by the Head of the Procurement Function but ought to be defined in the existing Procurement Plan and as such, it was clear that the instant procurement proceedings were commenced on the basis of an internal memo and not the existing procurement plan.
25. Counsel pointed out that the Professional Opinion intended to be rendered after an evaluation process is conducted is what the Respondent relied upon to initiate the procurement proceedings in the subject tender and referred the Board to annexure marked VS-03 being a copy of the purported professional opinion. He urged the Board to note that pursuant to Section 84 of the Act as read with Regulation 78 and 79 of Regulations 2020, a professional opinion is not rendered for purposes of initiating a procurement process but for purposes of confirming that the entire process was compliant with the law.

26. Counsel submitted that from the impugned Professional Opinion, the Respondents selected the bidders who they intended to invite to participate in the procurement proceedings in the subject tender and that contrary to Regulation 89(5) of Regulations 2020, these bidders were not prequalified for provision of similar goods or works being a clear demonstration that the procurement process was commenced in a manner that is tantamount to abuse of the Act.

27. Counsel further submitted that the courts have frowned upon the practice where procuring entities initiate parallel procurement processes leading to award of the same tender to multiple people with a different desired outcome and referred the Board to the holding in *PPARB Application No. 12 of 2021 Five Blocks Enterprises Ltd v KEBS*. He reiterated that the manner in which the Respondents had applied the restricted tendering method offends the law and that the bidders invited to participate in the instant procurement proceedings were not pre-qualified. He urged the Board to note that the Applicant's argument is not an attack on the choice of procurement method noting that the tendering method is determined in advance and is contained in the procurement plan which was non-existent in these circumstances.

28. Counsel submitted that the instant procurement proceedings have been initiated with the sole aim of prejudicing the Applicant's ongoing contracts and as such, the Applicant stands to suffer loss and damage for the reason that the items that the Applicant is already contracted to supply are the ones that the Respondent seeks to procure. For instance, he referred the Board to the items at page 90 of the Applicant's annexures

and indicated that the Applicant and the Respondents already have ongoing procurement contracts for the supply of parts of the reed stackers, terminal tractors and forklifts.

29. He indicated that through craft, the Respondents had opted to float a separate tender for similar spare parts as seen from its contents as seen at page 91 to 94 of the Applicant's bundle of documents being items that were already procured and which the High Court gave orders not to procure similar items as those with the existing procurement contracts that are now being sought through the instant procurement proceedings in the subject tender.

30. In support of his arguments he referred the Board to the holdings in *PPARB Application No. 18 of 2018 Chogis Garage Limited & 22 Others v Ministry of Water & Irrigation*; *PPARB Application No. 30 of 2015 Noble Gases International Limited v Kenyatta National Hospital*; *Rentco East Africa Limited, Lantech Africa Limited, Toshiba Corporation Consortium v Public Procurement Administrative Review Board & another (2017) eKLR*; and *Victoria Cleaning Services v Kenya Medical Training College*.

31. He submitted that the annulment of the impugned procurement proceedings in the subject tender can only be sought by way of administrative review under Section 173 of the Act being the first point of seeking relief. He stated that the power of the High Court to punish for contempt is distinguishable from the powers of the Board and reliefs sought herein and as such, there is no danger that the instant Request

for Review is *sub judice* or *res judicata*. He further stated that the powers of the Board are asymmetrical to the powers of the High Court in punishing for contempt and that the instant Request for Review is specific to the conduct of the procurement proceedings in the subject tender noting that the proceedings before the High Court are purely in arbitration and were commenced under Section 7 of the Arbitration Act and sought for interim measures of protection pending arbitration.

32. Counsel urged the Board to allow the instant Request for Review with costs as prayed.

1st and 2nd Respondents' submissions

33. In his submissions, Mr. Munyao relied on the documents filed before the Board on behalf of the Respondents in the instant Request for Review.

34. Mr. Munyao submitted that the Applicant is neither a candidate nor a tenderer in respect of the impugned subject tender and as such, Section 167 of the Act locks it out from commencing the instant Request for Review. He pointed the Board to paragraph 7 of the Applicant's Supporting Affidavit and indicated that the Applicant had falsely sworn that it was a candidate or tenderer in the subject tender. Counsel indicated that the Board had been supplied with a list of the candidates and tenderers identified by the Procuring Entity with regard to the subject tender.

35. Mr. Munyao submitted that the instant Request for Review was an abuse of judicial process and that it is an attempt by the Applicant to be assisted to monopolize the supply of spare parts to the Procuring Entity. Counsel referred the Board to the proceedings in the High Court at Mombasa in Commercial Case No. E070 of 2025 between Powerparts (Kenya) Limited v Kenya Ports Authority and submitted that the learned Judge had rendered her ruling and issued orders to the applications by the Applicant in the said suit. He pointed out that one of the application therein dated 27th February 2025 is a replica of what is before the Board and that it ought to be noted that the learned Judge declined to grant several of the orders sought by the Applicant.

36. Counsel argued that in granting the orders sought by the Applicant herein, the Board will be granting it the balance of the orders that the Learned Judge declined to grant and that the Board will in fact be overturning the decision by the High Court. He further argued that the law does not envisage that the Applicant will litigate before the High Court and the Board concurrently over the same matter as this would be absurd.

37. Counsel urged the Board to strike out the instant Request for Review and to allow parties to continue to litigate before the High Court and the arbitral tribunal.

38. He pointed out that there were known candidates and tenderers in the impugned subject tender and that the Applicant chose not to join them to the review application. He further pointed out that these companies

are already supplying spare parts according to the Professional Opinion and were already prequalified and issuance of orders against them without hearing them would be denying them a chance to be heard in a matter that affects them. He stated that it was deliberate of the Applicant to avoid joining them to the instant Request for review so as to have their say.

39. Counsel submitted that the dispute herein concerns choice of procurement method and that pursuant Section 167(4)(a) of the Act the Board is divested of jurisdiction to hear such a review.

40. Mr. Munyao indicated that the Applicant has two contracts that are running with the Procuring Entity which are contracts for supply of spare parts for Kalmar Terminal Tractors and Reach stackers dated 2nd February 2024 and supply of spare parts for Kalmar Terminal tractors dated 19th April 2024. He urged the Board to note that the Applicant did not have a contract for the suit tender. He further elaborated that Kalmar is just one of the many manufacturers who supplies equipment to the Procuring Entity and that it was represented by the Applicant but there were numerous manufacturers who supply equipment like cranes and tractors to the Procuring Entity and as such, the Applicant cannot be said to supply all spare parts to the Procuring Entity. He submitted that the subject tender is wide and includes elements of consultancy and services and does not just apply to spare parts.

41. He submitted that the Applicant infiltrated the communication ecosystem of the Respondent to get the tender documents that were not available to it or other parties which is not fair practice and as such, the Applicant does not deserve any positive exercise of the Board's discretion. He indicated that the Procuring Entity is a public body whose funding is from the public and it is not possible for the Board to tie it to procure only from the Applicant. He reiterated that the Applicant followed the provisions of the law in the procurement process in the subject tender.
42. Counsel urged the Board to dismiss the instant Request for Review with costs for lacking in merit.

Applicant's Rejoinder

43. In a rejoinder, Mr. Omollo submitted that the allegation that the Applicant infiltrated the communication ecosystem of the Respondent was unfounded and referred the Board to paragraph 7 of the Applicant's Supporting Affidavit where it disclosed that the Tender Documents were published on the Public Procurement Information Portal by the Respondents and the URL for this particular source was provided.
44. As to the allegation that the Applicant is neither a candidate or tenderer with regard to the subject tender, counsel referred to Section 2 of the Act and submitted that from the Tender Document annexed to the Applicant's bundle of documents marked as VS-2, there was no indication that the invitation to tender was addressed to only the 10 bidders indicated by the Respondents and as such, the Applicant having obtained the Tender

Document from the PPIP, where it was readily available, is a candidate within the meaning of Section 2 as read with Section 167 (1) of the Act.

45. Mr. Omollo stated that it had been erroneously submitted that the Applicant was trying to force the hands of the Board so as to make sure that it is the only party that supplies spare parts to the Procuring entity. He submitted that the Applicant had clearly pleaded in the orders sought that it was seeking an order directing the 1st Respondent to refrain from commencing new procurement proceedings in respect of goods that are subject to ongoing procurement contracts executed the Applicant. He indicated that there was no risk that the Applicant was putting the operations of the Procuring Entity since it was not asking for a blanket ban on the operations of the Procuring Entity.

46. As to non-joinder of the 10 companies by the Applicant with the intention of denying them a chance to participate in the instant proceedings, counsel submitted that he was not privy to the internal running of the Board following the filing of the instant Request for Review but he was aware that upon filing the review application, the Board issues a notification of review and suspension of procurement proceedings and that it is also mandated to request the Respondent to submit particulars of all parties participating in the subject tender and on receipt of this information, it notifies the other parties, if they so wish to participate. Counsel argued that it had not been demonstrated that the 10 companies named fall within this category and that they would best join the

proceedings following receipt of the invitation by the Board under Regulation 205 of Regulations 2020.

47. He urged the Board to find the instant request for review meritorious and to grant the prayers sought.

CLARIFICATIONS

48. When asked to clarify to the Board how the Applicant got hold of the Tender Document, Mr. Omollo submitted that the Applicant had pleaded at paragraph 7 of its Supporting Affidavit that it obtained the Tender Document published by the Procuring Entity on the Public Procurement Information Portal on the URL <https://tenders.go.ke/tenders/225471> on [10th February 2025](#).

49. As to how the Tender Document in the subject tender was availed to candidates and tenderers, Mr. Munyao submitted that the Public Procurement Information Portal was not accessible to persons who have not been invited in a restricted tender. He indicated that his understanding of restricted tendering is that you basically have a list of candidates or tenderers and you mail the tender documents asking them to respond which is different from when a procuring entity advertises on its website. He submitted that the Tender Document was available on the Public Procurement Information Portal and that the Applicant cannot have access to it because it is not part of the people the document was mailed to.

50. In a rejoinder, Mr. Omollo submitted that the Public Procurement Information Portal is a publicly accessible portal and that documents therein are readily accessible and that he was ready to demonstrate this to the Board.

51. As to whether the URL provided by the Applicant was the same used by the Respondents to make the Tender Document available, Mr. Munyao indicated that he was not able to confirm this issue having not taken instructions from the Respondents.

52. When asked to expound on the orders being sought at the High Court vis-à-vis the orders sought from the Board in the instant Request for Review, Mr. Omollo submitted that the proceedings at the High Court had been concluded noting the ruling that had been shared with the Board by the Respondents whereby the Applicant was seeking an interim measure of protection under Section 7 of the Arbitration Act. He further submitted that the court was clear that during the arbitration proceedings, the contracts be performed in terms of Clause 10.7 of the contracts and this was what the Applicant relied on in filing the instant Request for Review.

53. Counsel submitted that the proceedings before the Board relate to the tender process that was commenced by the Procuring Entity and that this process and the grounds presented by the Applicant are asymmetrical to the grounds before the High Court noting that the Applicant was alleging breach of the Act before the Board and that the Board's role would be limited to reviewing whether there has been a breach of the Act in

commencing the subject tender. He indicated that there was no remote chance that the Board would reach a decision that conflicts with that of the High Court and in any event, the Board would be giving effect to the orders of the High Court.

54. On his part, Mr. Munyao submitted that the Board's inquiry was a clear indication that the matter herein is *sub judice*. He indicated that when the Applicant initially got the injunction order, the Procuring Entity proceeded to make other procurements for spare parts i.e. from a company called DAF and when the Applicant went to court for contempt orders, it was not granted orders sought but the Procuring Entity was ordered to continue servicing the contracts. He indicated that the Procuring Entity could not be restricted from procuring since it will ground to a halt because Kalmar does not have all the spare parts that it requires. He further stated that the Board does not have jurisdiction to enforce the orders from the High Court.

55. At this juncture, Mr. Omollo submitted that if an issue of *sub judice* is being raised, it is not one of saying that the Board does not have jurisdiction in view of Section 6 of the Civil Procedure Act which leads to stay pending the outcome.

56. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 24th February 2025 was due to expire on 17th March 2025 and that the Board would

communicate its decision to all parties to the Request for Review via email.

BOARD'S DECISION

57. The Board has considered each of the parties' submissions and documents placed before it and finds the following issues call for determination.

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

In determining the first issue, the Board will make a determination on the following sub-issues:

- i Whether the Applicant has the requisite *locus standi* to approach the Board by dint of Section 167(1) of the Act read with Section 2 of the Act.

Depending on the outcome of sub-issue (i)

- ii Whether the Applicant challenges the choice of procurement method thereby ousting the jurisdiction of the Board by dint of Section 167(4)(a) of the Act.

Depending on the outcome of Issue A

B. Whether the instant Request for Review as filed offends the legal doctrine of *sub judice* ?

C. Whether the Procuring Entity in commencing the procurement process in the subject tender acted contrary to the law.

D. What orders should the Board grant in the circumstances?

58. Before delving into the issues framed for determination, we note that the Applicant at paragraphs 6, 7 and 8 of its Supplementary Affidavit sworn by Vishal Soni on 12th March 2025 sought for the Respondent's responses to be expunged from the record for having been filed outside the 5 days' statutory period stipulated under Regulation 205(3) of Regulations 2020.

59. We note, from the Board's file and Registry records, that the Respondents were notified of the existence of the instant Request for Review on 24th February 2025 by the Acting Board Secretary, Mr. James Kilaka. They first filed through Munyao, Muthama & Kashindi Advocates on 3rd March 2025 a Notice of Appointment dated 28th February 2025 and a Memorandum of Appearance dated 28th February 2025 and later on 5th March 2025 submitted the confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act through Mr. Daniel Amuyunzu. Their responses were later on filed by their advocates on record on 6th March 2025.

60. The Board is cognizant of the provisions of Regulation 205 of Regulations 2020 which provides:

"(1) The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.

(2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the Review Board Secretary

(3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified.

(4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.

(5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3)."

61. In essence, the Board's Secretary serves a notice to the accounting officer of a procuring entity in accordance with Section 168 of the Act upon receipt of a request for review. Upon service of the notice of the request for review, the accounting officer is under an obligation to file a response together with all confidential document in the procurement proceedings within five (5) days of the notice or such lesser period as may be specified. Failure by the accounting officer to submit a response and documents requested within the stipulated time is an offence which attracts a fine not exceeding four million shillings or imprisonment for a term not exceeding ten years or both.

62. We are also cognizant of provisions of **Article 159(2)(d)** of the Constitution which provide that justice shall be administered without undue regard to procedural technicalities. However, this provision should not be used to trash procedural provisions as the rules are the handmaidens of justice. It has however been reiterated that courts should not pay undue attention to procedural technicalities and requirements at the expense of substantive justice. The Supreme Court of Kenya in the case of **Raila Odinga v I.E.B.C & Others (2013) eKLR**, held that:

"Article 159(2)(d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."

63. In the Board's considered view, Regulation 205 (3) & (4) of Regulations 2020 seeks to cure the mischief where procuring entities delay in submitting responses to allegations by candidates and tenderers of breach of a duty imposed by the Act or Regulations considering the limited timelines within which administrative reviews ought to be heard and determined or altogether fail to respond or submit confidential documents thus frustrating the Board in reviewing and determining administrative reviews.

64. This Board has a duty to do substantive justice to parties while at the same time considering whether a matter before it has been properly filed. The Board is cognizant of the need to exercise its discretion with utmost care when faced with an application to strike out pleadings for having been filed out of time as striking out pleadings is a draconian action which may have the consequence of slamming the door of justice on the face of one party without according it an opportunity to be heard. This was the position held by Madan JA (as he then was) in ***DT Dobie & Co (K)***

Ltd V Muchina, [1982] KLR, where the Court of Appeal expressed itself as follows:

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way ... no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward"

65. Further, the Board notes that the power to strike out a pleading is a discretionary one as held in **Crescent Construction Co Ltd V Delphis Bank Limited, [2007] eKLR**, where the Court of Appeal stated as follows:

"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."

66. Guided by the holding in the above cases, we find that no prejudice was occasioned on the Applicant as none has been presented in filing of the Respondent's responses on 6th March 2025 since the Applicant has been afforded an opportunity to respond and address issues raised therein.

67. All parties have indeed filed and served their respective pleadings and confidential documents as requested and attended the virtual hearing as scheduled. The Respondents' Responses as filed together with the annexures and confidential documents filed with the Board have enabled the Board have an informed view of the procurement proceedings in the subject tender and to review the instant Request for Review. Having filed their responses and the confidential documents, we find that the Respondents are not subject to the sanctions provided under Regulations 204 (4) of Regulations 2020. We would have held otherwise if the

Respondents had not filed any response to the Request for Review or submitted confidential documents to the Board in accordance with Section 67(3) of the Act and perhaps escalated the matter to PPRA for relevant action to be taken.

68. In the circumstances, we find that the Respondents' Responses as filed in the instant Request for Review are properly before the Board and may be relied upon in these proceedings.

As to whether the Board has jurisdiction to hear and determine the instant Request for Review

69. This Board is mindful of the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

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

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

71. The *locus classicus* case on the question of jurisdiction is the celebrated Court of Appeal decision in **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989]eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** which underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, 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 evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

72. The Supreme Court added its voice 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. We agree with Counsel for the first and second Respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings.”

73. In the persuasive authority from the Supreme Court of Nigeria in the case of **State v Onagoruwa [1992] 2 NWLR 221 – 33 at 57 – 59** the Supreme Court held:

“Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based.”

74. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both. This Board is a creature of statute owing to its establishment as provided under Section 27 (1) of the Act which reads:

"(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."

75. Further, the functions of the Board are provided under Section 28 of the Act as follows:

***"(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."***

76. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

77. The jurisdiction of this Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for Powers of the Board.

78. Turning to the instant Request for Review, the Respondents challenged the jurisdiction of the Board to hear and determine the instant Request for Review as follows:

i As to whether the Applicant has the requisite locus standi to approach the Board by dint of Section 167(1) of the Act read with Section 2 of the Act.

79. It is the Respondents' case that the Applicant is not a candidate in the subject tender and that it obtained the Tender Document of the subject tender through craft, fraud and illegal infiltration of the communication ecosystem of the Procuring Entity. Mr. Munyao submitted that the subject tender was a restricted tender and that the Applicant is neither a candidate nor a tenderer in respect of the impugned subject tender, having not been part of the 10 bidders invited to tender and as such, Section 167 of the Act locks it out from commencing the instant Request for Review.

80. In response, the Applicant deponed at paragraph 7 of its Supplementary Affidavit that it is a candidate in the subject tender within the meaning assigned by Section 2 of the Act having obtained the Tender Document in the subject tender which was published by the Procuring Entity on the Public Procurement Information Portal on the URL <https://tenders.go.ke/tenders/225471> on 10th February 2025. In support of this, the Applicant annexed a copy of the Tender Document marked as exhibit VS-02. During the hearing, Mr. Omollo submitted that the

allegation that the Applicant infiltrated the communication ecosystem of the Respondent was unfounded and pointed out that the Public Procurement Information Portal is a publicly accessible portal, the documents therein are readily accessible and that he was ready to demonstrate this assertion to the Board.

81. Having considered parties' submission, the Board notes that the question of whether or not the Applicant has the requisite *locus standi* to approach the Board as a candidate is a jurisdictional issue since it is not just any and every person that may move the Board or invoke the jurisdiction of the Board by way of a Request for Review under Section 167 (1) of the Act which states:

"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."

82. On the other hand, Section 2 of the Act provides that:

"Candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity"

83. The question whether or not the Applicant was a candidate in the subject tender's procurement proceedings, rests solely on the interpretation of the term "candidate" under Section 2 of the Act. According to that provision, for one to be a candidate, such a person must have obtained a tender document from a public entity pursuant to an invitation notice by a procuring entity.

84. According to Black's Law Dictionary, 7th Edition, the word 'pursuant to' means '*a term meaning to conform to something or something that is done in consequence of*'. The Collins English Dictionary, 8th Edition defines the term "pursuant to" to mean '*In accordance with*'. This therefore means that a candidate is a person who has obtained a tender document from a public entity in accordance with an invitation notice by a procuring entity.

85. Section 2 of the Act cures the mischief whereby a person obtains a tender document from somewhere else or from someone else, other than the procuring entity that issued the said tender document or such person obtains the tender document from a procuring entity without following the procedure provided for obtaining the tender document.

86. In **PPARB Application No. 1 of 2020, Energy Sector Contractors Association v. Kenya Power & Lighting Company Limited & Another**, the Board held that:

"From the above decisions, the Board notes that the Courts were alive to the fact that it is only candidates (persons who have obtained a procuring entity's tender document) and tenderers (persons who participate in the tendering process) that may approach this Board. From the definition provided in section 2 of the Act, for one to be a candidate in a procurement proceeding or asset being disposed, what that person has to do is to obtain the tender documents from a public entity pursuant to an invitation notice by a procuring entity.

The Procuring Entity in this instance provided two methods that any person could have used to obtain the tender document, and the Applicant chose to exercise one of the two, that is, to download a copy of the Bidding Document applicable to the subject tender from the Procuring Entity's Official Website.

In all the scenarios cited by the Procuring Entity, the Board observes that none of them affect the jurisdiction of the Board to hear and determine an application before it where the Applicant has demonstrated it was a candidate in procurement proceedings initiated under the Act. The Applicant herein filed a copy of the Bidding Document and upon perusal, the same is a copy of the Bidding Document issued by the Procuring Entity in so far as the subject procurement process is concerned.

Accordingly, the Board finds that the Applicant has the locus standi as a candidate to file a Request for Review before this Board as required under section 167 (1) of the Act read together with section 2 of the Act.”

87. Further, in **PPARB Application No. 30 of 2016, Achelis Material Handling Limited v. County Government of Kitui (hereinafter referred to as the County Government of Kitui’s case)** the Board explained the import of the term “candidate” under Section 2 of the Act as follows:

“The law is therefore clear that a party to a Request for Review must first demonstrate that it made an attempt to participate in the procurement process by first and foremost obtaining the tender document. This is necessary to avoid a situation where anyone may choose to interfere with a procurement process in jest or as an afterthought or to just settle scores. The threshold for candidature in this tender as set out by the law is that one must demonstrate they intended to participate in the tender by obtaining the tender document”

88. From the above holdings, the Board found that a candidate must demonstrate its intention to participate in the tendering process and this would be by first and foremost obtaining the tender document.

89. Turning to the circumstances in the instant Request for Review, we note that while Clause 2 of the Invitation to Tender at page 5 of the Tender

Document indicated that tendering would be conducted under the restricted tendering method using a standardized tender document, the Procuring entity did not indicate that this would be restricted to few known suppliers or to a limited number of prospective tenderers.

90. The Procuring Entity actually published the Tender Document on the subject tender on the Public Procurement Information Portal where it was accessible to all eligible and interested bidders to view. This by itself was an invitation to tender by the Procuring Entity. In our considered view, the Applicant accessed the Public Procurement Information Portal and obtained the Tender Document published on the said portal by the Procuring Entity without any reservations or restrictions on any qualifications thus making it a candidate in the subject tender. Upon perusal, we have established that the Tender Document marked as Applicant's exhibit VS-02 is the same as the copy issued by the Procuring Entity and submitted to the Board as part of the confidential documents as far as the subject procurement is concerned.

91. Accordingly, this Board finds that the Applicant has *locus standi* as a candidate to approach the Board and institute the instant Request for Review by dint of Section 167(1) of the Act read with Section 2 of the Act.

ii As to whether the Applicant challenges the choice of procurement method thereby ousting the jurisdiction of the Board by dint of Section 167(4)(a) of the Act.

92. Section 167(4)(a) of the Act expressly stipulates that the jurisdiction of this Board is ousted in instances where the choice of procurement method is the subject of review proceedings before this Board. It reads:

167. Request for a review

.....

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

(1)-

(a) the choice of a procurement method;

93. The Respondents contends that the Applicant in the instant Request for Review seems to take issue with the choice of procurement method undertaken by the Respondents in the subject tender contrary to Section 167(4)(a) of the Act.

94. In response, the Applicant argued that contrary to the averments by the Respondents, the instant Request for Review does not relate to choice of procurement method but rather alleges failure by the Respondents to comply with their obligations under the Act, Regulations 2020 and the Constitution in commencing the subject tender and as such, Section 167(4)(a) of the Act was inapplicable in the circumstances.

95. In order for this Board to establish whether the instant Request for Review requires it to review the Procuring Entity's choice of procurement method, we have examined the Applicant's Request for Review and

observe that the Applicant raised ten (10) grounds of review. A cursory examination of these grounds of review reveals that the instant request for Review raises issues touching on commencement of procurement proceedings in the subject tender by the respondents in breach of the provisions of the Constitution, the Act, Regulations 2020, and in disobedience to the orders of the High Court in Mombasa in High Court Case No. HCCOMM/E070/20204; Power Parts (Kenya) Limited v Kenya Ports Authority.

96. Further, no ground of review had been raised by the Applicant challenging the Procuring Entity's choice of procurement method in the subject tender. What the Applicant takes issue with is how the Procuring Entity went about initializing the procurement process in the subject tender. This has been confirmed by the Applicant as seen at paragraph 10 of its Supplementary Affidavit where it depones that:

"Contrary to the erroneous averment by the Respondents, the Applicant request for review does not relate to choice of procurement method for the subject tender. The Applicant's request for review alleges failure by the Respondents to comply with their obligations under the Public Procurement and Asset Disposal Act, the regulations thereunder and the Constitution in commencing and continuing the subject tender."

97. In the circumstances, it is the Board's finding that the Applicant's instant Request for Review does not challenge the choice of procurement method.

98. The effect of our findings under sub-issue (i) and (ii) of the first issue is that the Board has jurisdiction to hear and determine the instant Request for Review and shall now proceed to address the substantive issues framed for determination.

As to whether the instant Request for Review as filed offends the legal doctrine of *sub judice*?

99. According to the Respondents, the proceedings herein offend the legal doctrine of *sub judice* since the Applicant in filing the instant Request for Review is inviting this Board to exercise its jurisdiction under Section 173 of the Act on matters that are being litigated or are capable of being litigated before the High Court at Mombasa in High Court Case No. HCCOMM/E070/20204; Power Parts (Kenya) Limited v Kenya Ports Authority.

100. The Respondents contend that the instant Request for Review is an abuse of the process of the Board since the subject matter of the Applicant's Request for Review being the subject tender is also the subject matter of the proceedings before the High Court at Mombasa in High Court Case No. HCCOMM/E070/20204; Power Parts (Kenya) Limited v Kenya Ports Authority (hereinafter referred to as

“HCCOMM/E070/20204”) which is being concurrently litigated between the same parties as the proceedings herein.

101. On its part, the Applicant contends that the proceedings in the instant Request for Review are not *sub judice* and depones at paragraph 14 of its Supplementary Affidavit that:

- a) The proceedings at in HCCOMM/E070/20204 were brought under provisions of Section 7 of the Arbitration Act seeking interim measures of protection pending the arbitration proceedings in the contractual dispute arising from the impugned termination of the Applicant’s procurement contracts by the Procuring Entity.
- b) The instant Request for Review is instituted under Section 167 of the Act and Regulation 203 of Regulations 2020 challenging the legality of the procurement proceedings of the subject tender.
- c) The jurisdiction of the Board which has been invoked in the instant Request for Review is incapable of being invoked before the High Court in the proceedings under Section 7 of the Arbitration Act.
- d) The scope of the powers of the Review Board under Section 173 of the Act as invoked by the Applicant cannot be granted by the High Court in proceedings under Section 7 of the Arbitration Act.
- e) The administrative review proceedings and the proceedings in HCCOMM/E070/20204 are asymmetrical.

102. In view of the parties rival submissions, we note that the competency of the instant Request for Review is being challenged on an allegation of having violated the legal doctrine of *sub judice* which is provided in our legal system under Section 6 of the Civil Procedure Act, 2010 as follows:

6. Stay of suit

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

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

103. Section 6 of the Civil Procedure Act expressly provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. In essence, the doctrine of *sub judice* precludes courts and tribunals from proceeding with the trial of any suit where the matter in issue is also the subject of trial in previously commenced proceedings between the same parties or parties under whom any of them claim.

104. For the doctrine of *sub judice* to apply the following principles ought to be present:

(a) There must exist two or more suits filed consecutively;

(b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

105. In **Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 others [2022] eKLR ; Nairobi ELC Case No. E246 of 2021** the Environment and Land Court struck out a suit underscoring the position that a multiplicity of suits over the same issue between the same parties only serves to clog the justice system and is frowned upon as an abuse of the court process:

"30.The point to underscore is that a litigant has no right to pursue paripasu more than once processes which will have the same effect at the same time or at different times with a view of obtaining victory in one of the process or in both. I have in previous decisions stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. Litigation is a contest by judicial process

where the parties place on the table of justice their different position clearly, plainly and without tricks.

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

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

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

106. Additionally, in **Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga**, the High Court held that it is not the form in which the suit is framed that

determines whether it is *sub judice*, rather it is the substance of the suit, and that, there can be no justification in having the two cases being heard parallel to each other.

107. In view of the contest between the parties herein, the question that this Board must now ask itself is whether the substance of the instant Request for Review is wholly identical to the proceedings before the High Court at Mombasa in HCCOMM/E070/20204 as to render the instant Request for Review *sub judice*.

108. From our reading of the Ruling delivered by Justice Wangari in the High Court at Mombasa in HCCOMM/E070/20204 on 6th March 2025 during the pendency of the instant Request for Review, we note that the decision by the High Court relates to applications filed within the suit by the Applicant dated 5th December 2024, 9th January 2025, 30th January 2025 and 27th February 2025. The court pointed out that applications after the one dated 5th December 2024 make reference to the first application and as such, pronouncing itself on the first application would resolve the subsequent applicants. Its ruling therefore concerned itself with the first application of 5th December 2024 which was brought under Section 6 and 7 of the Arbitration Act, Rule 2 of the Arbitration Rules and all other enabling provisions of the law.

109. The orders sought therein were that:

(a).....

(b) Pending the hearing and determination of the application inter partes, the Honourable Court be pleased to issue interim protection relief in the nature of an injunction restraining the Respondent, its officials, servants, agents, employees, assigns and/or any other person or entity claiming through it from any manner upholding the termination of contracts Tender No. KPA/107/2023-24/TE dated 2nd February 2024 and Contract Tender No. KPA/205/2023-24/TE dated 19th April 2024; assigning the said contract items to any other person; advertising fresh tenders for the said contract items and all other matters ancillary or incidental thereto including supply of spare parts for Kalmar Terminal Tractors and supply of spare parts for Kalmar Reach stackers, whether internally or on local newspapers, websites and other forms of media; or interfering with the existing contracts;

(c).....

(d) the matter be referred to Arbitration as per Clause 10(b) of the contracts;

(e) Pending the hearing and determination of the Arbitration proceedings between the parties herein, the Honourable Court be pleased to grant interim protection measures in the nature of injunction staying the termination of the Applicant's contracts Tender No. KPA/107/2023-24/TE dated 2nd February, 2024 and Contract Tender No. KPA/205/2023-24/TE dated 19th April, 2024 for the supply of spare parts for

***Kalmar Terminal Tractors and supply for spare parts for Kalmar Reach stackers; and
(f) Costs of the application be provided for.***

110. The High Court discerned the issue for determination in the above application to be whether the Plaintiff (Applicant herein) had made out a case for grant of interim protection measures of injunction and if to refer the matter to arbitration. From its analysis, the High Court established that the dispute between parties revolved around termination of contracts in Tender No. KPA/107/2023-24/TE dated 2nd February, 2024 and Tender No. KPA/205/2023-24/TE dated 19th April, 2024 for the supply of spare parts for Kalmar Terminal Tractors and supply for spare parts for Kalmar Reach stackers respectively. From the two contracts, it was clear that parties had expressly agreed to make every effort to resolve amicably by direct negotiations any dispute arising and in the event it was not resolved within 30 days, either party was to give notice of its intention to commence arbitration.

111. The court found that parties had expressly consented to a dispute resolution forum being arbitration and that the subject matter of the arbitration pertained to performance of the two contracts and as such, an interim protection measure in the nature of injunction was appropriate in the circumstances as it would restrain the Defendant (Respondents) from terminating the two contracts pending arbitration. The Court also found the prayer to refer the matter to arbitration merited as per Clause 10(b) of the contracts in dispute.

112. Notably, from the Order issued by the Learned Judge on 6th December 2024 pertaining to the Applicant's Chamber Summons Application dated 5th December 2024, the court issued a temporary injunction against the Respondent, on interim basis and pending further directions of the court, as prayed in prayer (b) where it restrained the Respondents from in any manner upholding the termination of the aforementioned contracts, assigning the said contract items to any other person, advertising fresh tenders for the said contract items and all other matters ancillary or incidental thereto including supply of spare parts for Kalmar Terminal Tractors and supply of spare parts for Kalmar Reach stackers, whether internally or on local newspapers, websites and other forms of media, or interfering with the existing contracts.

113. The order of 6th December 2025 pertaining to the Applicant's Chamber Summons Application dated 5th December 2024 as referred to by the Applicant at paragraph 11 of its Supporting Affidavit was clearly issued on an interim basis and further directions pertaining to this application were issued in the form of the Ruling delivered on 6th March 2025 whereby prayers (d) and (e) were granted.

114. Turning to the instant Request for Review, we note that the prayers sought by the Applicant pertain to annulment of the commencement of a fresh tendering process by the Respondents with regard to Rewinding, Servicing, Repair, and Condition Monitoring of Rotating Electromechanical Machines. The Applicant also seeks for the Board to direct the 1st Respondent to refrain from commencing new procurement proceedings

in respect of goods, works and/or services which are subject of the ongoing procurement contracts executed between parties that are in dispute.

115. Having keenly examined the issues raised in HCCOMM/E070/20204 and in the instant Request for Review, we note that:

- i The parties in both are similar;
- ii The issue in contest in HCCOMM/E070/20204 relates to termination of contracts in Tender No. KPA/107/2023-24/TE dated 2nd February, 2024 and Tender No. KPA/205/2023-24/TE dated 19th April, 2024 for the supply of spare parts for Kalmar Terminal Tractors and supply for spare parts for Kalmar Reach stackers respectively while the issue in contest in the instant Request for Review relate to commencement of procurement proceedings in Tender No. KPA/115/2024-25/TE for Rewinding, Servicing, Repair, and Condition Monitoring of Rotating Electromechanical Machines;
- iii There is no specific order issued by the High Court in HCCOMM/E070/20204 that restrains the Respondents from pursuing fresh tendering. What the Respondents are restrained from doing is terminating the two contracts pending arbitration and the Applicant has been issued with an interim protection measure in the nature of an injunction to this effect as far as the two contracts are concerned. In essence, the Applicant already has appropriate remedies under the existing contracts.

- iv The impugned subject tender in the instant Request for Review has no correlation to the existing contracts in dispute in so far as the same is a fresh procurement process that does not fall within the terms of the existing contracts between the parties that are in dispute.
- v The proceedings before this Board are not identical to the proceedings before the High Court at Mombasa in HCCOMM/E070/20204 since the subject matter herein arose from a fresh procurement while the issues in HCCOMM/E070/20204 pertain to existing contracts between parties which in any event, the Board is divested of jurisdiction of delving into their contents by virtue of Section 167(4)(c) as read with Section 135 of the Act.

116. Based on the above findings, we find and hold that the instant Request for Review as filed does not offend the legal doctrine of *sub judice*.

As to whether the Procuring Entity in commencing the procurement process in the subject tender acted contrary to the law.

117. We understand the Applicant's case on this issue to be that in commencing the procurement process in the subject tender, the Respondents acted contrary to the orders of the High Court in HCCOMM/E070/20204 and breached the constitutional principle of rule of law as well as the statutory obligations on conduct of restricted tendering

under Section 102(1)(b) of the Act. The Applicant took issue with how the procurement proceedings in the subject tender was initiated and contend that the process was commenced based on a professional opinion rendered by the head of procurement and not on the basis of an existing procurement plan. Further, the Applicant contends that the Respondent breached its obligation by inviting tenderers who were not prequalified for the provision of the similar goods, works, and/or services sought to be procured in the subject tender.

118. In response, the Respondents submitted that in commencing the procurement proceedings in the subject tender, they were not in contempt of the orders of the High Court issued in HCCOMM/E070/20204 and that they complied with the requirements of initiating an alternative procurement process by way of restricted tendering as stipulated under Article 227 of the Constitution as read with Sections 3, 91(2) and 102 of the Act.

119. The Board is alive to the objective of public procurement which is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

"227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in

accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –

a)d)”

120. Initiation of the procurement process is provided for under Section 73 of the Act which provides:

"Subject to the procurement planning, initiation of the procurement process shall be as prescribed in the Regulations."

121. Regulation 71 of Regulations 2020 further provides that:

"(1) Pursuant to section 73 of the Act, the head of the user department shall initiate the procurement process through a requisition as per the approved procurement plan.

(2) The user department shall submit the requisition under paragraph (1) to the head of the procurement function for processing which shall be accompanied by the following, as applicable—

(a) feasibility studies or surveys and reports;

(b) specifications, bills of quantities, technical drawings, or terms of reference;

- (c) environmental and social impact assessment reports;***
 - (d) reasonable expected date of delivery; and***
 - (e) any other necessary information pertaining to the procurement.***
- (3) When estimating the value of the goods, works or services, the accounting officer shall ensure that the estimate is realistic and based on up-to-date information on economic and market conditions.”***

122. Turning to the instant Request for Review, we have hereinabove established that commencement of the procurement proceedings in the above subject tender by the Respondents was not in violation of the orders by the High Court in HCCOMM/E070/20204. These proceedings do not fall within the terms of the impugned contracts that were signed between the parties herein and it is speculative for the Applicant to assume that the 2 contracts would be affected by initiation of the procurement proceedings in the subject noting in view of the interim protection measure in the nature of an injunction issued by the High Court.

123. We note that the Respondents produced into evidence marked as exhibit KPA-7 and KPA-8 at paragraphs 23 and 24 of the Affidavit in Support of the Memorandum of Response sworn by Captain William Ruto an Internal Memo dated 9th August 2024 from the Manager Container Terminal Engineering of the Procuring Entity requesting urgently through the General Engineering Services for the start of a procurement process

for rewinding, servicing, repair and condition monitoring of rotating electromechanical machines.

124. Subsequently, vide a further Internal Memo dated 22nd January 2025, the head of procurement function and the General Manager, Supply Chain Management of the Procuring Entity provided the 1st Respondent with a signed professional opinion recommending for the procurement of the subject tender to be conducted by way of restricted tendering method pursuant to Section 102(1)(b) of the Act and Regulation 89(1) of Regulations 2020. This professional opinion was approved by the 1st Respondent on 23rd January 2025.

125. We note that pursuant to Section 44 of the Act, it is the responsibility of the 1st Respondent to ensure that procurement of goods, works and services are within the approved budget, and in this instance, the 1st Respondent in approving the Professional Opinion dated 22nd January 2025 (exhibit marked 'KPA-8') satisfied himself that adequate funds had been set aside and budgeted for the procurement in the subject tender and that this expenditure would be charged against the Crane Spares Vote under cost centre 2100312 GL 600442 based on as and when the need arises.

126. In view of the above, we have no doubt that the procurement proceedings in the subject tender were planned for, budgeted for and initiated based on an existing procurement plan. It is therefore incorrect for the Applicant to state that the same were initiated based on a

professional opinion rendered by the head of procurement function noting that the Professional Opinion of 22nd January 2025 was propelled by the Internal Memo from the General Manager Supply Chain (exhibit marked 'KPA 7').

127. As to the choice of procurement method adopted in the subject tender we note that Section 91 of the Act provides for Choice of Procurement procedure while Section 102 of the Act provides for Restricted tendering as follows:

91. Choice of procurement procedure

(1) Open tendering shall be the preferred procurement method for procurement of goods, works and services.

(2) The procuring entity may use an alternative procurement procedure only if that procedure is allowed and satisfies the conditions under this Act for use of that method.

(3) Despite sub-sections (1) and (2) open tendering shall be adopted for procurement of goods, works and services for the threshold prescribed in the respective national and county Regulations.

.....

102. Restricted tendering

(1) An accounting officer of a procuring entity may use restricted tendering if any of the following conditions are satisfied—

(a) competition for contract, because of the complex or specialized nature of the goods, works or services is restricted to prequalified tenderers resulting from the procedure under section 94;

(b) the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, works or services to be procured;

or

(c) if there is evidence to the effect that there are only a few known suppliers of the whole market of the goods, works or services;

(d) an advertisement is placed, where applicable, on the procuring entity website regarding the intention to procure through limited tender.

(2) An accounting officer of a procuring entity may engage in procurement by means of restricted tendering in such manner as may be prescribed.

128. Regulation 89 of Regulations 2020 further provides that:

89. Restricted tendering

(1) An accounting officer may use restricted tendering, only if any of the conditions set out in section 102(1) of the Act are satisfied.

(2) A procuring entity that conducts procurement using the restricted tendering method shall be subject to the

procurement thresholds set out in the Second Schedule to these Regulations.

(3) Unless otherwise provided in this regulation, the procedure for open tendering set out in the Act and these Regulations shall apply mutatis mutandis to restricted tendering.

(4) A procuring entity shall, for the purpose of identifying pre-qualified contractors pursuant to section 102(1)(a) of the Act, use the pre-qualification procedures set out in sections 93, 94 and 95 of the Act.

(5) Where restricted tendering is used pursuant to section 102(1)(b) of the Act, the procuring entity shall invite tenders from at least ten persons selected from the list maintained as provided under sections 57 and 71 of the Act or otherwise as permitted under section 56 of the Act.

(6) Where restricted tendering is used pursuant to section 102(1)(c) of the Act, the procuring entity shall invite tenders from all the known suppliers of the goods, works or services.

(7) The minimum time for preparation of tenders for the purposes of section 102 of the Act shall be a period of seven days.

(8) For greater certainty of section 102(1)(d) of the Act, any procurement under section 102(1)(c) of the Act, the procuring entity shall place an advertisement on its

website or on state portal regarding their intention to procure through restricted tender for at least three days before inviting tenders and where any bidder outside the known suppliers emerge, he or she shall be invited to bid.

129. In essence, an accounting officer of a procuring entity may use restricted tendering method if it is both allowed and satisfied, *inter alia*, that the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, works or services to be procured. In such instance, the procuring entity shall invite tenders from at least 10 persons selected from the list maintained as provided under Section 57 and 71 of the Act or otherwise as permitted under Section 56 of the Act whose provisions are as hereunder:

***"56. Use of list of another state organ or public entity
(1) To identify qualified persons, a State organ or public entity may seek, in writing, to use another State organ's, public entity's or regulated professional body's registration list of all registered persons in the category, provided that the list is valid and developed through a competitive process in accordance with the relevant provisions of this Act or, in the case of regulated professional bodies, developed through a process in accordance with relevant provisions of the legislation regulating the particular profession.***

(2) The State organ or public entity shall then subject the list, together with its own, where applicable, to the procedures in this Act”

" 57 List of registered suppliers

(1) The head of the procurement function of a procuring entity shall maintain and update lists of registered suppliers, contractors and consultants in the categories of goods, works or services according to its procurement needs.

(2) Submission of names shall be continuous and the registration list shall be updated periodically as prescribed in Regulations and in accordance with this Act.”

71. Registration of suppliers

(1) The head of procurement function shall maintain and continuously update lists of registered suppliers, contractors and consultants in various specific categories of goods, works or services according to its procurement needs.

.....

(4) The lists shall be applied on the alternative procurement methods as specified and appropriate and the list shall —

(a) be generated through portal, websites and people submitting hard copies of their intention to supply;

(b) allow for continuous applications and hence updating;

(c) be evaluated leading to registration on a bi-annual basis;

(d) be generated through market knowledge and survey; and

(e) be as may be prescribed.

130. With the above in mind, we note that from the background of the procurement proceedings in the subject tender as laid out in the Professional Opinion of 22nd January 2025, the restricted method of tendering was recommended due to the urgency considering the short lead time available coupled with the need and firms identified for invitation were listed from persons who had previously performed similar works and demonstrated satisfactory services to the Procuring Entity, meaning that these were from the list of registered suppliers maintained by the Head of Procurement Function.

131. In the circumstances, this Board finds that by commencing the procurement process in the subject tender, the Procuring Entity did not act contrary to the law.

What orders the Board should grant in the circumstances?

132. The Board has found that the preliminary objections raised by the Respondents are devoid of merit and that it has jurisdiction to hear and determine the instant Request for Review.

133. We have also found that the instant Request for Review as filed does not offend the legal doctrine of *sub judice*.

134. We have established that the Procuring Entity did not act contrary to the law in commencing the procurement process in the subject tender.

135. The upshot of the Board’s findings is that the instant Request for Review fails and is disallowed.

FINAL ORDERS

136. 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:

A. The Request for Review dated 21st February 2025 and filed on 24th February 2025 in respect of Tender No. KPA/115/2024-25/TE for Rewinding, Servicing, Repair, and Condition Monitoring of Rotating Electromechanical Machines be and is hereby dismissed.

B. The Respondents are hereby directed to proceed with the procurement proceedings of the subject tender to its logical conclusion.

C. Considering the outcome of this Request for Review, each party shall bear its own costs in the Request for Review

Dated at NAIROBI this 17th Day of March 2025.

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PANEL CHAIRPERSON

SECRETARY

PPARB

PPARB