

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 115/2019 OF 24TH SEPTEMBER 2019

BETWEEN

KENSUN ENTERPRISES

JV GUANGDONG HONNY POWER TECH

CO. LTD.....APPLICANT

AND

ACCOUNTING OFFICER,

KENYA AIRPORTS AUTHORITY.....1ST RESPONDENT

AND

KENYA AIRPORTS AUTHORITY.....2ND RESPONDENT

Review against the decision of Kenya Airports Authority to terminate Tender No. KAA/OT/JKIA/1534/2018-2019 for the Supply, Installation of a 2 No. 2MVA Standby Generators and Associated Works at Jomo Kenyatta International Airport.

BOARD MEMBERS

- | | |
|--------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Eng. Weche Okubo, OGW | -Member |
| 3. Mrs. Rosemary Gituma | -Member |
| 4. Mrs. Gilda Odera | -Member |

5. Mr. Nelson Orgut -Member

IN ATTENDANCE

1. Mr. Philemon Kiprop -Holding brief for Secretary
2. Ms. Maryanne Karanja -Secretariat
3. Mr. Eustus Mwethia -Intern
4. Ms. Whitney Achieng' -Intern
5. Ms. Lorine Akinyi -Intern

PRESENT BY INVITATION

APPLICANT

**-KENSUN ENTERPRISES JV
GUANGDONG HONNY POWER TECH
CO. LTD**

1. Mr. Emmanuel Mumia -Advocate, M G Law Advocates
2. Mr. Moses Kahoro -Advocate, M G Law Advocates

PROCURING ENTITY

-KENYA AIRPORTS AUTHORITY

1. Mr. Abdihakim Aden -Advocate, Abdulkhakim & Company
Advocates
2. Mr. Jim Akatch -Advocate, Abdulkhakim & Company
Advocates

3. Patrick Wanjuki -General Manager, Procurement and Logistics
4. Mr. Emmanuel Lotabu -KAA

INTERESTED PARTIES

1. Mr. Paul Mbari -Sales Representative, Electrowatts Limited
2. Mr. George Masaba -Manager, Sterling & Wilson Private Ltd
3. Mr. Amos Kamau -Manager, Kassarani Enterprises
4. Ms. Janet Kajuju -Manager, Lenican
5. Ms. Beth Shiru -Manager, Lenican
6. Mr. Patrick Njuguna -Manager, Corner Electrical
7. Mr. Paul Olela -Engineer, Commin C & G Ltd

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Airports Authority (hereinafter referred to as “the Procuring Entity”) invited sealed bids from eligible Tenderers to bid for Tender No. KAA/OT/JKIA/1534/2018-2019 for the Supply, Installation of a 2 No. 2MVA Standby Generators and Associated Works at Jomo Kenyatta International Airport (hereinafter referred to as “the subject tender”).

The tender was advertised in the local newspapers under *MyGov* segment on 4th June 2019 and a site visit & pre-bid meeting was held at the Procuring Entity's Headquarters at the Data Centre Conference room on 19th June 2019 at 10.00 a.m. The tender closing/opening was scheduled on 21st June 2019, however three (3) addenda were issued on 10th, 11th and 18th June 2019 thereby necessitating extension of the closing date to 28th June 2019.

Bid Submission Deadline and Opening of Bids

The tender closed and opened on 28th June 2019 at 11.00 am in the presence of tenderers' representatives. Eleven (11) bids were submitted and the Tender Opening Committee proceeded to read out the names of the bidders, amounts quoted as per their Form of tender, tender security validity period and number of documents submitted by each tenderer.

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was conducted in the following three stages:-

- i.** Preliminary Evaluation/Mandatory Requirements;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

1. Preliminary Evaluation/Mandatory Requirements

At this stage, the Evaluation Committee applied the evaluation criteria under Clause 1 of Section IV. Evaluation Criteria at page 27 of the Document for Supply, Installation of a 2 No. 2MVA Standby Generators and Associated Works at Jomo Kenyatta International Airport (hereinafter referred to as “the Tender Document”). Two **(2)** bidders complied fully with the mandatory requirements, hence qualified for Technical evaluation. The remaining **nine (9)** bidders were found non-responsive at the end of Preliminary Evaluation and reasons given as below:-

BID No.	NAME OF COMPANY	REASON (S) FOR FAILURE
1	Famiar Generating System Ltd	<ol style="list-style-type: none"> 1. Did not provide proof of registration as Original Equipment Manufacturer (OEM) representative neither 2. Did not provide National Construction Specialist Contractors Category NCA1 and NCA2 for local firms- Electrical Installation or Generating Plans instead he provided NCA7
2	Ryce East Africa Ltd	<ol style="list-style-type: none"> 1. Did not provide proof of registration as Original Equipment Manufacturer (OEM) representative 2. Did not provide After-Sales maintenance proposal for a period of five years after commissioning
3	Central Electricals International Ltd	<ol style="list-style-type: none"> 1. Did not provide proof of registration as Original Equipment Manufacturer (OEM) representative
6	AEA Ltd JV M.J Vekaria Electric Limited	<ol style="list-style-type: none"> 1. Did not provide proof of registration as Original Equipment Manufacturer (OEM) representative 2. Tax compliance for AEA is not valid (provided certificate for 27/03/2018) and acknowledgement receipt dated 30/04/2019
7	Electro Watts Ltd	<ol style="list-style-type: none"> 1. Did not provide proof of registration as Original Equipment Manufacturer (OEM) representative 2. Did not provide National Construction Specialist Contractors Category NCA1 and NCA2 for local firms- Electrical Installation or Generating Plans instead he provided NCA6
8	Abiel Supplies Ltd JV Philafe Engineering Ltd	<ol style="list-style-type: none"> 1. Did not provide proof of registration as Original Equipment Manufacturer (OEM) representative 2. Did not provide After-Sales maintenance proposal for a period of five years after commissioning
9	Cummins C & G Limited	<ol style="list-style-type: none"> 1. Did not provide proof of registration as Original Equipment Manufacturer (OEM) representative

BID No.	NAME OF COMPANY	REASON (S) FOR FAILURE
		2. Did not provide After-Sales maintenance proposal for a period of five years after commissioning
10	Mantrac Kenya Ltd	1. Did not provide proof of registration as Original Equipment Manufacturer (OEM) representative
11	Achelis Material Handling Ltd	1. Did not provide proof of registration as Original Equipment Manufacturer (OEM) representative

The two (2) bidders who were responsive and qualified for Technical evaluation were:-

- a) Bidder No. 4, Kensun Enterprises JV Guangdong Honny Power-Tech Co. Ltd
- b) Bidder No. 5, Sterling & Wilson Private Ltd

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria under Clause 2 of Section IV. Evaluation Criteria of the Tender Document. Bidders were required to meet the requirements in all the sub-categories for Technical Evaluation in order to be found responsive and eligible to proceed to Financial Evaluation.

One **(1)** bidder complied fully with the technical requirements, hence qualified for Financial Evaluation. However, the other bidder failed at the Technical stage due to the following reasons:-

1. Did not demonstrate past experience and performance in Installation of Generating Plants projects, (minimum 2No projects) in the role of contractor, subcontractor, or management contractor, each with value

of at least **KES 100,000,000.00** within the past three consecutive years (*2015, 2016, 2017and 2018*)

2. Did not demonstrate experience in Medium Voltage Installation works minimum 2No. Projects of Value KES 100,000,000.00 within the past three consecutive years (*2015, 2016, 2017and 2018*)
3. **Did not meet the minimum of 3 similar works** in the role of contractor, subcontractor, or management contractor; **only provided for 2 works done**
4. **Did not meet the minimum of 3 similar works** Supply and installation of a bank-up of at least two or multiple electrical generator sets with parallel operation providing combined load capacity of at least 2 MVA; **only provided for 2 works done**
5. Supply and installation of automatic electrical change-over systems
6. Supply and installation of two or multiple electrical generator sets synchronization systems
7. He did not provide Experience in automation and SCADA system configuration minimum one project for the last 3yrs.
8. He did not provide Maintenance Plan for 5 years and tabulation of full life-cycle cost of the equipment.
9. **Electrical Technician, did not** meet at least five (5) years' experience threshold in installations of similar works – holding at least Diploma in Electrical Engineering or equivalent and Valid Class 'B' ERC license

10. **Mechanical Technician, did not** meet at least five (5) years' experience threshold in installations of similar works – holding at least Diploma in Mechanical Engineering Plant or equivalent.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the evaluation criteria under Clause 5 of Section IV. Evaluation Criteria of the Tender Document which criteria stated that:-

"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be subject of correction, adjustment or amendment in any way by any person or entity as provided under section 82 of the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act"). The award will be based on the lowest evaluated bidder."

The results of Financial Evaluation was recorded as follows:-

Bidder No.	Name of the firm	Amount in Kshs.
4	Kensun Enterprises JV Guangdong Honny Power-Tech Co. Ltd	Kshs. 147,960,078.00

Recommendation

The Evaluation Committee recommended that the subject tender be awarded to **M/s Kensun Enterprises JV Guangdong Honny Power-Tech Co. Ltd** being the lowest evaluated responsive tender in accordance with the Act at their quoted bid price of **Kshs. 147,960,078.00 (Kenya Shillings One Hundred and Forty-Seven Million, Nine Hundred and Sixty Thousand and Seventy-Eight)** inclusive of **taxes**, subject to a due diligence exercise on information provided by the bidder.

Due Diligence

a. Initiation of the due diligence exercise

According to the Due Diligence Results Report signed on 9th September 2019, the Evaluation Committee conducted a due diligence exercise on the previous works done by M/s Guangdong Honny Power-Tech Co. Ltd to confirm whether the works were executed to completion and satisfactorily and also on the authentication of the Original Equipment Manufacturers of the Certificate.

b. Progress Report on Evaluation and Due Diligence

During the pendency of the Due Diligence exercise, the Head of Procurement function, that is, the General Manager, Procurement and Logistics issued a Progress Report on Evaluation and Due Diligence for the subject tender expressing his views on the Evaluation process and ongoing due diligence

exercise. In his conclusion, he noted that the Evaluation Committee is awaiting the response of M/s Sime Darby Elco Power Systems Limited regarding authentication of the OEM Certificate submitted by **M/s Kensun Enterprises JV Guangdong Honny Power-Tech Co. Ltd** to enable it (the Evaluation Committee) make an informed decision whether to make a recommendation for award of the tender or not.

c. Conclusion of due diligence

Upon concluding its due diligence exercise, the Evaluation Committee recommended that the subject tender be awarded to **M/s Kensun Enterprises JV Guangdong Honny Power-Tech Co. Ltd** at their quoted tender sum, after a physical site visit to the factory to verify the capacity and capability of the bidder to undertake the task.

Professional Opinion

The Head of Procurement function through his Professional Opinion dated 11th September 2019, expressed his views concerning the subject procurement process. He further reviewed the Evaluation Report and Due Diligence Report and stated that in his opinion, the subject procurement process should be terminated pursuant to section 63 (1) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") since he opined that material governance issues had been detected.

Notification of Termination and outcome of evaluation

In letters dated 11th September 2019, all bidders who participated in the subject tender were notified that the subject procurement process has been terminated due to material governance issues being detected on tender documentation. Bidders were further informed why their bids had been found non-responsive in the relevant stage of evaluation.

THE REQUEST FOR REVIEW

M/s Kensun Enterprises JV Guangdong Honny Power Tech Co. Ltd (hereinafter referred to as "the Applicant") lodged a Request for Review sworn and filed on 24th September 2019 together with a Statement in Support of the Request for Review (hereinafter referred to as "the Applicant's Statement") dated and filed on even date and a Further Statement in Support of the Request for Review sworn and filed on 7th October 2019 (hereinafter referred to as "the Applicant's Further Statement").

In response, the Procuring Entity lodged a Reply dated 30th September 2019 and filed on 1st October 2019 (hereinafter referred to as "the Procuring Entity's Response").

The Applicant sought for the following orders in the Request for Review:-

- 1. An order declaring that the 2nd Respondent's decision terminating Tender No. KAA/OT/JKIA/1534/2018-2019 for***

the Supply, Installation of a 2 No. 2MVA Standby Generators and Associated Works at Jomo Kenyatta International Airport, null and void;

- 2. An order quashing and setting aside the termination;***
- 3. An order directing the 2nd Respondent to extend the tender validity period for such period as the Review Board deems fit to enable the Respondent conclude the tender process;***
- 4. An order directing the 2nd Respondent to award the tender to the Applicant subject to the recommendation of the tender evaluation committee;***
- 5. An order awarding costs of the review to the Applicant;***
- 6. Any other relief that the Review Board deems fit to grant.***

During the hearing, the Applicant was represented by Mr. Mumia on behalf of the firm of Mwaniki Gachoka & Co. Advocates while the 1st and 2nd Respondents were represented by Mr. Abdihakim appearing together with Mr. Akatch.

PARTIES' SUBMISSIONS

Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. Emmanuel Mumia, fully relied on the Request for Review, the Applicant's Statement and Further Statement.

Mr. Mumia submitted that vide a letter dated 11th September 2019, the Procuring Entity informed the Applicant that the subject tender was terminated pursuant to section 63 (1) (e) of the Act because the Procuring Entity had detected material governance issues, but that no particulars of the said material governance issues had been furnished to the Applicant. This prompted the Applicant to write to the Procuring Entity and that the Procuring Entity informed the Applicant that there was no information to verify the documents submitted by the Applicant in its tender in so far as Proof that the Applicant's Joint Venture Partner is an approved and authorized OEM is concerned.

He then referred the Board to paragraph 3 of the Applicant's Further Statement where the correspondences between the Applicant's JV partner, Perkins Engines Company, Sime Darby Elco Power Systems Limited can be found. In Counsel's view, the Procuring Entity received confirmation that the Applicant's Joint Venture partner is an approved and authorized OEM and Perkins Engines' distributor, but still chose to terminate the subject tender on account of material governance issues.

Mr. Mumia submitted that there was no real and cogent evidence of the alleged material governance issues to satisfy termination of the subject tender on that ground. In that regard, he urged the Board to annul the said

termination and direct the Procuring Entity to proceed and award the subject tender to the Applicant.

Procuring Entity's Submissions

In their submissions, Mr. Abdihakim Aden and Mr. Jim Akatch relied on the Procuring Entity's Response.

Mr. Abdihakim began his oral submissions by stating that section 63 of the Act gives the Procuring Entity the discretion to terminate a tender prior to award. Hence, it was his position that the Procuring Entity had the right to terminate the subject tender and further that all bidders who participated in the subject tender were notified of the said termination and no award was made by the Procuring Entity.

He further submitted that the Procuring Entity conducted a due diligence process pursuant to section 83 of the Act, under which material governance issues were discovered during such due diligence process.

On his part, Mr. Akatch submitted that material governance issues comprise of anything that interferes with the integrity of the procurement process that makes the Accounting Officer unable to award the tender. He directed the Board to the Evaluation Report pertaining to this procurement process and

submitted that the Evaluation Committee recommended award to the lowest evaluated bidder subject to a due diligence process.

To put the alleged material governance issues detected into context, Mr. Akatch referred the Board to page 70 of the Procuring Entity's bundle of documents wherein the criteria for "proof of registration as Original Equipment Manufacturer representative" can be found. In relation to this requirement, Mr. Akatch submitted that in a letter dated 8th August 2019, the Procuring Entity wrote to Perkins Engines Company Ltd seeking confirmation whether the Applicant's JV partner is an approved original equipment manufacturer and authorized distributor of Perkins Engines Company Ltd.

He then submitted that the Procuring Entity received a response on the same date of 8th August 2019 from Perkins Engines Company Ltd who referred the Procuring Entity to Perkins US Customer Service Office. The Procuring Entity then wrote to Perkins US Customer Service Office who could not answer the Procuring Entity's question as the said customer service office stated that Perkins has many companies that manufacture its engines. According to Mr. Akatch, this was evidence that the Applicant's OEM certificate was in doubt.

Mr. Akatch submitted that the Procuring Entity then wrote to **M/s Guangdong Honny Power-Tech Co. Ltd**, who is the JV partner of the Applicant, vide a letter dated 26th August 2019. The Applicant's JV partner,

in Counsel's view, introduced a third party, i.e. M/s Sime Darby Elco Power Systems Limited. This introduction of the so called "third party" whose details had not been submitted in the Applicant's tender document led the Procuring Entity to conclude that material governance issues had arisen. He thus urged the Board to interrogate whether a distributor can confirm approval and authorization of a fellow distributor.

He further urged the Board to interrogate the legal relationship between the Applicant's Joint Venture Partner and Perkins Engines Company Ltd and that since Perkins, in his view, stated they were unable to respond to the Procuring Entity's query, then they had not authorized the Applicant's Joint Venture to use their equipment.

Mr. Akatch submitted that the award of the tender could not be made to the Applicant since a confirmation whether the Applicant is an approved and authorized OEM distributor of Perkins Engines Company could not be made during the due diligence exercise.

In conclusion, Mr. Akatch urged the Board to dismiss the Request for Review with costs to the Procuring Entity.

Applicant's Rejoinder

In a rejoinder, Mr. Mumia submitted that the instant review does not call for the Board to consider the legal relationship between the Sime Darby Elco Power Systems Limited and Perkins Engines Company Limited. However, it was Counsel's view that should the Board interrogate the legal relationship of the two companies, the Board would observe that the correspondences of M/s Sime Darby Elco Power Systems Limited show that Perkins Engines Company Limited is cited on the letterhead of the letter written by Sime Darby Elco Power Systems Limited to the Procuring Entity.

Counsel submitted that the Applicant is well aware of the Procuring Entity's discretion to terminate a procurement process, but that the same ought to be exercised judiciously and whether that threshold was met has not been proved to the satisfaction of the Board.

In conclusion, Counsel urged the Board to find merit in the Request for Review and allow the same as prayed by the Applicant.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documentation filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and oral submissions of the parties. Before identifying the issue for determination, the Board would like to dispense with a preliminary issue that arose on the hearing date.

The Applicant lodged its Request for Review on 24th September 2019. Later on 1st October 2019, the Board Secretary notified all bidders who participated in the subject tender that the hearing date of the review has been scheduled for 9th October 2019 at 2.00pm. The Board Secretary further informed bidders that they are *"required to forward to the Board any information and arguments about the tender."*

The Request for Review came up for hearing on 9th October 2019, but the Board began its proceedings at 3.00pm. The Manager of M/s Sterling & Wilson Company Limited, that is, Mr. George Masaba introduced himself immediately after Advocates for the Applicant and the Procuring Entity intimated their intention to address the Board.

Mr. Masaba submitted that he would not be supporting the Applicant neither the Procuring Entity and had not filed any documentation before the time for hearing. He presented a document when the hearing was ongoing but none

of the parties to the Request for Review had prior opportunity to study the same and challenge its contents if they wished to do so. Consequently, the Applicant and the Procuring Entity objected to the same being admitted part of the pleading before the Board, which objection was upheld.

Having considered the circumstances before it, the Board noted that even though the matter was scheduled for hearing at 2.30pm, the hearing only started at 3.30pm. This afforded sufficient time to all Interested Parties including Mr. Masaba to file any documentation that other parties to the review would have studied before the hearing. Secondly, Mr. Masaba intimated that he was dissatisfied with the outcome of the procurement process and would like to address the Board on his dissatisfaction.

A bidder who is dissatisfied by the decision of a procurement process on its bid, can only express his dissatisfaction by lodging a Request for Review pursuant to section 167 (1) of the Act, which states as follows:-

"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."

Mr. Masaba, being dissatisfied with the decision of the Procuring Entity ought to have filed a Request for Review. Since he was neither supporting the Applicant nor the Procuring Entity, inevitably, he would raise issues touching on the outcome of the bid submitted by his company, that is M/s Sterling & Wilson Company Limited, as he indicated that he was dissatisfied by the Procuring Entity's decision.

Had he filed a Request for Review on behalf of M/s Sterling & Wilson Company Limited, the Board would have exercised its discretion and perhaps consolidate the two review applications, that is, the one by the Applicant herein, and the one filed on behalf of M/s Sterling & Wilson Company Limited if they relate to the same tender. This discretion is identified in Regulation 82 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") which states as follows:-

"Where two or more requests for review are instituted arising from the same tender or procurement procedure the Review Board may consolidate the requests and hear them as if they were one request for review."

Given that Mr. Masaba had not expressed his dissatisfaction on the outcome of the bid submitted on behalf of M/s Sterling & Wilson Company Limited through a Request for Review, he was only allowed to address the Board on

provisions of law touching on the subject procurement process but he chose not to exercise this right.

Having dispense with the above preliminary issue, the main issue for determination is as follows:-

Whether the Procuring Entity terminated the procurement proceedings of the subject tender in accordance with section 63 of the Act thus ousting the jurisdiction of the Board.

Termination of procurement proceedings is governed by section 63 of the Act. In addition to this, when the said termination meets the threshold of that provision, the jurisdiction of this Board is ousted by section 167 (4) (b) of the Act which states that:-

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

(a)

(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act..."

[Emphasis by the Board]

In the case of **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR** (hereinafter referred to as "the Selex Sistemi Integrati Case"), the court while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 that dealt with termination of procurement proceedings held as follows:-

"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005, section 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the jurisdiction of the Review Board. That question can be answered by a close scrutiny of section 36 (6) of the said Act which provides:

"A termination under this section shall not be reviewed by the Review Board or a court."

In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of Smith v. East Elloe Rural

District Council [1965] AC 736 Lord Viscount Simonds stated as follows:

"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."

It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures.

To illustrate the point, the failure by the 2nd Respondent [i.e. the Procuring Entity] to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether the termination met the

threshold under the Act, before finding that it lacks jurisdiction to entertain the case before it on the basis of a mere letter of termination furnished before it.

The court in the Selex Sistemi Integrati case cited above, held that the Board has the duty to question whether a decision by a procuring entity terminating a tender meets the threshold of section 63 of the Act, and that this Board's jurisdiction is not ousted by the mere fact of the existence of a letter of notification terminating procurement proceedings.

It is therefore important for the Board to determine the legality, or lack thereof, of the Procuring Entity's decision terminating the subject tender, which determination can only be made by interrogating the reason cited for the termination. It is only then, that a determination whether or not the Board has jurisdiction can be made.

The Applicant herein participated in the subject tender by returning its bid in response to the Procuring Entity's advertisement. Having conducted an evaluation process, the Evaluation Committee recommended award of the subject tender subject to a due diligence exercise on the lowest evaluated bidder. The Board studied the confidential documents submitted to it and notes, the Applicant is the bidder who had been determined to be the lowest evaluated bidder, hence was subjected to a due diligence exercise.

Upon concluding its due diligence exercise, the Evaluation Committee, in its Due Diligence Results Report of 9th September 2019 recommended award of the subject tender to the Applicant. However, on 11th September 2019, the Head of Procurement function took a different view on the outcome of evaluation and the due diligence exercise thus advising the Accounting Officer to terminate the subject tender for the reason that material governance issues had been detected.

Subsequently, the Procuring Entity terminated the subject procurement proceedings and issued notification letters to all bidders that participated in this tender. A letter signed by the Head of Procurement Function on behalf of the Managing Director which is dated 11th September 2019 was addressed to the Applicant with the following details:-

"This is to notify you that the procurement proceedings for the subject tender have been terminated due to material governance issues being detected on tender documentation.

We regret for any inconvenience and we look forward to working with you in future when other opportunities arise. Kindly collect your tender security after fourteen (14) days from the date of this letter. The letter of notification is issued in accordance with the Public Procurement and Asset Disposal Act, 2015"

In an email dated 12th September 2019, the Applicant wrote to the Procuring Entity requesting for particulars of the said material governance issue that informed the decision terminating the subject tender. However, no response was given to it by the Procuring Entity, which resulted in the Applicant lodging this Request for Review challenging the Procuring Entity's decision.

The reason cited by the Procuring Entity for terminating the subject tender is captured in section 63 (1) (e) of the Act states as follows:-

"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:-

...(e) material governance issues have been detected"

Given that the decision terminating the subject tender emanated from the due diligence exercise, the Board studied the Procuring Entity's file to establish how due diligence was conducted and what material governance issue, if at all, the Procuring Entity discovered during that exercise.

The genesis of the Procuring Entity's due diligence exercise on the Applicant is a letter dated 8th August 2019 addressed to M/s Perkins Engines Company Limited (hereinafter referred to as "Perkins") seeking information concerning

M/s Guangdong Honny Power-Tech Co. Ltd (hereinafter referred to as “the Applicant’s Joint Venture Partner”). The said letter states as follows:-

“We are carrying out due diligence process on the above bidder [i.e. “the Applicant’s Joint Venture Partner”] who has participated in one of our tenders.

The Authority is seeking your confirmation whether M/s Guangdong Honny Power-Tech Co. Ltd is an approved original equipment manufacturer (OEM) & Authorized Distributor with your organization in People’s Republic of China as per attached certificate.

Kindly provide us feedback by 12th August, 2019 through the following email: Euphasia.moseti@kaa.go.ke.”

The Board would like to note that the intention of the above letter was to confirm whether the Applicant’s Joint Venture Partner is an Approved Original Equipment Manufacturer and Authorized Distributor with M/s Perkins Engines Company Limited in the People’s Republic of China. The certificate that the Applicant attached in its original bid to demonstrate this was attached to the said letter for purposes of the said due diligence exercise.

Further to this, the said letter was sent to the email of M/s Perkins Engines Company Limited, which is customerservices-us@perkins.com.

In response to this letter, an email was sent to the Procuring Entity on 8th August 2019 stating as follows:-

"I am sorry but we here at the Perkins US Customer Service Office cannot answer this question. We have many companies that make our engines"

The Board notes, the author of the above email clearly specified that it is the US Customer Service of Perkins and could not answer the Procuring Entity's question, since Perkins have many companies that manufacture their engines.

During the hearing, the Procuring Entity contended that Perkins' response in the email dated 8th August 2019 meant that the said company could not confirm whether the Applicant's Joint Venture is its Approved Original Equipment Manufacturer (OEM) and Authorized Distributor, hence this in itself created doubt on the authenticity of the Applicant's OEM certificate.

The alleged doubt notwithstanding, the Procuring Entity did not conclude its due diligence exercise on the Applicant, instead, the Procuring Entity addressed another letter dated 26th August 2019 to the Applicant's Joint Venture Partner which was sent through sales@honnypower.com, stating as follows:-

"Due Diligence of the Contractor for Supply and Installation of 2No. 2MVA Standby Generators and Associated Works at Jomo Kenyatta International Airport (Re-tender)"

"Reference is made to a bid you submitted on 28th June 2019 in response to the above tender joints venture agreement between Kensun Enterprisesand Guangdong Honny Power-Tech Co. Ltd..."

In the bid document, you provide a certificate from Perkins Engines Company Limited that you are an approved Original Equipment Manufacturer (OEM) and Authorized Perkins Engines Distributor.

We are in the process of undertaking due diligence on the qualification information as provide in the tender document and our previous attempts to reach Perkins Engines Company Limited through customerservices-us@perkins.com have been non-committal

This is therefore to request that you provide us with the names of the contact persons, their postal & physical addresses and their email contacts.

Kindly provide us your feedback by Wednesday, 28th August 2019 through the undersigned's email at patrick.wanjuki@kaa.go.ke. We will appreciate your prompt response to this request.

From the above letter, the Procuring Entity demonstrated that its due diligence process on the Applicant was still underway despite the fact that efforts to reach Perkins through customerservices-us@perkins.com, which did not assist the Procuring Entity to get the information it needed. In the Board's view, the Procuring Entity did not disqualify the Applicant after the failure to get information it needed, but made effort to contact the Applicant's Joint Venture Partner whom the Procuring Entity believed was capable of providing the information sought.

In response to the above letter, the Applicant's Joint Venture Partner, in an email dated 28th August 2019 addressed to the Procuring Entity stated as follows:-

"We refer to your email to do due diligence for above tender and your request for us to give you contact for Perkins.

As you may be aware that Perkins are an international company and the company has offices in different regions, Asia being one China is represented by Sime Darby Elco Power Systems Limited, who will directly communicate to confirm we are the OEM manufacturer. The contacts as follows, her name is Betty, phone No....., her email address is betty.sun.lina@simedarby.com.hk. ”

The Board observes that the Procuring Entity addressed a letter dated 4th September 2019 to betty.sun.lina@simedarby.com.hk, being the contact person for Sime Darby given in the email dated 28th August 2019.

The Procuring Entity stated as follows:-

"We are carrying out due diligence process on the above bidder who has participated in one of our tenders.

The Authority is seeking your confirmation whether you are the official representative of Perkins Engines Company Limited and that you issued the attached certificate of Original Equipment Manufacturer (OEM) to M/s Guangdong Honny Power-Tech Co. Ltd certifying them as an approved Original Equipment Manufacturer (OEM) and Authorized Distributor in People's Republic of China.

Kindly provide us with feedback by Friday, 6th September, 2019 through email to the undersigned at patrick.wanjuki@kaa.go.ke and copy to euphasia.moseti@kaa.go.ke. ”

Since the Applicant’s Joint Venture Partner stated that Perkins Engines Company Limited is an international company with offices in different regions and that its representative in China is M/s Sime Darby Elco Power Systems Limited (hereinafter referred to as “Sime Darby”), in the Procuring Entity’s view, this was an introduction of a “third party”, not previously identified in the Applicant’s original bid.

This led the Board to interrogate the relationship between Sime Darby, Perkins and the Applicant’s Joint Venture partner. To answer this question, the Board first studied the response to the above letter dated 4th September 2019.

In a letter dated 5th September 2019, Sime Darby wrote to the Procuring Entity stating as follows:-

“We refer to your request to confirm if Guangdong Honny Power-Tech Co. Ltd is OEM manufacturer we have already

***confirmed as per our email letter dated 2nd September 2019
Ref 4016/2MVA/HonnyPower.***

We also confirm the certificate is from Perkins

***We are the main distributor in China Sime Darby Elco Power
System Limited, we attached a letter from Perkins to show our
appointment as main distributor in People's Republic of
China"***

The Board studied the Procuring Entity's confidential file but did not find the earlier email of 2nd September 2019 referred to by the representative of Sime Darby, however, the letter dated 5th September still served the purpose intended by the Procuring Entity as it shows the following:-

- i.** That Sime Darby, in its letterhead, affixed its logo and that of Perkins to demonstrate that there is a business relationship between the two companies;
- ii.** That Sime Darby attached its appointment letter issued to it by Perkins which is dated 1st January 2018, which clearly states as follows:-

***"we are pleased to advise that Sime Darby Elco Power
Systems is our Perkins Authorized Distributor for Hong
Kong and China Mainland"***

- iii.** That Sime Darby reiterated in the said letter of 5th September 2019 that it is the main distributor in China on behalf of Perkins;

iv. That Sime Darby clearly indicated that the OEM certificate was issued by Perkins Engines Company Limited to the Applicant's Joint Venture and not by Sime Darby itself.

The distributorship relationship as explained in the book titled **"International Commercial Agreements: An Edinburgh Law Guide: (Edinburg University Press, 2013)** at pages 118 to 119 is as follows:-

"The distributorship arrangement has certain characteristics. Firstly, the nature and scope of the relationship existing between the distributor and the principal is characterized by the dependency of the distributor on the principal, resulting in the creation of a special relationship between the distributor and the principal. Under this set-up, the distributor undertakes to sell goods of the principal in his own name [distributor's name] and on his account [i.e. the distributor's account] whilst at the same time the distributor is incorporated into the operations of the principal thus becoming part of the sales organization of the principal

Secondly, the relationship between the principal and the distributor is more substantively regulated by means of the terms of the distribution agreement. The principal may provide ongoing support and training to the distributor, the principal may insist that the distributor market the goods in a

certain manner and, in a number of situations, the distributor may even be awarded exclusivity of supply and distribution in an assigned territory”

The above excerpt clearly demonstrates the relationship between Perkins, being the principal and Sime Darby, being the distributor. From the appointment letter dated 1st January 2019, Perkins gave Sime Darby exclusive rights to distribute products of Perkins in Hong Kong and China. Secondly, Sime Darby distinguished the extent of its authority when it asserted that the OEM certificate of the Applicant’s Joint Venture Partner was issued by Perkins and not by it.

The relationship between Sime Darby and Perkins does not in any way lead to introduction of a third party in an attempt to mislead the Procuring Entity. On the contrary, Sime Darby supported the view that the said certificate was issued to the Applicant’s Joint Venture partner by Perkins, who is in a distributorship relationship with Sime Darby.

It is the Board’s finding that the Procuring Entity had sufficient evidence before it confirming that the OEM certificate was issued to the Applicant’s Joint Venture by Perkins.

The Board studied the Professional Opinion dated 11th September 2019 to further ascertain the Procuring Entity's allegation of "material governance issue on tender documentation" and notes the following:-

At page 4 of the Professional Opinion dated 11th September 2019, the Procuring Entity's General Manager (Procurement and Logistics) stated as follows:-

"Having reviewed the Evaluation Reports for the above and on the basis of reports laid before me, it is my opinion that whereas it was carried out as per the provisions of the Public Procurement and Asset Disposal Act, 2015, there are material governance issues arising from the following

- 1. The tender document provided a mandatory requirement of proof of Registration as Original Equipment Manufacturer (OEM) representative. However, in the standard forms what was attached was the Manufacturer's Authorization. Nine out of eleven tenderers who submitted bids failed because of this requirement;***
- 2. The required Original Equipment Manufacturer not specific to what component of the Generator creating further confusion to participating bidders;***
- 3. Pursuant to section 83 (1) of the PPADA, 2015, due diligence on the OEM and past performance was carried***

out on the lowest valuated bidder, M/s Guangdong Honny Tech Company Limited, however the response from Perkins Engines Company Limited was non-committal having issued the OEM as stated in their email of August 2019;

4. Attempts to get the contact person at Perkins engines Company Limited who issued the certificate for M/s Guangdong Honny Tech Company Limited resulted to introduction of a third part called Sime Darby Elco Power Systems Limited whose details were not submitted in the recommended tenderer's bid document;

5. The Evaluation Committee's recommendation of award is conditional on undertaking a physical site visit to the factory to verify the capacity and capability of the bidders to undertake this task despite undertaking these reference checks.

Having addressed Items 3 and 4 raised in the Professional Opinion, the Board shall now examine the reasons raised by the Procuring Entity in the professional opinion under Items 1, 2 and 5 above.

Clause 1 (iii). Preliminary Evaluation Criteria under page 27 of the Tender Document provides that:-

"Tenderers, including all parties of a Joint Venture, shall submit copies of all the following documents with the tender

i).....;

ii).....;

iii) Proof of registration as Original Equipment Manufacturer (OEM) representative..."

Further, Section VIII. Standard Forms at page 105 of the Tender Document provided a Standard Manufacturer's Authorization Form which bidders were required to fill and attach to their original bids.

According to the Procuring Entity, since there was no Standard Form for providing "***Proof of registration as Original Equipment Manufacturer (OEM) representative***", the presence of a Standard Form for Manufacturer's Authorization created confusion to bidders, hence a material governance issue had been detected.

If indeed the Procuring Entity knew these two requirements would confuse bidders, the Board wonders why the Procuring Entity did not modify its Tender Document before the deadline for submitting tenders to clarify the two requirements. Modification of tender documents is recognized in section 75 of the Act which states that:-

- "(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender.***
- (2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.***
- (3) A procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.***
- (4) The addendum shall be deemed to be part of the tender document"***

Pursuant to the above provisions, the Procuring Entity ought to have issued an Addendum before the date of close of tender explaining the said requirements if at all it felt the same would confuse bidders. The changes introduced in the Addendum would then form part of the Tender Document and bidders would take such changes into account when submitting their bids.

The Board notes, contrary to the Procuring Entity's assertion that the two requirements confused bidders, two of the bidders as indicated in the Professional Opinion were able to comply with the requirement of "***Proof of registration as Original Equipment Manufacturer (OEM) representative***". Further to this, there is no clarification that was sought

from any bidder on the requirement of OEM registration and Manufacturer's Authorization Form.

This means, all bidders understood provisions of the Tender Document and the Procuring Entity is precluded from stating that the said requirement confused bidders with no evidence that a clarification had been sought with no response, so that it can be assumed the alleged confusion was never addressed. Since no bidder sought clarification before the date of close of tenders, the Board wonders how the Procuring Entity knew bidders were confused on the two requirements.

Secondly, the Head of Procurement function stated that "*The required Original Equipment Manufacturer was not specific to what component of the Generator creating further confusion to participating bidders*"

The Board studied the Tender Document at clauses 5.2 and 5.3 of Section IV. Conditions of Contract at pages 55 to 58 thereof where the Generator, being one of the Products that the Procuring Entity is procuring is described.

The Tender Document gives the Technical Specifications of the said Generator without stating that bidders are required to provide an OEM certificate that is specific to a particular component of the Generator.

Further to this, clause 10 of Section V. Technical Specifications of the Tender Document provided for safeguards that would assist the Procuring Entity in inspection of the Products being procured by it in the subject tender after an award has been made. According to clause 10, the Procuring Entity would first undertake a factory inspection on completion of manufacturing by the manufacturer, wherein an inspection visit would be made at the premises of the manufacturer at the cost of the successful bidder.

Secondly, a pre-delivery inspection would be performed by the system Manufacturer's Local Agent to ensure no damage occurs in transit. This would be followed by a Pre-Delivery Testing which entails testing the generator set to show whether it is free of any defects and whether it can start automatically and carry the maximum load required.

It is the Board's considered view that the Tender Document already provided safeguards to the Procuring Entity and an opportunity for the Procuring Entity to inspect the Generator it is procuring after award has been made to the successful bidder, so that the Procuring Entity is certain of the equipments that the bidder would be delivering to it.

The Board notes, the Evaluation Committee upon concluding its due diligence exercise, recommended award of the subject tender to the Applicant, "after a physical site visit to the factory to verify the capacity and capability of the bidder (i.e. the Applicant) to undertake this task." This

recommendation was not taken into account by the Head of Procurement function when he issued his professional opinion recommending termination of the subject procurement process.

In **PPARB Application No. 69 of 2019, CMC Motors Group Limited v. The Principal Secretary, Ministry of Interior and Coordination of National Government & Another**, the Board held as follows regarding termination of a tender as a result of detection of material governance issues:-

"To understand what material governance is, the Board first interpreted the word "governance" and how it relates to public procurement. The Cambridge Dictionary of English defines "governance" as:-

"the way that organizations or countries are managed at the highest level, and the systems for doing this"

According to the United Kingdom Department for International Development (DFID) (2001), governance is:-

"how institutions, rules and systems of the executive, legislature, judiciary and military operate at central and local level and how the state relates to individual citizens, civil society and the private sector"

On the other hand, governance and how it relates to public procurement is explained in the book "Public Procurement: International Cases and Commentary, (2012) edited by Louise Knight, et al, as follows:-

"Effective procurement practices provide governments with a means of bringing about social, economic and environmental reform. Conversely, malpractice within public procurement demonstrates a failure of governance and typically arises from corruption and fraud"

From the above definitions, the Board notes that principles of governance dictate that a procuring entity and bidders avoid any form of malpractice that compromise a procurement process leading to failure of good governance practices.

Principles of governance that bind public procurement are explained in the Constitution, some of which include the following:-

"Article 10 (2) (c): The national values and principles of governance include:-... good governance, integrity, transparency and accountability

Article 201 (d) The following principles shall guide all aspects of public finance in the Republic:-... public money shall be used in a prudent and responsible way

Article 227 (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."

The Cambridge Dictionary of English defines "material" as "significant, major, important, of consequence, consequential".

Therefore, it can be said that material governance issues as they relate to a procurement process, are significant issues detected by a procuring entity, for example, corruption, fraud and collusive tendering during the procurement process, that are contrary to the principles of governance and national values under the Constitution. Consequently, when such material governance issues are detected, the accounting officer has the option to terminate procurement proceedings.

The Procuring Entity submitted that material governance issues can be detected by a procuring entity when the integrity of the procurement process is at risk. The Board concurs with this position noting further the finding that was made in Review No. 69/2019 as outlined hereinabove that "material governance issues as they relate to a procurement process, are significant issues detected by a procuring entity, for example, corruption, fraud and collusive tendering during the procurement process, that are contrary to the principles of good governance and national values under the Constitution. Consequently, when such material governance issues are detected, the accounting officer has no option but to terminate a tender."

In Review No. 69/2019, the Board went on to hold that:-

"The Board finds, the Procuring Entity failed to terminate the subject tender in accordance with section 63 of the Act, which not only provides a procedure for termination, but grounds which may require real and tangible evidence to support a termination process"

The Board would like to reiterate that material governance issues is one of the grounds in section 63 (1) of the Act that requires real and tangible evidence.

The Procuring Entity herein conducted a well-structured due diligence exercise, went to great lengths to contact the Applicant's Joint Venture Partner, the distributor of Perkins and did not stop until it got a final confirmation that the Applicant's Joint Venture Partner is the Approved Original Equipment Manufacturer and Authorized Perkins Distributor. Notably, the Evaluation Committee itself assert in its Due Diligence Results Report as follows:-

"Response was received on 5th September 2019 and M/s Sime Darby Elco Power Systems Limited confirmed that M/s Guangdong Honny Power-Tech Co. Ltd is approved OEM manufacturer and certificate was from Perkins, they further confirmed that they were the main authorized distributor in China and they have the necessary capabilities to fully support the Perkins products"

The Procuring Entity then provided safeguards in its own Tender Document of how it would inspect the generator it is procuring prior to delivery of the same to it, which fact was noted by the Evaluation Committee but the Procuring Entity still terminated the subject tender without persuasive evidence to support the termination.

The requirement of real and tangible evidence supports the provision of Article 47 of the Constitution which states that:-

- "(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"***

It is the Board's finding that no real and tangible evidence has been adduced by the Procuring Entity to persuade us that termination of the subject tender on the ground of material governance issues meets the threshold under section 63 (1) of the Act.

The Board is alive to the provisions of section 63 of the Act that termination is at the discretion of a procuring entity. However, the proper procedure for terminating a procurement process is as follows:-

According to section 63 (1) of the Act, termination of a procurement process is done by an accounting officer prior to notification of award and not the Head of Procurement function who signed notification letters that were issued to all bidders that participated in the subject tender. To issues such notification letters on behalf of the Accounting Officer, the Head of Procurement function must act pursuant to delegated authority evidenced in

writing issued to him or her, specifying the tender for which the authority has been delegated.

As noted above, the Procuring Entity must have real and tangible evidence that supports its grounds for termination of a tender, and not merely stating the grounds provided in section 63 of the Act. The grounds stipulated under section 63 of the Act are not mere pronouncements of the law but grounds that should be well founded by evidence and fair administrative action that is reasonable and procedurally fair.

Secondly, the Accounting Officer must submit a report to the Public Procurement Regulatory Authority within 14 days from the date of termination of a tender. Such a report must contain the reasons for termination of the tender.

Thirdly, all persons who submitted tenders must be notified within fourteen days from the date of termination and such notice must contain the reasons for termination, which reasons may require real and tangible evidence to afford bidders the right to fair administrative action as stipulated in Article 47 of the Constitution.

When a procuring entity finds all tenders to be non-responsive, section 63 (1) (f) of the Act gives it the option to terminate the procurement process

for the reason that “all tenders were non-responsive” and not due to material governance issues, which as noted earlier, is a ground that requires real and tangible evidence.

The Board finds, the Procuring Entity failed to terminate the subject tender in accordance with section 63 of the Act, which not only provides a procedure for termination, but grounds which may require real and tangible evidence to support a termination process.

Before addressing our minds on the appropriate reliefs to grant in the circumstances, the Board observes that the Head of Procurement function issued a Progress Report on Evaluation and Due Diligence for the subject tender dated September 2019. The Head of Procurement function explained the procurement process from its inception up to the point of the ongoing due diligence exercise.

The Act does not envision the Head of Procurement function issuing a Progress Report on the procurement process, but that he or she issues a Professional Opinion pursuant to section 84 of the Act upon reviewing the Evaluation Report and Due Diligence Report. He then advises the Accounting Officer of the appropriate decision to make, be it, award of a tender, a retender or termination of a tender.

The Accounting Officer (and not the Head of Procurement function) may then approve award of a tender, order a re-evaluation, terminate or cancel the tender and/or initiate a re-tender. As earlier noted, if the Accounting Officer delegates his role, the same must be in writing specifying the extent of the delegated authority and for the specific tender to which the delegated authority relates to.

The Head of Procurement function herein submitted a Progress Report that does not advise the Accounting Officer on the appropriate decision to make noting that due diligence exercise had not been concluded at the time the Progress Report was issued. Furthermore, when due diligence exercise was concluded, the Head of Procurement function failed to take into account the findings by the Evaluation Committee confirming that the Applicant is an approved Original Equipment Manufacturer and authorized distributor of Perkins, but still went ahead to advise the Accounting Officer that the subject tender be terminated.

The Board finds that the Progress Report issued by the Head of Procurement function in this instance serves no purpose as it was issued before conclusion of due diligence and does not review the evaluation process, neither does it advise the Accounting Officer of the appropriate decision to make.

Consequently, the Progress Report on Evaluation and Due Diligence for Tender issued in September 2019 by the Head of Procurement function is hereby nullified.

In totality, the Request for Review succeeds and the Board makes the following specific orders:-

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:-

- 1. The Procuring Entity's Letter of Notification dated 11th September 2019 addressed to all bidders who participated in Tender No. KAA/OT/JKIA/1534/2018-2019 for the Supply, Installation of a 2 No. 2MVA Standby Generators and Associated Works at Jomo Kenyatta International Airport notifying bidders that the subject procurement process has been terminated, be and is hereby cancelled and set aside.**

- 2. The Progress Report on Evaluation and Due Diligence for Tender issued in September 2019 by the General Manager (Procurement and Logistics) is hereby nullified.**

For the avoidance of doubt, the Evaluation Report dated 26th July 2019 and the Due Diligence Results Report dated 9th September 2019 remain valid.

3. The Procuring Entity is hereby directed to award the subject tender to the lowest evaluated bidder in accordance with section 86 (1) (a) of the Act, within fourteen (14) days from the date of this decision and proceed with the procurement process to its logical conclusion, taking into consideration the Board's findings in this case.

4. The Tender Validity Period of the subject tender is hereby extended for a further period of 45 days from the date of its expiry.

5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Dated at Nairobi, this 15th day of October, 2019

Signed

**CHAIRPERSON
PPARB**

Signed

**SECRETARY
PPARB**

Delivered in the presence of:-

- i. Mr. Mumia for the Applicant; and**
- ii. Mr. Abdihakim for the 1st and 2nd Respondents.**