

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 114/2020 OF 10TH AUGUST 2020

BETWEEN

PAUL CAFFE LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA AIRPORTS AUTHORITY.....RESPONDENT

Review against the decision of the Accounting Officer of Kenya Airports Authority with respect to Tender No. KAA/RT/MBD/0072/2019-2020 for the Development, Management and Operation of a Branded Restaurant at Jomo Kenyatta International Airport, Domestic Departures-Terminal 1D.

BOARD MEMBERS

1. Ms. Faith Waigwa -Chairperson
2. Ms. Phyllis Chepkemboi -Member
3. Mr. Alfred Keriolale -Member

IN ATTENDANCE

1. Mr. Philip Okumu -Holding brief for the Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Airports Authority (hereinafter referred to as “the Procuring Entity”) invited bids for Tender No. KAA/RT/MBD/0072/2019-2020 for the Development, Management and Operation of a Branded Restaurant at Jomo Kenyatta International Airport, Domestic Departures-Terminal 1D (hereinafter referred to as “the subject tender”) on 28th February 2020 from 18 firms using the restricted method of tendering.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received five (5) bids by the bid submission deadline of 6th May 2020. The same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders’ representatives and recorded as follows: -

NO	BIDDER’S NAME
1.	Interstrat Limited BIG SQUARE P.O Box 433-00502 Karen, Nairobi Tel; 020 249 26672 Email: info@big-square.co.ke
2.	Art-Caffe Coffee & Bakery Limited P.O Box 14510 - 00800 Nairobi Tel; 020 2329737 Email: betty.musyoki@artcaffe.co.ke
3.	Bean Plant Limited P.O Box 13571-00800 Nairobi Tel: 0733349969 Email: rupa.beanplant@gmail.com

NO	BIDDER'S NAME
4.	Nairobi Java House Limited P.O Box 21533-00505 Nairobi TEL: 0203504468 Email; admin@javahouseafrica.com
5.	Paul Caffe Limited P.O Box 8630-00300 Nairobi Tel: 0719787808 Email: paulcaffe2014@gmail.com

Evaluation of Bids

Having appointed an Evaluation Committee, bids received in the subject tender were evaluated in the following three stages: -

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

1. Mandatory Requirements/Preliminary Evaluation

At this stage, the Evaluation Committee applied the criterion under Clause 2.20 of Section II. Instructions to Tenderers read together with Clause A. Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document. According to the Evaluation Report dated 28th May 2020, bidders who did not meet the mandatory requirements specified in the Tender Document were found non-responsive therefore did not proceed to Technical Evaluation. At the end of evaluation at this stage, only two bidders, M/s Bean Plant Limited and M/s Paul Caffe Limited were found responsive, therefore proceeded to Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause B. Technical Requirements of the Appendix to Instructions to Tenderers of the Tender Document, which contains six parameters that were considered during Technical Evaluation. Further to this, evaluation at this stage was on a PASS/FAIL basis. At the end of Technical Evaluation, the Evaluation Committee noted the following: -

- **Bidder 3, M/s Bean Plant Limited**

- ✓ The bidder did not meet all the technical requirements;
- ✓ The bidder provided documentation for M/s The Good Food Company that had not been listed as part of the bid process through a Joint Venture agreement or "Trading as" (T/a).

- **Bidder 5, M/s Paul Caffè Limited**

- M/s Paul Caffè Limited was found responsive to the requirements at the Technical Evaluation Stage therefore proceeded to Financial Evaluation

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause C. Financial Requirements of the Appendix to Instructions to Tenderers of the Tender Document which outlined the parameters for Financial Evaluation. At the end of Financial Evaluation, the Evaluation Committee noted the following: -

Bidder 5, M/s Paul Caffe Limited		
The financial evaluation will comprise		MUST MEET
Minimum Annual Guaranteed	Payment of a fixed minimum annual guarantee of Kshs. 1,000,000/= payable quarterly in advance.	Bidder signed statement of financial compliance.
Annual concession fee	Bidders to propose an annual concession rate based on gross turn over (to be captured by EPOS Once installed). However, the proposed rate should not be less than 7.5%. Proposed annual concession rate..... 10.02% The concession fees shall be payable quarterly in arrears based on management accounts and reconciled at the end of the financial year based on the audited accounts.	Bidder signed statement of financial compliance.
Rental fee	Payment of a building rental fee at the rate of Kshs. 2,400/- per sq. ft. PA	Bidder signed statement of financial compliance.

Recommendation

The Evaluation Committee recommended award of the subject tender to Bidder No. 5, M/s Paul Caffe Limited at its proposed Minimum Annual Guarantee of Kshs. 1,000,000.00, a concession rate of 10.02% and payment of a building rental fee at the rate of Kshs. 2,400.00 per square feet.

Due Diligence

According to the Due Diligence Report dated 12th June 2020, the Evaluation Committee carried out a due diligence exercise on M/s Paul Caffe Limited by visiting the bidder's outlet sites within Nairobi on 10th June 2020. The Evaluation Committee made the following findings: -

OUTLETS	LOCATION	FINDINGS (PHYSICAL)	STATUS	REMARKS
Guest Park Restaurant T/A Paul Caffe	JKIA Terminal 1A	Seen	Closed at the time of visit	Lease Agreement Provided
Guest Park Restaurant T/A Paul Caffe	JKIA Roof Top of Parking Garage	Seen	Opened/ Operational at the time of visit	Lease Agreement Provided
Power General Contractors Limited T/A Paul Caffe	Nairobi South Station SGR Terminus, on 2 nd Floor waiting Hall	Seen	Closed at the time of visit	Lease Agreement Provided
Fien Limited T/A Paul Caffe	Gigiri behind US Embassy	Seen	Closed at the time of visit	Owned. Title deed no. Nairobi/block 91/213

At the time of site visit, only one restaurant - Guest Park Restaurant t/a Paul Caffe Limited at Jomo Kenyatta International Airport-Roof Top of the Parking Garage was operational. The Evaluation Committee was informed that the government directive on cessation of movement due to Covid-19 pandemic necessitated closure of other sites. Having established the existence of all the sites provided in the bidder's original bid, the Evaluation Committee concluded that the M/s Paul Caffe Limited has sufficient capacity and experience to offer the services.

Professional Opinion

In a Professional Opinion dated 1st July 2020, the Procuring Entity's General Manager (Procurement and Logistics) reviewed the Evaluation Report dated 28th May 2020 and the Due Diligence Report dated 12th June 2020. He took

the view that the subject procurement process met the requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and urged the Accounting Officer to consider and approve award of the subject tender to Bidder 5, M/s Paul Caffe Limited as recommended by the Evaluation Committee. Through handwritten comments found on the face of the said professional opinion, the Accounting Officer and the General Manager, Procurement and Logistics stated as follows: -

- *On 7th July 2020, the General Manager, Procurement and Logistics informed the Accounting Officer that the subject procurement process commenced before the onset of Covid-19 pandemic. In view of the physical distancing protocols in place, he urged the Accounting Officer to re-consider and advise on the merits of proceedings with the procurement process;*
- *On 10th July 2020, the Accounting Officer asked the General Manager, Procurement and Logistics to advise on Physical Distancing Implications on the award recommendation.*
 - ✓ *On 14th July 2020, the General Manager, Procurement and Logistics stated that the proposed space allocation is 64M² and further noted that there will be need for the Procuring Entity to re-organize the remaining space to accommodate passenger traffic;*
 - ✓ *On 29th July 2020, the General Manager, Procurement and Logistics stated that having consulted with Operations and Marketing 1 department of the Procuring Entity, his advice to the Accounting Officer was for the Procuring Entity to*

terminate the subject procurement process on account of space constraints occasioned by Covid-19 physical distancing measures.

Notification of Termination of Procurement proceedings

In letters dated 7th August 2020, the Accounting Officer notified all bidders that the procurement proceedings of the subject tender have been terminated because the subject procurement has been overtaken by operation of the law pursuant to section 63 (1) (a) (i) of the Act. He also informed all unsuccessful bidders of the reasons why their bids were found non-responsive.

THE REQUEST FOR REVIEW

M/s Paul Caffè Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 7th August 2020 and filed on 10th August 2020 together with a Statement in Support of the Request for Review sworn and filed on even date and a Further Statement sworn and filed on 21st August 2020, through the firm of Gerivia Advocates LLP, seeking the following orders: -

- a) An order compelling the Respondent to immediately issue a Notification of Award to the Applicant in the subject Tender and in any event, not more than (7) days from the date of the Board's Ruling;***
- b) An order compelling the Respondent to pay the costs to the Applicant arising from/and incidental to this Application; and***

c) The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

In response, the Respondent lodged a Response to the Request for Review dated 14th August 2020 and filed on 17th August 2020 through the Procuring Entity's General Manager (Procurement and Logistics) while M/s Nairobi Java House Limited who is one of the bidders who participated in the procurement process filed a letter dated 21st August 2020 addressed to the Board Secretary in response to the Request for Review.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website (www.ppra.go.ke) in recognition of the challenges posed by the Covid-19 pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the Covid-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions. Clause 1 at page 2 of the said

Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged Written Submissions dated and filed on 21st August 2020 while the Respondent lodged Written Submissions dated and filed on 18th August 2020. M/s Nairobi Java House Limited did not lodge any written submissions.

BOARD'S DECISION

The Board has considered all the pleadings and written submissions filed before it, including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issue calls for determination: -

Whether the Procuring Entity terminated the subject procurement process in accordance with section 63 of the Act.

Before addressing the above issue, the Board would like to note that the Applicant filed its Request for Review on 10th August 2020 at around 9.30 am. Thereafter, the Board Secretary addressed a letter dated 10th August 2020 to the Respondent notifying it of the existence of the Request for Review and suspension of the procurement proceedings pursuant to section 168 of the Act. Further to this, the Board Secretary directed the Respondent to forward all the confidential documents pertaining to the subject

procurement process as required by section 67 (3) (e) of the Act. In its Request for Review, the Applicant contends that the Respondent refused to issue it with a letter of notification of award pursuant to section 87 of the Act. In the Applicant's view, it was likely to be the successful tenderer since a due diligence exercise was conducted on it by the Procuring Entity on 10th June 2020 in accordance with section 83 of the Act and was therefore the bidder to be awarded the subject tender. According to the Applicant, the Procuring Entity breached section 176 (1) (j) of the Act by knowingly withholding the notification of award to it.

Having considered the foregoing submissions, the Board observes that at paragraph 3 of its Further Statement, the Applicant admits that it received a letter of notification of termination of procurement proceedings dated 7th August 2020, on 10th August 2020 at 3.15pm, which was a few hours after the Applicant filed its Request for Review. On the other hand, the Respondent's copy of the Request for Review sent to it by the Board Secretary shows that the same was received at the Procuring Entity's offices on 12th August 2020. This in the Board's view demonstrates that the Procuring Entity notified the Applicant of termination of the subject procurement proceedings before it received formal communication from the Board Secretary regarding the existence of the Request for Review.

The Board observes that, in response to the Respondent's Response filed on 17th August 2020 and the Respondent's Written Submissions filed on 18th August 2020, the Applicant, through its Further Statement filed on 21st

August 2020 and Written Submissions filed on even date, had sufficient opportunity to challenge the Procuring Entity's decision terminating the subject tender. This is because, the letter of notification of termination of procurement proceedings dated 7th August 2020 and received by the Applicant on 10th August 2020 at 3.15pm informed the Applicant that the subject procurement process was terminated pursuant to section 63 (1) (a) (i) of the Act. In essence, the question whether the Applicant received a letter of notification (which in this instance was a notification of termination of procurement proceedings and not a notification of award as the Applicant alleges should have been provided to it) from the Procuring Entity is already dispensed with and it now behooves upon this Board to determine whether termination of the subject procurement proceedings was done in accordance with section 63 of the Act.

Having dispensed with the above preliminary issue, the Board now proceeds to address the substantive issue framed for determination as follows: -

Termination of procurement and asset disposal proceedings is governed by section 63 of the Act. Further, if such termination meets the requirements of section 63 of the Act, the jurisdiction of this Board is ousted pursuant to section 167 (4) (b) of the Act which provides as follows: -

"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 62 of this Act” [i.e. section 63 of the Act] Emphasis by the Board

In **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 (hereinafter referred to as “the Repealed Act”) 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 (hereinafter referred to as “the Repealed Act”), 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 held that this Board (as was constituted then) had the duty to question whether a decision by a procuring entity terminating a tender met the threshold of section 100 (4) of the Repealed Act, and that the Board's jurisdiction was not ousted by mere existence of a letter of termination furnished before it.

Further, in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR** (hereinafter referred to as "JR No. 142 of 2018") it was held as follows: -

"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement...

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

section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.

As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A- Light Ltd [2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body which is the primary decision maker, [in this instance the Applicant as the procuring entity] to determine if the statutory pre-conditions and circumstances in section 63 exists before a procurement is to be terminated...

However, the Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard...

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as

to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v. Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act”

The Court in JR No. 142 of 2018 affirmed the decision of the Court in the *Selex Sistemi Integrati Case* that this Board has the obligation to first determine whether the statutory pre-conditions of section 63 of the Act have been satisfied to warrant termination of a procurement process, in order to make a determination whether the Board’s jurisdiction is ousted by section 167 (4) (b) of the Act.

It is therefore important for this Board to determine whether the Procuring Entity terminated the subject tender in accordance with provisions of section 63 of the Act, which determination can only be made by interrogating the reason cited by the Procuring Entity and whether or not the Procuring Entity satisfied the statutory pre-conditions for termination outlined in section 63 of the Act.

Section 63 (1) (a) (i), 2, 3 and 4 of the Act states as follows: -

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

(a) the subject procurement has been overtaken by—

(i) operation of law; or

(ii)

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i)

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

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

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

The Procuring Entity cited section 63 (1) (a) (i) of the Act as the reason for termination of the subject tender. The Board considered parties' pleadings and written submissions on the reason for termination cited by the Procuring Entity and notes that according to paragraph 4 to 6 of the Procuring Entity's Response to the Request for Review, the Procuring Entity avers that, the Letter of Notification of termination of procurement proceedings issued to the Applicant clearly stated that the subject procurement process had been overtaken by operation of the law pursuant to section 63 (1) (a) (i) of the Act. In the Procuring Entity's view, the wake of the Corona Virus pandemic resulted in not only a national but global crisis. The Procuring Entity further states that the Cabinet Secretary for Health issued the Public Health (Covid-19 General Public Safety) Rules, 2020 (hereinafter referred to as the "Covid-19 General Public Safety Rules") pursuant to section 36 of the Public Health Act, Chapter 242 of the Laws of Kenya and published the said Covid-19 General Public Safety Rules as Legal Notice No. 129 in the Kenya Gazette Supplement No. 127 of 14th July 2020. At paragraph 7 of its Response to the Request for Review, the Procuring Entity refers to Rule 3 (2) (b) of the Covid-19 General Public Safety Rules and further states that upon reviewing the

said provision, in addition to restrictions, guidelines and protocols issued by the Government of Kenya, the Procuring Entity was of the view that the space allocated for development of the branded restaurant would constrain the implementation of the required physical distance and lead to major interruption of the flow of passenger traffic at the Terminal while posing a threat to public health and safety. According to the Procuring Entity, it would incur expenses to re-organize the space in question in order to accommodate passenger traffic, maintain the set standard for customer experience and ensure security measures are preserved. Therefore, implementation of the subject tender would not be feasible in the circumstances. At paragraph 12 and 13 of its Written Submissions, the Procuring Entity states that public interest requires the Procuring Entity to ensure measures on safety and health of all its passengers and members of staff are enhanced and observed with the advent of the Covid-19 pandemic. As a result, the Respondent's duty to safeguard the safety of the airport passengers necessitated the need to terminate the subject procurement process to ensure compliance with Covid-19 General Public Safety Rules.

In response, the Applicant at paragraph 7 of its Further Statement depones that the Procuring Entity has a duty to comply with the statutory pre-conditions for termination of the subject procurement process outlined in section 63 (1), (2), (3) and (4) of the Act. While citing the reason under section 63 (1) (a) (i) of the Act, the Applicant provides a definition to the word "overtaken" to support its view that the Covid-19 General Public Safety Rules did not ban or outlaw the activities under the subject tender making it

impossible to implement the same. In the Applicant's view, the Covid-19 General Public Safety Rules only provide implementation of additional safety measures which though onerous, inconvenient or even more expensive especially on the successful bidder more than on the Procuring Entity, did not make the subject tender illegal or incapable of being performed should it be awarded to a particular bidder. At paragraph 15 of its Further Statement, the Applicant deposes that a plain reading and interpretation of the Covid-19 General Public Safety Rules does not reveal any intention by the Cabinet Secretary for Health or the Government to lead to closure of any businesses or termination of any procurement proceedings. In the Applicant's view, the Covid-19 General Public Safety Rules are facilitative to ensure that businesses continue to operate safely amidst the Covid-19 pandemic. According to the Applicant, the burden of complying with Rule 3 (2) (b) of the Covid-19 General Public Safety Rules rests on the successful bidder since such a bidder would be awarded the subject tender in order to develop, manage and operate a branded quick service restaurant at Terminal 1D within the space demarcated for use by the Procuring Entity. In its Written Submissions, the Applicant reiterates the averments made in its Further Statement and further states that the Procuring Entity has various food and beverage outlets operating at Jomo Kenyatta International Airport which have complied with social distancing rules issued by the Government and that this is sufficient evidence that adjustments to the layout of the proposed restaurant is possible. At paragraph 50 of its Written Submissions, the Applicant further contends that the Procuring Entity should have taken the expenses for both the tenderers and the Procuring Entity into

consideration before terminating the subject tender. According to the Applicant, the Procuring Entity did not provide sufficient evidence for termination of the subject procurement process pursuant to section 63 (1) (a) (i) of the Act.

Having considered parties' pleadings and written submissions, the Board now proceeds to make the following findings: -

Section 63 (1) (a) (i) of the Act gives the accounting officer of a procuring entity discretion to terminate procurement proceedings only if the procurement proceedings has been overtaken by operation of law. The Black's Law Dictionary, 9th Edition at page 990 thereof, defines the term "law" as: -

- "(a) The regime that orders human activities and relations in a society;***
- (b) The aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction or the country as a whole applies in deciding controversies (i.e. the law of the land);***
- (c) The set of rules or principles dealing with a specific area of a legal system;***

(d) The judicial and administrative process; legal action and proceedings;

(e) A statute.

The Board observes that the Black's Law Dictionary provides several definitions to the word "law" including an interpretation that law is a set of rules dealing with a specific area of a legal system, a statute or an aggregate of legislation applied in a particular country. On its part "overtaken" in ordinary English Language as defined by the Cambridge English Dictionary, 11th Edition means: -

"to catch up with"

Pierre Catala in his Article "**Proposal for Reform on the Law of Obligations and the Law of Prescription**" (Oxford, 2007) explains the term "**by operation of law**" to mean: -

"The phrase "by operation of law" is a legal term that indicates that a right or liability has been created for a party, irrespective of the intent of that party, because it is dictated by existing legal principles. Rights that arise by operation of law often arise by design of certain contingencies set forth in a legal instrument. Rights or liabilities arising by operation of law can also be created involuntarily, because a contingency occurs for which a party has failed to plan (e.g. failure to write a will)"

Having considered the above definitions, the Board deems it fit to address the question whether the Covid-19 General Public Safety Rules cited by the Procuring Entity fall under the category of law. The introductory part of the Covid-19 General Public Safety Rules states as follows: -

"LEGAL NOTICE NO. 129

THE PUBLIC HEALTH ACT

THE PUBLIC HEALTH (COVID-10 GENERAL PUBLIC SAFETY RULES, 2020

IN EXERCISE of the powers conferred by section 36 of the Public Health Act, the Cabinet Secretary for Health makes the following Rules..."

According to the introductory part of the Covid-19 General Public Safety Rules, it stated that the said Rules were made by the Cabinet Secretary for Health in exercise of the powers conferred upon him by section 36 of the Public Health Act, Chapter 242 of the Laws of Kenya (hereinafter referred to as "the Public Health Act") which provides that: -

"36. Rules for prevention of disease

Whenever any part of Kenya appears to be threatened by any formidable epidemic, endemic or infectious disease, the Minister may make rules for all or any of the following purposes, namely—

- (a) the speedy interment of the dead;***
- (b) house to house visitation;***
- (c) the provision of medical aid and accommodation, the promotion of cleansing, ventilation and disinfection and guarding against the spread of disease;***

- (d) preventing any person from leaving any infected area without undergoing all or any of the following, namely, medical examination, disinfection, inoculation, vaccination or revaccination and passing a specified period in an observation camp or station;***
- (e) the formation of hospitals and observation camps or stations, and placing therein persons who are suffering from or have been in contact with persons suffering from infectious disease;***
- (f) the destruction or disinfection of buildings, furniture, goods or other articles, which have been used by persons suffering from infectious disease, or which are likely to spread the infection;***
- (g) the removal of persons who are suffering from an infectious disease and persons who have been in contact with such persons;***
- (h) the removal of corpses;***
- (i) the destruction of rats, the means and precautions to be taken on shore or on board vessels for preventing them passing from vessels to the shore or from the shore to vessels, and the better prevention of the danger of spreading infection by rats;***
- (j) the regulation of hospitals used for the reception of persons suffering from an infectious disease and of observation camps and stations;***
- (k) the removal and disinfection of articles which have been exposed to infection;***
- (l) prohibiting any person living in any building or using any building for any other purposes whatsoever, if in the opinion of the medical officer of health any such use is liable to cause the spread of any infectious disease; and any rule made under this paragraph may give the health officer or a medical***

officer of health power to prescribe the conditions on which such a building may be used;

(m) any other purpose, whether of the same kind or nature as the foregoing or not, having for its object the prevention, control or suppression of infectious diseases,

and may by order declare all or any of the rules so made to be in force within any area specified in the order, and such area shall be deemed an infected area, and to apply to any vessels, whether on inland waters or on arms or parts of the sea within the territorial jurisdiction of Kenya."

Section 3 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya defines the term "written law" as: -

"written law" means—

(a) an Act of Parliament for the time being in force;

(b)

(c) any subsidiary legislation for the time being in force"

Further to this, the term "subsidiary legislation" is defined in section 3 of the Interpretation and General Provisions Act to mean: -

"any legislative provision (including a transfer or delegation of powers or duties) made in exercise of a power in that behalf conferred by a written law, by way of by-law, notice, order, proclamation, regulation, rule, rule of court or other instrument"

Having established that the Cabinet Secretary issued the Covid-19 General Public Safety Rules in exercise of the powers conferred upon him by section 36 of the Public Health Act, the Board finds that the Covid-19 General Public Safety Rules fall under the category of subsidiary legislation and is therefore written law within the meaning of section 3 of the Interpretation and General Provisions Act.

The Board has already established that **“by operation of law”** is a legal term which indicates that a right or liability has been created in favour of a party, irrespective of the intent of that party, because it is dictated by existing legal principles. Further to this, rights or liabilities arising by operation of law can also be created involuntarily, because a contingency occurs for which a party has failed to plan. Therefore, if an action (i.e. a procurement process) has been overtaken by operation of law, it means that such a procurement process has been caught up by the existence of a right or liability created for a party irrespective of the intent of that party. In essence, by the existence of an automatic right or liability arising from a certain law, a procurement process may not be capable of proceeding to award of a tender, leaving a procuring entity with the option to terminate the procurement process.

This Board would like to make an observation that the intention of the Procuring Entity in advertising the subject tender was to procure services for the *Development, Management and Operation of a Branded Restaurant at Jomo Kenyatta International Airport, Domestic Departures-Terminal 1D.*

According to the Blank Form of Tender found at Section VI. Standard Forms of the Tender Document, the Procuring Entity required bidders to provide an undertaking on the following: -

***"Having examined the tender documents including Addenda No. (insert numbers)the receipt of which is hereby acknowledged, we the undersigned, offer to procure (the particulars of the tender) under this tender in conformity with the said tender document for the sum of.....
proposed concession rate or such other sums as may be ascertained in accordance with the Schedule of Prices attached herewith ad made part of this Tender***

We undertake, if our Tender is accepted, to abide by the conditions of the tender..."

From the foregoing, the Board observes that in addition to expressing the intention of the Procuring Entity in advertising the tender, the Tender Document also gave bidders the obligation to submit a duly completed Form of Tender wherein bidders would express an undertaking to abide by the conditions of the subject tender.

This therefore leads the Board to address the question whether the Covid-19 General Public Safety Rules vested an automatic right or liability either on the Procuring Entity or to bidders, in a manner that prevents the subject procurement process from being awarded to the effect that the subject procurement process could not be implemented as envisioned in the Tender

Document, therefore leaving the Procuring Entity with no option but to terminate the same.

It is worth noting that the Respondent relies on Rule 3 (2) (b) of the Covid-19 General Public Safety Rules to support the reason why it terminated the subject procurement process. This provision states as follows: -

- "3. (1)**
- (2) *Every organization, business entity or any other trader, whether in an open air market, enclosed premises or any other public place shall-***
- (a)**
- (b) put in place measures to ensure that a physical distance of at least one metre is maintained between persons accessing or within its premises**"

The above provision requires every organization, business entity or any other trader, whether in an open air market, enclosed premises or any other public place to put in place measures to ensure that a physical distance of at least one metre is maintained between persons accessing or within its premises.

The question that comes to mind in interpreting the aforestated provision is whether it vests an automatic right to every organization, business entity or any other trader, whether in an open air market, enclosed premises or any other public place to cease doing business and in this instance, for a

procuring entity to refrain from initiating a procurement process (if it had not advertised the same) or to terminate an ongoing procurement process (if it had commenced the same).

The Board observes that Rule 3 (2) (b) of the Covid-19 General Public Safety Rules requires public and private entities to put in place measures that will ensure a physical distance of one metre is maintained. It does not in any way vest an automatic right to such public or private entities to cease doing business. It is the Board's considered view that, the Cabinet Secretary for Health took into consideration the need for all organizations, business entities or traders, whether in an open air market, enclosed premises or any other public place to continue carrying out economic activities whilst implementing measures that will ensure a physical distance of at least one metre is maintained between persons accessing the organization, business entity, a trading area, an open air market including all persons within the premises of the organization, business entity, trading area or an open air market.

It is not lost to the Board that at paragraph 8 of its Response, the Respondent argued that the space allocated for development of the branded restaurant would constrain the implementation of the required physical distance and lead to major interruption of the flow of passenger traffic at the Terminal while posing a threat to public health and safety. According to Section V. Schedule of Requirements, the Tender Document outlines the

measurements for the Kitchen Service Area and Seating Area of the proposed Branded Restaurant as 33 square metres and 34 square metres respectively. However, the Procuring Entity never adduced any real and tangible evidence of how the space allocated for construction of the branded restaurant would constrain the implementation of a physical distance of at least one metre specified in Rule 3 (2) (b) of the Covid-19 General Public Safety Rules.

All public procurement processes must adhere to the guiding principles under section 3 of the Act and Article 227 (1) of the Constitution. Section 3 (e) of the Act states that: -

Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

(a);

(b);

(c);

(d);

(e) the principles of public finance under Article 201

Article 201 of the Constitution referenced hereinbefore provides among other principles that: -

"The following principles shall guide all aspects of public finance in the Republic—

(a) there shall be openness and accountability, including public participation in financial matters

(b)

(c)

(d) public money shall be used in a prudent and responsible way"

Further, Article 227 (1) of the Constitution provides as follows: -

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

Procurement processes involve the use of public money and the same must be used in a prudent and responsible way in a system that is fair, transparent and cost-effective. The Procuring Entity terminated the subject procurement process without considering the implication of Rule 3 (2) (b) of the Covid-19 General Public Safety Rules which envisions that procurement processes ought to continue whilst observing measures to ensure a physical distance of one metre is maintained. In any case, no real and tangible evidence has been adduced by the Procuring Entity to demonstrate how the space

allocated for construction of the branded restaurant would constrain the implementation of a physical distance of at least one metre specified in Rule 3 (2) (b) of the Covid-19 General Public Safety Rules. The Board is alive to the fact that the Procuring Entity and the bidder determined to be successful both have an obligation to observe the measures proposed under Rule 3 (2) (b) of the Covid-19 General Public Safety Rules and if such measures are taken into consideration, the purpose of the subject tender can be achieved. Furthermore, having established that it is the successful bidder who is developing the branded restaurant in implementation of the subject tender, it is the Board's considered view that nothing stops the Procuring Entity from initiating dialogue with the successful bidder on the manner in which the required physical distance of at least one metre specified in Rule 3 (2) (b) of the Covid-19 General Public Safety Rules can be implemented.

As a result, this Board is not persuaded that Rule 3 (2) (b) of the Covid-19 General Public Safety Rules is geared towards halting procurement processes in this country, more specifically, the Board is not convinced that an automatic right exists that warrants termination of the subject procurement process as a result of Rule 3 (2) (b) of the Covid-19 General Public Safety Rules.

Accordingly, the Board finds that termination of the subject procurement process fails to meet the threshold of section 63 (1) (a) (i) of the Act.

At this point, the Board deems it necessary to address its mind on the procedural requirements for termination of a procurement process specified in section 63 (2), (3) and (4) of the Act.

In **Republic v. Public Procurement Administrative Review Board & another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR**, the court held that: -

"In a nutshell therefore, the procuring entity is under duty to place sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Procuring Entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of section 63 of the Public Procurement and Asset Disposal Act, 2015"

Having considered the finding in the foregoing case, the Board notes that, in addition to citing any of the reasons listed in section 63 (1) of the Act, a procuring entity must also comply with the procedural requirements for termination of a tender specified in section 63 (2), (3) and (4) of the Act.

Section 63 (2) and (3) of the Act provide that a procuring entity must provide a written report to the Public Procurement Regulatory Authority (hereinafter

referred to as “the Authority”) within fourteen (14) days from the date of the termination including reasons for the termination. All bidders who participated in the procurement process must also be notified within fourteen (14) days from the date of the termination, citing the specific reason why the tender was terminated pursuant to section 63 (4) of the Act.

The Board was only furnished with letters of notification of termination of procurement proceedings dated 7th August 2020 addressed to all bidders who participated in the subject tender. The Board was not furnished with a report submitted to the Authority within fourteen days after 7th August 2020, citing the reason for termination the subject tender. In essence, whereas the Procuring Entity cited section 63 (1) (a) (i) of the Act for termination of the subject tender, which reason we have established had no real and tangible evidence, it has failed to demonstrate whether it complied with the procedural requirements of section 63 (2) and (3) of the Act given that there is no documentation before the Board regarding a written report submitted to the Authority, containing specific reasons for the said termination.

The Court in the case of **Republic v. Public Procurement Administrative Review Board ex-parte Magic Contractors Limited & 2 Others (2018) eKLR** cited the decision in **Resley v. The City Council of Nairobi (2006) 2 EA 311** where it was held as follows: -

"In this case there is an apparent disregard of statutory provisions by the Respondent, which are of fundamental

nature. Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid.”

The Act and the Constitution lay down a clear framework within which procuring entities must exercise their discretion when procuring for goods and services. The Respondent in this instance failed to exercise the discretion conferred upon it by law in accordance with the substantive and procedural requirements under section 63 of the Act, therefore making its decision terminating the subject tender null and void.

Accordingly, the Board finds that the Procuring Entity failed to terminate the subject procurement process in accordance with section 63 of the Act.

In totality, the Request for Review succeeds in terms of the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review: -

- 1. The Letters of Notification of Termination of Tender No. KAA/RT/MBD/0072/2019-2020 for the Development, Management and Operation of a Branded Restaurant at Jomo Kenyatta International Airport, Domestic Departures-Terminal 1D addressed to the Applicant and all other tenderers, be and are hereby cancelled and set aside.**
- 2. The Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion including issuance of letters of notification within seven (7) days from the date of this decision, taking into consideration the Board's findings in this Review.**
- 3. 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 31st day of August 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB