

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 118/2020 OF 17TH AUGUST 2020

BETWEEN

RHOMBUS CONSTRUCTION COMPANY

LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY.....1ST RESPONDENT

**KENYA PORTS AUTHORITY.....2ND
RESPONDENT**

Review against the decision of Kenya Ports Authority with respect to Tender No. KPA/121/2019-20/TE for Supply and Commissioning of Five (5) New Empty Container Handlers (ReachStacker Type).

BOARD MEMBERS

- 1. Ms. Faith Waigwa -Chairperson
- 2. Ms. Phyllis Chepkemboi -Member
- 3. Dr. Joseph Gitari -Member

IN ATTENDANCE

- 1. Mr. Stanley Miheso -Holding brief for the Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Ports Authority (hereinafter referred to as "the Procuring Entity") advertised Tender No. KPA/121/2019-20/TE for Supply and Commissioning of Five (5) New Empty Container Handlers (ReachStacker Type) (hereinafter referred to as "the subject tender") on 3rd March 2020 on MyGov Publishing Website inviting sealed bids from eligible tenderers.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of eight (8) bids by the bid submission deadline of 2nd June 2020. The same were opened shortly thereafter by a Tender Opening Committee and recorded as follows: -

No	Name of Bidder
1	BEK Suppliers Ltd
2	CVS Ferrari
3	Kone Cranes Lifttrucks AB
4	Graduate Africa Ltd
5	Joh Achelis Soehne GmBH
6	Tisco Construction Ltd
7	Cargotech Finland Oy
8	Rhombus Construction Company Ltd

Evaluation of Bids

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

- i.** Preliminary Evaluation;

- ii. Detailed Technical Evaluation; and
- iii. Financial Evaluation.

1. Preliminary Evaluation

At this stage, the Evaluation Committee applied the criteria under Clause 10 of Section III. Tender Data Sheet of the Tender Document. At the end of Preliminary Evaluation, the following tenderers were found responsive therefore qualified for Detailed Technical Evaluation: -

- M/s BEK Suppliers Ltd;
- M/s Cargotech Finland Oy; and
- M/s Rhombus Construction Company Ltd.

2. Detailed Technical Evaluation

At this stage, the Evaluation Committee applied the criteria under Clause 30 of Section III. Tender Data Sheet of the Tender Document. The Tender Document provided that tenderers would be required to achieve a minimum technical score of 75% in order to proceed to Financial Evaluation. At the end of Detailed Technical Evaluation, it is only M/s Cargotech Finland Oy and M/s Rhombus Construction Company Limited who achieved the minimum technical score required to proceed to Financial Evaluation. Their respective scores were recorded as follows: -

Bidder	Wt. (%)	Cargotech Finland Oy	Rhombus Construction Company Limited
Marks	100	97	95

Re-evaluation

Having submitted the Evaluation Report to the Acting Head of Procurement and Supplies, the Acting Head of Procurement and Supplies in his letter dated 19th June 2020 addressed to the Chairman of the Evaluation Committee stated that he did not concur with some of the reasons for non-responsiveness of bidders at the Preliminary Evaluation Stage. He directed the Evaluation Committee to review the Evaluation Report dated 10th June 2020 and ensure that the reasons given for non responsiveness are well elaborated to avoid ambiguity when communicating the outcome of the tender to unsuccessful bidders.

2nd Preliminary Evaluation

Having undertaken a re-evaluation, the Evaluation Committee noted that the following tenderers met all mandatory requirements and therefore qualified for Technical Evaluation: -

- M/s BEK Suppliers Ltd;
- M/s Tisco Construction Ltd;
- M/s Cargotech Finland Oy; and
- M/s Rhombus Construction Company Ltd.

2ndDetailed Technical Evaluation

At the Technical Evaluation stage, the Evaluation Committee found that only two bidders achieved the minimum technical score specified in the

Tender Document, therefore recommended for Financial Evaluation. Their scores were recorded as follows: -

Bidder Name	Wt. (%)	Cargotech Finland Oy	Rhombus Construction Company Ltd
Total marks	100	97	95

Professional Opinion

In a professional opinion dated 30th June 2020, the Acting Head of Procurement and Supplies reviewed the Evaluation Report dated 24th June 2020 wherein he stated that he did not agree with the findings of the Evaluation Committee on the outcome of the two tenderers recommended for Financial Evaluation. He took the view that none of the tenderers recommended to proceed to Financial Evaluation were responsive. He therefore recommended cancellation of the subject tender in accordance with section 63 (1) (f) of the Public Procurement & Asset Disposal Act, 2015 (hereinafter referred to as "the subject tender") on account of non-responsiveness of all tenderers. The said professional opinion was approved by the Procuring Entity's Acting Managing Director on 29th July 2020.

Cancellation of Tender

In letters dated 3rd August 2020, the Procuring Entity notified all tenderers who participated in the subject tender that the same was cancelled pursuant to section 63 (1) (f) of the Act and that the same was re-

advertised. The Procuring Entity further informed tenderers of the reasons why their respective tenders were non-responsive.

THE REQUEST FOR REVIEW

M/s Rhombus Construction Limited (hereinafter referred to as “the Applicant”) lodged a Request for Review dated 14th August 2020 and filed on 17th August 2020 together with a Supporting Affidavit sworn and filed on even date and a Supplementary Affidavit sworn on 27th August 2020 and filed on 28th August 2020, through the firm of Sigano & Omollo LLP Advocates, seeking the following orders: -

- i. An order annulling and setting aside the Procuring Entity’s decision contained in the letter dated 3rd August 2020 purporting that the Applicant’s bid was non-responsive in the subject tender number KPA/121/2019-20/TE – Supply and Commissioning of Five (5) New Empty Container Handlers (Reach stacker Type);***
- ii. An order declaring the Procuring Entity’s decision contained in the letter dated 3rd August 2020 purporting to cancel/terminate the subject tender number KPA/121/2019-20/TE – Supply and Commissioning of Five (5) New Empty Container Handlers (Reach stacker Type) null and void and the same be set aside;***
- iii. An order directing the Procuring Entity to immediately re-admit the Applicant’s tender for further evaluation in***

accordance with the criteria for evaluation provided in the Tender Document, taking into account the findings of the Review Board herein and to award in accordance with the award criteria provided in Clause 33 of the Instructions to Tenderers in the tender document;

- iv. Any other relief that the Board may deem fit and just to grant;
and***
- v. An order awarding costs of the Review to the Applicant.***

In response, the 1st and 2nd Respondents lodged a Memorandum of Response dated 21st August 2020 and filed on 24th August 2020 together with an Affidavit in Support of the 1st and 2nd Respondents' Memorandum of Response, which Affidavit was sworn on 21st August 2020 and filed on 24th August 2020 through Addraya Dena Advocate.

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 Skeletal Submissions dated 27th August 2020 and filed on 28th August 2020 while the 1st and 2nd Respondents lodged Written Submissions dated 31st August 2020 and filed on 3rd September 2020. Despite the Board Secretary having notified other tenderers of the existence of the Request for Review through letters dated 17th August 2020, none of them filed any pleadings or written submissions in response to the Request for Review.

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

In addressing the issue framed for determination, the Board shall make a determination on the following sub-issues: -

- a) *Whether the Applicant satisfied the criterion under Clause 10 (vi) of Section III. Tender Data Sheet of the Tender Document;*
- b) *Whether the Procuring Entity's Acting Head of Procurement and Supplies acted within the confines of the law in directing the Evaluation Committee to carry out a re-evaluation of bids in the subject tender; and*
- c) *Whether the Procuring Entity complied with the procedural requirements for termination of procurement proceedings outlined in section 63 (2) (3) and (4) of the Act*

The Board now proceeds to address the above issue 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 not 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 then constituted) 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) (f), 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)

(b)

(c)

(d)

(e)

(f) all evaluated tenders are non-responsive;

(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) (f) of the Act as the reason why it terminated the subject tender, because in its view, all evaluated tenders were non-responsive. However, the Applicant contends that its bid ought to have been found responsive in accordance with section 79 (1) and 80 (2) of the Act. According to the Procuring Entity's letter of Cancellation of Tender dated 3rd August 2020, the Procuring Entity notified the Applicant that the subject tender had been cancelled because of evaluated tenders were non-responsive and further specified the following reason why the Applicant's bid was found non-responsive: -

"You failed because you did not provide a valid quality certificate for the manufacture of Empty Container Handles (Reach Stackers Type) i.e. ISO certification or equivalent instead you provided ISO certificates for Heavy Port Machinery and its frame structure"

The Board studied the Tender Document to determine the criterion in issue and notes that Clause 10 (vi) of Section III. Tender Data Sheet of the Tender Document provides as follows: -

"Valid quality certificate for the manufacturing company stating clearly that their systems are certified for design, manufacture and supply of New Empty Container Handlers (Reachstacker Type) i.e. ISO certification or equivalent (Mandatory)"

In order to address the first sub-issue, that is, whether the Applicant satisfied the criterion under Clause 10 (vi) of Section III. Tender Data Sheet of the Tender Document, the Board studied the Applicant's original bid and notes that in response to this criterion, the Applicant attached the following: -

- *At page 00000109 of its original bid, a Certificate of Conformity of Quality Management System Certification No. 2070019Q10020ROM on the letterhead of Guangdong Zhongzhijian Certification Co. Ltd with the following details: -*

"This is to certify that the quality system of SANY MARINE HEAVY INDUSTRY CO. LTD, Floor 1, Office Auxiliary Building No. 631, SANHU Avenue, Pingsha Town Zhuhai City is in conformity with GB/T 19001-2016/ISO9001:2015 Standard. This system is valid for the Design, Manufacturing, Sales and Technical Service of Heavy Port Machinery and its Frame Structure, Parts

(Operation with Government approval if the items required permission)”

- *At page 00000111 of its original bid, an Environmental Management System Certificate No. 2070019E10008ROM on the letterhead of Guangdong Zhongzhijian Certification Co. Ltd with the following details: -*

“This is to certify that the Environmental Management system of SANY MARINE HEAVY INDUSTRY CO. LTD, Floor 1, Office Auxiliary Building No. 631, SANHU Avenue, Pingsha Town Zhuhai City by reason of its environmental management system has been awarded this certificate for compliance with the standard GB/T 24001-2016/ISO14001:2015. The Environmental Management System applies in the following area:

The Relative Managemnt Activities of the Design, Manufacturing, Sales and Technical Service of Heavy Port Machinery and its Frame Structure, Parts (Operation with Government approval if the items required permission)”

- *At page 00000113 of its original bid, a Certificate of Conformity of Occupational Health and Safety Management System No. 2070019S10006ROM on the letterhead of Guangdong Zhongzhijian Certification Co. Ltd with the following details: -*

"This is to certify that the Occupational Health and Safety Management system of SANY MARINE HEAVY INDUSTRY CO. LTD, Floor 1, Office Auxiliary Building No. 631, SANHU Avenue, Pingsha Town Zhuhai City by reason of its Occupational Health and Safety Management system has been awarded this certificate for compliance with the standard Audit Specification of Occupational Health and Safety Management System GB/T 28001-2011/OHSAS 18001:2007 Standard. The Occupational Health and Safety Management System applies in the following area:

The Relative Management Activities of Design, Manufacturing, Sales and Technical Service of Heavy Port Machinery and its Frame Structure, Parts (Operation with Government approval if the items required permission)

The Board observes that Clause 10 (vi) of Section III. Tender Data Sheet of the Tender Document required tenderers to provide a valid quality certificate for the manufacturing company stating clearly that their systems are certified for design, manufacture and supply of New Empty Container Handlers (Reachstacker Type) i.e. ISO certification or equivalent. However, the Applicant provided quality certificates for the Design, Manufacturing, Sales and Technical Service of Heavy Port Machinery and its Frame Structure.

The Board takes cognizance of section 60 (1), (2) & 3 (b) of the Act, which provides that: -

"60 (1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.

(2) The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured

(3) The technical requirements shall, where appropriate—

(a)

(b) be based on national or international standards whichever is superior"

The above provision gives discretion to the accounting officer of a procuring entity to prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and

open competition among those who may wish to participate in the procurement proceedings. In doing so, the accounting officer of a procuring entity should include all the procuring entity's technical requirements with respect to the goods, works or services being procured and such technical requirements, where appropriate, ought to be based on national or international standards, whichever is superior. In this instance, the 1st Respondent specified a technical requirement for a valid quality certificate for the manufacturing company based on ISO Certification (an International Standard) or its equivalent. Whereas the Procuring Entity desires a valid quality certificate for New Empty Container Handlers (Reachstacker Type), the Applicant provided a quality certificate for Heavy Port Machinery and its Frame Structure.

It is the Board's considered view that, the Procuring Entity is better placed to know the documentation that meets the technical specifications required to implement the subject tenders since it will be the ultimate beneficiary of the Empty Container Handlers (Reachstacker type). The Applicant ought to have provided a quality certificate stating clearly that the systems to be provided by the manufacturer are for design, manufacture and supply of New Empty Container Handlers (Reachstacker Type) with ISO certification or the equivalent and not a quality certificate for Design, Manufacturing, Sales and Technical Service of Heavy Port Machinery and its Frame Structure.

It is worth noting that the criterion under Clause 10 (vi) of Section III. Tender Data Sheet of the Tender Document was a mandatory requirement. Section 79 (1) of the Act which deals with responsiveness of bids states as follows: -

"A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents"

On its part, section 80 (2) of the Act states that: -

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents..."

The Procuring Entity referred the Board to the Court's decision in **Republic v. Public Procurement Administrative Review Board & 3 Others ex parte Roben Aberdare (K) Ltd (2019) eKLR** where it was held as follows: -

"It is evident that compliance with the requirements for a valid tender process including terms and conditions set out in the bid documents, issued in accordance with the constitutional and legislative procurement framework, is thus legally required...Mandatory requirements in bid documents must be complied with. Deviations from mandatory bid requirements are not permissible"

Having considered the court's finding in the foregoing case, the Board would like to note that an evaluation committee must evaluate bids against the eligibility and mandatory requirements using the criteria set out in the tender documents. The criterion under consideration required bidders to provide quality certificate stating clearly that the systems being offered by the manufacturer is for design, manufacture and supply of New Empty Container Handlers (Reachstacker Type) i.e. ISO certification or equivalent and not a quality certificate for Design, Manufacturing, Sales and Technical Service of Heavy Port Machinery and its Frame Structure provided by the Applicant. In essence, the Applicant's quality certificate was not specific to design, manufacture and supply of New Empty Container Handlers (Reachstacker Type).

Accordingly, the Board finds that the Applicant failed to satisfy the criterion under Clause 10 (vi) of Section III. Tender Data Sheet of the Tender Document.

Having found that the Applicant failed to satisfy the criterion under Clause 10 (vi) of Section III. Tender Data Sheet of the Tender Document, the Board observes that section 63 of the Act contains substantive and procedural requirements that a procuring entity must satisfy in order for a termination to be rendered lawful. Furthermore, the substantive and procedural requirements for termination of a procurement process must be carried out in a systematic way, that is to say, all players in the

procurement process must exercise their functions in accordance with the Act.

At this juncture, the Board deems it necessary to outline the manner in which the Procuring Entity carried out the subject procurement process as seen in the confidential documents submitted to the Board by the Procuring Entity pursuant to section 67 (3) (e) of the Act. It is not in dispute that the Procuring Entity invited sealed bids from eligible tenderers through an advertisement published on MyGov Website on 3rd March 2020. It is also common ground that the Procuring Entity received eight bids by the tender submission deadline of 2nd June 2020. All the bids were opened on the same date and recorded by a Tender Opening Committee. An Evaluation Committee carried out evaluation of bids at the Preliminary and Technical Evaluation Stages. Since this was a two-enveloped tender, the Evaluation Committee carried out Preliminary and Technical Evaluation since the Technical Envelope contained requirements to be considered at the Preliminary and Technical evaluation stages. At the end of evaluation at the Preliminary Evaluation Stage, the Evaluation Committee found three tenderers responsive, i.e. M/s BEK Suppliers Ltd, M/s Cargotech Finland Oy and the Applicant. These three tenderers proceeded to Technical Evaluation. At the Technical Evaluation Stage, the Evaluation Committee found that M/s Cargotech Finland Oy and the Applicant attained the minimum technical score of 75% and were therefore eligible to proceed to Financial Evaluation. The Acting Head of Procurement and Supplies reviewed the Evaluation Report dated 10th June 2020 after the same was

submitted to him by the Chairman of the Evaluation Committee. Through a letter dated 19th June 2020, addressed to the Chairman of the Evaluation Committee, the Acting Head of Procurement and Supplies stated as follows: -

"We refer to the technical evaluation report for the above mentioned tender

During review of your report, we did not concur with some of the reasons used to disqualify bidders at the preliminary stage. We have sampled a few cases as follows: -

- i. There was a requirement in the Tender Document that bidders should submit a valid quality certificate for the manufacturing company stating clearly that their systems are certified for design, manufacture and supply of New Empty Container Handlers (Reachstaker Type) i.e. ISO certification of equivalent (Mandatory). Two bidders, Joh Achelis & Soehne GmbH and Tisco Construction Limited have been disqualified because their ISO certificates did not specifically say that they manufacture Empty Container Handlers (Reachstaker Type). A review of their documents revealed the following on the ISO certificates:***

<i>Bidder No.</i>	<i>Name</i>	<i>Remarks on ISO Certificates submitted</i>
<i>5</i>	<i>Joh Achelis & Soehne GmbH</i>	<i>Manufacture of Empty Container Handlers (Reach Stacker Type) is not stated on the ISO Certificate on page 42-44 instead the scope includes industrial</i>

		<i>trucks and forklift truck components</i>
6	<i>Tisco Construction Limited</i>	<i>Manufacture of Empty Container Handlers (Reach Stacker Type) is not stated on the ISO Certificate on page 65 instead the scope includes Cranes and crane semi-Trailer</i>

However, it was noted that besides the two bidders above, there were other bidders whose ISO Certificates did not specifically state as above and who were found responsive on this criterion.

<i>Bidder No.</i>	<i>Name</i>	<i>Remarks on ISO Certificates submitted</i>
7	<i>Cargotech Finland Oy</i>	<i>Manufacture of Empty Container Handlers (Reach Stacker Type) is not stated on the ISO Certificate on page 56-58 instead the scope cargo handling equipment</i>
8	<i>Rhombus Construction Company Limited</i>	<i>Manufacture of Empty Container Handlers (Reach Stacker Type) is not states on the ISO Certificate on page 105-114 instead the scope includes Heavy Port Machinery and its frame structure</i>

ii. KoneCranes Liftrucks AB. There was a Tax Assessment Report dated 27/02/2020. I believe the comments should acknowledge this and it not satisfied give a reason why the same is not acceptable other than just ignoring it.

iii. KoneCranes Liftrucks AB. On page 207, the Bidder has made a statement regarding Business Permit. I believe the committee should acknowledge this and if not

satisfied give a reason why the same is not acceptable other than just ignoring it.

iv. Joh Achelis & Soehne GmbH. There was a requirement in the Tender Document that bidders should submit a written undertaking that the components or parts furnished by the manufacturer must be a product of the original licensed (patented) manufacturer or original factory authorized fabricator/supplier (Mandatory). The bidder submitted a document on page 79/80 (Confirmation-Components/Parts Origin) though the wording did not exactly match what is above. I believe the committee should acknowledge this and if not satisfied give a reason why the same is not acceptable other than just ignoring it.

v. Tisco Construction Limited. The Written undertaking by the tenderer that when awarded the tender will deliver the 5No. New Empty Container Handlers (Reachstacker Type) with all the manuals as specified in the technical specifications (Mandatory) for this company is contained on page 360 of their bid submission.

Kindly review your report entirely and ensure that the reasons given for non-responsiveness are well elaborated to avoid ambiguity when communicating the outcome of the tender for the unsuccessful bidders.

Please be guided accordingly and review your report and resubmit the same not later than Tuesday, 23^d June 2020.

The Evaluation Committee carried out a review of evaluation at the Preliminary and Technical Evaluation Stages and found four tenderers responsive at the end of Preliminary Evaluation, i.e. M/s BEK Supplies Ltd, M/s Tisco Construction Ltd, M/s Cargotech Finland Oy and the Applicant. At the Technical Evaluation Stage, the Evaluation Committee found that M/s Cargotech Finland Oy and the Applicant were the only tenderers who achieved the minimum technical score required to proceed to Financial Evaluation. The Evaluation Committee submitted an Evaluation Report dated 24th June 2020 following a re-evaluation, to the Acting Head of Procurement and Supplies recommending the two aforementioned tenderers to proceed to Financial Evaluation. In addition to this, the Chairman of the Evaluation Committee addressed a letter dated 24th June 2020 to the Acting Head of Procurement and Supplies stating as follows: -

"This has reference to your Ref:PSM/CTC/1/03 (121) Vol. 1 dated 19th June 2020 on the above subject. We have reviewed the evaluation as directed and rectified the discrepancies as stated below:

- i. Valid Quality Certificate for the manufacturing company stating clearly that the systems are certified for design, manufacture and supply of new Empty Container Handlers (Reachstacker Type) i.e. ISO certification or***

equivalent. After review of the documents the following are the findings: -

<i>Bidder No.</i>	<i>Name</i>	<i>Remarks on ISO submitted</i>
<i>5</i>	<i>Joh Achelis Soehne GmbH</i>	<i>The manufacturer provided ISO Certificates, ISO 14001:2015, ISO 9001:2008 specific for manufacture of internal combustion powered and electrical powered industrial forklift trucks and forklift trucks components</i>
<i>6</i>	<i>Tisco Construction Ltd</i>	<i>The manufacturer provided ISO 9001:2008 specific for design, development, production and servicing of cranes, cranes semi-trailer</i>
<i>7</i>	<i>Cargotech Finland Oy</i>	<i>The manufacturer provided ISO 14001:2015, OHSAS 18001:2017 for development, deliveries and customer support of Kalmar cargo handling solution</i>
<i>8</i>	<i>Rhombus Construction Company Ltd</i>	<i>The manufacturer provides ISO 9001:2015, ISO 14001:2015, and OHSAS 18001:2007 for design, manufacture, sales and technical service for Heavy Port Machinery and its frame</i>

		<i>structure</i>
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The KPA document section 10 (vi) gave requirement of a valid certificate for manufacturing stating clearly that the systems are certified for Design, Manufacture and Supply of Empty Container Handlers. The Committee found all the above firms responsive for this requirement. The committee further notes that ISO certification is for a process for manufacture and not specific for Empty Container Handlers...”

In a Professional Opinion dated 30th June 2020 addressed to the 1st Respondent, the Acting Head of Procurement and Supplies reviewed the Evaluation Report dated 24th June 2020 whilst outlining the manner in which the procurement process was carried out from inception. He further stated as follows: -

"6.1 Pursuant to section 84 (1) and (2) of the Public Procurement and Asset Disposal Act, 2015 having reviewed the Evaluation Report and recommendations made therein, I am satisfied that the tendering process was done as per the provisions of the Public Procurement and Asset Disposal Act, 2015. However, I do not concur with the Committee recommendations.

6.2. There was a requirement in the Tender Document that bidders should submit a valid Quality Certificate for the manufacturing company stating clearly that their

systems are certified for design, manufacture and supply of New Empty Container Handlers (Reachstacker Type). A review of the two bidders recommended by the Evaluation Committee has revealed that their ISO Certificate were not for Empty Container Handler and read as follows:

<i>Bidder No.</i>	<i>Name</i>	<i>Remarks on ISO Certificates submitted</i>
<i>7</i>	<i>Cargotech Finland Oy</i>	<i>Manufacture of Empty Container Handlers (Reach Stacker Type) is not stated on the ISO Certificate on page 56-58 instead the scope cargo handling equipment</i>
<i>8</i>	<i>Tisco Construction Limited</i>	<i>Manufacture of Empty Container Handlers (Reach Stacker Type) is not states on the ISO Certificate on page 105-114 instead the scope includes Heavy Port Machinery and its frame structure</i>

6.3. The Chairman of the Evaluation Committee was advised of the findings in paragraph 6.2. However, in his reply, he advised that ISO certification is a process of Manufacture and not specific to Empty Container Handlers. For that reason, the Committee did not find it necessary to disqualify the two bidders above on the basis of ISO non-compliance.

6.4. I have reviewed the bids of all the eight bidders on this matter and found that there are three (3) bidders who submitted ISO certificates which are specific to Empty Container Handlers dismissing the arguments by the

Chairman in paragraph 6.3 above. For this reason, the two bidders who have been recommended for further evaluation cannot be responsive.

6.5. In my professional opinion, I recommend cancellation of the above tender in accordance with clause 63 (1) (f) of the Public Procurement and Asset Disposal Act, 2015 on account of non-responsiveness of all the bidders...”

From the above sequence of events, the Board notes that: -

- The Acting Head of Procurement and Supplies was not in agreement with the findings of the Evaluation Committee that M/s Joe Achelis Soehne GmBH, M/s Tisco Construction Limited, M/s Cargotech Finland Oy and the Applicant met the requirement of Clause 10 (vi) of Section III. Tender Data Sheet of the Tender Document;
- The Acting Head of Procurement, by his own motion, directed the Evaluation Committee to review the Evaluation Report dated 10th June 2020;
- The Evaluation Committee conducted the said review and submitted another Evaluation Report dated 24th June 2020 but still found that M/s Joe Achelis Soehne GmBH, M/s Tisco Construction Limited, M/s Cargotech Finland Oy and the Applicant met the requirement of Clause 10 (vi) of Section III. Tender Data Sheet of the Tender Document;

- The Acting Head of Procurement and Supplies in his professional opinion dated 30th June 2020 stated that having reviewed the bids of all eight tenderers, three (3) tenderers submitted ISO certificates specific to Empty Container Handlers and he therefore dismissed the arguments of the Chairman of the Evaluation Committee;
- The Acting Head of Procurement and Supplies thereafter recommended termination of the subject tender pursuant to section 63 (1) (f) of the Act since he took the view that all evaluated tenders were non-responsive.

At this point, the Board would like to note that the Black's Law Dictionary, 9th Edition at page 1462 thereof, defines the term **"review"** as follows: -

"Consideration, inspection, or reexamination of a subject or thing [for a second time]"

On its part, the Cambridge English Dictionary, 7th Edition, defines the term "re-evaluate" as: -

"To consider or examine something again in order to make changes or to form a new opinion about it"

Having considered the foregoing definitions, it is possible to deduce that the term "review" is synonymous to the term "re-evaluate". This means, in directing the Evaluation Committee to review its findings in the Evaluation

Report dated 10th June 2020, the Acting Head of Procurement directed the Evaluation Committee to undertake a re-evaluation of bids in the subject tender. The outcome of such re-evaluation was contained in the Evaluation Report dated 24th June 2020. To support the Board's position that the Acting Head of Procurement and Supplies directed the Evaluation Committee to conduct a re-evaluation, the Board notes that whereas the Evaluation Committee previously found three bidders responsive at the end of Preliminary Evaluation (i.e. M/s BEK Suppliers Ltd, M/s Cargotech Finland Oy and the Applicant), the Evaluation Committee had a different outcome at the end of re-evaluation at the Preliminary Evaluation stage given that four bidders namely; M/s BEK Suppliers Ltd, M/s Tisco Construction Ltd, M/s Cargotech Finland Oy and the Applicant were found responsive. In essence, this different outcome was only arrived at upon considering, inspecting and reexamining all bids submitted in the subject tender a second time; an action that is known as "a re-evaluation" undertaken by the Evaluation Committee as directed by the Acting Head of Procurement and Supplies.

This therefore leads the Board to address the second sub-issue, that is, whether the Procuring Entity's Acting Head of Procurement and Supplies acted within the confines of the law in directing the Evaluation Committee to undertake a re-evaluation process. In addressing this issue, the Board finds it necessary to make a determination on the following question: -

What is the role of an Evaluation Committee vis-à-vis the role of the Head of Procurement function as provided in the Act?

As regards the role of an Evaluation Committee, section 46 (1) and (4) (a) of the Act provides as follows: -

(1) An Accounting officer shall ensure that an ad hoc evaluation committee is established in accordance with this Act and Regulations made thereunder and from within the members of staff, with the relevant expertise.

(2)

(3)

(4) An evaluation committee established under subsection (1), shall—

(a) deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it

Section 80 (1) of the Act further provides that: -

"The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected under section 82(3).

Further, section 80 (2) of the Act cited hereinbefore requires an evaluation committee to evaluate bids using the procedures and criteria specified in the Tender Document. It is the Board's considered view that an evaluation committee is the designated functionary that deals with evaluation of bids (including the technical and financial aspects of a procurement as well as the negotiation of the process, proposals for prequalification, registration lists, Expression of Interest) and in doing so, it must apply the procedures and criteria specified in the Tender Document.

On the other hand, section 84 of the Act provides that: -

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

(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the

event of dissenting opinions between tender evaluation and award recommendations.

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

Section 85 of the Act further provides that: -

"Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers"

Having considered the foregoing provisions, the Board observes that the primary role of the Head of Procurement function is to review the evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings. Further the Professional Opinion of the Head of Procurement function serves the following functions: -

- Provides guidance on the procurement proceedings in the event of dissenting opinions between tender evaluation and award recommendations; and

- Guides an accounting officer in making a decision to award a tender.

According to section 84 of the Act, a professional opinion serves as the central aspect between tender evaluation and award recommendation. The Act considers the Head of Procurement function to be a person with the professional qualification capable of reviewing an evaluation report and recommending the appropriate action to be taken by the Accounting Officer. It is correct to state that the Head of Procurement function does not always have to agree with the findings of the Evaluation Committee. In any case, section 84 (2) of the Act envisions instances of dissenting opinions between tender evaluation and award recommendations. In such an instance, the Head of Procurement function in reviewing an Evaluation Report will issue his professional opinion and advise the Accounting Officer on the appropriate action to take i.e. advise the Accounting Officer whether or not it is appropriate to award in the circumstances.

In the subject tender where a two-enveloped system of tendering was used, the Board is cognizant of Regulation 31 (4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") which provides that: -

(1)

(2)

(3)

(4) Where the technical and financial bids are submitted in separate envelopes, a technical report shall be prepared and submitted to the head of procurement for review and invitation of bidders for the opening of financial proposals

Having considered the above provision together with section 84 (2) of the Act, the Board observes that once the Head of Procurement function has reviewed the Technical Evaluation Report (which would contain a summary of evaluation and comparison of tenders at the Preliminary and Technical Evaluation Stages) submitted in a two enveloped tender, he ought to bring his professional opinion to the attention of and advising the Accounting Officer on whether or not it is appropriate for the Accounting Officer (and not the Head of Procurement function on his own volition) to direct the Evaluation Committee to conduct a re-evaluation.

In all the two scenarios considered by the Board, either in a one-enveloped tender or a two-enveloped tender, the Act and Regulations 2020 do not give the Head of Procurement function powers to directly order an Evaluation Committee to conduct a re-evaluation after he has reviewed an evaluation report. This is a role that ought to be exercised by the Accounting Officer (i.e. the 1st Respondent herein) after he has considered the Professional Opinion submitted by the Head of Procurement.

This therefore leads the Board to find that the Acting Head of Procurement and Supplies acted outside the confines of section 84 of the Act and Regulation 31 (4) of Regulations 2020, therefore rendering the reevaluation process directed by the Acting Head of Procurement and Supplies, null and void. Consequently, the Evaluation Report dated 24th June 2020 emanating from a directive by the Acting Head of Procurement and Supplies in the letter dated 19th June 2020 for the Evaluation Committee to carry out a re-evaluation process, is null and void.

Having nullified the re-evaluation process, the Board considered the Professional Opinion dated 30th June 2020 and notes that, the Acting Head of Procurement and Supplies reviewed the bids of all eight bidders and found that, three (3) bidders submitted ISO certificates specific to Empty Container Handlers and he therefore dismissed the arguments of the Chairman of the Evaluation Committee. As a result, the Acting Head of Procurement and Supplies recommended termination of the subject tender pursuant to section 63 (1) (f) of the Act as he took the view that all evaluated tenders were non-responsive.

It is worth noting that, the Acting Head of Procurement and Supplies disagreed with the findings of the Evaluation Committee on two occasions. The first time, he directed a re-evaluation instead of reviewing the technical report (i.e. evaluation report on preliminary and technical evaluation) and advising the 1st Respondent on the appropriate action to

be taken in the circumstances. During the second time, he dismissed the arguments of the Chairman of the Evaluation Committee, therefore recommending termination of the subject tender instead of reviewing the technical report (i.e. evaluation report on preliminary and technical evaluation) and advising the 1st Respondent on the appropriate action to be taken. This shows that, the 1st Respondent approved termination of the subject procurement process even though the Acting Head of Procurement and Supplies acted outside the confines of section 84 of the Act and Regulations 31 (4) of Regulations 2020, by directing a re-evaluation and dismissing the arguments of the Evaluation Committee which ought to determine the responsiveness (or lack thereof) of tenders.

Having established that the Acting Head of Procurement and Supplies acted outside the powers specified in the Act, the Board observes that the procedure applied by the Procuring Entity up to the point where the 1st Respondent approved termination of the subject tender was marred with irregularities owing to the fact that the Acting Head of Procurement and Supplies acted outside the confines of section 84 of the Act and Regulations 31 (4) of Regulations 2020, by directing a re-evaluation and dismissing the arguments of the Evaluation Committee which ought to determine the responsiveness (or lack thereof) of tenders, instead of advising the 1st Respondent on the appropriate action to be taken especially in this case as outlined hereinbefore.

In addition to this, the Board observes that once an accounting officer approves a recommendation that procurement proceedings be terminated, the Act provides procedural requirements that ought to be followed by a procuring entity. It is therefore necessary for the Board to establish whether the same were followed. 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 gives the Procuring Entity an obligation to submit a written report on termination to the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") within fourteen days of termination. The Board was furnished with a letter of

Termination of Procurement dated 3rd August 2020 addressed to the Director General of the Authority together with a Report of Termination of the subject procurement process. These two documents are original and not copies noting that the name of the person signing the documents, signatures and date are affixed in a blue ball point pen. The Board was not furnished with any evidence of dispatch of the letter dated 3rd August 2020 and the Report dated on even date, in order to ascertain whether the same were furnished to the Authority. In addition to this, the Procuring Entity had 14 days after 3rd August 2020, that is, up to 17th August 2020 to submit the letter of Termination of Procurement dated 3rd August 2020 to the Director General of the Authority and the Report of Termination of the subject procurement process. From the Procuring Entity's confidential file, the Board notes that the Procuring Entity received a notification from the Board Secretary on 19th August 2020 that the Request for Review had been filed by the Applicant. This demonstrates that the Procuring Entity had a period of 14 days between 3rd August 2020 and 17th August 2020 within which it ought to have furnished the letter of Termination of procurement dated 3rd August 2020 and the Report on Termination of procurement proceedings to the Director-General since during that period, the Procuring Entity had not learnt of the existence of the Request for Review.

In the absence of any proof by the Procuring Entity that it furnished the aforementioned documents to the Director General of the Authority, the Board finds that the Procuring Entity did not submit the letter of

Termination of Procurement dated 3rd August 2020 and the Report on Termination dated on even date to the Director-General of the Authority.

It is also worth noting that, section 63 (4) of the Act requires the accounting officer of a procuring entity to notify all tenderers of the termination within fourteen days of termination with reasons for the said termination. The Applicant challenged its letter of Cancellation of Tender dated 3rd August 2020, by alleging that the person who signed the said letter did not have authority to do so. The foot of the letter of Cancellation of Tender dated 3rd August 2020 appears as follows: -

"....."

Yours Faithfully,

[signature affixed]

Aza Dzengo

Ag. Head of Procurement and Supplies

FOR: Ag. MANAGING DIRECTOR

It is worth noting that section 2 of the Act refers one to the Public Finance Management Act, 2012 (hereinafter referred to as the "Public Finance Management Act") in so far as the meaning of an accounting officer is concerned. Accordingly, the Board considered the meaning of an

accounting officer provided in section 2 of the Public Finance Management Act which states as follows: -

"accounting officer" means—

(a) an accounting officer of a national government entity referred to in section 67"

Further, section 67 of the Public Finance Management Act provides that: -

"The Cabinet Secretary, except as otherwise provided by law, shall in writing designate accounting officers to be responsible for the proper management of the finances of the different national government entities as may be specified in the different designations"

Section 5 of the Kenya Ports Authority Act, Chapter 391, Laws of Kenya referred to by the Procuring Entity states that: -

"(1) There shall be a Managing Director who shall be appointed by the Minister after consultation with the Board and whose terms and conditions of service shall be determined by the Minister in the instrument of appointment or otherwise in writing from time to time.

(2) Subject to this Act, the control and executive management of the Authority shall be vested in the Managing Director."

Further, section 61 (2) of the Kenya Ports Authority Act provides as follows: -

"Any act or decision or notification thereof, of the Board or the Managing Director under this Act may be signified under the hand of an employee authorized for that purpose

It is not in dispute that the Accounting Officer of the Procuring Entity herein is the Acting Managing Director joined as a 1st Respondent to the Request for Review. From the above provisions, the Board notes that the Kenya Ports Authority Act allows a notification to be given by the Board of the Procuring Entity or by the Managing Director and that such notification may be signified under the hand of an employee authorized for that purpose. Therefore, as regards the question whether an accounting officer can delegate his authority to issue a notification, section 61 (2) of the Kenya Ports Authority Act suggests that authority must have been given to the employee in question to issue such notification.

The above provision demonstrates that an employee of Kenya Ports Authority may be given authority to issue a notification. The Board is cognizant of section 63 (4) of the Act which states that an accounting officer of a procuring entity ought to be the person notifying tenderers of termination of procurement proceedings within fourteen days of termination with reasons of such termination.

In essence, whereas section 61 (2) of the Kenya Ports Authority Act suggests that authority must have been given to the employee in question to issue notifications, section 63 (4) of the Act states that an accounting officer of a procuring entity ought to be the person notifying tenderers of termination of procurement proceedings.

The Board observes that section 5 of the Act provides that: -

"(1) This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services"

The Board takes cognizance that the Act is the substantive law applicable in all matters relating to public procurement and asset disposal in so far as they are not excluded from application of the Act. In determining the person who issues letters of notification of termination of procurement proceedings to tenderers, the Board must consider the provisions of section 63 (4) of the Act which gives authority to issue notification letters to an accounting officer and whether such authority can be delegated.

It is therefore important to establish whether an accounting officer of a procuring entity can delegate the authority to issue notification letters to another person and if so, how such delegation ought to be undertaken. To answer this question, the Board observes that section 37 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya provides that: -

"Where by or under an Act, powers are conferred or duties are imposed upon a Minister or a public officer, the President, in the case of a Minister, or the Minister, in the case of a public officer, may direct that, if from any cause the office of that Minister or public officer is vacant, or if during any period, owing to absence or inability to act from illness or any other cause, the Minister or public officer is unable to exercise the powers or perform the duties of his office, those powers shall be had and may be exercised and those duties shall be performed by a Minister designated by the President or by a person named by, or by the public officer holding an office designated by, the Minister; and thereupon the Minister, or the person or public officer, during that period, shall have and may exercise those powers and shall perform those duties, subject to such conditions, exceptions and qualifications as the President or the Minister may direct."

The above provision specifies that a public officer, such as the Accounting Officer herein may delegate his authority because of inability to act in certain circumstances. However, in exercise of his function as a public officer, the Accounting Officer is bound by principles of leadership and integrity under the Constitution and other legislation. Article 10 (2) (c) of the Constitution outlines national values and principles of governance that bind all State organs, State officers and public officers including *"good governance, integrity, transparency and accountability"*. Article 232 (1) (e) of the Act puts it more strictly, that *"the values and principles of public service include accountability for administrative acts"*.

Section 5 of the Public Service (Values and Principles) Act No. 1 A of 2015 requires public officers to maintain high standards of professional ethics in that: -

- "5 (1) *Every public officer shall maintain high standards of professional ethics***
- (2) *For purposes of subsection (1), a public officer maintains high standards of professional ethics if that public officer***
 - (a) *.....;***
 - (b) *.....;***
 - (c) *is transparent when executing that officer's functions;***

- (d) can account for that officer's actions;**
- (e)**
- (f)**
- (g)**
- (h) observes the rule of law.**

From the above provisions, the Board notes that the Accounting Officer has the obligation to maintain high standards of professional ethics as he is held accountable for administrative acts, whether performed personally or through delegated authority.

The above provisions demonstrate that the Accounting Officer has power to delegate his authority, but he must still remain accountable for acts performed by persons to whom he has delegated authority to act on his behalf. In order to observe the national values and principles of governance, it is more efficient for an accounting officer to specify the tender for which the delegated authority is given to avoid instances where such authority is exercised contrary to the manner in which he had specified. The person to whom the authority is delegated may use such delegated authority to undermine the Accounting Officer.

The Constitution and the aforementioned legislation gives responsibilities to all persons in the public service including the Procuring Entity's Accounting Officer to take necessary steps to ensure that his authority, when delegated, is specific, is given in writing and not open to misuse contrary to the manner he had specified.

It is the Board's finding that to achieve the underlying principles and national values of governance, the delegated authority by an accounting officer must be in writing and specific to the tender concerned to avoid instances where such authority is exercised contrary to the manner in which he had specified, thus undermining the accounting officer.

With respect to delegation of authority, the Board finds that the Accounting Officer of the Procuring Entity has the power to delegate his authority in writing to issue letters of notification of termination of procurement proceedings to tenderers. Therefore, even though section 61 (2) of the Kenya Ports Authority Act suggests that authority can be given to the employee of Kenya Ports Authority to issue notifications and section 63 (4) of the Act states that an accounting officer of a procuring entity ought to be the person notifying tenderers of termination of procurement proceedings, when an accounting officer exercises the discretion to delegate authority, he must do so in writing and specify the tender for which such authority has been given.

Having noted that the Procuring Entity's Acting Head of Procurement & Supplies signed letters of notification of termination of procurement proceedings for the Procuring Entity's Acting Managing Director, the Board studied the confidential file submitted to it to establish whether there was a letter of delegation of authority given to the Procuring Entity's Acting Head of Procurement & Supplies to issue letters of notification of procurement proceedings. However, the Board did not find a letter delegating authority to the Acting Head of Procurement and Supplies to issue notification of letters to tenderers. Having considered the provisions of the Kenya Ports Authority Act, section 37 of the Interpretation and General Provisions Act and section 5 (1) and (2) of the Public Service (Values and Principles) Act, this Board arrives at the conclusion that their ought to be evidence adduced by the Procuring Entity that the Acting Head of Procurement and Supplies (being an employee of the Procuring Entity) was authorized in writing to issue letters of notification of termination of the subject procurement proceedings.

It is trite law that **"he who alleges must prove"**. The Procuring Entity is the party alleging that such authorization was issued but has failed to discharge its burden of proof by furnishing the Board with a letter specifically delegating authority to the Acting Head of Procurement and Supplies (i.e. authorizing the Acting Head of Procurement and Supplies) to issue letters of notification of termination of procurement proceedings.

In the circumstances, the Board finds that the letters of Notification of Cancellation of Tender dated 3rd August 2020 were issued by a person who did not have written delegated authority from the Procuring Entity's Acting Managing Director to issue the said letters of Cancellation of Tender and the same are null and void.

Accordingly, the Board finds that the Procuring Entity failed to terminate the subject procurement process in accordance with the procedural requirements of section 63 (2) (3) and (4) of the Act.

The Board has established that the procedure used by the Procuring Entity in terminating the subject procurement process was marred with irregularities noting that the Acting Head of Procurement Supplies acted outside the powers vested upon him by section 84 of the Act and Regulation 31 (4) of Regulations 2020 which do not expressly allow him to direct a re-evaluation but to advise the 1st Respondent whether or not to approve a re-evaluation in the circumstances. The Board has also established that the Procuring Entity failed to provide any evidence to the Board's satisfaction that the Letter of Termination of Procurement dated 3rd August 2020 and the Report on Termination of the subject procurement process dated on even date were furnished to the Authority within 14 days of the alleged termination. Furthermore, the Board has found that the letters of Notification of Cancellation of Tender dated 3rd August 2020 addressed to all tenderers were issued by a person who did not have

written delegated authority from the Procuring Entity's Acting Managing Director, thus nullifying the same.

This means that, the Procuring Entity's decision terminating the subject procurement proceedings clearly emanated from a flawed process. 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 Procuring Entity's letters of Cancellation of Tender dated 3rd August 2020 were based on a professional opinion approved by the Accounting Officer of the Procuring Entity, and such professional opinion emanated from a direct order by the Acting Head of Procurement and Supplies for the Evaluation Committee to undertake a re-evaluation and

dismissal of the findings of the Evaluation Committee, which actions were ultra vires. This therefore makes the professional opinion dated 30th June 2020 null and void and any action undertaken by the Procuring Entity thereafter is 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.

It is worth noting that whereas the Board has found that the Procuring Entity failed to comply with the procedural requirements for termination of the subject procurement proceedings, the Applicant failed to meet the requirement of Clause 10 (vi) of Section III. Tender Data Sheet of the Tender Document.

Having nullified the Professional Opinion dated 30th June 2020 and the second Evaluation Report dated 24th June 2020, it is important for the Procuring Entity to undertake the subject procurement process in accordance with the principle of fairness outlined in Article 227 (1) of the Constitution. All tenderers must be re-evaluated at the Preliminary Evaluation Stage in accordance with Clause 10 (vi) of Section III. Tender Data Sheet of the Tender Document and Article 227 (1) of the Constitution.

The upshot of this is that the Board directs the Procuring Entity to re-evaluate all the bids at the Preliminary Evaluation stage with respect to

Clause 10 (vi) of Section III. Tender Data Sheet of the Tender Document taking into consideration the Board's findings in this Review and complete the procurement process to its logical conclusion within 14 days from the date hereof.

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 Procuring Entity's Letters of Notification of Cancellation of Tender No. KPA/121/2019-20/TE for Supply and Commissioning of Five (5) New Empty Container Handlers (ReachStacker Type) dated 3rd August 2020 addressed to all tenderers, be and are hereby cancelled and set aside.**

- 2. The Procuring Entity is hereby directed to re-admit all tenders received in Tender No. KPA/121/2019-20/TE for Supply and Commissioning of Five (5) New Empty Container Handlers (ReachStacker Type) at the Preliminary Evaluation Stage and conduct a re-evaluation at the Preliminary**

Evaluation Stage only with respect to Clause 10 (vi) of Section III. Tender Data Sheet of the Tender Document.

- 3. Further to Order No. 2 above, the Procuring Entity is hereby directed to proceed with the procurement process in Tender No. KPA/121/2019-20/TE for Supply and Commissioning of Five (5) New Empty Container Handlers (ReachStacker Type) to its logical conclusion in accordance with the Constitution and the Act within fourteen (14) days from the date of this decision, whilst taking into consideration the findings of the Board in this Review.**

- 4. 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 7th day of September 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB