

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 119/2020 OF 17<sup>TH</sup> AUGUST 2020**

**BETWEEN**

**RHOMBUS CONSTRUCTION COMPANY**

**LIMITED.....APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

**KENYA PORTS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**KENYA PORTS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

Review against the decision of Kenya Ports Authority with respect to Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers.

**BOARD MEMBERS**

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

**IN ATTENDANCE**

- 1. Mr. Philip Okumu                     -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/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers (hereinafter referred to as “the subject tender”) on 14<sup>th</sup> January 2020 on MyGov Publishing Website and the Lloyd’s List on 15<sup>th</sup> January 2020 inviting sealed bids from eligible tenderers.

### **Bid Submission Deadline and Opening of Bids**

The Procuring Entity received a total of nine (9) bids by the bid submission deadline of 7<sup>th</sup> May 2020. The same were opened shortly thereafter by a Tender Opening Committee and recorded as follows: -

<b>No.</b>	<b>Firm</b>
1.	Holman Brothers
2.	JGH Marine A/S
3.	ZPMC Engineering (Pty)
4.	Rhombus Construction Company Ltd
5.	Konecranes LiftTrucks AB
6.	Ferrari
7.	Joh Achelis Soehne GmbH
8.	Neral Holdings
9.	Kalmar Reachstacker

## **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.** 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 Technical Evaluation: -

- M/s Rhombus Construction Company Limited;
- M/s Joh Achelis & Soehne GmBH;
- M/s Neral Holdings Ltd; and
- M/s Kalmar Reachstackers.

### **2. 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 Technical Evaluation, the following tenderers achieved the minimum technical score required to proceed to Financial Evaluation: -

- M/s Rhombus Construction Company Limited; and
- M/s Kalmar Reachstackers.

### **3. Financial Evaluation**

At this stage, the Evaluation Committee applied the criterion under Clause 10. Envelope B-Financial Proposal of Section III. Tender Data Sheet of the Tender Document. The prices quoted by the two tenderers were recorded as follows: -

<b>No.</b>	<b>Firm name</b>	<b>Price schedule in the form of tender</b>
1	M/s Rhombus Construction Company Limited	<b>USD 5,628,207.01</b>
2	M/s Kalmar Reach Stacker	<b>USD 5,475,000.00</b>

### **Recommendation**

The Evaluation Committee recommended award of the subject tender to M/s Rhombus Construction Company Ltd having determined that it was the lowest evaluated bidder at the price of USD 5,628,207.01

### **Professional Opinion**

In a professional opinion dated 29<sup>th</sup> July 2020, the Procuring Entity's Acting Head of Procurement and Supplies outlined the manner in which the

Procuring Entity undertook the subject procurement process whilst reviewing the Evaluation Report received on 10<sup>th</sup> June 2020. He then recommended cancellation of the subject tender in accordance with section 63 (1) (b) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") due to inadequate budgetary provision. The said professional opinion was approved by the Procuring Entity's Acting Managing Director on 6<sup>th</sup> August 2020.

### **Letters of Notification of Cancellation of Tender**

In letters dated 10<sup>th</sup> August 2020, the Procuring Entity notified all tenderers that the subject procurement process had been cancelled due to inadequate budgetary provision.

### **THE REQUEST FOR REVIEW**

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

- a) An order declaring the Procuring Entity's Notification of the purported Termination of procurement proceedings in Tender Number KPA/073/2019-20/TE for Supply, Testing and***

***Commissioning of 12No. New Reachstackers) dated 10<sup>th</sup> August 2020, that was addressed to the Applicant and/or any other bidder who participated in the subject tender process, null and void;***

***b) An order directing the Procuring Entity to award Tender No. KPA/073/2019-20/TE for Supply, Testing and Commissioning of 12No. New Reachstackers) to the Applicant herein having met the award criteria under Clause 33 of the Instructions to Tenderers in the Tender Document;***

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

***d) An order awarding costs of the Review to the Applicant.***

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

On 16<sup>th</sup> 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](http://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 24<sup>th</sup> 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 27<sup>th</sup> August 2020 and filed on 28<sup>th</sup> August 2020 while the 1<sup>st</sup> and 2<sup>nd</sup> Respondents lodged Written Submissions dated 31<sup>st</sup> August 2020 and filed on 3<sup>rd</sup> September 2020. Even though the Board Secretary notified all tenderers of the existence of the Request for Review through letters dated 17<sup>th</sup> August 2020, other tenderers did not file pleadings or written submissions in 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***

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, 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 2<sup>nd</sup> 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 precondition that first needs to be satisfied in the said subsection 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) (b), 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) inadequate budgetary provision;***

***(c) .....***

**(d) .....**

**(e) .....**

**(f) .....**

**(g) .....**

**(h) .....**

**(i) .....**

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

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

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

The Procuring Entity relied on section 63 (1) (b) of the Act to support its position that it terminated the subject procurement process due to inadequate budgetary provision. On its part, the Applicant alleged at paragraph 17 (c) of its Request for Review that, if the budgetary provision for the subject tender is inadequate as alleged by the Respondents, then such inadequacy can only be attributed to the 1<sup>st</sup> Respondent's failure to

prepare a procurement plan which is based on realistic cost estimates and thereby is in breach of section 53 (2) and section 44 of the Act.

Having considered the foregoing averments, the Board deems it necessary to first address its mind on the responsibilities of an accounting officer of a procuring entity under section 44 (1) and (2) (a) of the Act which provides as follows: -

***"(1) An accounting officer of a public entity shall be primarily responsible for ensuring that the public entity complies with the Act.***

***(2) In the performance of the responsibility under subsection (1), an accounting officer shall—***

***(a) ensure that procurements of goods, works and services of the public entity are within approved budget of that entity"***

An Accounting Officer has the primary responsibility of ensuring a procuring entity complies with the provisions of the Act. In doing so, one of the obligations vested upon such accounting officer is to ensure that procurements of goods, works and services of a public entity are within approved budget of that entity. Section 53 of the Act further provides that:

-

- "(1) All procurement by State organs and public entities are subject to the rules and principles of this Act.***
- (2) An accounting officer shall prepare an annual procurement plan which is realistic in a format set out in the Regulations within the approved budget prior to commencement of each financial year as part of the annual budget preparation process.***
- (3) .....***
- (4) .....***
- (5) A procurement and asset disposal planning shall be based on indicative or approved budgets which shall be integrated with applicable budget processes and in the case of a State Department or County Department, such plans shall be approved by the Cabinet Secretary or the County Executive Committee member responsible for that entity.***
- (6) .....***
- (7) .....***
- (8) Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.***



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

Having considered the foregoing provisions, the Board notes that prior to commencement of each financial year, an accounting officer ought to prepare an annual procurement plan which is realistic and within the approved budget. Furthermore, an accounting officer can only commence any procurement proceeding if satisfied that sufficient funds are available to meet the obligations of the resulting contract and are reflected in its approved budget estimates. This means that, the 1<sup>st</sup> Respondent is required by the Act to commence a procurement process only if he is satisfied that sufficient funds are available for the procurement process as reflected in the Procuring Entity’s approved budget.

The Board would like to note that when preparing an annual procurement plan, the Accounting Officer will base the procurement plan on estimates. However, in certain circumstances, the approved budget may turn out to be lower than the amount the accounting officer had estimated in his procurement plan and thus the Procuring Entity will only use the approved budget to commence a procurement process.

This therefore leads the Board to address the question; what was the approved budget of the Procuring Entity for the subject procurement process. The Board studied the Procuring Entity's confidential file and notes that according to Clause 7.2 of the Acting Head of Procurement and Supplies' Professional Opinion dated 29<sup>th</sup> July 2020, it is stated as follows: -

***"The user availed Kshs. 550,000,000.00 against the proposed award of USD 5,628,207.01, DDP, Mombasa (Approximately Kshs. 597,022,189.36). This creates a deficit of Kshs. 47,022,189.36. The Acting General Manager, Finance in a mail dated 26<sup>th</sup> June 2020 affirmed the deficit"***

The Procuring Entity furnished the Board with the email dated 26<sup>th</sup> June 2020 from the Procuring Entity's Acting General Manager, Finance referenced above, wherein he states as follows: -

***"Dear team, the lowest bidder quoted Kshs. 597,022,189.36 compared to an approved budget of Kshs. 550,000,000.00; there is therefore deficit of Kshs. 47,022,189.36 implying inadequate budgetary provision."***

Having considered the foregoing documentation, the Board observes that whereas the Applicant was found to be the lowest evaluated bidder at USD 5,628,207.01, translated to Kshs. 597,022,189.36, the Procuring Entity's approved budget for the subject tender is Kshs. 550,000,000.00. This

prompted the Board to address its mind on the options and/or solutions, if at all, available to the Procuring Entity in this instance where the Applicant's tender sum was Kshs. 47,022,189.36 more than the Procuring Entity's approved budget of Kshs. 550,000,000.00.

In doing so, the Board notes that at paragraph 17 (f) of its Request for Review, the Applicant avers that if its tender price exceeded the budgetary provision of the Procuring Entity, the Procuring Entity could still conduct negotiations with it pursuant to Clause 37 of the Tender Document. On its part, the Procuring Entity at paragraph 18 of its Memorandum of Response states that Clause 37 of the Tender Document would only apply in cases of direct procurement and not the subject tender which applied open tendering method of procurement.

In addressing the foregoing submissions, the Board observes that Clause 37.1 of Section II. Instructions to Tenderers of the Tender Document provides as follows: -

***"Limited negotiations may be undertaken with the evaluated tender under direct procurement method relating to the following areas: -***

***(a) A minor deviation to the technical details of the statement of requirements;***

- (b) Reduction of quantities for budgetary reasons where the reduction is in excess of any provided for in the solicitation documents;***
- (c) A minor amendment to the contract data sheet;***
- (d) Finalising payment arrangements;***
- (e) Delivery arrangements;***
- (f) The methodology; or***
- (g) Clarifying details that were not apparent or could not be finalised at the time of tendering.”***

Having considered the above provision, the Board notes that the Procuring Entity outlined instances when limited negotiations would be undertaken when the direct method of procurement is used. That notwithstanding, the Board observes that the Procuring Entity submitted a letter dated 23<sup>rd</sup> July 2020 together with its confidential file, which letter is written on the letterhead of the Public Procurement Regulatory Authority (hereinafter referred to as “the Authority”) addressed to the Procuring Entity’s Acting Managing Director, stating as follows: -

**"REQUEST FOR ADVISORY ON INSUFFICIENT BUDGETARY PROVISION BEFORE AWARD OF TENDERS**

***...We have reviewed contents of your letter and noted that:***

**(1) Your Procuring Entity advertised two tenders and each one of them is at different levels of processing as follows:**

-

**(a) Tender No. KPA/065/2019-20/TE: Supply and Commissioning of 2 No. Wheel Drive Terminal Tractors: -**

.....;

**(b) Tender No. KPA/073/2019-2020/TE: Supply, Testing and Commissioning of 12No New Reachstackers:-**

**(i) price as read out during tender opening was USD 5,628,207.01 (inclusive of 12No. reachstackers, priced list of special tools, spares to be used for 24 months' warranty period, local training, overseas training, pre-shipment inspection, one spare wheel).**

**(ii) The available budget was Kshs. 550,000,000 whereas the proposed award is approximately Kshs. 597,022,189.00.**

**(iii) The tender has not been awarded yet due to lack of sufficient budget.**

**(2) You now seek our guidance on:**

**(a) .....**

***(b) Application of section 63 (1) (b) of the Act in respect of the two tenders considering that in both cases, the proposed award exceeded the available budget***

***(c) .....***

***(3) We have not had sight of the relevant documents and information pertaining to the two subject tenders to enable us offer advice from an informed point of view These documents and information include but not limited to:***

***(a) Copies of blank bid document issued to bidders and the bid document submitted by the successful tenderers***

***(b) Copies of the tenders' opening registers***

***(c) Copies of the tenders' evaluation reports***

***.....***

***In the view of the above, our comments are therefore, limited to the information disclosed in your letter***

***.....***

***10. On your request for guidance on application of section 63 (1) (b) of the Act, we find the aforementioned section to be self-explanatory in its guidance that the 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 there is inadequate budgetary provision. Please note that the termination or cancellation of a procurement or disposal proceeding as provided for in the aforementioned section is only applicable prior to notification of tender award. In the event that your procuring entity opts to terminate or cancel a procurement or asset disposal proceedings after having notified the successful tenderer(s), we advise that you seek legal guidance from the Attorney General.***

- 11. With regard to your request for guidance on the way forward, we hereby clarify that procurement decision making is the responsibility of the Accounting Officer. It is therefore incumbent upon your procuring entity to consider the circumstances you are in and relate with provisions of the Act to enable you to make an informed decision on the way forward. The aforementioned decision should be in tandem with Article 227 (1) of the Constitution of Kenya, 2020 (the Constitution) and in accordance with the Act and the Regulations...We trust that our guidance above will assist you in making a decision on the way forward...***

Having considered the contents of the letter dated 23<sup>rd</sup> July 2020, the Board observes that the Procuring Entity requested for an advisory from the

Authority on insufficient budgetary provision before award of Tender No. KPA/065/2019-20/TE: Supply and Commissioning of 2 No. Wheel Drive Terminal Tractors and the subject tender. In response, the Authority referred the Procuring Entity to section 63 (1) (b) of the Act, whilst advising the 1<sup>st</sup> Respondent to consider the circumstances of the Procuring Entity and relate such circumstances with provisions of the Act in order to make an informed decision in tandem with Article 227 (1) of the Constitution, the Act and the Regulations.

The Board observes that the guidance given by the Authority was merely an advisory that was not binding on the Procuring Entity, neither did the same stop the Procuring Entity from exploring more appropriate options if at all they are available in the Act. The Act proposes an option that may be used by a procuring entity when faced with a situation where the lowest evaluated tender price is above the procuring entity's approved budget. In that regard, Section 131 and 132 of the Act provides as follows:-

***"131. Competitive Negotiations***

***An accounting officer of a procuring entity may conduct competitive negotiations as prescribed where—***

- (a) there is a tie in the lowest evaluated price by two or more tenderers;***
- (b) there is a tie in highest combined score points;***
- (c) the lowest evaluated price is in excess of available budget; or***



- (d) there is an urgent need that can be met by several known suppliers.***

***132. Procedure for Competitive Negotiations***

- (1) In the procedure for competitive negotiations, an accounting officer of a procuring entity shall—***

***(a) identify the tenderers affected by tie;***

***(b) identify the tenderers that quoted prices above available budget; or***

***(c) identify the known suppliers as prescribed.***

- (2) In the case of tenderers that quoted above the available budget, an accounting officer of a procuring entity shall—***

***(a) reveal its available budget to tenderers; and***

***(b) limit its invitation to tenderers whose evaluated prices are not more than twenty-five percent above the available budget.***

- (3) An accounting officer of a procuring entity shall request the identified tenderers to revise their tenders by submitting their best and final offer within a period not exceeding seven days.***

- (4) The revised prices shall not compromise the quality specifications of the original tender.***

**(5) Tenders shall be evaluated by the evaluation committee appointed in the initial process.**

Before addressing our minds on the import of section 131 and 132 of the Act, the Board would like to point out that whereas the Tender Document outlined instances where limited negotiations would be undertaken if direct method of procurement is used, nothing stopped the Procuring Entity from exploring any options available in the Act. As already noted above, the Act is the substantive law applicable in public procurement and asset disposal proceedings in so far as they are not excluded from application of the Act. In addition to this, if the Tender Document is silent on negotiations that can be applied when the open method of tendering is used, a procuring entity ought to consider whether the Act gives guidance on how negotiations can be carried out in open tendering method.

The Board further makes an observation that the Applicant is not challenging the method of procurement that was used by the Procuring Entity. It is also worth noting that the circumstances listed under section 131 of the Act where a procuring entity may conduct competitive negotiations include an open tender (i.e. section 131 (a) and (c) of the Act) because a successful tenderer in an open tender under section 86 (1) (a) of the Act is one whose tender has the lowest evaluated price; Request for Proposal (i.e. section 131 (b) of the Act) because a successful tenderer in a Request for Proposal is one whose tender has the highest score determined by combining the

technical and financial proposal in accordance with section 86 (1) (b) of the Act; and restricted method of tendering (i.e. section 131 (d) of the Act) because the restricted method of tendering under section 102 (1) (b) & (c) of the Act, is used when the time and costs required to examine and evaluate tenders would be disproportionate to the value of what is being procured and there are only a few known suppliers in the market. This in the Board's view demonstrates that competitive negotiation can be used in an open tender where the Request for Proposal method of procurement is not used. In addition to this, competitive negotiations is not a stand-alone method of procurement but same is applied after other methods of procurement have been used up to the Financial Evaluation Stage but; (a) there is a tie in the lowest evaluated price by two or more tenderers; (b) there is a tie in highest combined score points; (c) the lowest evaluated price is in excess of available budget; or (d) there is an urgent need that can be met by several known suppliers.

The lowest evaluated price is used as an award criterion in open tenders where the Request for Proposal is not used in accordance with section 86 (1) (a) of the Act, which states as follows: -

***(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—***

***(a) the tender with the lowest evaluated price***

This was the award criterion to be applied by the Procuring Entity in the subject tender noting that Clause 33.1 of Section II. Instructions to Tenderers of the Tender Document states that: -

***"The Procuring Entity will award the contract to the tenderer whose tender has been determined to be substantially responsive to the Tender Documents and who has offered the lowest evaluated tender price"***

The Applicant's bid was evaluated at the Preliminary and Technical Evaluation stages where its responsiveness to eligibility and mandatory requirements (including technical specifications) was considered. At the Financial Evaluation Stage, the bid of M/s Kalmar Reach Stacker and that of the Applicant were subjected to evaluation wherein the Evaluation Committee determined that the Applicant submitted the lowest evaluated bid therefore recommended the Applicant for award of the subject tender. The Board further notes that the Applicant's tender price of USD 5,628,207.01 and M/s Kalmar Reach Stacker's tender price of USD 5,475,000.00 are within the threshold of 25% more than the Procuring Entity's available budget of Kshs. 550,000,000.00 in order for the invitation for competitive negotiations to apply as stated in section 132 (2) (b) of the Act. In essence, two bidders made it to Financial Evaluation, the lowest evaluated price is in excess of the Procuring Entity's available budget, the prices quoted by M/s Kalmar Reach Stacker and the Applicant are not more

than twenty-five percent above the Procuring Entity's available budget, in order for competitive negotiations to apply.

It is the Board's considered view that this option ought to have been considered by the Procuring Entity with a view of determining the bidder that is willing to implement the subject tender within the Procuring Entity's approved/available budget. To support this position, this Board would like to emphasize that procuring entities ought to view termination of procurement proceedings as a last resort considered only after all options available under the Act have been exhausted by the procuring entity. The subject tender commenced through an advertisement notice of 14<sup>th</sup> January 2020. It is now over nine months since the procurement process began and the same has not been finalized. Bidders who participated in the subject procurement process also took time in preparation of their bids with the hope of providing services to the public in the event of being successful. In any procurement process, tax payer's money is used in order to provide goods, works and services for the benefit of the people of Kenya. Exploring the option of competitive negotiations will be an opportunity for the Procuring Entity to save time and public resources already incurred since January 2020 instead of initiating the subject procurement process afresh, giving bidders time to prepare and submit their bids, convening an Evaluation Committee who will use public resources to conduct another evaluation, preparation of a professional opinion, awaiting approval of the same by the Accounting Officer and notifying bidders of the outcome of their bids.

Having noted that the circumstances of this case meet the requirements for competitive negotiations, it is the Board's considered view that the Procuring Entity ought to have considered the same as opposed to rushing to terminate the subject procurement process, given that the Procuring Entity found itself with tenderers whose tender sums were in excess of the available budget at the Financial Evaluation Stage and the lowest evaluated price at the Financial Evaluation Stage was in excess of available budget but within the 25% threshold specified in section 132 (2) (b) of the Act.

Having found that the Procuring Entity failed to consider the option for competitive negotiation under section 131 and 132 of the Act, the Board further notes that the Applicant challenged the manner in which the letter of notification of termination was issued, which forms part of the procedural requirements under section 63 of the Act.

The Board observes that even though an accounting officer may exercise discretion under section 63 (1) of the Act, such discretion must be exercised in accordance with the procedural requirements for termination of procurement proceedings. 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 the termination to the Public Procurement Regulatory Authority (hereinafter referred to as “the Authority”) within fourteen days. The Board was furnished with a letter of Termination of Procurement dated 10<sup>th</sup> August 2020 addressed to the Director General of the Authority together with a Report of Termination of the subject procurement process, which report is dated 10<sup>th</sup> August 2020. 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 biro pen. The Board was not furnished with any evidence of dispatch of the letter dated 10<sup>th</sup> August 2020 and the Report dated on even date, in order to ascertain whether the same were furnished to the Authority. In the absence of any proof by the Procuring Entity, the Board finds that the Procuring Entity did not submit the letter of Termination dated 10<sup>th</sup> August 2020 and the

Report on Termination of the subject procurement process 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 10<sup>th</sup> 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 10<sup>th</sup> 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 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."***

On its part, 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 1<sup>st</sup> 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 notification letters, 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.

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 a particular tender 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 has the power to delegate his authority in writing to issue letters of notification of termination of procurement proceedings to tenderers.

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 provision of section 61 (2) 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 10<sup>th</sup> August 2020 were issued by a person who did not have written delegated authority from the Procuring Entity's Acting Managing Director.

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 Procuring Entity ought to have considered the provisions of section 131 and 132 of the Act given that the circumstances of the instant review met the conditions for competitive negotiations outlined therein. The Board has also found that the Procuring Entity failed to provide substantial evidence that it submitted a report on termination of the subject procurement process to the Director-General of the Authority within fourteen days from the date of termination. In addition to this, no evidence was furnished to the Board demonstrating that the Acting Head of Procurement and Supplies had written delegated authority to sign letters of notification of termination on behalf the Accounting Officer of the Procuring Entity. In essence, the Procuring Entity failed to consider the option of competitive negotiation available under the Act and applicable to the subject tender and when it opted to terminate the subject procurement process, the Procuring Entity failed to satisfy all procedural requirements for termination of procurement proceedings under section 63 of the Act.

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 Procuring Entity's Letter of Notification of Cancellation of Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers addressed to all tenderers, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity is hereby directed to proceed with the procurement proceedings in Tender No. KPA/073/2019-20/TE for Supply and Commissioning of 12No. New Reachstackers to its logical conclusion within fourteen (14) days from the date of this decision whilst taking into consideration the findings of the Board 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 7<sup>th</sup> day of September 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**