REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 43/2020 OF 20TH MARCH 2020

BETWEEN

ROBEN ABERDARE (K) LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA RURAL ROADS AUTHORITY.....1st RESPONDENT

AND

KENYA RURAL ROADS AUTHORITY.....2nd RESPONDENT

Review against the decision of the Accounting Officer of Kenya Rural Roads Authority with respect to Tender No. RWC 561 Upgrading to Bitumen Standard and Performance Based Routine Maintenance of Ihwa-Ihururu, Ndugamano-Gura/Ndugamano-Gachatha & Gachatha-Kangaita-Ithekahuno-Gatiki Roads

BOARD MEMBERS

1. Ms. Faith Waigwa -Chairperson
2. Mr. Alfred Keriolale -Member
3. Mr. Steven Oundo, OGW -Member

IN ATTENDANCE

1. Mr. Philemon Kiprop -Holding brief for Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Rural Roads Authority (hereinafter referred to as "the Procuring Entity") invited eligible firms through an advertisement appearing on My Government pull-out dated **2nd April, 2019** as well as its website **(www.kerra.go.ke) on 11th April, 2019** to bid for Tender No. RWC 561 for Upgrading to Bitumen Standards and Performance Based Routine Maintenance of Ihwa-Ihururu, Ndugamano-Gura/Ndugamano-Gachatha, & Gachatha-Kangaita-Ithekahuno-Gatiki Roads (hereinafter referred to as "the subject tender").

Five (5) addenda were issued for the tender pursuant to sub clauses 11.2 and 11.3 of the Instructions to Bidders of the Document Tender No. RWC 561 for Upgrading to Bitumen Standards and Performance Based Routine Maintenance of Ihwa-Ihururu, Ndugamano-Gura/Ndugamano-Gachatha, & Gachatha-Kangaita-Ithekahuno-Gatiki Roads (hereinafter referred to as "the Tender Document").

Pre-bid Site Visit and Meeting

A Pre-Bid site visit was open but mandatory and bidders were free to visit but with prior arrangement with the Procuring Entity's Regional (Deputy Director) for Nyeri where the project is located. Site visit certificates were supposed to be duly signed by the Deputy Director or his representative. This was conducted as per the Conditions of Tender and Instructions to Bidders under Clauses 8.1 and 8.2 respectively of the Tender Document.

Bid Notices

The five (5) addenda issued pursuant to sub clauses 11.2 and 11.3 of the Instructions to Bidders Appendix 2 of the Tender Document stated as follows:-

a) **Addendum:1** - In My Government pullout, on 30th April 2019 clarifying the NCA registration categories per contract, detailing the level of participation (open or citizen) and extending the bidding closing date from 15th May 2019 to 22nd May 2019;
b) **Addendum:2** - Through a letter to all bidders and placed on the Procuring Entity's Website on 22nd May 2019, clarifying that the Mobile Weigh Bridge Specifications for Appendix 'E' was attached before the Bills of Quantities in PDF format and extending the bidding closing date from 22nd May 2019 to 30th May 2019;
c) **Addendum:3** - Through a letter to all bidders and placed on the Procuring Entity's Website on 27th May 2019, extending the Tender

Submission Date for all the five bids including construction of Sapet Bridge and Approach Roads from 30th May 2019 to 5th June, 2019;

d) **Addendum:4** - In the National Dailies (Nation and Standard), on 30th May, 2019 extending the closing date for bidding from 30th May 2019 to 5th June 2019;

e) **Addendum:5** - In My Government pullout, on 4th June 2019 extending the closing date for bidding from 5th June 2019 to 12th June 2019 after 5th June 2019 was declared a public holiday to mark Idd-Ul-Fitr through Gazette Notice No. 4850.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of twenty-eight (28) bids which were opened by the bid submission deadline on 12th June 2019.

Evaluation of Bids

The Procuring Entity's Director General vide memo **Ref: KeRRA/011/IA/Vol. III (058)** dated **12th June, 2019** appointed an Evaluation Committee to evaluate the bids received and to make recommendations regarding award of the tender.

The Evaluation Committee conducted the evaluation process from 17th June 2019 to 1st July 2019. It began with a Detailed Preliminary Evaluation

(Eligibility, Completeness and Responsiveness) of the bids received. A responsive bid was considered as one which met all the completeness criteria as outlined in the Tender Document and which at the minimum was consistent with the requirements of the Tender Document without material deviation, reservation or omission and did not limit the rights of the Employer or the obligations of a bidder or affect unfairly the competitive position of other responsive bidders.

Upon conclusion of the Detailed Preliminary Evaluation, all the twenty-eight (28) bidders did not meet the requirements of completeness criteria and were therefore considered non-responsive**.**

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended that the subject tender be **re-tendered** since all the bidders were non responsive to the requirements of the Bidding Document.

There was a dissenting opinion from the Secretary to the Evaluation Committee disagreed with the Evaluation Committee recommendations and offered the following explanation of her differences:-

"Section 79 (1) of the Public Procurement and Asset Disposal Act, 2015 provides that a tender is responsive if it conforms to all the eligibility and other mandatory requirements in the Bidding Documents.

The tender by Bidder (16) conformed to all the eligibility and bids mandatory requirements in the bid document and hence is a responsive tender.

Section 79 (2) of the Public Procurement and Asset Disposal Act, 2015 provides that a responsive tender shall not be affected by;

a) Minor deviations that do not materially depart from the requirements set out in the Bidding Documents or

b) Errors or oversights that can be corrected without affecting the substance of the tender.

From the foregoing provision, it is apparent that a bid that contains "minor informalities" is not considered non-responsive.

A minor informality or irregularity, in turn, is defined as: one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired.

The bid document by Bidder (16) contains some errors or oversights;

> *Under Item 17.12 Dichloromethane, the BOQ was indicated as zero but the tenderer indicated 200kg. As the BOQ was zero, it is apparent that the item was not to be used. Hence, the quantity quoted by Bidder (24) of no consequence.*

By the tenderer indicating a quantity for the said item, that does not affect the substance of the tender, the same is not prejudicial to other bidders. As a consequence, the error or oversight does not render the tender non responsive pursuant to the provisions of Section 79 (2) of the PPADA 2015.

Item No. 22.09 of the bid document by Bidder (16) does not have a quantity. However, the item Labor which should not have a quantity has a quantity of 8 hours. This appears to have been a mismatch at the time of filling out the form such that as from Item No. 22.09, the entries went one row below.

Section 81 of the PPADA 2015 provides as follows:

a) A procuring entity may, in writing request a clarification of a tender from tenderer to assist in the evaluation and comparison of tenders.

b) A clarification shall not change the terms of the tender.

It is therefore clear that under the said provision a procuring entity may seek a clarification of the tender which clarification may assist in the evaluation and comparison of the tenders.

The Evaluation Committee ought to have sought clarification regarding Item No. 22.09 and the Item titled Labour from the bidder pursuant to the provisions of Section 81 of the Public Procurement Asset and Disposal Act, 2015. This is an

error that could be corrected without affecting the substance of the tender and as a consequence, the said error does not render the tender by Bidder (16) non responsive."

Professional Opinion

The Procuring Entity's Deputy Director, Supply Chain Management (i.e. the Head of Procurement function) reviewed the Evaluation Report and noted the following:-

"Although the Secretary of the Evaluation Committee is not a member of the Evaluation Committee, the dissenting opinion on this tender is noted. However, the Bidder altered the BOQ by deleting the quantity for bill items No.22.09 with quantity of 8hrs and inserting item (labor) with quantity of 8hrs contrary to the provision of clause 20.3 of the Instructions to Bidders.

Alterations to the bills of quantities in my opinion are major deviation as they have implication during implementation stage in addition, makes it difficult to compare altered bills of the Bidder with other competitors bids (like for like). Provision of clear Specifications is the work of the Employer and bidders should strictly follow the instructions provided or seek clarification before the tender opening date."

She expressed her professional opinion that the subject procurement satisfied the requirements of the Bidding Document and statutory requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and urged the Accounting Officer to adjudicate as appropriate.

REQUEST FOR REVIEW NO 121/2020

M/s Roben Aberdare (K) Limited lodged a Request for Review dated and filed on 18th October 2019 together with the Applicant's Affidavit/Statement sworn and filed on even date.

In response, the Procuring Entity lodged a Response to the Request for Review (hereinafter referred to as "the Procuring Entity's Response") dated and filed on 6th November 2019.

The Applicant sought for the following orders:-

i. ***An order annulling and setting aside the Respondent's decision to terminate the procurement proceedings in relation to Tender No. RWC 561;***
ii. ***An order annulling and setting aside the Respondent's decision to the effect that the Applicant's bid in Tender***

No. RWC 561 was not responsive as communicated via its letter dated 2nd October 2019;

iii. An order directing the Respondents to complete the tendering process, evaluate the Applicant's bid and award the tender to the lowest evaluated bidder as provided in the tender document, the Board having reviewed all records of the procurement process relating to Tender No. RWC 561;

iv. In the alternative to (b) above, an order directing the Respondent to award Tender No. RWC 561 to the Applicant in case the Applicant was/is determined and/or found to be the lowest evaluated bidder;

v. An order directing the Respondent to pay the costs of and incidental to these proceedings; and

vi. Such other or further relief or reliefs as this Board shall deem just and expedient.

The Board having considered parties' cases and the documents filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act ordered as follows in its decision dated 7th November 2019: -

I. The Procuring Entity's Letter of Notification of Unsuccessful Bid and Termination of Procurement Process

dated 2nd October 2019 that was addressed to all bidders who participated in Tender No. RWC 561 for Upgrading to Bitumen Standards and Performance Based Routine Maintenance of Ihwa-Ihururu, Ndugamano-Gura/Ndugamano-Gachatha, & Gachatha-Kangaita-Ithekahuno-Gatiki Roads including the Applicant herein, be and is hereby cancelled and set aside.

II. The Recommendation of the Evaluation Committee captured in clause 4.2 of the Evaluation Report signed on 16th July 2019 recommending that the subject tender be re-tendered is hereby expunged.

III. The Dissenting Opinion of the Secretary to the Evaluation Committee captured in clause 3.9 of the Evaluation Report signed on 16th July 2019 in respect of evaluation of the Applicant's Bill of Quantities in the subject tender is hereby expunged.

IV. For the avoidance of doubt and without prejudice to the Board's finding on the Applicant's bid, the remaining contents of the Evaluation Report remain valid.

V. **The Procuring Entity is hereby directed to re-evaluate the Applicant's bid with respect to the following specific Items under Section 12. Bill of Quantities of the Bidding Document:-**

   a) **Item A 104/17.12 of Appendix A; and**
   b) **Item 22.09 of Bill No. 22. Schedule of Day works.**

VI. **Further to Order No. 4 above, the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion, including the making of an award, taking into consideration the findings of the Board in this case within fourteen (14) days from the date of this decision.**

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

Re-evaluation of the Applicant's Bid

Following the decision of the Board in **PPARB Application No. 121/2019**, the Procuring Entity's Evaluation Committee was instructed to conduct a re-evaluation of the Applicant's bid in accordance with the directives issued by the Board in the said decision and similar decisions made by the Board in **PPARB Application No. 104/2019** and **PPARB**

Application No. 110/2019 with respect to Tenders No RWC 562 and RWC 563 respectively.

This re-evaluation was intended to focus on the areas that had resulted in the Applicant's bid being considered non-responsive in the preliminary stage of evaluation, that is, alteration of the BOQ and specifically on line items (A 104.17/12 of (Appendix A) and Item 22.09 of Bill No. 22 (schedule of Day Work) during the initial evaluation for the subject tender and the two other tenders, that is, Tenders No RWC 562 and RWC 563.

The Evaluation Committee noted that during the initial evaluation process, it relied on the copies of the bid documents submitted by the bidders. However, as per the directive issued by the Board, the Evaluation Committee proceeded to re-evaluate the Applicant's submissions from its original documents.

The Evaluation Committee noted that while concurring that the original documents ought to have been relied upon in case of a discrepancy it observed that the directive by the Board only resulted in the bidder being responsive under the eligibility completeness and responsiveness criteria.

In this regard, the Evaluation Committee considered it prudent to subject the Applicant to a full evaluation as per the set criteria in the Tender Document (detailed and technical, financial capacity, general and similar

experience and sensitivity analysis as stipulated in section 3 (Instructions to Bidders) and 5 (Evaluation Criteria) of the tender documents).

From the re-evaluation findings, one (1) out of the twenty-eight (28) bidders, who submitted their bids met all the requirements of the completeness criteria and therefore considered responsive.

The one (1) bidder, that is, M/s Roben Aberdare (K) Limited was subjected to Technical Responsiveness Evaluation from which the said bidder was found to be technically responsive.

Upon conclusion of the evaluation process, the Evaluation Committee established that M/s Roben Aberdare (K) Limited's bid was the lowest evaluated bid.

However, the Evaluation Committee noted that it was not possible to make a recommendation for award of the subject tender due to the following reasons: -

1. The bidder provided details of key personnel which were similar for three tenders, that is, Tenders No RWC 561, RWC 562 and RWC 563
2. The bidder provided details of key equipment and plant which were similar for three tenders, that is, Tenders No RWC 561, RWC 562 and RWC 563

3. The bidder provided details of financial capacity which were similar for all the three tenders, that is, Tenders No RWC 561, RWC 562 and RWC 563, as summarized in the table below:

Table 1: Financial requirements and bidders' capacity for 3 Tenders (RWC 561, RWC 562 and RWC 563)

S/No.	Tender No.	Requirements		Bidder's Capacity	
		Cash Flow	**Turnover**	**Cash Flow**	**Turnover**
1.	RWC 561	500,000,000.00	750,000,000.00	1,047,773,916	1,039,841,005.00
2.	RWC 562	500,000,000.00	750,000,000.00		
3.	RWC 563	500,000,000.00	750,000,000.00		
Total		1,500,000,000.00	2,250,000,000.00	1,047,773,916	1,039,841,005.00

Due to the reasons outlined hereinabove, the Evaluation Committee therefore recommended that the decision to award any or all of the three tenders that the bidder qualified for, be at the discretion of the Accounting Officer.

Professional Opinion

The Deputy Director, Supply Chain Management, in her professional opinion dated 26th November 2019, noted that the Evaluation Committee had not made any recommendations to award the subject tender.

Further, she noted that according to the Procuring Entity's approved procurement plan for the financial year 2019-2020, the budgetary

allocation for the project was Kshs 80 million and pursuant to section 53 (8) of the Act, the budgetary allocation was barely sufficient to start off the road.

In addition, Circular No Ref. OP/CAB18/19/10A dated July 2019, from the Office of the President put all the projects in abeyance until further notice.

In view of the foregoing, she advised the Procuring Entity's Director General to terminate the tender and to adjudicate as appropriate.

The Accounting Officer concurred with the Professional Opinion and proceeded to terminate the tender due to inadequate budgetary provision on 29th November 2019.

All bidders who participated in the subject tender were issued with letters of notification of termination of the procurement process dated 9th March 2020.

REQUEST FOR REVIEW NO 43/2020

M/s Roben Aberdare (K) Limited (hereinafter referred to as "the Applicant") lodged this Request for Review dated 18th March 2020 and filed on 20th March 2020 (hereinafter referred to as "the Request for Review") together with a Statement in Support of the Request for Review sworn on 18th March 2020 and filed on 20th March 2020 (hereinafter referred to as "the

Applicant's Statement"). The Applicant further filed a Supplementary Affidavit sworn on 2nd April 2020 and filed on 3rd April 2020 (hereinafter referred to as "the Applicant's Supplementary Affidavit").

In response, the Procuring Entity filed its Response to the Request for Review Application dated 31st March 2020 and filed on 1st April 2020 (hereinafter referred to as "the Procuring Entity's Response").

The Applicant sought for the following orders:-

i. ***An order annulling the Procuring Entity's decision contained in the letter dated 9th March 2020 terminating the procurement process;***
ii. ***An order of specific performance compelling the Procuring Entity to conclude the tendering process within fourteen (14) days in default of which the Board be pleased to review all the records of the procurement process relating to Tender No. RWC 561 Upgrading to Bitumen Standard and Performance Based Routine Maintenance of Ihwa-Ihururu, Ndugamano-Gura/Ndugamano-Gachatha & Gachatha-Kangaita-Ithekahuno-Gatiki Roads, evaluate all the bids and award the tender to the lowest evaluated bidder as provided for in the Tender Document; and***

iii. An order directing the Procuring Entity to bear the costs of and incidental to this Request for Review.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic and 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 disease. 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.

In compliance with the directions of the Board, the Applicant filed its written submissions on 3rd April 2020. The Procuring Entity lodged its written submissions in opposition of the Request for Review on 6th April 2020.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") together with the written submissions by parties.

The issues that call for determination are as follows:-

I. ***Whether the Procuring Entity terminated or cancelled the procurement proceedings of the subject tender in accordance with section 63 of the Act, thus ousting the jurisdiction of this Board.***

II. ***What are the appropriate orders to issue in the circumstances?***

The Board would like to pronounce itself on a preliminary issue raised by the Procuring Entity in its Response before putting its mind to the main issues for determination in the Request for Review.

It was the Procuring Entity's submission that the Applicant failed to comply with the provisions of section 170 of the Act in lodging the Request for

Review application as the Applicant included the Procuring Entity as a party to the Request for Review.

The Board takes cognizance of its findings in **PPARB Application No. 104 of 2019, Roben Aberdare (K) Limited v. Kenya Rural Roads Authority** (hereinafter referred to as "Review No. 104/2019") where it held as follows:

> ***"Despite the requirement of section 170 (b) of the Act that an accounting officer be identified as a party to the review and not a procuring entity, Form RB 1, made pursuant to Regulation 73 of the Public Procurement and Asset Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") still identifies a procuring entity as a party to be joined to the Request for Review.***
>
> ***The Board notes that the 2006 Regulations, made pursuant to the repealed Public Procurement and Disposal Act, 2005 and which remain applicable in so far as they do not contradict the 2015 Act, still guide applicants to join procuring entities as one of the parties to their review applications hence the reason why applicants still join the "procuring entity" as a party to the Review.***

The Board agrees with the court's finding in the above cases that the Accounting Officer must be joined as a party to a review application, noting that any orders issued by this Board are taken up by the Accounting Officer, being the person responsible for overseeing the entire procurement process to its conclusion. This does not however mean that "the Procuring Entity" lacks any responsibility to bidders, or that the accounting officer is substituted for the procuring entity. In essence, the Board finds, the Accounting Officer is the necessary party to a review application.

The Applicant cannot be faulted for joining the "Procuring Entity" as a party to the Request for Review, noting that the 2006 Regulations, which are still applicable, directs the Applicant to join the "Procuring Entity" to its review application. The Board therefore allows the Application to expunge the 2nd Respondent and awards no costs on the said application. "

In the above matter, the Board held that the Public Procurement and Asset Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") which make reference to a procuring entity being a party to a

request for review, remain in force in so far as they do not contradict the Act.

Further, the Board in its delivery of Review No. 104/2019 addressed its mind on the Court of Appeal's decision in **Civil Appeal No. 131 of 2018, James Oyondi t/a Betoyo Contractors, John Kivunzi t/a Jona Pestcon & 9 Others** which held as follows: -

> ***"It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings the current statute which replaced it, the PPADA, requires that the Accounting officer of the procuring entity, be the party."***

From the above finding, it is now well settled that despite the 2006 Regulations identifying a procuring entity as a party to a request for review, the necessary party is the accounting officer of the procuring entity as required in section 170 (b) of the Act. The said section states

> **"The parties to a review shall be—**
>
> **(a) .....;**
>
> **(b) the accounting officer of a procuring entity;**

Accordingly, the Board finds that the 2nd Respondent need not to have been joined as a party to the Request for Review and the Board proceeds to expunge the 2nd Respondent from the parties to the Request for Review with no orders as to costs.

Having dispensed with the above preliminary issue, the Board now turns to address the main issues for determination as follows:-

Termination of procurement proceedings is governed by section 63 of the Act, which stipulates that when a termination meets the threshold of the said provision, the jurisdiction of this Board is ousted by virtue of 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 63 of this Act..."***
> **[Emphasis by the Board]**

In the case of **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR**, the High

Court while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 that dealt with termination of procurement proceedings held as follows:-

> ***"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005, s 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the jurisdiction of the Review Board. That question can be answered by a close scrutiny of section 36 (6) of the said Act which provides:***
>
> > ***"A termination under this section shall not be reviewed by the Review Board or a court."***
>
> ***In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of Smith v. East Elloe Rural District Council [1965] AC 736 Lord Viscount Simonds stated as follows:***
>
> > ***"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for***

ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."

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

To illustrate the point, the failure by the 2nd Respondent to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether the termination met the threshold under the Act, before finding that it lacks jurisdiction to entertain the case before it, on the basis of a mere letter of termination furnished before it.

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

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

A brief background to the Request for Review is that the Procuring Entity invited interested and eligible firms to submit bids in response to the subject tender and two other tenders, that is, Tender No RWC 562 and Tender No. RWC 563 via an advertisement dated 2nd April 2019. The Applicant herein submitted bids in response to all the three tenders.

Bids received were opened by the Procuring Entity on 12th June 2019, and it commenced the evaluation process shortly thereafter. Upon conclusion of the evaluation process, the Procuring Entity's Evaluation Committee recommended termination of the subject tender, including Tender No RWC 562 and Tender No. RWC 563 since all the bidders who submitted bids in

response to the three tenders did not meet the preliminary and mandatory requirements in the respective tender documents and were therefore considered to be non-responsive.

The Accounting Officer approved the Evaluation Committee's recommendation, having been reviewed by the Head of Procurement function. All bidders, including the Applicant herein, were informed of the Procuring Entity's decision to terminate the subject tender, including Tender No RWC 562 and Tender No RWC 563.

Aggrieved, the Applicant lodged **PPARB Application No. 104/2019** on 4th September 2019, challenging the Procuring Entity's decision to terminate Tender No RWC 562, **PPARB Application No. 110/2019** on 17th September 2019, challenging the Procuring Entity's decision to terminate Tender No. RWC 563 and **PPARB Application No. 121/2019** on 18th October 2019, challenging the Procuring Entity's decision to terminate the subject tender.

In its decisions with respect to the three request for review applications mentioned hereinabove, the Board held that the Procuring Entity failed to fairly evaluate the Applicant at preliminary evaluation and its bids ought to have qualified for further evaluation. In view of this finding, the Board held that the Procuring Entity's termination of the three tenders on the ground

that all tenders were found non-responsive was unfounded and therefore declared termination of the three tenders null and void. The Board directed the Procuring Entity to proceed with the procurement process in all the three tenders to their logical conclusion, including the making of an award within fourteen (14) days from the date of the decisions of the Board respectively.

On 7th November 2019, the Procuring Entity made an oral application before the Board for an extension of time to comply with its orders in **PPARB Application No. 104 of 2019** with respect to Tender No RWC 562. The Board granted the Procuring Entity's request and extended the period of compliance by the Procuring Entity for a further thirty six (36) days from 16th October 2019.

Subsequently thereafter, the Procuring Entity completed the evaluation process with respect to Tender No RWC 563 and awarded the Applicant the said tender at a contract sum of Kshs 1,854,676,121.00.

However, vide a letter dated 9th March 2020, the Procuring Entity notified the Applicant of its decision to terminate the subject tender, which notification read as follows: -

"Reference is made to your tender submitted to the Authority for the above project on 12th June 2019 and the PPARB Ruling No 121 of 2019 where the Authority was directed to re-evaluate the above tender.

Pursuant to section 63 (1) (b) of the Public Procurement and Asset Disposal Act (PPADA) 2015, this is to notify you that the above tender has been terminated due to inadequate budgetary provisions.

We further wish to inform you that the above tender has not been awarded to any bidder and the procurement process has been terminated pursuant to the provisions of section 63 (1) (b) of the PPADA 2015.

However, we take this opportunity to thank you for showing interest in the project.

Please arrange to collect your original bid security after expiry of fourteen days from the date of this letter."

Dissatisfied with the Procuring Entity's decision, the Applicant moved the Board through this Request for Review.

The Applicant submitted that 'inadequate budgetary provision' was not raised by the Procuring Entity as a ground for termination of the subject tender the first time the procurement process was before the Board in **PPARB Application No 121/2019**. The Applicant contended that the decision of the Board in **PPARB Application No 121/2019** was final and binding on all parties and the Procuring Entity was obliged to proceed with the procurement process to its logical conclusion and award the subject tender in compliance with the orders of this Board. It was the Applicant's submission that any action taken by the Procuring Entity contrary to the orders of the Board in **PPARB Application No 121/2019** was null and void.

Relying on the High Court's decisions in **Judicial Review Miscellaneous Application 142 of 2018 Republic v Public Procurement Administrative Review Board; Leeds Equipments & Systems Limited (Interested Party) Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR** and **Judicial Review Case No. 56 of 2019 Island Homes Developers Limited v Public Procurement Administrative Review Board; Kenya Ports Authority & 2 Others (Interested Parties) (2020) eKLR**, the Applicant submitted that the

Procuring Entity's decision to terminate the subject tender on account of insufficient budgetary allocation was in contravention of procurement principles and sections 53 (8) and (9) of the Act.

On its part, the Procuring Entity submitted that the subject procurement process was initiated in the financial year 2018-2019 with a budget of Kshs 80 million and the Procuring Entity expected that there would be an enhancement of the budget in subsequent financial years so as to meet the financial obligations from the anticipated contract, including any advance payments the Procuring Entity would have to undertake as part of its contractual obligations. However, in June 2019, the budget was retained at Kshs 80 million which the Procuring Entity submitted was inadequate for the project.

The Procuring Entity submitted that in the last quarter of 2019, the National Treasury issued two circulars requiring all accounting officers to *interalia* adhere to the moratorium placing in abeyance all projects budget based or not, save for new projects with specific approval from the National Treasury. In view of the reduction in budget for the project and the requirement for all accounting officers to ensure adequate budget provision before proceeding with procurements as stipulated in the two circulars from the Office of the President, the Procuring Entity submitted that it sought confirmation for continued availability of budget for the

subject procurement in subsequent years, which confirmation it did not receive.

Due to this uncertainty, the Procuring Entity submitted that it opted to terminate the subject procurement in accordance with the applicable law and the orders of this Board. Therefore, in compliance with section 63 of the Act, the Procuring Entity informed the Authority in addition to all bidders of the termination of the tender, giving the reasons thereof.

Having heard parties' submissions, the Board studied section 63 of the Act which reads as follows: -

> ***"(1) <u>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</u> where any of the following applies—***
>
> ***(a) the subject procurement have been overtaken by—***
>
> ***(i) operation of law; or***
>
> ***(ii) substantial technological change;***
>
> ***(b) inadequate budgetary provision;***
>
> ***(c) no tender was received;***
>
> ***(d) there is evidence that prices of the bids are above market prices;***

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

(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."

Section 63 of the Act is instructive of the manner in which a procuring entity may terminate a tender. According to this provision, a tender is terminated by an accounting officer who is the person mandated to terminate any procurement process as per the said section of the Act.

Further, an accounting officer may terminate a tender at any time, prior to notification of tender award, in the specific instances as highlighted under section 63 (1) of the Act, as cited hereinabove.

Section 63 further stipulates that a procuring entity is obliged to submit a report to the Authority stating the reasons for the termination within fourteen days of the termination of the tender. A procuring entity must also notify all bidders who participated in the subject procurement process of the termination, including the reasons for the termination, within fourteen days of termination of the tender.

In its interpretation of section 63 of the Act, the Board considered the decision of the High Court in **Republic v Public Procurement Administrative Review Board; Leeds Equipment & Systems Limited (interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR** where it held as follows: -

> ***"in a nutshell therefore and based on the above-cited cases where the decision of a procuring entity to terminate procurement process is challenged before the Board the procuring entity is to place sufficient reasons and evidence before the Board 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 Act".

Accordingly, a procuring entity invoking section 63 must put forward sufficient evidence to justify and support the ground of termination of the procurement process relied on.

The requirement of real and tangible evidence supporting the ground of termination of the procurement process relied on supports the provision of Article 47 of the Constitution of Kenya, 2010 which states that:-

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"

With this in mind, the Board examined the Procuring Entity's confidential file submitted in accordance with section 67 (3) (e) of the Act and observes therein a letter dated 24th October 2018 from the Principal Secretary, Ministry of Transport, Infrastructure, Housing, Urban Development & Public

Works which indicated that the budget set aside for the subject procurement process was Kshs. 90 million for the financial year 2018/2019.

The Board observes that following this letter, the Accounting Officer of the Procuring Entity received a further letter dated 12th July 2019 from the Principal Secretary, Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works which indicated that the budget set aside for the subject procurement process for the financial year 2019/2020 is Kshs 80 million.

There being no evidence to the contrary, the Board finds that the budget set aside for far in the two financial years;2018/2019 and 2019/2020 is an accumulative amount of Kshs. 170 Million for the subject tender.

However, on 23rd July 2019, the Office of the President, through the Head of Public Service issued a Circular Reference No. OP/CAB 18/19/10A addressed to all Chairpersons and Chief Executive Officers of State Corporations which read as follows: -

> ***"RE: BUDGET ALIGNMENT PROCESS FOR FINANCIAL YEAR FY 19/20***

The Government is currently seized with the alignment of the Financial Year 2019-2020 Budget towards support for the Big Four Agenda.

In furtherance of the same, the Cabinet has directed that all State Corporations and Semi-Autonomous (SAGA) are only allowed to spend an amount equivalent to one quarter (1/4) of last year's approved recurrent budget. This amount should support all priority expenses over the first quarter ending 30th September 2019. Further a moratorium is hereby issued placing in abeyance all capital expenditures until otherwise directed. During this moratorium period, no capital expenditure is to be undertaken unless the particular expenditure item is an ongoing project and is specifically approved in writing by the National Treasury.

During this period, a further review and rationalization of the individual State Corporation and SAGA budgets will be undertaken by a team established by the National Treasury, comprising officials from respective line ministries and the Presidency. Consequently, all State Corporations and SAGAs are required to submit information to the Director General,

Public Investment and Portfolio Management, National Treasury as per the attached template by 31st July 2019.

Accordingly, and by way of this circular, the Board of Directors are required to enforce the full compliance of this directive."

According to the above circular, all state corporations and semi-autonomous agencies were directed to spend only one quarter of the last financial year, that is, 2018/2019, approved recurrent expenditure which should support all priority expenses over the first quarter ending 30th September 2019. Moreover, no capital expenditure was to be undertaken unless the particular expenditure item was an ongoing project and specifically approved in writing by the National Treasury.

On 11th November 2019, the Head of Public Service issued a further circular addressed to all Principal Secretaries, Secretaries of Constitutional Commissions and Chief Executive Officers of State Corporations/State Agencies with the reference heading ***"Implementation of State Programmes & Projects – FY 2019-2020"*** which directed *interalia* as follows: -

"...all Ministries, State Departments, Constitutional Commissions, State Corporations and State Agencies are directed: -

(i).....;

(ii) To effect a moratorium on all new projects whether they are budget-based or otherwise; unless the new projects have received the prior written approval of the National Treasury issued under the hand of the Cabinet Secretary or the Principal Secretary. Further, no commitments are to made by agencies without receipt of exchequer. In circumstances where commitments must be undertaken prior to exchequer release, then the express written approval of the National Treasury issued under the hand of the Cabinet Secretary or Principal Secretary is to be obtained.....

In this circular, all Ministries, State Departments, Constitutional Commissions, State Corporations and State Agencies were directed to suspend all new projects whether budget based or otherwise unless the new projects have received prior written approval from the National Treasury, specifically from the Cabinet Secretary or the Principal Secretary.

In essence therefore, all new projects budget based or otherwise, were suspended unless the new projects had received prior written approval

from the National Treasury, specifically from the Cabinet Secretary or the Principal Secretary.

Turning to the subject procurement process, the Board observes that the subject tender was initiated in the financial year 2018/2019 and was advertised by the Procuring Entity on 2nd April 2019. Further, tenders received in response to the subject tender were opened by the Procuring Entity on 12th June 2019. This means that by the time the Procuring Entity received the aforementioned circulars from the Office of the President dated 23rd July 2019 and 11th November 2019 respectively, the subject procurement process was alive for which a budget line of Kshs. 90 Million and Kshs. 80 Million had been approved by the Principal Secretary for the financial year 2018/2019 and 2019/2020 respectively as evidenced in the letter dated 24th October 2019 and 12th July 2019 respectively.

The Board has already found that the subject procurement process was not an ongoing project. In the converse, it was a new project which required prior written approval from the National Treasury, specifically from the Cabinet Secretary or the Principal Secretary in line with the Circular dated 11th November 2019.

Nevertheless, the Board observes that via a letter dated 13th November 2019, the Accounting Officer of the Procuring Entity requested for a "***No***

Objection" to complete the subject procurement process during the current financial year 2019-2020 from the Principal Secretary, Ministry of Transport Infrastructure, Housing, Urban Development & Public Works which letter read as follows: -

"ROADS 10,000 PROGRAMME DEVELOPMENT OF 10,000 KMS OF ROADS, SUPPORTING PRIMARY GROWTH SECTORS LOW VOLUME SEAL ROADS (LVSR); PHASE 1

REQUEST TO CONCLUDE TENDER PROCESS

Reference is made to your letter Ref No. MOTIHUD & PW/I/A.14.21/C/VOL.10 dated 9th August 2019 granting us a "No Objection" to re-scope and re-advertise the road projects listed below (Copy Attached)

S/No	*ROAD NAME*	*COUNTY*	*LENGTH*	*ESTIMATED COST (KSHS)*	*BUDGET ALLOCATION*
1.	*Ihwa-Ihururu, Ndugamano-Gura/Ndugamano –Gachatha & Gachatha– Kangaita– Ithekahuno– Gatiki Roads*	*NYERI*	*32.0*	*1,280,000,000.00*	*80,000,000.00*
2.	*----------*	*---------*	*----------*	*----------*	*----------*

The purpose of this letter therefore is to request for your "No Objection" to complete the procurement process of the

above mentioned roads so as to expedite their commencement during this financial year 2019-2020."

Via a letter dated 3rd December 2019, the Principal Secretary granted the Procuring Entity's request for a "***No Objection***" to proceed with the subject procurement process and expedite its commencement during the financial year, 2019/2020, which letter stated as follows –

"RE: ROADS 10,000 PROGRAMME DEVELOPMENT OF 10,000 KMS OF ROADS, SUPPORTING PRIMARY GROWTH SECTORS LOW VOLUME SEAL ROADS (LVSR); PHASE 1

REQUEST TO CONCLUDE TENDER PROCESS

Reference is made to your letter Ref No. KERRA/16/LVSR/3G/VOL. II/3536 dated 13th November 2019 on the above subject.

The purpose of this letter is therefore to give you a "No Objection" to the tender process to complete procurement of the roads indicated below so as to expedite their commencement during this Financial Year 2019-2020 as follows: -

S/No	*ROAD NAME*	*COUNTY*	*LENGTH*	*ESTIMATED COST (KSHS)*	*BUDGET ALLOCATION*
1.	*Ihwa-Ihururu, Ndugamano-Gura/Ndugamano –Gachatha &*	*NYERI*	*32.0*	*1,280,000,000.00*	*80,000,000.00*

	Gachatha– Kangaita– Ithekahuno– Gatiki Roads				
2.	***----------***	***---------***	***----------***	***----------***	***----------***

In view of the foregoing, it is evident that the Procuring Entity sought and had the written approval of the Principal Secretary, Ministry of Transport Infrastructure, Housing, Urban Development & Public Works to complete the subject procurement process with a budget line of Kshs. 80 Million for the financial year 2019/2020.

If the Procuring Entity had on a separate occasion sought confirmation for continued availability of the budget for the subject procurement process from the Principal Secretary of its parent ministry or from another entity, proof of this request is not before this Board and we can therefore not rely on the Procuring Entity's submission to ascertain whether the availability of the approved budget line for the subject procurement process for subsequent financial years was in doubt.

The Board is therefore left with the letter from the Principal Secretary dated 3rd December 2019 which granted the Procuring Entity's request for a "***No Objection***" to commence the subject procurement process. With this green light from the Principal Secretary, Ministry of Transport Infrastructure, Housing, Urban Development & Public Works we are of the

view that nothing barred the Procuring Entity from making an award and subsequently executing a contract with the successful bidder of the subject tender, noting that the Procuring Entity had concluded the evaluation process and had determined the lowest evaluated bidder as evidenced in its Tender Re-Evaluation Report dated 19th November 2019 and had a budget of accumulative amount of Kshs. 170 Million for the financial years 2018/2019 and 2019/2020.

The Procuring Entity further submitted that it could not proceed with the subject procurement process by awarding the successful bidder, this being the Applicant herein, as the Applicant had no capacity to implement the subject tender since it submitted bids in response to three tenders simultaneously, that is, the subject tender, Tender No. RWC 562 and Tender No. RWC 563. The Procuring Entity contended that the Applicant had relied on the same documents in all the three tenders with respect to financial capacity, staff and machinery. In the Procuring Entity's view, the Applicant was thus deficient of capacity to take on more tenders on the basis of the same qualifications, noting that the Applicant had already been awarded Tender No. RWS 563.

The Board examined the Tender Document and notes that, there is no requirement that bars bidders from participating in several tenders simultaneously and relying on similar or identical documents in its bid

documents. Moreover, the Board examined the Procuring Entity's Tender Re-Evaluation Report dated 19th November 2019, and observes therein that the Procuring Entity only raised the issue of the Applicant's capacity to implement the subject tender in addition to Tender No RWC 562 and RWC 563, after the Applicant had been found responsive at both Preliminary and Technical Evaluation and found to be the lowest evaluated bidder upon conclusion of financial evaluation.

The Board further notes that the above issue raised by the Procuring Entity is not one of the grounds outlined in section 63 (1) of the Act for terminating of a tender or for disqualification of a bidder determined to be the successful bidder in all stages including the Financial Evaluation Stage.

In totality of the foregoing, it is the Board's view that all the reasons advanced by the Procuring Entity to justify its termination of the tender do not meet the threshold under section 63 of the Act.

It is therefore the Board's finding that no real and tangible evidence has been adduced by the Procuring Entity to persuade us that termination of the subject tender on the ground of inadequate budgetary allocation meets the threshold under section 63 of the Act.

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

The Board is now left with the question as to what are the appropriate reliefs to grant in the circumstances.

The Board notes, in **PPARB Application No. 121/2019** the Board held that the Procuring Entity's termination of the subject tender was null and void, due to the Procuring Entity's failure to provide real and tangible evidence to justify the said termination. In its orders, the Board *interalia* directed the Procuring Entity to proceed with the subject procurement process to its logical conclusion, including the making of an award within fourteen (14) days from the date of its decision.

On 7th November 2019, the Procuring Entity requested the Board for an extension of the period for compliance with the orders issued on 25th September 2019 in **PPARB Application No. 121/2019** which was duly granted by the Board for a further thirty-six (36) days from 16th October 2019.

The Procuring Entity is now before the Board for the third times in the present Request for Review application.

Article 227 (1) of the Constitution of Kenya provides that: -

> ***"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective"***

Accordingly, public procurement processes should be guided by the principles of fairness, equitability, transparency, competitiveness and cost-effectiveness, since public procurement involves the acquisition of public goods or services for the benefit of the public at large.

Having established that the Procuring Entity's termination of the subject tender fails to meet the threshold under section 63 of the Act, and is thus null and void, it is worth noting that this is second time that the Board has found that the Procuring Entity's termination of the subject tender fails to meet the threshold under section 63 of the Act.

The first time, it alleged that no bidder was responsive thereby terminated the subject procurement process by dint of section 63 (1) (f) of the Act,

which decision was annulled by this Board. This time, the Procuring Entity alleged to lack sufficient budget to complete the subject procurement process, an issue it never raised the first time it opted to terminate the subject procurement process and further alleges the Applicant lacks capacity to execute the subject tender despite having found the Applicant responsive in all the stages of evaluation, an allegation that is not among the grounds for termination of a tender under section 63 of the Act.

It is evident the Procuring Entity herein is on a fishing expedition for reasons to terminate the subject tender. In essence, the Procuring Entity failed to prove any of the alleged reasons for terminating the subject tender to the satisfaction of the Board.

The Board is cognizant of its powers under section 173 of the Act which stipulates as follows: -

> ***"Upon completing a review, the Review Board may do any one of the following:-***
>
> ***(a)……;***
>
> ***(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings…"***
>
> ***(c)……;***

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed".

We are of the considered view that there should be an end to litigation to allow a procurement to proceed without undue delay and for the public to benefit from the goods, works or services in good time.

The Procuring Entity's failure to complete the procurement process to its logical conclusion has occasioned this Board to deal with the same procurement dispute for the second time and such fact must not be overlooked or encouraged.

We are also of the considered view that the orders of this Board are not issued in vain and that a procuring entity ought to observe the principles of public procurement as outlined under the Act, and the Constitution when directed to redo something in a procurement process.

The Board considered the provision of section 34 with respect to powers to ensure compliance under the Act which provides that:-

"A public entity shall provide the National Treasury or the Authority with such information relating to procurement and asset disposal as may be required in writing"

The case before the Board is one that is ripe for the Procuring Entity to be ordered to provide the Authority with information relating to compliance with the Board's orders herein.

In totality, the Board holds that the Request for Review succeeds with respect to the following specific orders:-

FINAL ORDERS

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

1. **The Procuring Entity's Letter of Notification of Termination of the Procurement Process of Tender No. RWC 561 for Upgrading to Bitumen Standards and Maintenance of Ihwa-Ihururu, Ndugamano-Gura/Ndugamano-Gachatha & Gachatha-Kangaita-Ithekahuno-Gatiki dated 9th March 2020, addressed to the Director General of the Public Procurement Regulatory Authority be and is hereby cancelled and set aside.**

2. **The Procuring Entity's Letter of Notification of Termination of the Procurement Process of Tender No. RWC 561 for Upgrading to Bitumen Standards and Maintenance of Ihwa-Ihururu, Ndugamano-Gura/Ndugamano-Gachatha & Gachatha-Kangaita-Ithekahuno-Gatiki dated 9th March 2020, addressed to all bidders be and are hereby cancelled and set aside.**
3. **The Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion, including the making of an award within seven (7) days from the date of this decision.**
4. **The Procuring Entity shall bear the costs of this Request for Review amounting to Kshs. 255,000/- to be paid to the Applicant.**

Dated at Nairobi, this 14th Day of April, 2020

CHAIRPERSON **SECRETARY**

PPARB **PPARB**