

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 82/2020 OF 18TH JUNE 2020

BETWEEN

GE EAST AFRICA SERVICES LIMITED.....APPLICANT

AND

**KENYATTA UNIVERSITY TEACHING REFERRAL & RESEARCH
HOSPITAL.....1ST RESPONDENT**

THE ACCOUNTING OFFICER,

**KENYATTA UNIVERSITY TEACHING REFERRAL & RESEARCH
HOSPITAL.....2ND RESPONDENT**

Review against the decision of Kenyatta University Teaching, Referral & Research Hospital (KUTRRH) dated 15th June 2020 with respect to Tender No. KUTRRH/TNDR/W/050/CETO-IMIC/2019-2020 for Construction, Equipping, Training and Operationalization of Integrated Molecular Imaging Centre.

BOARD MEMBERS

- | | |
|-------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Alfred Keriolale | -Member |
| 3. Ms. Robi Chacha | -Member |

IN ATTENDANCE

1. Mr. Philemon Kiprop -Holding brief for the Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Kenyatta University Teaching, Referral and Research Hospital (hereinafter referred to as "the Procuring Entity") advertised Tender No. KUTRRH/TNDR/W/050/CETO-IMIC/2019-2020 for Construction, Equipping, Training and Operationalization of Integrated Molecular Imaging Centre (hereinafter referred to as "subject tender") in the MyGov Pullout Newspaper and the Procuring Entity's Website (www.kutrrh.go.ke) on 3rd March 2020 inviting eligible tenderers to bid for the same.

Bid submission Deadline and Opening of Bids

The Procuring Entity received one (1) bid by the bid submission deadline of 24th March 2020. The same was opened shortly thereafter by a Tender Opening Committee and recorded as follows: -

S/No	Bidder Name	Address	Physical Address	Email Address
1	GE East Africa Services Ltd	41608-00100 Nairobi	The Countryard building, Westlands	ge.kenya@ge.com

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of the bid submitted was conducted in the following three stages:-

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

1. Mandatory/Preliminary Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause A. Mandatory Requirements found immediately after Section V. Specifications of the Document for Construction, Equipping, Training and Operationalization of Integrated Molecular Imaging Centre (hereinafter referred to as "the Tender Document"). At the end of evaluation at this stage, the Evaluation Committee found Bidder No. 1, M/s GE East Africa Services Limited responsive therefore proceeded to Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause B. Technical Requirements found immediately after Section V. Specifications of the Tender Document which required a bidder to attain a minimum technical score of 70 points to proceed to Financial Evaluation. At the end of this stage, Bidder No. 1, M/s GE East Africa Services Limited attained the

minimum technical score of 70 points therefore proceeded to the Financial Evaluation Stage.

3. Financial Evaluation

The Evaluation Committee applied the criterion outlined in Clause C. Financial Requirements found immediately after Section V. Specifications of the Tender Document which specified that award of the tender would be made to the bidder with the lowest evaluated bid price. The Evaluation Committee noted that Bidder No. 1, M/s GE East Africa Services Limited's bid price was USD 20,353,697.00, which amount was equivalent to Kshs. 2,130,881,458.54 (converted with the prevailing exchange rate of USD 1 to Kshs. 104.6926) against the Procuring Entity's prevailing budget of Kshs. 1,900,000,000.00. As a result, the Evaluation Committee recommended negotiations to be initiated with the bidder.

Recommendation

Having conducted a negotiation meeting on 3rd April 2020, the Evaluation Committee recommended award of the subject tender to Bidder No. 1, M/s GE East Africa Services Limited at USD 18,145,315.49 inclusive of VAT.

Due Diligence

According to the Due Diligence Report dated 22nd April 2020, the Evaluation Committee conducted a due diligence exercise on Bidder No. 1, M/s GE East Africa Services Limited on 22nd April 2020 in terms of the following key issues: -

- M/s GE East Africa Services Limited's experience on projects such as the one to be undertaken in the subject tender, in terms of delivery, challenges encountered and mitigation factors employed by the said bidder;
- Training project components and capacity building (transfer of skills); and
- Possibility of support with existing facilities.

The Evaluation Committee also visited Aga Khan University Hospital cyclotron centre and established that M/s GE East Africa Services Limited installed the Hospital's cyclotron, PET/CT equipment which was operational.

Professional Opinion

In a Professional Opinion dated 23rd April 2020, the Procuring Entity's Head of Supply Chain Management noted the Procuring Entity's intention to construct a futuristic comprehensive cancer care center in Kenya by developing an Integrated Molecular Imaging Center that would increase the accessibility to comprehensive cancer care for patients in Kenya. He further reviewed the Evaluation Report dated 14th April 2020 and the Due Diligence

Report dated 22nd April 2020, therefore took the view that the evaluation process complied with sections 46, 47 and 84 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and Article 227 (1) of the Constitution. As a result, he urged the Chief Executive Officer of the Procuring Entity to consider awarding the subject tender to Bidder No. 1, M/s GE East Africa Services Limited at USD 18,145,315.49 inclusive of VAT. The said professional opinion was approved by the Chief Executive Officer on 27th April 2020.

Notification of Award

In a letter dated 28th April 2020, the Chief Executive Officer of the Procuring Entity notified M/s GE East Africa Services Limited that it was awarded the subject tender at USD 18,145,315.49 inclusive of VAT.

Cancellation of Tender

In a letter dated 15th June 2020, the Acting Chief Executive Officer of the Procuring Entity notified M/s GE East Africa Services Limited that it had review its bid document, looked into the matter and taken a position to cancel the tender and restart the process afresh.

THE REQUEST FOR REVIEW

M/s GE East Africa Services Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated and filed on 18th June 2020

together with a Statement in Support of the Request for Review sworn and filed on even date and a Further Statement in Support of the Request for Review sworn and filed on 1st July 2020 through the firm of Mbugwa, Atudo & Macharia Advocates, seeking the following orders: -

- i. An order allowing the Request for Review;***
- ii. An order quashing and setting aside the Procuring Entity's cancellation of Tender No. KUTRRH/TNDR/W/050/CETO-IMIC/2019-2020 for Construction, Equipping, Training and Operationalization of Integrated Molecular Imaging Centre through the letter dated 15th June 2020;***
- iii. An order directing the Procuring Entity to complete the procurement process in respect of Tender NO. KUTRRH/TNDR/W/050/CETO-IMIC/2019-2020 for Construction, Equipping, Training and Operationalization of Integrated Molecular Imaging Centre to its conclusion, by honouring the award to the Applicant and executing the contract negotiated between the parties;***
- iv. An order directing the Procuring Entity to bear the costs of the Request for Review.***

In response, the 1st and 2nd Respondents addressed a letter dated 24th June 2020 to the Director General of the Public Procurement Regulatory Authority (i.e. a response to the Request for Review and forwarding confidential documents relating to the subject procurement process) together with its Written Submissions dated 24th June 2020 and filed on 25th June 2020

through the Procuring Entity's Acting Chief Executive Officer. The 1st and 2nd Respondents also addressed a letter dated 29th June 2020 to the Chairperson of the Board but erroneously referring to the Chairperson as Mary Waigwa instead of Faith Waigwa. The Board observes that at paragraph 3 of its Submissions, the 1st and 2nd Respondents erroneously referred to a Replying Affidavit sworn on 28th August 2019 but the same was never filed at the Board's offices. The 1st and 2nd Respondents addressed an email to the Board noting the error and urged the Board to expunge the said paragraph. Having studied the documentation before it, the Board verified that the 1st and 2nd Respondents did not file a Replying Affidavit therefore paragraph 3 of the 1st and 2nd Respondent's Submissions does not relate to the instant Request for Review and the same is hereby expunged.

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

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate

the COVID-19 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. 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.

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 issues call for determination: -

- I. Whether the Procuring Entity terminated the subject procurement process in accordance with section 63 of the Act, section 4 and 5 of the Fair Administrative Actions Act, 2015, read together with Articles 47 and 227 of the Constitution;***
- II. Whether a bidder that is part of a conglomerate can rely on the technical expertise/specifications of its Parent Company.***

The Board now proceeds to address the above issues as follows: -

Termination of procurement and asset disposal proceedings is governed by section 63 of the Act. Further, if such termination meets the requirements of

section 63 of the Act, the jurisdiction of this Board is ousted pursuant to section 167 (4) (b) of the Act which provides as follows: -

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

(a);

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act"

[i.e. section 63 of the Act] Emphasis by the Board

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

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

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

In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of *Smith v. East Elloe Rural District Council* [1965] AC 736 Lord Viscount Simonds stated as follows: -

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

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

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

The court in the Selex Sistemi Integrati Case held that this 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 mere existence of a letter of notification terminating procurement proceedings.

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

"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction

to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement...

A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said 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 Intergrati 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 it followed the procedure provided in law in terminating the subject procurement process.

Having considered parties' Pleadings and the Procuring Entity's Written Submissions on the first issue for determination, the Board notes that, it is common ground between parties that the Procuring Entity advertised an Open International Tender on 3rd March 2020 inviting eligible bidders who would undertake Construction, Equipping, Training and Operationalization of an Integrated Molecular Imaging Centre.

Further to this, all parties are in agreement that upon conclusion of evaluation of bids in the subject tender, the Applicant was found to be the successful bidder and was issued a letter of notification of award dated 28th April 2020 with the following details: -

"Reference is made to our invitation to tender for Construction, Equipping, Training and Operationalization of

Integrated Molecular Imaging Centre which opened on Tuesday 24th March 2020

I am pleased to inform you that your bid has been accepted by the Hospital in accordance with our conditions and at your quoted total tender sum of USD 18,145,315.49 VAT inclusive. The terms and condition remain the same as per the tender documents. You are required to furnish us with Performance Security of 10% of the total award price within thirty (30) days from the date of this letter.

Please acknowledge the receipt of this letter of award by return mail and if you accept the offer, please sign the attached copy of this letter and put your company stamp. A contract shall be signed on expiry of 14 days from the date of this letter"

On the same letter, the Procuring Entity provided blank spaces wherein the Applicant could indicate whether it accepted the award of the subject tender. Accordingly, the Applicant duly signified its acceptance of award of the subject tender as follows: -

"1, DIANA NYAMBANE on behalf of the Company

GE EAST AFRICA SERVICES LIMITED (name of Company), of

P.O Box: 41608-00100, accept the offer

[signature affixed] Date: April 29, 2020"

However, on 15th June 2020, the Procuring Entity's Acting Chief Executive Officer (i.e. the 2nd Respondent) addressed a letter dated 15th June 2020 to the Applicant stating as follows: -

"CANCELLATION OF TENDER FOR CONSTRUCTION, EQUIPPING, TRAINING AND OPERATIONALIZATION OF INTEGRATED MOLECULAR IMAGING CENTRE, KUTRRH/TNDR/W/050/CETO-IMIC/2019-2020

The above subject refers

We have reviewed your bid document which you submitted and opened on 24th March 2020. We have looked at the matter and taken a position to cancel the tender and restart the process afresh.

We wish to thank you for showing interest in the tender and look forward to where your bid will be successful"

Despite being notified of the filing of the Request for Review vide a letter dated 18th June 2020 and suspension of the procurement proceedings under section 168 of the Act, the Procuring Entity in blatant breach of section 168 of the Act, addressed the Applicant in a letter dated 30th June 2020 while attaching the Solicitor-General advisory dated 29th May 2020 and stated follows: -

"...Following our letter for cancellation of the above tender REF: KUTRH/PD/GF/VOL.1 (210) dated 15th June 2020. This

is to advise that our cancellation was based on advisory received from the Office of the Attorney General which please find attached”

The said letter by the Solicitor General dated 29th May 2020 advised the Procuring Entity as follows: -

“This has reference to your letter dated 28th May 2020, by which you responded to ours of 15th May 2020

We have taken note of the explanations provided in your referenced letter in response to the issues we had raised in ours of 15th May 2020. We note that the following information is provided on the legal personality of the successful bidder, GE East Africa Services Limited:

“GE East Africa Services Limited is a wholly owned subsidiary of the General Electric Company. GE East Africa Services Limited is one of a large number of legal entities which transacts business within the GE Health care segment and GE Health Care is the name given to one of the several sub-divisions within GE company. The certificate of ownership of General Electric Company and GE East Africa Services Limited demonstrates that GE met the eligibility criteria of an Original Equipment Manufacturer

Having noted the foregoing explanation, we reiterate the advice in our above-mentioned letter that GE Company and GE East Africa Services Limited are legal entities and save where a bid is submitted by them as a joint venture, the technical qualifications of one cannot be relied upon by the other legal entity for purposes of evaluation. Consequently, we advise that the status of GE Company as an Original Equipment Manufacturer cannot be relied upon by its subsidiary, GE East Africa Services Limited as proof of the latter's qualification as an Original Equipment Manufacturer.

It is therefore our advice that GE East Africa Services Limited does not meet the evaluation criteria of an OEM as stipulated in the tender document and could not therefore qualify to be awarded the tender. Section 133 (1) of the Public Procurement and Asset Disposal Act, 2015 (the Act) is clear in this regard:

"The successful best and final offer shall be the best rated tender using evaluation criteria set forth in the tender documents"

Section 135 (2) of the Act requires an accounting officer of a procuring entity to enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings. The tender document in this case

required the successful tender to be from an Original Equipment Manufacturer

In view of the foregoing, we advise the Kenyatta Teaching, Referral and Research Hospital (KUTRRH) to cancel the procurement proceedings and the consequent award to M/s GE East Africa Services Limited

Section 63 (1) of the Act provides for the procedure of cancellation of procurement and asset disposal proceedings. The section provides that an accounting officer may at any time prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract

However, in this case, the KUTRRH has already issued a notification of tender award. Therefore, there is the question whether the procurement proceedings can still be cancelled

In our considered view, it is legally justifiable to cancel the subject procurement proceedings despite a notice of award of tender having been issued to GE East Africa Services Limited, as the process leading to the issuance of the said notice of award is incapable of resulting into a valid contract under the Act. Entering into a contract with a bidder that did not meet the evaluation criteria would be an illegality under the Act

In the case of Republic v. Public Procurement Administrative Review Board ex parte Meru University of Science &

Technology; M/s Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR, the High Court noted as follows:

"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet the requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions

To be considered for award, a bid must comply in all material respects prescribed in the invitation for bids"

As stipulated in section 87 (4) of the Act, a notification of award does not constitute a contract. In Line with section 135 (1) of the Act, a contract only comes into existence after a written contract is signed by the accounting officer of the procuring entity and the successful bidder. There is therefore no binding contractual relationship between KUTRRH and GE East Africa Services Limited. In view of the legal anomalies

that would arise if a contract was signed between the KUTRRH and GE East Africa Services Limited, the KUTRRH should therefore proceed to expeditiously cancel the procurement proceedings

Conclusion:

Entering into a contract with a bidder who does not meet the evaluation criteria would be an illegality under the Act. The KUTRRH is therefore advised to cancel the procurement proceedings.

Having noted the importance of the project and its significance in the realization of the Government's Big Four Agenda, we advise the KUTRRH, as the procuring entity, to urgently commence a fresh procurement process for purposes of the project. In light of the timelines attendant to the project, its public importance and the complexity thereof, we advise KUTRRH to select an appropriate procurement method under the Act and to immediately and with the necessary dispatch commence the process of engaging a suitable and qualified Original Equipment Manufacturer in strict conformity with the requirements of the Act, in order to ensure that the objectives of the project are not compromised or delayed

Please be advised accordingly"

The Applicant was aggrieved by the decision of the Procuring Entity to cancel the procurement proceedings for the subject tender in the letter dated 15th June 2020, therefore lodged this Request for Review. In addressing the question whether the Procuring Entity terminated the subject procurement process in accordance with section 63 of the Act, the Board observes that the said provision states as follows: -

"63. Termination or cancellation of procurement and asset disposal proceedings

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

(a) the subject procurement has been overtaken by—

(i) operation of law; or

(ii) 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 (1) of the Act gives an accounting officer discretion to terminate procurement proceedings. However, this discretion is only exercised before notification of award. Section 63 (1) of the Act further outlines reasons that may result in termination of a tender, which reasons must be justifiable and in some instances, a procuring entity must have real and tangible evidence that supports the reason it has cited for terminating procurement proceedings. Section 63 (2) and (3) of the Act further provide that the

procuring entity has the obligation to provide a written report to the Public Procurement Regulatory Authority within fourteen (14) days from the date of the termination including reasons for the termination. All bidders who participated in the procurement process must also be notified within fourteen days (14) days from the date of the termination, citing the specific reason why the tender was terminated.

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"

The Board notes that the court in the above case emphasized that a procuring entity should provide sufficient reasons and evidence to justify and support a ground for terminating a procurement process. In the Board's view, sufficient reasons, including real and tangible evidence require the Procuring Entity to particularize the reason why it is unable to award a

tender. In the instant Request for Review, the Procuring Entity notified the Applicant of termination of the subject procurement process through a letter dated 15th June 2020, after it already awarded the subject tender to the Applicant in a letter of notification of award dated 28th April 2020 and the Applicant having signified its acceptance of the said award on 29th April 2020.

It is worth noting that the Procuring Entity in its letter dated 30th June 2020 addressed to the Applicant stated that the subject procurement proceedings was terminated after the Procuring Entity received an advisory from the Office of the Attorney General and Department of Justice, through the Solicitor-General. It is the Board's view that it was reasonable for the Solicitor-General to raise concerns with the Procuring Entity regarding its decision to award the subject tender, noting that any public procurement process involves use of tax payer's money and such a process ought to benefit the public in general. Furthermore, the Procuring Entity is accountable to the public on how it uses public funds in its procurement process. However, the constitutional right to fair administrative action includes the right to provide a person with sufficient reasons and information following an administrative action as codified in section 5 and 6 of the Fair Administrative Actions Act. It is the Board's considered view that the Applicant had the right to be given an opportunity to be heard on the Procuring Entity's intention to terminate the subject tender, especially in this instance where the Applicant was already notified of award of the tender and had accepted the award on 29th April 2020.

The procedure outlined in section 63 of the Act shows that the intention of the legislature was to ensure that the right to fair administrative action is achieved in public procurement processes. Article 47 of the Constitution 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"***

Further, section 5 of the Fair Administrative Actions Act No. 4 of 2015 provides as follows: -

- "(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights of interests of a group of persons or the general public, an administrator shall: -***
 - (a)***
 - (b)***
 - (c)***
 - (d) where the administrator proceeds to take the administrative action proposed***

(i) give reasons for the decision of administrative action as taken”

On its part, section 6 of the Fair Administrative Actions Act, 2015 states as follows: -

“(1) Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review

(2) The information referred to in subsection (1) may include: -

(a) the reasons for which the action was taken

(b) any other relevant documents relating to the matter”

In addition to the above provisions, Article 73 (1) of the Constitution on responsibility of leadership states that: -

“73. Responsibilities of leadership

(1) Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—

- (i) is consistent with the purposes and objects of this Constitution;**
- (ii)**
- (iii); and**
- (iv) promotes public confidence in the integrity of the office”**

On its part, Article 227 (1) of the Constitution states that: -

"When a State organ or public entity contract for goods and services, it must do so in a system that is fair, equitable, transparent, competitive and cost effective"

The Procuring Entity has a constitutional duty to promote the public's confidence in the subject procurement process. Therefore, it ought to have followed the procedure under section 63 of the Act and most importantly, to take into account the fact that section 63 (1) of the Act precludes the Procuring Entity from terminating the subject tender after notification of award had already been made to the Applicant. The Applicant herein had a legitimate expectation that after notification of award and acceptance of the same, the Procuring Entity would proceed to prepare contract documents so that implementation of the subject tender can be commenced. The fact that concerns had been raised concerning the relationship between General Electric Company and the Applicant ought to have motivated the Procuring Entity to give the Applicant an opportunity to be heard on the administrative

action taken by the Procuring Entity at a stage where termination is not permitted under section 63 of the Act. It is the Board's considered view that such an action adversely affected the Applicant's right to fair administrative action provided under section 5 and 6 of the Fair Administrative Actions Act and Article 47 of the Constitution.

In essence, at the time the Procuring Entity notified the Applicant of termination of the subject procurement proceedings through the letter dated 28th April 2020, no reasons as outlined in section 63 (1) (a) to (i) of the Act were provided to the Applicant. Secondly, the reason that was provided to the Applicant in a letter dated 30th June 2020 for termination of the subject tender, was made after the Applicant lodged its Request for Review on 18th June 2020 and in blatant breach of section 168 of the Act, and such reason was an advisory by the Solicitor-General through a letter dated 29th May 2020, which advisory does not fall under the reasons for termination of a tender pursuant to section 63 (1) (a) to (i) of the Act. Thirdly, the Procuring Entity never furnished the Board with a report (with reasons) on termination of the subject procurement proceedings issued to the Public Procurement Regulatory Authority pursuant to section 63 (2) and (3) of the Act. Finally, the said termination was done after notification of award contrary to section 63 (1) of the Act, which only permits the Procuring Entity to terminate procurement proceedings prior to award of a tender.

Accordingly, the Board finds that the Procuring Entity failed to terminate the subject procurement process in accordance with section 63 of the Act, section 4 and 5 of the Fair Administrative Actions Act, 2015 read together with Article 47 and 227 of the Constitution

On the second issue for determination, the Board notes that at paragraphs 8 to 14 of its Further Statement in Support of the Request for Review, the Applicant provides background information regarding its formation and how it conducts its business. The Applicant submits that it was incorporated on 1st March 2005 under the provisions of the repealed Companies Act, Chapter 486, Laws of Kenya and was initially known as Water Investments Limited. On 12th April 2005, the original nominee shareholders of Bay Water Investments Limited transferred their shares in the company and the company name was subsequently changed to GE East Africa Services Limited upon acquisition by General Electric Company. The Applicant further submits that its shareholders are wholly owned subsidiaries of General Electric Company and that these shareholders are; GE Power Netherlands BV, which holds 99.999981% of the shares in GE East Africa Services Limited and GE Holdings Luxembourg & Co S.a.r.l, which holds 0.000019% of the shares in GE East Africa Services Limited. The Applicant further submits that General Electric Company is a conglomerate incorporated in New York State with its headquarters in Boston and is listed in the New York Stock Exchange.

Having considered the foregoing submissions, the Board observes that the Procuring Entity's Advertisement Notice dated 3rd March 2020 did not specify who an eligible tenderer is. However, Clause 1.1 of Section I. Invitation to Tender of the Tender Document provides that: -

"Kenyatta University Teaching, Referral and Research Hospital (KUTRRH) invites sealed tenders from Original Cyclotron Equipment Manufacturers (OEM) who can undertake Construction, Supply, Installation, Commissioning, operation of the facility for the first eighteen (18) months and Comprehensive Maintenance of an Integrated Molecular Imaging Centre, and Associated Training. The OEM for the cyclotron shall be the lead tenderer."

Further, Clause 2 (xii) of the Appendix to Instructions to Tenderers of the Tender Document provides that: -

"Where applicable: the tenderer shall provide a manufacturer authorization specifying name, model number and country of origin for all such equipment without any alteration"

On its part, Clause 1.7 of Part I. Technical Specifications for Security Management and Access Control System of the Tender Document states that: -

"The tenderer shall demonstrate his competence with the equipment he is tendering by either:

The tenderer shall obtain a letter signed by a company director or head of training from the original equipment manufacturer. The letter must state the name of tendering company and a statement to the effect that the tenderer is of sufficient competence to install the tendered equipment.

The tenderer shall provide proof in the form of training certificates from the original equipment manufacturer. Certificates will contain named individuals and the course applicable to the equipment being tendered. The named individuals must be employed by the tenderer and play an active part in the installation of equipment."

Having studied the foregoing provisions, the Board observes that the Procuring Entity considered Original Cyclotron Equipment Manufacturers (OEM) to be eligible tenderers to bid for the subject tender. However, a tenderer who provided a manufacturer's authorization specifying the name, model number and country of origin for all equipments proposed to be used in implementing the subject tender, would also be considered eligible to participate in the subject tender. Pursuant to Clause 1.7 of Part I. Technical Specifications for Security Management and Access Control System of the Tender Document, a tenderer that obtained a letter from the original

equipment manufacturer showing that the tenderer has sufficient competence to install the tendered equipment and has provided proof in the form of training certificates from the original equipment manufacturer, could also bid in the subject tender.

The Board further notes that for a tenderer to qualify for award of the subject tender, one of the requirements under Clause 1.7 (b) of Section II. Instructions to Tenderers of the Tender Document was that such a tenderer must have experience as a main contractor in the project of at least 10 years and equipment manufacturing of not less than 10 years.

Having noted the contradiction in the provisions of the Tender Document, where on one hand the Tender Document required an Original Cyclotron Equipment Manufacturers (OEM) and on the other hand, the Tender Document allowed tenderers to obtain a manufacturer's authorization, it is the Board's considered view that it was possible for the following to participate in the subject tender: -

- i.** Original Cyclotron Equipment Manufacturers (OEM);
- ii.** A tenderer (not an Original Equipment Manufacturer) but one who had obtained a manufacturer's authorization that specifies the name, model number and country of origin for all equipments;
- iii.** A tenderer (who is not an Original Equipment Manufacturer) but one who had obtained a letter from the original equipment manufacturer showing that the tenderer has sufficient competence to install the

tendered equipment and has provided proof in the form of training certificates from the original equipment manufacturer.

At this point, the Board deems it necessary to consider the meaning of the word "conglomerate" and how such an entity operates in order to understand the relationship between the Applicant and General Electric Company. The Black's Law Dictionary, 8th Edition, defines the term as: -

"A corporation that is run like a single business but has several firms to keep things diverse"

In the book, **Financial Conglomerates: New Rules for New Players?** edited by **L. van den Berghe**, the terms "conglomerate" and "financial conglomerate" are defined at page 19 thereof as: -

"The term "Conglomerate" refers to a group in which the corporations form an economic entity and are structurally connected

"financial conglomerate" is used to refer to any group of companies under common ownership where financial activities-whether securities, business, banking, insurance and some other financial services are undertaken on a significant scale by one or more companies in that group"

At page 27 of his book, the author provides essential elements of a conglomerate and further explains as follows: -

"In a nutshell, there are elements necessary to distinguish a conglomerate from other groups of undertakings, and the following criteria remain to be discussed

-The relevant relationship between the companies

-The relevant activities and undertakings (supervised companies providing financial services)

-The specific composition of the group (activities consist largely though not necessarily, wholly of financial services of at least two different sectors)

As regards the relevant relationship between the companies it appears that the "parent-subsidiary relationship" should in any case be an element of the definition of a conglomerate

On the aspect of 'relevant activities and undertakings' constituting a conglomerate, it follows that the presence of supervised undertakings is a necessary condition for the existence of a conglomerate. On the third aspect of relevant activities and undertakings" constituting a conglomerate, one will note that conglomerates may refer to groups of companies which are either exclusively or mainly active in providing services and each company in the group may handle one aspect of the business"

The Board studied the Applicant's original bid and notes that at page 609 of its original bid, the Applicant attached a Certificate of Incorporation under the repealed Companies Act, Chapter 486 of the Laws of Kenya, issued to M/s Bay Water Investments Limited on 1st March 2005. The Applicant also attached a Certificate of Change of Name which demonstrates that M/s Bay Water Investments Limited changed its name to GE East Africa Services Limited following a special resolution passed by M/s Bay Water Investments Limited and approved by the Registrar of Companies on 12th April 2005. To support its relationship with General Electric Company, the Applicant at page 613 of its bid attached an Attestation Certificate dated 4th September 2014 with the following details: -

"GENERAL ELECTRIC COMPANY

ATTESTING SECRETARY'S CERTIFICATE

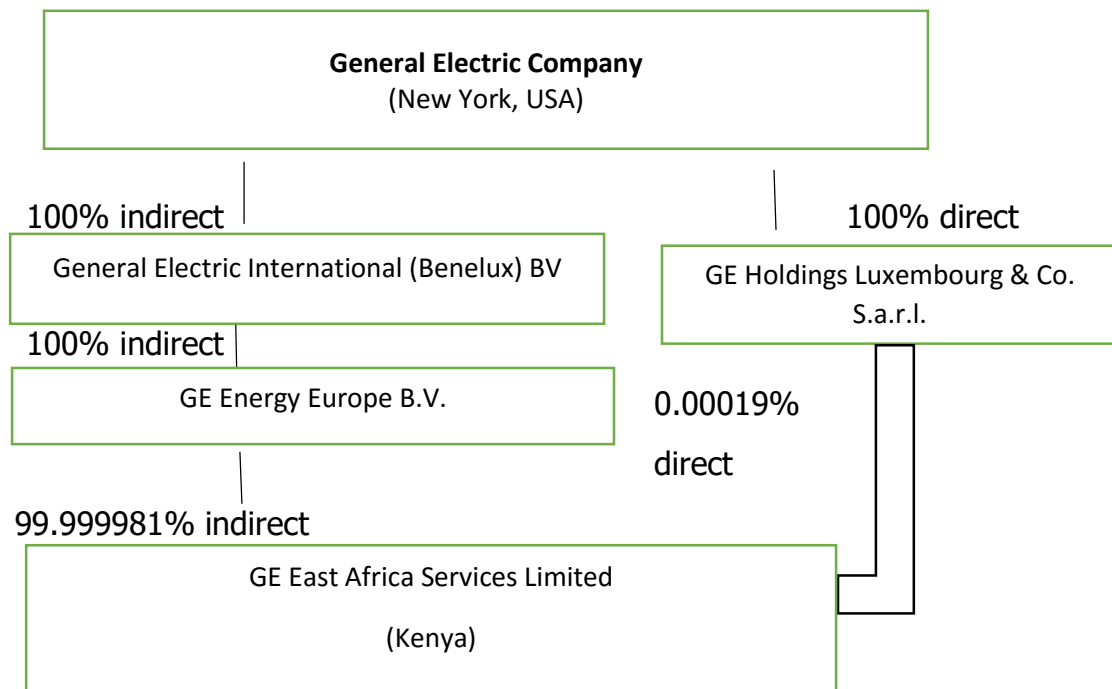
The undersigned, an attesting secretary of GENERAL ELECTRIC COMPANY "the Corporation", a New York Corporation does hereby certify that:

GE East Africa Services Limited, a company duly formed under the laws of Kenya is an indirect wholly-owned subsidiary of the Corporation

Attached hereto is a true and correct ownership chart of General Electric Company and GE East Africa Services Limited

Witness my hand and seal of the Corporation this 4th day of September 2014"

The ownership chart referenced hereinbefore is found at page 614 of the Applicant's original bid with the following details: -



From the foregoing documentation and having considered the meaning of the word conglomerate, the Board observes that General Electric Company is a conglomerate of several companies. Further, in a letter dated 19th May 2020, GE East Africa Services Limited clarified the ownership and operation of the conglomerate and in particular that General Electric Company is a high stake industrial company that operates worldwide through its four industrial segments namely; **Power, Renewable Energy, Aviation** and **Healthcare** and its financial service segment, **Capital**. The said clarification further indicated that the Healthcare segment (i.e. GE Healthcare) provides essential healthcare technologies to developed and emerging markets with expertise in medical imaging, digital solutions, patient monitoring and diagnostics, drug discovery biopharmaceutical manufacturing technologies

and performance improvement solutions that are the building blocks of precision health.

The Board observes from the said clarification, GE Healthcare is not a legal entity in its own right and therefore does not feature in the organizational chart mentioned hereinbefore but is a name given to one of the several segments and/or subdivisions within General Electric Company. GE East Africa Services Limited is however one of a large number of legal entities as can be seen on the organizational chart mentioned hereinbefore which transacts business within GE Healthcare (i.e. the healthcare segment of General Electric Company) and in this case, specifically in Kenya. The said clarification further states that a cyclotron is one of a large number of products manufactured and sold by GE Healthcare but that GE Healthcare conducts its business via legal entities, best suited for the purpose and in this particular case, since the project is in Kenya, GE East Africa Services Limited (being a legal entity established in Kenya) is considered the most appropriate. From the said clarification, the bid requirement was for a tenderer to be a cyclotron OEM. GE East Africa Services Limited is an OEM in the sense that it is a legal entity within the business segment and/or division of General Electric Company which manufactures and sells cyclotrons.

This prompted the Board to study the Applicant's bid to ascertain which business unit deals with the Health component that relates to the subject tender.

At page 581 to 590 of its original bid, the Applicant attached CT Brochures and Datasheet which provides an overview of the work done by GE Healthcare as follows:-

"About GE Healthcare

GE Healthcare is the \$19.8 billion healthcare business of GE (NYSE:GE) [i.e. General Electric Company]. As a leading provider of medical imaging, monitoring, biomanufacturing, cell and gene therapy technologies, GE Healthcare enables precision, health in diagnostics, therapeutics and monitoring through intelligent devices, data analytics, applications and services. With over 100 years' experience in the health care industry and more than 50,000 employees globally, the company helps improve outcomes more efficiently for patients, healthcare providers, researchers and life sciences companies around the world."

The Applicant also attached in its original bid, a document it refers to as "a Summary of Safety and Effectiveness" with respect to a product referred to as "Revolution CT, Revolution CT ES, Revolution CT with Apex Edition,

Revolution Apex". The said document shows that the said product is manufactured by GE Healthcare.

The Applicant further provided a Manufacturer's Authorization at page 589 of its original bid which states as follows: -

"We hereby confirm that GE Healthcare is the established and reputable manufacturer of the following product at the corresponding GE Healthcare associated company below:

Cyclotron: TRACERCenter with PETtrace880-having manufacturer site at: GEMS PET Systems AB, Husbybog, SE-752 28 Uppsala, Sweden

PET/CT-Discovery MI Digital Ready 64 SLICE-having manufacturer site at GE Medical Systems LLC, 3000 North Grandview Blvd, Waukesha, WI 53188, USA

SPECT/CT-NMCT 870 DR- having manufacturer site at:

GE Medical Systems Israel, Functional Imaging 4 Hayozyma street TIRAT HACARMEL, 30200 Israel

MRI-Signa Architect-having manufacturer site as:

GE Healthcare Japan Corporation 7-127, Asahigaoka 4-chome, Hino-shi Tokyo 191 8503 Japan

CT-Revolution ES-having manufacturer site at:

***GE Medical Systems LLC, 3000 North Grandview Blvd,
Waukesha, WI, 53188, USA”***

***This confirmation is given in connection with
KUTRRH/TNDR/W/50/CETO-IMIC/2019-2021 for the above
goods manufactured by us”***

Having noted that GE Healthcare is a business segment and/or division that deals with healthcare on behalf of General Electric Company, the Manufacturer’s Authorization found at page 589 of the Applicant’s original bid demonstrates that GE Healthcare (a business segment/division of the Conglomerate) is the established and reputable manufacturer of the product specified in the said manufacturer’s authorization. The Applicant also attached in its original bid, a Medical Device Certificate issued to it by the Pharmacy and Poisons Board under the Ministry of Health with respect to **“approval to supply Revolution CT, Revolution Discovery CT”**. This in the Board’s view demonstrates that the Applicant obtained manufacturer’s authorization which confirms that GE Healthcare is the manufacturer of the product specified in the said manufacturer’s authorization and that having obtained approval from the Pharmacy and Poisons Board under the Ministry of Health, the Applicant would supply the equipment manufactured by GE Healthcare that will be used to implement the subject tender.

The Board has already established that General Electric Company is a conglomerate with a business segment and/or division known as GE

Healthcare that deals with healthcare business and that the Attestation Certificate dated 4th September 2014 specifies that the Applicant is an indirect wholly-owned subsidiary of the General Electric Company. It is therefore important to determine whether the Applicant could rely on the technical expertise/specifications of its Parent Company with respect to being an Original Equipment Manufacturer.

Section 3 of the Companies Act, No. 17 of 2015 (hereinafter referred to as "the Companies Act") states that: -

"wholly-owned subsidiary company" (of another company) means a company that has no members other than that other company and that other company's wholly owned subsidiaries (or persons acting on behalf of that other company or its wholly-owned subsidiaries)"

The Board in **PPARB Application No. 94 of 2019, Techno Relief Services Limited v. The Accounting Officer, Kenya Medical Supplies Authority & 3 Others** addressed the relationship between parent companies and their subsidiaries. In doing so, the Board cited with approval the decision by Lord Denning in the Court of Appeal of England in **DHN Food Distributors Ltd and Others v. London Borough of Tower Hamlets (1967) 3 ALL ER 462** and further held as follows: -

"...We all know in many respects that a group of companies is treated together for the purpose of general accounts,

balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says: "there is evidence of general tendency to ignore the separate legal entities of various companies within a group"
This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says.

This group in my view is virtually a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point."

....The Board is persuaded that even though wholly-owned subsidiary companies may prepare their own individual financial statements, the law (as can be seen from the judicial precedents of the Courts of India and England cited hereinabove), permits a wholly-owned subsidiary to rely on the Financial Statements of the Parent Company as the two companies are treated as one concern (or a single economic entity) when preparing Consolidated Financial Statements of the Parent Company and its subsidiaries."

In the foregoing case, the Board addressed the question whether a wholly-owned subsidiary can rely on the financial statements of its parent company

for purposes of a tendering process. In the instance Request for Review, the Board notes that, GE Healthcare confirmed that it manufactures cyclotron equipment to be supplied by the Applicant (the indirect wholly owned subsidiary of General Electric Company), because GE Healthcare is the business segment and/or division of General Electric Company that deals with health care. The Applicant also obtained approval from the Pharmacy and Poisons Board to supply the cyclotron equipment manufactured by GE Healthcare.

It is the Board's considered finding that the Applicant being an indirect wholly owned subsidiary of General Electric Company (the Parent Company and conglomerate) can rely on the technical expertise of its parent company and in this case being an Original Equipment Manufacturer, by treating all the legal entities that form the General Electric Company conglomerate as one concern and not separate so as to be defeated on a technical point.

At this juncture, it is important for the Board to address its mind on the options available to the Procuring Entity in the instant scenario where it already awarded the subject tender to the Applicant and it cannot therefore terminate the subject procurement process after notification of award pursuant to section 63 (1) of the Act. Section 135 (2) of the Act provides that: -

"Section 135 (1)

(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings

According to section 2 of the Act, the word "person" has the meaning assigned to it in Article 260 of the Constitution and includes sole proprietorship. Turning to Article 260 of the Constitution, the Board notes that a person includes: -

"a company, association or other body of persons whether incorporated or unincorporated"

Further to this, section 3 of the Companies Act, 2015 defines the term "Associated Company" as: -

- "(a) a subsidiary of the company;***
- (b) a holding company of the company; or***
- (c) a subsidiary of such a holding company"***

On its part, the term "holding company" is defined under Section 3 of the Companies Act as a company that—

(a) controls the composition of that other company's board of directors;

(b) controls more than half of the voting rights in that other company;

(c) holds more than half of that other company's issued share capital; or

(d) is a holding company of a company that is that other company's holding company;"

It is worth noting that the Applicant can be referred to as an Associated Company of General Electric Company since the Applicant is its indirect wholly-owned subsidiary. As a result, associated companies such as the Applicant that is wholly-owned by a holding company or conglomerate are "persons" within the meaning of section 135 (2) of the Act. Section 135 (2) of the Act permits the Accounting Officer of the Procuring Entity (i.e. 2nd Respondent herein) to enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

Since the Applicant is part of a conglomerate and the Procuring Entity may have concerns of the person that would implement the subject tender having noted that the Solicitor-General raised concerns regarding the legal status of General Electric Company and the Applicant, it is the Board's considered view

that nothing stops the Procuring Entity from entering into a contract with the Applicant and/or the Applicant's parent company/designated Original Cyclotron Equipment Manufacturer provided that the Procuring Entity specifies the obligations of the Applicant and/or the parent company of the Applicant/designated Original Cyclotron Equipment Manufacturer GE Electric Company in the event of default by the Applicant and/or the parent company of the Applicant/designated Original Cyclotron Equipment Manufacturer in performing the contract.

Martin Loosemore, John Raftery, Charles Reilly in their book on **"Risk Management in Projects (Taylor and Francis, 2006)"** explain that: -

"The most common form of guarantee in construction projects is the parent company guarantee which is used on many projects to ensure that the obligation of a subsidiary company will be underwritten by its holding or parent company in a financially stable group. Parent company guarantees are designed to provide the same cover as a performance bond with the advantage of having no apparent cost for the employer or limit which may not cover the employer's cost for non-performance. "

From the above excerpt, it is worth noting that a procuring entity may require a parent company to provide a parent company guarantee within the contract in the subject tender that binds such a parent company to the terms

and conditions of a contract executed in the subject tender. The parent company will have an obligation to ensure that its subsidiary company implements the subject tender in accordance with the terms of the contract executed between the parent company, in this case, M/s General Electric Company/designated Original Cyclotron Equipment Manufacturer, the subsidiary (i.e. the Applicant) and the Procuring Entity. In the event of non-performance by the Applicant, General Electric Company will be under a legal obligation to ensure that the Procuring Entity recovers all losses and expenses incurred as a result of the Applicant's non-performance of the contract.

The Board studied the Procuring Entity's Board Paper on the Proposed Integrated Molecular Imaging Centre dated December 2019, which forms part of the confidential file submitted to the Board pursuant to section 67 (3) (e) of the Act and notes that the Procuring Entity was alive to the urgent need of a Cancer Centre that would be accessible to all Kenyans and facilitate detection of cancer disease at its early stages. At Clause 3.1 and 3.2 of the Board paper, it is stated as follows: -

"3.1. According to Globocan data, cancer ranks third as a cause of death after infectious diseases and cardiovascular diseases in Kenya. In 2018, there were about 47,887 new diseases and 32,987 cancer deaths in the country. This translates to about 70% deaths which mean only 30% of those sick survive..."

3.2. According to the third Medium Term Plan III 2018-2022, the Government plans to establish 4 comprehensive cancer centers complete with PET scans...

Currently, there is only one Comprehensive Cancer Center in Kenya at Aga Khan University Hospital, Nairobi. This is a private center therefore not within reach of many Kenyans. With the establishment of KUTRRH as a National Referral Hospital and the establishment of Integrated Molecular Imaging Center (IMIC), KUTRRH is set to be the first Public Comprehensive Cancer Centre not only in Kenya but also in the region. This will lead to an improvement in capacity to handle cancer cases within the country and region”

The subject procurement process is evidently a great milestone in achieving one of the pillars of the Government’s Big Four Agenda referred to as Universal Health Coverage and in line with attaining equitable, affordable and quality health care services in Kenya. This procurement process has been initiated at a time when there are rising number of cancer patients who most of the time are diagnosed of the disease at an advance stage because no early detection measures are available. Further to this, most patients spend large sums of money seeking health care in foreign countries whereas with a public comprehensive cancer center, cancer patients will receive affordable treatment within the country. Article 43 (1) (a) of the Constitution recognizes that:-

***"43 (1) Every person has the right—
(a) to the highest attainable standard of health, which
includes the right to health care services, including
reproductive health care"***

The establishment of an Integrated Molecular Imaging Centre is an opportunity for the constitutional socio-economic right under Article 43 (1) (a) of the Constitution to be actualized with respect to cancer, given the rising number of cancer cases, which as noted hereinbefore, ranks third as the cause of death after infectious diseases and cardiovascular diseases in Kenya. In the Board's view, the subject procurement process is set to produce the greatest happiness for the greatest number of people and it is therefore important for the same to proceed to its logical conclusion in line with the pillar of the Government's Big Four Agenda on Universal Health Coverage and the right to highest attainable standard of health, which includes the right to health care services under Article 43 (1) (a) of the Constitution.

From the foregoing, the Board is convinced that a delay by way of terminating the subject procurement proceedings and starting afresh will delay the promotion of the socio-economic right under Article 43 (1) (a) of the Constitution to the detriment of the people of Kenya. In the circumstances, the Board finds that the subject procurement process should proceed to its logical conclusion as long as the contract to be executed with respect to this procurement process is signed by the Procuring Entity, the

Applicant and the designated Original Cyclotron Equipment Manufacturer/parent company of the Applicant.

In totality, the Request for Review is hereby allowed and the Board proceeds to make the following 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 Cancellation of Tender No. KUTRRH/TNDR/W/050/CETO-IMIC/2019-2020 for Construction, Equipping, Training and Operationalization of Integrated Molecular Imaging Centre dated 15th June 2020 and addressed to the Applicant, be and is hereby cancelled and set aside.**

- 2. The Procuring Entity is hereby directed to proceed with the subject procurement process to its logical conclusion within fourteen (14) days from the date of this decision.**

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 6th day of July 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB