

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 16/2020 OF 31ST JANUARY 2020

BETWEEN

PAPATON SECURITY SERVICES LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

KAKAMEGA COUNTY

WATER AND SANITATION COMPANY.....1ST RESPONDENT

KAKAMEGA COUNTY

WATER AND SANITATION COMPANY.....2ND RESPONDENT

Review against the decision of Kakamega County Urban Water and Sanitation Corporation with respect to Tender No. KACWASCO/SEC/4/2019-2020 for Provision of Security Services

BOARD MEMBERS

- | | |
|--------------------------|------------------|
| 1. Mr. Steven Oundo, OGW | -Member Chairing |
| 2. Mr. Alfred Keriolale | -Member |
| 3. Ms. Rahab Chacha | -Member |

IN ATTENDANCE

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

2. Ms. Maryanne Karanja

-Secretariat

PRESENT BY INVITATION

APPLICANT

-PAPATON SECURITY SERVICES LIMITED

1. Mr. Duncan Okatch

-Advocate, Okatch & Partners
Advocates

2. Mr. Lenny Kimaiti

-Advocate, Okatch & Partners
Advocates

1ST AND 2ND RESPONDENTS

-KAKAMEGA COUNTY WATER AND SANITATION COMPANY

1. Ms. Irene Kashindi

-Advocate, Munyao Muthama &
Kushindi Advocates

2. Ms. Were Gaudence Akinyi

-Associate Advocate, Munyao
Muthama & Kushindi Advocates

3. Mr. Fredrick Atwa

-C.E.O

4. Ms. Linet Wasaba

-HRM

5. Ms. Maurine Aura

-P.M

6. Ms. Ashiono Murwa

-Principal Legal Officer

INTERSETED PARTIES

A. VIGILMAX

BACKGROUND TO THE DECISION

The Bidding Process

Kakamega County Urban Water and Sanitation Corporation (hereinafter referred to as "the Procuring Entity) invited eligible and interested bidders to submit their bids in response to Tender No. KACWASCO/SEC/4/2019-2020 for Provision of Security Services (hereinafter referred to as "the subject tender"). The subject tender was advertised on The Standard Newspaper, the Kakamega County Government Website and the Procuring Entity's website on 27th December 2019.

Bid Submission Deadline and Opening of bids

A total of eight (8) firms/bidders submitted bids and the same were opened on 11th December 2019. The following firms submitted bids in response to the subject tender: -

- 1) M/s Papaton Security
- 2) M/s Kisspag Security Services
- 3) M/s Kleen Homes Security
- 4) M/s FTA Security Group EA Limited
- 5) M/s Hewson Company Limited
- 6) M/s Vigilmax Security Services Limited
- 7) M/s Golden Protection E.A. Limited

8) M/s Best Africa Security Experts (BASE) Limited

Evaluation of bids

According to the Procuring Entity's Tender Document with respect to the subject tender, evaluation was to be conducted in the following three stages:-

- Preliminary Evaluation
- Technical Evaluation;
- Financial Evaluation.

1. Preliminary Evaluation

At this stage of evaluation, bidders were evaluated against the following mandatory criteria and bidders who failed in any of the criteria did not proceed to the next stage of evaluation.

The Evaluation criteria were as follows:-

No.	PARTICULARS	YES/NO	REMARKS
1.	Company registration certificate (Certificate of incorporation)	Yes/No	
2.	Valid Tax Compliance Certificate (KRA), PIN, and VAT certificates	Yes/No	
3.	Valid letter of compliance from Ministry of Labour and attach Certified (by ministry of labour or commissioner of oath) extract of payroll to demonstrate compliance with minimum wage guidelines	Yes/No	
4.	Provide evidence of NSSF (latest Certificate of compliance from NSSF) remittances for the employees for the last three months (not pay slips)	Yes/No	

5.	Provide evidence of NHIF (latest Certificate of compliance from NHIF)remittances for the employees for the last three months (not pay slip)	Yes/No	
6.	Copy of valid membership certificate for KSIA or PSIA	Yes/No	
7.	Evidence of existence of an operating office(s) (Titles/Lease agreement, and single Business Permit)	Yes/No	
8.	Certified Valid Communications Authority (CA) Licenses for both Radio and Alarm communications	Yes/No	
9.	Audited Financial Accounts for the last (3) years	Yes/No	
10.	Duly signed form of tender	Yes/No	
11.	Duly filled business questionnaire	Yes/No	
12.	Valid Tender security in the acceptable format	Yes/No	

The results were as follows: -

BID NO	FIRM	COMMENTS	REMARKS
B1	Papaton Security	-Submitted all the mandatory requirements	Passed
B2	Kisspag Security Services	-Did not submit a valid letter of compliance from Ministry of Labour or commissioner of oath. No copy of certified extract of payroll to demonstrate compliance with minimum wage guidelines -Did not submit evidence of NHIF (latest Certificate of compliance from NHIF) remittances for the employees for the last three months. - Did not submit Certified Valid Communications Authority (CA) Licenses for both Radio and Alarm communications. - Did not submit a valid Tender security in the acceptable format.	Failed
B3	Kleen Homes Security	-Submitted all the mandatory requirements	Passed
B4	FTA Security Group EA Ltd	-Submitted a Protective Security Industry Association (PSIA) membership certificate which was not valid. PSIA confirmed that they were non members as per attached email from PSIA.	Failed

		-Did not submit evidence of latest Certificate of compliance from NSSF remittances for the employees for the last three months.	
B5	Hewson Company Ltd	-Submitted all the mandatory requirements	Passed
B6	Vigilmax Security Services Ltd	-Submitted all the mandatory requirements	Passed
B7	Golden Protection E.A LTD	-KRA Tax Compliance certificate number KRANON0474122019 submitted was not valid as per the online KRA Tax Compliance Certificate Checker. (attached is a print out of the online results of the KRA Tax Compliance Checker)	Failed
B8	Best Africa Security Experts (BASE) Ltd	-KRA Tax Compliance certificate number KRAWON1145191019 submitted was withdrawn by KRA as per the online KRA Tax Compliance Certificate Checker.(attached is a print out of the online results of the KRA Tax Compliance Checker)	Failed

At the conclusion of this stage of the evaluation process, Bidders B1, B3, B5, B6, proceeded to the Technical evaluation stage

2. Technical Evaluation

At this stage of evaluation, bidders were evaluated against the technical specifications stipulated in the Tender Document as follows: -

NO	REQUIREMENTS	MAX. POINTS	B1	B2	B3	B4	B5	B6	B7	B8
1	Enclose letters, copies of certificates and curriculum vitae of Directors CR 12	10	10	-	10	-	10	10	-	-
2	Enclose letters, copies of certificates and curriculum vitae of	5	5	-	4	-	5	5	-	-

	Management team, Supervisors and Key staff									
3	Evidence of similar works. Provide copies of contracts, LPO/LSO /Award letters from at least (3) 15 organizations with at least Kshs. 500,000 monthly invoice value being served currently.	15	15	-	15	-	15	15	-	-
4	Equipment Evidence of the following equipment 1. Operating fleet of vehicles (Attach Log books of vehicles) 2. Functional VHL Radio set 3. Metal detectors/under vehicle inspection gadgets 4. Security Dogs	15	15	-	15	-	11.6	15	-	-
5	Evidence of training guards in: -Significance of criminal investigation -Fire fighting -First Aid -Customer care and Public Relations -Surveillance and Monitoring -Physical Security environment -Supervision	14	14	-	10.6	-	10.6	10	-	-
6	Provide evidence of ability to effectively supervise guards while on duty -Supervisory gadgets -Supervisory reports	5	5	-	5	-	5	3	-	-

7	Operation plan/scheme of works	10	7.6	-	8	-	10	8.6	-	-
8	Credit period: 90 days	10	10	-	10	-	10	10	-	-
9	Reference letters from at least three (3) similar organizations served in the last 3years	3	3	-	3	-	3	3	-	-
1	Evidence of Insurance Covers: -WIBA -Public/contractual Liability -Burglary -Fidelity Guarantee	8	6	-	8	-	6	8	-	-
1	Value that the business can handle at one time should be above 1,000,000/= Attach evidence	5	5	-	5	-	5	5	-	-
TOTAL SCORE		100	95.6	0	93.6	0	91.2	92.6	0	0

Bidders were required to attain a minimum score of 75% in order to qualify for financial evaluation.

The following bidders passed the technical evaluation stage after attaining 75% and above and therefore proceeded to financial evaluation: -

BID NO	FIRM	COMMENTS	SCORE
B1	Papaton Security	- passed the technical evaluation stage	95.6
B3	Kleen Homes Security	- passed the technical evaluation stage	93.6
B5	Hewson Company Ltd	- passed the technical	91.2

		evaluation stage	
B6	Vigilmax Security Services Ltd	- passed the technical evaluation stage	92.6

3. Financial Evaluation

At this stage of evaluation, the Evaluation Committee conducted a comparison of prices submitted by bidders who qualified for financial evaluation, that is, Bidders B1, B6, B3 and B5.

The results were as follows: -

BID NO	FIRM	COST PER TENDER FORM	SCORE	RANK	REMARKS
B1	Papaton Security	7,656,000	95.6	1st position	-lowest evaluated bidder
B6	Vigilmax Security Services Ltd	7,669,600	92.6	2nd position	-Second lowest evaluated bidder
B3	Kleen Homes Security	8,352,000	93.6	3rd position	-Third lowest evaluated bidder
B5	Hewson Company Ltd	9,744,000	91.2	4rd position	-Fourth lowest evaluated bidder

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended that due diligence be conducted as per section 83 of the Public Procurement and Asset Disposal Act, 2015, by the evaluation team, on Bidder 1, that is M/s Papaton Security, who quoted a tender sum of **Kshs. 7,656,000 (Seven Million, Six Hundred and Fifty Six Thousand shillings only)** before an award is made for the subject tender, as its bid was found to be the lowest evaluated responsive bid,

and had met all the requirements as stated in Clause 40.1 of the Tender Document.

The Evaluation Committee further recommended that during the due diligence the following requirements will be verified:

- The existence of physical facilities shall be established
- Verification of tax compliance certificate.
- Certificate of Registration/Incorporation,
- PIN certificate.
- Valid letter of compliance from Ministry of Labour.
- Evidence of NSSF (latest Certificate of compliance from NSSF) remittances for the employees for the last three months.
- Evidence of NHIF (latest Certificate of compliance from NHIF) remittances for the employees for the last three months.
- Valid membership certificate for KSIA or PSIA.
- Valid Communications Authority (CA) Licenses for both Radio and Alarm communications.
- Evidence of similar works done.
- Evidence of the following equipment(Operating fleet of vehicles, Functional VHL Radio set, Metal detectors/under vehicle inspection gadgets, Security Dogs)
- Evidence of training guards (Significance of criminal investigation, Fire fighting, First Aid, Customer care and Public Relations,

surveillance and Monitoring, Physical Security environment, Supervision).

- Evidence of ability to effectively supervise guards while on duty (Supervisory gadgets, Supervisory reports).
- Evidence of Insurance Covers (WIBA, Public/contractual Liability, Burglary, Fidelity Guarantee).

Due Diligence

The Evaluation Committee conducted a due diligence exercise on M/s Papaton Security Services on 19th December 2019. The Evaluation Committee visited the bidder's offices on the said dated and viewed the office premises, security guards, vehicles, and control room alarm systems etc.

The Evaluation Committee, in its due diligence report dated 19th December 2019, indicated that the scope of the due diligence exercise included but was not limited to: -

- a) Verification of original documents at the office;
- b) Access to Papaton Payroll system;
- c) Field visit at selected organizations where Papaton is providing security services;
- d) Obtaining recommendation letters from clients.

The findings of the due diligence exercise were as follows: -

i. Registration Documents and Compliance Certifications

The Evaluation Committee established that M/s Papaton Security Services is a duly registered company for provision of security services with effect from 1/11/2010 and incorporated vide Certificate of Incorporation No. CPR/2014/142659.

The Evaluation Committee viewed the bidder's Tax Compliance Certificate Number KRASON113875619 issued by Kenya Revenue Authority on 28th March 2019 and the original documents for the company such as certificate of compliance number MEAL&SP/KAK/2019 issued on 19th January 2019 by Ministry of Labour and Social Protection signed and stamped by S.D. Abdalla County Employment Officer Kakamega.

The Evaluation Committee also confirmed that the bidder had complied with the provisions of the National Social Security Services Fund Act, No. 45 of 2013 Laws of Kenya vide certificate of compliance of serial number 2121090X signed and stamped by Esther Kemei, Zonal Compliance Officer and Branch Manager Vihiga Sub-County Branch.

It was also observed by the Evaluation Committee that the bidder is compliant with respect to the provisions of the NHIF Act No. 9 of 1998 which is issued on monthly basis 2/12/2019. The certificate of compliance serial number 6843 was signed and stamped by the Chief Executive Officer on 2/12/2019.

ii. **Access to Papaton Security Books of Accounts and Financial Statements**

It was established that the financial statements for the last three years are up to date as presented in the statements. Payment is prepared and approved as per the company procedures.

iii. The Evaluation Committee further visited Sangalo Institute of Science and Technology and Lugulu Girls High School.

It was confirmed that the M/s Papaton Security Services provides security services to the aforementioned places where the committee established are vigilant, disciplined and have excellent customer care skills. It was also noted that the staff were satisfied and happy with their working environment.

From the documents presented to the Evaluation Committee for review and in addition to the field visit conducted at some of the institutions where M/s Papaton Security Services has been engaged for provision of security services, the Evaluation Committee noted that the company is well established and their services are satisfactory.

Professional Opinion

The Head of Procurement reviewed the Evaluation Report and concurred with the recommendation of award made by the Evaluation Committee which recommendations were approved by the Procuring Entity's Managing Director on 19th December 2019.

THE REQUEST FOR REVIEW NO. 4 OF 2020

M/s Papaton Security Services Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated and filed on 31st January 2020 (hereinafter referred to as "the Request for Review") together with a Statement in Support of the Request for Review sworn and filed on the same date (hereinafter referred to as "the Applicant's Statement"). The Applicant also filed a Further Statement in Support of the Request for Review (hereinafter referred to as "the Applicant's Further Statement") sworn and filed on 17th February 2020.

In response, Kakamega County Urban Water and Sanitation Company (hereinafter referred to as "the Procuring Entity") filed a Response dated and filed on 10th February 2020 (hereinafter referred to as "the Procuring Entity's Response"). The Procuring Entity further filed a Memorandum of Response dated 12th February 2020 and filed on 13th February 2020 (hereinafter referred to as "the Procuring Entity's Further Response") together with an affidavit sworn and filed on 13th February 2020 (hereinafter referred to as "the Procuring Entity's Affidavit").

The Applicant sought for the following orders in the Request for Review:-

- i. An order declaring that the tender cancellation was unfair and discriminatory to the Applicant thus offending clear provisions of the Constitution and the Public Procurement and Asset Disposal Act, 2015;***

ii. An order reinstating the award of tender to the Applicant and further compel the Respondents to proceed and sign the contract for Tender No. KACWASCO/SEC/4/2019-2020;

iii. An order awarding costs to the Applicant

During the hearing, the Applicant was represented by Mr. Okatch on behalf of the firm of Okatch & Partners Advocates whereas the Procuring Entity was represented by Ms. Kashindi on behalf of the firm of Munyao Muthama & Kushindi Advocates.

PARTIES' SUBMISSIONS

The Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. Okatch, fully relied on the Request for Review, the Applicant's Statement, Further Statement and supporting documentation thereto.

Mr Okatch submitted that the Applicant was issued a letter of award by the Procuring Entity dated 19th December 2019 with respect to the subject tender which the Applicant subsequently accepted. However, via a letter dated 22nd January 2020, the Procuring Entity purported to cancel the award pursuant to a due diligence exercise conducted post award by the Procuring Entity.

Mr Okath contended that the purported cancellation of award of the tender to the Applicant ran contrary to the provisions of the Act on two fronts. Firstly, the Procuring Entity was not permitted to conduct a due diligence exercise after award of a tender as provided for under section 83 of the Act as a due diligence exercise must be conducted before award of a tender and not post-award.

Mr. Okatch further argued that from the Affidavit sworn by the Procuring Entity's Principal Legal Officer, one Ms Christabel Ashiono, it was evident that she was not part of the tender evaluation committee and was therefore an outsider in the evaluation process. Any action she purported to do was clearly outside the provisions of the law.

In conclusion, he urged the Board to find merit in the Request for Review application and grant the orders therein.

The 1st & 2nd Respondent's/The Procuring Entity's Submissions

In her submissions, Counsel for the Procuring Entity, Ms. Kashindi, fully relied on the Procuring Entity's Response, Further Response, Affidavit and supporting documentation thereto.

Ms. Kashindi submitted that pursuant to section 167 of the Act as read together with Regulations 73 of the 2006 Regulations, a request for review should state the reasons for the complaint including any alleged breach of the Act or these Regulations in order for the jurisdiction of this

Board to be invoked. This means that a request for review should specify the provisions of the Act or the regulations that impose a duty upon a procuring entity which duties have been breached. It was therefore the Procuring Entity's submission that this had not been done by the Applicant.

Ms. Kashindi submitted that the review application was bare and merely stated in general terms that there was a breach of the provisions of the Act but failed to specify the exact provisions of the law the Applicant alleged the Procuring Entity was in breach of. She further submitted that the Applicant's Further Statement did not cure the defect in the Request for Review, which is further not provided for in the Act and/or its regulations.

In support of the Procuring Entity's submissions, Ms Kashindi invited the Board to consider its bundle of authorities and referred the Board to the first case where this Board stated that "*under section 93 there are three pre-requisites for a person to seek administrative review: first he must be a candidate, secondly he must claimed to have suffered a risk or loss or damage arising from the procurement process and thirdly the damage must emanate from a duty imposed on a procuring entity by the Act or Regulations.*" She submitted that similar sentiments have also been made in the authorities submitted to the Board by the Procuring Entity.

With respect to the substance of the review application, Ms. Kashindi submitted that the tender was cancelled by the letter dated 22nd January

2020, a copy of which was at page 9 of the Applicant's bundle of documents. She submitted that the said letter listed the reasons for the cancellation, the first being that upon further due diligence, it was found that there were some material governance issues that were detected and also that the Applicant lacked the capacity to undertake the services under the subject tender.

The second issue that emerged was that upon examination of the Applicant's quote, the Procuring Entity noted that the Applicant would not meet the minimum wages set out in the law. Ms. Kashindi submitted that the Procuring Entity required a total of 58 guards. From the Applicant's quote of Kshs 7,656,000/-, she submitted that if you do a quick mathematical calculation it would amount to Kshs 638,000/- per month to cover 58 guards, giving you less than Kshs 7,000/- per month per guard, assuming that the entire amount would be used towards paying salaries, noting that the same sum would also have to cover other expenses related to implementation of the tender. According to Ms Kashindi, the amount of Kshs 7,000 per month per guard was in violation of the legal requirements with respect to minimum wage.

Ms Kashindi submitted that once these issues came to the attention of the Procuring Entity, it took an extra step and proceeded to interview guards currently employed by the Applicant which confirmed the fears of the Procuring Entity.

Counsel further submitted that from the independent due diligence that was carried out, other issues such as capacity and governance issues also came to the fore which are reproduced in the Procuring Entity's Affidavit. It was therefore the Procuring Entity's submission that due to these emerging issues, the Procuring Entity wrote a letter to the Applicant dated 22nd January 2020 cancelling the tender and the tender award.

Ms Kashindi submitted that cancellation of award of a tender was allowed by law and was provided for under section 63 of the Act, which section the Procuring Entity duly invoked in cancelling the award. She invited the Board to consider the principles of public procurement as listed under section 3 of the Act, which includes maximization of value for money. She submitted that this particular principle did not necessarily only mean that a bidder has to have the lowest bid price, but this principle also requires provision of quality service. She submitted that if a bidder's quote was too low, as was the case with the Applicant's bid, the bidder in question would not be able to provide quality services and there would also be breach of laws, such as labour laws.

According to the Procuring Entity, the Applicant would not be completely locked out due to the cancellation of the award as the tender would be re-advertised as indicated in the Applicant's cancellation letter.

She invited the Board to consider the persuasive authority from South Africa, the case of Good Hope, whose facts are similar to the instant

case, as there was a cancellation of a tender after contract award due to grave issues that came to the fore. In the Good Hope case, the only option available was to cancel the entire tender as failure to do so would have amounted to rubber stamping a violation of the law and other irregularities.

In conclusion therefore, she urged the Board to dismiss the Request for Review and award costs to the Procuring Entity.

The Applicant's Rejoinder

In a rejoinder, Mr Okatch submitted that the letter that communicated the cancellation of award to the Applicant did not disclose all the reasons for cancellation of the award and with respect to the calculations done by the Procuring Entity on the Applicants' tender sum, it was the Applicant's contention that no clarifications were sought with respect to the same contrary to the Act and the rules of natural justice.

Mr. Okatch submitted that the Applicant further provided in its bid a compliance certificate from the Ministry of East Africa Community, Labour and Social Protection confirming that the Applicant was in compliance with labour laws.

It was also the Applicant's submission that there was no minimum amount stipulated in the Tender Document which is also not a

requirement under the Act, and therefore the Procuring Entity's submission that the Applicant's tender sum was too low was unfounded.

With respect to the competency of the review application, Mr. Okatch submitted that one cannot read the Request for Review application in isolation and that in reading the same, the infringements complained about are clearly identifiable. He submitted that paragraph six of the Request for Review indicated that the cancellation is not in line with provisions of the Act and further, paragraph two addressed the due diligence exercise that was conducted contrary to the provisions of the Act.

Mr Okatch contended that under the current constitutional dispensation, it was important to focus on substantive justice and not procedural technicalities in the interests of justice. He submitted that the lack of specificity of the exact provisions of the law did not go to the root of the matter and no prejudice was occasioned to any party before the Board in this matter. He further submitted that the Procuring Entity fully understood the compliant in the Request for Review and subsequently lodged a comprehensive response before the Board.

Finally, he urged the Board to find that the Procuring Entity's cancellation of the award was not proper and for the Board to grant costs to the Applicant.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act") and the oral submissions by all parties to the Request for Review.

The issues for determination are as follows:-

I. Whether the Applicant's failure to specify in its Request for Review Application, the provision of the Act and/or its Regulations that the Procuring Entity has allegedly breached, renders the Request for Review incompetent thus ousting the jurisdiction of this Board;

Dependant on the outcome of this issue: -

II. 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.

To determine this issue, the Board shall address the following sub-issues: -

a) Whether the independent due diligence exercise commissioned by the Procuring Entity's Principal Legal Officer meets the threshold under section 83 of the Act;

b) Whether the award of tender to the Applicant was lawfully cancelled by the Procuring Entity thereby informing its decision to terminate the subject tender.

Dependant on the outcome of the second issue: -

III. What are the appropriate reliefs to grant in the circumstances?

The Board will now proceed to determine the issues framed for determination as follows:

The nature of a preliminary objection, was explained in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696** as follows:-

"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

This finding has also been made in the case of **George Oraro v. Barak Eston Mbaja, Civil Suit No 85 of 1992**, where Ojwang, J (as he then was) observed as follows:-

"I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection... I am in agreement with learned counsel, Mr. Ougo, that "where a Court needs to investigate facts, a matter cannot be raised as a preliminary point."

The Board notes that the Procuring Entity raised a Preliminary Objection requesting the Board to strike out the Request for Review application due to the Applicant's failure to set out in its Request for Review Application, the provision of the Act and/or its Regulations that the Procuring Entity had allegedly breached as required under section 167 of the Act. It was the Procuring Entity's submission that the Board's jurisdiction may only be invoked where an applicant has demonstrated that there is a breach of a duty imposed on a procuring entity by the Act or the Regulations.

Further, it was the Procuring Entity's submission that Regulation 73 (2) of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations"), provides that a request for

review application should state the reasons for an applicant's complaint including any alleged breach of the Act and the Regulations. As such, the Request for Review before the Board was in the Procuring Entity's view incompetent and should therefore be struck out forthwith.

In response, the Applicant submitted that its Request for Review application clearly identifies the infringements by the Procuring Entity with respect to the subject procurement process, which in the Applicant's view were clearly understood by the Procuring Entity, as evidenced by the comprehensive response it duly filed before the Board.

Further, the Applicant submitted that at paragraph 6 of its Request for Review, it clearly indicated that the cancellation of the award of tender by the Procuring Entity was not in line with the provisions of the Act. It was therefore the Applicant's submission that the Procuring Entity's preliminary objection is unfounded and should be dismissed by the Board.

The Board having considered submissions by parties on the Preliminary Objection finds that the following issue calls for determination:-

Whether the Applicant's failure to specify in its Request for Review Application, the provision of the Act and/or its Regulations that the Procuring Entity has allegedly breached renders the Request for Review incompetent thus ousting the jurisdiction of this Board;

As stated in the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**, jurisdiction is everything and without it, a court or any other decision making body has no power to make one more step the moment it holds that it has no jurisdiction.

Accordingly, once a jurisdictional issue is before a court or a decision making body, it must be addressed at the earliest opportune moment and it therefore behooves upon this Board to determine whether it has the jurisdiction to entertain the substantive Request for Review.

The jurisdiction of this Board flows from section 167 (1) of the Act which provides that:-

"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed"

Accordingly, in order to file a Request for Review application, a candidate or tenderer must at the very least claim to have suffered or to

be at the risk of suffering loss or damage due to a breach of a duty imposed by a procuring entity by the Act or Regulations.

The manner in which a request for review ought to be filed is prescribed under Regulation 73 (2) of the 2006 Regulations which provides as follows: -

"The request referred to in paragraph (1) shall-

- (a) state the reasons for the complaint, including any alleged breach of the Act or these Regulations;***
- (b) be accompanied by such statements as the applicant considers necessary in support of its request;***
- (c) be made within fourteen days of –***
 - (i) the occurrence of the breach complained of where the request is made before the making of an award; or***
 - (ii) the notification under sections 67 or 83 of the Act;***
- (d) be submitted in fifteen bound copies and a soft copy , pages of which shall be consecutively numbered;***
- (e) be accompanied by the fees set out in Part II of the Fourth Schedule which shall not be refundable."***

From the above provisions, it is clear that a request for review application should clearly state the reasons for the complaint, including any alleged breach of the Act or these Regulations in order for the

applicant to demonstrate that it has indeed suffered or is at risk of suffering loss due to the breach of a duty imposed on a procuring entity by this Act or its attendant Regulations.

With this in mind, the Board studied the Request for Review and the grounds raised therein. The Board observes that a reading of the grounds raised in the Request for Review reveals that the breach alleged by the Applicant is that the Procuring Entity cancelled its award of the tender to the Applicant, after the Applicant had accepted the said award, which cancellation the Applicant argues in its Request for Review "*.... is not in line with the provisions of the Public Procurement and Asset Disposal Act, 2015....was totally outside the requirements enunciated by the Respondent in its Standard Tender Document....was made without strict adherence to the instructions to tenderers and in total disregard of the public procurement laws.*"

The Applicant further argued in its Request for Review that the Procuring Entity's decision to cancel the award of tender was unfair and discriminatory to the Applicant.

From the foregoing, the Board notes that the Applicant in its Request for Review has clearly stated the reasons for its complaint with respect to the subject procurement process. Further, that the said complaint is in breach of the Procuring Entity's Tender Document, the Act and its Regulations.

The Board notes that although the Applicant did not specify the exact provision of the law that has been breached by the Procuring Entity, it stated that the said breach is with respect to a duty imposed by the Procuring Entity's Tender Document, the Act and its Regulations.

In its defence, the Board heard submissions from the Applicant that the Procuring Entity's objection to the Request for Review amounted to a procedural technicality and in the current constitutional dispensation it was not tenable for an application before any court or adjudicating body to be struck out on this basis as substantive justice ought to take precedence over procedural technicalities.

In this regard, the Board studied Article 159 (2) (d) of the Constitution of Kenya, 2010 which provides: -

"In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a).....

(b).....

(c).....

(d) justice shall be administered without undue regard to procedural technicalities;" [Emphasis by the Board]

Accordingly, when any court or adjudicating body is called upon to administer justice, it shall not have undue regard to procedural technicalities.

The Board notes the use of the word 'undue', which is defined under the Cambridge English Dictionary to mean: -

"a level that is more than is necessary, acceptable, or reasonable"

'Undue regard' may therefore be interpreted to mean that a court or tribunal shall not disregard procedural technicalities but should not give more than the necessary, acceptable or reasonable regard or attention to procedural technicalities.

A definition of 'procedural technicality' was provided by the Honourable Justice Richard Mwangi, in **Kenya Ports Authority v. Kenya Power & Lighting Co. Limited (2012) eKLR** where he held as follows: -

"Combining the meanings of these words "procedural technicalities" may be described as those that concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice...."

Procedural technicalities therefore include the rules and procedures that regulate the formality and mode of legal proceedings.

With regard to what amounts to undue regard to procedural technicalities Lady Justice C.K. Byamugisha's essay on **Administering Justice Without Undue Regard to the Technicalities (2013)**, stated as follows: -

"In particular administration of justice without undue regard to technicalities was understood to mean that rules of procedure were handmaidens of justice. What this meant in practical terms was that the courts were charged with resolving disputes without being unduly hindered by legal technicalities. In other words rules of procedure are supposed to help the courts expedite court business but are not supposed to be ironclad obstacles to all causes in all circumstances." [Emphasis by Board]

The Board considered the decision of the High Court in **First National Finance Bank Limited v Universal Apparels (EPZ) Ltd & 2 others [2017] eKLR** where it held: -

"Where the statute or the applicable rules stipulate a procedure to be followed, parties ought to comply. It is only when rules are followed that there is orderliness in the manner in which proceedings are handled. If the courts were to totally disregard the rules of procedure, the result is likely to be total anarchy.

Nonetheless, Article 159 (2) (d) of the Constitution makes it clear that when called upon to administer Justice, the courts or any other tribunals which exercise judicial

authority, shall not be blindly enslaved by procedural technicalities.

The Constitution does not urge the courts to disregard procedural rules. It only says that the courts should not have undue regard to procedural technicalities.

Ordinarily therefore, Article 159 (2) (d) of the Constitution ought to be a shield, rather than a spear. It ought to be invoked to protect a substantive application so that the application can be heard, rather than having the application struck out or dismissed on the basis of a technicality. [Emphasis by the Board]

Further, Lady Justice C.K. Byamugisha in her essay on **Administering Justice Without Undue Regard to the Technicalities (2013)**, stated as follows: -

"In exercising its discretion, the circumstances of each case are very important. However, the right to be heard should always be a relevant consideration and therefore should be considered before such applications are rejected on technical grounds... In any case, our judicial system should never permit a party to be driven from the judgment seat without the court considering his/her/its/ right to be heard except in cases where the cause of the action is obviously and almost uncontestably bad."

Accordingly, it is clear that procedural technicalities are essential in assisting adjudicating bodies to conduct and expedite legal proceedings.

However, these procedures should not hinder the achievement of substantial justice in any legal proceeding and the courts in exercise of their discretion in determining what amounts to undue procedural technicalities must first examine the circumstances of the case before it.

Turning to the circumstances of the case, the Board notes that although the Applicant did not cite the specific provisions of the law it alleges the Procuring Entity has breached, the Request for Review application clearly outlines a cause of action as envisioned under section 167 (1) of the Act as read together with Regulation 73 (2) of the 2006 Regulations which simply requires an applicant to demonstrate an alleged breach of a duty imposed on a procuring entity by the Act and the Regulations.

Further, the Board notes that the Procuring Entity in its Response to the Request for Review application, addressed the issues raised by the Applicant, and was able to highlight the various sections of the law that touch on the allegations raised by the Applicant.

It is therefore the finding of this Board that the Applicant's failure to specify in its Request for Review Application, the exact provision of the Act and Regulations that the Procuring Entity has allegedly breached, does not render the Request for Review Application incompetent.

Accordingly, the Preliminary Objection raised by the Procuring Entity fails and the same is hereby dismissed.

The Board will now proceed to the second issue for determination: -

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 by way of an advertisement in the Standard Newspaper on 27th November 2019, the Procuring Entity invited interested and eligible bidders to submit bids in response to the subject tender. By the bid submission deadline of 11th December 2019, the Procuring Entity received a total of four (4) bids which were opened on the same date by the Procuring Entity's Tender Opening Committee.

At the conclusion of the evaluation process, the Procuring Entity's Evaluation Committee recommended award of the tender to the Applicant herein for having the lowest evaluated responsive bid which was approved by the Procuring Entity's Accounting Officer, having been reviewed by the Head of Procurement function. The successful bidder including all unsuccessful bidders, were duly notified of the outcome of their bids.

The Applicant submitted that it received a letter of award dated 19th December 2019, which read as follows: -

"This is in reference to the above stated tender. We would like to notify you that you have been awarded the above stated tender at the bid evaluated price of Kenya Shillings Seven Million Six Hundred and Fifty Six Thousand Only (7,656,000) inclusive of VAT.

You are required to give formal written unconditional acceptance of this offer within seven (7) days from the date of this letter.

The contract shall be signed by the parties within 30 days from the date of this letter but not earlier than 14 days from the date of this letter.

You may contact the undersigned on the subject matter of this letter of notification of award.”

The Applicant upon receiving the said letter of award communicated its acceptance of the same to the Procuring Entity via a letter dated 26th December 2019. However, much to the Applicant’s dismay, it received a letter of cancellation of the award from the Procuring Entity dated 22nd January 2020, which read as follows:

"Reference is hereby made to the above subject matter.

Kakamega County Urban Water and Sanitation Corporation (KACUWASCO) formerly Kakamega County Water and Sanitation Company Limited is a County Corporation under the County Government of Kakamega mandated to provide water and sanitation services within Kakamega County.

Following your award letter dated 19th December 2019 for the Tender for Provision of Security Services for the year 2020, I hereby wish to inform you that the same has been cancelled based on the following reasons: -

1. Further to the due diligence conducted, an independent due diligence was conducted on the same and found out that some material governance issues were detected which indicated that the firm lacked capacity to undertake the services.

2. As the lowest responsive bidder for the Tender for the Provision of Security Services, it has been noted that the price quoted of Kshs 7,656,000.00 per annum equivalent of Kshs 638,000.00 per month may be insufficient as it may not conform to the minimum wage guidelines as provided by the government, may not ensure compliance to various government authorities, may not ensure provision of quality services to the Corporation and may also not ensure sustainability of the security firm.

This is therefore to inform you that the contract agreement shall not be entered into and the Tender for Provision of Security Services shall be re-advertised.”

Aggrieved with the decision of the Procuring Entity, the Applicant moved this Board through this Request for Review.

The Applicant argued that the purported cancellation of the award by the Procuring Entity was made contrary to the provisions of the Tender Document, the Act and the Regulations. Further, that the independent due diligence exercise that lead up to the cancellation of the award was conducted contrary to the provisions of section 83 of the Act, which requires that a due diligence exercise, should be carried out after tender evaluation but prior to award.

Moreover, the Applicant submitted that according to section 83 of the Act, a due diligence exercise ought to be conducted by the members of an evaluation committee in order to verify the qualifications of the bidder determined to be the lowest evaluated responsive bidder.

Contrary to this provision of the Act, the Applicant submitted that the Procuring Entity's Principal Legal Officer, who was not a member of the evaluation committee and did not participate in the evaluation process with respect to the subject tender, sanctioned an independent due diligence exercise to be conducted on the Applicant, which ultimately led to the cancellation of the award of tender to the Applicant.

In response to the allegation which emerged from the Procuring Entity's independent due diligence exercise that the Applicant was in violation of Labour Laws with respect to the minimum wage requirement, the Applicant contended that it was certified compliant with labour statutes by the Ministry of East African Community, Labour and Social Protection as evidenced in a letter dated 19th January 2020. Further, that the

Procuring Entity had only two (2) municipalities and two (2) town councils, which areas have different payment scales that the Applicant duly accounted for in its bid. It was therefore the Applicant's submission that the Procuring Entity's reason for cancelling the award of tender was untenable rendering the said cancellation unlawful.

In response, the Procuring Entity submitted that it cancelled the award of tender to the Applicant for the following reasons: -

Firstly, the Procuring Entity submitted that in addition to the first due diligence exercise that was conducted on the Applicant, the Procuring Entity conducted another independent due diligence exercise in order to confirm legal compliance with the applicable laws and regulations prior to drafting the contract. The Procuring Entity submitted that from this independent due diligence exercise, it came to the Procuring Entity's attention that there were some material governance issues which indicated that the Applicant lacked the capacity to undertake the services under the subject tender.

Further, the Procuring Entity submitted that under the subject tender, it procured for 58 guards. Based on the Applicant's tender sum, the Procuring Entity contended that a quick calculation demonstrated that a guard would be paid a gross salary of Kshs 11,000 per month and approximately a net salary of Kshs 7,000 per month after statutory deductions, which in its view is in violation of the applicable minimum wages under the Regulation of Wages (General) (Amendment) Order,

2018 Legal Notice No. 2 issued under the Labour Institutions Act No. 12 of 2007 by the Cabinet Secretary for Labour and Social Protection.

In view of the foregoing, it was the Procuring Entity's submission that it was necessary to cancel the award there being no other options available to remedy the serious issues raised by the independent due diligence exercise. In its view, failure to cancel the award and subsequently terminate the tender would have further contravened the guiding values and principles under section 3 of the Act.

Having heard submissions by all parties, the Board finds it necessary to first establish what a due diligence exercise is, and its purpose.

Black's Law Dictionary, Ninth Edition at page 523 defines 'due diligence as ***"the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation"*** with the term 'diligence' meaning ***"the attention and care required from a person in a given situation"***.

A due diligence exercise is therefore a fundamental element of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.

Further, section 83 of the Act provides as follows:-

"(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation."

Accordingly, a procuring entity may elect to conduct a due diligence exercise to satisfy itself of the qualifications of the tenderer determined by the evaluation committee to be the lowest evaluated responsive tenderer.

It is important to note that when a procuring entity advertises a tender, bidders submit their tender documents attaching evidence of their qualifications. In arriving at the responsive tenderer therefore, the

procuring entity considers documents that support the eligibility and mandatory requirements specified in the procuring entity's tender document.

Section 79 of the Act is instructive on this aspect as it states:-

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

These eligibility and mandatory documents/requirements are considered at the Preliminary and Technical Evaluation stages after which Financial Evaluation is conducted. During Financial Evaluation in open tenders, where Request for Proposal method of tendering is not used, award of a tender is based on the criteria of lowest evaluated responsive tender. Hence, when the accounting officer awards the tender, he or she does so to the tenderer determined to have submitted the lowest evaluated responsive tender.

This means the lowest evaluated responsive tenderer is determined by looking at its qualifications that meet the minimum eligibility and mandatory requirements in the Tender Document.

In this regard therefore, a procuring entity conducts a due diligence exercise to verify and confirm the qualifications of the lowest evaluated responsive tenderer, which exercise would be based on documents and

qualifications considered during evaluation that met the minimum eligibility and mandatory requirements of the Tender Document.

Section 83 (3) of the Act as outlined hereinabove, clearly stipulates the procedure that must be followed in a due diligence process. For one, due diligence is conducted after tender evaluation but prior to award of the tender to confirm and verify the qualifications of the tenderer determined by the Procuring Entity to be the lowest evaluated responsive tenderer.

Secondly, the Procuring Entity must prepare a due diligence report outlining how due diligence was conducted and the findings of the process. The said report is signed only by members of the Evaluation Committee who took part in the due diligence exercise, and they must include their designation. Further, the report must be initialled on each page.

If the qualifications of the lowest evaluated tenderer are satisfactory, the due diligence report is submitted to the Head of Procurement function for his professional opinion and onward transmission to the Accounting Officer who will consider whether or not to award the tender to that lowest evaluated tenderer.

If the lowest evaluated tenderer is disqualified after due diligence, this fact must be noted in the Due Diligence Report with reasons. In view of

the findings of this report that the lowest evaluated tenderer be disqualified after due diligence, the Evaluation Committee then recommends award to the next lowest evaluated tenderer, subject to a similar due diligence process conducted on such tenderer, as outlined hereinbefore.

This procedure is applied until the successful tenderer for award of the tender is determined.

Turning to the circumstances of the case, the Board heard submissions from the Procuring Entity that its Principal Legal Officer conducted an independent due diligence exercise after award of the tender to the Applicant by the Procuring Entity's Accounting Officer.

The Board examined the Procuring Entity's confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act and notes that the Procuring Entity conducted a due diligence exercise on the Applicant on 19th December 2019. However, there is no record or report of the purported second due diligence exercise conducted on the Applicant by the Procuring Entity.

During the hearing of this matter, the Board inquired from the Procuring Entity whether a report was prepared with respect to the second due diligence report commissioned by its Principal Legal Officer. The Procuring Entity submitted that no report was prepared but the findings

of the said exercise were reproduced in the Procuring Entity's Affidavit sworn and filed on 13th February 2020 by its Principal Legal Officer, one Ms. Christabell Ashiono.

From the contents of the Procuring Entity's Affidavit, the Board observes that the purported second due diligence exercise conducted on the Applicant revealed the following issues: -

- a) The Applicant lacked a physical training and vetting facility as required by the Kenya Private Security Regulation Act, 2016;
- b) The Applicant was not up to date in payment of statutory deductions including PAYE and NHIF as the Applicant appeared to not have paid deductions for most of its employees;
- c) The Applicant paid its guards wages/salaries lower than the minimum wages;
- d) The performance of the contract by the Applicant based on their quoted amount would limit the provision of quality services to the Procuring Entity and overall sustainability of the security firm.

The Board has already established that in conducting a due diligence exercise, a procuring entity uses specific criteria to confirm and verify the documents presented by the lowest evaluated responsive bidder to support their qualifications to the requirements in the Tender Document.

The Board having studied the Procuring Entity's Tender Document and its Evaluation Report notes that the parameters and the issues raised in

the purported second due diligence exercise were addressed in the Preliminary and Technical Evaluation undertaken by the Procuring Entity's Evaluation Committee and that some of these parameters fell under the first due diligence exercise that was conducted by the Procuring Entity on 19th December 2019, where the Applicant was found responsive.

In this regard therefore, the Board notes that the evaluation process conducted with respect to the subject procurement process has established the Applicant's capacity to implement the subject tender.

Further, from the Procuring Entity's confidential file, the Board observes that the Procuring Entity's Principal Legal Officer was not a member of the Procuring Entity's Evaluation Committee and therefore did not participate in the evaluation process with respect to the subject tender.

Moreover, from the report of the first due diligence exercise that was conducted with respect to the Applicant on 19th December 2019, the Board observes that the Principal Legal Officer was also not part of the team that undertook the first due diligence exercise with respect to the Applicant.

Taking the foregoing into consideration, it is possible that the purported second due diligence exercise was undertaken by the Principal Legal

Officer in an attempt to obtain extrinsic evidence that was then used to cancel the award on the Applicant.

In this regard therefore, the Board finds that the purported second due diligence exercise that was conducted by the Procuring Entity's Principal Legal Officer cannot be a due diligence exercise as envisioned under section 83 of the Act, noting that the said exercise was conducted after the tender evaluation process was concluded and after the tender was awarded and subsequently accepted by the Applicant. It is therefore the finding of this Board that the said independent due diligence exercise is null and void.

The Board also heard submissions from the Procuring Entity that it cancelled the award of tender based on the outcome of the second due diligence exercise which revealed material governance issues that indicated that the Applicant lacked the capacity to implement the subject tender.

It is important to note that once a procurement process is complete, and an award has been made, this award represents a decision made by a procuring entity with respect to a procurement process. In this regard therefore, a procuring entity cannot exercise its powers twice by cancelling an award of a tender as the procuring entity would in essence, be reviewing its own decision which is represented by the award made to a bidder with respect to a specific procurement process.

In the Board's view, the only stage where a procuring entity can exercise its discretion twice is where an accounting officer, upon receiving an evaluation report and the professional opinion forwarded to him/her, may order a re-evaluation and such an order is done before he/she awards a tender to a bidder and not after an award.

To buttress this point, this Board observes that once it renders a decision concerning a request for review application before it, it becomes *functus officio* and therefore cannot thereafter sit to review its own decision.

In the same spirit, an accounting officer cannot sit to review his/her own award decision and proceed to cancel an award that has already been made to a successful bidder *moreso* after communication has been made to that bidder who has promptly accepted the said award.

It is worth noting that procurement processes are guided by the provisions of the Act and its attendant Regulations and the Board notes that no provision in the Act and the Regulations allows a procuring entity to cancel an award of a tender. It is therefore the finding of this Board that the cancellation of award of tender by the Procuring Entity was unlawful and is hereby null and void.

Further, the Board heard submissions from the Procuring Entity that it not only cancelled the award but proceeded to terminate the tender in accordance with section 63 of the Act.

The Board studied section 63 of the Act which reads as follows: -

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

(a) the subject procurement 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 in 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 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. This means that before an award is made with respect to a subject tender, an accounting officer may terminate a tender. Further, a tender may only be terminated by a procuring entity 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 Public Procurement Regulatory Authority (hereinafter referred to as "PPRA") stating the reasons for the termination within fourteen days of the termination of the tender. The 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 Board examined the Procuring Entity's confidential file and notes that there is no report or documentation prepared by the Procuring Entity indicating when the tender was terminated and the reasons for the termination.

The Board however heard submissions from the Procuring Entity that it cancelled the subject tender via a letter addressed to the Applicant dated 22nd January 2020.

The Board observes that the heading of the said letter read as follows: -

"CANCELLATION OF AWARD FOR THE TENDER FOR PROVISION OF SECURITY SERVICES FOR THE YEAR 2020"

From this heading and the contents therein which were cited hereinbefore, the said letter purported to cancel the award of tender to the Applicant, which cancellation the Board has hereby found to be null and void.

However, at the tail end of the letter, the Procuring Entity stated as follows: -

"This is therefore to inform you that the contract agreement shall not be entered into and the Tender for Provision of Security Services shall be re-advertised"

The Board notes that the said statement informed the Applicant that the subject tender shall be re-advertised but does not specifically state that the tender has been terminated and the reasons why as required under section 63 of the Act. This letter therefore does not amount to a notification of termination of a tender as envisioned under section 63 (4) of the Act.

The Board further studied the Procuring Entity's confidential file and notes that there is no record of any notifications issued to all bidders who participated in the subject procurement process informing them of the termination of tender and the reasons thereof, in accordance with section 63 (4) of the Act.

Nevertheless, from the submissions of the Procuring Entity, the Board notes that the Procuring Entity based its decision to terminate the tender on the detection of material governance issues which in the Procuring Entity's view was an indication that the Applicant lacked the capacity to undertake the services procured for under the subject tender.

In **PPARB Application No. 69 of 2019, CMC Motors Group Limited v. The Principal Secretary, Ministry of Interior and Coordination of National Government & Another** (hereinafter referred to as "Review No. 69/2019"), the Board held as follows regarding termination of a tender as a result of detection of material governance issues:-

"To understand what material governance is, the Board first interpreted the word "governance" and how it relates to public procurement. The Cambridge Dictionary of English defines "governance" as:-

"the way that organizations or countries are managed at the highest level, and the systems for doing this"

According to the United Kingdom Department for International Development (DFID) (2001), governance is:-

"how institutions, rules and systems of the executive, legislature, judiciary and military operate at central and local level and how the state relates to individual citizens, civil society and the private sector"

On the other hand, governance and how it relates to public procurement is explained in the book "Public

Procurement: International Cases and Commentary, (2012) edited by Louise Knight, et al, as follows:-

"Effective procurement practices provide governments with a means of bringing about social, economic and environmental reform. Conversely, malpractice within public procurement demonstrates a failure of governance and typically arises from corruption and fraud"

From the above definitions, the Board notes that principles of governance dictate that a procuring entity and bidders avoid any form of malpractice that compromise a procurement process leading to failure of good governance practices.

Principles of governance that bind public procurement are explained in the Constitution, some of which include the following:-

"Article 10 (2) (c): The national values and principles of governance include:-... good governance, integrity, transparency and accountability

Article 201 (d) The following principles shall guide all aspects of public finance in the Republic:-... public money shall be used in a prudent and responsible way

Article 227 (1) 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."

The Cambridge Dictionary of English defines "material" as "significant, major, important, of consequence, consequential".

Therefore, it can be said that material governance issues as they relate to a procurement process, are significant issues detected by a procuring entity, for example, corruption, fraud and collusive tendering during the procurement process, that are contrary to the principles of governance and national values under the Constitution. Consequently, when such material governance issues are detected, the accounting officer has an option to terminate a tender.

Accordingly, material governance issues as they relate to a procurement process, are significant issues detected by a procuring entity, for example, corruption, fraud and collusive tendering during the procurement process, that are contrary to the principles of governance and national values under the Constitution. Consequently, when such

material governance issues are detected, the accounting officer has an option to terminate a tender." These issues can be detected by a procuring entity when the integrity of the procurement process is at risk.

In Review No. 69/2019, the Board went on to hold that:-

"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 may require real and tangible evidence to support a termination process"

The Board would like to reiterate that material governance issues is one of the grounds in section 63 (1) of the Act that requires real and tangible evidence.

The requirement of real and tangible evidence before terminating a procurement process due to material governance issues supports the provision of Article 47 of the Constitution 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"

The Board heard submissions from the Procuring Entity that the material governance issues which indicated that the Applicant lacked the capacity to undertake the services were as follows as outlined on page 2 of the Procuring Entity's Further Response: -

- a) The Applicant lacked a physical training and vetting facility as required by the Kenya Private Security Regulation Act, 2016;
- b) The Applicant was not up to date in payment of statutory deductions including PAYE and NHIF as the Applicant appeared to not have paid deductions for most of its employees;
- c) The Applicant paid its guards wages/salaries lower than the minimum wages;
- d) The performance of the contract by the Applicant based on their quoted amount would limit the provision of quality services to the Procuring Entity and overall sustainability of the security firm.

From the aforementioned definition of material governance issues, it is apparent that the issues as outlined hereinabove, are not material governance issues, but relate to the eligibility and the qualifications of the Applicant.

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 material governance issues having been detected meets the threshold under section 63 (1) of the Act.

In view of the foregoing, 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 may require real and tangible evidence to support a termination process.

In totality, 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 Cancellation of Award with respect to Tender No. KACWASCO/SEC/4/2019-2020 for Provision of Security Services dated 22nd January 2020 addressed to the Applicant be and is hereby cancelled and set aside.**

- 2. The Procuring Entity's Letter of Award with respect to the subject tender dated 19th December 2019 addressed to the Applicant be and is hereby upheld.**

3. Each party shall bear its own costs in the Request for Review.

Dated at Nairobi, this 20th Day of February, 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB

Delivered in the presence of: -

- i.** Mr. Lenny Kimathi for the Applicant;
- ii.** Ms. Diana Ngei for the 1st & 2nd Respondent.