

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 127/2020 OF 25TH SEPTEMBER 2020

BETWEEN

AGILE BUSINESS SOLUTIONS LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

AGRICULTURE DEVELOPMENT CORPORATION.....RESPONDENT

Review against the decision of the Accounting Officer of Agriculture Development Corporation dated 16th September 2020 with respect to Tender No. ADC/13/2019/20 for Request for Proposal for the Supply, Installation, Configuration, Testing and Commissioning of an Enterprise Resource Planning (ERP) Solution.

BOARD MEMBERS

- | | |
|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Nicholas Mruttu | -Member |
| 3. Mr. Ambrose Ogetto | -Member |

IN ATTENDANCE

- | | |
|------------------------|----------------------------------|
| 1. Mr. Philemon Kiprop | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Agricultural Development Corporation (hereinafter referred to as “the Procuring Entity”) invited eligible tenderers to bid for Tender No.

ADC/13/2019/20 for Request for Proposal for the Supply, Installation, Configuration, Testing and Commissioning of an Enterprise Resource Planning (ERP) Solution (hereinafter referred to as "the subject tender") through an advertisement published on the official Government Public Procurement Information Portal (www.tenders.go.ke) and MyGov Publication website (www.mygov.go.ke) on 12th May 2020.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of fourteen (14) bids by the bid submission deadline of 27th May 2020. The same were opened shortly thereafter at the Procuring Entity's Boardroom situated at Development House in the presence of tenderer's representatives and recorded as follows:

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No.	Name of Firm
1	Impax Business Solutions
2	System Reengineered Limited
3	Techbiz Infotech Limited
4	Abno Software International Limited
5	Centric Limited
6	Agile Business Solutions Limited
7	Suresteps Systems & Solutions Limited
8	DSL Systems & Solutions Limited
9	Teknohub Limited
10	Dynasoft Business Solutions
11	Enterprise Information Management Solutions Limited

12	MFI Document Solutions Limited
13	Softtec Innovation Africa Limited
14	Appkings Solutions Limited

Evaluation of Bids

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

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

1. Preliminary Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause 3.19.3 of the Appendix to Instructions to Tenderers of the Tender Document. The Evaluation Committee found the following nine (9) tenderers out of fourteen (14) tenderers responsive and therefore eligible to proceed to Technical Evaluation: -

Bidder No.	Name of Bidder
1	Impax Business Solutions Limited
3	Techbiz Infotech Limited
4	Abno Software International Limited
5	Centric Limited
6	Agile Business Solutions Limited
9	Teknohub Limited
10	Dynasoft Business Solutions

Bidder No.	Name of Bidder
11	Enterprise Information Management Solutions Limited
12	MFI Document Solutions Limited

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Clause 3.20.1 of the Appendix to Instructions to Tenderers of the Tender Document which comprised of three limbs of evaluation namely; Firm and Team Experience, Conformity to Technical Requirements and System Demonstration.

2.1. Firm and Team Experience

Having subjected the remaining 9 tenderers to evaluation, the Evaluation Committee noted the following: -

Bidder	1	3	4	5	6	9	10	11	12
Firm Experience	16	16	17	21	19	0	16	21	21
Team Experience	12	12	8	11	12	11	10	7	9
Total Marks	28	28	25	32	31	11	26	28	30

According to the Tender Document, tenderers were required to score a minimum of 28 out of 33 points in order to proceed to the second limb of Technical Evaluation. From the table outlined hereinbefore, it is only Bidder 1, 3, 5, 6, 11 and 12 that proceeded to the second limb of Technical Evaluation.

2.2. Conformity to Technical Requirements

The Evaluation Committee subjected the remaining 6 tenderers to evaluation in order to assess their Conformity to Technical Requirements and recorded their aggregate technical score as follows: -

Bidder	1	3	5	6	11	12
Compliance to Technical Requirements	25	22	25	27	21	25
Firm and Team Experience	28	28	32	31	28	30
Total	53	50	57	58	49	55

According to the Tender Document, tenderers were required to achieve a minimum technical score of 50 out of 60 marks in order to proceed to System Demonstration. From the table outlined hereinbefore, Bidder No. 1, 3, 5, 6 & 12 achieved the minimum technical score of 50 marks and were invited for System Demonstration at the Procuring Entity's Boardroom.

2.3. System Demonstration

According to the Evaluation Report dated 7th July 2020, the remaining five tenderers achieved the following scores at the end of evaluation of their respective system demonstration presentation: -

Bidder	Techbiz	MFI Documents	Impax	Agile	Centric
Score	13.2	12	17.6	18.4	12.6

Tenderers were required to achieve a minimum score of 15 out of 20 marks to proceed to Financial Evaluation. From the table outlined hereinbefore, it is only M/s Agile Business Solutions Limited and M/s Impax Business Solutions Limited that were found responsive having achieved the required minimum technical score and therefore eligible to proceed to Financial Evaluation.

Notification to Tenderers

In letters dated 8th July 2020, the Procuring Entity notified unsuccessful tenderers disqualified after Technical Evaluation of the outcome of their bids.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Stage 3. Financial Evaluation of the Appendix to Instructions to Tenderers of the Tender Document. Having subjected the remaining two tenderers to evaluation, the Evaluation Committee noted that M/s Impax Business Solutions Limited and M/s Agile Business Solutions Limited achieved an

overall combined technical and financial score of 86.57% and 96.4% respectively.

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Agile Business Solutions Limited at a cost of Kshs. 29,699,337.00, having met the requirements at the Preliminary, Technical and Financial Evaluation stages.

Due Diligence

The Evaluation Committee sent questionnaires to three clients of M/s Agile Business Solutions Limited to confirm and verify the qualifications of the said tenderer. According to the Due Diligence Report dated 4th August 2020, the Evaluation Committee received the following responses regarding services provided to three clients of M/s Agile Business Solutions Limited: -

National Irrigation Board	The organization indicated that the Enterprise Resource Planning (ERP) system implemented by M/s Agile Business Solutions Limited is Microsoft Dynamics NAV Version 16 (2020). The Evaluation Committee was informed that M/s Agile Business Solutions Limited implemented most of the modules in the project including livestock and crops (Farming Systems). The organization recommended M/s Agile Business Solutions limited as a good company with a highly trained team who act professionally.
Farmers' Choice	The organization indicated that the ERP system implemented by M/s Agile Business Solutions Limited is Microsoft Dynamics NAV Version

	16 (2020). The Evaluation Committee was informed that M/s Agile Business Solutions Limited implemented most of the modules in the project including manufacturing. The organization recommended M/s Agile Business Solutions limited as a reputable company with a highly skilled team and that goes out of its way to offer advisory services.
CPF Lap Trust	The organization indicated that the ERP system implemented by M/s Agile Business Solutions Limited is Microsoft Dynamics NAV Version 13 (2018). The Evaluation Committee was informed that M/s Agile Business Solutions Limited implemented majority of the modules in the project including Legal case management. The organization recommended M/s Agile Business Solutions limited as a reputable company with a highly skilled team that was reliable during and after the project

Professional Opinion

In a professional opinion dated 9th September 2020, the Procuring Entity’s Senior Procurement Officer reviewed the Evaluation Report dated 7th July 2020 and Due Diligence Report dated 4th August 2020 whilst outlining the manner in which the Procuring Entity undertook the subject procurement process. He noted that the tenderer recommended for award of the subject tender submitted a tender price of Kshs. 29,699,337.00 which amount was above the budgetary allocation of Kshs. 21,000,000/- for the Financial Year 2019/2020. He further stated that the subject procurement process spilled over to the financial year 2020/2021 where the budgetary allocation for the Enterprise Resource Planning System is Kshs. 10,000,000.00. According to him, the lowest evaluated tenderer did not qualify to be invited for competitive negotiations under section 131 and 132 of the Public

Procurement and Asset Disposal Act, 2015 (hereinafter referred to as “the Act”). As a result, he recommended the following: -

- A supplementary budget be prepared so as to ensure there is sufficient budgetary allocation for the Enterprise Resource Planning System; and
- The tender to be refloated since the lowest evaluated tenderer quoted way above the budgetary allocation of the Procuring Entity.

The said professional opinion was approved by the Procuring Entity’s Managing Director on 9th September 2020.

Notification to Tenderers

M/s Agile Business Solutions Limited and M/s Impax Business Solutions Limited were notified of the outcome of their bids through letters dated 16th September 2020.

THE REQUEST FOR REVIEW

M/s Agile Business Solutions Limited (hereinafter referred to as “the Applicant”) lodged a Request for Review dated 25th September 2020 and filed on even date together with a Statement in Support of the Request for Review sworn on 25th September 2020 and filed on even date, a Verifying Affidavit sworn and filed on even date and a Reply to the Respondent’s Memorandum of Response, dated and filed on 7th October 2020, through the firm of Caroline Oduor & Associates Advocates, seeking the following orders:

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- 1. An order cancelling and setting aside the Respondent's decision contained in the letter dated 16th September 2020 and related notifications to other tenderers;***
- 2. An order directing the Respondents to award Tender No. ADC/13/2019/20 for Request for Proposal for the Supply, Installation, Configuration, Testing and Commissioning of an Enterprise Resource Planning (ERP) Solution to the Applicant in accordance with the law;***
- 3. An order directing the Respondents to pay the costs of the Request for Review; and***
- 4. Such further orders as are necessary for the ends of justice in the matter.***

In response, the Respondent lodged a Memorandum of Response dated 30th September 2020 and filed on even date through the Procuring Entity's Managing Director, Mr. Mohamed Bulle.

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 Covid-19 pandemic. Through the said Circular, the Board instituted certain measures restricting 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 pandemic.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged its Written Submissions dated 8th October 2020 and filed on even date, while the Respondent did not lodge any Written Submissions.

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, thus ousting the jurisdiction of the Board.**

Depending on the outcome of the above issue: -

- II. Whether the Procuring Entity rightfully found the Applicant's bid non-responsive in accordance with the criteria set out in the Tender Document; and**
- III. Whether the Procuring Entity issued the Applicant with a letter of notification in accordance with section 126 (4) of the Act read together with section 63 (4) and Article 227 (1) of the Constitution.**

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

In addressing the first issue for determination, the Board observes that according to paragraph 13 of its Memorandum of Response, the Respondent avers that since the Applicant who submitted the lowest bid had quoted above the Procuring Entity's budgetary allocation, the subject procurement process was terminated. The Respondent further referred the Board to excerpts of Minutes attached to the Respondent's Memorandum of Response to support its assertion of the amount of budget that was available for the subject procurement process. In its Reply to the Respondent's Memorandum of Response, the Applicant at paragraph 6 thereof states that the Respondent did not make any disclosure of its approved budget for the Enterprise Resource Planning (ERP) System. While making reference to excerpts of Minutes attached to the Respondent's Memorandum of Response, the Applicant states at paragraph 21 of its Written Submissions that the genuineness of the said minutes are doubtful. The Applicant further

states that even though lack of a budgetary allocation is one of the reasons for termination of procurement proceedings, the Respondent's conduct of the subject procurement process, in the Applicant's view, does not meet the requirements of section 63 of the Act.

Having considered parties' pleadings, the Board takes cognizance of the provisions of section 63 of the Act which deals with termination of procurement and asset disposal proceedings. 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:

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

(a);

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act" [i.e. section 63 of the Act] Emphasis by the Board

In **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR** (hereinafter referred to as "the Selex Sistemi Integrati Case"), the court while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and

Disposal Act, 2005 (hereinafter referred to as "the Repealed Act") that dealt with termination of procurement proceedings held as follows: -

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

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

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

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

that his grievance may be remitted to some other tribunal.”

It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should not be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures.

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

The court in the Selex Sistemi Integrati Case held that this Board (as was then constituted) had the duty to question whether a decision by a procuring entity terminating a tender met the threshold of section 100 (4) of the

Repealed Act, and that the Board's jurisdiction was not ousted by mere existence of a letter of termination furnished before it.

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

"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement..."

A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory precondition that first needs to be satisfied in the said subsection namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.

As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A- Light Ltd

[2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body which is the primary decision maker, [in this instance the Applicant as the procuring entity] to determine if the statutory pre-conditions and circumstances in section 63 exists before a procurement is to be terminated...

However, the Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard...

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v. Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act"

The Court in JR No. 142 of 2018 affirmed the decision of the Court in the *Selex Sistemi Integrati Case* that this Board has the obligation to first determine whether the statutory pre-conditions of section 63 of the Act have been satisfied to warrant termination of a procurement process, in order to make a determination whether the Board's jurisdiction is ousted by section 167 (4) (b) of the Act.

It is therefore important for this Board to determine whether the Procuring Entity terminated the subject procurement process in accordance with provisions of section 63 of the Act, which determination can only be made by interrogating the reason cited by the Procuring Entity and whether or not the Procuring Entity satisfied the statutory pre-conditions for termination outlined in section 63 of the Act.

The Respondent states at paragraph 13 of its Memorandum of Response that there was no successful tenderer in the subject procurement process because the Applicant who submitted the lowest bid price had quoted above the Procuring Entity's budgetary allocation, hence the subject procurement process was terminated. Having considered the provisions of section 63 of the Act, the Board observes that it is only subsection (1) (b) thereof that deals with termination of procurement proceedings as a result of inadequate budgetary allocation. In addition to this, an elaborate procedure is provided under section 63 (2), (3), & (4) of the Act on how a procuring entity ought to exercise the option of terminating procurement proceedings. Section 63 (1) (b), 2, 3 and 4 of the Act states as follows: -

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

(a)

(b) inadequate budgetary provision;

(c)

(d)

(e)

(f)

(g)

(h)

(i)

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

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

(4) An accounting officer shall notify all persons who submitted tenders of the termination within

fourteen days of termination and such notice shall contain the reason for termination.

It is important to point out that section 63 (1) (b) of the Act cites inadequate budgetary allocation as one of the reasons why an accounting officer of a procuring entity may at any time before notification of award terminate procurement proceedings. In determining whether or not the Respondent exercised this discretion within the confines of the law, the Board has the obligation to address its mind on the question whether the Procuring Entity has provided sufficient evidence in its pleadings and confidential file submitted to the Board pursuant to section 67 (3) (e) of the Act regarding the Procuring Entity's budgetary allocation for the subject tender. To address this question, the Board studied the Annexures attached to the Procuring Entity's Memorandum of Response and the Procuring Entity's confidential file and we now proceed to make the following findings: -

The Respondent referred the Board to Annexure MB1 attached to the Respondent's Memorandum of Response, which annexure is an extract of **"Minutes of the 25th Agriculture, Livestock & Projects Board Committee Meeting, held on Wednesday, 24th July 2019 at ADC Boardroom commencing at 11.30 am"** titled as such on the page that is numbered as **"Page 1 of 8"**. The next page that is overleaf is blank and is not paginated. The next page appearing immediately after the blank overleaf page, is numbered as **"Page 7 of 8"** with the following details: -

"MIN 417/7/2019: - PROPOSED ACQUISITION AND IMPLEMENTATION OF INFRASTRUCTURE AND ERP SYSTEM

The Committee was informed that there was need to explore new opportunities in ICT especially on service delivery. The system is aimed to improve on internal controls.

It was reported that the project implementation will take 4 months and in three phases. The budget estimate is Kshs. 32,850,000/=. There were concerns as to whether the project had been budgeted for and procurement compliance followed"

The next page that is overleaf is blank and is not paginated. Further, there is a page appearing immediately after the blank overleaf page, which does not take the same manner of pagination as "Page 1 of 7" and "Page 7 of 8" but is serialized as "007", with the following details: -

"It was stated that money for mechanization had been approved for reallocation of acquisition of an ERP

S/No	Recommendation	Action	Time
1	The request for implementation of the ERP system has been approved and recommended to the Board The management to re-advertise the tender and ensure the budget	MD/ICTM	Next meeting

	has been approved by the ministry		
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There being no other business the meeting was adjourned at 4.50pm.

**SIGNED FOR CIRCULATION....[signature affixed]27/7/2019....
Ag. Corporation Secretary**

.....[signature affixed]27/7/2019....
Chairperson, Agriculture, Livestock & Projects Committee

The Procuring Entity referred the Board to a second document titled "**25th Agriculture, Livestock & Project Board Committee Meeting, Wednesday 25th July 2019... (c) Proposed Paper on acquisition and implementation of ICT infrastructure and ERP system, Justication for the Acquisition and Implementation of ICT Infrastructure and ERP System 2019/2020**". According to Item 7. Budgeted Estimates at page 8 thereof, which is serialized as "**090**", the Procuring Entity's ICT Department Capital Requirements for the Supply, Installation and Commissioning of ERP system is provided as **Kshs. 21,000,000/-** as a budget estimate.

The Board was also referred to Annexure MB2 attached to the Respondent’s Memorandum of Response, which annexure is an extract of **“Minutes of Full Board Meeting held on Wednesday, 31st July 2019 in Development House at ADC 10th Floor Boardroom in Nairobi commencing at 10.30am”**, titled as such on the page that is numbered **“Page 1”**. The page that is overleaf is blank and is not paginated. The next page appearing immediately after the blank overleaf page is also not paginated but is serialized as **“020”**, with the following details: -

“PROPOSED ACQUISITION AND IMPLEMENTATION OF INFRASTRUCTURE AND ERP SYSTEM

The Committee was informed that there was need to explore new opportunities in ICT especially on service delivery. The system is aimed to improve on internal controls.

It was reported that the project implementation will take 4 months and in three phases. The budget estimate is Kshs. 32,850,000/=. There were concerns as to whether the project had been budgeted for and procurement compliance followed

S/No	Recommendation	Action	Time
1	The request for implementation of the ERP system has been approved and recommended to the Board The management to re-advertise the tender and ensure the	MD/ICTM	Next meeting

	budget has been approved by the ministry		
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The next page that is overleaf is blank and is not paginated. The next page appearing immediately after the blank overleaf page is numbered as **"Page 29"** but serialized as **"021"**, with the following details: -

There being no other business the meeting was adjourned at 4.50pm.

**SIGNED FOR CIRCULATION.... [signature affixed]1/8/2019....
Ag. Corporation Secretary**

.....**[signature affixed]1/8/2019....**
Chairman, FSGP Committee

Lastly, the Procuring Entity attached a copy of its Procurement Plan for the Financial Year 2019/2020, which forms part of the confidential file submitted to the Board pursuant to section 67 (3) (e) of the Act. The said procurement plan shows that the estimated cost for ERP System and Infrastructure was **Kshs. 33,000,000/-**

Having considered the foregoing documentation, the Board observes the following: -

- The Procuring Entity never supplied the Board with the entire **“Minutes of the 25th Agriculture, Livestock & Projects Board Committee Meeting, held on Wednesday, 24th July 2019 at ADC Boardroom commencing at 11.30 am”** and **“Minutes of Full Board Meeting held on Wednesday, 31st July 2019 in Development House at ADC 10th Floor Boardroom in Nairobi commencing at 10.30am”** in the confidential file submitted to the Board but attached extracts of the said minutes in the Procuring Entity’s Memorandum of Response;
- The Procurement Plan for the Financial Year 2019/2020 previously prepared by the Procuring Entity shows that the estimated cost for the subject procurement process was **Kshs. 33,000,000/-**;
- Page 7 of 8 of Annexure MB1 (i.e. extract of **“Minutes of the 25th Agriculture, Livestock & Projects Board Committee Meeting, held on Wednesday, 24th July 2019 at ADC Boardroom commencing at 11.30 am**) and the page serialized as “020” of Annexure MB2 (i.e. extract of **“Minutes of Full Board Meeting held on Wednesday, 31st July 2019 in Development House at ADC 10th Floor Boardroom in Nairobi commencing at 10.30am”**) both show that the estimated budget for Proposed Acquisition and Implementation of Infrastructure and ERP system (i.e. Supply, Installation and Commissioning of ERP system (the subject tender), Network Infrastructure and Hardware & Accessories) was **Kshs 32,850,000/-**, without specifying the approved budget for the subject tender;

- Item 7. Budgeted Estimates at page 8 (serialized as “090”) of the **25th Agriculture, Livestock & Project Board Committee Meeting, Wednesday 25th July 2019... (c) Proposed Paper on acquisition and implementation of ICT infrastructure and ERP system”** shows that the estimated budget for the subject tender was Kshs. **21,000,000/-**, without specifying the approved budget for the subject tender;
- There is a striking similarity between the contents of page 7 of 8 of Annexure MB1 and the page serialized as “020” of Annexure MB2, especially the fact that the page serialized as “020” of Annexure MB2 makes reference to **“the Committee” being informed of the need to explore new opportunities in ICT especially on service delivery”**, yet these were Minutes of the Procuring Entity’s Full Board Meeting and not Minutes of a Committee;
- Having noted the members present in the **Full Board Meeting held on Wednesday, 31st July 2019**, including a Chairman of the Full Board meeting known as Hon. Benjamin Cheboi, EBS, this Board notes that the Full Board Meeting Minutes were signed by Chairman of FSGP Committee on 1st August 2019 and not the Chairman of the Full Board Meeting.

In essence, even though the Procuring Entity provided budget estimates projected in relation to; the subject tender at Kshs. 21,000,000/-, Network Infrastructure and Hardware & Accessories totaling to Kshs. 11,850,000/-, there is no evidence in the Procuring Entity’s confidential file and the extracts of Minutes by the Procuring Entity’s **Agriculture, Livestock & Project**

Board Committee Meeting and the Procuring Entity's **Full Board Meeting**, that the amount of **Kshs. 21,000,000/-**, was finally allocated as **"the approved budget"** for the subject procurement process.

At paragraph 4.0 of the Professional Opinion dated 9th September 2020, the Procuring Entity's Senior Procurement Officer states as follows: -

"Following through the procurement process, we confirm that the process has been commenced upon confirmation by the User Unit-ICT department.

However, the procurement process commenced in the Financial Year 2019/2020 where there was an allocation of 21,000,000.00 for the Enterprise Resource Planning System (ERP). The procurement process spilled over to the current Financial Year where the budgetary allocation for the ERP System is Kshs. 10,000,000.00

The best evaluated bidder has quoted Kshs. 29,699,337.00 which is way above the budget allocation for the Financial Year 2019/2020 as well as 2020/21..."

Having noted that the Procuring Entity did not provide any evidence of approval of Kshs. 21,000,000/- as the budgetary allocation for the subject procurement process, the Board notes that the Procuring Entity's Senior Procurement Officer makes reference to the amount of Kshs. 10,000,000/-

as the budgetary allocation for the financial year 2020/2021 in relation to the subject tender. However, there is no evidence of the approval of the alleged budgetary allocation from the Procuring Entity's confidential file to demonstrate that the amount of Kshs. 10,000,000/- was the approved budgetary allocation for the subject tender in the financial year 2020/2021.

The Procuring Entity merely states that it terminated the subject procurement process because the lowest evaluated tenderer quoted above the Procuring Entity's budgetary allocation, without evidence that Kshs. 21,000,000/- was the approved budgetary allocation for the subject tender and without evidence to show how the amount of Kshs. 21,000,000/- was accounted for, since the subject procurement process was terminated i.e. whether the same was returned to the National Treasury or whether the amount of Kshs. 21,000,000/- is still with the Procuring Entity in addition to the alleged Kshs. 10,000,000/- for the current financial year 2020/2021. In essence, the Procuring Entity has failed to provide real and tangible evidence to demonstrate the approved budgetary allocation for the subject tender in the financial year 2019/2020 and 2020/2021. It is also worth noting that the Senior Procurement Officer further noted the following in the Professional Opinion dated 9th September 2020: -

"As per PPDA 2015 Section 131 (c), competitive negotiations may be applied to the lowest evaluated price in excess of available budget. Section 132 (2A) further states that this must be limited to tenderers whose evaluated prices are not

more than twenty-five percent above the available budget. In this particular case the bidder does not qualify to be invited for competitive negotiations

In view of the above, I recommend the following:

- 1. A supplementary budget be done so as to ensure there is sufficient budgetary allocation for the Enterprise Resource Planning System.***
- 2. The tender to be refloated as the lowest evaluated bidder has quoted way above the budgetary provision currently available”***

In order to determine whether or not competitive negotiations would have been applicable in this instance, the Board ought to address its mind on the available/approved budget of the Procuring Entity against the amount quoted by the lowest evaluated tenderer. However, and as already noted, the Procuring Entity failed to provide real and tangible evidence of its approved budget for the subject procurement process so that the Board can assess whether the 25% threshold of section 132 (2) (b) of the Act has been met. That notwithstanding, even assuming that the Procuring Entity's assertion that it had a budget of Kshs. 21,000,000/- for the financial year 2019/2020 is considered, the Board observes that the Applicant's tender price of Kshs. 29,699,337/- is over and above the 25% threshold set in section 132 (2) (b) of the Act for competitive negotiation to apply.

However, section 128 of the Act provides the option for negotiations with the successful Request for Proposal tenderer. The said provision states as follows: -

"128. Negotiations with successful request for proposal tenderer

- (1) The accounting officer may negotiate with the person who submitted the successful proposal and may request and permit changes, subject to section 129 (1).***
- (2) If the negotiations with the person who submitted the successful proposal do not result in a contract, the accounting officer may negotiate with the second person who submitted the proposal that would have been successful had the successful proposal not been submitted.***
- (3) Despite subsection (1) and (2) of this section, an offer made to any other person shall not have any price advantages over the earlier one"***

Section 129 (1) of the Act referenced hereinbefore states as follows: -

129. Contract requirements

- (1) The contract may not vary from the requirements of the terms of reference, the request for proposals or***

the terms of the successful proposal except in accordance with the following—

(a) the contract may provide for a different price but only if there is a proportional increase or reduction in what is to be provided under the contract; and

(b) the variations shall be such that if the proposal, with those variations, was evaluated again under section 127, the proposal would still be the successful proposal.

The manner in which a procuring entity undertakes negotiations with a Request for Proposal tenderer is further explained in Regulation 130 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as “Regulations 2020”) as follows: -

“(1) The accounting officer may negotiate with successful tenderers in accordance with section 128 (1) of the Act.

(2) A procuring entity shall not enter into any negotiations pursuant to section 128 of the Act, until —

(a) the accounting officer has approved the successful proposal in line with section 127 of the Act; and

(b) the accounting officer has notified the successful and unsuccessful bidders pursuant to section 126

(4) of the Act and regulation 82 of these Regulations.

- (2) For greater certainty, where negotiations are to be conducted the notification to the successful bidder shall specify that entering into a contract shall be subject to the successful negotiations.***
- (3) Where the evaluation committee conducts negotiations on behalf of the accounting officer, the evaluation committee shall prepare a report of the negotiations and submit it to the head of procurement function for onward submission to the accounting officer.***
- (4) The negotiation report under paragraph (3) shall be accompanied by a professional opinion of the head of the procurement function to the accounting officer for decision making and approval.***
- (5) The report and the professional opinion prepared under paragraphs (3) and (4) shall form part of the records of the procurement proceedings”***

Having considered the foregoing provisions, the Board observes that negotiations with a successful Request for Proposal tenderer may be conducted by a procuring entity in accordance with section 128 read together with Regulation 130 of Regulations 2020 by considering whether there would be a proportional increase or reduction of what is to be supplied to the procuring entity. Section 128 (2) of the Act gives the Procuring Entity the

option to negotiate with the next lowest evaluated tenderer if negotiations with the lowest evaluated tenderer do not result in a contract. The method of procurement of the subject tender was an open tender where a Request for Proposal method was used as can be seen from the name of the tender which is **Tender No. ADC/13/2019/20 for Request for Proposal for the Supply, Installation, Configuration, Testing and Commissioning of an Enterprise Resource Planning (ERP) Solution**. There is no doubt therefore that this was a Request for Proposal tender and this is buttressed by the fact that the Evaluation Committee's recommendation for award was based on the responsive proposal with the highest score determined under section 86 (1) (b) of the Act and as required by section 127 of the Act, to justify negotiations with successful Request for Proposal tenderer under section 128 of the Act.

From the documentation provided to the Board, this option was never explored by the Procuring Entity having formed the opinion that competitive negotiations under section 131 and 132 of the Act would not apply. It is the Board's considered view that the mere fact that the Act provides several options that can be explored by the Procuring Entity whenever the lowest evaluated price is above the available budget, shows that termination of procurement proceedings ought to be a last resort considered only after the Procuring Entity has explored all other options available under the Act. This is because initiating a procurement process ought to have the end goal of providing goods and services to the general public, as opposed to rushing to terminate the procurement process without exploring options that have the

potential of identifying a service provider that would meet the Procuring Entity's needs and the public at large. This would also save time and public resources used by a procuring entity in retendering, opening and evaluation of tenders and award of the retendered services, leading to a delay of the procurement process as a whole, especially in this instance where the Procuring Entity confirms that the subject procurement process has spilled over to the current financial year 2020/2021.

Having interrogated the manner in which the Procuring Entity conducted the subject procurement process, the Board is not persuaded that the Procuring Entity took reasonable steps to explore the options available under the Act especially the option of negotiation with the successful Request for Proposal tenderer under section 128 of the Act, prior to exercising discretion to terminate the subject tender. Even if the Procuring Entity in this instance rushed to exercise the option of terminating the subject procurement process, it has failed to provide evidence of the approved budget for the subject tender for the Board to establish whether indeed such budget was inadequate. Further to this, the Board observes that even though an accounting officer may exercise discretion under section 63 (1) of the Act, such discretion must be exercised in accordance with the procedural requirements for termination of procurement proceedings. In **Republic v. Public Procurement Administrative Review Board & another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR**, the court held that: -

"In a nutshell therefore, the procuring entity is under duty to place sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Procuring Entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of section 63 of the Public Procurement and Asset Disposal Act, 2015"

Having considered the finding in the foregoing case, the Board notes that, in addition to citing any of the reasons listed in section 63 (1) of the Act, a procuring entity must also comply with the procedural requirements for termination of procurement proceedings specified in section 63 (2), (3) and (4) of the Act. Section 63 (2) & (3) of the Act requires the Respondent to submit a written report on the termination to the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") within fourteen days. Further, section 63 (4) of the Act gives the Respondent the obligation to notify all tenderers of the termination within fourteen days of termination and such notification shall contain the reason for termination.

The Board was not furnished with any report prepared and submitted to the Director General of the Authority regarding termination of the subject procurement process. The letters of notification to tenderers, including that of the Applicant only informed tenderers of the reason for their non-

responsiveness but did not notify them of termination of the subject procurement process with specific reasons of the alleged termination.

It is trite law that **“he who alleges must prove”**. The Procuring Entity is the party alleging that the subject procurement process was terminated due to inadequate budgetary allocation but has failed to discharge its burden of proof by furnishing the Board with; (a) its approved budgetary allocation, (b) evidence that it explored the option of negotiation under section 128 of the Act which was applicable in the subject procurement process and (c) evidence of compliance with the procedural requirements for termination of a procurement process under section 63 (2), (3) & (4) of the Act. In particular, this Board wonders why the Procuring Entity would only attach excerpts of Minutes in its Memorandum of Response with striking similarities between Minutes of a meeting held by its **Agriculture, Livestock & Project Board Committee** and Minutes of another meeting of its **Full Board Meeting**, which offer no clarification on the approved budget for the subject tender, but fail to provide the full Minutes in its confidential file submitted to the Board.

The Court in the case of **Republic v. Public Procurement Administrative Review Board ex-parte Magic Contractors Limited & 2 Others (2018) eKLR** cited the decision in **Resley v. The City Council of Nairobi (2006) 2 EA 311** where it was held as follows: -

"In this case there is an apparent disregard of statutory provisions by the Respondent, which are of fundamental nature. Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid."

The Constitution and the Act lay down a clear framework within which procuring entities must exercise their discretion when procuring for goods and services. The Respondent in this instance failed to exercise the discretion conferred upon it by law in accordance with the substantive and procedural requirements under section 63 of the Act, therefore making its decision terminating the subject tender null and void.

Accordingly, the Board finds that the Procuring Entity failed to terminate the subject procurement process in accordance with section 63 of the Act. The effect of this finding is that the Board has jurisdiction to entertain the other issues framed for determination and shall now address the same as hereunder.

On the second issue for determination, the Board observes that the Applicant's letter of notification of unsuccessful bid dated 16th September 2020 contained the following details: -

"Following your participation in the above mentioned tender, this is to inform you that your tender was not successful

You quoted above the budgetary allocation

However, we wish to thank you for your participation and interest in doing business with the Corporation, and look forward to working with you in future

Attached herein is the original copy of your financial proposal and the original copy of your tender security from Monarch Insurance of Kshs. 595,000.00"

At paragraph 8 (i) of its Request for Review and paragraph 12 of its Statement in Support of the Request for Review, the Applicant avers that the Respondent's decision in the letter of notification dated 16th September 2020 was made on the basis of an evaluation criteria that is not provided for in the Tender Document and/or the law for purposes of financial evaluation. In its Memorandum of Response, the Respondent only denies the contents of paragraph 12 of the Applicant's Statement in Support of the Request for Review but does not clarify whether or not **"quoting above the Procuring Entity's budgetary allocation"** was an evaluation criterion applicable in the subject procurement process. The Respondent further makes reference to its alleged budgetary allocation for the subject tender, which assertions have already been addressed by the Board in the first issue for determination.

Having considered the foregoing pleadings, the Board observes that section 126 (4) of the Act provides that: -

"When a person submitting the successful bid shall be notified, the accounting officer of the procuring entity shall at the same time notify in writing all other persons who had submitted bids that their bids were not successful and give reasons thereof"

From the foregoing provision, the Board notes that the Respondent ought to notify the successful and unsuccessful tenderers of the outcome of their bids, and in doing so, the Respondent ought to disclose the specific reasons why unsuccessful tenderers were not successful. In determining the successful tenderer, a procuring entity considers a tenderer's responsiveness (or lack thereof) to eligibility and mandatory requirements (including technical specifications), and awards the tender in accordance with the applicable award criterion to the procurement method used. To support this position, the Board takes cognizance of sections 79 (1), 80 (2), 86 (1) and 127 of the Act, which provide as follows: -

"Section 79 (1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents

Section 80 (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents...

Section 86 (1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the lowest evaluated tender price;

(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

Section 127: The successful proposal shall be the responsive proposal with the highest score determined by an accounting officer in accordance with procedure and criteria set out under section 86 of this Act”

Having studied the Tender Document applicable to the subject procurement proceedings, the Board observes that pages 23 to 29 thereof outline the evaluation criteria to be applied at the Preliminary, Technical and Financial Evaluation stages. None of these criteria were based on assessing the amounts quoted by tenderers against the Procuring Entity’s budgetary allocation. The Procuring Entity therefore had the obligation to stick to the criteria and procedures set out in the Tender Document in determining the

responsiveness of bids as required by section 79 (1) read together with section 80 (2) of the Act. The Board did not find any provisions in the Tender Document disclosing the Procuring Entity's budgetary allocation and specifying that the same would be used as an evaluation criterion for determining responsiveness or lack thereof of tenderers.

The award criterion applicable in this instance was that of lowest evaluated tender price, since this was an open tender where Request for Proposal method of tendering was used. We say so because the Procuring Entity advertised the subject tender inviting bids from the public through a Newspaper Pullout on MyGov Publication Website published on 12th May 2020, described the subject tender as a Request for Proposal tender and directing tenderers to submit technical and financial proposals.

The Board notes that the Evaluation Committee recommended award of the subject tender to the Applicant for being the lowest evaluated tenderer, conducted a due diligence exercise on the Applicant which had a positive outcome and as already established, there was room for negotiation under section 128 of the Act.

Accordingly, the Board finds that the Procuring Entity did not find the Applicant's bid non-responsive in accordance with the criteria set out in the Tender Document, since quoting above the Procuring Entity's budgetary allocation was not a criterion for evaluation.

On the third issue for determination, the Board observes that the Applicant took the view that the Procuring Entity failed to disclose the successful tenderer in the Applicant's letter of notification of unsuccessful bid dated 16th September 2020. On the other hand, the Board notes that there was no tenderer that was awarded the subject tender, but instead the Procuring Entity terminated the subject procurement process, which decision the Board has found to have been null and void, for failure to meet the requirements of section 63 of the Act. Hence, there was no successful tenderer to be disclosed in the letter of notification of unsuccessful bid dated 16th September 2020 that was furnished to the Applicant.

That notwithstanding, the Board takes cognizance of Article 227 (1) of the Constitution which cites transparency as one of the principles that guide procurement of goods and services in this country. The said provision states as follows: -

"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"

To enhance the principle of transparency, the Procuring Entity ought to have informed the Applicant whether or not the subject tender was awarded to another tenderer and if it was not awarded to any tenderer, to notify the Applicant of the fate of the subject procurement process. It is only through this Request for Review that the Applicant has learnt that the subject tender

was not awarded to any tenderer but was terminated. This information ought to have been availed to the Applicant and all other tenderers in the subject tender, a requirement that is already expressed in section 63 (4) of the Act (i.e. notification of termination to tenderers with specific reasons) and Article 227 (1) of the Constitution by virtue of the principle of transparency in public procurement to ensure all tenderers are aware of the fate of a procurement process in which they participated.

Having considered the manner in which the Procuring Entity carried out the subject procurement process including the contents of the notification letters sent to tenderers, the Board finds that the Procuring Entity failed to issue the Applicant with a letter of notification in accordance with section 87 (3) read together with section 126 (4) and section 63 (4) of the Act and Article 227 (1) of the Constitution.

In totality of the foregoing, the Board holds that the Request for Review is hereby allowed in terms of 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, the Board makes the following orders in the Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's decision terminating the procurement proceedings in Tender No. ADC/13/2019/20 for Request for Proposal for the Supply, Installation, Configuration, Testing and Commissioning of an Enterprise Resource Planning (ERP) Solution, be and is hereby nullified and set aside.**

- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Unsuccessful Bid dated 16th September 2020 addressed to the Applicant, be and is hereby cancelled and set aside.**

- 3. The Accounting Officer of the Procuring Entity's Letters of Notification to all other tenderers in the subject tender, be are hereby cancelled and set aside.**

- 4. The Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement process in Tender No. ADC/13/2019/20 for Request for Proposal for the Supply, Installation, Configuration, Testing and Commissioning of an Enterprise Resource Planning (ERP) Solution to its logical conclusion including issuance of notification letters to all tenderers in the subject procurement process within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this Review.**

5. 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 15th day of October 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB