REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 30/2020 OF 4TH MARCH 2020

BETWEEN

EL-VIS COMMUNICATIONS LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

NATIONAL WATER HARVESTING

AND STORAGE AUTHORITY.....RESPONDENT

Review against the decision of the National Water Harvesting and Storage Authority with respect to Tender No. NWC/ONT/004/2019-2020 for Construction of River Kuja Dyke Migori County (Reserved for AGPO – Youth, Women and Persons with Disabilities)

BOARD MEMBERS

1. Ms. Phyllis Chepkemboi -Member Chairing
2. Mr. Steven Oundo -Member
3. Dr. Joseph Gitari -Member

IN ATTENDANCE

1. Mr. Philemon Kiprop -Holding brief for Secretary
2. Ms. Maryanne Karanja -Secretariat

PRESENT BY INVITATION

APPLICANT	**-EL-VIS COMMUNICATIONS LIMITED**
1. Mr. Charles Kiplangat	-Advocate, Kipngeno & Associates Advocates
2. Mr. Robert Njau	-Associate, Kipngeno & Associates Advocates
3. Mr. Nelson Mbuthia	-Applicant
1ST RESPONDENT	**-NATIONAL WATER HARVESTING AUTHORITY**
1. Ms. Doris Mwangi	-Advocate

BACKGROUND TO THE DECISION

The Bidding Process

The National Water Harvesting and Storage (hereinafter referred to as "the Procuring Entity) invited eligible and interested bidders to submit their bids in response to Tender No. NWC/ONT/004/2019-2020 for Construction of River Kuja Dyke Migori County (Reserved for AGPO – Youth, Women and Persons with Disabilities) (hereinafter referred to as "the subject tender"). The subject tender was advertised in *MyGov* newspaper and the Procuring Entity's website www.watercorporation.go.ke on 17th December 2019.

Bid Submission Deadline and Opening of bids

A total of twenty five (25) firms/bidders submitted bids and the same were opened on 14th January 2020. The following firms submitted bids in response to the subject tender: -

Bidder No.	Bidders/Firms
1	Masterpiece Contractors Ltd
2	Ronald ventures Ltd
3	Imperial Africans (K) Ltd
4	Three shades Company Ltd
5	Four Weeks Enterprises Ltd
6	Gratimo Holdings Company Ltd
7	Kester Construction LTD
8	Paradigm Ventures Ltd
9	Bainridge Construction Company LTD
10	Ceanimi Merchants Ltd
11	Laismat Enterprises Ltd
12	Trippleage investment
13	El-Vis Communication Ltd
14	Wainach Ltd
15	Vanqo Road & Engineering Ltd
16	Supreme Waterways & General Contractors
17	Co-Cotech Investments Limited

Bidder No.	Bidders/Firms
18	Portland Builders & General Suppliers Ltd
19	Muscal company Ltd
20	Brestom Investment Ltd
21	Trigamo Enterprises Ltd
22	Rollins Kenya Ltd
23	Najile Services Ltd
24	Ridgewing Arena Gen.
25	Raphavetiva Engineering

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 mandatory criteria as stipulated in the Tender Document and bidders who failed in any of the criteria did not proceed for further evaluation.

The results were as follows: -

Bidder No.	Bidder	Verdict
1	Masterpiece Contractors Ltd	Fail
2	Ronald ventures Ltd	Fail
3	Imperial Africans (K) Ltd	Fail
4	Three shades Company Ltd	Fail
5	Four Weeks Enterprises Ltd	Fail
6	Gratimo Holdings Company Ltd	Fail
7	Kester Construction LTD	Fail
8	Paradigm Ventures Ltd	Fail
9.	Bainridge Construction Company	Fail

Bidder No.	Bidder	Verdict
	Ltd	
10	Ceanimi Merchants Ltd	Fail
11	Laismat Enterprises ltd	Fail
12	Trippleage investment	Fail
13	El-Vis Communication Ltd	Pass
14	Wainach Ltd	Fail
15	Vanqo Road & Engineering Ltd	Fail
16	Supreme Waterways & General Contractors	Fail
17	Co-Cotech Investments Limited	Fail
18	Portland Builders & General Suppliers Ltd	Fail
19	Muscal company Ltd	Fail
20	Brestom Investment Ltd	Fail
21	Trigamo Enterprises Ltd	Fail
22	Rollins Kenya Ltd	Fail
23	Najile Services Ltd	Fail
24	Ridgewing Arena Gen. Contract & Supplies	Fail
25	Raphavetiva Engineering	Fail

2. Technical Evaluation

At this stage of evaluation, bidders were evaluated against the technical specifications stipulated in the Tender Document.

Bidder No. 13, that is, M/s El-vis Communications Limited scored 98% in the technical evaluation stage and proceeded to the technical evaluation stage.

3. Financial Evaluation

At this stage of evaluation, Bidder No. 13, that is, M/s El-vis Communications Limited, was the only bidder that qualified for financial evaluation, with a quoted amount of **Kshs. 26,938,386 (Twenty-Six Million, Nine Thirty-Eight Thousand And Three Hundred And**

Eighty-Six Shillings) VAT Incl. and was thus found to be the lowest evaluated bidder.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended that **M/s El-vis Communication Limited** be awarded the tender at the evaluated price of **Kshs. 26,938,386 (Twenty-Six Million, Nine Thirty-Eight Thousand And Three Hundred And Eighty-Six Shillings) VAT Incl**.

Professional Opinion

The Head of Procurement reviewed the Evaluation Report and concurred with the recommendation of award made by the Evaluation Committee which recommendation was approved by the Procuring Entity's Accounting Officer on 4th February 2020 subject to confirmation from the Finance Department of the budget, that is, Kshs 119 million, for flood control works.

THE REQUEST FOR REVIEW NO. 30 OF 2020

M/s El-Vis Communications Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated 3rd March 2020 and filed on 4th March 2020 (hereinafter referred to as "the Request for Review") together with a Statement Review dated 3rd March 2020 and filed on 4th March 2020 (hereinafter referred to as "the Applicant's Statement").

In response, the Procuring Entity filed a Replying Affidavit sworn on 13th March 2020 and filed on 16th March 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 annulling and/or setting aside the Respondent's letter dated 17th February 2020 purporting to cancel and revoke the letter or award in respect of Tender No. NWC/ONT/004/2019-2020;***
ii. ***An order directing the Respondent to enter into a written contract with the Applicant forthwith pursuant to the notification of award dated 4th February 2020 in respect of Tender No. NWC/ONT/004/2019-2020;***
iii. ***An order awarding costs of and incidental to these proceedings to the Applicant;***
iv. ***Such further or alternative relief as this Board may deem just and expedient.***

During the hearing, the Applicant was represented by Mr Kiplangat, on behalf of the firm of Kipngeno & Associates Advocates whereas the Procuring Entity was represented by its Advocate, Ms. Mwangi.

PARTIES SUBMISSIONS

The Preliminary Objection

The Respondent/Procuring Entity's Submissions

Counsel for the Procuring Entity, Ms. Mwangi, submitted that section 167 (1) of the Act clearly stipulated that a candidate or tenderer who claimed to have suffered or risks suffering loss or damage due to a breach of a duty imposed on a procuring entity by the Act or 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, in such a manner as may be prescribed. Ms Mwangi submitted that the alleged breach in this instance or the letter leading to the filing of the Request for Review was the letter from the Procuring Entity dated 17th February 2020 which was sent to the Applicant on 18th February 2020 by post. However, the Request for Review was filed on 4th March 2020 and it was therefore the Procuring Entity's submission that the Request for Review was filed out of time and thus the Board had no jurisdiction to hear the matter.

The Applicant's Submissions

In response, Counsel for the Applicant, Mr. Kiplangat, submitted that no preliminary objection was filed and served as required by law. Moreover, a preliminary objection raises a point of law and not a point of fact or evidence. He submitted that the letter dated 17th February 2020 was dispatched on 18th February 2020 and any submissions in this regard amounted to raising evidence and matters of fact which was not permissible in preliminary objections. It was also the Applicant's

submission that a preliminary objection should be raised on the assumption that the facts as pleaded by the other party are correct.

In this regard therefore, Mr Kiplangat submitted that the position of the Applicant on this issue was clearly stated in paragraph 7 of its Request for Review application where the Applicant stated that the letter in question dated 17th February 2020, was posted on 19th February 2020 and was received by the Applicant on 20th February 2020. Mr. Kiplangat submitted that the Applicant annexed a copy of the letter and submitted proof of postage before the Board in form of a photocopy of the letter's envelope which had a post office stamp dated 19th February 2020 which was evidently the date of postage and not 18th February 2020 as alleged by the Procuring Entity.

Moreover, the letter was addressed to a Murang'a address and therefore it was the Applicant's submission that it received the letter on 20th February 2020. Mr. Kiplangat submitted that the Applicant lodged its Request for Review before the lapse of fourteen days from the date of its receipt of the letter and therefore the review application was filed within time and the Board had jurisdiction in this matter. He therefore urged the Board to dismiss the Preliminary Objection and proceed to hear the Request for Review.

The Request for Review

The Applicant' Submissions

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

Mr. Kiplangat submitted that the first issue for determination was whether the Procuring Entity had the powers to cancel or revoke the letters of award. It was the Applicant's submission that the Act did not confer powers upon the Procuring Entity to cancel or revoke any notification of award of tender and therefore the decision by the Procuring Entity to revoke the same was illegal and in contravention of the rule of law and the principles outlined under section 3 of the Act.

Counsel submitted that the power to review anything done during procurement proceedings was exclusively vested in the Board and the High Court and thus the Procuring Entity could not usurp those powers by sitting in appeal of its own decision. He submitted that if the Procuring Entity was aggrieved by the actions of its officers, it had a right of recourse at the High Court. On this basis therefore, Mr Kiplangat submitted that the Procuring Entity's letter dated 17th February 2020 should be nullified.

Mr Kiplangat submitted that with respect to the Procuring Entity's allegation that the officer who signed the award letters was not authorised to do so, the Board had deliberated on this issue in *PPARB*

Application No. 24 of 2020 and it was the Applicant's submission that if there was any defect in the issuance of the award letter, it was not for the Procuring Entity to intervene but for the Board or the High Court to issue orders in this regard. He therefore submitted that the Board should nullify the cancellation of award of tender on this basis.

With regards to the second issue for determination as to whether the review application had been overtaken by events, Mr Kiplangat submitted that the Procuring Entity, in its Replying Affidavit alleged that it had terminated the subject procurement proceedings and further annexed various termination letters addressed to bidders dated 2nd March 2020. Mr Kiplangat submitted that the Applicant was not in receipt of the said letter and as the review proceedings were lodged on 4th March 2020, an automatic stay of the subject proceedings was granted and thus the purported termination was in disobedience of this stay and was therefore a nullity. Mr Kiplangat submitted that the purported termination letter was null and void having been issued after filing of the Request for Review unless the Procuring Entity was able to demonstrate that the letter was issued prior to filing of the Request for Review.

Further, Mr. Kiplangat submitted that the Procuring Entity's purported termination letter did not comply with the mandatory substantive and procedural requirements of section 63 of the Act. He contended that the purported termination was done by the Procuring Entity and not by its Accounting Officer yet section 63 of the Act vested the mandate to

terminate procurement proceedings in the Accounting Officer and not the Procuring Entity itself. Mr Kiplangat referred the Board to the definitions of a procuring entity and the accounting officer as provided under section 2 of the Act and section 31 of the Water Act, No. 43 of 2016, which instrument established the Authority as a distinct legal entity from the Chief Executive Officer. He therefore submitted that the decision to terminate was made by the wrong entity and not by the Accounting Officer and therefore the termination failed the test of section 63 of the Act.

Moreover, the Procuring Entity had failed to demonstrate that the termination letter was served on the Applicant and therefore Mr Kiplangat submitted that there was no procedural compliance with the requirements of section 63 of the Act.

On the same issue for determination, Mr. Kiplangat submitted that the reason given by the Procuring Entity for the termination of the subject tender was lack of budgetary allocation. It was the Applicant's submission that the Procuring Entity had not submitted sufficient evidence to justify lack of budgetary allocation. Mr Kiplangat submitted that the Procuring Entity received a letter from the Permanent Secretary on 30th October 2019 which requested for funds to be allocated to certain projects in Mwingi Constituency. Nevertheless, the Procuring Entity proceeded to advertise the subject tender on 17th December 2019 which implied that there was budgetary provision for the subject tender

and that the Procuring Entity had factored the sentiments of the Permanent Secretary's letter in its budget and procurement plans.

Further, Mr Kiplangat submitted that in *PPARB Application No. 24 of 2020* the Board held that the same Procuring Entity who was before the Board in the present review application had failed to justify lack of budgetary provision.

On the appropriate orders to be issued in this review application, Mr. Kiplangat submitted that the purported cancellation of the letter of award was unlawful and in breach of section 3 of the Act and he therefore urged the Board to nullify the letter dated 17th February 2020, since there was no challenge of the award by any candidate/tenderer and thus the award to the Applicant should stand.

In the alternative, Mr Kiplangat submitted that if the Board was persuaded that it had the powers to look at the validity of the notification of award, then in line with its decision in *PPARB Application No. 24 of 2020*, the Board should nullify the notification of award and direct the Procuring Entity to issue a fresh notification in line with the professional opinion.

Mr Kiplangat contended that the attempt by the Procuring Entity to impugn the evaluation process had no legal basis and therefore could not stand. Substantively, Mr Kiplangat submitted that there was no

requirement in the tender evaluation criteria that a bidder could not bid for two tenders using the same equipment and thus the Procuring Entity was introducing new criteria not in its Tender Document.

Mr Kiplangat submitted that the only issue to be determined in this regard was whether the person who signed the notification of award was authorized to do so. In the alternative, Mr Kiplangat submitted that based on this Board's decision in *PPARB Application No. 24 of 2020,* the Applicant conceded that the person who authored the letters of notification of award might not have had the authority to do so and therefore the proper order was to direct the Procuring Entity to issue proper letters of notification to all bidders.

On the issue of costs, Mr Kiplangat urged the Board to consider the entire matter in totality of the Procuring Entity's behaviour and conduct in the subject procurement proceedings. Mr. Kiplangat submitted that the Procuring Entity advertised for the subject tender and midstream, its Accounting Officer went on leave and left an officer in charge who issued letters of notification of award without authority. Counsel submitted that noting that the Procuring Entity was a public entity, its conduct was abhorrent and amounted to mistreatment and lack of good governance. He therefore urged the Board to slap costs on the Procuring Entity which in the Applicant's view should be borne personally by Accounting Officer.

The Respondent/Procuring Entity's Submission

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

Ms. Mwangi submitted that as indicated in paragraph seven of the Procuring Entity's Affidavit, the Accounting Officer travelled on official duties to Israel from 1st to 10th February 2020 and in his absence instructed Ms Sharon Obonyo to hold his brief. Ms Mwangi submitted that Ms Obonyo was required to only handle policy issues in consultation with the Principal Secretary of the Ministry of Water and Irrigation but she exceeded her mandate and went ahead and issued award and regret letters for various works including the subject tender without the direct authority and written instructions from the Accounting Officer. Ms Mwangi submitted that this action by Ms Obonyo offended section 87 of the Act which required notification of award letters to be issued by a procuring entity's accounting officer.

Counsel submitted that section 87 (3) of the Act further required that regret letters should disclose the successful tenderer and that the various regret letters issued did not contain this disclosure. In view of the Board's decision in *PPARB Application No. 24 of 2020,* she urged the Board to adopt the position it took in that matter where it nullified the award and regret letters issued by the Procuring Entity on account of lack of mandate.

With respect to the letters of revocation dated 17th February 2020, Ms Mwangi submitted that the reason why the Procuring Entity decided to revoke the letters of notification of award was the lack of mandate by the officer who purportedly signed the said notifications in contravention of section 87 of the Act.

Counsel submitted that the second reason why the Procuring Entity decided to revoke the letters of notification of award was with respect to the professional opinion as explained in paragraph fourteen of the Procuring Entity's Affidavit. Ms Mwangi submitted that section 84 of the Act specifically required the professional opinion to be considered by an accounting officer. However, in the subject tender, the professional opinion was considered and approved by Ms Obonyo who acted devoid of consultation and the mandate to do so.

Ms Mwangi submitted that the Procuring Entity was further challenging the evaluation process on two grounds. The first ground was that the plants and equipment to be used by the Applicant were the same in *PPARB Application No. 31 of 2020* which the Applicant listed in its bid under that tender on page 99 to 129. Moreover, the same list of motor vehicles was listed in both tenders. Ms Mwangi submitted that the two projects were to run concurrently in different parts of the country being Homa Bay, Isiolo and Migori counties. Moreover, the subject works were flood control works which were in essence emergency works.

Ms Mwangi submitted that on page 131 to 151 of the Applicant's tender, the same personnel were listed that would be required to undertake the works in different counties under different tenders. It was for this reason amongst others that the Accounting Officer decided to revoke the award and the notifications issued thereof.

On the termination letters dated 2nd March 2020, Ms Mwangi submitted that their purpose was to deter an illegality, noting the infractions that had occurred in the subject procurement process. She submitted that contrary to the Applicant's allegations, the termination letter was issued in compliance with section 63 of the Act and was intended to notify all tenderers and the Public Procurement Regulatory Authority of the termination of the subject procurement process.

Ms Mwangi contended that the letter of notification of termination was dispatched to the Applicant on 2nd March 2020 prior to the Applicant's filing of the Request for Review and therefore the said letter was served within time by the Procuring Entity.

On the content of the letters of notification of termination, Ms Mwangi submitted that an allegation was made by the Applicant that the same were issued by the Procuring Entity itself and not the Accounting Officer. Ms Mwangi submitted that the letters of notification of termination were issued by Eng. K Sang, the acting Chief Executive Officer who was duly appointed by the Board and has the authority and the mandate to issue the said notifications to bidders under the subject tender.

In justification of the reason why the Procuring Entity opted to terminate the subject tender, Ms Mwangi submitted that the Accounting Officer received a letter from the Principal Secretary, Ministry of Water and Sanitation which directed the Procuring Entity to set aside a budget of Kshs 50 million to undertake priority works to address the water situation in Mwingi Constituency. She submitted that this directive informed the decision by the Accounting Officer to reduce the budget and the scope of the works for the subject tender.

Counsel submitted that the original price available for the project was Kshs 135 million as indicated in the internal memo attached to the Procuring Entity's Affidavit. However, in line with the directive from the Principal Secretary, she submitted that the Procuring Entity was required to make a saving of Kshs 50 million to provide for monies to undertake the five projects in Mwingi Constituency. She contended that the Procuring Entity was a state corporation fully funded by the Ministry of Water and Irrigation which reported directly to the Principal Secretary of the said Ministry. In this regard therefore, there was no way the Procuring Entity could have failed to implement the Principal Secretary's directive and it was therefore the Procuring Entity's submission that the same informed its decision to terminate the tender and reduce the scope of work and budget to undertake the same.

In conclusion, she urged the Board to dismiss the Request for Review with costs to the Procuring Entity and allow the Procuring Entity to re-tender with a reduced budget and a reduced scope of works.

The Applicant's Rejoinder

In a rejoinder, Mr. Kiplangat submitted that in *PPARB Application No. 24 of 2020,* the Board explicitly ruled that a procuring entity had no right to interfere with the budgetary provisions of an ongoing tender and thus the same holding applied in this instance.

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 Request for Review filed on 4th March 2020 was lodged outside the statutory period under section 167 (1) of the Act thus ousting the jurisdiction of this Board;

Dependent on the outcome of this issue: -

II. Whether the Procuring Entity terminated the procurement proceedings of the subject tender in accordance with section 63 of the Act, thus ousting the jurisdiction of this Board;

Depending on the outcome of the second issue: -

III. Whether the Procuring Entity issued the Applicant with a letter of notification of unsuccessful bid in accordance with section 87 (3) of the Act;

IV. What are the appropriate orders to issue in the circumstances?

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

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1** it was stated that 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.

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** held that:

> ***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."***

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:

> ***"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. "***

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 states as follows: -

> ***"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 <u>within fourteen days of notification of award</u> or <u>date of occurrence of the alleged breach at any stage of the procurement process, or disposal process</u> as in such manner as may be prescribed."***

The Board considered the use of the word 'or' and notes that the Concise Oxford English Dictionary (11 Edition, Oxford University Press) defines "or" as a ***'conjunction used to link alternatives.'***

Applying the foregoing construction, the Board notes that the use of the word "or" in section 167 (1) of the Act connotes a conjunction that gives alternatives. The first option which an aggrieved candidate or tenderer has, is to file its Request for Review within fourteen (14) days of notification of award. The alternative option is to file a Request for Review within fourteen (14) days from the date the aggrieved candidate or tenderer learns of the alleged breach by the Procuring Entity at any stage of the procurement process or disposal process.

The jurisdiction of this Board under section 167 (1) of the Act was challenged by the Procuring Entity in its submissions before the Board. It was the Procuring Entity's submission that the Applicant failed to move this Board by way of a Request for Review within fourteen days from the date of occurrence of an alleged breach by the Procuring Entity in accordance with section 167 (1) of the Act.

The Procuring Entity submitted that the letter that prompted these review proceedings was the letter dated 17th February 2020 addressed to the Applicant from the Procuring Entity, which was a letter of revocation and cancellation of award/regret letters for the subject tender. It was the Procuring Entity's submission that this letter was sent to the Applicant via ordinary post on 18th February 2020. According to the Procuring Entity, fourteen days within which the Applicant ought to have filed its Request for Review lapsed on 3rd March 2020. However, the Applicant filed its Request for Review on 4th March 2020, one day later. In this regard therefore, the Request for Review was filed out of time contrary to section 167 (1) of the Act and therefore the Board was absent of jurisdiction in this matter.

The Applicant on its part submitted that contrary to the Procuring Entity's submission, the letter from the Procuring Entity dated 17th February 2020 was posted by the Procuring Entity on 19th February 2020, as evidenced by the date of postage which was stamped on the envelope containing the said letter. The Applicant submitted that the letter dated 17th February 2020 was sent via ordinary post and

addressed to the Applicant's address in Murang'a. The Applicant submitted that it received the Procuring Entity's letter a day later, on 20th February 2020, and subsequently thereafter filed its Request for Review within fourteen days from this date, that is, on 4th March 2020. It was therefore the Applicant's submission that its Request for Review was filed within the statutory period in accordance with section 167 (1) of the Act.

Upon considering parties' submissions, the Board notes, to determine the period within which the Applicant ought to have filed its Request for Review, the Board must first establish the date of occurrence of the alleged breach of duty by the Procuring Entity.

It is important to note that the fourteen day period provided under section 167 (1) of the Act starts running from the point at which the applicant learns or has knowledge of an alleged breach of duty by a procuring entity. This principle was explained in the case of **Judicial Review Miscellaneous Application 135 of 2018 Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR** where the Honourable Justice Nyamweya opined as follows: -

> ***"As regards how the date of occurrence of a breach is to be determined, I am persuaded by the decision by Elias JA of the English Court of Appeal in SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156 wherein while applying the decision of the European Court of Justice in Uniplex (UK) Ltd vs NHS Business Services***

<u>Authority</u> (2010) 2 CMLR 47 extensively discussed when time starts to run with respect to a breach in procurement proceedings as follows:

> *".....In Uniplex, the Court of Justice decided to adopt a test of discoverability, not a test which would result in time running from the happening of an event of which the victim might not know.....*
>
> *It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings..... time only starts to run once the unsuccessful tenderer can "come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings" reflects a number of decisions that the Court of Justice must have taken with respect to the test of discoverability.*
>
> *The most obvious question that arises for consideration, given that the unsuccessful tenderer has such a small window of time in which to start proceedings and given that the factual basis of a claim may be complex, is what happens if the information which the unsuccessful tenderer has is incomplete? It seems to me that in effect the Court of*

Justice resolves the problem of gaps in knowledge by treating the existence of an informed view as sufficient to bridge this gap. Once that is reached, there is no further threshold test in terms of prospects of success or indeed any other reason to escape the consequence of knowledge, such as lack of resources or failure to realize the true position in law, that can be taken into account. From this analysis it must follow that it is irrelevant that the unsuccessful tenderer's evidence is incomplete. The unsuccessful tenderer has the requisite knowledge once he has sufficient information to enable him to reach an informed view…."

The answer then to the question when time started to run in the present application can only be reached upon an examination of the breach that was alleged by the 2nd Interested Party in its Request for Review, and when the 2nd Interested Party had knowledge of the said breach."

Accordingly, the fourteen day period starts to run from the date an applicant is informed or has knowledge of the alleged breach of duty by a procuring entity.

It is undisputed that the letter dated 17th February 2020 which communicated the Procuring Entity's decision to revoke/cancel the award/regret letters with respect to the subject tender prompted the review proceedings before this Board.

The question that the Board must now answer is when did the Applicant learn of the occurrence of the alleged breach of duty by the Procuring Entity for the fourteen-day period under section 167 (1) of the Act to start running.

The Board heard submissions from the Procuring Entity that it posted the letter addressed to the Applicant dated 17th February 2020 on 18th February 2020 via ordinary post and therefore, the fourteen day period within which the Applicant ought to have filed its Request for Review started running from the 18th of February 2020. This submission was disputed by the Applicant who contended that the said letter was posted by the Procuring Entity on 19th February 2020 and received by the Applicant on 20th February 2020.

With this in mind, the Board considered the service of documents upon a company as specified in section 1010 of the Companies Act No. 17 of 2015 (hereinafter referred to as "the Companies Act") which provides as follows: -

> ***"A document may be served on a company registered under this Act by leaving it at, or sending it by post to, the company's registered office."***

Further, section 1011 of the Companies Act provides as follows: -

"(1) A document may be served on a person to whom this section applies by leaving it at, sending it by post to, the person's registered address.

(2) This section applies to the following persons:

(a) a director or secretary of a company;"

In view of the provisions referred to hereinabove and noting that the bidders who participated in the subject tender are companies, it is the Board's considered view that the provisions of the Companies Act relating to service of documents to companies applies in this instance.

The Board notes that documents may be served on a company either by: -

(a) personally serving it on an officer of the company, or

(b) sending it by post to the registered postal address of the company in Kenya, or

(c) leaving it at the registered office of the company.

Further, the Board considered section 3 (5) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya, which makes certain provisions on service by post as follows: -

"Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or

"give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post." **[Emphasis by Board]**

From the above provision, it is worth noting that, when a letter is sent or served via post, it should be properly addressed to the last known postal address of the intended recipient and delivery is only effected the time at which the letter would be delivered in the ordinary course of the post.

In the instant case, the Board notes that the Procuring Entity did not submit any proof in support of its submission that the letter dated 17th February 2020 was posted to the Applicant on 18th February 2020 and further did not demonstrate that the said letter was received by the Applicant on the same date.

Where the service of a letter of notification is disputed by a bidder, the Procuring Entity is under an obligation to provide evidence to establish that the said letter was either personally served upon the bidder or produce a certificate of posting as proof of service.

In the absence of any evidence in support of the assertion made by the Procuring Entity, we cannot rely on submissions made by it in order to ascertain the point at which the Applicant learnt of the occurrence of the alleged breach of duty by the Procuring Entity.

The Board is now left with the Applicant's submission that the said letter was posted on 19th February 2020 and received on 20th February 2020. In support of this submission, the Applicant submitted for the Board's consideration the envelope that contained the letter dated 17th February 2020.

The Board examined the said envelope and observes on its face the following address: -

"M/s EL-VIS COMMUNICATIONS LIMITED
P.O. Box 841-10200
MURANG'A"

The Board further observes that the face of the envelope holds a postage stamp on the bottom part with the date 19th February 2020.

In view of the foregoing, the Board notes, the letter to the Applicant was stamped received by the Post Office and thereby posted on 19th February 2020.

Noting this date of postage, the Applicant submitted that it received the letter on 20th February 2020, one day after the date of postage. The

Board is cognizant of the fact that letters sent by ordinary post will be presumed to have been received within seven (7) days after the date of postage which is a position that was also held by the High Court in **Petition 25 of 2016 Peter Omwando v Nick Mwendwa & another [2016] eKLR.**

In this regard therefore, the fourteen-day period imposed under section 167 (1) of the Act started running a day after the 20th day of February 2020, this being the time at which the Applicant received the letter dated 17th February 2020 and thus became aware of the alleged breach of duty by the Procuring Entity. We note, the Applicant lodged its Request for Review on 4th March 2020, a day before the lapse of the fourteen day period.

The Board therefore finds that the Applicant's Request for Review was filed within the statutory period required under section 167 (1) of the Act.

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

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, <u>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</u>"

[Emphasis by the Board]

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.

Via a letter dated 2nd March 2020, the Procuring Entity notified all bidders of its decision to terminate the subject tender, which letter read as follows: -

"TERMINATION OF TENDER NOs: NWHSA/ONT/002/2019-2020 AND NWHSA/ONT/004/2019-2020

Please refer to the above subject matter.

Reference is made to our letter dated 17th February 2020. Please note that National Water Harvesting and Storage Authority (NWHSA) has decided to terminate the tendering process for the construction of River Awach Dyke located in Homa Bay County and construction of River Kuja Dyke in Migori County due to budget constraints. This is in response to the letter from the Ministry of Water, Sanitation and Irrigation highlighting emergency works which should be addressed using the same budgetary allocation earmarked for the projects.

The Authority has reviewed the project scope and revised its budget as appropriate for the next action.

We thank you for showing interest to work with us.

Yours faithfully,

Eng Geoffrey Sang
Ag. Chief Executive Officer"

The Procuring Entity submitted that it terminated the subject tender due to lack of budgetary allocation and its decision to do so was prompted

by a letter that it received from the Principal Secretary, Ministry of Water and Sanitation dated 28th February 2020 which read as follows: -

"REQUEST FOR FUNDS TO ADDRESS WATER SITUATION IN MWINGI NORTH CONSTITUTENCY

This is in reference to our earlier letter Ref. No. WD/3/3/1306 Vol V dated 30th October 2019 concerning a request to fund implementation of 5 small dam projects to address the water situation in Mwingi North Constituency. The projects proposed are:

1. Itunguni Dam – Tseikuru

2. Ikime Dam – Ngomeni

3. Ngungi Dam – Muumoni

4. Kamula Dam – Kyuso

5. Kwa Kimanzi Dam (Kitambembe Dam) – Kyuso (Tulanduli)

The purpose of this letter is to request you to assess the situation and prioritize those projects with high impact to reduce the water stress in the constituency. You are advised to use Kshs 50 million from resources allocated under Flood Control for implementation.

Kindly take the necessary action accordingly.

Joseph W. Irungu

Principal Secretary"

According to the Procuring Entity, the above letter directed the Accounting Officer to prioritize and reallocate a sum of Kshs 50 million for purposes of addressing the water situation in Mwingi Constituency.

Further, noting that it only had a budget of Kshs 135 million for flood control projects for the fiscal year 2019-2020, the Procuring Entity submitted that it proceeded to re-allocate the funds available as demonstrated in its internal memo dated 24th February 2020 prepared by the Head of Flood Division.

The Procuring Entity was of the view that as a state corporation fully funded by the Ministry of Water, Sanitation and Irrigation, it was required to report to the Principal Secretary of the said Ministry and therefore it could not fail to implement the directives as issued by the Principal Secretary.

On the Applicant's part, it submitted that the termination of the subject tender by the Procuring Entity had not occurred by the time it lodged its Request for Review before this Board. In this regard therefore, the Procuring Entity was in disobedience of stay proceedings rendering the said notification of termination null and void.

Moreover, the Applicant submitted that the letter of notification of termination did not comply with section 63 of the Act as the letter was not issued by the Accounting Officer of the Procuring Entity.

In response to the reason proffered by the Procuring Entity for its termination of the subject tender, the Applicant contended that there was no sufficient evidence provided by the Procuring Entity justifying the said termination. The Applicant argued that the approved estimates for flood control were Kshs 438 million and this amount was not accurately captured in the Procuring Entity's internal memo dated 24th February 2020.

The Applicant was therefore of the view that the Procuring Entity did not comply with section 63 of the Act in its termination of the subject tender and therefore the termination process should be nullified by this Board.

Having heard parties' submissions, 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 the person mandated to terminate any procurement process as per the said section of the Act.

Further, an accounting officer may terminate a tender at any time, prior to notification of tender award. 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 requirement of real and tangible evidence supporting the ground of termination of the procurement process relied on supports the provision of Article 47 of the Constitution of Kenya, 2010 which states that:-

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

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

Turning to the circumstances of the case, the Board studied the confidential documents submitted by the Procuring Entity in accordance with section 67 (3) (e) of the Act, and observes a report therein dated

12th March 2020, addressed to the Public Procurement Regulatory Authority (hereinafter referred to as "PPRA") from one Eng Geoffrey Sang dated 12th March 2020. From the contents of the said report, the Board observes that the subject tender was terminated on the 2nd of March 2020 and the reason cited for termination was '*inadequate budgetary provision'.*

The Board proceeded to examine the letter of notification of termination addressed to the Applicant dated 2nd March 2020 and observes that the same was issued and signed by one Eng Geoffrey Sang, the Ag. Chief Executive Officer.

Having established that an accounting officer is the person mandated to sign and issue notifications of termination of a tender to all bidders who participated in a tender, it behooves upon this Board to determine who is the Accounting Officer of the Procuring Entity?

In order to answer this question, the Board studied section 2 of the Act which defines the term 'accounting officer' as follows:

> ***"accounting officer has the meaning assigned to it under section 2 of the Public Finance Management Act, 2012 (No. 18 of 2012)"***

On its part, section 2 of the Public Finance Management Act, 2012 (No. 18 of 2012) states that: -

"accounting officer means

a) An accounting officer of a national government entity referred to in section 67;

b) An accounting officer of a county government entity referred to in section 148;

c) In the case of the Judiciary, the Chief Registrar of the Judiciary or

d) In the case of the Parliamentary Service Commission

i. The clerk of the senate in respect of the senate

ii. The clerk of the national assembly in respect of the national assembly;

iii. Such other officer in the parliamentary service in respect of any other office in the parliamentary service…."

Further, section 17 (3) and (4) of the Water Act, 2016 provides as follows: -

"(3) The Chief Executive Officer is the accounting officer of the Authority;

(4) The Chief Executive Officer is subject to the direction of the Management Board and is responsible to it for the -

(a) implementation of the decisions of the Management Board;

(b) day to day management of the affairs of the Management Board;

(c) organization and management of the employees; and

(d) any other function that may be assigned by the Management Board."

From the foregoing, the Board observes that the Chief Executive Officer is the Accounting Officer of the Procuring Entity and is responsible for the implementation of the decisions of the Management Board, day to day management of the affairs of the Management Board, organization and management of the employees and any other function that may be assigned by the Management Board.

It is therefore settled that the Chief Executive Officer is the Accounting Officer of the Procuring Entity.

In this regard therefore, the Board finds that the letters of notification of termination were properly issued by Eng Geoffrey Sang, who is currently the Ag. Chief Executive Officer of the Procuring Entity.

The question that now arises is whether the letter notifying the Applicant of the Procuring Entity's decision to terminate the subject tender was issued within fourteen days from the date of termination of the tender in accordance with section 63 (4) of the Act.

The Board notes, section 63 (4) of the Act requires the accounting officer of a procuring entity to: -

> ***"…..notify all persons who submitted tenders of the termination <u>within fourteen days of termination and such notice shall contain the reason for termination</u>."***

Accordingly, a procuring entity should send a notification of termination to all bidders who participated in a procurement process within fourteen days of termination of a tender and the said notification should provide a reason why the tender was terminated

The Board heard submissions from the Applicant that by the time of filing of its Request for Review on 4th March 2020, it had not received the said letter from the Procuring Entity and therefore any action taken by the Procuring Entity after filing of the Request for Review was in disobedience of stay of review proceedings, thereby rendering the Procuring Entity's letter of notification of termination null and void.

The Board has established from the Procuring Entity's report of termination of the subject tender addressed to PPRA dated 12th March 2020 that the Procuring Entity terminated the subject tender on 2nd March 2020.

The Board studied the letter addressed to the Applicant notifying it of the Procuring Entity's decision to terminate the subject tender and observes that the said letter was dated 2nd March 2020. This means that the Procuring Entity issued a letter of notification to the Applicant

informing it of its decision to terminate the tender on 2nd March 2020, on the same date that it terminated the tender.

The Board notes, the Procuring Entity terminated the subject tender two days prior to the Applicant lodging its Request for Review application before this Board, that is, on 4th March 2020. Moreover, by the time the Applicant lodged its Request for Review, the fourteen day period as stipulated under section 63(4) of the Act had not yet lapsed and thus the Procuring Entity still had time to issue a letter of notification of termination to the Applicant.

With respect to the ground relied upon by the Procuring Entity justifying its termination of the subject tender, the Board examined the letter from the Principal Secretary, Ministry of Water and Sanitation and Irrigation addressed to the Accounting Officer dated 28th January 2020 and notes that although the letter directs the Procuring Entity to prioritize and reallocate a sum of Kshs 50 million for purposes of addressing the water situation in Mwingi Constituency, it does not mention the subject tender or specifically direct that the funds should be reallocated from the funds already set aside for the subject tender.

The Board notes that the said letter was received by the Procuring Entity on 28th January 2020 after the subject tender closed on 14th January 2020. This means that by the time the Procuring Entity received the said letter, tenders received in response to the subject tender had been

opened by the Procuring Entity and the procurement process was live and ongoing.

The Board examined the Procuring Entity's confidential file and notes, a lack of response therein from the Procuring Entity to the Principal Secretary, seeking specifics as to where the funds, that is, Kshs 50 million, should be reallocated from, whether the Procuring Entity should reallocate funds from a procurement process that was ongoing and explaining the consequences of interfering with a live and ongoing tender.

Moreover, the Board examined the Procuring Entity's internal memo dated 24th February 2020 from the Head of Flood Division, addressed to the Ag. Chief Executive Officer, titled '*Re-defining of scope to raise funds to address water situation in Mwingi North Constituency'* which was approved by the Accounting Officer on 24th February 2020. From its contents, the Board observes that the Head of Flood division stated as follows: -

> ***"....As advised by his office (The Principal Secretary), the division has assessed the situation and noted the emergency required in reducing the impact of water stress in the constituency. In order to raise the Kshs 50 million to tackle the situation, we looked at the projects whose funds have not been committed and propose the change of scope in order to recover the needed funds for this prioritized works. The project which we re-defined their***

scope includes: River Kuja Dyke, River Awach Tende Dyke, Godha Merti Channel and River Tana Delta Flood.

Enclosed is the schedule for the change of scope and savings obtained by each project……."

The Board studied the enclosed schedule which stated as follows: -

"This fiscal year 2019-20, <u>some projects</u> were set to commence at a value of Kshs 135.32 million. This flood control site include: -

1. River Kuja Dyke Project – Migori County

2. River Awach Tende Dyke Project – Homa Bay County

3. Godha Merti – Isiolo County

4. Tana River Delta – Tana River County

. ……This re-allocation of funds affects the line budget for projects whose budget has not been committed and re-planning of the same as appropriate. This means that at this point the projects scope may need to drift from the pre-set plan…

The scope will be revised on the following elements on respective works as indicated below: -

FID	FLOOD PROJECT	ELEMENT	ORIGINAL SCOPE	NEW SCOPE	ORIGINAL PRICE	NEW PRICE	SAVINGS
	River Kuja	Dyke	1.572 km	1km	35 million	22 million	13 million
	River Awach	Dyke	2 km	1.25 km	39.9 million	24.9 million	15 million

	Tende						
	Godha Merti	Channel	760 m	532 m	50 million	35 million	15 million
	Tana River Delta	Dyke	0.6 km	0.283 km	7.2 million	3.4 million	3.8 million
		Investigating new sites	16km	0 km	720,000	0	0.72 million
		Repairs to eastern dyke	Item	Nil	500,000	0	0.5 million
		Improving investigated sites	Item	Nil	2 million	0	2 million
					135.32 million	85.3 million	50.02 million

The Kes 50.02 million will be able to fund the emergency works as reflected on the re-arrangement of work schedule by the line department. **"**

According to the above letter, the Procuring Entity's Head of Flood Division stated that '**some**' of the flood control projects were set to commence at a value of Kshs 135.32 million. In view of this statement it is not clear whether the amount of Kshs 135.32 million was the entire budget amount for flood control projects for the fiscal year 2019/2020 or whether it was the budget amount for the four flood control projects listed in the aforementioned letter.

The Head of Flood Division further indicated that the funds for the four flood control projects as mentioned hereinabove <u>had not yet been committed</u> and he further proposed for the change of scope of the projects in order to recover the needed funds for the projects prioritized by the Principal Secretary.

The Board notes that section 45 (3) of the Act clearly stipulates that all procurement processes shall be: -

> ***(a) within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan;***
>
> ***(b) ……;***
>
> ***(c) undertaken in strict adherence to Article 227 of the Constitution.*** **[Emphasis by Board]**

This means that all procurement processes should be undertaken by a procuring entity within a procuring entity's approved budget and as provided for within an annual procurement plan. Further, all procurement processes should be undertaken in strict adherence to Article 227 (1) of the Constitution, which on its part provides that all procurement processes should be conducted in a fair, equitable, transparent, cost-effective manner.

It is important to note that the subject tender is reserved for AGPO – Youth, Women and Persons with Disabilities and the Board is cognizant of section 53 (5) of the Act which stipulates as follows: -

> ***"5) A procurement and asset disposal planning shall be based on indicative or approved budgets which shall be integrated with applicable budget processes and in the case of a State Department or County Department, such plans shall be approved by the Cabinet Secretary or the County Executive Committee member responsible for that entity.***

(6) All procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups.

(8) Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.

(9) An accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offence under this Act." **[Emphasis by Board]**

This means that all procurement and asset disposal proceedings should be based on approved budgets and no procurement process should be commenced without an accounting officer ascertaining that a particular procurement process has been budgeted for. Further, procuring entities are required to reserve a minimum of thirty per cent of their budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups.

In this regard therefore, the Procuring Entity's Head of Flood Control mistakenly indicated in the internal memo that no funds had been committed with respect to the subject tender. Noting the aforementioned requirements of law, the Board is of the considered view that once a procurement process is commenced by a procuring entity in accordance with its annual procurement plan, funds from its approved

budget are allocated and committed to a particular procurement process.

This means that funds committed to a live and ongoing procurement process may not be re-committed mid-stream to another procurement process.

In this instance, the Head of Flood Division proposed a re-defining of the scope of works and budget with respect to the subject tender on 24th February 2020, when the subject tender was still ongoing and prior to termination of the tender by the Procuring Entity.

Further, we note, the Procuring Entity did not indicate how it arrived at the reduced scope of works and the reduced budget for each of the flood control projects and what formula was applied in each instance.

More importantly, no procedure was outlined for the movement of funds between approved budget lines by the Procuring Entity and whether the approval of the Accounting Officer in addition to the approval of the Principal Secretary was required in order for funds to be re-allocated from a live and ongoing tender to another tender or project.

In this regard therefore, it is the finding of this Board that no real, tangible and justifiable evidence has been adduced by the Procuring Entity to persuade us that its termination of the subject tender on the

ground of inadequate budgetary provision meets the threshold under section 63 (1) of the Act.

The Board finds, the Procuring Entity failed to terminate the subject tender in accordance with section 63 of the Act, rendering the purported termination of the subject procurement process null and void.

In view of this finding the Board finds it has jurisdiction in this matter and proceeds to the third issue for determination: -

The Board observes that the Procuring Entity issued letters of notification dated 4th February 2020, to all bidders, including the Applicant herein.

On 4th February 2020, the Applicant accepted the award of the subject tender vide a letter dated 5th February 2020.

However, on 20th February 2020, the Applicant received a letter from the Procuring Entity which read as follows: -

> ***"REVOCATION AND CANCELLATION OF AWARD/REGRET LETTERS FOR TENDERS***
>
> ***Reference is made to the above subject matter.***
>
> ***The Authority has arrived at a decision to revoke and cancel all the letters of award and regrets for Tenders***

bearing Rf. No. NWC/ONT/OO5/2019-20; Ref. No. NWC/ONT/002/2018-19 and Ref. No. NWC/ONT/004/2019-20 dated 4th February 2020 with immediate effect from the date of this letter.

The move will accord the Accounting Officer the necessary time to assess the process of evaluation and then advise the bidders in accordance with the Public Procurement and Asset Disposal (PPAD) Act. No. 33 of 2015 of the outcome.

Yours faithfully,
(signed)

Eng Geoffrey Sang
Ag. Chief Executive Officer"

According to the Applicant, the Act did not confer any power on the Procuring Entity to cancel or revoke a notification of award of tender and therefore the Procuring Entity's decision was illegal and in contravention of the rule of law principle.

The Applicant argued that the power of review was exclusively vested in the Board and the High Court and therefore the Procuring Entity cannot sit in appeal of its decisions.

On its part, the Procuring Entity submitted that one Ms Sharon Obonyo signed and issued notification letters to both successful and unsuccessful bidders with respect to the subject tender devoid of consultation and authority from its Accounting Officer, rendering the award and the notifications issued null and void. In view of this infraction of law, the Accounting Officer proceeded to issue letters of revocation and cancellation of the notifications issued to both the successful and unsuccessful bidders.

In its determination of the third issue, the Board studied section 87 of the Act as cited hereinabove which stipulates as follows: -

> ***"(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.***
>
> ***(2) .....;***
>
> ***(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.***

(4) .....;

The above provision clearly stipulates that the accounting officer of a procuring entity issues notification letters to successful and unsuccessful bidders.

As to whether an accounting officer can delegate his authority to issue notification letters to successful and unsuccessful bidders, this Board referred to its decision in **PPARB Application No. 9 of 2020 Internet Solutions (K) Limited v. Kenya Airports Authority** where it held that an accounting officer of a procuring entity may delegate his/her authority to issue letters of notification to successful and unsuccessful bidders alike due to his/her inability to act in certain circumstances. Nevertheless, as a public officer, an accounting officer is bound by principles of leadership and integrity under the Constitution and other relevant legislation and therefore remains accountable for acts performed by persons to whom he has delegated authority to act on his behalf.

Moreover, in order to ensure that any delegated authority is not exercised in order to undermine an accounting officer, it is necessary for the delegated authority to be in writing and specific, in that the accounting officer should specify the tender for which the delegated authority is given as such delegated authority may be prone to abuse

and exercised contrary to the manner in which the accounting officer had specified.

Turning to the circumstances of the case, the Board studied the Procuring Entity's memo dated 30th January 2020 addressed to one Ms Sharon Obonyo from the Procuring Entity's Accounting Officer which read as follows: -

> ***"Subject: ABSENCE ON OFFICIAL DUTY OUTSIDE THE COUNTRY***
>
> ***I shall be out of the country on official duties in Israel with effect from 1st February 2020 up to 10th February 2020. While I am away, Ms Sharon Obonyo, the Acting General Manager – Corporate Services will hold brief.***
>
> ***Any policy issues to be handled in consultation with our Principal Secretary Ministry of Water & Sanitation and Irrigation.***
>
> ***Please accord the officer the necessary support to enable the Authority meet its objectives."***

From the above letter, the Board observes that the Procuring Entity's Accounting Officer directed that one Ms. Obonyo would hold his brief in his absence from the 1st of February 2020 to the 10th of February 2020 and any policy issues were to be handled in consultation with the Principal Secretary Ministry of Water, Sanitation and Irrigation.

The question that arises in this regard is what does it mean 'to hold brief'?

The Board observes that the Cambridge Dictionary defines the term 'brief' to mean: -

> ***"a set of instructions or information"***

Moreover, the Black's Law Dictionary defines the term 'hold' as follows: -

> ***"To posses; To administer; to conduct or preside at; to convoke, open, and direct the operations of..."***

From the foregoing definitions, holding brief can be construed to mean to possess, administer or conduct a set of instructions or information.

Moreover, the Board observes that the phrase 'holding brief' is often used in legal practice to refer to an arrangement between two lawyers where one lawyer is standing in temporarily for the other lawyer in a case until the other lawyer is available to continue with the handling of his case personally.

In the same spirit, according to the memo dated 30th January 2020, one Ms Obonyo was required by the Procuring Entity's Accounting Officer to stand in temporarily in his place for a specific duration of time, from 1st

to 10th February 2020, and administer the instructions issued to her by the Accounting Officer.

The Board then examined the notification of award issued to the Applicant dated 4th February 2020 and observes the tail end of the Applicant's letter appears as follows: -

> ***".....You may contact the undersigned in case you need clarification on the subject matter of the notification of award.***
>
> ***Yours faithfully,***
>
> ***CS Sharon Obonyo***
>
> ***FOR: Ag Chief Executive Officer"***

From the above excerpt, the Board observes that the said notification of award was issued to the Applicant on behalf of the Acting Chief Executive Officer of the Procuring Entity, by one Ms Sharon Obonyo.

The Board further examined the Procuring Entity's confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act and observes that the Professional Opinion issued by the Procuring Entity's Chief Procurement Officer and dated 4th February 2020 was approved by Ms Sharon Obonyo on the same date, that is, 4th February 2020. Further that notifications sent to all bidders also dated 4th

February 2020 were issued on behalf of the Acting Chief Executive Officer of the Procuring Entity, by Ms Sharon Obonyo.

From the foregoing, the Board notes that the memo dated 30th January 2020, from the Procuring Entity's Accounting Officer, instructed Ms Obonyo to hold his brief from 1st February 2020 to 10th February 2020.

However, it is evident from the said memo that the Accounting Officer did not direct one Ms Obonyo to act with respect to the subject tender by approving the Professional Opinion therein or sign and issue notification letters to successful and unsuccessful bidders as the memo did not specify the tender for which the delegated authority is given and further, did not specify what actions, if any, were to be taken with respect to the subject tender.

It is therefore the finding of this Board that one Ms. Sharon Obonyo who approved the Professional Opinion dated 4th February 2020 and signed notification letters to both successful and unsuccessful bidders on behalf of the Accounting Officer acted without authority in doing so, since the memo dated 30th January 2020 did not delegate such authority to her.

Moreover, the Board studied section 84 of the Act which states that:-

> ***"(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the***

tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.

(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.

(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1)."

Section 84 of the Act demonstrates that a professional opinion is a central aspect between tender evaluation and award recommendations. The professional opinion emanates from the Head of Procurement and offers guidance or what may be referred to as an overview of the entire procurement process to the accounting officer. The Head of Procurement function reviews the Evaluation Report and offers his/her opinion/advice/views to the Accounting Officer on the appropriate decision to make with respect to a procurement process.

Turning to the circumstances of the case, the Board has established that the Professional Opinion dated 4th February 2020 was approved by an officer who acted without the authority of the Accounting Officer of the Procuring Entity. Further, that notification letters dated 4th February 2020 sent to both the successful and unsuccessful bidders with respect to the

subject tender were also issued by an officer who acted without the authority of the Accounting Officer of the Procuring Entity.

The Board is cognizant of the fact that any challenge raised with respect to a procurement process is lodged against the decision of an accounting officer, being the person responsible for overseeing the entire procurement process.

In this instance however, the professional opinion which provides an overview of the entire procurement process was not considered by the Procuring Entity's Accounting Officer or by an officer who had specific delegated authority to consider the same in making an award with respect to the subject tender. It therefore follows that the decision to award was not made by the Procuring Entity's Accounting Officer, but was made by an officer who acted without his authority, thereby rendering the said award null and void.

In this regard therefore, it is the Board's finding that the actions of an officer who acted without the authority of the Procuring Entity's Accounting Officer, do not bind the Procuring Entity as they were not issued by the Accounting Officer of the Procuring Entity or under his express authority, and such actions are therefore null and void.

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

The Board takes cognizance of section 173 (b) of the Act, which states that:-

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

In view of the Board's findings in this matter, and having found that the Procuring Entity's termination of the subject tender was null and void, it is the Board's considered view that the Procuring Entity's Accounting Officer should be allowed to consider the Professional Opinion dated 4th February 2020 and in doing so examine and consider what transpired during the entire procurement process. If the Accounting Officer finds it fit that a re-evaluation should be conducted, or a due diligence exercise conducted following a discovery of infractions of law during the evaluation process, the Accounting Officer may direct for the same to be conducted by the Evaluation Committee.

If having looked at the professional opinion and the Accounting Officer finds that it is satisfied with the conduct of the subject procurement process, the Accounting Officer should therefore proceed to approve the same and make an award or in the alternative, do what is necessary to conclude the subject procurement process. Moreover, if the Accounting

Officer finds that the procurement process should be terminated, the Procuring Entity will have an obligation to undertake the same taking into consideration the Board's findings in this case on the actions it ought to have taken in accordance with section 63 of the Act.

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

FINAL ORDERS

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

1. **The Procuring Entity's Letter of Notification of Award dated 4th February 2020 addressed to M/s El-Vis Communications Limited, with respect to Tender No. NWC/ONT/004/2019-2020 for Construction of River Kuja Dyke Migori County (Reserved for AGPO – Youth, Women and Persons with Disabilities) be and is hereby cancelled and set aside.**

2. **The Procuring Entity's Letters of Notification of Unsuccessful Tender dated 4th February 2020 addressed to all unsuccessful bidders with respect to Tender No. NWC/ONT/004/2019-2020 for Construction of River Kuja Dyke Migori County (Reserved for AGPO – Youth, Women and Persons with Disabilities) be and are hereby cancelled and set aside.**

3. **The Procuring Entity's Letters of Termination of Tender with respect to Tender No. NWC/ONT/004/2019-2020 dated 2nd March 2020 and addressed to all bidders be and are hereby cancelled and set aside.**

4. **The Procuring Entity's Accounting Officer is hereby directed to consider the Professional Opinion dated 4th February 2020, taking into consideration the findings of this Board herein and proceed with the procurement process with respect to Tender No. NWC/ONT/004/2019-2020 for Construction of River Kuja Dyke Migori County (Reserved for AGPO – Youth, Women and Persons with Disabilities) to its logical conclusion, within twenty one (21) days from the date of receipt of the signed decision.**

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

Dated at Nairobi, this 25th Day of March 2020

CHAIRPERSON **SECRETARY**

PPARB **PPARB**

Delivered in the presence of: -

i. Mr. Njau holding brief for Mr Kiplangat for the Applicant;

ii. Mr. Kiprono holding brief for Ms. Mwangi for the Respondent.