

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 135/2020 OF 26<sup>TH</sup> OCTOBER 2020**

**BETWEEN**

**THE COPY CAT LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**KENYA POST OFFICE SAVINGS BANK.....1<sup>ST</sup> RESPONDENT**

**KENYA POST OFFICE**

**SAVINGS BANK.....2<sup>ND</sup> RESPONDENT/PROCURING ENTITY**

Review against the decision of Kenya Post Office Savings Bank with respect to Tender No. KPOSB/013/2019 For Supply, Installation, Commissioning and Maintenance of Enterprise Servers with Requisite Software (Retendered)

**BOARD MEMBERS**

- |                           |              |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa       | -Chairperson |
| 2. Mr. Ambrose Ngare      | -Member      |
| 3. Ms. Phyllis Chepkemboi | -Member      |

**IN ATTENDANCE**

- |                      |                              |
|----------------------|------------------------------|
| 1. Mr. Phillip Okumu | -Holding brief for Secretary |
|----------------------|------------------------------|

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

Kenya Post Office Savings Bank (hereinafter referred to as “the Procuring Entity”) invited interested and eligible bidders to submit proposals in response to Tender No. KPOSB/013/2019 For Supply, Installation, Commissioning and Maintenance of Enterprise Servers with Requisite Software (Retendered) (hereinafter referred to as “the subject tender”) via an advertisement in MyGov pull-out newspaper on 3<sup>rd</sup> December 2019.

### **Bid Submission Deadline and Opening of bids**

A total of six (6) bidders/firms submitted technical and financial proposals in response to the subject tender. Technical proposals were opened on 19<sup>th</sup> December 2019 in the presence of bidders and their representatives who chose to attend and which proposals were recorded as follows:

<b>Bidder No.</b>	<b>Firm</b>
1.	Innovative Technologies Africa
2.	Telenet Solutions Ltd
3.	Trans Business Machines Ltd
4.	Symphony Technologies Ltd
5.	The Copy Cat Ltd
6.	Technology Associates East Africa Limited

### **Evaluation of Proposals**

The evaluation process was conducted in three stages:

1. Mandatory Evaluation;
2. Technical Evaluation;
3. Financial Evaluation.

## **1. Mandatory Evaluation**

At this stage of evaluation, proposals received were evaluated to confirm compliance with the mandatory requirements as outlined in the Tender Document.

Upon conclusion of this stage of evaluation, Bidders No. 1, 2 and 6 were found non-responsive whereas Bidders No. 3, 4 and 5 met all the mandatory requirements and thus qualified to proceed to the next stage of evaluation.

## **2. Technical Evaluation**

At this stage of evaluation, bidders were evaluated against the response guideline provided in the Tender Document with the following levels of compliance codes: -

### ***4.1.1. Full Compliance:***

<b><i>Code and Meaning</i></b>	
<b><i>FC</i></b>	<b><i>This requirement is part of the standard core product.</i></b>
<b><i>F3</i></b>	<b><i>This requirement is included and provided under licence through a 3<sup>rd</sup> Party.</i></b>

### ***4.1.2. Partial Compliance but can be enhanced***

<b><i>Code and Meaning</i></b>	
<b><i>PS</i></b>	<b><i>This requirement can be achieved through further development (by the Vendor) for full compliance.</i></b>
<b><i>P3</i></b>	<b><i>This requirement can be achieved</i></b>

	<i>through development/interfacing with a 3<sup>rd</sup> Party system</i>
--	---

**4.1.3. No compliance but can be enhanced**

<b>Code and Meaning</b>	
<b><i>XS</i></b>	<i>This requirement is not included but can be achieved through development (by the Vendor).</i>
<b><i>X3</i></b>	<i>This requirement is not included but can be achieved through development/interfacing with a third party system.</i>

**4.1.4. No compliance and cannot be achieved:**

<b>Code and Meaning</b>	
<b><i>NA</i></b>	<i>This requirement is not available and cannot be incorporated</i>

The technical evaluation ratings were as follows: -

<b>NO</b>	<b>DESCRIPTION TECHNICAL REQUIREMENT</b>	<b>WEIGHTED SCORE per item</b>	<b>TOTAL WEIGHTED SCORE</b>
1	Hardware	50	55
	Enterprises servers	50	
	Server Implementation Requirements	5	
2	VMware vSphere suite	5	5
3	Comprehensive Support	20	20
4	Installation and Commissioning		20
	Hardware	10	
	Software	10	
	<b>Total Score</b>		100

The pass mark was 80%.

Upon conclusion of Technical Evaluation, Bidder No. 3 (M/s Trans Business Machines Limited) and Bidder No. 4 (Symphony Technologies Limited) both scored 100% while Bidder No. 5 (M/s Copy Cat Limited) scored 95% of the total score hence all the three bidders qualified to proceed for the next stage of evaluation.

#### 4. Financial Evaluation

Financial proposals for Bidder No. 3 (M/s Trans Business Machines Limited), Bidder No. 4 (Symphony Technologies Limited) and Bidder No. 5 (M/s Copy Cat Limited) were opened on 28<sup>th</sup> January 2020 and were evaluated as follows: -

<b>DESCRIPTION</b>	<b>Bidder No. 3 (Trans Business Machines Limited)</b>	<b>Bidder No. 4 (Symphony Technologies Limited)</b>	<b>Bidder No. 5 (The Copy Cat Limited)</b>
Total Hardware and Software Supply, Commissioning Installation and Costs – One time	Kshs 48,563,160.00	Kshs 31,740,347.85	Kshs 41,994,186.30
Recurrent costs related to Hardware and Software Maintenance and Support – For 5 years	Kshs 29,979,800.00	Kshs 15,523,031.40	Kshs 1,892,187.70
Total Training Costs – One time	Kshs 2,100,000.00	Kshs 12,056,194.40	Kshs 9,397,752.40
Any Other Costs (Please specify if any)	N/A	Kshs 8,659,769.37	N/A
<b>Total Cost</b>	<b>Kshs 80,642,960.00</b>	<b>Kshs 67,979,343.02</b>	<b>Kshs 53,284,126.40</b>

The pass mark for Financial Evaluation was 40%.

The results were as follows: -

<b>Bidder Nos</b>	<b>Firm</b>	<b>Technical Evaluation Scores (60%)</b>	<b>Financial Evaluation Scores (40%)</b>	<b>Total Scores (100%)</b>	<b>Remarks</b>
5	The Copy Cat Limited	57%	40%	97%	Lowest bidder
4	Symphony Technologies Limited	60%	32%	92%	2 <sup>nd</sup> Lowest bidder
3	Trans Business Machines Limited	60%	27%	87%	3 <sup>rd</sup> Lowest Bidder

### **The Evaluation Committee's Recommendation**

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Copy Cat Limited** as the lowest responsive bidder at its quoted total cost of USD 530,454.22 VAT Inclusive.

### **Professional Opinion**

The Acting Manager, Procurement and Supplies reviewed the Evaluation Report and concurred with the Evaluation Committee's recommendation of award, vide a Professional Opinion dated 3<sup>rd</sup> February 2020.

The Managing Director of the Procuring Entity approved the Evaluation Committee's recommendation of award on 7<sup>th</sup> February 2020.

## **REQUEST FOR REVIEW NO. 135 OF 2020**

The Copy Cat Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated 23<sup>rd</sup> October 2020 and filed on 26<sup>th</sup> October 2020 together with an Affidavit (hereinafter referred to as "the Applicant's Affidavit") sworn on 23<sup>rd</sup> October 2020 and filed on 26<sup>th</sup> October 2020 through the firm of Conrad Maloba & Associates.

In response, the Procuring Entity, acting in person, lodged a Replying Affidavit sworn on 3<sup>rd</sup> November 2020 and filed on 4<sup>th</sup> November 2020 (hereinafter referred to as 'the Procuring Entity's Replying Affidavit').

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

-

- a. An order annulling the decision of the Procuring Entity contained in their letters of 11<sup>th</sup> September 2020 and 13<sup>th</sup> October 2020 terminating the award of Tender No. KPOSB/013/2019 For Supply, Installation, Commissioning and Maintenance of Enterprise Servers;***
- b. An order directing the Procuring Entity to cause the signing of the contract in respect of the Tender No. KPOSB/013/2019 For Supply, Installation, Commissioning and Maintenance of Enterprise Servers;***
- c. An order prohibiting the Procuring Entity from entering and/or signing any contract with any third-party concerning Tender No. KPOSB/013/2019 For Supply,***

***Installation, Commissioning and Maintenance of Enterprise Servers;***

***d. An order prohibiting the Procuring Entity from re-tendering KPOSB/013/2019 For Supply, Installation, Commissioning and Maintenance of Enterprise Servers;***

***e. An order for costs of this Review to the Applicant;***

***f. Any other relief that the Board deems fit to grant.***

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

On 24<sup>th</sup> 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 be canvassed by way of written submissions.

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on



documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act").

The Applicant lodged Written Submissions on 13<sup>th</sup> November 2020 but the Procuring Entity did not file any Written Submissions.

### **BOARD'S DECISION**

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

The issues that arise for determination are as follows: -

- I. Whether a contract with respect to the subject tender was executed between the Procuring Entity and the Applicant in accordance with section 135 (3) of the Act thereby ousting the jurisdiction of this Board;**

Depending on the outcome of this issue: -

- II. Whether the Procuring Entity terminated the subject procurement process in accordance with section 63 of the Act thereby ousting the jurisdiction of this Board.**

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

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."***

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

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

***(2).....;***

***(3).....;***

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

***(a) the choice of a procurement method;***

***(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); and***

***(c) where a contract is signed in accordance with section 135 of this Act."[Emphasis by the Board]***

Accordingly, section 167 (4) (b) and (c) of the Act strips off the jurisdiction of this Board where a procuring entity terminates procurement proceedings in accordance with section 63 of the Act or where a contract is signed between a procuring entity and a successful bidder, in accordance with section 135 of the Act.

The Board studied section 135 (3) of the Act which reads as follows: -

***"The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period."***

This means that a written contract shall be entered into within the period specified in the notification but not before the lapse of fourteen days following the giving of a notification of award and within the tender validity period.

Further, section 135 (2) of the Act clearly stipulates: -

***"An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings."*** [Emphasis by the Board]

Accordingly, a contract entered into between a procuring entity and a successful bidder in any procurement process ought to be reduced into writing.

The Applicant contended in paragraph 4 of its Request for Review that on 10<sup>th</sup> February 2020, it received a letter of award from the Procuring Entity together with a corresponding Local Purchase Order (LPO) in the amount of USD 511,617.19. The Applicant submitted that it confirmed and acknowledged receipt of the award of the subject tender vide a letter dated 27<sup>th</sup> February 2020.

According to the Applicant, it then entered into consultations with the Procuring Entity and subsequently executed a Statement of Works for implementation of the subject tender. The Applicant contended that it duly complied with the requirements as outlined in the Statement of Works and completed its obligations as required to the satisfaction of the Procuring Entity.

However, the Applicant submitted that between the months of July and September 2020, officers of the Procuring Entity including its Managing Director, called for several meetings whereby it advised the Applicant that the subject tender and its subsequent award to the Applicant was improper but failed to disclose its reasons for this finding.

Thereafter, the Applicant received a letter from the Managing Director of the Procuring Entity on 11<sup>th</sup> September 2020, terminating its services under the subject tender, which letter the Applicant contended did not assign reasons for the said termination. The Applicant submitted that in response thereto its Advocates, vide a letter dated 6<sup>th</sup> October 2020, sought information from the Procuring Entity as to the reason for the Procuring Entity's termination of the contract and further notified the Procuring Entity that in the absence of justifiable grounds, it could not terminate the subject procurement process.

The Applicant submitted that despite its letter dated 6<sup>th</sup> October 2020, the Procuring Entity affirmed its decision to terminate the subject procurement process vide a letter dated 13<sup>th</sup> October 2020.

On its part, the Procuring Entity contended that indeed the Applicant emerged as the lowest evaluated bidder and was awarded the subject tender vide a letter of award dated 10<sup>th</sup> February 2020. However, the Procuring Entity contended that the Applicant quoted in United States Dollars (US Dollars) contrary to the instructions in the Tender Document and its Evaluation Committee failed to factor in the exchange rate risk in its evaluation of the Applicant's tender. It was therefore the Procuring Entity's submission that it was unable to execute the contract and thus was forced to cancel the subject tender due to budgetary constraints resulting from fluctuation of the US Dollar. The Procuring Entity further contended that if it continued engaging the Applicant for provision of the services procured for, the Procuring Entity may not be able to pay for

the services rendered as it did not have an approved budgetary allocation for the subject tender.

Having considered parties' written submissions, the Board deems it fit to first determine the meaning of the term 'contract' and its constitution thereof.

The Black's Law Dictionary (9<sup>th</sup> Edition) assigns the following meaning to the term 'contract': -

***"A covenant or agreement between two or more persons, with a lawful consideration or cause"***

Further, section 3 (1) of the Sale of Goods Act, Chapter 16 of the Laws of Kenya (hereinafter referred to as 'the Sale of Goods Act') recognizes that: -

***"A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price."***

Further, in P.S. Atiyah's **An Introduction to the Law of Contract**, (3<sup>rd</sup> Edition) the following view of a contract is propounded: -

***"[A]n offer is, in effect, a promise by the offeror to do or abstain from doing something, provided that the offeree will accept the offer and pay or promise to pay the 'price' of the offer...."***

It is trite law that there are three essential elements for a valid contract, that is, an offer, which is defined as the promise to do or abstain from doing something, acceptance, which can be interpreted as one's consent to the offer, and consideration.

The Black's Law Dictionary defines the term 'consideration' as: -

***"Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled"***

**Chitty on Contracts, Vol. 1, General Principles (29<sup>th</sup> Edition)** defines consideration as follows: -

***"The traditional definition of consideration concentrates on the requirement that 'something of value' must be given and accordingly states that consideration is either some detriment to the promisee (in that he may give value) or some benefit to the promisor (in that he may receive value)."***

Consideration can therefore be understood to mean something of value that must be given in a transaction between a buyer and a seller, in that the promisee/seller must give value or some benefit to the promisor (in form of goods), so that the promisor/buyer may receive value. Moreover, the promisor/buyer must give value (in form of money) in order for the promisee/seller to receive value.



Having established the meaning and constitution of a contract, the Board examined the Procuring Entity's original and confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act, and observes that there is no contract therein executed between the Procuring Entity and the Applicant.

However, the Board observes a letter of award dated 10<sup>th</sup> February 2020 issued by the Managing Director of the Procuring Entity, one Anne Karanja and addressed to the Managing Director of the Applicant which reads as follows: -

***"We are pleased to inform you that you have been awarded Tender for Supply, Installation, Commissioning and Maintenance of Enterprise Servers with Requisite Software.***

***The tender has been awarded as tabulated below: -***

<b><i>DESCRIPTION</i></b>	<b><i>COST IN USD (VAT INCL)</i></b>
<b><i>Total Hardware and Software Supply, Commissioning Installation and Costs – One time</i></b>	<b><i>418,060.59</i></b>
<b><i>Recurrent costs related to Hardware and Software Maintenance and Support – For 5 years</i></b>	<b><i>18,837.11</i></b>
<b><i>Total Training Costs – One time</i></b>	<b><i>93,556.52</i></b>
<b><i>Grand Total Cost in USD</i></b>	<b><i>530,454.22</i></b>

***Kindly acknowledge receipt of this letter and avail to us the draft contract document for our perusal and submit 10% performance bond."***

Attached to this letter of award, the Board observes that the Procuring Entity further issued a local purchase order, dated 13<sup>th</sup> February 2020 signed by the Managing Director of the Procuring Entity, one Anne Karanja, with the following particulars: -

***"Supplier***

***The Copy Cat Limited***

***P.O. Box 49872-00100***

***Nairobi Kenya***

***[muinde@copycatltd.com](mailto:muinde@copycatltd.com)***

***(0+2) 540-2053 Ext. 4008***

<b><i>Item Number</i></b>	<b><i>DESCRIPTION</i></b>	<b><i>Unit</i></b>	<b><i>QTY</i></b>	<b><i>Unit Price</i></b>	<b><i>Total Price</i></b>
	<b><i>Supply of Services and Software, Commissioning and INSTA</i></b>	<b><i>Each</i></b>	<b><i>6.0</i></b>	<b><i>USD 60,066.17</i></b>	<b><i>USD 360,397.02</i></b>
	<b><i>Total/Training Costs</i></b>	<b><i>Each</i></b>	<b><i>1.0</i></b>	<b><i>USD 80,652.17</i></b>	<b><i>USD 80,652.17</i></b>
				<b><i>Subtotal</i></b>	<b><i>USD 441,049.19</i></b>
				<b><i>Tax</i></b>	<b><i>USD 70,568.00</i></b>
				<b><i>Order Total</i></b>	<b><i>USD 511,617.19</i></b>

***Total Amount***

***Five Hundred Eleven Thousand Six Hundred Seventeen***

***Terms of Payments: 30 days from Receipt of Invoice***

***Please attach a copy of this Order to the Delivery Note"***

The Board observes that the Procuring Entity through its letter of award dated 10<sup>th</sup> February 2020, instructed the Applicant to acknowledge receipt of the letter of award of the subject tender at a consideration of USD 530,454.22.

Further, the Procuring Entity requested the Applicant to avail to it a draft contract for its perusal pursuant to Clause 11.7.4 (g) Comprehensive Support of the Detailed Evaluation Criteria on page 76 of the Tender Document which reads as follows: -

***"Contract period will be Five years (Provide a draft contract)"***

Notably, a sample of a draft contract and its contents thereof, are provided on page 31 to 45 of the Procuring Entity's Tender Document.

However, the Board observes from the Procuring Entity's confidential file that there is no proof of acknowledgement of receipt by the Applicant of the Procuring Entity's letter of award dated 10<sup>th</sup> February 2020 or any draft contract for the Procuring Entity's further action.

This notwithstanding, the Board observes a copy of a letter annexed to the Applicant's Request for Review application, issued by the Managing Director of the Applicant and addressed to the Managing Director of the Procuring Entity, dated 27<sup>th</sup> February 2020, confirming and acknowledging receipt of the award letter and corresponding LPO for the subject tender.

Further, the Applicant annexed to its Request for Review application, a copy of a document titled 'Statement of Work (SOW) For Postbank Installation, Commissioning and Support of Servers'.

The Board examined the said document and observes from its Introduction therein, the purpose of the document which reads as follows: -

***"The To-BE Build (SOW) Document provides the project details for the Postbank Bank. This document is prepared in reference of the Request sent by the client, the proposal sent by TCCL and other referencing documents such as the PO.***

***The purpose of this document is to define the following aspects of the project: -***

- 1. Document all requirements and objectives that have been brainstormed in all previous documents and meetings***
- 2. Align the client requirements with the "suppliers" deliverables***
- 3. The deliverables which will be produced by the project and the quality criteria which will support these deliverables***
- 4. The project staff***
- 5. The project governance process that will be followed"***

Further, the Board observes on the last page of the said document under the heading 'Document Approvals' that the same was signed and witnessed by representatives of the Applicant on 6<sup>th</sup> May 2020 and was further signed and witnessed by representatives of the Procuring Entity on 29<sup>th</sup> May 2020.

The question that now arises is, what is a 'Statement of Work'?

The **Project Management Body of Knowledge (PMBOK Guide) (Sixth Edition), 2017**, defines the term 'Statement of Work' as follows: -

***"A narrative description of products, services, or results to be delivered by the project"***

A Statement of Work is therefore a technical work description of the products, services or results to be delivered in a project.

Notably, a Statement of Work is ordinarily submitted to the Procuring Entity as part of a bidder's tender document or technical proposal in a Request for Proposals Procurement and may or may not be included as part of the contract document.

With this definition in mind, and having established that a contract is an agreement between two parties that must be reduced into writing and consists of an offer, acceptance and lawful consideration, it is evident that the Statement of Work signed by both the Applicant and the Procuring Entity cannot be construed on its own merit to be a contract in the subject procurement proceedings.

As noted hereinbefore, a sample of a draft contract was provided on page 31 to 45 of the Procuring Entity's Tender Document which is clearly distinguishable from the Statement of Work executed between the Procuring Entity and the Applicant.

The Statement of Work executed by both the Applicant and the Procuring Entity merely outlines the technical requirements and deliverables to be produced under the subject tender but does not constitute a contract for provision of the said services between the two parties noting that the same outlines only one party's (the Applicant's)

obligations with respect to the subject tender and further, no lawful consideration is provided therein for provision of the subject services.

It is therefore the finding of this Board that no contract with respect to the subject tender was executed between the Procuring Entity and the Applicant in accordance with section 135 (3) of the Act.

The Board will now proceed to the second jurisdictional issue framed for determination.

Termination of procurement and asset disposal proceedings is governed by section 63 of the Act. Further, if such termination meets the requirements of section 63 of the Act, the jurisdiction of this Board is ousted pursuant to section 167 (4) (b) of the Act as cited hereinbefore.

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 High 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, section 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the jurisdiction of the Review Board. That question can be answered by a close scrutiny of section 36 (6) of the said Act which provides: -***

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

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

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

***It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the***



***said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures.***

***To illustrate the point, the failure by the 2<sup>nd</sup> 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 High Court in the Selex Sistemi Integrati Case held that this Board (as was constituted then) 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 pre-condition that first needs to be satisfied in the said sub-section 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 High 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 tender in accordance with the 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.

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.**

The Procuring Entity relied on section 63 (1) (b) of the Act to support its position that it terminated the subject procurement process due to budgetary constraints resulting from fluctuation of the USD, noting that the Applicant was awarded the subject tender at its quoted tender sum of USD 530,454.22. The Procuring Entity contended that when financial evaluation in the subject tender was carried out, the exchange rate used was 1 USD exchanging for Kshs. 103.00/-. However, its Evaluation Committee failed to factor in the exchange rate risk when making a recommendation for award of the subject tender and thus a higher exchange rate would mean that the actual amount payable to the Applicant would be higher.

In this regard therefore, it is the Procuring Entity's position that if it continues to engage the Applicant in the provision of the services procured for, the Procuring Entity may not be able to pay for the

services rendered due to the absence of an approved budget allocation for the subject services.

On its part, the Applicant alleged in paragraph 13 of its written submissions that, if the budgetary provision for the subject tender is inadequate as alleged by the Procuring Entity, then such inadequacy can only be attributed to the 1<sup>st</sup> Respondent's failure to ascertain to its satisfaction that there is an adequate budget in place to undertake the subject procurement process prior to its initiation of the same and the Procuring Entity is thereby in breach of section 53 (9) of the Act.

Having considered the foregoing averments, the Board studied the Procuring Entity's confidential file and observes there is no documentation provided pertaining to termination of the subject procurement process.

However, the Board observes a letter dated 11<sup>th</sup> September 2020 annexed to the Applicant's Request for Review Application, in the Procuring Entity's Letter Head, addressed to the Managing Director of the Applicant, issued and signed by the Managing Director of the Procuring Entity, one Raphael Lekoolool, which reads as follows: -

**"TERMINATION OF SERVICES (TENDER FOR SUPPLY AND INSTALLATION, COMMISSIONING AND MAINTENANCE OF ENTERPRISE SERVERS WITH REQUISITE SOFTWARE)**

***Reference is made to the above matter and the award letter dated 10<sup>th</sup> February 2020.***

***As mutually agreed, and discussed between yourselves and the undersigned, we write to confirm that we will no longer require your services for Supply, Installation, Commissioning and Maintenance of Enterprise Servers with requisite software.***

***Please note that procurement of the Enterprise Servers will be re-tendered in the near future.***

***Kindly acknowledge receipt of this letter.”***

The Applicant further annexed to its Request for Review Application, its Advocate's response dated 6<sup>th</sup> October 2020, challenging the termination of the contract referenced in the letter cited hereinbefore from the Procuring Entity, following the Applicant's performance of its obligations therein to the satisfaction of the Procuring Entity.

Vide a letter dated 13<sup>th</sup> October 2020 addressed to the Applicant's Advocates, the Procuring Entity's Managing Director, one Raphael Lekool responded to the Applicant's letter dated 6<sup>th</sup> October 2020 as follows: -

***"...Your client was indeed awarded a tender for the supply, installation, commissioning and maintenance of enterprise server with requisite software on 10<sup>th</sup> February 2020. After the award, your client was requested to submit a draft contract for the bank's review to confirm that the bank was agreeable with the terms of the contract and thereafter sign off the contract before performing any obligation whatsoever under the contract. We were taken aback when your client started to perform obligations of the unsigned contract before the terms of the contract were agreed between the bank and your client and the contract signed off.***

***The bank also conducted an independent audit which revealed that the process through which your client was awarded the abovementioned tender was marred with irregularities more details of this are well within your clients' knowledge.***

***We have held various meetings with your client during which we briefed your client of some of the irregularities and agreed to cancel the tender which we did vide our letter dated 11<sup>th</sup> September 2020.***

***Note that we are not in any breach as no contract was signed between the bank and your client..."***



From the foregoing correspondence, the Board notes, the Procuring Entity notified the Applicant of its termination of the subject services as provided by the Applicant and not termination of the subject procurement proceedings. Further, the Procuring Entity informed the Applicant that procurement of the subject services would be re-tendered in the near future.

The Board having established that no contract was executed between the Procuring Entity and the Applicant, it therefore follows that it was not possible for the Procuring Entity to terminate the services provided by the Applicant, in the absence of a contract executed by both parties, noting that any services to be provided under the subject tender ought to be pegged on a valid contract executed between the two parties.

Alternatively, if it was indeed the intention of the Procuring Entity in its letter dated 11<sup>th</sup> September 2020 to notify the Applicant of its termination of the subject procurement process, such termination ought to have been undertaken in accordance with section 63 of the Act.

The Board observes that even though an accounting officer may exercise its discretion under section 63 (1) of the Act to terminate a procurement process, such discretion must be exercised in accordance with the substantive and 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, for one, section 63 (1) of the Act provides that a procuring entity may terminate procurement or asset disposal proceedings at any time, prior to notification of tender award. Further, a procuring entity may only terminate procurement proceedings where any of the reasons cited in section 63 (1) of the Act applies, as cited hereinbefore.

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 a tender specified in section 63 (2), (3) and (4) of the Act. Section 63 (2) and (3) of the Act gives the Procuring Entity an obligation to submit a written report on the termination to the Public

Procurement Regulatory Authority (hereinafter referred to as “the Authority”) within fourteen days.

It is also worth noting that, section 63 (4) of the Act requires the accounting officer of a procuring entity to notify all tenderers of the termination within fourteen days of termination with reasons for the said termination.

Turning to the instant case, the Board observes that the Procuring Entity’s letter of termination dated 11<sup>th</sup> September 2020 was issued to the Applicant after notification of award of the subject tender, contrary to section 63 (1) of Act, which requires termination of procurement proceedings to be undertaken prior to notification of award.

More so, the Procuring Entity in its letter dated 11<sup>th</sup> September 2020, did not provide a reason(s) for termination of the subject tender as required under section 63 (4) of the Act. This letter therefore does not amount to a notification of termination of a tender as envisaged under section 63 (4) of the Act.

Upon examination of the Procuring Entity’s confidential file with respect to the subject tender, the Board notes that there is no record of any notifications issued to all bidders who participated in the subject procurement process informing them of the termination of the subject

tender and the reasons thereof, in accordance with section 63 (4) of the Act.

Moreover, there is no report on the termination of the subject procurement proceedings therein addressed to the Director General of the Authority.

However, the Board observes from paragraph 15, 16 and 17 of the Procuring Entity's Affidavit that the Procuring Entity was forced to cancel the tender due to budgetary constraints resulting from fluctuation of the USD. In paragraph 17 of its Replying Affidavit, the Accounting Officer of the Procuring Entity, one Raphael Lekoolool stated as follows: -

***"THAT if we continue engaging the Applicant in the provision of the services procured for, we may not be able to pay for the services rendered as we do not have an approved budget allocation for the said services.***

At this juncture, the Board deems it necessary to first address its mind on the responsibilities of an accounting officer of a procuring entity under section 44 (1) and (2) (a) of the Act which provides as follows: -

***"(1) An accounting officer of a public entity shall be primarily responsible for ensuring that the public entity complies with the Act.***

***(2) In the performance of the responsibility under subsection (1), an accounting officer shall—***

***(a) ensure that procurements of goods, works and services of the public entity are within approved budget of that entity”***

An Accounting Officer has the primary responsibility of ensuring a procuring entity complies with the provisions of the Act. In doing so, one of the obligations vested upon such accounting officer is to ensure that procurements of goods, works and services of a public entity are within approved budget of that entity. Section 53 of the Act further provides that: -

***"(1) All procurement by State organs and public entities are subject to the rules and principles of this Act.***

***(2) An accounting officer shall prepare an annual procurement plan which is realistic in a format set out in the Regulations within the approved budget prior to commencement of each financial year as part of the annual budget preparation process.***

***(3) .....***

***(4) .....***

***(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) .....

(7) .....

**(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"***

Having considered the foregoing provisions, the Board notes that prior to commencement of each financial year, an accounting officer ought to prepare an annual procurement plan which is realistic and within the approved budget. Furthermore, an accounting officer can only commence any procurement proceedings if satisfied that sufficient funds are available to meet the obligations of the resulting contract and are reflected in its approved budget estimates. This means that, the Accounting Officer of a Procuring Entity is required by the Act to commence a procurement process only if he/she is satisfied that sufficient funds are available for the procurement process as reflected in the Procuring Entity's approved budget.

Turning to the instant case, the Board observes that despite the Procuring Entity's averment that it was forced to cancel the tender due

to budgetary constraints, it submitted no evidence before this Board to substantiate its position.

However, the Board observes from the Professional Opinion dated 3<sup>rd</sup> February 2020 the following statement on page 11 therein: -

***"The budget for Supply, Installation, Commissioning and Maintenance of Enterprise Servers with Requisite Software will be sourced from 2020 budget which is Kshs 45m for ongoing projects."***

From the above excerpt, the Board observes that according to the Acting Manager, Procurement and Supplies, one Joan Kimosop, the budget for the subject tender was to be sourced from the 2020 budget which is Kshs 45m for ongoing projects.

This notwithstanding, the Procuring Entity provided no evidence in support of this position and further no evidence demonstrating whether the Kshs. 45 million as stated in its Professional Opinion dated 3<sup>rd</sup> February 2020 would be utilized solely to procure the subject services or whether this Kshs 45 million would also be utilized for other ongoing projects in that financial year.

Notably, the Acting Manager, Procurement and Supplies in her Professional Opinion dated 3<sup>rd</sup> February 2020, confirmed that the evaluation process was conducted in compliance with the evaluation criteria set out in the Tender Document and concurred with the

Evaluation Committee's recommendation of award to the Applicant at its quoted tender sum of USD 530,454.22/-, whilst noting that the approved budget for the subject tender would be sourced from the 2020 budget which is Kshs. 45 million for ongoing projects.

It is also worth noting, that the contract period under the subject tender as provided in Clause 11.7.4 (g) Comprehensive Support of the Detailed Evaluation Criteria on page 76 of the Tender Document is for a period of five years. It therefore follows that the budget for the entire subject tender need not emanate from the budget of one financial year, but may be spread out over five financial years or as may be determined by the Procuring Entity.

In essence, the Procuring Entity did not provide any evidence to support its termination of the subject procurement process on the basis of inadequate budgetary allocation.

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

The requirement of real and tangible evidence before terminating a procurement process due to inadequate budgetary allocation supports the provision of Article 47 of the Constitution which states that: -



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

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

It is therefore the Board's finding that no real and tangible evidence has been adduced by the Procuring Entity to prove termination of the subject tender on the ground of inadequate budgetary allocation meets the threshold under section 63 (1) of the Act.

The Board also considered the Procuring Entity's contention that it was forced to cancel the tender due to budgetary constraints resulting from fluctuation of the USD.

The Board studied the Procuring Entity's Tender Document and observes Clause 3.3 Quoted Currency of Section A 'Request for Proposal Information & Completion Guidelines' on page 10 therein which states as follows: -

***"All monetary values should be in Kenya Shillings and inclusive of VAT and any other taxes as applicable"***

Clause 7.3.4 Bid Currency of Section 7 Instructions to Bidders on page 24 of the Tender Document also provides as follows: -

***"Tenders shall be priced in Kenya Shillings"***

Further, Note 1 (e) of Clause 6.5 Technical and Financial Evaluation Criteria of the Evaluation Criteria on page 19 of the Tender Document provides as follows: -

***"The Financial Evaluation shall be determined by:***

***a) .....***

***b) .....***

***c) .....***

***d) .....***

***e) Converting all tenders to the same currency..."***

**[Emphasis by Board]**

Accordingly, even though bidders were required to price their tenders in Kenya Shillings inclusive of VAT and any other taxes as applicable, the Procuring Entity's Evaluation Committee was required to convert all tenders to the same currency, implying that tenders received which were not priced in Kenya Shillings would be converted to Kenya Shillings at the Financial Evaluation Stage.

With this in mind, the Board examined the Applicant's original financial proposal which forms part of the Procuring Entity's confidential file in the

subject tender and observes on page 14 thereof that the Applicant quoted a tender price in US Dollars in the amount of USD 530,454.22. Further, on page 15 of its original financial proposal, the Applicant stated as follows in Item No. 5 of its Terms & Conditions: -

**"Quoted in US DOLLARS: If the payment is in Kenya Shillings, the CBK mean rate at the point on payment will apply."**

The Board examined the Procuring Entity's Evaluation report signed on 3<sup>rd</sup> February 2020 and observes that three bidders qualified for Financial Evaluation, with the Applicant as the only bidder whose tender sum was quoted in USD and not in Kenya Shillings. The Board observes that the Procuring Entity's Evaluation Committee proceeded with Financial Evaluation of the three financial proposals and upon conclusion of the same determined that the Applicant was the lowest responsive bidder at its total tender cost of USD 530,454.22 VAT Inclusive.

Firstly, the Board notes that the subject tender is a Request for Proposals Procurement.

Section 116 of the Act provides as follows: -

***"(1) An accounting officer of a procuring entity may use a request for proposals for a procurement if—***

***(a) the procurement is of services or a combination of goods and services; and***

***(b) the services to be procured are advisory or otherwise of a predominately intellectual nature.***

***(2) Subject to any prescribed restrictions, a procuring entity may use a request for proposals in combination with other methods of procurement under this Act."***

Accordingly, a request for proposals is an alternative procurement procedure or a method of procurement which may be employed by a procuring entity in two instances: -

a) where a procurement is of services or a combination of goods and services; and

(b) where the services to be procured are advisory or otherwise of a predominantly intellectual nature.

In accordance with section 118 of the Act, a procuring entity who employs the request for proposals method of procurement may—

***"(a) request for proposals through advertisement;***

***(b) invite expression of interests or utilize the register provided for under section 57 of this Act.***

***(2) The accounting officer of a procuring entity shall invite proposals from only the persons who have been shortlisted as qualified to submit their tenders within a period as prescribed."***

The Board observes, a procuring entity may request for proposals through an advertisement or alternatively request for proposals from its list of registered suppliers as provided under section 57 of the Act.

Where a procuring entity does not have a list of registered suppliers, it may invite expressions of interests in order to shortlist persons qualified to submit proposals. Further, a procuring entity may also opt to invite proposals from persons shortlisted as qualified to submit their tenders within a period as prescribed.

Once a procuring entity receives proposals, it proceeds to evaluate the proposals received in accordance with section 124 of the Act which outlines various methods for evaluation of request for proposals.

The successful proposal according to section 127 of the Act shall be the proposal with ***“the highest score determined by an accounting officer in accordance with the procedure and criteria set out under section 86 of this Act.”***

Notably, section 86 (1) (b) of the Act provides that a successful tender with respect to a request for proposal shall be: -

***“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”***

This means that the successful or responsive proposal shall be the one with the highest score determined by combining for each proposal the

scores assigned to the technical and financial proposals in accordance with the procedures and criteria set out in the request for proposals unless there is only one proposal at the Financial Evaluation Stage.

Turning to the instant case, the Board observes that according to the Procuring Entity's Tender Document, the successful proposal shall be determined and selected using the formulae as outlined in Clause 6.6.6 of the Evaluation Criteria on page 20 of the Tender Document which reads as follows: -

***"The formulae for determining the financial score (SF) to the bidder shall be as follows:***

***Sf = 100 X FM/F where Sf is the financial score; Fm is the lowest fees quoted and F is the price of the proposal under consideration."***

Clause 6.67 of the Evaluation Criteria on page 20 of the Tender Document provides as follows: -

***"The lowest fees quoted will be allocated the maximum score of 100.***

***The bidders' proposals will be ranked according to their combined technical and financial scores. Where combined technical score (S<sub>t</sub>) and financial score (S<sub>f</sub>) using the weights explained below: -***

***S is the total combined scores of technical and financial scores***

***S<sub>t</sub> is the technical score, S<sub>f</sub> is the financial score, T is the weight given to the technical proposal and P is the weight given to the financial proposal***

***Note P + T will be equal to 100%***

Further, Clause 6.6.8 of the Evaluation Criteria on page 20 of the Tender Document provides as follows

***"The individual bidder achieving the highest combined technical and financial score will be recommended for award."***

In view of the foregoing clauses, each proposal received by the Procuring Entity, subject to having been found responsive at the Mandatory Evaluation Stage and the Technical Evaluation Stage, shall be ranked according to its combined technical and financial scores and the firm/proposal achieving the highest combined technical and financial scores would be recommended for award.

The Board examined the Procuring Entity's Evaluation Report signed on 3<sup>rd</sup> February 2020 and observes on page 9 thereof, that three bidders, including the Applicant, were found technically responsive and qualified for the Financial Evaluation Stage. Further, that the Evaluation

Committee combined the technical and financial scores for the three bidders as follows: -

<b>Bidder Nos</b>	<b>Firm</b>	<b>Technical Evaluation Scores (60%)</b>	<b>Financial Evaluation Scores (40%)</b>	<b>Total Scores (100%)</b>	<b>Remarks</b>
5	The Copy Cat Limited	57%	40%	97%	Lowest bidder
4	Symphony Technologies Limited	60%	32%	92%	2 <sup>nd</sup> Lowest bidder
3	Trans Business Machines Limited	60%	27%	87%	3 <sup>rd</sup> Lowest Bidder

However, upon conclusion of Financial Evaluation, the Evaluation Committee proceeded to recommend award of the subject tender to the Applicant for being the 'lowest bidder'.

As explained hereinbefore, a recommendation of award in a Request for Proposals procurement ought to be made to the bidder with the 'highest combined technical and financial score' and not the 'lowest bidder'.

Notably, from the table cited hereinbefore, the Applicant did indeed have the highest combined technical and financial score and thus should have been identified as the bidder with the 'highest score' and not the 'lowest bidder'.

Secondly, the Board observes that the Evaluation Committee converted the Applicant's bid from USD to Kenya Shillings in order to undertake a



comparison of prices of the three bidders that qualified for Financial Evaluation as indicated in the table below as extracted from the Procuring Entity's Evaluation report signed on 3<sup>rd</sup> February 2020: -

<b>DESCRIPTION</b>	<b>Bidder No. 3 (Trans Business Machines Limited)</b>	<b>Bidder No. 4 (Symphony Technologies Limited)</b>	<b>Bidder No. 5 (The Copy Cat Limited)</b>
Total Hardware and Software Supply, Commissioning Installation and Costs – One time	Kshs 48,563,160.00	Kshs 31,740,347.85	Kshs 41,994,186.30
Recurrent costs related to Hardware and Software Maintenance and Support – For 5 years	Kshs 29,979,800.00	Kshs 15,523,031.40	Kshs 1,892,187.70
Total Training Costs – One time	Kshs 2,100,000.00	Kshs 12,056,194.40	Kshs 9,397,752.40
Any Other Costs (Please specify if any)	N/A	Kshs 8,659,769.37	N/A
<b>Total Cost</b>	<b>Kshs 80,642,960.00</b>	<b>Kshs 67,979,343.02</b>	<b>Kshs 53,284,126.40</b>

To determine the rate of conversion used by the Evaluation Committee, the Board divided Kenya Shillings 53,284,126.40/- by USD 530,454.22 to arrive at a conversion rate of 1 USD = Kshs. 100.38/- as at the point of evaluation.

However, from the Professional Opinion dated 3<sup>rd</sup> February 2020, the Acting Manager, Procurement and Supplies made the following remarks

on page 10 thereof with respect to the Financial Evaluation as conducted by the Procuring Entity's Evaluation Committee: -

***"i. The Copy Cat Limited had quoted using US Dollars and I converted to Kshs using the exchange rate for today which is 1 USD = Kshs 100.45. Their total quote was USD 530,454,22***

***ii. The bidder has indicated in the terms and conditions that the quote in US Dollars, if the payments is in Kenya Shillings the CBK Mean rate at the point on payment will apply."***

From the above excerpt, the Board observes that the Procuring Entity's Acting Manager Procurement and Supplies, applied the exchange rate as at the date of her overview of the subject procurement process in order to arrive at the Applicant's tender price in Kenya Shillings.

This prompted the Board to examine the Procuring Entity's Tender Document in order to determine whether a rate of conversion was provided therein for conversion of tenders received by the Procuring Entity under the subject tender, which were not priced in Kenya Shillings. The Board notes, no conversion rate was provided in the Procuring Entity's Tender Document.

At this point, the Board shall address the question what is a 'tender sum'?

The Act defines a “tender” under section 2 in the following terms: -

***“tender” means an offer in writing by a candidate to supply goods, services or works at a price; or to acquire or dispose stores, equipment or other assets at a price, pursuant to an invitation to tender, request for quotation or proposal by a procuring entity.***

Further, section 82 of the Act states that: -

***“The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity”***

Having compared the above provisions, the Board notes, in a procurement process, bidders submit a tender, that is, ***an offer in writing to supply goods, services or works at a price pursuant to a request for proposal by a procuring entity.***

In that offer, bidders quote a tender sum, i.e. the price at which they undertake to execute or implement the tender if found successful. Pursuant to section 82 of the Act, this tender sum, that is quoted in a bidder’s Form of Tender is absolute and final and is not subject to any correction, adjustment or amendment.

It is worth noting, that the Board has consistently held in its previous decisions that the tender sum is absolute and cannot be changed. In **PPARB Application No. 42 of 2017, Surestep Systems and Solutions Limited vs. Industrial and Commercial Development Corporation**, concurred with its decision in **PPARB Application No. 38 of 2019, Alfatech Contractors Limited vs. Kenya National Highways Authority**, where the Board stated the importance and the primacy of the form of tender in any tender process in the following words: -

***"The Board holds that the form of tender is the document which the offer is communicated to specified employer. It is the offer that the procuring entity would consider and either accept or reject. The Board finds that the form of tender is a very vital document which communicates every essential information based on which a contract is created. The provision of section 82 of the Act, are couched in mandatory terms and leaves no room for any other interpretation. The tender sum for the successful bidder as read out and as recorded at the tender opening was Kshs. 34,166,398.13/- and was not subject to any variation whatsoever pursuant to the prohibition contained in section 82 of the Act."***

In this regard therefore, the amount as quoted by the Applicant in its form of tender which was received by the Procuring Entity on the tender

submission deadline is absolute and final. It therefore follows that the rate of conversion applicable in this instance, is the rate of conversion as at the tender submission deadline. This means that the Applicant's tender sum or the amount payable to the Applicant in the event their proposal is successful will be the amount arrived at in Kenya Shillings using the rate of conversion as at the tender submission deadline thus eliminating the exchange/conversion risk or fluctuation of the USD as contended by the Procuring Entity.

In the instant review, the subject tender submission deadline was 19<sup>th</sup> December 2019. Accordingly, the rate of conversion of the Applicant's tender sum from USD to Kenya Shillings would be the rate applicable as at 19<sup>th</sup> December 2019.

The Board therefore finds that conversion risk or fluctuation of USD as contended by the Procuring Entity was not a sufficient reason to justify termination of the subject procurement process.

The Board would like to emphasize that procuring entities ought to view termination of procurement proceedings as a last resort considered only after all options available under the Act have been exhausted by the procuring entity.

In any procurement process, tax payers' money is used in order to provide goods, works and services for the benefit of the people of

Kenya. This is the second time that this tender has been floated by the Procuring Entity. Notably, time and public resources have been expended by the Procuring Entity in both procurement proceedings. Procurement processes should be conducted and subsequently concluded by procuring entities without undue delay, whilst using public resources responsibly for the public good.

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

In totality, the Board has established that no contract was executed between the Procuring Entity and the Applicant with respect to the subject tender in accordance with section 135 (3) of the Act. Further, the Procuring Entity failed to terminate the subject procurement process in accordance with section 63 of the Act rendering the said termination null and void.

In this regard therefore, the Board deems it fit to direct the Procuring Entity to proceed with the subject procurement process to its logical conclusion, taking into consideration the findings of the Board herein, the provisions of the Tender Document, the Act and the Constitution.

Accordingly, the Board finds that the Request for Review Application succeeds with respect to the following specific orders: -.

### **FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's Letter of Termination of Services with respect to Tender No. KPOSB/013/2019 For Supply, Installation, Commissioning and Maintenance of Enterprise Servers with Requisite Software (Retendered) dated 11<sup>th</sup> September 2020 addressed to the Applicant, be and is hereby cancelled and set aside.**
  
- 2. The Accounting Officer of the Procuring Entity is hereby directed to proceed with the subject procurement process to its logical conclusion, within fourteen (14) days from the date of this decision, taking into consideration the findings of the Board herein, the provisions of the Tender Document, the Act and the Constitution.**

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

**Dated at Nairobi this 16<sup>th</sup> Day of November 2020**

**CHAIRPERSON**

**PPARB**

**SECRETARY**

**PPARB**