

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 53/2020 OF 22<sup>ND</sup> APRIL 2020**

**BETWEEN**

**GEO DEVELOPMENT KENYA LIMITED.....APPLICANT**

**AND**

**THE PRINCIPAL SECRETARY/ACCOUNTING OFFICER,**

**MINISTRY OF AGRICULTURE,**

**LIVESTOCK, FISHERIES AND**

**COOPERATIVES, STATE DEPARTMENT**

**FOR CROP DEVELOPMENT &**

**AGRICULTURE RESEARCH.....RESPONDENT**

Review against the decision of the Principal Secretary of the Ministry of Agriculture, Livestock, Fisheries and Cooperatives, State Department for Crop Development & Agriculture Research with respect to Tender No. MOALF&C/SDCD&AR/R&I/RFP/24/2019-2020 for the Provision of Consultancy Services for Development of a Feasibility Study for the Proposed Lake Olbolossat Bio-Deposit Organic Fertilizer Extraction and Rehabilitation Project.

**BOARD MEMBERS**

- |                      |              |
|----------------------|--------------|
| 1. Ms. Faith Waigwa  | -Chairperson |
| 2. Dr. Joseph Gitari | -Member      |

3. Arch. Steven Oundo OGW

-Member

### **IN ATTENDANCE**

1. Mr. Phillip Okumu

-Holding brief for Secretary

### **BACKGROUND TO THE DECISION**

#### **The Bidding Process**

The Ministry of Agriculture, Livestock, Fisheries and Cooperatives, State Department for Crop Development and Agricultural Research (hereinafter referred to as "the Procuring Entity") advertised Tender No. MOALF&C/SDCD&AR/R&I/RFP/24/2019-2020 for the Provision of Consultancy Services for Development of a Feasibility Study for the Proposed Lake Olbolossat Bio-Deposit Organic Fertilizer Extraction and Rehabilitation Project (hereinafter referred to as "the subject tender") on 18<sup>th</sup> February 2020 in MyGov Publication Website ([www.mygov.go.ke](http://www.mygov.go.ke)) and also through its website [www.kilimo.go.ke](http://www.kilimo.go.ke) inviting sealed proposals from interested eligible bidders.

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

The Procuring Entity received a total of three (3) proposals by the submission deadline of 3<sup>rd</sup> March 2020 and the same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders and their representatives.

The following bidders submitted their proposals: -

SN	Consultants Name	Address
1.	JKUAT ENTERPRISES LTD	P.O. Box 61000 - 00200 Nairobi
2.	GEODEV Kenya Ltd	P.O. Box 14066 - 00100 Nairobi <a href="mailto:geodevkenya@yahoo.com">geodevkenya@yahoo.com</a>

## Evaluation of Bids

An Evaluation Committee appointed by the Principal Secretary of the Procuring Entity evaluated bids in the following stages:-

- i. Preliminary Evaluation (Mandatory Requirements);
- ii. Technical Evaluation

### 1. Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee evaluated the bids received by the Procuring Entity against the mandatory requirements as outlined in the Tender Document as follows: -

MANDATORY REQUIREMENTS	Bidder 1	Remarks bidder 1	Bidder 2	Remarks bidder 2
Certificate of registration/certificate of incorporation	Yes	Responsive	Yes	Responsive
Valid PIN Certificate	Yes	Responsive	Yes	Responsive
Valid KRA Tax Compliance certificate.	Yes	Responsive	Yes	Responsive
Confidential Business Questionnaire fully filled and signed	Yes	Responsive	Yes	Responsive
Statement of Declaration fully filled and signed	Yes	Responsive	Yes	Responsive
Financial Proposal Submission Form duly completed signed, and stamped.		This form is not available in the bid document but should be in the		This form is not available in the bid document but should be in the



<b>MANDATORY REQUIREMENTS</b>	<b>Bidder 1</b>	<b>Remarks bidder 1</b>	<b>Bidder 2</b>	<b>Remarks bidder 2</b>
		financial proposal		financial proposal
Tender validity for the period required.	Yes	Responsive	Yes	Responsive
Indication in the technical Proposal that the bid bond is provided in the Financial Proposal	Yes	Responsive	Yes	Responsive
Audited financial statement for the last three financial (3) years	Yes	Responsive	Yes	Responsive
Should have a single business permit	Yes	Responsive	Yes	Responsive
The current workload status should be indicated	Yes	Responsive	Yes	Responsive
The lead consultant should be the one submitting the proposal documents	Yes	Responsive	Yes	Responsive
Valid practicing certificates in their field of assignment	No	Non responsive <i>Note 1</i>	Yes	Responsive
List of three similar projects undertaken in the last three(3) years and proof of the same	No	Non responsive <i>Note 2</i>	Yes	Responsive
Company profile	Yes	Responsive	Yes	Responsive
Other professionals should be registered with the respective professional bodies	No	Non responsive <i>Note 3</i>	Yes	Responsive
Lead consultant to be able to coordinate Geological/Hydrological/Economic, Social and Environmental feasibility study.	Yes	Responsive	Yes	Responsive

The Evaluation Committee noted from Bidder 1's proposal that seven (7) of the ten (10) professionals did not attach their practicing certificates in their field of assignment, only two (2) of the listed similar projects were found to be relevant and seven (7) of the ten (10) professionals did not attach their practicing certificates from their respective professional bodies.



Upon conclusion of Preliminary Evaluation, **Bidder No.1** was found non-responsive and could therefore not proceed to the second stage of technical evaluation. **Bidder No.2** was found to have met all the preliminary requirements and thus qualified for technical evaluation.

## 2. Technical Evaluation

At this stage of evaluation, the Evaluation Committee evaluated Bidder No.2 against the technical criteria as outlined below: -

Criteria	Details of criteria description	Maximum Score	Score
<b>Criteria A: Specific experience of the consultant related to the assignment</b>		<b>24</b>	<b>12</b>
a.	Shall have conducted at least 3 geological surveys/ assignments within the last 3 years	6	6
b.	Shall have conducted at least 3 hydrological surveys/assignments within the last 3 years	6	0
c.	Shall have conducted at least 3 efficacy trials on performance of organic fertilizers in agricultural productivity within the last 5 years	6	0
D	Shall have conducted at least 3 Technical and Economic feasibility studies within the last 5 years	6	6
<b>Criteria B: Adequacy of the proposed work plan and methodology in responding to the terms of reference</b>		<b>40</b>	<b>40</b>
a.	The firm must submit a detailed methodology and procedures for the execution of the stipulated tasks and in accordance with Annex 3	20	20
b.	The firm must submit a detailed work plan with clear timelines for the execution of the stipulated tasks	20	20
<b>Criteria C: Qualifications and competences of the key staff for the assignment</b>		<b>31</b>	<b>29</b>
<b>Team leader/Lead consultant</b>		<b>16</b>	<b>14</b>
a.	Post graduate qualification in Mining Engineering or any other equivalent related qualifications	8	8
b.	The Team Leader must have undertaken at least five (5) geological or hydrological	4	4

	assignments or related studies during the last 5 years		
c.	The Team Leader must have project management experience	4	2
<b>Support staff: A Team of three (3)</b>		15	15
a.	Support staff should consist of a team having minimum qualifications of a Bachelor's degree in geology or hydrological studies or related studies and;	10	10
b.	Information Technology (IT) with bias in water engineering or mining engineering or related studies.	5	5
<b>Criteria D: Suitability to the transfer of technology (training) and granting of access rights</b>		<b>5</b>	<b>0</b>
a.	The bidder must demonstrate how they shall assist the Ministry to develop capacity on the use of bio deposit fertilizers for agricultural production	5	0
<b>TOTAL</b>		<b>100</b>	<b>81</b>

Upon conclusion of technical evaluation, the Evaluation Committee recommended M/s Geo Development Kenya Limited to proceed to the next stage of financial evaluation after obtaining a score of 81% in the technical evaluation.

### **Professional Opinion**

In a Professional Opinion dated 30<sup>th</sup> March 2020, the Head of Procurement Function stated as follows: -

#### **"Part B: Legal and Practical Aspects of the Tender**

The Evaluation Committee carried out the evaluation of the above tender and recommended GeoDev Kenya Limited of P.O. Box 14066-00100 Nairobi to proceed to the next stage of financial evaluation after obtaining a score of 81% in the technical evaluation. The other bidder, JKUAT Enterprises Ltd P.O. Box



62000-00200 Nairobi failed at the preliminary evaluation stage due to lack of the following; valid practising certificate in their field of assignment, list of 3 similar projects undertaken in the last 3 years and proof of the same and lack of other professionals registered with the respective professional bodies.

"Since only one firm qualified for the opening of the financial bid this procurement proceeding is not competitive and hence this implies that the State Department will not get value for money. It is also important to note that the application of the Quality and Cost Based Selection method has been rendered null and void; hence we cannot ascertain whether or not we shall realize value for money. If we proceed with this procurement proceeding, we shall be in breach of sections 3(d)(e)(g)(h) of the Public Procurement and Asset Disposal Act 2015.

**"Part C: Recommendation to the Accounting Officer for Approval/Rejection**

We recommend that this procurement proceeding be terminated in accordance with Section 63(1)(e), (2), (3) and (4) of the Act, to be retendered or conducted by the Government in accordance with the provisions of the Public Procurement and Asset Disposal Act 2015 and its Regulations. The financial proposals to be returned to the bidders unopened."

The Accounting Officer signified his approval of the Head of Procurement's Professional Opinion on 31<sup>st</sup> March 2020.



## **Notification of Termination**

In letters dated 8<sup>th</sup> April 2020, the Procuring Entity notified bidders who participated in the subject tender that the same was terminated pursuant to section 63 (1) (e) (2) (3) (4) of the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act").

## **THE REQUEST FOR REVIEW NO. 53 OF 2020**

M/s Geo Development Kenya Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated and filed on 22<sup>nd</sup> April 2020 (hereinafter referred to as "the Request for Review") together with a Witness Statement dated and filed on even date through the firm of Nyamweya Mamboleo Advocates.

In response, the Procuring Entity, on its behalf, lodged a Notice of Preliminary Objection and Response to the Request for Review dated and filed on 4<sup>th</sup> May 2020.

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

- i. An order annulling the Respondent's decision terminating the procurement proceedings in relation to Tender No. MOALF&C/SDCD&AR/R&I/RFP/24/2019-2020 for the Provision of Consultancy Services for Development of a Feasibility Study for the Proposed Lake Olbolossat Bio-***

***Deposit Organic Fertilizer Extraction and Rehabilitation Project;***

- ii. An order directing the Respondent to notify the Applicant of the scores it was awarded at Tender Evaluation Stage;***
- iii. An order directing the Respondent to progress the tender proceedings to financial evaluation;***
- iv. An order directing the Respondent to pay the costs of this application;***
- v. Any other order that the Board may deem fit and just to grant in the circumstances.***

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 the 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 the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions.

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

In compliance with the directions of the Board, the Applicant lodged a Response to the Procuring Entity's Notice of Preliminary Objection and Response dated and filed on 8<sup>th</sup> April 2020 and Written Submissions also dated and filed on 8<sup>th</sup> April 2020. The Respondent did not file any written submissions.

### **BOARD'S DECISION**

The Board has considered each of the parties' pleadings together with the confidential documents submitted to it pursuant to Section 67 (3) (e) of the Act and finds that the following issues call for determination:-

- I. Whether the Procuring Entity terminated the subject procurement process in accordance with section 63 read together with section 3 of the Act, the Fair Administrative Actions Act, 2015 and Articles 10 and 47 of the Constitution, thereby ousting the jurisdiction of the Board.**



Depending on the determination of the above issue:-

**II. What are the appropriate orders to issue in the circumstances?**

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

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

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

The Board observes that the Procuring Entity raised a Preliminary Objection to the Request for Review challenging the jurisdiction of this Board on the following ground:

***"The procurement proceeding which is the subject of this review was terminated by the Procuring Entity in accordance with section 93 of the Act. Therefore this matter is not subject to review as stipulated by section 167 (4) (b) of the Act. The Review Board has no***

***jurisdiction to hear this matter. We therefore request the Review Board to dismiss the application."***

Notably, the Procuring Entity in its Notice of Preliminary Objection stated that it terminated the subject procurement proceedings in accordance with section 93 of the Act which reads as follows: -

***"(1) Subject to provisions of subsection (2), an accounting officer of a procuring entity where applicable, may conduct a pre-qualification procedure as a basic procedure prior to adopting an alternative procurement method other than open tender for the purpose of identifying the best few qualified firms for the subject procurement.***

***(2) Pre-qualification shall be for complex and specialized goods, works and services.***

***(3) In conducting a pre-qualification procedure an accounting officer of a procuring entity shall publish an invitation notice to candidates to submit applications to be pre-qualified.***

***(4) The invitation referred to in paragraph (2) shall include—***

***(a) the name, address and contact details of the procuring entity;***

***(b) outline of the procurement requirement, including the nature and quantity of goods, works or services***

***and the location and timetable for delivery or performance of the contract;***

***(c) statement of the key requirements and criteria to pre-qualify;***

***(d) instructions on obtaining the pre-qualification documents, including any price payable and the language of the documents; and***

***(e) instructions on the location and deadline for submission of applications to pre-qualify;***

***(f) applicable preferences and reservations or any conditions arising from the related policy;***

***(g) declaration that it is open to bidders who meet the eligibility criteria; and***

***(h) requirement that only bidders with capacity to perform can apply.”***

The Board notes that section 93 of the Act addresses the pre-qualification method of procurement and does not deal with termination of procurement proceedings.

Noting this discrepancy, the Board examined the Procuring Entity's Response and observes in paragraph 3 therein that the Procuring Entity referred to its termination of the subject procurement proceedings in accordance with section 63 (1) (e) (2) (3) (4) of the Act . The Procuring Entity further referred to section 63 of the Act in its letter of notification of termination of the subject tender to the Applicant dated 8<sup>th</sup> April



2020. It is therefore possible to assume that it was the Procuring Entity's intention to indicate in its Notice of Preliminary Objection that it terminated the subject procurement proceedings in accordance with section 63 of the Act and not section 93 of the Act.

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 62 of this Act (i.e. section 63 of the 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 2<sup>nd</sup> Respondent to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether the termination met the threshold under the Act, before finding that it lacks jurisdiction to entertain the case before it, on the basis of a mere letter of termination furnished before it.*

The court in the *Selex Sistemi Integrati* case cited above, held that the Board has the duty to question whether a decision by a procuring entity terminating a tender meets the threshold of section 63 of the Act, and that this Board's jurisdiction is not ousted by the mere fact of the existence of a letter of notification terminating procurement proceedings.

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

It is therefore important for the Board to determine the legality, or lack thereof, of the Procuring Entity's decision terminating the subject tender, which determination can only be made by interrogating the reason cited for the impugned termination. It is only then, that a determination whether or not the Board has jurisdiction can be made.

A brief background to the Request for Review is that the Procuring Entity, through a Request for Proposals, invited interested and eligible tenderers to collect Tender Documents and submit their bids with respect to the subject tender. The said advertisement attracted a total of three (3) proposals, including the Applicant's, which were opened on 3<sup>rd</sup> March 2020.

The Procuring Entity appointed an evaluation committee that proceeded to evaluate the proposals as received. Upon conclusion of the Technical Stage of Evaluation, only one proposal qualified for financial evaluation. It was therefore the Procuring Entity's view that since only one firm qualified for the opening of the financial bids, the procurement proceeding was not competitive which implied that it would not get value for money.

On this basis, the Procuring Entity terminated the subject procurement proceedings in accordance with Section 63 (1) (e), (2), (3) and (4) of the Act and the Procuring Entity returned financial proposals to all bidders unopened.



On 21<sup>st</sup> April 2020, the Applicant received through email a letter from the Procuring Entity dated 8<sup>th</sup> April 2020 which read as follows: -

***"Reference is made to the above tender in which you participated.***

***This is to notify you that the procurement proceeding was terminated in accordance with section 63 (1) (e) (2) (3) (4) of the Public Procurement and Asset Disposal Act, 2015.***

***The reason for termination was lack of competitiveness as only 2 firms participated and only one qualified for the opening of the financial proposals. This implied that the State Department will not get value for money if we proceeded with this procurement proceeding.***

***Please find your financial proposal unopened. Thank you for participating in this procurement proceeding."***

Aggrieved, the Applicant moved this Board through this Request for Review application.

The Applicant contended that the Procuring Entity in its termination of the subject tender did not disclose the 'material governance issues

detected' in the procurement proceedings in accordance with section 63 (1) (e) of the Act in its letter of notification of termination to the Applicant. Further, the Procuring Entity's reason for termination of the subject tender, that is, that there was lack of competitiveness as only one proposal qualified for financial evaluation and that the Procuring Entity will not get 'value for money' if it proceeded with the procurement proceedings had no anchorage in any of the grounds for termination set out under section 63 (1) of the Act. On this basis therefore it was the Applicant's view that the Procuring Entity's termination of the subject tender was unlawful and thus null and void.

To support its submission, the Applicant in its Request for Review referred the Board to Articles 10 and 47 of the Constitution read together with section 3 of the Act to support its view that the foregoing provisions dictate that, procurement processes must be carried out in an efficient, lawful, reasonable and procedurally fair manner. In the Applicant's view, the Procuring Entity's termination of the procurement proceedings did not serve any public interest and was inimical to the efficiency required in any public procurement process.

On its part, the Procuring Entity in its Response contended that there was no provision of the Act or its attendant regulations that requires a procuring entity to disclose details of material governance issues. It submitted that it clearly indicated to bidders that the subject tender was terminated as a result of lack of adequate competition as value for money would not be realised in the subject procurement proceedings.

According to the Procuring Entity, it evaluated proposals received using the 'Quality and Cost Based Method' in accordance with section 124 (2) of the Act which takes into account the quality of the proposal and the cost of the services in the selection of a successful firm. However, this method of evaluation as stipulated under Clause 2.8.1.4 of the Request for Proposal Document became null and void once only one bidder qualified for financial evaluation. In the Procuring Entity's view, this caused the subject tender to become a direct procurement and since the conditions of section 103 and 104 of the Act could not be met, the Procuring Entity decided to terminate the procurement proceedings.

Moreover, the Procuring Entity brought to the attention of the Board that its budget of Kshs 64 million that had been set aside for the subject procurement proceedings had been re-allocated by Parliament as evidenced in the "*Supplementary Estimates II (Development Expenditure) for the year 2019-2020*" which document it attached to its Response.

The Board has considered submissions by both parties and in its determination of this issue, observes that the questions that arise in this regard is whether the Procuring Entity detected material governance issues to terminate the subject tender, whether the Procuring Entity's termination of the subject tender on the basis of lack of competitiveness amounted to a material governance issue in line with section 63 (1) (e)



of the Act and whether the Applicant was afforded specific and sufficient reasons for termination of the subject tender.

To begin with, section 63 of the Act is instructive in the manner in which a procuring entity may terminate a tender. It 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."***

According to this provision, a tender is terminated by an accounting officer who is mandated to terminate any procurement process 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, cited hereinbefore.

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". [Emphasis by the Board]***

Accordingly, a procuring entity invoking section 63 must put forward sufficient evidence to justify and support the ground of termination of the procurement process relied on.

The Board notes that section 63 (1) (e) of the Act, as cited hereinbefore stipulates that one of the grounds that a procuring entity may rely on to



justify its termination of a tender is that 'material governance issues have been detected.'

As to what amounts to issues of material governance, this Board first interpreted the word "governance" and how it relates to public procurement. The Cambridge Dictionary of English defines "governance" as:-

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

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

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

Governance and how it relates to public procurement is explained in the book ***"Public Procurement: International Cases and Commentary, (2012)*** edited by Louise Knight, as follows:-

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

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

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

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

***Article 227 (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective."***

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

Therefore, the Board observes that one may deduce the meaning of material governance in public procurement to mean; significant or important governance issues detected in a procurement process that negatively affect the capability of a procuring entity to guarantee compliance with principles of governance, leadership and integrity when

procuring for goods and services. Such material governance issues may emanate from malpractice during the procurement process by the bidders, or by the bidder while colluding with a procuring entity, or operational challenges attributed from policy decisions influencing a procuring entity's procurement process.

In this regard therefore material governance issues may also be occasioned in instances where a procuring entity overlooks certain key procedures in a procurement process either by mistake or deliberately and this omission or commission on the part of the procuring entity impugns the entire procurement process in question.

The question that now arises is whether the reasons advanced by the Procuring Entity to justify its termination of the subject tender amounted to material governance issues.

The Board examined the Procuring Entity's confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act and observes that in the Procuring Entity's Professional Opinion dated 30<sup>th</sup> March 2020, the Head of Procurement Function made the following remarks on page 2 and 3 of the said opinion: -

*"Part B: Legal and Practical Aspects of the Tender*

***The Evaluation Committee carried out the evaluation of the above tender and recommended GeoDev Kenya Limited of P.O. Box 14066-00100 Nairobi to proceed to the***



***next stage of financial evaluation after obtaining a score of 81% in the technical evaluation. The other bidder, JKUAT Enterprises Ltd P.O. Box 62000-00200 Nairobi failed at the preliminary evaluation stage due to lack of the following; valid practising certificate in their field of assignment, list of 3 similar projects undertaken in the last 3 years and proof of the same and lack of other professionals registered with the respective professional bodies.***

***Since only one firm qualified for the opening of the financial bid this procurement proceeding is not competitive and hence this implies that the State Department will not get value for money. It is also important to note that the application of the Quality and Cost Based Selection method has been rendered null and void; hence we cannot ascertain whether or not we shall realize value for money. If we proceed with this procurement proceeding, we shall be in breach of sections 3(d)(e)(g)(h) of the Public Procurement and Asset Disposal Act 2015.***

***Part C: Recommendation to the Accounting Officer for Approval/Rejection***

***We recommend that this procurement proceeding be terminated in accordance with Section 63(1) (e), (2), (3)***

***and (4) of the Act, to be retendered or conducted by the Government in accordance with the provisions of the Public Procurement and Asset Disposal Act 2015 and its Regulations. The financial proposals to be returned to the bidders unopened."***

From the above excerpt, the Board observes that the Procuring Entity upon conclusion of technical evaluation of bids, found that only one bid qualified for financial evaluation. It therefore found that the procurement proceeding was no longer competitive and that it would not get value for money as the 'Quality and Cost Based Selection Method of Evaluation' would not be applicable in the circumstances. The Procuring Entity therefore proceeded to terminate the procurement proceedings in accordance with section 63 (1) (e) of the Act.

At this juncture, the Board will first establish what is the Quality and Cost Based Selection Method of Evaluation in a Request for Proposals procurement?

The interpretation section of the Act defines procurement as: -

***"the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system"***

Accordingly, procurement is the acquisition of works, assets, services or goods by purchase, rental, lease, hire purchase, license, tenancy, franchise or by any other contractual means.

The Board studied section 91 of the Act which provides as follows: -

***"(1) Open tendering shall be the preferred procurement method for procurement of goods, works and services.***

***(2) The procuring entity may use an alternative procurement procedure only if that procedure is allowed and satisfies the conditions under this Act for use of that method.***

***(3) Despite sub-sections (1) and (2) open tendering shall be adopted for procurement of goods, works and services for the threshold prescribed in the respective national and county Regulations."***

Accordingly, procurement or the acquisition of works, assets, services or goods under the Act, shall be by open tendering. However, a procuring entity may use an alternative procurement procedure if that procedure is allowed and satisfies the conditions under this Act for use of that method.

Alternative procurement procedures that may be used by a procuring entity are stipulated under section 92 of the Act which provides as follows: -



***"Subject to this Act and prescribed provisions, an accounting officer of a procuring entity shall procure goods, works or services by a method which may include any of the following—***

- (a) open tender;***
- (b) two-stage tendering;***
- (c) design competition;***
- (d) restricted tendering;***
- (e) direct procurement;***
- (f) request for quotations;***
- (g) electronic reverse auction;***
- (h) low value procurement;***
- (i) force account;***
- (j) competitive negotiations;***
- (k) request for proposals;***
- (l) framework agreements; and***
- (m) any other procurement method and procedure as prescribed in regulations and described in the tender documents."***

From the above provision, the Board observes that one of the alternative procurement procedures that a procuring entity may employ includes a request for proposals.

In this regard, the Board studied section 116 of the Act which reads 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."***

Accordingly, 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. According to section 124 (1) and (2) of the Act,

***"(1) The Procuring Entity shall select Quality and Cost Based Selection (QCBS) method as the preferred method to be used to evaluate proposals and shall state the selection procedure in the Request for Proposals.***

***(2) For the purposes of subsection (1), "Quality and Cost Based Selection" method is a method that uses a competitive process that takes into account the quality of the proposal and the cost of the services in the selection of the successful firm."***

According to the above provision, the Quality and Cost Based Selection Method is the preferred method to be used to evaluate proposals and



shall be stated as the selection procedure in the request for proposals. Moreover, this selection procedure uses a competitive process that takes into account the quality of the proposal and the cost of the services in the selection of the successful firm or bidder.

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 (c) 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 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.

Turning to the circumstances of the case, the Board observes that the Procuring Entity, through a Request for Proposals, invited sealed

proposals for the provision of consultancy services for "***Development of a Feasibility Study for the Proposed Lake Olbolossat Bio-Deposit Organic Fertilizer Extraction and Rehabilitation Project.***"

The Board examined the Procuring Entity's Request for Proposals Document and observes that consultants were invited to submit a Technical and Financial Proposal in accordance with Clause 2.1.2 of Section II Information to Consultants on page 5 of the Request for Proposals Document.

The Board observes that the method of selection of proposals is indicated on page 10 of the Request for Proposals Document as follows:

-

***"Method of Selection***

***Quality Cost Based Selection Method (QCBS) shall be used to select the successful consultant from the shortlisted firms."***

According to the Procuring Entity's Request for Proposals Document, the successful proposal shall be determined and selected using the formulae as outlined under Clause 2.8.1.4 Public Opening and Evaluation of Financial Proposals of Section II Information to Consultants on page 14 of the Request for Proposals Document which reads as follows: -

***"The formulae for determining the Financial Score (Sf) shall, unless an alternative formulae is indicated in the Appendix "ITC", be as follows: -***

***Sf + 100 X  $\frac{Fm}{F}$  where Sf is the financial score; Fm is the lowest priced financial proposal and F is the price of the proposal under consideration. Proposals will be ranked according to their combined technical (St) and financial (Sf) scores using the weights (T=the weight given to the Technical Proposal; P= the weight given to the Financial Proposal; T + P = 1) indicated in the Appendix. The combined technical and financial score, S, is calculated as follows: - S = St x T % + Sf x P%. The firm achieving the highest combined technical and financial score will be invited for negotiations."***

In accordance with the above formulae, each proposal received by the Procuring Entity 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 invited for negotiations. Further, the weights to be assigned to each technical proposal and financial proposal shall be indicated in the Appendix of the Request for Proposals Document.

The Board examined the Appendix to the Information to Consultants and observes Clause 2.6.3 therein which reads as follows:

***"The minimum technical score required to pass 75%"***



Further Clause 2.7.1 of the Appendix to the Information to Consultants stipulates as follows: -

***"Alternative formula for determining the financial scores is the following N/A***

***The weights given to the Technical and Financial Proposals are:***

***TP = 80%***

***FP = 20%"***

The Board examined the Procuring Entity's Technical Evaluation Report dated 13<sup>th</sup> March 2020 and observes on page 5 therein that only one bidder, that is, M/s Geo Development Limited, qualified for technical evaluation. Upon conclusion of technical evaluation, the Evaluation Committee made the following remarks which are captured on page 7 of the report: -

***"The Committee recommends that M/s Geo Development Kenya Limited P.O. Box 14066-00100 Nairobi to proceed to the next stage of financial evaluation after obtaining the score of 81% in the technical evaluation."***

However, according to the Procuring Entity's Professional Opinion dated 30<sup>th</sup> March 2020, the Procuring Entity determined that the procurement proceeding was no longer competitive and that it would not get value for money since only the Applicant's bid qualified for financial evaluation

and as such the Quality and Cost Based Selection Method of Evaluation would not be applicable in the circumstances. The Procuring Entity therefore proceeded to terminate the procurement proceedings in accordance with section 63 (1) (e) of the Act.

In view of the foregoing, it is the Board's considered view that irrespective of whether only one proposal qualifies for financial evaluation, the Quality and Cost Based Selection Method of Evaluation as outlined under Clause 2.8.1.4 Public Opening and Evaluation of Financial Proposals of Section II Information to Consultants on page 14 of the Request for Proposals Document shall still apply as it clearly stipulates that the successful proposal shall be the proposal with the highest combined technical and financial scores.

This means that a combination of both the technical score and the financial score has to be made in order to determine the successful proposal in the respective procurement proceedings. In the event there is only one firm that qualifies for financial evaluation, a procuring entity is obliged to open the firm's financial proposal and award it a financial score, even though it is the only financial proposal up for consideration.

Notably, the Procuring Entity in paragraph 5 of its Response made the following admission: -

***"It's a fact that there is no legal requirement which stipulates that if one bidder qualifies in the technical evaluation the procurement proceedings cannot proceed***

***to the financial evaluation of that one bidder. This means that the Procuring Entity has the necessary discretion to take the appropriate action..."***

From this admission, it is evident that the Procuring Entity was fully aware that it could proceed with the procurement proceedings even where only one bidder qualified in the technical evaluation stage. This therefore was not a sufficient reason for the Procuring Entity to terminate the subject tender.

The Board further observes that it was the Procuring Entity's submission in paragraph 6 of its Response, that when only one proposal qualified for financial evaluation, the subject procurement proceedings became a direct procurement. In its view, since the conditions of section 103 and 104 of the Act could not be met, the subject procurement proceedings became null and void, hence the Procuring Entity's decision to terminate the subject procurement.

In view of this submission by the Procuring Entity, the Board sought to establish the meaning of a 'direct procurement'.

Mr Okonji in his research paper titled **Factors Influencing the Use of Direct Procurement Of Common User Items By Government Ministries from Supplies Branch (2011)** defines direct procurement as follows: -



***"Direct procurement is a method of procurement where goods, works or services are acquired from a supplier without subjecting the supplier to any form of competition. Open competitive processes for example, inviting quotes, tenders, or proposals from more than one supplier will not be applicable for all procurement by public entity. In some instances, a public entity may procure directly from a supplier. In deciding to take this approach, a public entity considers the value and risk of the purchase as well as the outcome that it intends from the procurement."***

From the above definition, a direct procurement can be understood to mean a method of procurement where goods, works or services are acquired from a supplier without subjecting the supplier to any form of competition. In this method of procurement, a procuring entity approaches a supplier directly as opposed to other competitive procurement processes.

As explained hereinbefore, procurement or the acquisition of works, assets, services or goods under the Act, shall be by open tendering. However, a procuring entity may use an alternative procurement procedure if that procedure is allowed and satisfies the conditions under this Act for use of that method.

One of the alternative procurement procedures that may be used by a procuring entity as stipulated under section 92 (e) of the Act, which is cited hereinbefore, includes direct procurement.

Direct procurement may be employed by a procuring entity as long as the purpose is not to avoid competition as provided for under section 103 of the Act.

Section 103 of the Act further provides that a procuring entity may use direct procurement if any of the following are satisfied: -

***"(a) the goods, works or services are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, works or services, and no reasonable alternative or substitute exists;***

***(b) due to war, invasion, disorder, natural disaster or there is an urgent need for the goods, works or services, and engaging in tendering proceedings or any other method of procurement would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;***

***(c) owing to a catastrophic event, there is an urgent need for the goods, works or services, making it impractical to use other methods of procurement because of the time involved in using those methods;***

***(d) the procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies shall be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;***

***(e) for the acquiring of goods, works or services provided by a public entity provided that the acquisition price is fair and reasonable and compares well with known prices of goods, works or services in the circumstances. "***

Further, a procuring entity, in conducting a direct procurement shall adhere to the following procedures as stipulated under section 104 of the Act: -

***"(a) issue a tender document which shall be the basis of tender preparation by tenderer and subsequent negotiations.***

***(b) appoint an ad hoc evaluation committee pursuant to section 46 to negotiate with a person for the supply of goods, works or non-consultancy services being provided;***



***(c) ensure appropriate approvals under this Act have been granted;***

***(d) ensure the resulting contract is in writing and signed by both parties.”***

Accordingly, a procuring entity in conducting a direct procurement shall issue a tender document to a specific tenderer and shall appoint an adhoc evaluation committee to negotiate with the specific tenderer for the supply of goods, works or non-consultancy services. Further, a procuring entity can only conduct a direct procurement once appropriate approvals under the Act have been granted to the procuring entity.

From the foregoing, it is clear that a direct procurement is a distinct method of procurement which a procuring entity can only employ once it has been granted approvals to do so. Moreover, a direct procurement from the onset involves only one prospective tenderer.

It is therefore evident that a direct procurement method of procurement is clearly distinguishable from a request for proposals method of procurement as outlined hereinbefore.

In this instance, the Board has established hereinbefore that the subject procurement is a 'Request for Proposals' and not a 'Direct Procurement'. On this basis therefore, in the event only one bidder qualifies for the final stage of evaluation, the subject procurement does not automatically become a 'Direct Procurement', but remains a 'Request for

Proposals', noting the specific and distinct features of a 'Direct Procurement'.

It is therefore the Board's considered view that this was not a reason for termination of the subject procurement proceedings by the Procuring Entity as contemplated under section 63 of the Act and should not have been used by the Procuring Entity to justify termination of the procurement proceedings under section 63 (1) (e) of the Act.

The Board observes that the Procuring Entity in its Response further brought to the Board's attention another reason justifying its termination of the subject procurement proceedings. The Procuring Entity in paragraph 7 of its Response stated as follows: -

***"The Procuring Entity complied with section 3 of the Act. This tender was advertised, opened, evaluated and terminated in accordance with the provisions of the Act. The Review Board may also note that due to the current COVID -19 emergency, the budget of Kshs 64 million that had been set aside for this procurement proceeding has been re-allocated by Parliament. (See Appendix)"***

The Procuring Entity attached to its Response a document titled **"Supplementary Estimates II (Development Expenditure) for the financial year 2019-2020"**.

From the aforementioned document, the Board observes that the approved estimates for the subject procurement proceedings for the financial year 2019-2020 was Kshs 64 million. However, according to the amended approved estimates, no funds were allocated for the subject procurement proceedings.

However, the Board notes that the reason for termination of the subject procurement proceedings given by the Procuring Entity in its letter to the Applicant dated 8<sup>th</sup> April 2020 was as follows: -

***".....This is to notify you that the procurement proceeding was terminated in accordance with section 63 (1) (e) (2) (3) (4) of the Public Procurement and Asset Disposal Act, 2015.***

***The reason for termination was lack of competitiveness as only 2 firms participated and only one qualified for the opening of the financial proposals. This implied that the State Department will not get value for money if we proceeded with this procurement proceeding.***

Further, the Procuring Entity notified the Director General of the Public Procurement Regulatory Authority in a letter dated 8<sup>th</sup> April 2020 of its termination of the subject procurement proceedings in accordance with section 63 (2) of the Act which read as follows: -

***"...We have terminated the tender in accordance with section 63 of the Public Procurement Act, 2015.***



***The reason for termination was due to lack of adequate competition as only two firms submitted bids, one failed at the preliminary evaluation stage and only one qualified for the opening of financial bids. The State Department subsequently made a decision to return the financial proposals unopened. The tender is to be re-tendered or conducted by the Government in accordance with the provisions of the Act.***

***The purpose of this letter is to notify you of the termination in accordance with section 63 (2) of the Act."***

From the above notifications of termination, it is evident that the Procuring Entity terminated the subject procurement proceedings due to lack of competitiveness and not with respect to the amended approved estimates as cited hereinbefore. For the Procuring Entity to later proffer 'lack of budgetary allocation' as a reason to justify its termination of the subject procurement proceedings upon the Applicant filing this Request for Review seems disingenuous on the part of the Procuring Entity.

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

The requirement of real and tangible evidence before terminating a procurement process due to material governance issues supports the

provision of Article 47 of the Constitution 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"***

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

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

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

- "(1) Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review***
- (2) The information referred to in subsection (1) may include:-***
- (a) the reasons for which the action was taken***
  - (b) any other relevant documents relating to the matter"***

The constitutional right to fair administrative action including the right to provide a person with sufficient reasons and information following an administrative action is codified in section 5 and 6 of the Fair Administrative Actions Act.

Moreover, section 3 of the Act, which cites the principles that guide public procurement processes, provides that:-

***"Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—***

- (a) the national values and principles provided for under Article 10;***



- (b) .....;
- (c) .....;
- (d) .....;
- (e) .....;
- (f) ***the values and principles of public service as provided for under Article 232"***

In view of the above provisions of law, we are of the view that all bidders, including the Applicant herein had legitimate expectation and commercial interests when submitting their proposals in response to the tender advertisement. Therefore, if the procurement proceedings are affected by factors leading to a termination, such bidders ought to be afforded sufficient reasons in the form of real and tangible evidence explaining the material governance issue that was detected by the Procuring Entity.

It is therefore the Board's finding that no real and tangible evidence has been adduced by the Procuring Entity to persuade us that termination of the subject tender on the ground of material governance issues having been detected meets the threshold under section 63 of the Act.

The Board finds, the Procuring Entity failed to terminate the subject tender in accordance with section 63 of the Act as read together with section 3 of the Act, the Fair Administrative Actions Act, 2015, and Articles 10 and 47 of the Constitution which not only provides a

procedure for termination, but grounds which require real and tangible evidence to support a termination process, rendering the purported termination of the subject procurement process null and void.

Accordingly, the Preliminary Objection fails and the Board finds that it has jurisdiction in the Request for Review.

The issue that now remains for determination is 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..."***

The Board has established that the decision of the Procuring Entity terminating the subject procurement process as communicated in the letter of notification dated 8<sup>th</sup> April 2020 is null and void.

It is therefore our considered view that the most appropriate orders in these circumstances is to direct the Procuring Entity to proceed with the

subject procurement process to its logical conclusion including issuance of notification letters to all bidders of the outcome of the technical evaluation giving specific and sufficient reasons in accordance with the provisions of the Act and the Constitution and taking into consideration the findings of the Board in this matter.

Furthermore, the Board directs that each party bear its own costs with respect to the Request for Review, noting that the subject procurement process is yet to be completed.

In totality, the Request for Review hereby succeeds in terms of 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 Procuring Entity's Letters of Notification of Termination of Procurement proceedings dated 8<sup>th</sup> April 2020 with respect to Tender No. MOALF&C/SDCD&AR/R&I/RFP/24/2019-2020 for the Provision of Consultancy Services for Development of a Feasibility Study for the Proposed Lake Olbolossat Bio-Deposit Organic Fertilizer Extraction and Rehabilitation Project addressed to the Applicant herein and all other**



**bidders who participated in the subject tender, be and are hereby cancelled and set aside.**

- 2. The Procuring Entity is hereby directed to complete the procurement process in the subject tender to its logical conclusion including issuance of notification letters of the outcome of Tender No MOALF&C/SDCD&AR/R&I/RFP/24/2019-2020 for the Provision of Consultancy Services for Development of a Feasibility Study for the Proposed Lake Olbolossat Bio-Deposit Organic Fertilizer Extraction and Rehabilitation Project to all bidders who participated with specific and sufficient reasons in accordance with the Act and the Constitution, within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this case.**
- 3. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi, this 13<sup>th</sup> Day of May, 2020**



**CHAIRPERSON**

**PPARB**



**SECRETARY**

**PPARB**

