

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 140/2020 OF 19TH NOVEMBER 2020

BETWEEN

THE CONSORTIUM OF RENTCO

AFRICA LIMITED AND SPENOMATIC (K) LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

MOI TEACHING AND REFERRAL HOSPITAL.....RESPONDENT

Review against the decision of The Accounting Officer, Moi Teaching and Referral Hospital with respect to Tender No. MTRH/RFP/1/2020-2021 For 'Sourcing of Boiler 4 Ton Water/Feed System on Leasing Agreement (Re-tender).

BOARD MEMBERS

- | | |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Alfred Keriolale | -Member |
| 3. Arch. Steven Oundo, OGW | -Member |

IN ATTENDANCE

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

The Bidding Process

Moi Teaching and Referral Hospital (hereinafter referred to as "the Procuring Entity") invited eligible and interested bidders to submit proposals for Tender No. MTRH/RFP/1/2020-2021 For Sourcing of Boiler 4 Ton Water/Feed System on Leasing Agreement (Re-tender) (hereinafter referred to as "the subject tender") via an advertisement in the MyGov pull-out newspaper on 14th July 2020.

Bid Submission Deadline and Opening of bids

A total of six (6) bidders/firms submitted proposals and the same were opened on 11th September 2020 in the presence of bidders and their representatives who chose to attend and which bids were recorded as follows:

B. No	Co. Address	Tel and email	Directors	Tender security
RFP 1 B1	Star Rentals Ltd 2 nd FLOOR, Signon Complex, P.O. Box 19055-00501 Nairobi	Tel: 020-2636764 0704-104093 Email: osaina@starrentals.co.ke info@starrentals.co.ke	Edwin Kiplagat Ronoh Joseph Kipketer Koskey Suginon Group Limited Kencont Logistics Services Limited Meshack Torotich Kipturgo Zambuni Alun Shaun	Kenya Commercial Bank Limited Ksh.800,000/- -
RFP 1 B2	Energy Intelligence Africa Ltd P.O. Box 158-00618, Nairobi	Tel: 0728-153000 0725-666141 Email: info@energyintelligenceafrica.com	Godfrey Marambe M. Robert Munga B. Doreen Nyakeraro O.	Credit Bank PLC Kshs. 800,000/-
RFP 1 B3	Pharmaken Ltd	Tel: 020-2040269 / 0717-685075	Samier Mohamedraza Muravvej	I @ M Bank Limited

B. No	Co. Address	Tel and email	Directors	Tender security
	5 th Floor Links Plaza P.O. Box 95625- 80106, Mombasa	0726-849861/ 0733-944444 Email: msa@pharmaken.net	Leonard Muriuki Njeru Mohamedraza Muravvej Seyed	Kshs.800,000 /-
RFP 1 B4	Rentco Africa Ltd Upper Hill Masaba road P.O. Box 20736- 00100 Nairobi	0704-278808 0737-761270 Email; info@rentco.co.ke	Natasha Kanda Abigail Kanda Innocent Odhiambo Muganda Raymond Otieno Omondi Robert Kanda Nyasimi	Sidian Bank Ksh.800,000/ -
RFP 1 B5	Aqua Boil Contractors Ltd Motor World Centre P.O. Box 58380- 00200 Nairobi	Tel: 0722-553520 0722-334777 Email: info@aquaboil.co.ke mokanyeria@gmail.com	Moffat Kanyeria Kibuthu Nahashon Anyeria Mugo	Xplico Insurance Company Ltd Ksh.800,000/ -
RFP 1 B6	Robert Bosch East Africa Limited, 4 th Floor, Fedha Plaza, Westlands, P.O. Box 856-00606, Nairobi	Tel: 0798-499657 0721-537668 Email: victor.mailu@bosch.com	Markus Thill Johannes VandanRughaniPiyus Alex Marentia Homan Robert Bosh InternationaleBeteiligung en AG Robert Bosch Investment Nederland B.V.	Kshs. 800,000/- Stanbic bank Kenya

Evaluation of Bids

The evaluation process was conducted in four stages:

1. Mandatory Requirements Evaluation;
2. Competency Evaluation;
3. Technical Evaluation;
4. Financial Evaluation.

1. Mandatory Requirements Evaluation

At this stage of evaluation, proposals submitted by bidders were subjected to an examination to confirm compliance with the following mandatory requirements:

No.	Mandatory Requirements
1.	Certificate of Incorporation or Registration.
2.	Valid Tax Compliance Certificate or equivalent.
3.	Valid Trade License or Single Business Permit or equivalent.
4.	Duly filled, signed and stamped form of tender.
5.	Completely filled, signed and stamped business questionnaire.
6.	Original bid bond of Ksh. 800,000/- or 8,000 US Dollars. Tender Securing Declaration form for entities belonging to YWPDs shall be required.
7.	Bidders must provide evidence of having supplied an oil run steam boiler of at least 4 ton and HFO vessel of at least 60m ³ by providing copies of orders or award letters from the current major clients.
8.	Submit either audited accounts for 2017 and 2018 or current bank statement for the last 6 month preceding tender opening date.
9.	Submit a valid license of the lead Engineer registered by Engineers Board of Kenya (EBK)
10.	NCA certification as a Specialist Contractor of at least NCA 4 or above.
11.	A sworn statement or declaration stating that: -
	a) The firm has not been debarred from participating in any public procurement by PPRA.
	b) No person related to the firm has any spouse or children working at M.T.R.H.
	c) The firm has not been engaged in any unethical, corrupt, collusive or fraudulent activities in public procurement matters.
	d) The firm has not been declared bankrupt, insolvent and or under receivership.
	e) The firm is not guilty of any violation of fair employment law practices.
	f) Declaration that the firm will not engage in any corrupt or fraudulent practice.

Bidders were required to attain 100% compliance with the foregoing mandatory requirements to proceed to the next stage of evaluation.

Failure to adhere to any of the listed mandatory requirements would lead to disqualification.

The Evaluation Committee observed as follows: -

- a) **B1** – Did not provide evidence of having supplied an oil run steam boiler of at least 4 ton and HFO vessel of at least 60m³ by providing copies of orders or award letters from the current major clients.
- b) **B2**– Did not submit evidence of having supplied an oil run steam boiler of at least 4 tons and HFO vessel of at least 60m³ by providing copies of orders or award letters from the current major clients.
- c) **B5** - Did not submit evidence of having supplied an oil run steam boiler of at least 4 tons and HFO vessel of at least 60m³ by providing copies of orders or award letters from the current major clients; No valid license of the lead Engineer registered by Engineers Board of Kenya (EBK) and no sworn statement or declaration stating **a** to **f** as indicated in the tender document.

Upon conclusion of this stage of evaluation, the Evaluation Committee found that Bidders **B3**, **B4** and **B6** submitted all mandatory requirements and thus qualified to proceed to the next stage of evaluation while Bidders **B1**, **B2** and **B5** did not qualify as they did not provide all mandatory requirements.

2. Competency Evaluation

At this stage of evaluation, bidders were required to provide the following documentary evidence: -

No.	Requirement	Marks	
1	Evidence of having performed similar leasing or outright purchase in at least two reputable organizations (attached any leasing evidence document)	1 And below Institutions	15
		3-4 institutions	20
		5 and above institutions	25
2	Capacity to install, maintain and sustain the boiler operation professionally (attach CV for your technical personnel. The lead Engineer to have valid license from EBK)	Certificate	15
		Diploma	20
		Degree	25
3	Evidence of the company having operated for at least 2 years carrying out specialized engineering works	2 – 3 years	15
		4 – 5 years	20
		5 years and above	25
4	Evidence of having capacity to procure the steam boiler and sustain it for at least one year (show available finance or promise by financial institution)	71 – 80 million	15
		81 – 90 million	20
		91 million and above	25
TOTAL		100	

The pass mark was 70% and bidders who attained 70 marks and above would proceed to technical evaluation.

The results were as follows: -

Bidder	Marks	Remarks
B3	100%	Qualified
B4	100%	Qualified
B6	100%	Qualified

Bidders **B3**, **B4** and **B6** met the 70% threshold and qualified for the next stage of evaluation.

3. Technical Evaluation

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

NO.	ITEM DESCRIPTION
A	STEAM BOILER
	- Complete burner assembly
	- internal water column
	- Two low water cutoffs and one high water level cutoff (probe type)
	- Water gauge assembly
	- Water gauge blow down
	- Stack adaptor
	- Low and high-water level alarm
	- Flame failure alarm
	- Operation pressure control
	- Two high limit pressure controls
	- Two (2) Steam safety valves
	- Control panel – completely wired with wiring diagram & mounted pressure gauge
	- Flame programmer
	- Water stop valve
	- Blow down valves
	- Surface blow down connection and valve
	- Water check valve
	- Instruction manual

NO.	ITEM DESCRIPTION
B	<p>2 DAY TANKS (Day water tank and a simplex steam heavy oil pre-heated tank) 5000 litres day tanks to be installed on a false floor inside the boiler room raised to a height of 4 meter above the floor Other tank components:</p> <ul style="list-style-type: none"> - Material – Carbon steel - Pump and motor assembled and piped - Strainer and stuff off valve piped in line - Water level control with solenoid valve - Water site glass and valve assembly - 3 phase electrical panel box with CCT feed water – pump motor starters
C	<p>WATER RETURN SYSTEM</p> <ul style="list-style-type: none"> - Stand - pump and motor assembled and piped - strainer and shut off valve piped in line - 3 Phase Electrical panel box with CCT <p>pump motor starter and Hand-off auto switch and Lights, Horizontal pump(s)</p>
D	<p>BLOW OFF SEPARATOR</p> <ul style="list-style-type: none"> - 3x4 Hand hole for clean-out and inspection - Durable heavy gauge steel construction - Baffle plate design to absorb steam flash and pressure - Cold water inlet - Bottom drain opening for sludge removal <p>Large steam vent opening.</p>
E	<p>WATER SOFTENER</p> <ul style="list-style-type: none"> - Water softener complete with timed down flow brining saves salt and provides greater iron removal capacity - salt usage is fully adjustable with direct reading dial. - Automatic built in by pass for uninterrupted water service during regeneration cycle. <p>Control valve with programmable totalize set points for auto generation.</p>
F	<p>STEAM BOILER CHIMNEY INSTALLATION</p> <ul style="list-style-type: none"> - Boiler chimney made of 5mm thick M.S plate rolled and welds to fit Height approximately 12m high, flanged at some intervals and painted with heat resistant aluminum paint, insulated and cladded
G	<p>Transfer pumps as "MONO" complete with motor auto control panel</p>
H	<p>Cold oil filters.</p>
I	<p>2 HOT WATER CALORIFIER – LAUNDRY & KITCHEN 5000 liters standard hot water calorifier, vertical, cylindrical, made of 6mm thick M.S plate complete with;</p>
	<ul style="list-style-type: none"> - Copper heat battery
	<ul style="list-style-type: none"> - Safety valve

NO.	ITEM DESCRIPTION
	<ul style="list-style-type: none"> - Temperature control - Temperature gauge - Pressure gauge - Hot water outlet gate valve - Cold water inlet gate valve - Hot water returns inlet gate valve - Inspection man hole - Steam inlet to the heater battery c/w steam globe valve - 50mm thick fiber rock wool insulation - Aluminum cladding - Condensate outlet steam trap set and valves - The calorifiers to be internally coated with 3 coats of epoxy paint and hydraulic tested to approval.
	<p>PRESSURE REDUCING STATION TO 5000LTS HOT WATER CALORIFIERS</p>
J	<p>Temperature and steam flow control for the calorifier Steam thermostat temperature range 0-150 degrees Celsius complete with probe and pocket.</p> <p>Steam and condensate pipe work and their insulation</p>
K	<p>PROVISION</p> <p>Allow for blow down extension and termination</p> <p>Allow for fuel pipe work insulation (lagging and cladding) from burner to the fuel storage tanks</p> <p>Allow for boiler & calorifier access ladders</p> <p>Allow for pipe brackets & bolts</p> <p>Allow for boiler electrical works</p>
L	<p>SPECIFICATIONS FOR WATER BOILER RESERVOIR TANKS AND</p>

NO.	ITEM DESCRIPTION
	<p><u>ACCESSORIES.</u></p> <p>Tank capacity10,000 liters' x 6 Tank material PVC, such as in KENTANK Maximum Diameter for a tank 260cm Maximum height280 cm</p> <p><u>Scope of works</u></p> <p>1. Supply, deliver, install, test and commission the above mentioned tanks, their piping and pumps as follows</p> <p>a) 6 (six) of the tanks to be install at the building top where the current tanks that serve the kitchen and laundry sit. Out of the six tanks, three will be connected to serve the purpose which the current installed tanks serve i.e. to supply water for use in kitchen, laundry and fire extinguisher. Inlet of the three tanks to be the inlet of the existing tanks.</p> <p>Remaining three tanks serve as boiler reservoir tanks and should be connected as such.</p> <p>The inlet of these three tanks to be from two sources</p> <p>i) From the kitchen/laundry tank inlet pipe. ii) A provision is made that will be used as an inlet from a main water tank that is currently under procurement process.</p> <p>All the 6 tanks to be isolatable, by way of valves, such that it is possible to prevent entry and /or exit of the tank content.</p> <p>Piping from these tanks is such as to feed the boiler day tank situated inside the mezzanine floor in the boiler room. Current pipe sizes to be maintained.</p> <p>2. Dis-assemble the existing tanks system to give way for the installation of the new incoming tanks system. The work to be in such a manner as to avoid disrupting kitchen/laundry service delivery as much as possible.</p>

The pass mark was 100%. Bidders who offered a steam boiler compliant with the desired technical specifications would qualify to proceed to financial evaluation and have their financial proposal opened on a date to be communicated.

The Evaluation Committee observed that Bidder **B6** did not submit a list of all required technical specifications for hot water calorifier namely;

- Safety valve
- Temperature control
- Temperature gauge
- Pressure gauge
- Inspection man hole
- Steam inlet to the heater battery c/w steam globe valve
- Condensate outlet steam trap set and valves

The results were as follows: -

Bidder	Remarks	Weight
B3	Qualified	100%
B4	Qualified	100%
B6	Not Qualified	0

Bidders **B3 and B4** met the required threshold of 100% and qualified to proceed for the next stage of evaluation.

4. Financial Evaluation

The Evaluation Committee undertook financial evaluation and observed that Bidder 3 and Bidder 4 provided both leasing and outright purchase proposals as shown below:

Leasing option

	B3 (Pharmaken Limited)	B4 (Rentco Africa Limited)
Commitment deposit	10,000,000.00	-
Monthly rental for 5 years	60,000,000.00	78,492,943.80

Fuel Tank and accessories including mechanical works	6,595,560.00	5,705,969.00
TOTAL	66,595,560.00	84,198,112.80
Percentage	100%	79.10%

Outright purchase

	B3 (Pharmaken Limited)	B4 (Rentco Africa Limited)
Cost of boiler	43,500,000.00	49,974,408.00
Maintenance fee for 5 years	2,250,000.00	2,370,060.00
Fuel Tank and accessories including mechanical works	6,595,560.00	5,705,969.00
TOTAL	52,345,560.00	58,050,437.00
Percentage	100%	90.18%

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Pharmaken Limited** as the lowest technically responsive bidder on outright purchase option of Kshs. 52,345,560.00/- having scored 100%.

Professional Opinion

The Supply Chain Manager reviewed the Evaluation Report and concurred with the Evaluation Committee's recommendation of award, vide a Professional Opinion signed on 23rd September 2020.

The Chief Executive Officer of the Procuring Entity approved the Evaluation Committee's recommendation of award on 24th September 2020.

REQUEST FOR REVIEW NO. 133 OF 2020

The Consortium of Rentco Africa Limited and Spenomatic (K) Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated and filed on 7th October 2020 together with a Statement in Support of the Application for Review dated and filed on even date through the firm of Sagana, Biriq & Company Advocates.

In response, the Procuring Entity lodged a Memorandum of Response dated 16th October 2020 and filed on 19th October 2020 through its Advocate, Mr Josphat Mutuma Kirima.

The Applicant sought for the following orders in Request for Review No. 133 of 2020: -

- a. An order allowing the Request for Review;***
- b. An order annulling the decision of the Procuring Entity through its letter dated 24th September 2020 that the Applicant had not been successful in Tender No. MTRH/RFP/1/2020-2021;***
- c. In the alternative, an order awarding the tender to the successful bidder following a re-evaluation of the Applicant's tender and the Tender Document;***
- d. An order directing and compelling the Public Procurement Regulatory Authority to conduct a procurement audit of the Procuring Entity and the Interested Party's records regarding the subject tender;***

e. An order for costs of and/or incidental to this review be borne by the Procuring Entity;

f. Any other orders that deem just and fit in the circumstances.

The Board having considered parties' cases and the documents before it, together with confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, No. 33 of 2015, ordered as follows in its decision dated 27th October 2020: -

1. The Accounting Officer of the Procuring Entity's Letter of Notification to Enter into a Contract with respect to Tender No. MTRH/RFP/1/2020-2021 For Sourcing of Boiler 4 Ton Water/Feed System on Leasing Agreement (Re-tender) dated 24th September 2020 addressed to M/s Pharmaken Limited be and is hereby cancelled and set aside.

2. The Accounting Officer of the Procuring Entity's Letters of Notification of Unsuccessful Bid with respect to Tender No. MTRH/RFP/1/2020-2021 For Sourcing of Boiler 4 Ton Water/Feed System on Leasing Agreement (Re-tender) dated 24th September 2020 and addressed to all unsuccessful bidders, including the Applicant herein, be and are hereby cancelled and set aside.

3. The Accounting Officer of the Procuring Entity is hereby directed to re-admit the Applicant's financial proposal at the Financial Evaluation Stage and conduct a re-evaluation

of the Applicant's financial proposal at the Financial Evaluation Stage in accordance with Clause 2.8 of Section II Information to Consultants on page 12 of the Request for Proposals Document read together with section 80 (2) of the Act and Article 227 (1) of the Constitution taking into consideration the findings of the Board herein.

4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion, including making of an award within fourteen (14) days from the date of this decision.

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

Re-evaluation pursuant to the orders issued on 27th October 2020 in PPARB Application Number 133 of 2020

After the Board's decision in PPARB Application No. 133 of 2020, the Procuring Entity re-admitted all the technical proposals submitted by the six (6) bidders in response to the subject tender and conducted a re-evaluation at the Preliminary Evaluation Stage.

Upon conclusion of Preliminary Evaluation, the Evaluation Committee noted that all the six (6) bidders did not satisfy the mandatory requirements and were all found non-responsive.

However, following the Board's orders issued in **PPARB Application No. 133 of 2020** which *interalia* directed the Procuring Entity to re-admit the Applicant's financial proposal at the Financial Evaluation Stage, the Evaluation Committee conducted a re-evaluation of the Applicant's financial proposal at the Financial Evaluation Stage but noted that the said proposal did not cover the entire scope of the assignment as listed below: -

- a) Fuel tank
- b) Fuel tank accessories
- c) Civil works for the tank foundation
- d) Mechanical Works

The Evaluation Committee therefore requested Management to seek clarification from the Applicant (Bidder No. 4) as to whether the cost of the above listed items were captured in its financial proposal.

In conclusion, the Evaluation Committee recommended that the subject tender was non-responsive, pending confirmation from Bidder No. 4.

Second Professional Opinion

The Supply Chain Manager, in his Professional Opinion dated 6th November 2020 stated as follows: -

"2. That after the re-evaluation, the Tender Evaluation Committee found that none of the tenderers satisfied the evaluation criteria issued by the Honourable Board.

3. That the Tender Evaluation Committee re-admitted the financial proposal submitted by M/s Rentco Africa Limited as was ordered by the Board and they realized it was not comprehensive since the following components of the assignment were not quoted: -

- i. Cost of fuel tank***
- ii. Cost of tank accessories***
- iii. Cost of civil works***
- iv. Cost of mechanical works***
- v. That the financial bid for the above was irregularly contained in the technical proposal which contravened provision of section 120 of the Regulations.***

4. That M/s Rentco was communicated to on 4th October 2020 to clarify their costing as provided for under section 81 of the Public Procurement and Asset Disposal Act, 2015 to enable the Tender Evaluation Committee to conclude on their assignment.

5. That the tender cannot be awarded to M/s Rentco Africa Limited since the above mentioned components of the works have been excluded and this will conflict with provision of section 3 (h) of the Public Procurement and Asset Disposal Act, 2015.

6. I submit that this procurement proceeding is non-responsive and should be terminated.”

The Chief Executive Officer of the Procuring Entity approved termination of the subject tender on 6th November 2020.

REQUEST FOR REVIEW NO. 140 OF 2020

The Applicant lodged a Request for Review dated and filed on 19th November 2020 (hereinafter referred to as "the Request for Review") together with a Statement in Support of the Application for Review sworn and filed on even date (hereinafter referred to as "the Applicant's Statement") through the firm of Sagana, Biriq & Company Advocates. The Applicant also lodged a Supplementary Affidavit sworn and filed on 1st December 2020 (hereinafter referred to as "the Applicant's Affidavit").

In response, the Procuring Entity lodged a Response to the Application for Review dated 22nd November 2020 and filed on 24th November 2020 (hereinafter referred to as "the Procuring Entity's Response") through its Advocate, Mr Josphat Mutuma Kirima. The Procuring Entity further lodged an Amended Response to the Application for Review dated 26th November 2020 on even date.

The Applicant sought for the following orders in Request for Review No. 133 of 2020: -

a. An order allowing the Request for Review;

- b. An order annulling the decision of the Procuring Entity through its letter dated 7th November 2020 rejecting the Applicant's bid in Tender No. MTRH/RFP/1/2020-2021 For 'Sourcing of Boiler 4 Ton Water/Feed System on Leasing Agreement (Re-tender).***
- c. In the alternative, an order awarding the tender to the Applicant following a re-evaluation of the Applicant's tender at the financial stage;***
- d. An order for costs of and/or incidental to this Review to be borne by the Procuring Entity;***
- e. Any other orders that the Board deems just and fit in the circumstances.***

On 16th 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) 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 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic. Through this circular, the Board

dispensed with physical hearings and directed that all request for review applications 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 dated 2nd December 2020 on even date while the Procuring Entity lodged Written Submissions on 2nd December 2020.

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 parties' Written Submissions.

The issues that arise for determination are as follows: -

- I. Whether the Procuring Entity terminated the subject tender in accordance with section 63 of the Act, thus ousting the jurisdiction of this Board.**

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

The Board observes that the Procuring Entity raised an objection in its Amended Response to the Application for Review lodged on 26th November 2020, challenging the jurisdiction of this Board to hear the instant Request for Review on the basis that the subject tender was duly terminated by the Procuring Entity in accordance with section 63 (1) (f) of the Act.

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);

(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) [Emphasis by the Board]

Accordingly, section 167 (4) (b) 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.

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

The 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(s) 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) (f) 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)

(c)

(d)

(e)

(f) all evaluated tenders are non-responsive;

(g)

(h)

(i)

(2)

(3)

(4)

The Procuring Entity cited section 63 (1) (f) of the Act as the reason for termination of the subject tender, because in its view all evaluated tenders were non-responsive.

The Procuring Entity contended that following the Board’s decision in **PPARB Application No. 133 of 2020**, the Procuring Entity re-evaluated the Applicant’s bid and found that the said bid was not in compliance with Section III of the Tender Document with respect to mandatory requirements at the Mandatory Evaluation Stage and thus was determined non-responsive for failing to conform to all the eligibility requirements in the Tender Document. Further, the Procuring Entity re-evaluated the Applicant’s financial proposal at the Financial Evaluation Stage and determined that the said proposal did not comply with bid formalities and pricing requirements. According to the Procuring Entity, it was not possible to establish the exact cost of the envisaged project for budgeting and planning purposes from the Applicant’s financial proposal.

It was therefore the Procuring Entity’s submission that having found the Applicant’s financial proposal non-responsive, which was the sole reason for re-evaluation as per the orders of the Board in **PPARB Application**

No. 133 of 2020, the Procuring Entity terminated the subject tender and submitted a report to the Public Procurement Regulatory Authority on 9th November 2020.

The Applicant refuted these submissions and contended that the Procuring Entity did not comply with the orders of the Board as issued in **PPARB Application No. 133 of 2020** which were simply to re-evaluate the Applicant's bid at the Financial Evaluation Stage only. The Applicant argued that the question as to the responsiveness of its bid was concluded by the Board in **PPARB Application No. 133 of 2020** and the Procuring Entity's Evaluation Committee had no jurisdiction to re-evaluate the Applicant's bid at the Mandatory Evaluation Stage without an order from the Board.

Further, the Applicant argued that the new terms/costs which the Procuring Entity used to evaluate the Applicant's financial proposal were not contained in the Procuring Entity's Request for Proposals Document and thus amounted to variation of the terms of the subject tender contrary to section 3, 81 (2) of Act and Article 227 of the Constitution.

It was therefore the Applicant's submission that the Procuring Entity unfairly rejected its bid for the third time and further arbitrarily terminated the subject procurement proceedings in outright contravention of section 63 of the Act.

Having considered the foregoing averments, 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"

With this in mind, 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 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 record therein 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.

Notably, the Procuring Entity did issue letters of notification dated 6th November 2020, to all the six (6) bidders who participated in the subject tender informing them of the outcome of their individual bids. However, such letters of notification do not amount to a notification of termination as envisaged under section 63 (4) of the Act as they do not inform

bidders of the Procuring Entity's decision to terminate the subject tender and reasons thereof.

Moreover, there is no report on the termination of the subject procurement proceedings addressed to the Director General of the Authority in the Procuring Entity's original and confidential file. However, the Board notes that on 1st December 2020, the Procuring Entity forwarded to the Board Secretary a scanned copy of a notice of rejection of the subject tender sent to the Director General of the Authority dated 9th November 2020.

As to the reason why the Procuring Entity terminated the subject tender, the Board examined the Procuring Entity's Professional Opinion signed on 6th November 2020 and observes the following remarks made by the Procuring Entity's Supply Chain Manager on page 4 therein:

"1.....Evaluation of this tender was undertaken in strict compliance to the guidelines issued by the Public Procurement Administrative Review Board in its final decision from PPARB Application Number 133/2020 of 7th October 2020.

2. That after the re-evaluation, the Tender Evaluation Committee found that none of the tenderers satisfied the evaluation criteria issued by the Honourable Board.

3. That the Tender Evaluation Committee re-admitted the financial proposal submitted by M/s Rentco Africa Limited as was ordered by the Board and they realized it was not

comprehensive since the following components of the assignment were not quoted: -

i. Cost of fuel tank

ii. Cost of tank accessories

iii. Cost of civil works

iv. Cost of mechanical works

4. That the financial bid for the above was irregularly contained in the technical proposal which contravened provision of section 120 of the Regulations.

5. That M/s Rentco was communicated to on 4th October 2020 to clarify their costing as provided for under section 81 of the Public Procurement and Asset Disposal Act, 2015 to enable the Tender Evaluation Committee to conclude on their assignment.

5. That the tender cannot be awarded to M/s Rentco Africa Limited since the above mentioned components of the works have been excluded and this will conflict with provision of section 3 (h) of the Public Procurement and Asset Disposal Act, 2015.

6. I submit that this procurement proceeding is non-responsive and should be terminated.”

From the foregoing excerpt, the Board observes that after it issued orders in **PPARB Application No. 33 of 2020**, the Procuring Entity conducted a re-evaluation of all the bids received in response to the subject tender at the Mandatory Evaluation Stage and found that none

of the tenderers satisfied the evaluation criteria issued by the Board. Further, the Procuring Entity conducted a re-evaluation of the Applicant's financial proposal at the Financial Evaluation Stage and established that several components had been excluded from its financial proposal. All the bids were therefore found non-responsive and the procurement proceedings recommended for termination, which recommendation was approved by the Accounting Officer of the Procuring Entity on 6th November 2020.

In view of the foregoing, the Board finds it necessary to answer two questions that arise in this regard: what were the orders of this Board with respect to **PPARB Application No. 133/2020** and whether or not the Procuring Entity complied with the said orders.

As a brief background, in **PPARB Application No. 133/2020**, the Applicant challenged award of the subject tender to the successful bidder therein, that is M/s Pharmaken Limited, on the basis that the successful bidder, as a joint venture, did not comply with the mandatory requirements as set out in the Request for Proposals Document. Further, the Applicant contended that the Procuring Entity in determining the successful tenderer did not conduct Financial Evaluation with respect to the subject tender in accordance with the Financial Evaluation Criteria as outlined in the Request for Proposals Document.

In **PPARB Application No. 133/2020**, the Board established from the Procuring Entity's Request for Proposals Document that according to

Section III Terms of Reference on page 14 thereof, where a bidder submits a bid/proposal as a legally constituted joint venture, **each** partner to a joint venture will be required to pass the Mandatory Requirements Evaluation Stage before the joint venture can qualify to proceed for further evaluation.

Noting that the successful bidder in **PPARB Application No. 133/2020**, that is M/s Pharmaken Limited participated in the subject procurement proceedings as a joint venture, the Board established that the Procuring Entity was obligated to evaluate the documents submitted by both the successful bidder and its joint venture partner at the Mandatory Requirements Evaluation Stage, pursuant to Section III Terms of Reference on page 14 of the Request for Proposals Document.

The Board examined the original technical proposal submitted by M/s Pharmaken Limited and established that M/s Pharmaken Limited, as one of the joint venture partners, and its joint venture partner, Henan Yuanda Boiler Corporation Limited failed to satisfy some of the mandatory requirements as stipulated on page 19 of the Request for Proposals Document and thus, ought to have been disqualified from further evaluation upon conclusion of the Mandatory Requirements Evaluation Stage. It was therefore the finding of this Board that M/s Pharmaken Limited did not qualify for award of the subject tender.

On the second issue for determination in **PPARB Application No. 133/2020**, the Board examined the Procuring Entity's Evaluation

Report signed on 22nd September 2020 and established that the Procuring Entity did not award the subject tender in accordance with the formulae for Financial Evaluation as stipulated in Clause 2.8 of Section II Information to Consultants on page 12 of the Request for Proposals Document, since it failed to combine the technical and financial scores of the two bidders who qualified for Financial Evaluation.

In view of the foregoing findings, the Board issued the following orders in its decision in **PPARB Application No. 133/2020** rendered on 27th October 2020: -

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification to Enter into a Contract with respect to Tender No. MTRH/RFP/1/2020-2021 For Sourcing of Boiler 4 Ton Water/Feed System on Leasing Agreement (Re-tender) dated 24th September 2020 addressed to M/s Pharmaken Limited be and is hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letters of Notification of Unsuccessful Bid with respect to Tender No. MTRH/RFP/1/2020-2021 For Sourcing of Boiler 4 Ton Water/Feed System on Leasing Agreement (Re-tender) dated 24th September 2020 and addressed to all unsuccessful bidders, including the Applicant herein, be and are hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby directed to re-admit the Applicant's financial proposal at the Financial Evaluation Stage and conduct a re-evaluation**

of the Applicant's financial proposal at the Financial Evaluation Stage in accordance with Clause 2.8 of Section II Information to Consultants on page 12 of the Request for Proposals Document read together with section 80 (2) of the Act and Article 227 (1) of the Constitution taking into consideration the findings of the Board herein.

4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion, including making of an award within fourteen (14) days from the date of this decision.

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

Having found that M/s Pharmaken Limited did not qualify for award of the subject tender and the only other bidder found responsive at the Technical Evaluation Stage who qualified for Financial Evaluation, was the Applicant, the Board directed the Procuring Entity in Order No. 3 as cited hereinabove, to re-admit the Applicant's bid at the Financial Evaluation Stage and conduct a re-evaluation of the Applicant's bid at the Financial Evaluation Stage in accordance with Clause 2.8 of Section II Information to Consultants on page 12 of the Request for Proposals Document read together with section 80 (2) of the Act and Article 227 (1) of the Constitution.

Further, the Board directed the Procuring Entity to proceed with the procurement process to its logical conclusion, including making of an award within fourteen (14) days from the date of the decision.

The Board examined the Procuring Entity's Evaluation Report signed on 4th November 2020, and observes that the Procuring Entity's Evaluation Committee re-admitted all the six (6) bids received in response to the subject tender and conducted a re-evaluation at the Preliminary Evaluation Stage contrary to the express order of the Board, i.e. Order No. 3 in **PPARB Application No. 133/2020** which required the Applicant's Bid to be re-admitted at the Financial Evaluation Stage and to be re-evaluated at the Financial Evaluation Stage.

According to the Evaluation Committee, as captured on page 8 of the Evaluation, none of the six (6) bidders satisfied the mandatory requirements, hence all bids were found non-responsive. Further, the Evaluation Committee proceeded to re-admit the Applicant's financial proposal at the Financial Evaluation stage and conducted a re-evaluation of the same. The Evaluation Committee noted that the Applicant's financial bid did not cover the entire scope of the assignment as listed below: -

- a) Fuel tank
- b) Fuel tank accessories
- c) Civil Works for the tank foundation
- d) Mechanical Works

In this regard therefore, the Evaluation Committee requested Management to seek clarification from the Applicant as to whether the cost of the abovementioned items had been captured in its financial proposal, as captured on page 8 of the Evaluation Report. In conclusion, the Evaluation Committee recommended that the subject procurement proceedings were non-responsive, pending the Applicant's response to the clarification to be sought.

Vide a letter dated 4th November 2020, the Procuring Entity's Chief Executive Officer sought clarification from the Applicant with respect to its financial proposal as follows: -

"You participated in our Tender No. MTRH/RFP/1/2020-2021 and upon evaluation of reservoir tanks, accessories, financial bid which was opened on 11th September 2020, we were not able to ascertain the cost of civil works for tank foundation and mechanical works in respect to this procurement proceeding.

Pursuant to provision of section 81 of the Public Procurement and Asset Disposal Act, 2015, we are seeking to be guided on the cost of the above listed works in your already submitted financial bid.

We would be grateful to receive your guidance latest by Friday 6th November 2020 at 12:00pm to enable compliance with the timeline issued by the Public Procurement Administrative Review Board.

In its response dated 6th November 2020, the Applicant stated as follows: -

"...That RentCo Africa Limited did participate in Tender No. MTRH/RFP/1/2020-2021 and financial bids were opened on 11th September 2020, we recognize the tenets of section 81 of the Public Procurement and Asset Disposal Act, it is expected however that such clarifications by law be done during the evaluation process and before an award has been issued, we cannot rely on section 81 of the Act in order to correct, adjust or amend the tender sum as submitted and read out during the tender opening which by law is stated to be absolute and final.

This matter was before the Public Procurement Review Board Application No. 133/2020, it was heard and determined. We find your query on clarification to be ambiguous, kindly refer to your Evaluation Committee's submission before the Public Procurement Review Board, in respect to the financials on page 53 and 54 which we stand guided by. The prices you seek were an issue of your interest and review culminating in a conclusive tender

evaluation and consequent award, which was overturned by the Review Board, further which details you provided before the Board in your replying affidavit.

We find it instructive that an evaluation process that you concluded was done without seeing previous clarification, is now open after the process has been questioned by the Review Board. We request you to refer to the ruling delivered on 27th October by the Review Board namely page 53 – 62, where the Board made clear directions in this matter and we would like to adhere to the same.”

In view of this response, the Procuring Entity found that the Applicant had excluded the costings of the aforementioned components of the subject works and thus found the Applicant’s bid non-responsive. Noting that all bids were found non-responsive, the Accounting Officer of the Procuring Entity approved termination of the subject tender on 6th November 2020.

It is not lost to the Board that in its orders dated 27th October 2020 in **PPARB Application No. 133 of 2020**, it directed the Procuring Entity to re-admit the Applicant’s financial proposal at the Financial Evaluation Stage and conduct a re-evaluation of the Applicant’s financial proposal at the Financial Evaluation Stage taking into consideration the findings of the Board therein.

From a cursory reading of the Board's orders in **PPARB Application No. 133/2020**, it is evident that the Board did not direct the Procuring Entity to re-admit all the six (6) technical proposals it received in response to the subject tender and conduct a re-evaluation of the technical proposals at the Mandatory Evaluation Stage. The orders issued by the Board in **PPARB Application No. 133 of 2020** with respect to re-evaluation, were limited to re-evaluation of the Applicant's financial proposal at the Financial Evaluation Stage, in view of the Board's findings that M/s Pharmaken Limited, the successful bidder in that request for review application did not qualify for award of the subject tender and that the only other bidder found responsive at the Technical Evaluation Stage who qualified for evaluation at the Financial Evaluation Stage, was the Applicant.

In this regard therefore, the Procuring Entity did not comply with the Board's orders as issued in its decision rendered on 27th October 2020 in **PPARB Application No. 133/2020**, in so far as it re-admitted all six (6) technical proposals received in response to the subject tender, at the Mandatory Evaluation Stage and conducted a re-evaluation of all the technical proposals at the Mandatory Evaluation Stage.

The Board is cognizant of section 175 (1) of the Act which provides as follows: -

"A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's

decision, failure to which the decision of the Review Board shall be final and binding to both parties” [Emphasis by the Board]

Accordingly, the decision of this Board is final and binding to parties to a request for review application unless challenged through judicial review by the High Court within fourteen days from the date the decision is issued by this Board.

In view of this provision, if the Procuring Entity was dissatisfied with the orders of the Board as issued in **PPARB Application No. 133/2020**, it ought to have challenged the same by filing an application for judicial review at the High Court.

The Board observes that it rendered its decision with respect to **PPARB Application No. 133/2020** on 27th October 2020, and the fourteen (14) day period within which a judicial review application may be lodged lapsed on 10th November 2020. The Board further observes from the documents before it that no application for judicial review has been filed at the High Court with respect to the aforementioned decision and therefore the same remains final and binding on parties therein.

The Procuring Entity in this instance, did not challenge the decision of the Board rendered on 27th October 2020 in **PPARB Application No. 133/2020** and therefore had the obligation to implement the said decision in terms of the specific orders issued therein. This means, the Procuring Entity did not have leeway to conduct a re-evaluation at the

Mandatory Evaluation Stage or any other stage other than the Financial Evaluation Stage since the decision and orders issued in **PPARB Application No. 133/2020** are final and binding to the Procuring Entity.

However, the Board observes that as a result of re-admitting the Applicant's bid at the Mandatory Evaluation Stage and conducting a re-evaluation of the Applicant's bid at the Mandatory Evaluation Stage the Procuring Entity identified new issues with respect to the responsiveness of the Applicant's bid at this stage of evaluation which issues were never raised in the evaluation conducted prior to the filing of **PPARB Application No. 133/2020**.

In **Judicial Review Miscellaneous Application No. 283 of 2019 Republic v Public Procurement Administrative Review Board & 3 others Ex parte Tecno Relief Services Limited [2019] eKLR** (hereinafter referred to as "the Tecno Relief Case"), the Honourable Justice Nyamweya opined as follows: -

"68. In the second Request for Review, the ex parte Applicant (Tecno Relief Services Limited) alleges that there was non-compliance by the 2nd Respondent (Kenya Medical Supplies Authority) with the 1st Respondent's (Board's) directives to re-evaluate all bids in accordance with its stated criteria, as regards the 3rd Respondent's (Nuflower) bid. Therefore, the new set of intervening facts created a new cause of action, which arose as a result of

the 1st Respondent's own orders. In other words, even though the same set of circumstances may have existed in the First Request for Review as regards the 3rd Respondent's bid, the 1st Respondent's orders of 26th July 2019, which were final and binding, that the 3rd Respondent's bid among others be re-evaluated in line with specified criteria opened the gate for a new cause of action, in the event that there was non-compliance. It is also notable that the complaints raised by the ex parte Applicant's Request for Review was specifically on the noncompliance by the 2nd Respondent with the 1st Respondent's orders of 26th July 2019.

69. This Court therefore finds that in the circumstances of the Second Request for Review, the 1st Respondent did make an error of law in holding that the doctrine of res-judicata on account of cause of action estoppel applied to the complaints raised by the ex parte Applicant as regards the 3rd Respondent's bid. This is for the reasons that its orders of 26th July 2019 materially changed the context in which the parties were operating after the First Request for Review and created a new cause of action."

In the Tecno Relief Case, the Honourable Justice Nyamweya held that in instances where the Board directs a procuring entity to conduct a re-evaluation of tenders, new issues may be raised emanating from the re-evaluation process, opening the gate for a new cause of action, in the event of non-compliance.

As a brief background, when the Tecno Relief Case was before the Board in **PPARB Application No. 94/2019**, the Board directed the procuring entity in that case, to conduct a re-evaluation of all bids received under the subject tender at the Mandatory Evaluation Stage. When the procuring entity in that case re-admitted the said bids and conducted a re-evaluation process at the Preliminary Evaluation Stage, new issues were raised with respect to the responsiveness of a bid submitted by Nuflower Foods and Nutrition PVR Limited, the 3rd Respondent in the Tecno Relief Case, which according to Justice Nyamweya may constitute a new cause of action before this Board.

The circumstances in the Tecno Relief Case can be distinguished from the circumstances in the instant case, whereby in the latter, new issues have been raised by the Procuring Entity as regards the responsiveness of the Applicant's bid. However, these issues have been raised as a direct result of a re-evaluation of the Applicant's bid at the Mandatory Evaluation Stage which was contrary to the express order of the Board in **PPARB Application No. 133/2020** requiring the re-evaluation of the Applicant's bid be conducted at the Financial Evaluation stage.

The Procuring Entity re-admitted all the technical proposals received in the subject tender, including the Applicant's technical proposal at the Mandatory Evaluation Stage and conducted a re-evaluation of all bids at the Mandatory Evaluation Stage contrary to the orders of this Board in **PPARB Application No. 133/2020** as issued on 27th October 2020

which specifically directed the Procuring Entity to re-admit only the Applicant's financial proposal at the Financial Evaluation Stage and only conduct a re-evaluation of the Applicant's financial proposal at the Financial Evaluation Stage because the Board had found Pharmaken Limited, being the only other bidder that had made it to the Financial stage as per the Procuring Entity's evaluation report dated 22nd September 2020, not to have qualified for an award in the subject tender.

It is therefore the Board's considered view that any new issues arising from a re-evaluation process that was not part of the Board's orders as issued in **PPARB Application No. 133/2020** do not open up a new cause of action before this Board.

Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya (hereinafter referred to as "the Civil Procedure Act"), which codifies the plea of *res judicata* in our laws, states as follows: -

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

This provision was discussed at length by the Court of Appeal in **Civil Appeal No. 42 of 2014, John Florence Maritime Services Ltd V. Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR** (hereinafter referred to as "Civil Appeal No. 42 of 2014") as follows: -

"From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally ...

Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indentation of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313: -

".....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under

special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time...

The court in Civil Appeal No. 40 of 2014 went further to hold that: -

"The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter.

Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may

arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.”

According to section 7 of the Civil Procedure Act, read together with the findings in Civil Appeal No. 42 of 2014, the ingredients of *res judicata* are as follows: -

- i. The former suit should be between the same parties, or parties under whom they or any of them claim, litigating under the same title;
- ii. The issue in dispute in the former suit between the parties must directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded (or raised) as a bar;
- iii. The court or tribunal before which the former suit was litigated was competent and determined the suit with finality;
- iv. The plea of *res judicata* extends to points upon which the court was actually required by parties to form an opinion and pronounce a judgment on, including every point which properly belonged to the subject of litigation;
- v. The plea of *res judicata* extends to a point which might have been made but was not raised and decided in the earlier proceedings.

The cause of action as to whether the Applicant's technical proposal complies with the mandatory requirements as outlined on page 19 of the Request for Proposals Document, is a cause of action which could have been raised by the Procuring Entity in **PPARB Application No. 133/2020**, but was not raised at that time.

Noting that the responsiveness of the technical proposal submitted by the successful bidder, that is, M/s Pharmaken, at the Mandatory Evaluation Stage was an issue for determination in **PPARB Application No. 133/2020**, the Procuring Entity ought to have raised any issues with respect to the responsiveness of the Applicant's technical proposal at the Mandatory Evaluation Stage in the course of proceedings in that request for review.

This Board is of the view that the plea of *res judicata*, is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. As rightly observed in Civil Appeal No. 40 of 2014: -

"...Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in

maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence.

The Board is inclined to adopt the position of the court in Civil Appeal No. 40 of 2014 and will therefore resist the invitation to address an issue governing the same parties, litigating under the same title, in the same tender, with respect to an issue which ought to have been raised in **PPARB Application No. 133/2020.**

In this regard therefore, the Board finds that the Preliminary Re-evaluation process undertaken by the Procuring Entity's Evaluation Committee as captured in its Evaluation Report signed on 4th November 2020 cannot be allowed to stand.

This notwithstanding, the Board has established that the Procuring Entity's Evaluation Committee did indeed conduct a re-evaluation of the Applicant's bid at the Financial Evaluation Stage as captured in its Evaluation Report signed on 4th November 2020.

In this regard therefore, any issues emanating from a re-evaluation at the Financial Evaluation Stage may be ventilated as a new cause of action before this Board, arising as a result of the orders of this Board,

specifically Order No. 3 in **PPARB Application No. 133/2020**, directing the Procuring Entity to re-institute the Applicant's bid at the Financial Evaluation Stage and conduct a re-evaluation of the Applicant's bid at the Financial Evaluation Stage.

The Board observes that the Procuring Entity, after seeking clarification from the Applicant, determined that the Applicant excluded the costings of certain components of the subject works from its financial proposal and thus found the Applicant's financial proposal non-responsive at the Financial Evaluation Stage.

The Board examined the Procuring Entity's Request for Proposals Document and observes on page 24 and 25 therein a table titled 'Specifications for Boiler Fuel Tanks and Accessories', which included certain components grouped as 'Civil Works – Tank Foundation' and 'Mechanical Works'. Accordingly, bidders were required to complete the said table and include the quantity, rate and price for the various components listed in the table.

Notably, the said table is part of the Technical Specifications, listed under the Evaluation Criteria in the Procuring Entity's Request for Proposals Document and the Board observes no clause therein that directs bidders to include the said table in their Financial Proposals.

The Board examined the Applicant's original Technical Proposal and found the completed table, inclusive of costings on the various components cited by the Procuring Entity, that is, '*Fuel tank, Fuel tank accessories, Civil Works for the tank foundation and Mechanical Works*' on page 586 – 587 therein.

As mentioned hereinabove, when the subject tender was before this Board in **PPARB Application No. 133/2020**, the Applicant was found responsive at the Technical Evaluation Stage and thus qualified to proceed for Financial Evaluation.

In view of the foregoing, the Board would like to re-iterate that according to Order No. 3 of the Board's orders issued in **PPARB Application No. 133 of 2020**, the Procuring Entity was directed to re-institute the Applicant's financial proposal at the Financial Evaluation Stage and conduct a re-evaluation of the Applicant's financial proposal at the Financial Evaluation Stage in accordance with Clause 2.8 of Section II Information to Consultants on page 12 of the Request for Proposals Document, this being the criteria for conducting financial evaluation as outlined in the Request for Proposals Document.

It is therefore the Board's considered view, that the Procuring Entity should confine itself to the criteria for Financial Evaluation as stipulated in Clause 2.8 of Section II Information to Consultants on page 12 of the Request for Proposals Document, in conducting a financial re-evaluation of the Applicant's financial proposal, noting that the Request for

Proposals Document did not expressly direct bidders to include the costings of the various components, that is, 'Fuel tank, Fuel tank accessories, Civil Works for the tank foundation and Mechanical Works' as contained in the table titled 'Specifications for Boiler Fuel Tanks and Accessories' in their financial proposals.

Further, the said table forms part of the Technical Specifications in the Request for Proposals Document, and the Board has confirmed that the costings in issue were included by the Applicant in its technical proposal on page 586 – 587 thereof as follows: -

	SPECIFICATIONS FOR BOILER FUEL TANKS AND ACCESSORIES				
a.	CIVIL WORKS – TANK FOUNDATION	UNITS	QTY	RATE	TOTAL (SH)
1.	Allow for excavation of foundation pits 8000mm by 4000mm with depth not exceeding 1500mm to hard ground and cart away debris	CM	48		33,000
2.	Supply and lay boulders to 300mm and compact	TON	12		18,000
3.	Supply and lay Class 25 concrete blinding to foundation pits	CM	7		108,000
4.	Supply deformed bars for footing reinforcing mesh work as follows, including cutting, bending, overlaps,	KG	280		55,800

	cleaning, spacer blocks and tying stirrups. <i>Bending schedule as Along Y axis longitudinal reinforcing bars, Y12 mm Bars @ 200mm, Along Y axis Y12 mm Bars @ 200mm.</i> Y12mm High tensile Twisted reinforcement bars to BS 4461				
5.	Supply and lay in position sawn formwork for footing casting	SM	32		60,000
6.	Supply, lay, vibrate and compact Class25 concrete to footings. Use concrete with minimum compressive strength of 25 N/mm ² and allow for curing and allow for band wall of 1000mm above the ground around the tanks by use of natural stones and allow for plastering to give smooth finish by use of cement motor	CM	112		199,360
b.	MECHANICAL WORKS – ALL INSTALLATIONS BE DONE AS PER API 650 & 653 STANDARDS				
1.	Supply and Install 2 (two) vertical cylindrical carbon	ITEM	LOT		3,367,500

	<p>steel tanks measuring 3000mm diameter by 43000mm height to hold capacity of 30m³ HFO fuel complete with two manholes, ventilation hatch, drain nozzle, inlet and outlet nozzles and access ladders. The tanks to have gauges with which contents can be quantified. The tanks to be connected in such a manner that one can operate independently from the other if need be.</p>				
2.	<p>Supply and install carbon steel pipes Dn 75 alongwith fittings, flanges, elbows, tees, reducersgaskets, valves, bolts and nuts</p>	ITEM	LOT		276,076
3.	<p>Supply and install a HFO strainer immediately at the exit of the conveyance pipe from the tank</p>	ITEM	LOT		70,000
4.	<p>Supply and install 2 (minimum) pump of 5 HP, in parallel, to pump the HFO to fuel day tank situated at a head of 6 meters. Approximate distance from the tanks to the kitchen building is</p>	ITEM	SE		300,000

	30 meters.				
	GRAND TOTAL				5,705,969.04
5.	Supply and install 3" class 150 gate valve, with raised face standard flanges (ASTM A216 WCB) tank outlet and boiler outlet valves	NO	4		142,500
c.	PAINTING				
1.	Apply two coats of Jotamastic 87 primer (150 microns each) followed by one coat of marine Aluminium Hardtop AS (50 microns) to DFT of 350 microns	SM	LOT		375,000
	SUBTOTAL				5,005,236
	16% VAT				700,733.04

The Board is cognizant of section 82 of the Act which provides as follows: -

"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 or by any person or entity."

Accordingly, a bidder's tender sum as indicated in its form of tender is absolute and final and shall not be the subject of correction or adjustment in any way by any person or entity.

If the Applicant is found to be the lowest evaluated bidder, upon conclusion of Financial Evaluation, an award of the subject tender would be made to it at the amount quoted in the Form of Tender.

If the Applicant agrees to be bound by the amount as indicated in its Form of Tender, the Procuring Entity will proceed to award the subject tender to the Applicant following which both parties will execute a contract in accordance with section 135 (3) of the Act which provides 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."

However, if the Applicant does not agree to be bound by the total amount as indicated in its Form of Tender, the Procuring Entity shall proceed to consider the next lowest evaluated bidder in accordance with the criteria and procedure for financial evaluation as outlined in the Request for Proposals Document until a successful bidder is found. Notably, the Applicant's financial proposal is the only proposal to be considered at the Financial Evaluation Stage.

In conclusion, the Board has established that the Procuring Entity did not comply with section 63 (4) of the Act which requires the accounting officer of a procuring entity to notify all tenderers of its decision to

terminate procurement proceedings within fourteen days of termination, with reasons thereof.

Moreover, the Board has established that the Procuring Entity did not conduct re-evaluation of the Applicant's financial proposal at the Financial Evaluation Stage in accordance with Order 3 of the orders of the Board as issued in **PPARB Application No. 133/2020** and thus the Applicant's bid was unlawfully found non-responsive.

From the foregoing, it is evident that the Procuring Entity did not comply with the substantive and procedural requirements for termination of procurement proceedings as stipulated in section 63 of the Act.

It is therefore the finding of this Board that 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.

The Board has further established that the Procuring Entity proceeded to conduct a re-evaluation at the Preliminary Evaluation stage contrary to the express orders of the Board rendered on 27th October 2020 in **PPARB Application No. 133/2020**, requiring a re-evaluation of the Applicant's financial proposal at the Financial Evaluation stage.

The orders of this Board as issued in **PPARB Application No. 133/2020** must be discharged in terms of the specific directions given by the Board. In *Macfoy vs United Africa Co Ltd* [1961] 3 All ER 1169 Lord Denning delivering the opinion of the Privy Council at page 1172 (I) held as follows:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado; though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

As established by this Board, the Procuring Entity never challenged the Board's decision in **PPARB Application No. 133/2020** therefore the same remains final and binding to it as stated in section 175 (1) of the Act.

The Procuring Entity ought to discharge its obligation under the Act in accordance with the orders issued by the Board in **PPARB Application No. 133/2020** and that is to re-admit the Applicant's financial proposal only at the Financial Evaluation Stage and conduct a re-evaluation at the Financial Evaluation Stage only in accordance with Clause 2.8 of Section II Information to Consultants on page 12 of the Request for Proposals Document read together with section 80 (2) of the Act and Article 227

(1) of the Constitution taking into consideration the findings of the Board herein and the Board's findings in **PPARB Application No. 133/2020**.

Notably, this is the third time that the subject tender is before the Board and as mentioned hereinbefore, procurement proceedings should not be prolonged unnecessarily in the public interest.

In view of the foregoing, the Board hereby deems it fit to refer the subject tender to the Public Procurement Regulatory Authority for investigation into its conduct thereof in accordance with section 9 (h) of the Act and take any necessary steps to ensure compliance of the orders of this Board.

In totality, the Request for Review succeeds in terms of the following specific orders: -

FINAL ORDERS

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

- 1. The Decision of the Accounting Officer of the Procuring Entity terminating the procurement proceedings of Tender No. MTRH/RFP/1/2020-2021 For 'Sourcing of Boiler 4 Ton**

Water/Feed System on Leasing Agreement (Re-tender) be and is hereby nullified.

2. The Accounting Officer of the Procuring Entity's Letter of Notification of Unsuccessful bid dated 6th November 2020 with respect to Tender No. MTRH/RFP/1/2020-2021 For 'Sourcing of Boiler 4 Ton Water/Feed System on Leasing Agreement (Re-tender) addressed to the Applicant, be and is hereby cancelled and set aside.

3. The Procuring Entity's Preliminary Re-evaluation Findings as captured in its Tender Evaluation Report signed on 4th November 2020 with respect to Tender No. MTRH/RFP/1/2020-2021 For 'Sourcing of Boiler 4 Ton Water/Feed System on Leasing Agreement (Re-tender), be and are hereby expunged.

4. The Accounting Officer of the Procuring Entity is hereby directed to comply with Order No. 3 of the decision of the Board rendered on 27th October 2020 with respect to PPARB Application No. 133 of 2020, The Consortium of Rentco Africa Limited and Spenomatic (K) Limited v. The Moi Teaching and Referral Hospital and Another and to proceed with the procurement process to its logical conclusion, including the making of an award within

fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this Review.

5. The Accounting Officer of the Procuring Entity shall bear the costs of this Request for Review amounting to Kshs. 305,000/- to be paid to the Applicant.

Dated at Nairobi this 10th Day of December 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB