

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 57/2020 OF 30TH APRIL 2020

BETWEEN

ARPRIM CONSULTANTS.....APPLICANT

AND

ACCOUNTING OFFICER (DIRECTOR GENERAL)

PARLIAMENTARY JOINT SERVICES,

PARLIAMENTARY SERVICE COMMISSION.....1ST RESPONDENT

PARLIAMENTARY JOINT SERVICES,

PARLIAMENTARY SERVICE COMMISSION.....2ND RESPONDENT

Review against the decision of the Parliamentary Joint Services, Parliamentary Service Commission with respect to RFP. No. PJS/RFP/001/2019-2020 for the Provision of Consultancy Services for Preparation of a Master Plan, Preliminary and Detailed Design, Tender Documents and Construction Supervision of the Proposed Centre for Parliamentary Studies and Training on L.R. No. 28172

BOARD MEMBERS

- | | |
|----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Ambrose Ogeto | -Member |
| 3. Ms. Robi Chacha | -Member |

IN ATTENDANCE

1. Mr. Stanley Miheso

-Holding brief for Secretary

BACKGROUND TO THE DECISION

The Bidding Process

The Parliamentary Service Commission (hereinafter referred to as “the Procuring Entity”) advertised RFP. No. PJS/RFP/001/2019-2020 for the Provision of Consultancy Services for Preparation of a Master Plan, Preliminary and Detailed Design, Tender Documents and Construction Supervision of the Proposed Centre for Parliamentary Studies and Training on L.R. No. 28172 (hereinafter referred to as “the subject tender”) on 10th February 2020 in the Star Newspaper and People Daily Newspaper inviting sealed proposals from interested eligible bidders.

Pre-Proposal Conference

The Procuring Entity hosted a pre-proposal conference on 19th February 2020 from 11:00 am at the proposed site along Langata South Road. The conference was attended by seventeen (17) representatives from eleven (11) firms.

Clarifications and Addendum

The Procuring Entity received various questions from prospective candidates concerning the Request for Proposal Document. These questions were responded to through a letter dated 10th March 2020. Various bidders requested for an extension of the proposal opening

date. An addendum was advertised on Monday 9th March 2020 extending the tender closing date by eight (8) days to Friday 20th March 2020 at 11:00 am.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of nine (9) proposals by the submission deadline of 20th 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	Firm
1.	M/s Tectura International Limited; M/s Quantec Consultancy; M/s Interconsult Engineers Limited; M/s Geomax Consulting Engineers Limited; M/s Serene Landscapers Limited; M/s Kiburu and Associates (<i>Joint Venture</i>)
2.	M/s Getso Consultants Limited; M/s AIA Architects Limited; M/s Dutch Engineering Services; M/s Apex Systems Consulting Group Limited (<i>Joint Venture</i>)
3.	M/s Gitutho Architects & Planners Limited; M/s Continental Quantity Surveyors Limited; M/s CGP Consulting Engineers Limited; M/s Synchroconsult Associates Limited; M/s Alliance Land Surveyors (<i>Joint Venture</i>)
4.	M/s Arprim Consultants; M/s Nyange Integrated Consultants Limited; M/s Peng Limited (<i>Joint Venture</i>)
5.	M/s Dama Services Limited; M/s Integra Consulting Limited; M/s Fluid System Engineers Limited (<i>Joint Venture</i>)
6.	M/s Scope Design Systems; M/s Shaque Associates; M/s Professional Consultants; M/s Syldon & Partners Consulting Engineers Limited (<i>Joint Venture</i>)
7.	M/s S.K. Archplans; M/s Runji Consulting Group Limited; M/s Aegis Development Solutions Limited (<i>Joint Venture</i>)
8.	M/s Edon Consultants International Limited; M/s Songa Ogoda & Associates; M/s Frontier Designs Limited; M/s Norkun Intakes Limited (<i>Joint Venture</i>)
9.	M/s Tej Architects; M/s Procosts Limited; M/s Wastruct Consultants Limited; M/s Gedox Associated Limited; M/s Landtek Studios; M/s

Evaluation of Proposals

An Evaluation Committee was conducted in five (5) stages as follows:-

- i.** Preliminary Evaluation (Mandatory Requirements);
- ii.** Technical Evaluation;
- iii.** Financial Evaluation;
- iv.** Determination of the Highest Combined Score and ranking stage;
- v.** Recommendation of Award

1. Preliminary Evaluation/Mandatory Requirements

At this stage of evaluation, the Evaluation Committee evaluated the proposals received by the Procuring Entity against the mandatory requirements as outlined in the Request for Proposals Document.

	CRITERIA
1.	Submission of duly authorized and stamped Curriculum Vitae (CVs) of proposed personnel for the assignment.
2.	Power of Attorney delegating authority to the signatory of the tender to commit the tenderer and in joint venture a party to the joint venture should be nominated to commit on behalf of the whole team.
3.	Submission of a table of contents page clearly indicating Sections and Page Numbers.
4.	Submission of a document numbered in the correct sequence including all appendixes and attachments. Bidders must provide a statement of how many pages their proposal has.
5.	Submission of firmly bound and should not have any loose pages. Spiral binding and files (spring and box) are not acceptable
6.	Submission of one original and two copies of the original, and a CD of the Technical Proposal.
7.	Submission of Certificate of Registration/ Incorporation;
8.	Submission of Current Business Permit/trade permit
9.	Submission of Valid Tax Compliance Certificate from relevant Authorities where the business operations of tenderer are domiciled.

	CRITERIA
10.	Submission of CR12 Letter from Registrar of Companies or equivalent to show names of Directors of the tendering company (in case of a company), Name of Proprietor (for Sole Proprietor and Business Name) and Names of Partners (for Partnerships) – as applicable.
11.	Submission of National Identity for Directors/owners of the company.
12.	Submission of duly filled, signed and stamped Confidential Business Questionnaire.
13.	Submission of duly filled, signed and stamped Declaration Form.
14.	Submission of duly filled, signed and stamped Anti-Corruption Declaration Commitment/ Pledge.
15.	Submission of confirmation in writing that all documents provided in support of their bids are authentic and not forged, will be confirmed as the truth if verified.
16.	Submission of Valid copy of Registration and practicing certificates from relevant professional bodies.
17.	Submission of certified Audited Financial Accounts for the last three (3) years (2016, 2017 and 2018). The Audited Accounts must be prepared by certified accountant(s).
18.	Submission of Professional indemnity cover with combined minimum cover limit of KES 100 million (aggregate) for the consortium/ firm.
19.	Submission of a signed statement that the candidate is not debarred by PPRA certified by a commissioner of Oaths.
20.	Submission of a prototype model of master plan.
21.	Submission of tender security amount of Kshs.2,000,000 valid for 150 days from the date of proposal opening.

The Evaluation Committee made the following observations: -

1. In the Technical Opening Minutes, Firm No. 3 was referred to as M/s Gathutho Consultants and Planners Ltd. The Committee however confirmed that the firm's name is M/s Gitutho Architects & Planners Limited.
2. For Firm No. 3, the opening committee in their minutes wrote that the firm had submitted a soft copy of the technical document. However, the Evaluation Committee could not verify the soft copy as no CD was presented.

3. The Opening Committee referred to Firm No. 4 as M/s Aprim Consortium when the actual name is M/s Arprim Consultants.
4. Firm No. 5's lead partner submitted audited financial accounts for the years 2017, 2018 and 2019. Even though the firm did not submit audited accounts for the year 2016, the Committee considered the firm responsive for the criterion as they submitted audited accounts of other partners to the joint venture that were relevant.

Upon conclusion of preliminary evaluation, eight (8) firms were found non-responsive. Only one firm, Firm No. 4, a joint venture between M/s Arprim Consultants, M/s Nyange Integrated Consultants Limited and M/s Peng Limited was found responsive and therefore proceeded to technical evaluation.

2. Technical Evaluation

At this stage of evaluation, the Evaluation Committee evaluated Firm No. 4 against the technical criteria in the Request for Proposals Document.

Technical Evaluation Matrix

No.	Factor	Max Score
1	Specific experience of Consultant related to the assignment	10
	a. Experience in consultancy for projects of similar magnitude or more Three(3) projects each of Kshs. 1billion and above-6marks Two (2) projects each of Kshs. 1billion and above-4marks One (1) projects each of Kshs. 1billion and above-2marks	6

No.	Factor	Max Score
	b. Experience in training institute/training centre design and construction supervision Two (2) projects of similar nature (university or a training institute)-4marks One project of similar nature (university or a training institute)-2marks	4
2	Adequacy of the proposed work plan and methodology in responding to the terms of reference	40
	a. Preparation of Master plan	8
	b. Preliminary design	8
	c. Detailed design	8
	d. Tender process	8
	e. Construction supervision	8
3	Qualifications and competence of the key staff proposed for the assignment	40
	a. Qualifications and experience of Architect	10
	<ul style="list-style-type: none"> • Qualification (Masters (5) With degree(3) Diploma (1) • Experience (Above Ten years (5), Five to Ten years (3), below five years (1) 	
	b. Qualifications and experience of Quantity Surveyor	6
	<ul style="list-style-type: none"> • Qualification (Masters (3) With degree(2) Diploma(1) • Experience (Above Eight years(3), Five to Eight years (2) , below five years(1) 	
	c. Qualifications and experience of Structural Engineer	7
	<ul style="list-style-type: none"> • Qualification (Masters(3) With degree(2) Diploma (1) • Experience (Above Eight years (4), Five to Eight years(2), below five years (1) 	
	d. Qualifications and experience of Electrical Engineer	6
	<ul style="list-style-type: none"> • Qualification (Masters (3) With degree (2) Diploma(1) • Experience (Above Eight years(3), Five to Eight years (2), below five years (1) 	
	e. Qualifications and experience of Mechanical Engineer	6
	<ul style="list-style-type: none"> • Qualification (Masters (3) With degree (2) With Diploma(1) • Experience (Above Eight years(3), Five to Eight years (2), below five years (1) 	
	f. Qualifications and experience of Civil Engineer	5
	<ul style="list-style-type: none"> • Qualification (Masters (2) With degree (1.5) Diploma(1) • Experience (Above Eight years(3), Five to Eight years (2), below five years (1) 	
4	Suitability to the transfer of Technology programme (training)	10
	a. Training of Client's staff in use of technical software	5
	b. Submission of soft and hard copies of documents, software and equipment in the manner prescribed in the tender	5

No.	Factor	Max Score
	document	
	Total	100

The pass mark for Technical Evaluation was set at 80%.

At this stage of evaluation, the Evaluation Committee resolved that on experience in consultancy for projects of similar magnitude or more: -

- It would consider consultancy projects carried out by the lead partner (Architect);
- On magnitude, the Committee considered projects above Kshs. 1 Billion as a consolidated figure for a single project;
- It would consider only completed projects. This would be verified through Completion Certificates attached;
- This was a general requirement and therefore any project meeting the requirements would be considered.

Upon conclusion of technical evaluation, the Evaluation Committee noted the following with respect to Firm No. 4: -

1. Firm No. 4 had only one training institute project completed.
2. The Annual Practicing Certificate of the proposed structural engineer had expired in 2019.
3. The candidate attained 84.2% and therefore fulfilled the technical requirements. They therefore proceeded to financial evaluation stage.

3. Financial Evaluation

At this stage of evaluation, the Evaluation Committee made the following observations: -

- ✓ The Opening Committee stated a figure of Kshs.3,391,870,883.94 as the consultancy fees. The Evaluation Committee noted that this was the estimated project cost and that the correct consultancy fees quoted was Kshs 369,759,324.00.
- ✓ Firm No. 4 did not quote the price as specified in the Request for Proposal as per the observation of three members of the Evaluation Committee since it quoted a percentage and not a lump sum figure contrary to Clause 6.1 of the RFP document and Section 124 (4) of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act").
- ✓ Two Members of the Evaluation Committee felt that the Financial Proposal was consistent to the requirements of the RFP document and therefore the firm proceeds; and that the consultant quoted the professional fees in accordance with Cap 525 of the Architects and Quantity Surveyors of Kenya.
- ✓ Two Members of the Evaluation Committee felt that a clarification be sought whether this was a lump sum or a percentage of the cost estimate of the firm.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee resolved that it would not recommend an award on the basis of the inconsistency of Firm No. 4's Financial Proposal.

First Professional Opinion

In a Professional Opinion dated 17th April 2020, the Principal Procurement Officer after reviewing the Evaluation Report stated as follows: -

"I have noted that Clause 6.1 of the Conditions of Contract has been relied upon as a basis of evaluation of tender and is the area of contention in this process. It is important that the Committee notes that the general and special information to consultants takes precedence in the evaluation of tenderers as the process is still at the tendering stage and the guidance notes for preparation of documents are provided for in this part of the document. The provisions of the general and special conditions of contract only apply at the contracting stage.

I have studied the report of the Evaluation Committee and noted that it did not conclude on the responsiveness of the proposal. I therefore recommend that the Tender Evaluation Committee reconsiders the matter with consideration to this opinion/guidance and the areas

highlighted above and present a conclusive recommendation.”

The Accounting Officer concurred with the views of the Principal Procurement Officer and requested the Evaluation Committee to take necessary action on the basis of the Professional Opinion which he approved on 17th April, 2020.

Continuation of the Evaluation Process

The Evaluation Committee met on 23rd April 2020 and on the basis of the Opinion of the Principal Procurement Officer, the Evaluation Committee observed the following:

1. The thirty (30) days evaluation period as stipulated in Section 80 (6) of the Act had already lapsed.
2. After reconsideration based on the opinion of the Principal Procurement Officer, three members of the evaluation committee still held that the Financial Proposal had not been submitted in accordance with the provisions of the RFP document and therefore the financial proposal should not proceed.
3. Based on the clarifications in the professional opinion of the Principal Procurement Officer, Clause 6.1 of the conditions of contract was not to be relied on in proposal evaluation stage, two members who had sought clarification were satisfied with the financial proposal.

4. Based on the clarification in the Professional Opinion of the Principal Procurement Officer, four members of the Committee felt the Financial Proposal met all the requirements as per the advice of the Head of Procurement and concluded that the proposal was responsive.

The bidder had a technical score of **84.2%**

This was weighted up to 80%

$$84.2 \times 80/100 = \mathbf{67.36\%}$$

The bidder's Financial Score was **20%**

Determination of the Highest Combined Score and ranking stage

The highest combined score was the Technical Score + the Financial Score

$$\text{Thus: } 67.36\% + 20\% = \mathbf{87.36\%}$$

The Evaluation Committee's Recommendation

In view of the continuation of the evaluation process, the Evaluation Committee recommended the award of proposal to Firm No. 4, that is, **M/s Arprim Consultants, M/s Nyange Integrated Consultants Limited and M/s Peng Limited (*Joint Venture*)**, the firm with the highest combined technical and financial score for award at their financial proposal sum of **Kshs.369,759,324.00 (Three Hundred and Sixty Nine Million, Seven Hundred and Fifty Nine Thousand,**

Three Hundred and Twenty Four shillings) only inclusive of all taxes.

However, three members of the Evaluation Committee dissented with this recommendation on the basis that the Financial Proposal had not met the requirements as per the Request for Proposals document.

Second Professional Opinion

In his Second Professional Opinion dated 27th April 2020, the Principal Procurement Officer made the following remarks upon his review of the second evaluation report dated 23rd April 2020: -

""I have perused through the report of the evaluation committee and noted that in the observations, although having adhered to the criteria provided for in the first two stages, three members dissented at the financial evaluation on account of an evaluation criterion which was not provided for as evaluation criterion in the Request for Proposal document. This is contrary to regulation 30 (a) of the Public Procurement and Asset Disposal Act 2020 which provides that in discharging the mandate provided for under the Act, members of the evaluation committee shall conduct the technical and financial evaluation of the tenders or proposals availed in strict adherence to the compliance and evaluation criteria set out in the tender documents.

Further, this is contrary to regulation 32 which provides as follows;

"The financial evaluation of the tenders or proposals received shall be in strict adherence to the compliance and evaluation criteria set out in the tender documents or request for proposals."

The Request for Proposal document issued by the Commission set the financial evaluation criteria under section IV in which the bidders were guided on how to prepare their responses and this would be the basis of which the bidders would be evaluated. The section did not provide for a criterion that the amount be in lump sum. The reliance on clause 6.1 of the conditions of contract therefore was a departure from the evaluation criteria set out in the request for proposal. The reliance on this goes against the principle of fairness in public procurement as the bidder was not aware of this criteria.

This position was clarified in my professional opinion dated 17th April 2020.

I therefore make a finding that the evaluation criteria were not adhered to in the financial evaluation.

(a) legality of tender award recommendations;

Having noted that the evaluation criteria was not adhered to by some members of the committee contrary to regulation 32 of the Public Procurement and Asset Disposal regulations 2020, I find that the legality of the award and recommendations thereof is questionable. Further I have noted that the committee raised in its report that the stipulated time for evaluation which is 21 days for a Request for Proposal has lapsed. Therefore, the evaluation committee cannot deliberate to harmonize its views in accordance with the evaluation criteria set in the Request for Proposal document.

On account of the above, the award recommendation cannot stand.

(b) whether the recommended price for standard goods, services and works are within the indicative market prices;

The assignment was a consultancy which is intellectual in nature and therefore the market prices are not set by the Public Procurement Regulatory Authority. However, prior to the advertisement, our chief engineer had prepared costs estimates amounting to Kshs. 204,400,000 for the assignment. The bidder M/s Arprim Consultants, Nyange Integrated Consultants and M/s Peng Ltd submitted a

proposal bid of Kshs. 369,759,324.40 which is well above the cost estimates by the engineer.

I am however guided by the provisions of section 124 (5) which provides that the request for proposal shall provide either the estimated budget or the estimated time of key experts, specifying that this information is given as an indication only and that consultants shall be free to propose their own estimates. The RFP document provided for the estimated time of 36 months and under clause 2.3.4(vi) of the document required that the technical proposal shall provide the estimates of the total staff input (professional and support staff- staff time) needed to carry out the assignment supported by bar chart diagrams showing the time proposed for each professional staff team member.

The above notwithstanding, the process only yielded one candidate for the financial evaluation and therefore the Commission may not be able to ascertain the market prices for this particular consultancy.

(c)availability of funds;

Funds are available for the assignment.

(f) a recommendation for change of scope, where the bid document had provided for change of scope, if the successful bid is above the budget available of the procuring entity, taking into account the effect of the scope of change to the entire evaluation of the tender.

This is not applicable

Recommendation

1. The evaluation criteria were not followed in the financial evaluation contrary to regulation 30 and 32.

2. That the legality of the tender award and recommendations thereof is questionable on account of the criteria not being followed and the lapse of the 21 days stipulated for evaluation of the RFP; and

3. The process only yielded one candidate for the financial evaluation and therefore the Commission may not be able to ascertain the market prices for this particular consultancy.

I find that the tender is non-responsive and recommend that the tender be terminated under section 63 of the Public Procurement and Asset Disposal Act 2015 subject to the procurement having been overtaken by operation of law and the evaluation committee having failed to reach a conclusion within the stipulated 21 days of evaluation.”

Notification of Termination

In letters dated 30th April 2020, the Procuring Entity notified bidders who participated in the request for proposals that the same had been terminated pursuant to section 63 (1) (a) (i) of the Act having been overtaken by operation of law.

THE REQUEST FOR REVIEW NO. 57 OF 2020

M/s Arprim Consultants Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated and filed on 30th April 2020 (hereinafter referred to as "the Request for Review") together with a Statement dated and filed on even date (hereinafter referred to as "the Applicant's Statement") through the firm of Mugendi Karigi & Company Advocates.

The Applicant further lodged an Amended Request for Review dated and filed on 11th May 2020 (hereinafter referred to as "the Amended Request for Review"), a Statement dated and filed on even date (hereinafter referred to as "the Applicant's Amended Statement") and a Further Statement in Support of the Request for Review dated and filed on 18th May 2020.

In response, the Procuring Entity, acting in person, lodged a Letter of Response to the Request for Review (hereinafter referred to as "the Procuring Entity's Response to the Request for Review") dated and filed on 6th May 2020. The Procuring Entity further lodged a Response to the

Amended Request for Review (hereinafter referred to as “the Procuring Entity’s Response to the Amended Request for Review”) filed on 13th May 2020 and a Response to the Applicant’s Further Statement dated and filed on 18th May 2020.

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

- i. An order declaring that the Respondent’s decision terminating the Request for Proposal RFP. No. PJS/RFP/001/2019-2020 for the Provision of Consultancy Services for Preparation of a Master Plan, Preliminary and Detailed Design, Tender Documents and Construction Supervision of the Proposed Centre for Parliamentary Studies and Training on L.R. No. 28172 is null and void;***
- ii. An order quashing and setting aside the termination of the procurement process by the Respondents;***
- iii. An order directing the Respondents to award the tender to the Applicant;***
- iv. In the alternative to prayer (c) above, an order directing the Respondent to conclude the procurement process and award the tender to the lowest evaluated bidder in accordance with the Act;***
- v. Any further orders that the Board may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of the Request for Review.***

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 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 24th 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").

The Applicant lodged Written Submissions dated 11th May 2020 and filed on 12th May 2020 and Supplementary Submissions dated and filed on

18th May 2020. The Procuring Entity 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 Applicant in lodging the Request for Review needed to comply with Regulation 204 of the Public Procurement and Asset Disposal Regulations, 2020;**

Depending on the outcome of the first issue:

- II. Whether the Procuring Entity terminated the subject procurement process in accordance with section 63 of the Act read together with Article 227 of the Constitution, thereby ousting the jurisdiction of the Board;**

Depending on the determination of the above issue:-

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

Before addressing our mind to the above issues for determination, the Board would like to dispense with one preliminary issue arising from the pleadings filed by parties to this Request for Review.

The Applicant lodged a Request for Review on 30th April 2020 where the Applicant alleged *inter alia* that the Procuring Entity had failed to complete the subject procurement process and notify the Applicant of the outcome of its proposal. On 5th May 2020, the Applicant received a notice of termination of the subject tender from the Procuring Entity. Thereafter, on 6th May 2020, the Procuring Entity filed its Response to the Request for Review. However, on 11th May 2020, the Applicant proceeded to file an Amended Request for Review.

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

"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"

Having considered the above provision, it is worth noting that the Applicant's Amended Request for Review filed on 11th May 2020 is within

the 14-day statutory period provided under section 167 (1) of the Act required to approach this Board, if the date of 5th May 2020 when the Applicant was notified of termination of the subject procurement process is taken into account. Accordingly, the Board admits the Applicant's Amended Request for Review as forming part of the proceedings before this Board.

Having dispensed with the above preliminary issue, the Board shall now address the main issues for determination.

On the first issue for determination, the Procuring Entity through its Response to the Amended Request for Review and its Response to the Applicant's Further Statement submitted that the Review Board ought to satisfy itself that the Applicant herein had complied with the requirements of Regulation 204 (1) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "the 2020 Regulations") which stipulates as follows: -

"Pursuant to section 167 (2) of the Act, the filing of a request for review shall be accompanied by a refundable deposit valued at fifteen percent (15%) of the applicant's tender sum which shall be paid into a deposit account"

According to the Procuring Entity, the 2020 Regulations were published by the Cabinet Secretary vide Legal Notice No. 69 published in Kenya Gazette Supplement No. 53 dated 22nd April 2020 pursuant to section 180 of the Act and the same took effect upon publication.

In the Procuring Entity's view, the 2020 Regulations as published by the Cabinet Secretary are in effect and shall only cease to have effect if the relevant regulation-making authority fails to comply with the requirement under section 11 (1) of the Statutory Instruments Act, No. 23 of 2013, (hereinafter referred to as "the Statutory Instruments Act") which requires the relevant regulation-making authority to transmit a copy of the statutory instrument to the responsible Clerk for tabling before the relevant House Committee of Parliament, within seven (7) sitting days following its publication in the Kenya Gazette.

In paragraph seventeen of the Procuring Entity's Response to the Applicant's Further Statement, the Procuring Entity contended that the 2020 Regulations remain in force until such a time that Parliament revokes them under section 15 (1) of the Statutory Instruments Act.

Moreover, in the Procuring Entity's view, the Applicant lodged the instant Request for Review application without sufficient grounds for review with the intention of leading the Board on a fishing expedition with respect to a lawful cancellation of a procurement process and as such the Applicant ought to forfeit its deposit pursuant to section 172 of the Act which requires forfeiture of deposit paid where the Review Board dismisses with costs a request that is frivolous or vexatious or was made solely for the purpose of delaying the procurement proceedings or performance of a contract.

On its part, the Applicant contended that the Procuring Entity had failed to demonstrate that the Cabinet Secretary tabled the 2020 Regulations before Parliament within seven (7) sitting days following their publication in the Kenya Gazette as required under Section 11 (1) and (4) of the Statutory Instruments Act. Furthermore, the Procuring Entity had also failed to demonstrate that Parliament approved the 2020 Regulations in accordance with section 15 (2) of the Statutory Instruments Act and section 180 of the Act.

According to the Applicant, the 2020 Regulations can only come into effect once approved by Parliament in accordance with section 180 of the Act. It was therefore the Applicant's submission that it could not be expected to comply with a regulation which had no force in law.

The Board observes that in its determination of the first issue, two sub-issues arise. The first sub-issue is whether the 2020 Regulations are in force and have the effect of law. In the event the Board determines the first sub-issue in the affirmative, the second sub-issue that arises for determination is whether the Applicant complied with Regulation 204 (1) of the 2020 Regulations which requires the payment of a refundable deposit valued at 15% of the Applicant's tender sum upon lodging its request for review application.

In its determination of the first sub-issue, the Board first addressed its mind to the manner and procedure of making regulation or what is referred to as subsidiary or subordinate legislation.

The Black's Law Dictionary (9th Edition) assigns the following definition to the term 'legislate':-

"to make or enact laws"

The Constitution of Kenya vests the power to legislate or to make and enact laws in Parliament as espoused under Article 94 (1) which reads as follows: -

"The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament"

Moreover, Article 94 (5) and (6) of the Constitution stipulates as follows:

-

"(5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation"

(6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.

Accordingly, all other persons or bodies other than Parliament are precluded from making provisions having the force of law in Kenya except under authority conferred by the Constitution or by legislation.

Notably, the term 'legislation' is defined under Article 260 of the Constitution as follows:

"legislation" includes—

(a) an Act of Parliament, or a law made under authority conferred by an Act of Parliament; or

(b) a law made by an assembly of a county government, or under authority conferred by such a law;"

Further, the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya defines 'written law' as follows:

"written law means—

(a) an Act of Parliament for the time being in force;

(b) an applied law;

(c) any subsidiary legislation for the time being in force; or

(d) any county legislation as defined in Article 260 of the Constitution;"

From the above two definitions, it is clear that legislation or what is referred to as written law includes *inter alia* laws made under authority

conferred by an Act of Parliament or what is commonly referred to as subordinate or subsidiary legislation.

Section 2 of the Statutory Instruments Act, defines subsidiary legislation or what is referred to as a 'statutory instrument' to mean: -

"Any rule, order, regulation, direction, form, tariff of costs of fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued"

From the above provision it is clear that regulations are statutory instruments issued or established in the execution of a power conferred by or under an Act of Parliament under which the regulations are expressly anchored.

This power is conferred upon a regulatory making authority which section 2 of the Statutory Instruments Act defines as "***an authority authorized by an Act of Parliament to make statutory instruments'***".

However, there are certain pre-requisites for preparation of a statutory instrument by a regulatory making authority before such a statutory instrument can come into effect.

For one, section 5 of the Statutory Instruments Act requires a regulatory making body to carry out consultations with persons who are likely to be affected by a proposed instrument and indicate, in detail, in the Explanatory Memorandum attached to the statutory instrument that consultations were carried out, including the outcome of such consultations.

Section 6, 7 and 8 of the Statutory Instruments Act, provides for the need to carry out an impact statement if a proposed statutory instrument is likely to impose significant costs on the community or a part of the community.

Once these pre-requisites have been met and a statutory instrument prepared, section 11 of the Statutory Instruments Act provides for its tabling before Parliament which provision reads as follows:

"(1) Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament.

(2) An explanatory memorandum in the manner prescribed in the Schedule shall be attached to any statutory instrument laid or tabled under subsection (1).

(3) The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying under this Part.

(4) If a copy of a statutory instrument that is required to be laid before Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.”

This provision simply requires every regulation making authority to transmit to the responsible Clerk for tabling before Parliament a copy of a statutory instrument within seven (7) sitting days following its publication, in the Kenya Gazette. Failure to do so, the statutory instrument in question shall cease to have effect and become null and void immediately after the last day it was required to be tabled or laid before Parliament.

Once tabled before Parliament, the statutory instrument is scrutinized by the relevant Parliamentary Committee pursuant to section 12 of the Statutory Instruments Act, in accordance with the principles of good governance, the rule of law and the considerations enumerated under section 13 of the Statutory Instruments Act.

The Board further observes section 15 of the Statutory Instruments Act which provides as follows: -

(1) The Committee shall make a report to Parliament containing only a resolution that the statutory instruments that stands permanently referred to the Committee be revoked.

(2) Where the Committee does not make the report referred to in subsection (1) within twenty eight sitting days after the date of referral of the statutory instrument to the Committee under section 12, or such other period as the House may, by resolution approve, the statutory instrument shall be deemed to have fully met the relevant considerations referred to in section 13.

(3) Despite the provision of this Act or any other written law, where a time is prescribed for doing an act or taking a proceeding by the National Assembly relating to the handling of a statutory instrument, the National Assembly may, by resolution, extend that time by a period not exceeding twenty-one days.

Further section 16 provides as follows:-

"Subject to section 11, and in so far as its practically possible, the Committee shall confer with the regulation-making authority for which the statutory instrument has been made and brought before the Committee for scrutiny, before tabling the report to Parliament for their information and modification where necessary"

From the above two provisions, the Board observes that upon scrutiny of a statutory instrument, the Parliamentary House Committee may approve the statutory instrument or table a report before Parliament revoking the statutory instrument in question. However, in the event a period of twenty eight days lapses after the date of referral of the

statutory instrument to the Parliamentary House Committee without a report of annulment, the statutory instrument shall be deemed to have fully met the considerations as outlined under section 13 of the Statutory Instruments Act. This period of twenty eight days may however be extended for a further period not exceeding twenty one days.

Moreover, where the House Committee tables a report before Parliament resolving to annul or revoke a statutory instrument, Parliament may adopt the House Committee's resolution and the statutory instrument stands annulled or revoked pursuant to section 18 and section 19 of the Statutory Instruments Act respectively which provide as follows:

(18) When a report on a statutory instrument has been tabled in Parliament, the statutory instrument shall be deemed to be annulled if Parliament passes a resolution to that effect.

(19) Where Parliament has adopted a report or a resolution that a statutory instrument be revoked, the instrument shall stand revoked and the regulation making authority shall publish the revocation within fourteen days.

Finally, section 23 of the Statutory Instruments Act addresses the commencement of the statutory instrument in question and provides as follows: -

"(1) A statutory instrument shall come into operation on the date specified in that behalf in the statutory instrument or, if no date is so specified, then, subject to subsection (2), it shall come into operation on the date of its publication in the Gazette subject to annulment where applicable.

(2) If a statutory instrument is made after the passing or making but before the coming into operation of the enabling legislation under which it is made, the statutory instrument, whether or not it is previously published, shall not come into operation before the date on which the enabling legislation comes into operation."

From the above provision, the Board observes that a statutory instrument shall come into operation on the date specified in the statutory instrument and where no date is specified it shall come into operation on the date of its publication in the Kenya Gazette subject to annulment where applicable.

Turning to the issue at hand, the Board observes that section 180 of the Act provides for the making of regulations under the Act which provision reads as follows: -

"The Cabinet Secretary shall make Regulations for the better carrying out of the provisions of this Act and, without limiting the generality of the foregoing, may make Regulations to facilitate the implementation of this Act, and such regulations shall not take effect unless approved

by Parliament pursuant to the Statutory Instruments Act, 2013. [Emphasis by the Board]

According to the above provision, the Cabinet Secretary, this being the Cabinet Secretary responsible for matters relating to finance pursuant to section 2 of the Act, shall make Regulations to facilitate the implementation of the Act and such regulations shall not take effect unless approved by Parliament, pursuant to the Statutory Instruments Act.

Notably, section 180 of the Act is couched in mandatory terms and thus any regulations made under the Act must be approved by Parliament prior to them taking effect, which approval is issued pursuant to the provisions of the Statutory Instruments Act.

As mentioned hereinbefore, section 15, 16, 18 and 19 of the Statutory Instruments Act, provides that Parliament may approve, reject or annul in whole or in part the regulations in question, following a report from the respective House Committee. Notably, if a report of annulment is not tabled within twenty eight days after the date of referral of the 2020 Regulations to the relevant Parliamentary House Committee, the 2020 Regulations shall be deemed to have fully met the considerations as outlined under section 13 of the Act. The Board notes, this period of twenty eight days may be extended for a further period not exceeding twenty one days.

Notably, section 180 of the Act seems to contradict section 23 (1) of the Statutory Instruments Act as to when the regulations under the Act would take effect.

On one hand, section 23 (1) of the Statutory Instruments Act as cited hereinbefore provides that a statutory instrument shall come into operation on the date specified in the statutory instrument and where no date is specified it shall come into operation on the date of its publication in the Kenya Gazette subject to annulment where applicable. On the other hand, section 180 of the Act clearly stipulates that regulations under the Act must be approved by Parliament, which approval, is pursuant to the Statutory Instruments Act, prior to such regulations taking effect.

Nevertheless, the Board notes that section 5 (1) of the Act provides for the Act to take precedence in the event of any inconsistency between the Act and any other legislation as it provides as follows: -

"This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services"

In view of the foregoing, it is the interpretation of this Board that the regulations as provided for under section 180 of the Act would only take

effect after the approval of Parliament, which approval, is pursuant to the Statutory Instruments Act.

With this interpretation in mind, the Board observes that the Procuring Entity contended that the 2020 regulations took effect upon publication in the Kenya Gazette on 22nd April 2020, but failed to demonstrate that said regulations had been tabled before Parliament within seven (7) sitting days following its publication and subsequently approved by Parliament thus taking effect in accordance with section 180 of the Act.

The Board takes judicial notice of Legal Notice No. 69 published in Kenya Gazette Supplement No. 53 dated 22nd April 2020 in which the 2020 Regulations were published as follows: -

"SPECIAL ISSUE **749**
Kenya Gazette Supplement No. 53 ***22nd April, 2020***
(Legislative Supplement No. 37)

LEGAL NOTICE NO. 69
THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT
(No. 33 of 2015)
THE PUBLIC PROCUREMENT AND ASSET DISPOSAL
REGULATIONS, 2020"

With the above information, the Board notes, the 2020 Regulations ought to have been transmitted to the responsible clerk for tabling before Parliament by 7th May 2020, noting that Parliament's scheduled sitting days are Tuesdays, Wednesdays and Thursdays.

Notably, the Applicant lodged its Amended Request for Review on 11th May 2020, and there is no evidence before the Board that the 2020 Regulations were transmitted to the Clerk for tabling before Parliament on or before 7th May 2020.

It is trite law that **'he who alleges, must prove'**. This principle is firmly embedded in the **Evidence Act, Chapter 80, Laws of Kenya** which stipulates in section 107 thereof as follows: -

" (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

The same was enunciated by the Honourable Justice Majanja in the case of **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** where he stated as follows: -

"...As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue."

This means that the burden of proving whether or not the 2020 Regulations had been transmitted to the Clerk for tabling before Parliament within seven (7) sitting days following its publication in the Kenya Gazette and subsequently approved by Parliament rested with the Procuring Entity.

The Board therefore cannot rely on the Procuring Entity's submission in order to ascertain whether or not the 2020 Regulations are in force.

In this instance, the Board has established that it is not possible to conclusively determine that the 2020 Regulations have been approved by Parliament and therefore have taken effect in accordance with section 180 of the Act. It therefore follows that the Board cannot disallow a request for review application on the basis of failure to pay the fee as prescribed under regulation 204 (1) of the 2020 Regulations, noting that there is no evidence that the same have taken effect.

The Board therefore finds that the Applicant in lodging its Request for Review did not need to comply with Regulation 204 (1) of the 2020 Regulations, noting that it is not possible for this Board to conclusively determine that the 2020 Regulations have been transmitted to the Clerk for tabling before Parliament in accordance with section 11 (1) of the Statutory Instruments Act and approved by Parliament and are thus in effect in accordance with section 180 of the Act.

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

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 2nd Respondent to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, 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 proposals with

respect to the subject tender. The said advertisement attracted a total of nine (9) proposals, including the Applicant's, which were opened on 20th March 2020.

The Procuring Entity appointed an evaluation committee that proceeded to evaluate the proposals as received. However, at financial evaluation, the Evaluation Committee differed on the criteria to be used in the evaluation of financial proposals and they therefore resolved to seek clarification on the same from the Procuring Entity's Principal Procurement Officer.

The Procuring Entity's Principal Procurement Officer, in his professional opinion dated 17th April 2020, advised the Evaluation Committee to conduct financial evaluation of the financial proposal in accordance with the 'General and Special Information to Consultants' as stipulated in the Request for Proposals Document and not Clause 6.1 of the General and Special Conditions of Contract which only apply at the contracting stage and proceed to determine the responsiveness of the said proposal.

On 23rd April 2020, the Evaluation Committee conducted financial evaluation taking into consideration the guidance and clarifications submitted to it by the Principal Procurement Officer and upon conclusion of the same, recommended award of proposal to **M/s Arprim Consultants**, that is, the Applicant herein.

However, three members of the Evaluation Committee dissented to this recommendation on the basis that the Financial Proposal had not met the requirements as per the Request for Proposals document. Moreover, the Evaluation Committee observed that the thirty (30) days evaluation period as stipulated under Section 80 (6) of the Act had already lapsed.

The Procuring Entity's Principal Procurement Officer, upon reviewing the evaluation report, in his professional opinion dated 27th April 2020 observed *inter alia* that the legality of the tender award and recommendations of the Evaluation Committee were questionable on account of the evaluation criteria not being followed and the lapse of the twenty one (21) day period stipulated for evaluation of proposals.

On this basis, the Procuring Entity terminated the subject procurement proceedings in accordance with Section 63 (1) (a) (i) of the Act.

On 5th May 2020, the Applicant received a letter from the Procuring Entity dated 30th April 2020 which read as follows: -

"Please refer to the above invitation for request for proposal and your responses thereof.

The Parliamentary Service Commission regrets to notify you that the above Request for Proposal (RFP) has been terminated under section 63 (1) (a) (i) having been overtaken by operation of law.

Thank you for responding to our invitation and look forward to your participation in our future tenders.”

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

The Applicant contended that the Procuring Entity's termination of the subject procurement proceedings did not meet the threshold under section 63 of the Act as the Procuring Entity did not identify or explain the nature in which the subject procurement had been overtaken by operation of the law. The Applicant submitted that it was not aware of any changes or developments of the law in a nature warranting termination of the subject procurement process on the ground of 'operation of law'.

To support its submission, the Applicant in its Request for Review referred the Board to Article 227 (1) 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 a manner that promotes transparency, accountability and public confidence. It was therefore the Applicant's submission that the Procuring Entity's termination of the subject procurement process was unlawful and in gross violation of the principles under the Act and the Constitution.

On its part, the Procuring Entity in its Response to the Amended Request for Review submitted that it terminated the subject procurement process on the basis of operation of law in accordance with section 63 (1) (a) (i)

of the Act as the evaluation committee had failed to reach a conclusion within the stipulated 21-day period of evaluation as provided for under section 126 (3) of the Act.

The Procuring Entity submitted that it duly notified all bidders who submitted proposals of the termination within the stipulated 14-day period vide letters dated 30th April 2020 in which the reasons for termination were cited. Further, the Procuring Entity presented a written report to the Public Procurement Regulatory Authority in the prescribed format citing the reasons for termination vide an email dated 4th May 2020 which was also within the 14-day period stipulated under section 63 of the Act.

It was therefore the Procuring Entity's submission that its termination of the subject procurement process met the threshold for termination as prescribed under section 63 of the Act.

The Board has considered submissions by both parties and in its determination of this issue, observes that the question that arises in this regard is whether the Procuring Entity's termination of the subject tender on the basis that the Evaluation Committee exceeded the stipulated 21-day period of evaluation as provided for under section 126 (3) of the Act was in line with section 63 (1) (a) (i) of the Act as the subject procurement had been overtaken by operation of law.

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) (a) (i) 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 the subject procurement has been overtaken by 'operation of law'.

The question that now arises is what is 'operation of law'?

The Black's Law Dictionary defines the phrase 'operation of law' as: -

"The means by which a right or a liability is created for a party regardless of the party's actual intent" [Emphasis by the Board]

Henry Campbell Black in his book **A Law Dictionary Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern (1995)** defined the phrase 'operation of law' as follows: -

"This term expresses the manner in which rights, and sometimes, liabilities devolve upon a person by the mere application to the particular transaction of the established rules of law, without the act or cooperation of the party himself" [Emphasis by the Board]

From the above definitions, the Board may deduce the meaning of 'operation of law' to mean the manner in which a person or institution may acquire certain rights or liabilities in any procurement process through no action, inaction or cooperation on his/her part, but merely by the application of the established legal rules to the procurement process in question. The application of these legal rules thus changes the manner in which the procurement process ought to be handled.

Such operation of law may also arise when a new law or regulation comes into force that affects the conduct or manner in which a

procurement process ought to be undertaken. An example can be made of the Public Procurement and Asset Disposal Regulations, 2020 which were published in the Kenya Gazette on 22nd April 2020. These regulations are intended to facilitate the better implementation of the Act and once they take effect upon approval by Parliament, which approval is pursuant to the Statutory Instruments Act and in accordance with section 180 of the Act, these regulations will impact the rights and liabilities of various procurement actors in any procurement process.

The question that now arises is whether the reasons advanced by the Procuring Entity to justify its termination of the subject tender were as a result of an operation of law in line with section 63 (1) (a) (i) of the Act.

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 initial Evaluation Report dated 2nd April 2020, the members of the Evaluation Committee differed on the criteria for financial evaluation and therefore sought guidance from the Head of Procurement Function.

The Board observes that the Procuring Entity's Principal Procurement Officer made the following remarks in his Professional Opinion dated 17th April 2020: -

"I have noted that Clause 6.1 of the conditions of contract has been relied upon as a basis of evaluation of the tender and is the area of contention in this process. It is

important that the committee notes that the general and special information to consultants take precedence in the evaluation of tenderers as the process is still at the tendering stage and the guidance notes for preparation of documents are provided for in this part of the document. The provisions of the general and special conditions of contract only apply at the contracting stage.

RECOMMENDATION

I have studied the report of the Evaluation Committee and noted that it did not conclude on the responsiveness of the proposal. I therefore recommend that the Tender Evaluation Committee reconsiders the matter with consideration to this opinion/guidance and the areas highlighted above and present a conclusive recommendation.”

From the above excerpt, the Board observes that the Principal Procurement Officer rightfully advised the Evaluation Committee that the ‘General and Special Information to Consultants’ take precedence in the evaluation of proposals and that the provisions of the ‘General and Special Conditions of Contract’ only apply at the contracting stage. Further, that the Evaluation Committee should take into consideration his guidance on the areas highlighted above and conclude on the responsiveness of the financial proposal in question.

The Board then examined the subsequent evaluation report dated 23rd April 2020, and observes that the Evaluation Committee concluded

financial evaluation and recommended award of tender to the Applicant herein. However, the Evaluation Committee observed that the thirty (30) days evaluation period as stipulated in section 80 (6) of the Act had already lapsed. Further, three members of the Evaluation Committee dissented with the overall recommendation of award on the basis that the Applicant's Financial Proposal had not met the requirements as per the Request for Proposals Document despite the Principal Procurement Officer's opinion dated 17th April 2020.

Upon examination of the Second Professional Opinion dated 27th April 2020, the Board observes therein that the Principal Procurement Officer after his review of the second evaluation report dated 23rd April 2020 determined that the Evaluation Committee did not follow the evaluation criteria contrary to the law and thus the legality of the recommendation of award was questionable on this basis. Moreover, the 21-day stipulated period for evaluation of proposals had lapsed. He was also of the view that the evaluation process had only yielded one candidate for the financial evaluation and therefore the Procuring Entity may not be able to ascertain the market prices for this particular request for proposals.

He therefore advised the Procuring Entity's Accounting Officer to terminate the subject procurement process, having been overtaken by operation of law since the evaluation committee had failed to reach a conclusion within the stipulated 21 days of evaluation.

Having considered parties' submissions, the Board deems it necessary to establish the meaning of evaluation and what it entails.

The Black's Law Dictionary, 6th Edition defines "Bid Evaluation" as follows:-

"After the submission deadline, the process of examining, and evaluating bids to determine the bidders' responsiveness, and other factors associated with selection of a bid for recommendation for contract award."

Section 85 of the Act further states that:-

"Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers"

From the above provisions and having noted the ordinary meaning of bid evaluation, it is the Board's considered view that evaluation is conducted with a view of recommending a bidder for award of a tender.

Section 80 (4) of the Act is further instructive on the document that marks the end of evaluation. It states as follows:-

"The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation"

An Evaluation Committee having conducted an evaluation of tenders is able to recommend a bidder for award of a tender. The recommendation envisioned by the Head of Procurement function is only in respect of his/her professional opinion given pursuant to section 84 of the Act advising the Accounting Officer on the appropriate action to take.

In essence, evaluation of bids ends once the Evaluation Committee prepares and signs an Evaluation Report containing a summary of evaluation and comparison of tenders and recommendation of award. It therefore follows that the evaluation of bids does not include all other processes after the conclusion of an evaluation process as contained in the Evaluation Report that is prepared and signed by the Evaluation Committee.

It is worth noting that the period of evaluation of bids does not include a post qualification evaluation pursuant to section 83 of the Act, a professional opinion rendered by the Head of Procurement Function pursuant to section 84 of the Act and award of tenders by the Accounting Officer pursuant to section 87 of the Act.

Accordingly, the Board now turns to determine whether the Procuring Entity complied with the timelines provided for evaluation of proposals as provided in the Act.

The Board observes that the tender in issue is a Request for Proposals and that section 126 (3) of the Act is instructive on the timeline for evaluation of proposals which reads as follows: -

"The evaluation shall be carried out within a maximum of twenty-one days, but shorter periods may be prescribed in the Regulations for particular types of procurement"

Accordingly, evaluation of proposals shall be carried out within a maximum of twenty-one days but shorter periods may be prescribed in the Regulations for particular types of procurement.

The Board observes that the first evaluation process was conducted for a period of ten (10) days from Tuesday 24th March 2020 to Thursday 2nd April 2020. The Evaluation Committee then sought a professional opinion from the Procuring Entity's Principal Procurement Officer and then resumed and concluded evaluation on 23rd April 2020. From this narrative of events, it is evident that the total number of days the Procuring Entity evaluated proposals was eleven days, which include the first ten days with respect to the initial evaluation process and the one day for the subsequent evaluation process.

Notably, the Board has established that the period within which the evaluation committee sought an opinion with respect to the Applicant's financial proposal ought not to be included in the computation of time for evaluation of proposals.

In this regard therefore, the evaluation committee conducted evaluation of proposals within the twenty-one day period for evaluation in accordance with section 126 (3) of the Act, noting that the evaluation committee conducted evaluation of proposals within a period of eleven (11) days.

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) (a) (i) of the Act.

The Board further observes that it was the Procuring Entity's submission in paragraph 6 of its Response to the Amended Request for Review, that the tender was not responsive as the evaluation process yielded only one candidate and therefore the Procuring Entity may not be able to ascertain the market prices for the subject procurement process. The Procuring Entity therefore found it necessary to terminate the same.

At this juncture, the Board will first establish what is 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."

The Board observes, a procuring entity may request for proposals through an advertisement or alternatively request for proposals from its list of registered suppliers as provided under section 57 of the Act. Where a procuring entity does not have a list of registered suppliers, it may invite expressions of interests in order to shortlist persons qualified to submit proposals. Further, a procuring entity may also opt to invite proposals from persons shortlisted as qualified to submit their tenders within a period as prescribed.

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

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

Notably, section 86 (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 ***“for Preparation of a Master Plan, Preliminary and Detailed Design, Tender Documents and Construction Supervision of the Proposed Centre for Parliamentary Studies and Training on L.R. No. 28172.”***

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 6 of the Request for Proposals Document.

The Board observes that the method of selection of proposals is indicated on page 3 of the Request for Proposals Document as follows: -

"The Consultant will be selected under Quality and Cost Based Selection (QCBS) and procedures described in the RFP, in accordance with the Public Procurement and Asset Disposal Act, 2015 and Regulations."

According to the Procuring Entity's Request for Proposals Document, the successful proposal shall be determined and selected using the formulae as outlined on page 23 of the Request for Proposals Document which reads as follows: -

"The Technical Proposal Score of each responsive firm shall be weighted up to 80% whereas the financial proposals score weighted up to 20%."

The below formulae as indicated under Clause 2.8.5 shall be applied: -

$S_f = 100 \times F_m / F$ where S_f is the financial score; F_m 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 = I) indicated in the Appendix.

The combined technical and financial score, S, is calculated as follows: - $S = St \times T \% + Sf \times P \%$.

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, subject to having been found responsive at the technical and financial stage of evaluation, 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.

The Board examined the Procuring Entity's Second Evaluation Report dated 23rd April 2020 and observes on page 3 therein that the Evaluation Committee recommended award of the tender to M/s Arprim Consultants Limited.

However, according to the Procuring Entity's Professional Opinion dated 27th March 2020, the Head of Procurement Function determined that since the evaluation process yielded only one candidate for the financial

evaluation, the Commission may not be able to ascertain the market prices for this particular procurement process. The Procuring Entity therefore proceeded to terminate the procurement proceedings in accordance with section 63 (1) (a) (i) 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 on page 3 and 23 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, noting that this Request for Proposals was openly advertised in the Star Newspaper and People Daily Newspaper on 10th February 2020 for all interested and eligible bidders to participate in the same.

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. This therefore was not a sufficient reason for the Procuring Entity to terminate the subject tender.

The Board further observes from the Procuring Entity's confidential file another reason that the Procuring Entity's Principal Procurement Officer

used to justify termination of the subject procurement process. In his view, the legality of the recommendation for tender award was questionable on account of the criteria not being followed at financial evaluation.

The Board examined the Procuring Entity's Evaluation Reports dated 2nd April 2020 and 23rd April 2020 and observes therein the dissenting opinion of some members of the evaluation committee with respect to the applicable criteria for financial evaluation.

The Board examined the Procuring Entity's Request for Proposals Document and observes Clause 2.4 Preparation of Financial Proposal of Section II Information to Consultants on page 8 and page 9 of the Request for Proposals Document which reads as follows: -

"2.4.1 In preparing the Financial Proposal, consultants are expected to take into account the requirements and conditions outlined in the RFP documents.

The Financial Proposal should follow Standard Forms (Section D). It lists all costs associated with the assignment including; (a) remuneration for staff (in the field and at headquarters), and; (b) reimbursable expenses such as subsistence (per diem, housing), transportation (international and local, for mobilization and demobilization), services and equipment (vehicles, office equipment, furniture, and supplies), office rent, insurance, printing of documents, surveys, and training, if

it is a major component of the assignment. If appropriate these costs should be broken down by activity.

2.4.2 The Financial Proposal should clearly identify as a separate amount, the local taxes, duties, fees, levies and other charges imposed under the law on the consultants, the sub-consultants and their personnel, unless Appendix "A" specifies otherwise

2.4.3 Consultants shall express the price of their services in Kenya Shillings.

2.4.4 Commissions and gratuities, if any, paid or to be paid by consultants and related to the assignment will be listed in the Financial Proposal Submission Form.

2.4.5 The Proposal must remain valid for 60 days after the submission date. During this period, the consultant is expected to keep available, at his own cost, the professional staff proposed for the assignment. The Client will make his best effort to complete negotiations within this period. If the Client wishes to extend the validity period of the proposals, the consultants shall agree to the extension."

From the above clause, the Board observes that bidders, in the preparation of their financial proposals, were required to list all costs associated with the assignment which cost should be broken down per activity. Moreover, bidders were required to clearly identify as a separate amount, the local taxes, duties levies and other charges imposed under the law on the consultants, the sub-consultants and their personnel.

This was further explained in Section IV Financial Proposal on page 35 of the Request for Proposals Document which provided guidance notes as follows: -

"Notes on preparation of Financial Proposal

4.1 The Financial proposal prepared by the consultant should list the costs associated with the assignment. These costs normally cover remuneration for staff, subsistence, transportation, services and equipment, printing of documents, surveys etc as may be applicable. The costs should be broken down to be clearly understood by the procuring entity.

4.2 The financial proposal shall be in Kenya Shillings or any other currency allowed in the request for proposal and shall take into account the tax liability and cost of insurances specified in the request for proposal.

4.3 The financial proposal should be prepared using the Standard forms provided in this part

4.4 Only the following documents should be included in the financial proposal document in the prescribed/provided format:-

- a) Financial proposal submission Form**
- b) Summary of costs**
- c) Breakdown of price/per activity**
- d) Breakdown of remuneration per activity**
- e) Reimbursable per activity**
- f) Miscellaneous expenses**
- g) Proof of local incorporation and citizenship.**
- h) Any other supporting document that enhances the firm financial proposal”**

With respect to the opening and evaluation of financial proposals, the Board observes Clause 2.8.2 and Clause 2.8.3 of Section II Information to Consultants on page 11 of the Request for Proposals Document which read as follows:

"2.8.2 The Financial Proposals shall be opened publicly in the presence of the consultants' representatives who choose to attend. The name of the consultant, the technical Scores and the proposed prices shall be read aloud and recorded when the Financial Proposals are opened. The Client shall prepare minutes of the public opening.

2.8.3 The evaluation committee will determine whether the financial proposals are complete (i.e. Whether the consultant has costed all the items of the corresponding Technical Proposal and correct any computational errors. The cost of any un-priced items shall be assumed to be included in other costs in the proposal. In all cases, the total price of the Financial Proposal as submitted shall prevail.”

According to the above provision, at financial opening, the name of the consultant, the technical scores and the proposed prices shall be read aloud and recorded in the presence of consultants’ representatives who choose to attend. Further, the evaluation committee, in the evaluation of financial proposals shall determine whether the financial proposals are complete, that is, whether the consultant has costed all the items of the corresponding technical proposal. Moreover, the total price of the financial proposal as submitted by a consultant shall prevail.

The Board then examined the Procuring Entity’s Evaluation Report dated 2nd April 2020 and observes therein that the Evaluation Committee noted that the Opening Committee erroneously read out a figure of Kshs 3,391,870,883.94 as the Applicant’s consultancy fees and yet the said amount was the estimated project cost and that the correct consultancy fees as quoted by the Applicant was a sum of Kshs 369,759,324.00.

The Board studied the Applicant’s original bid document and confirmed on page 6 therein, that the total consultancy fee inclusive of VAT and

disbursement was indicated at a sum of Kshs 369,759,324.00. The Applicant further indicated the total project cost on page 9 of its bid as Kshs 3,088,291,800.00 and not Kshs 3,391,870,883.94 as stated by the Evaluation Committee in its report dated 2nd April 2020.

As mentioned hereinabove, the tender in issue is a request for proposals procurement for the provision of consultancy services for "**Preparation of a Master Plan, Preliminary and Detailed Design, Tender Documents and Construction Supervision of the Proposed Centre for Parliamentary Studies and Training on L.R. No. 28172.**" This means that there should be a clear distinction between the Applicant's tender sum, this being the total cost of the consultancy services for the project, which the Applicant quoted at a sum of Kshs 369,759,324.00 and the total cost of construction of the proposed project.

Further, the Board notes, two members of the Evaluation Committee were of the view that the Applicant erroneously quoted a percentage and not a lump sum figure contrary to Clause 6.1 of the Request for Proposals Document and section 124 (4) of the Act.

Clause 6.1 Payments to the Consultant Part II General Conditions of Contract on page 80 of the Request for Proposals Document reads as follows:

"Lump-sum Remuneration

The Consultant's total remuneration shall not exceed the Contract Price and shall be a fixed lump-sum including all staff costs, Sub consultants' costs, printing, communications, travel, accommodation and the like and all other costs incurred by the Consultant in carrying out the

Services described in Appendix A. Except as provided in Clause 5.2, the Contract Price may only be increased above the amounts stated in Clause 6.2 if the Parties have agreed to additional payments in accordance with Clause 2.4."

The Board observes that the above clause in the Request for Proposals Document applies at the contracting stage in the subject procurement process and is not a criterion that should be applied at financial evaluation. In this regard therefore, the two dissenting members of the evaluation committee erred in applying this clause at the financial evaluation stage.

Moreover, section 12 (4) of the Act as cited by the two dissenting members reads as follows: -

"Subject to the foregoing provisions of this section, in the evaluation of tenders by public entities, the criteria for assessing the technical and financial capability of the tenderers shall be as prescribed by the accounting officer in the tender documents"

Accordingly, the criteria for assessing the technical and financial capability of the tenderers shall be as prescribed by the accounting officer in the tender documents.

The Board concurs that indeed the evaluation of tenders should be conducted in accordance with the criteria as stipulated in the tender documents. However, a procuring entity must ensure that it is well versed with its own tender document and applies the criteria outlined therein correctly and in accordance with the Act and the Constitution.

The Board finds that the financial evaluation of the Applicant's bid by the majority members of the Evaluation Committee in its subsequent evaluation report and the recommendation of award to the Applicant was in accordance with section 80 (2) of the Act and the provisions of the Request for Proposals Document. Moreover, the minority members of the evaluation committee erroneously dissented with the committee's recommendation based on Clause 6.1 of the General and Special Conditions of Contract.

It is worth noting that the professional opinion by the Head of Procurement Function, may provide guidance on the procurement proceedings in the event of dissenting opinions between tender evaluation and recommendations.

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) (a) (i) of the Act.

The Board notes that the requirement for real and tangible evidence before terminating a procurement process 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"***

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 operation of law that overtook the subject procurement process and thus formed the basis for its termination 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 'operation of law' having overtaken the subject procurement process 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, and Article 227 (1) 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 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 30th 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 evaluation process in accordance with the provisions of the Request for Proposal Document, the Act and the Constitution and taking into consideration the findings of the Board in this matter.

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 30th April 2020 with respect to RFP. No. PJS/RFP/001/2019-2020 for the Provision of Consultancy Services for Preparation of a Master Plan, Preliminary and Detailed Design, Tender**

Documents and Construction Supervision of the Proposed Centre for Parliamentary Studies and Training on L.R. No. 28172 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's Professional Opinion dated 27th April 2020 is hereby cancelled and set aside.

For avoidance of doubt, the Procuring Entity's Evaluation Report dated 23rd April 2020 recommending an award to the Applicant is hereby upheld.

3. The Procuring Entity is hereby directed to complete the procurement process to its logical conclusion including issuance of notification letters of the outcome of RFP. No. PJS/RFP/001/2019-2020 for the Provision of Consultancy Services for Preparation of a Master Plan, Preliminary and Detailed Design, Tender Documents and Construction Supervision of the Proposed Centre for Parliamentary Studies and Training on L.R. No. 28172 in accordance with the Request for Proposal Document, 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.

4. In view of the fact that the procurement process is still ongoing, each party shall bear its own costs in the Request for Review

Dated at Nairobi, this 21st Day of May, 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB