

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 23/2020 OF 17TH FEBRUARY 2020

BETWEEN

THE GARDENS AND

WEDDINGS CENTRE LIMITED.....APPLICANT

AND

THE PRIVATIZATION COMMISSION.....RESPONDENT

Review against the decision of the Accounting Officer of the Privatization Commission with respect to Tender No. PC/QUOT/026/2019-2020 for Provision of Comprehensive Cleaning, Fumigation and Sanitary Bin Services

BOARD MEMBERS

- | | |
|---------------------------|------------------|
| 1. Ms. Phyllis Chepkemboi | -Member Chairing |
| 2. Mr. Rahab Chacha | -Member |
| 3. Mr. Nicholas Mruttu | -Member |

IN ATTENDANCE

- | | |
|-------------------------|------------------------------|
| 1. Mr. Stanley Miheso | -Holding brief for Secretary |
| 2. Ms. Maryanne Karanja | -Secretariat |

PRESENT BY INVITATION

APPLICANT

1. Mr. Nathan Karugu

2. Mr. Daniel Gathogo

-THE GARDENS AND WEDDINGS CENTRE LIMITED

-Advocate, The Gardens and
Weddings Centre Limited

-Officer, The Gardens and
Weddings Centre Limited

RESPONDENT

1. Mr. Danson Maina

2. Ms. Zephaniah Aenapa

3. Ms Maureen Saina

3. Mr. Sylvester Kamau

-PRIVATIZATION COMMISSION

-Advocate, Karanja Njenga
Advocates

-Legal Department

-Principal Legal Officer

-MSCM

INTERESTED PARTY

1. Mr. Duncan Onsongo

-SAMAHU CLEANING SERVICES LIMITED

-Director

BACKGROUND TO THE DECISION

The Bidding Process

The Privatisation Commission (hereinafter referred to as “the Procuring Entity”) invited thirteen (13) firms on 3rd January 2020 to submit their bids in response to Tender No. PC/QUOT/026/2019-2020 for Provision of Comprehensive Cleaning, Fumigation and Sanitary Bin Services (hereinafter referred to as “the subject tender”).

Bid Submission Deadline and Opening of bids

A total of three (3) firms submitted bids and the same were opened on 10th January 2020 as follows: -

No	Firm name
1.	M/s Strami Limited
2.	M/s The Gardens & Wedding Centre Ltd
3.	M/s Samahu Cleaning Services

Evaluation of bids

According to the Procuring Entity’s Tender Document with respect to the subject tender, evaluation was to be conducted in the following three stages:-

- Preliminary/Mandatory Evaluation
- Financial Evaluation.

Preliminary Evaluation

At this stage of evaluation, bidders were evaluated based on Section V – Schedule of Requirements, Clause E of the Tender Document.

The criteria were as follows:-

	Criteria
1.	Certificate of registration/Incorporation.
2.	Submit two Separate sealed envelopes clearly marked as either technical and /or financial bid.
3.	Must submit an original and copy of the bid (Separate technical and financial).
4.	All pages of the bid must be serialized (Public Procurement and Asset Disposal Act 2015 section (1) (i)).
5.	Submit Valid AGPO Certificate.
6.	Must submit duly filled Bid/tender Security Declaration in the prescribed format
7.	Provide a valid Tax Compliance Certificate from KRA.
8.	Evidence of physical address.
9.	Must attach current certificates of compliance from NHIF for current year 2019/2020.
10.	Must attach current certificate of Compliance from NSSF 2019/2020.
11.	Must attach current certificate of workman's compensation.
12.	Submit a certificate of public liability insurance for its employees.
13.	Submit fully filled, signed and stamped attached Mandatory Confidential Business Questionnaire.
14.	Provide reference letters from at least five (5) organizations preferably Public Institutions/entities where you have provided cleaning and fumigation services.
15.	Operational plan for carrying out the assignment detailing the number of employees to be deployed, level of supervision, materials and equipment to be used (provide proof of ownership), reporting time etc.
16.	Must submit at least one (1) CV for the proposed supervisor(s) who should have at least two (2) years of relevant work experience and qualification.
17.	Must provide evidence of compliance with the government minimum wage rate for the current year (2019).
18.	Submit current certificates of good conduct for at least two (2) proposed personnel.
19.	Declaration that that the firm shall use only environmentally friendly detergents and materials.
20.	Duly filled Litigation history forms.
21.	Submit the Anti-Corruption Declaration form in the prescribed format.
22.	Duly filled forms of experience.
23.	Must have participated on site survey visit and signed the register.

The results were as follows: -

	B1	B2	B3
Bidder Number			
Responsiveness	X	√	√

Bidders B2 and B3 complied with the preliminary requirements and passed this stage of evaluation, having submitted and attached all the relevant mandatory requirements as per the Tender Document.

Bidder B1 was however found not responsive due to the following reasons listed below:-

Bidder No.	Firm Name	Explanations	Relevant Clause in RFP
Bidder 1	Strami Limited	<ul style="list-style-type: none"> Did not serialise the pages as per PPADA Act 2015 Section (10)(i) Did not submit current Compliance Certificate from NHIF for current year 2019/2020 Submitted an expired compliance with Government minimum wage rate Did not submit declaration that the firm shall use environmentally friendly cleaning detergents and materials 	<p>As per section requirements, clause No. 3 V, Schedule of subsection E,</p> <p>As per section requirements, clause No. 10 V, Schedule of subsection E,</p> <p>As per section requirements, clause No. 17 V, Schedule of subsection E,</p> <p>As per section requirements, clause No. 19 V, Schedule of subsection E,</p>

Financial Evaluation

At this stage of evaluation, the Evaluation Committee opened financial proposals for the two (2) technically responsive firms on Monday 20th January 2020, in the presence of the firms' representatives who chose to attend.

The name of the firm and the proposed prices were read out aloud and recorded by the Procuring Entity's Evaluation Committee.

The table below lists a record of the financial proposals as submitted by the firm and as read out during the opening:-

Bid No.	Firm	Total Cost (KES)	Remarks
2	M/s Gardens & Wedding Centre Ltd	660,000.00	Amounts indicated are inclusive of all taxes. The bidder submitted an original and a copy of the Financial proposals
3	M/s Samahu Cleaning Services Ltd	716,880.00	Amounts indicated are inclusive of all taxes. The bidder submitted an original and a copy of the Financial proposals

The Evaluation Committee's Recommendations

Upon conclusion of the evaluation process, the Evaluation Committee noted that the tender sum for the successful firm M/s The Gardens & Weddings Centre Ltd comprised of all the areas to be cleaned as ascertained in accordance with the schedules of prices attached in the Tender Document of **Kenya Shillings Six Hundred and Sixty Thousand only - inclusive of all applicable taxes and reimbursable.**

The Evaluation Committee further recommended that the firm be invited for contract negotiations having met all the mandatory/technical requirements and to enable confirmation of the financial quote in line with tender specifications.

Wrong Financial Bid Opening

Upon evaluating the bid, the Evaluation Committee noted that the financial bids that were opened were erroneously opened since they were for the past-terminated bid. The bidders were informed on the

occurrence and were requested to come for a meeting with the committee members. During the meeting it was noted that;-

- i. As per PPADA, 2015 Act The financial bid for the previous terminated tender for (provision of comprehensive cleaning, fumigation and sanitary bins) were to be returned back to the bidders but apparently, they were still held in the department and this brought confusion since they had no marked dates on the envelopes and thus resulted to Committee proceeding to open the financial bids and read out the tender sum in the presence of the bidders and members as per the PPADA, 2015 Act.

The committee called upon the Head of Supply Chain Management to give direction on the same since it was clearly noted that the financial bids were erroneously opened.

The Manager Supply Chain Management informed the Evaluation Committee that the tender would be terminated since the financial bids could not be opened twice of the same tender in compliance with the PPADA 2015 Act.

Termination of Tender No PC/QUOT/026/2019 for Provision of Comprehensive Cleaning, Fumigation and Sanitary Bins Services and Extension Of Contract

In a letter from the Manager Supply Chain Management to the Executive Director/CEO dated 29th January, 2020, the Manager Supply Management informed the CEO that the Commission's contract with

M/s Gardens & Weddings Centre Limited for Provision of Comprehensive Cleaning, Fumigation and Sanitary Bins Services expires on 6th February 2020 following an approval for extension that was granted on 16th December 2019 to allow the Commission adequate time to source for a service provider. (The principal contract was to lapse on 6th January 2020.)

He further stated that the Commission had floated quotations for the subject services on three previous occasions but had failed to identify a service provider. On the first two attempts, the quotations were non-responsive as on both occasions, only two bidders submitted their bids thus prompting termination of both processes as a minimum of three bidders are required for request for quotations to be processed.

On the third attempt, the process was almost successful as three firms out of a total of thirteen (13) firms invited for RFQs participated in the process. One of the three firms namely M/s. Strami Limited bid was disqualified at the preliminary stage for not attaching mandatory requirements. The remaining two firms namely M/s Gardens & Weddings Centre Limited and M/s. Samahu Cleaning Services Ltd were progressed to the financial bids opening after meeting the mandatory requirements but unfortunately, wrong financial bids were opened which invalidated the process as a procuring entity cannot have two financial opening ceremonies for the same process as doing so would be contrary to Section 82 of the PPADA 2015.

He thus stated that the Commission had still not identified a service provider noting that after the 6th of February 2020, the term for provision of the services lapses. He emphasised that the services in question were critical and that the Commission cannot stay without a service provider to provide the subject services.

In view of the foregoing, he requested for the following:-

- i) Approval for termination of Tender No. RFQ PC/QUOT/026/2019-2020 and launch of a fresh process.
- ii) That the current contract be extended for another period of two (2) months from the date the contract will lapse on the same terms and conditions to enable the Commission source for a service provider. The price for provision of the services as per the current contract was Kshs. 53,592.00 a month which is the rate that would be used even during the extension period. The total cost for two (2) months would therefore be Kshs. 107,184.00. Considering an extension of one (1) month had initially been granted, the total cumulative value of all contract variations would be Kshs. 160,776.00 which is 25% of the original contract price Kshs. 643,104.00 and therefore in compliance with Section 139 (4) (e) of the PPADA 2015. He therefore sought approval for extension of the contract for another two months with effect from 7th February 2020.

Approval of Termination of Tender No PC/QUOT/026/2019 for Provision of Comprehensive Cleaning, Fumigation and Sanitary Bins Services and Extension of Contract

The CEO/Accounting Officer approved the memo dated 29th January 2020 and directed the Manager, Supply Chain to re-advertise the tender immediately.

THE REQUEST FOR REVIEW NO. 23 OF 2020

M/s The Gardens and Weddings Centre Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated and filed on 17th February 2020 (hereinafter referred to as "the Request for Review") together with a Supporting Affidavit dated and sworn on even date (hereinafter referred to as "the Applicant's Affidavit").

In response, the Procuring Entity filed a Memorandum of Response dated 24th February 2020 and filed on 25th February 2020 (hereinafter referred to as "the Procuring Entity's Response"). The Procuring Entity further filed a Notice of Preliminary Objection dated 24th February 2020.

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

- i. An order allowing the Request for Review;***
- ii. An order directing the Procuring Entity to proceed with the financial evaluation of the subject tender and make an award thereof;***

iii. An order awarding costs to the Applicant;

iv. Any other orders that the Board may deem just and fit.

During the hearing, the Applicant was represented by Mr. Mbugua on behalf of the firm of Karugu Mbugua & Company Advocates whereas the Procuring Entity was represented Mr. Maina on behalf of the firm of Karanja Njenga Advocates.

PARTIES' SUBMISSIONS

The Applicant's Submissions

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

Mr Mbugua submitted that the Applicant submitted its bid in response to the subject tender, which the Applicant construed to be an open tender and not a Request for Proposals as indicated by the Procuring Entity. It was the Applicant's submission that it duly complied with all the requirements under the subject tender. However, on 3rd February 2020, the Applicant received an email to the effect that the subject procurement process had been terminated by the Procuring Entity since the Procuring Entity inadvertently opened the wrong financial bids during the financial opening thus invalidating the process.

This therefore prompted the Applicant to lodge its Request for Review on the grounds that the termination process with respect to the subject tender did not meet the threshold under section 63 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act").

Mr Mbugua invited the Board to consider the decision of the High Court in *Misc. Application No. 142 of 2018* where the Honourable Justice Nyamweya in paragraph 32 stated that sufficient evidence must be provided to justify a termination process. Further, that the substantive requirements for termination set out under section 63 of the Act must be complied with. Mr Mbugua submitted that in the Applicant's view, evidence was lacking in this instance and that the Procuring Entity did not meet the conditions and procedures set out in section 63 of the Act.

Mr Mbugua referred the Board to Clause 2.14, 2.15 and specifically 2.15.2 on page 10 of the Tender Document and submitted that the bid number with respect to the subject tender was number 26. However, the alleged financials that were opened were with respect to tender number 17. It was therefore the Applicant's submission that no reasonable person sitting in an evaluation committee would have made the same mistake as the Procuring Entity was required to return financials for Tender No. 17 to the respective bidders who participated in that particular bidding process.

Mr Mbugua submitted that the bidders with respect to Tender No. 17 and the subject tender, that is Tender No. 26, were completely different and therefore the issue of opening the wrong financials is neither here nor there and thus cannot stand as a reason to justify the termination of the subject tender. In the Applicant's view, this reason was fabricated and not supported by any tangible evidence as required by law.

Counsel submitted that an assertion was made by the Procuring Entity that the subject tender was terminated on the basis that material governance issues were detected by the Procuring Entity. He referred the Board to its decision in *Application No 23/2019* where this Board elaborated on what constitutes material governance, which did not apply in the instant case.

In conclusion, he urged the Board to allow the Request for Review and grant the orders as prayed therein.

Respondent's/The Procuring Entity's Submissions

In his submissions, Counsel for the Procuring Entity, Mr. Maina, fully relied on the Procuring Entity's Response, and supporting documentation thereto.

Mr. Maina submitted that on 8th November 2019, the Procuring Entity's user department raised a request for provision of cleaning and fumigation services which was approved on 11th November 2019. He

submitted that the Applicant is the current service provider of the said services and their contract was initially set to expire on 6th January 2020.

Mr Maina submitted that in order to identify a service provider for the subject services before expiry of the contract, the Procuring Entity opted to do a request for quotation but it did not have a pre-qualified list of firms for provision of fumigation services. The Procuring Entity therefore in line with section 56 of the Act, decided to use the list of service providers of another institution, that is, the Competition Authority of Kenya.

Counsel submitted that the Applicant was not among the list of pre-qualified service providers and was therefore not invited to submit a bid. He submitted that nine (9) firms were invited to submit bids, but only two (2) responded. The Procuring Entity therefore extended the time for submission of the bids, noting that at least three firms needed to quote as required under section 106 of the Act.

According to the Procuring Entity, during the second site visit that was conducted under that particular tender, the Applicant appeared despite having not been invited to attend and the Applicant duly signed the attendance register. When the deadline for tender submission was due, a total of three firms had submitted their quotations, including the Applicant herein. During the tender opening, the tender opening committee sought an opinion on whether or not to proceed with the

opening of quotations noting that one of the quotations belonging to the Applicant was an unsolicited quote. Counsel submitted that the tender opening committee was advised to open all quotations in line with section 78 of the Act and following an evaluation process, all the three bids were found to be non-responsive and the three firms were duly notified of the outcome of their bids.

Mr Maina submitted that the Procuring Entity re-invited the nine (9) firms to submit their bids and in this new procurement process, three (3) firms attended the mandatory site visit but only one firm submitted a bid thereby prompting the Procuring Entity to terminate the tender.

Counsel submitted that the Procuring Entity then made a third attempt to procure for the said services and this time it identified firms using a market survey in accordance with section 71 of the Act. The Procuring Entity identified thirteen (13) firms, including the Applicant, who were invited to submit their bids in response to Tender No. 26, which is the subject tender herein. Tenders received were opened on 13th January 2020 and a total of three (3) firms submitted their bids in response to the tender. He submitted that after evaluation of the bids, the Procuring Entity discovered that it had inadvertently opened the financials with respect to Tender No. 17 instead of the financials for Tender No. 26.

Mr. Maina submitted that at this juncture, the Evaluation Committee sought for a professional opinion from the Procuring Entity's Procurement Officer who advised that section 82 of the Act bars any

amendment or rectification or modification after the announcement of a financial evaluation. The Evaluation Committee therefore invited the bidders who participated in the subject tender for a meeting and informed them of the error. Regret letters were further issued highlighting the error and the original and unopened bids for the subject tender were returned to bidders. The Procuring Entity then proceeded to terminate the procurement process in accordance with section 63 of the Act.

Mr Maina submitted that in the Procuring Entity's view, the error amounted to a serious breach of the principles of governance and procurement as provided for under Article 227 of the Constitution. The only recourse available was therefore to re-tender afresh.

Counsel submitted that due to the fact that the contract with the Procuring Entity's current service provider, that is the Applicant herein, was due to expire, the Procuring Entity opted to extend the contract for a further two months to give time for a proper procurement process to be conducted.

Mr Maina submitted that in the Procuring Entity's fourth attempt to procure for the subject services, it floated an open tender and advertised the same in MyGov Newspaper on 4th February 2020. The tender was to be opened on 18th February 2020 on the date that the Procuring Entity was served with the Request for Review.

Mr Maina submitted that the Applicant did not participate in the new tendering process but instead through this Request for Review had opted to pursue an otherwise flawed tendering process.

Counsel submitted that the Procuring Entity had filed a Preliminary Objection in paragraph 5 of its response. It is the Procuring Entity's submission that it terminated the subject procurement process in line with section 63 of the Act and cited material governance issues as the reason for such termination. Therefore, in line with section 167 (4) of the Act, the jurisdiction of this Board had been expressly ousted in the present Request for Review.

Counsel further submitted that the error by the Evaluation Committee with respect to the subject procurement process went to the root of the tender and therefore any rectification was barred under section 82 of the Act. In order to secure the integrity of the subject procurement process, it was the Procuring Entity's submission that the only recourse available was to cancel the process and float a fresh tender and Mr Maina invited the Board to consider its decision in *Application No. 69 of 2019* where the Board held a similar view.

In response to an enquiry from the Board as to whether the Procuring Entity satisfied the conditions and requirements under section 63 of the Act, Mr Maina submitted that section 63 (1) stipulated the conditions that the Procuring Entity needed to undertake whereas section 63 (2)

involved issues of compliance which the Procuring Entity would undertake after termination.

Finally, Mr Maina urged the Board to dismiss the Request for Review.

The Applicant's Rejoinder

In a rejoinder, Mr Mbugua contended that with respect to Tender No. 17 and Tender No. 20, the Applicant submitted its bid in response to the invitations to tender which were floated on the Procuring Entity's website and were for all intents and purposes, open tenders.

Mr Mbugua further submitted that the Procuring Entity had an obligation to return the financial bids to respective bidders of all the previous tenders which it had cancelled, including Tender No. 17 and it therefore failed in this respect.

Counsel contended that the figures for financials for the Applicant with respect to the subject tender were the same in all the previous bids it had submitted to the Procuring Entity, therefore the Applicant could not have raised an issue during the reading of the financials as it was not privy to the cover envelope of its financial bid which was opened by the Procuring Entity's Tender Opening Committee.

In response to the Preliminary Objection filed by the Procuring Entity, Mr. Mbugua submitted that the Board had to first satisfy itself that

certain pre-conditions as outlined under section 63 of the Act have been met in order to determine if it has jurisdiction to hear the Request for Review. Counsel submitted that these statutory requirements have not been met and therefore the Board has jurisdiction in this matter.

Mr Mbugua reiterated that Justice Nyamweya in *Misc. Application No. 142 of 2018* was categorical that a procuring entity had to comply with both the substantive and procedural requirements as stipulated under section 63 of the Act and a procuring entity was not at liberty to selectively choose which requirements to adhere to.

Finally, Mr Mbugua disputed the Procuring Entity's submission that it invited all bidders to a meeting where it informed them of the error that was made with respect to the bidders' financials. Mr Mbugua submitted that the Applicant was not invited to any meeting by the Procuring Entity and the only communication it received from the Procuring Entity was an email informing it of the termination of the subject procurement proceedings on 3rd February 2020.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act

(hereinafter referred to as “the Act”) and the oral submissions by all parties to the Request for Review.

The issues for determination are as follows:-

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

Depending on the outcome of this issue: -

II. What are the appropriate reliefs to grant in the circumstances?

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

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

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

"That the Request for Review is fatally defective and incompetent and should be struck out with costs for reasons that contrary to the express provisions of section 167 (4) (b) as read together with section 63 of the Act, the Board lacks the jurisdiction to adjudicate on issues of termination and/or cancellation of a procurement or asset disposal proceedings".

Termination of procurement proceedings is governed by section 63 of the Act, which stipulates that when a termination meets the threshold of the said provision, the jurisdiction of this Board is ousted by virtue of section 167 (4) (b) of the Act which provides as follows:-

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

(a);

(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act..."[Emphasis by the Board]

In the case of **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR**, the High

Court while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 that dealt with termination of procurement proceedings held as follows:-

"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005, s 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the jurisdiction of the Review Board. That question can be answered by a close scrutiny of section 36 (6) of the said Act which provides:

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

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

"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of

remedy or in order that his grievance may be remitted to some other tribunal.”

It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures.

To illustrate the point, the failure by the 2nd Respondent to render reasons for the decision to terminate the Applicant’s tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, 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.

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 this Request for Review is that the Procuring Entity invited thirteen (13) firms to submit bids in response to the subject tender. By the bid submission deadline of 13th January 2020, the Procuring Entity received a total of three (3) bids which were opened on the same date by the Procuring Entity's Tender Opening Committee.

However, on 3rd February 2020, the Applicant received an email from the Procuring Entity which read as follows: -

"Reference is made to your bid for the provision of the above-mentioned services submitted on 10th January 2020.

This is to bring to your attention that the Commission has terminated the procurement as wrong financial bids were inadvertently opened during the financial opening meeting

thus invalidating the process. The Commission will advertise for the re-tender in due course.

We look forward to your participation in future Commission's procurements."

Aggrieved with the decision by the Procuring Entity, the Applicant moved the Board through this Request for Review.

The Applicant contended that the reason advanced by the Procuring Entity for terminating the subject tender did not meet the threshold of section 63 of the Act. Further, the Procuring Entity did not adhere to the statutory requirements and conditions as outlined under section 63 of the Act in its purported termination of the subject tender.

According to the Applicant, the Procuring Entity did not submit a report to the Public Procurement Regulatory Authority (hereinafter referred to as PPRA) as required under section 63 of the Act. Further, in view of the Procuring Entity's assertion that it terminated the tender due to material governance issues that were detected in the subject procurement process, it was the Applicant's submission that the Procuring Entity did not fully comprehend what constitutes material governance issues and as a result the purported termination ran contrary to section 63 of the Act.

The Procuring Entity on its part submitted that the tender before the Board was its third attempt to procure for the '*Provision of Comprehensive Cleaning, Fumigation and Sanitary Bin Services*' (hereinafter referred to as "the subject services"). According to the Procuring Entity, it received a total of three bids which were opened by its Tender Opening Committee and subsequently thereafter, the Procuring Entity's Evaluation Committee commenced the process of evaluation. Two technically responsive bids qualified for financial evaluation, whose financial proposals were opened on 20th January 2020 in the presence of bidders and their representatives.

However, after the opening of financial bids, the Procuring Entity realized that it opened the wrong financial bids which it had previously received with respect to a different tendering process. Going by the provisions of section 82 of the Act, which provides that financial bids are absolute and final and cannot be subject to correction, adjustment or amendment in any way, the Procuring Entity, informed all bidders of its error and terminated the subject procurement process.

The Procuring Entity submitted that it terminated the subject procurement process under section 63 of the Act, on the basis that its opening of the wrong financial bids was a material governance issue. The Procuring Entity then returned the unopened financial bids with respect to the subject tender back to the respective bidders.

Having heard submissions by parties, the Board studied section 63 of the Act which reads as follows: -

"(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement have been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.”

Section 63 of the Act is instructive in the manner in which a procuring entity may terminate a tender. According to this provision, a tender is terminated by an accounting officer who is mandated to terminate any procurement process as per the said section of the Act.

Further, an accounting officer may terminate a tender at any time, prior to notification of tender award. This means that before an award is made with respect to a subject tender, an accounting officer may terminate a tender. Further, a tender may only be terminated by a procuring entity in the specific instances as highlighted under section 63 (1) of the Act, 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".

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 examined the Procuring Entity's confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act and observes in the Procuring Entity's Evaluation Report dated 27th January 2020, the Evaluation Committee made the following remarks on page 6 of the report: -

"Wrong Financial Bid Opening

Upon evaluating the bid, the Evaluation Committee noted that the financial bids that were opened were erroneously opened since they were for the past-terminated bid. The bidders were informed on the occurrence and were requested to come for a meeting with the committee members. During the meeting it was noted that;-

- i. As per PPADA, 2015 Act The financial bid for the previous terminated tender for (provision of comprehensive cleaning, fumigation and sanitary bins) were to be returned back to the bidders but apparently, they were still held in the department and this brought confusion since they had no marked dates on the envelopes and thus resulted to Committee proceeding to open the financial bids and read out the tender sum in the presence of the bidders and members as per the PPADA, 2015 Act.***

The committee called upon the Head of Supply Chain Management to give direction on the same since it was

clearly noted that the financial bids were erroneously opened.

The Manager Supply Chain Management informed the Evaluation Committee that the tender would be terminated since the financial bids could not be opened twice of the same tender in compliance with the PPADA 2015 Act.”

Further, the Board observes a memo from the Manager Supply Chain Management addressed to the Executive Director/CEO dated 29th January with the heading “***Termination of PC/QUOT/026/2019 – 2020 & Extension of Contract for Provision of Comprehensive Cleaning, Fumigation and Sanitary Bins Services.*** In the said memo, the Manager Supply Chain Management, one Mr Sylvester Kamau, outlined the three prior attempts by the Procuring Entity to procure for ‘*Comprehensive Cleaning, Fumigation and Sanitary Bin Services*’ and further outlined the Evaluation Committee’s remarks as cited hereinbefore. Mr Sylvester Kamau further requested the Executive Director/CEO for the following: -

- i. "Approval for termination of RFQ PC/QUOT/026/2019-2020 and launch of a fresh process;***
- ii. That the current contract be extended for another period of two (2) months from the date the contract will lapse on the same terms and conditions to enable the Commission source for a service provider....We therefore wish to seek approval for the contract***

extension for another two months with effect from 7th February 2020.”

From the above memo, the Board observes that the Procuring Entity's Executive Director approved termination of the subject tender on the ground of inadvertent opening of the wrong financial bids. He further approved the launch of a fresh tendering process and extension of the existing contract with the current service provider, who is the Applicant herein, for a further two months with effect from 7th February 2020.

From the foregoing, the Board notes that the Procuring Entity terminated the subject tender on the ground that it opened the wrong financial bids, which in its view amounted to a 'material governance issue' as provided for under section 63 of the Act.

Firstly, the Board notes that the financial proposals that the Procuring Entity ought not to have opened, relates to a different tender that is not before the Board. When the Procuring Entity realized that it opened the wrong financial proposals, it still had the correct financial bids submitted to it in response to the subject tender. With respect to the subject tender that is now before the Board, the Procuring Entity had the correct financial bids before it when it undertook to return the same.

The Board is cognizant of Regulation 66 (1) of the Act which clearly stipulates that: -

"A procuring entity shall, upon rejecting unsuccessful tenders return any tender securities and any unopened financial proposals"

According to the above provision, once a procuring entity rejects any unsuccessful tenders, it is mandated to return any tender securities and any unopened financial proposals.

Financial proposals are returned unopened to bidders whose bids are found not responsive at preliminary and/or technical evaluation and therefore disqualified from proceeding for financial evaluation. The second reason why financial proposals of bidders who do not proceed to financial evaluation are returned unopened is to protect the integrity of the procurement process. In the sense that a procuring entity should not act in a mischievous way of opening a bidder's financial proposals in order to establish whether or not such a bidder submitted the lowest bid price, since a procuring entity should not be concerned about the lowest bid price, but should be concerned about awarding the tender to the lowest evaluated responsive bidder.

In this instance, the Procuring Entity ought to have proceeded to conduct a financial evaluation of the correct financial bids that were before it noting that the financial bid that was already opened relates to a different tender.

Secondly, the Board heard submissions from the Procuring Entity that once it discovered that it had inadvertently opened the wrong financial

proposals, it returned the unopened financial proposals submitted by bidders in response to the subject tender on the basis of section 82 of the Act which in its view provides that financial bids are absolute and final and cannot be subject to correction, adjustment or amendment in any way.

The Board notes that the interpretation section of the Act defines a "tender" under section 2 in the following terms: -

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

Further, section 82 of the Act states that: -

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

In view of the above provisions, the Board notes, in a procurement process, bidders submit a tender, that is, ***an offer in writing to supply goods, services or works at a price pursuant to an***

invitation to tender, request for quotation or proposal by a procuring entity.

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

The question that now arises is what amounts to a correction, adjustment or amendment by a procuring entity?

Once a bidder has submitted its bid including its financial proposal to a procuring entity, it may contain arithmetic errors or discrepancies that may be identified by a procuring entity during financial evaluation. As explained hereinbefore, section 82 of the Act expressly prohibits any alterations or corrections to the tender sum which remains absolute and final and is not subject to any correction, adjustment or amendment.

Accordingly, any corrections made by a procuring entity to a bidder's tender sum would therefore serve no purpose because the procuring entity cannot use such corrections to rank the bidders or amend the tender sum in the form of tender, which remains absolute and final in accordance with section 82 of the Act.

In view of the foregoing, it is therefore clear that if the Procuring Entity had opened the correct financial proposals with respect to the subject tender upon realizing that it had inadvertently opened the wrong ones, this action would not have amounted to a correction or adjustment or amendment of the bidders' tender sum.

As to what amounts to issues of material governance, the Board in its decision in **PPARB Application No. 69 of 2019, CMC Motors Group Limited v The Principal Secretary, Ministry of Interior and Coordination of National Government & Another** (hereinafter referred to as "Review No. 69/2019"), held as follows regarding termination of a tender as a result of detection of material governance issues:-

"To understand what material governance is, the Board first interpreted the word "governance" and how it relates to public procurement. The Cambridge Dictionary of English defines "governance" as:-

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

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

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

On the other hand, governance and how it relates to public procurement is explained in the book "Public Procurement: International Cases and Commentary, (2012) edited by Louise Knight, et al, as follows:-

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

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

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

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

Article 201 (d) The following principles shall guide all aspects of public finance in the Republic:-... public money shall be used in a prudent and responsible way

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

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

Therefore, it can be said that material governance issues as they relate to a procurement process, are significant issues detected by a procuring entity, for example, corruption, fraud and collusive tendering during the procurement process, that are contrary to the principles of governance and national values under the Constitution.

Consequently, when such material governance issues are detected, the accounting officer has an option to terminate a tender.

Accordingly, material governance issues as they relate to a procurement process, are significant issues detected by a procuring entity, for example, corruption, fraud and collusive tendering during the procurement process, that are contrary to the principles of governance and national values under the Constitution. Consequently, when such material governance issues are detected, the accounting officer has an option to terminate a tender." These issues can be detected by a procuring entity when the integrity of the procurement process is at risk.

In Review No. 69/2019, the Board went on to hold that:-

"The Board finds, the Procuring Entity failed to terminate the subject tender in accordance with section 63 of the Act, which not only provides a procedure for termination, but grounds which may require real and tangible evidence to support a termination process"

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

The requirement of real and tangible evidence before terminating a procurement process due to material governance issues supports the provision of Article 47 of the Constitution of Kenya, 2010 which states that:-

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

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

In view of the foregoing, it is the Board's view that all the reasons advanced by the Procuring Entity to justify its termination of the tender do not amount to material governance issues.

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

The Board finds, the Procuring Entity failed to terminate the subject tender in accordance with section 63 of the Act, which not only provides a procedure for termination, but grounds which may require real and

tangible evidence to support a termination process, rendering the purported termination of the subject procurement process null and void.

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

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

“Upon completing a review, the Review Board may do any one or more of the following-

(a).....;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings...”

The Board notes, the Procuring Entity admitted in its submissions that after its purported termination of the subject tender, it re-advertised for the subject services using a different tender number.

The Board further notes, that the Applicant received a letter dated 30th January 2020 informing it of the purported termination of the subject procurement process on 3rd February 2020, whereas the Procuring Entity proceeded to re-advertise the subject services using a different tender number on 4th February 2020.

Section 63 (4) of the Act as cited hereinbefore requires a procuring entity to notify bidders of termination of a procurement process within fourteen (14) days from the date of the termination.

On its part, section 167 (1) of the Act reads as follows: -

"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review 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."

Accordingly, the above provision gives bidders a right to approach this Board within fourteen (14) days of notification.

This means that the Procuring Entity interfered with the rights of all bidders who participated in the subject procurement process, including the rights of the Applicant herein, to approach the Board and challenge the Procuring Entity's decision to terminate the subject tender within fourteen (14) days from the date of notification.

The Honourable Justice Mativo in **Miscellaneous Application 284 of 2019, Republic v Public Procurement Administrative Review Board; Principal Secretary, State Department of Interior,**

Ministry of Interior and Co-ordination of National Government (Interested Party) ; Ex Parte Applicant CMC Motors Group Limited [2020] eKLR held as follows: -

"I have already concluded that the tender was lawfully terminated, hence, the Respondent did not error in dismissing the applicant's Request for Review. I have also held that the impugned decision is not tainted with unreasonableness, irrationality and bad faith. I have however held that the Interested Party could not legally re-advertise the tender before the expiry of 14 days after the date of the impugned decision, and, that, the purported re-advertisement of the tender prior to the expiry of the 14 days offends the act and the requirements of Article 227 of the Constitution. Simply put, the re-advertisement deprives the entire process the attributes of legality and fairness so cherished in public procurement.

The question that follows is what would be appropriate reliefs in the circumstances of this case. Having concluded as I have herein above, that the tender was validly terminated as provided under section 63 (d) of the act, this alone could have disposed this application in favour of the Respondent and the Interested Party. However, I have also held that the purported re-advertisement and any ensuing process emanating therefore is a nullity. It follows that no valid contract can be signed arising from such an illegality.

Accordingly, the Court held that re-advertisement of a tender prior to the expiry of the 14 days of notification of a procuring entity's decision to terminate, is in contravention of the Act and the requirements of Article 227 (1) of the Constitution and any ensuing process from such a re-advertisement of a tender is therefore a nullity. Further, no valid contract can be executed arising from such a nullity.

Turning to the circumstances of the case, the Board notes that the Procuring Entity re-advertised for the subject services, one day after the Applicant received its notification of the Procuring Entity's decision to terminate the subject tender, prior to the expiry of the fourteen day period contrary to section 167 (1) of the Act as read together with section 63 (4) (d) of the Act.

Having found that the Procuring Entity's termination of the subject tender was null and void, it therefore follows that the re-advertisement by the Procuring Entity for the subject services under a different tender number culminated from an illegal termination process, rendering the Procuring Entity's re-advertisement null and void.

With this in mind and noting that the Procuring Entity already returned the unopened financial proposals to the respective bidders, it is the Board's considered view that it would not be appropriate to direct the Procuring Entity to conduct a re-evaluation at the financial evaluation stage. This is because it is very likely that the returned financial bids with respect to the subject tender have already been tampered with.

It is therefore our considered view that the most appropriate orders in these circumstances is to direct the Procuring Entity to re-tender for "*Provision of Comprehensive Cleaning, Fumigation and Sanitary Bin Services*" in order to afford all bidders the opportunity to participate in the re-tendered services where the Procuring Entity will have an obligation to conduct evaluation taking into consideration the Board's findings in this case on the actions it ought to have taken when it realized it opened the bids for a different tender.

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

FINAL ORDERS

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

- 1. The Procuring Entity's Letters of Termination with respect to Tender No. PC/QUOT/026/2019-2020 for Provision of Comprehensive Cleaning, Fumigation and Sanitary Bin Services dated 30th January 2020 and issued to all bidders be and are hereby cancelled and set aside.**

2. The Procuring Entity's Re-advertisement for the Provision of Comprehensive Cleaning, Fumigation and Sanitary Bin Services dated 4th February 2020 of Tender No. PCC/003/2019-2020 be and is hereby cancelled and set aside.

3. The Procuring Entity is hereby directed to re-tender for the Provision of Comprehensive Cleaning, Fumigation and Sanitary Bin Services within twenty one (21) days from the date of receipt of the signed decision of the Board.

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

Dated at Nairobi, this 9th Day of March, 2020

.....

CHAIRPERSON

PPARB

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SECRETARY

PPARB

Delivered in the presence of: -

- i.** Mr Geoffrey Jomo for the Applicant;
- ii.** Mr Danson Maina for the Respondent.