

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 8/2021 OF 26TH JANUARY 2021

BETWEEN

DANIELS OUTLETS LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

NUMERICAL MACHINING

COMPLEX LIMITED.....1ST RESPONDENT

NUMERICAL MACHINING

COMPLEX LIMITED.....2ND RESPONDENT

Review against the decision/notification dated 19th January 2021 by Numerical Machining Complex Limited with respect to Tender No. NMC/ONT/06/2020-2021 for the Supply, Installation, Testing, Training and Commissioning of 1 No. Guillotine Machine.

BOARD MEMBERS

- | | |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Nicholas Mruttu | -Member |
| 3. Ms. Rahab Chacha | -Member |
| 4. Arch. Steven Oundo, OGW | -Member |
| 5. Mrs. Irene Kashindi | -Member |

IN ATTENDANCE

1. Mr. Stanley Miheso

-Holding brief for Acting Board
Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Numerical Machining Complex Limited (hereinafter referred to as "the Procuring Entity") invited interested and eligible bidders to submit bids in response to Tender No. NMC/ONT/06/2020-2021 for the Proposed Supply, Installation, Testing, Training and Commissioning of 1 No. Guillotine Machine (hereinafter referred to as "the subject tender") via an advertisement in MyGov pullout Newspaper published on Tuesday, 1st September 2020 as well as publication in the Procuring Entity's website www.nmc.go.ke and the Public Procurement Information Portal www.tenders.go.ke.

Bid Submission Deadline and Opening of bids

Upon issuance of an Addendum on 11th September 2020, the bid submission deadline was extended to 2nd October 2020 at 11:00 am. A total of eleven (11) bidders/firms submitted bids in response to the subject tender which were opened on 2nd October 2020 and recorded as follows: -

Bidder No.	Bidder's name
1.	M/s Arc-Plan Consulting Ltd
2.	M/s Treawil Enterprises

Bidder No.	Bidder's name
3.	M/s Belfast Engineering Works
4.	M/s Brainstorm Holdings Ltd
5.	M/s Daniel Outlets Ltd
6.	M/s Panorama Engineering & Trading Ltd
7.	M/s Vaghjiyani Enterprises Ltd
8.	M/s MKT Investment and Trading Ltd
9.	M/s Jantech Enterprises
10.	M/s Nariana Enterprises Ltd
11.	M/s Glistar Enterprises Ltd

Evaluation of Proposals

The evaluation process was conducted in three stages:

- 1. Mandatory Requirements/Preliminary Evaluation;**
- 2. Technical Evaluation;**
- 3. Financial Evaluation.**

1. Preliminary Evaluation

At this stage of evaluation, bids were evaluated for compliance with the preliminary mandatory criteria as outlined in the Tender Document as follows: -

No.	Criteria
1.	Bidder MUST submit two sets of tender documents clearly marked <i>ORIGINAL & COPY</i>
2.	Bidder MUST provide tender security of Kshs 100,000.00 from a Commercial Bank and valid for 90days
3.	Bidders equipment's country of origin MUST be any of the following only: Europe, America, South Africa, India, Japan
4.	Bidder MUST provide Litigation history in the format provided in the Tender document, must be filled, signed and stamped to be returned with tender submission. (Form A.)
5.	Bidder Must Dully fill, sign and stamp price schedule

6.	Bidder MUST Duly fill, sign and stamp form of Tender
7.	Bidder must paginate/serialize all the documents in the tender document in a continous manner without alteration
8.	Bidder MUST duly fill, stamp and sign the confidential business questionnaire.
9.	Bidder MUST provide copy of valid tax compliance issued by Kenya Revenue Authority
10.	Bidder MUST provide Copy of Certificate of Incorporation or a Certificate of Registration
11.	Bidder MUST provide Copy of valid Business permit from the County Government
12.	Bidder MUST provide Copy of CR 12
13.	Bidder MUST Attach Original Equipment Manufacturer's Authorization or Dealership Certificate with clear site and addresses/contacts for verification of the same.
14.	Bidder MUST provide Power of Attorney
15.	Bidder MUST provide recommendation letters from three (3) clients whom he/she have supplied, Installed and commissioned a powered equipment
16.	Bidder MUST provide Copy of brochure/manual for the machine. It Must be in English
17.	Bidder MUST attach Manufacturer's statement of warranty .Must be in English
18.	Bidder MUST attach Certified Audited Financial Statement for the last 3-consecutive years.
19.	Bidder MUST attach a duly signed and stamped form by one of our Engineers as proof of site visit scheduled to take place on 9 th September, 2020 at 11:00am at Numerical Machining Complex Ltd.

Upon conclusion of Preliminary Evaluation, six (6) firms were found non-responsive to the mandatory criteria, including the Applicant, who's bid was found non-responsive for the following reasons: -

- a) Did not submit a tender security from a commercial banking institution as specified in mandatory criteria no. 2;
- b) Offered to supply a machine from China and not from the specified countries of origin as specified in mandatory criteria no. 3.

Five (5) bidders/firms were found responsive to the mandatory criteria hence considered for further evaluation, namely: -

1. Bidder No. 1 M/s Arc-Plan Consulting Limited

2. Bidder No. 3 M/s Belfast Engineering Works
3. Bidder No. 4 M/s Brainstorm Holdings Limited
4. Bidder No. 8 M/s MKT Investment and Trading Limited
5. Bidder No. 9 M/s Jantech Enterprises

2. Technical Evaluation

At this stage of evaluation, bids were evaluated against the mandatory technical requirements and performance specifications as provided in the Tender Document as follows: -

Mandatory Technical Requirements

No.	Item	Requirement
1.	Original Equipment Manufacturer's commitment letter	Mandatory
2.	Machines literature and specifications supplied (in original colour form) while tendering to support what is filled in specifications.	Mandatory
3.	All literature, machines markings, machine controls must be in English language	Mandatory
4.	Attach Manufacturer's statement of warranty of at least 1year	Mandatory
5.	Commit to provide after sales services	Mandatory
6.	Commit and list to supply initial batch of support spare parts	Mandatory (specify)
7.	Maintenance and operation manuals (2No. sets) hard copies and a soft copy	Mandatory
8.	To be inspected by the Inspection and Acceptance Committee prior to installation	Mandatory
9.	Supplier to install, test, handover all necessary accessories, software and carry out training (skills transfer) on operations, quality control, maintenance and commissioning Provide all materials necessary for installation, testing, commissioning and training.	Mandatory
10.	Supplier to supply, install, test and commission all electrical units required for the shearing machine.	Mandatory
11.	Supplier to do all the civil works required	Mandatory
12.	Operator's handbook, parts catalogue supplied	Mandatory
13.	Supplier to provide necessary tools for operation and	Mandatory

No.	Item	Requirement
	maintenance of the shearing machine.	(specify)
14.	Comprehensive onsite training (Operations, quality control & maintenance)	Mandatory (specify)
15.	The Machine to be supplied must be new.	Mandatory

Bidder No. 4 M/s Brainstorm Holdings Limited was disqualified at the Mandatory Technical Requirements Evaluation Stage for not attaching the list of initial batch of support spare parts as specified herein above.

Performance Technical Requirements

	Specification	Requirement	Score
a)	The shearing machine must be capable of shearing a 14 mm Thick plate.	Cutting range from (6 to 14) mm Thk plate.	1
b)	Supplied new and unused	Yes	1
c)	MAKE	Specify	1
d)	MODEL	Specify	1
e)	COUNTRY OF ORIGIN	Specify	1
	SUB TOTAL		5
a)	Shearing machine.	Cutting range. Must be able to shear up to 14 mm Thick plate.	20
b)	Blade segments.	Must be up to 120 mm Long. All added together must have a blade length=3200 mm long.	20
c)	Rated.	[15-20] kw.	10
d)	Cutting Mode	Beam cutting.	5
e)	Automatic Level.	Fully automatic.	5
f)	Throat Depth (mm).	At least 120 mm.	5
g)	Voltage	415V/50 Hz.	5
h)	Maximum Cutting Width.	At least 3200 mm.	10
i)	Shear angle.	1 deg. 30 min.	2
j)	Back Gauge	500-700 mm.	3
k)	Electric Power Connection	240/415V , 50HZ	5
l)	Worktable max. load	specify	5
m)	Warranty	Specify	2
n)	Tool box.	Fully equipped	3
	Total		100

	Specification	Requirement	Score
	Grand total score		105

Bidders who scored 90% of the 105 marks, that is, 94.5 marks would qualify to proceed to the next stage of evaluation.

The results were as follows: -

Bidder	SCORE	BID NO. 1 M/s Arc Plan Consulting Ltd	BID NO. 3 M/s Belfast Engineering Works	BID NO. 8 M/s Mkt Investment and trading Ltd	BID NO. 9 M/s Jantech Enterprises
Total score	100	95	95	95	90
Grand total Score	105	100	100	100	95
Score out of 80%		76.19	76.19	76.19	72.38

Four (4) bidders that is Bidders No. 1, 3, 8 and 9 scored 95% and above and thus qualified to proceed for Financial Evaluation.

3. Financial Evaluation

At this stage of evaluation, the Evaluation Committee extracted from bids which qualified for financial evaluation, the financial figures for the last three years and used the average values to calculate financial ratios. Bidders were required to achieve a pass mark of 15 out of the total score of 20 marks.

The four bidders scored as follows: -

No.	Bidder No 1 M/s Arc Plan Consulting Limited	Bid 3 M/s Belfast Engineering Works	Bid 8 M/s Mkt Investment and Trading Limited	Bid 9 M/s Jantech Enterprises
	15	10	15	20

Pursuant to the financial evaluation criteria, Bidder No. 3 M/s Belfast Engineering Works was disqualified at this stage for not meeting the minimum financial score of 15 marks.

Thereafter, Bidders No. 1, 8 & 9 were considered for recommendation for final award of the tender as follows: -

No.	Evaluation Criteria	Max Marks	Pass mark	BID 1 M/s Arc Plan Consulting Limited	BID 8 M/s MKT Investment and Trading Limited	BID 9 M/s Jantech Enterprises
1.	Mandatory Requirements	Yes	Yes	Y	Y	Y
2.	Mandatory Technical Specifications	Yes	Yes	Y	Y	Y
3.	Technical Evaluation (Marks have been converted to 80%)	80	72	76.19	76.19	72.38
4.	Financial Evaluation	20	15	15	15	20
	Tender Sum			Kshs.5,760,000.00	Kshs.5,390,000.00	Kshs.7,799,500.00
	Ranking			2 nd lowest	Lowest	3 rd lowest

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to Bidder No. 8 **M/s MKT**

Investment and Trading Limited at their total contract cost of **Kshs. 5,390,000.00 (Five Million, Three Hundred and Ninety Thousand Kenya Shillings Only) all taxes inclusive** for being the lowest evaluated bidder.

Initial Professional Opinion

The Head of Supply Chain Management reviewed the Evaluation Report and concurred with the Evaluation Committee's recommendation vide a Professional Opinion signed on 4th December 2020.

The Managing Director of the Procuring Entity approved the Evaluation Committee's recommendation on 7th December 2020.

Second Professional Opinion

On 15th December 2020, the Head of Supply Chain Management issued a second Professional Opinion recommending termination of the subject procurement proceedings for the following reason: -

"Following a High court ruling on the matter: Nairobi HCC Commercial and Admiralty Misc. App. No. 289 of 2018 Karura Engineering Works Ltd Vs Numerical Machining Complex Ltd requiring Numerical Machining Complex Ltd to pay Kshs. 9,049,377.17 for supply of a guillotine and slotting machine, I hereby advice as follows:

- (a) The subject procurement be terminated since it's the same machine the honorable court has ordered we make payment for.***
- (b) The budgeted amount for this procurement to be used to pay for the decretal sum.***
- (c) The procurement proceedings be terminated as per S. 63 (1) (a) (i) which states that the subject procurement have been overtaken by operation of law.***
- (d) Bidder to be notified on the same.***
- (e) A report made to Public Procurement and Regulatory Authority on the termination of the procurement proceedings."***

This recommendation was approved by the Managing Director of the Procuring Entity on 11th January 2021.

REQUEST FOR REVIEW NO. 8 OF 2021

Daniels Outlets Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated 25th January 2021 and filed on 26th January 2021 together with a Supporting Affidavit sworn on 25th January 2021 and filed on 26th January 2021, through the firm of Andrew Ombwayo & Company Advocates, seeking the following orders: -

- i. An order setting aside and cancelling the notification dated 19th January 2021 (but communicated on the 25th***

January 2021) and the decision therein that disqualified the Applicant's tender/bid at the preliminary evaluation stage and that terminated and or purported to terminate or cancel the tender;

ii. An order re-instating the tender validity and the Applicant's tender and to direct the Respondents to evaluate the Applicant's tender/bid according to the criteria set out in the Tender Document, the Public Procurement and Asset Disposal Act, 2015, the Regulations thereunder and the Constitution

iii. An order directing the Respondent to pay the costs of this Review to the Applicant.

In response, the Procuring Entity, acting through its Managing Director, lodged a response to the Request for Review in form of a letter addressed to the Board Secretary titled 'Response on Request for Review on Application No. 8 of 2021' dated 4th February 2021 and filed on 5th February 2021.

M/s Panorama Engineering & Trading Limited, one of the bidders who participated in the subject tender, sent via email on 5th February 2021 a letter addressed to the Acting Board Secretary dated 5th February 2021 but a physical copy of the same was not filed at the Board's offices.

Pursuant to the Board Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions.

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act").

The Applicant lodged a document titled 'Applicant's Submissions Proposing Request for Review' dated 10th February 2021 on 11th February 2021. The Respondents and M/s Panorama Engineering & Trading Ltd did not file written submissions.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, confidential documents filed in accordance with section 67 (3) (e) of the Act including the Applicant's written submissions and finds that the following issues call for determination: -

- I. Whether the Procuring Entity terminated the subject procurement proceedings in accordance with the**

substantive and procedural requirements specified in section 63 of the Act, thus ousting the jurisdiction of this Board

Depending on the outcome of the first issue framed for determination: -

- II. Whether the Procuring Entity evaluated the Applicant's bid at the Mandatory Requirements/Preliminary Evaluation Stage in accordance with section 79 (1) & 80 (2) of the Act with respect to the criteria of tender security specified in Clause 2.14.1 of the Appendix to Instructions to Tenderers of the Tender Document read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document.**
- III. Whether the Procuring Entity evaluated bids in the subject tender within the maximum period of thirty days specified in section 80 (6) of the Act.**
- IV. Whether the Board can reinstate the Tender Validity Period of the subject tender after its expiry.**
- V. What are the appropriate orders to grant in the circumstances?**

The Board will now address the first issue framed for determination as follows: -

Termination of procurement and asset disposal proceedings is governed by section 63 of the Act. Further, if such termination meets the requirements of section 63 of the Act, the jurisdiction of this Board is ousted pursuant to section 167 (4) (b) of the Act 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 **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR** (hereinafter referred to as "the Selex Sistemi Integrati Case"), the court while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Repealed Act") that dealt with termination of procurement proceedings held as follows: -

"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005, section 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the jurisdiction of the Review Board. That question can be

answered by a close scrutiny of section 36 (6) of the said Act which provides: -

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

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

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

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

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

The court in the Selex Sistemi Integrati Case held that this Board (as was constituted then) had the duty to question whether a decision by a procuring entity terminating a tender met the threshold of section 100 (4) of the Repealed Act, and that the Board's jurisdiction was not ousted by mere existence of a letter of termination furnished before it.

Further, in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR** (hereinafter referred to as "JR No. 142 of 2018") it was held as follows: -

"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction to entertain the Interested Party's Request for

Review of the Applicant's decision to terminate the subject procurement...

A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.

As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A-Light Ltd [2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body which is the primary decision maker, [in this instance the Applicant as the procuring entity] to determine if the statutory pre-conditions and circumstances in section 63 exists before a procurement is to be terminated...

However, the Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard...

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v. Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act"

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

In the recent decision of the High Court in **Judicial Review Application No. 117 of 2020, Parliamentary Service Commission vs. Public Procurement Administrative Review Board & Another**, the Honourable Justice Nyamweya addressed the question whether this Board has jurisdiction to determine whether the statutory pre-conditions for termination of a tender have been met. At paragraph 51 of the said judgement, the Court held as follows: -

"This being the case, the Respondent and this Court upon an application for review have jurisdiction to determine whether or not the statutory pre-condition was satisfied.... Therefore, from the outset, the Respondent [Review Board] has jurisdiction to determine if the conditions of section 63 have been met when a tender is terminated on any of the grounds listed thereunder, and a termination under the section does not automatically oust the Respondent's jurisdiction. It is only upon a finding that the termination was conducted in accordance with section 63 of the Act that the Respondent is then divested of jurisdiction and obliged to down its tools"

It is therefore important for this Board to determine whether the Procuring Entity terminated the subject tender in accordance with provisions of section 63 of the Act, which determination can only be made by interrogating the reason (s) cited by the Procuring Entity and whether or not the Procuring Entity satisfied the statutory pre-conditions for termination outlined in section 63 of the Act.

Section 63 of the Act specifies the statutory pre-conditions for termination of a tender which include substantive and procedural requirements as follows: -

"63. (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)

(b) inadequate budgetary provision

(c)

(d)

(e)

(f)

(g)

(h)

(i)

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

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

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

In its pleadings before this Board, the Applicant avers that the Procuring Entity's termination of the subject tender was an abuse of its discretion under section 63 of the Act and more so, the reason for terminating/cancelling the subject tender was vague, ambiguous and founded on ulterior motives, rendering the said termination null and void.

According to the Applicant, the Procuring Entity's decision to terminate/cancel the subject tender was not communicated prior to the notification of award and thus the said decision is invalid, unlawful and in breach of section 63 (1) of the Act. Further, the Procuring Entity failed to communicate its decision to terminate the subject tender within fourteen (14) days of its termination of the procurement proceedings, rendering the said termination null and void and thus violating the Applicant's right to fair administrative action.

The Procuring Entity disputes the Applicant's submissions and avers that it terminated the subject procurement proceedings in accordance with section 63 of the Act.

On its part, M/s Panorama Engineering & Trading Ltd stated in its letter dated 5th February 2021 that it was satisfied by the Respondent's decision terminating the subject tender and that the subject procurement process was transparent.

With this in mind, the Board examined the Procuring Entity's confidential file submitted to the Board in accordance with section 67 (3) (e) of the

Act, in order to establish what transpired in the subject procurement proceedings and observes that the Evaluation Committee vide its report signed on 6th November 2020 recommended award of the subject tender to M/s MKT Investment and Trading Limited for being the lowest evaluated bidder.

Vide a professional opinion dated 4th December 2020, the Procuring Entity's Head of Supply Chain Management concurred with the Evaluation Committee's recommendation of award, which was approved by the Managing Director of the Procuring Entity on 7th December 2020. However, the Procuring Entity's Head of Supply Chain Management prepared a second professional opinion signed on 15th December 2020 which recommended termination of the subject procurement proceedings for the following reason: -

"Following a High court ruling on the matter: Nairobi HCC Commercial and Admiralty Misc. App. No. 289 of 2018 Karura Engineering Works Ltd Vs Numerical Machining Complex Ltd requiring Numerical Machining Complex Ltd to pay Kshs. 9,049,377.17 for supply of a guillotine and slotting machine, I hereby advice as follows:

(a) The subject procurement be terminated since it's the same machine the honorable court has ordered we make payment for.

(b) The budgeted amount for this procurement to be used to pay for the decretal sum.

(c) The procurement proceedings be terminated as per S. 63 (1) (a) (i) which states that the subject procurement have been overtaken by operation of law.

(d) Bidder to be notified on the same.

(e) A report made to Public Procurement and Regulatory Authority on the termination of the procurement proceedings.”

From the foregoing excerpt, the Procuring Entity's Head of Supply Chain Management recommended termination of the subject tender following a High Court ruling in **Nairobi HCC Commercial and Admiralty Misc. App. No. 289 of 2018 Karura Engineering Works Ltd Vs Numerical Machining Complex Ltd** which directed the Procuring Entity to pay Kshs. 9,049,377.17 for supply of a guillotine and slotting machine. Since this payment was for the same machine to be procured under the subject tender, the Head of Supply Chain Management recommended that the budgeted amount for the subject procurement be used to pay the decretal amount as directed by the High Court in its ruling.

Accordingly, the Procuring Entity hinged its termination of the subject tender on section 63 (1) (f) of the Act on the basis that the subject procurement proceedings have 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]

What is notable with this definition is that a right or liability will apply to a party whether or not it was their intention.

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 phrase 'operation of law' may be interpreted 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.

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.

As established hereinbefore, the Accounting Officer of the Procuring Entity terminated the subject procurement process since the machine to be procured under the subject tender was the same machine that the High Court directed the Procuring Entity to make payment for in its ruling in **Nairobi HCC Commercial and Admiralty Misc. App. No. 289 of 2018 Karura Engineering Works Ltd Vs Numerical Machining Complex Ltd**. However, the Procuring Entity did not proffer a copy of the said ruling of the High Court as proof that it was indeed directed to pay Kshs. 9,049,377.17 for supply of a guillotine and slotting machine and further, the Procuring Entity did not provide proof demonstrating that the machine to be procured under the subject procurement process is the same machine to be paid for pursuant to the said High Court ruling. In essence, the Procuring Entity failed to furnish the Board with any real and tangible evidence to support the ground under section 63 (1) (a) (i) of the Act for termination of the subject tender.

If indeed there was such a directive issued by the High Court, the onus was on the Procuring Entity to demonstrate to this Board that the funds that were to be utilized in the subject procurement process would need to be utilized to pay the decretal sum as directed by the High Court in

the said case, which sum would procure the same machine that is to be procured under the subject tender.

Accordingly, the Board finds that the Procuring Entity's termination of the subject procurement proceedings fails to meet the threshold of section 63 (1) (a) (i) of the Act, since the Procuring Entity did not provide real and tangible evidence to support this ground of termination.

Further, from an examination of the Procuring Entity's confidential file relevant to the subject tender, the Board observes from the notification letter issued to the Applicant dated 19th January 2021, that the Procuring Entity informed the Applicant of the outcome of the evaluation of its bid and its subsequent termination of the subject tender as follows: -

"This is to notify you that your bid for the proposed supply, installation, testing, training and commissioning of 1 No. Guillotine Machine was unsuccessful because you did not provide a tender security from a commercial bank as stipulated in the Tender Document.

The tender proceedings were however terminated because of inadequate budgetary provision.

Thank you for taking part in the tendering exercise."

According to the foregoing letter, the Procuring Entity indicated that it terminated the subject tender because of inadequate budgetary provision.

The responsibilities of an accounting officer of a procuring entity under section 44 (1) and (2) (a) of the Act are outlined as follows: -

- "(1) An accounting officer of a public entity shall be primarily responsible for ensuring that the public entity complies with the Act.***
- (2) In the performance of the responsibility under subsection (1), an accounting officer shall—***
 - (a) ensure that procurements of goods, works and services of the public entity are within approved budget of that entity"***

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

- "(1) All procurement by State organs and public entities are subject to the rules and principles of this Act.***
- (2) An accounting officer shall prepare an annual procurement plan which is realistic in a format set out in the Regulations within the approved budget prior to commencement of each financial year as part of the annual budget preparation process.***
- (3)***

- (4)
- (5) **A procurement and asset disposal planning shall be based on indicative or approved budgets which shall be integrated with applicable budget processes and in the case of a State Department or County Department, such plans shall be approved by the Cabinet Secretary or the County Executive Committee member responsible for that entity.**
- (6)
- (7)
- (8) **Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.**
- (9) ***An accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offence under this Act"***

Having considered the foregoing provisions, the Board notes that prior to commencement of each financial year, an accounting officer ought to prepare an annual procurement plan which is realistic and within the procuring entity's approved budget. Furthermore, an accounting officer can only commence procurement proceedings if satisfied that sufficient funds are available to meet the obligations of the resulting contract and

are reflected in the procuring entity's approved budget estimates. This means that, the Procuring Entity is required by the Act to commence a procurement process only if he is satisfied that sufficient funds are available for the procurement process as reflected in the Procuring Entity's approved budget.

The first professional opinion of the Head of Supply Chain Management dated 4th December 2020 states the budgeted cost of the equipment to be procured in the subject tender is Kshs 6,000,000.00. However, the Board was not furnished with any financial documents of the Procuring Entity to ascertain whether indeed the amount of Kshs 6,000,000.00 was the approved budget for the subject procurement process.

Moreover, the Head of Supply Chain Management's Professional Opinion dated 15th December 2020, states that the budgeted amount for the subject procurement would be used to pay the decretal sum of Kshs 9,049,377.17 as stipulated in the High Court ruling in **Nairobi HCC Commercial and Admiralty Misc. App. No. 289 of 2018 Karura Engineering Works Ltd Vs Numerical Machining Complex Ltd.** However, as mentioned hereinbefore, the Procuring Entity did not provide any proof demonstrating that it was indeed directed to pay the said decretal amount by the High Court and whether the machine to be procured under the subject procurement process is the same machine to be paid for pursuant to the said High Court ruling.

The Procuring Entity did not provide proof of its approved budget, failed to furnish the Board with proof that it was indeed directed to pay a decretal amount of Kshs 9,049,377.17 and further failed to demonstrate that the machine procured under the subject tender is the same machine to be paid for pursuant to a High Court ruling which was never furnished before the Board.

In essence, the Procuring Entity has failed to prove to this Board that termination of the subject procurement process met the threshold of section 63(1) (b) of the Act, having failed to provide real and tangible evidence of the Procuring Entity's approved budget for the subject tender.

It is not lost to the Board that two reasons have been cited by the Procuring Entity as a basis for the Procuring Entity's termination of the subject tender, that is, 'operation of law' as stated in the Head of Supply Chain Management's Professional Opinion dated 15th December 2020 and 'inadequate budgetary allocation' as stated in the notification letters issued to all bidders who participated in the subject tender, both of which the Procuring Entity has failed to substantiate before this Board.

It is also worth noting that fair administrative action requires the Procuring Entity to inform bidders of the reasons for termination even if such reasons are more than one. Otherwise, it disenfranchises bidders who participated in the subject tender to be informed the same was terminated pursuant to inadequate budgetary allocation only to learn

later that the subject tender was also terminated due to another reason under section 63 (1) (a) (i) of the Act, that is, 'operation of the law'. The Procuring Entity's actions demonstrates the subject procurement process lacks the attributes of fairness, transparency and accountability to bidders, so cherished under Article 227 (1) of the Constitution.

Any ground relied on by a procuring entity, be it 'operation of law' or 'inadequate budgetary allocation' requires real and tangible evidence to support termination of procurement proceedings under section 63 of the Act. The Board has established that the Procuring Entity has not provided any evidence to support its termination of the subject procurement proceedings on either ground.

In terms of the substantive requirements for termination, the Board finds the Procuring Entity failed to provide real and tangible evidence of either 'operation of law' or 'inadequate budgetary allocation' to support termination of the subject procurement process pursuant to section 63 (1) (a) (i) and (b) of the Act respectively.

Having established that the Procuring Entity failed to prove termination of the subject tender met the substantive requirements under section 63 (1) (a) (i) and (b) of the Act, the Board must now determine whether the procedural requirements for termination of the subject procurement proceedings were satisfied.

In **Republic v. Public Procurement Administrative Review Board & another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR**, the court held that: -

"In a nutshell therefore, the procuring entity is under duty to place sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Procuring Entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of section 63 of the Public Procurement and Asset Disposal Act, 2015"

Having considered the finding in the foregoing case, the Board notes that, in addition to citing any of the reasons listed in section 63 (1) of the Act, a procuring entity must also comply with the procedural requirements for termination of a tender specified in section 63 (2), (3) and (4) of the Act. Section 63 (2) and (3) of the Act gives the Procuring Entity an obligation to submit a written report on the termination to the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") within fourteen days from the date of termination.

The Board observes that there is no evidence in the Procuring Entity's confidential file to suggest that a report of termination of the subject procurement proceedings was issued and dispatched to the Authority within fourteen days of termination disclosing the reason thereof.

Further, as pertains to notifications to bidders, the Board observes that the Procuring Entity's confidential file contains letters of notification issued to all bidders dated 19th January 2021 informing them of the outcome of the evaluation of their bids and the subsequent termination of the subject tender.

The Applicant avers in Ground No. 7 of its Request for Review that the Procuring Entity's decision to terminate the subject tender was not communicated to all bidders, within fourteen (14) days of termination of the subject tender. It further states in paragraph 4 of its Supporting Affidavit that it received its letter of notification on 25th January 2021. In response, the Procuring Entity in paragraph 3 of its response avers that notification of tender results was communicated to all bidders through a letter and telephone communication on 19th January 2021.

In view of parties' averments, the Board notes, no evidence was adduced by the Procuring Entity demonstrating service of the letters of notification to bidders, thus the Procuring Entity failed to discharge this burden of proof.

The Board also considered the Applicant's allegation that the Procuring Entity knowingly withheld notification contrary to section 176 (1) of the Act and as such, the Applicant only received its letter of notification on 25th January 2021. However, it is the Board's considered view that the Applicant failed to substantiate its case that the Procuring Entity violated section 176 (1) of the Act since the Applicant did not furnish any

evidence demonstrating the manner in which it received its letter of notification but merely stated the same was received on 25th January 2021.

Accordingly, the Board finds that the Procuring Entity failed to prove that it complied with the procedural requirements under section 63 (2), (3) and (4) of the Act, since it did not furnish evidence of a report of termination prepared pursuant to section 63 (2) of the Act and issued to the Authority. Further, no evidence of dispatch was given to support the allegation that notification letters were issued to bidders on 25th January 2021. Failure to satisfy the procedural requirements for termination means such a termination does not meet the threshold of section 63 (2), (3) and (4) of the Act.

In totality of the foregoing, the Board finds that the Procuring Entity failed to terminate the subject procurement proceedings in accordance with the substantive and procedural requirements provided for in section 63 of the Act, thus rendering the said termination null and void. The effect of this finding is that the Board has jurisdiction to entertain the Request for Review and shall now address the second issue framed for determination.

The Applicant avers in paragraph 3 of its Supporting Affidavit that it provided sufficient tender security from Faulu Micro-Finance Bank Limited, which is licensed by the Central Bank of Kenya to offer bid securities recognized by the Authority under the Act and its attendant

regulations. On its part, the Procuring Entity contends that the Applicant's bid was disqualified at the Preliminary Evaluation Stage since it did not provide a bid bond in the form stipulated in the Tender Document, that is, a bid bond from a commercial bank.

In its determination of this issue, the Board studied the Tender Document and observes Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document which states that: -

"Tender security of Kshs. 100,000.00 valid for 90 days from the date of opening of the tender from a Commercial Bank Registered in Kenya"

It is not in dispute that the Applicant provided a tender security amounting to Kshs. 100,000.00 issued by Faulu Microfinance Bank Ltd as can be seen from the letter dated 24th September 2020 found at page 7 to 9 of the Applicant's original bid. Having considered parties' pleadings, the Board observes that section 80 (2) of the Act provides that: -

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents"

An evaluation committee has an obligation of evaluating tenders using the procedures and criteria set out in the Tender Documents. One of the criteria for evaluation and comparison of tenders in the subject tender is set out in Clause 2.14.1 read together with Clause A (2). Mandatory

Requirements of the Appendix to Instructions to Tenderers of the Tender Document requiring bidders to provide tender security of Kshs. 100,000.00 valid for 90 days from the date of tender opening from a Commercial Bank registered in Kenya. The question that arises is whether Faulu Microfinance Bank Ltd is a Commercial Bank registered in Kenya.

The Oxford Dictionary of English, 8th Edition, defines a commercial bank as:

"A commercial bank is a kind of financial institution which carries all the operations related to deposit and withdrawal of money for the general public, providing loans for investment, etc. These banks are profit-making institutions and do business to make a profit."

The preamble of the Banking Act describes the said statute as:

"An Act of Parliament to amend and consolidate the law regulating the business of banking in Kenya and for connected purposes."

A bank is described in section 2 of the Banking Act as follows: -

"bank" means a company which carries on, or proposes to carry on, banking business in Kenya but does not include the Central Bank"

As regards registration, the preamble of the Companies Act describes the said Act as: -

"AN ACT of Parliament to consolidate and reform the law relating to the incorporation, registration, operation, management and regulation of companies; to provide for the appointment and functions of auditors; to make other provision relating to companies; and to provide for related matters"

If the definition of a bank under section 2 of the Banking Act is compared with the preamble of the Companies Act, the Board may reasonably conclude that a bank is a company and thus the formalities for registration of a company specified in the Companies Act applies to banks.

Licensing of institutions that undertake the business of banking pursuant to the Banking Act is specified in section 5 (1) of the said Act as follows:

-

"5. (1) Subject to section 4, the Central Bank may, upon payment of the prescribed fee, grant a license to an institution to carry on business."

As regards the business of microfinance, the Preamble of the Microfinance Act describes the said statute as: -

"An Act of Parliament to make provision for the licensing, regulation and supervision of microfinance business and for connected purposes"

The term "**Microfinance Bank**" is described in section 2 of the Microfinance Act as follows: -

"microfinance bank means a company which is licensed to carry on microfinance bank business, and includes all branches, marketing units, outlets, offices and any other place of business that may be licensed by the Central Bank of Kenya;"

On its part, section 4 (1) of the Microfinance Act states as follows: -

"4 (1) No person shall carry out any deposit-taking microfinance business, hereinafter referred to as –deposit-taking business, unless such person is –

(a) A company registered under the Companies Act whose main objective is to carry out such business"

Further, Section 4 (A) (1) of the Central Bank of Kenya Act, Chapter 491, Laws of Kenya cites one of the functions of the Central Bank of Kenya as: -

"Without prejudice to the generality of section 4 the Bank shall

... license and supervise authorized dealers"

Having considered the foregoing provisions, the Board observes that institutions that undertake the business of banking under the Banking Act and institutions that undertake microfinance business under the Microfinance Act are registered under the Companies Act owing to the provisions of the preamble of the Companies Act and formalities of registration of a company specified in the said Act. The said institutions are licensed and supervised by the Central Bank of Kenya after registration pursuant to the Companies Act.

The Procuring Entity annexed to its response a List of **"Central Bank of Kenya Directory of Licensed Commercial Banks, Mortgage Finance Institutions and Authorized Non-Operating Holding Companies"**. According to the Procuring Entity, the said list can be found in the official website of the Central Bank of Kenya (www.centralbank.go.ke). The Board visited the said website wherein some of the functions of the Central Bank of Kenya are described therein as follows: -

"One of the Central Bank of Kenya's mandate is to foster the liquidity, solvency and proper functioning of a market-based financial system. This is achieved through the following:

- ***Licensing commercial banks, non-bank financial institutions, mortgage finance companies, credit reference bureaus, foreign exchange bureaus, money remittance providers and microfinance banks.***
- ***Inspection of commercial banks, microfinance banks, non-bank financial institutions, mortgage finance companies, building societies, credit reference bureaus, foreign exchange bureaus, money remittance providers and representative offices of foreign banks to ensure that they comply with all the relevant laws, regulations and guidelines and protect the interests of depositors and other users of the banking sector” [Emphasis by the Board]***

Further to this, the “**Central Bank of Kenya Directory of Licensed Commercial Banks, Mortgage Finance Institutions and Authorized Non-Operating Holding Companies**” referred to by the Procuring Entity can be found on the said website with details of commercial banks licensed by the Central Bank of Kenya provided therein as follows: -

CENTRAL BANK OF KENYA DIRECTORY OF LICENCED COMMERCIAL BANKS, MORTGAGE FINANCE INSTITUTIONS AND AUTHORISED NON-OPERATING HOLDING COMPANIES	
A: COMMERCIAL BANKS	
1	African Banking Corporation Limited
2	Bank of Africa Kenya Limited
3	Bank of Baroda (K) Limited
4	Bank of India
5	Barclays Bank of Kenya Limited
6	Charterhouse Bank Limited
7	Chase Bank (K) Limited
8	Citibank N.A Kenya
9	Commercial Bank of Africa Limited
10	Consolidated Bank of Kenya Limited
11	Co-operative Bank of Kenya Limited
12	Credit Bank Limited

CENTRAL BANK OF KENYA DIRECTORY OF LICENCED COMMERCIAL BANKS, MORTGAGE FINANCE INSTITUTIONS AND AUTHORISED NON-OPERATING HOLDING COMPANIES

A: COMMERCIAL BANKS

13	Development Bank of Kenya Limited
14	Diamond Trust Bank Kenya Limited
15	DIB Bank Kenya Limited
16	Ecobank Kenya Limited
17	Equity Bank Kenya Limited
18	Family Bank Limited
19	First Community Bank Limited
20	Guaranty Trust Bank (K) Ltd
21	Guardian Bank Limited
22	Gulf African Bank Limited
23	Habib Bank A.G Zurich
24	I & M Bank Limited
25	Imperial Bank Limited IN RECEIVERSHIP
26	Jamii Bora Bank Limited
27	KCB Bank Kenya Limited
28	Mayfair Bank Limited
29	Middle East Bank (K) Limited
30	M-Oriental Bank Limited
31	National Bank of Kenya Limited
32	NIC Bank Kenya Plc
33	Paramount Bank Limited
34	Prime Bank Limited
35	SBM Bank Kenya Limited
36	Sidian Bank Limited
37	Spire Bank Ltd
38	Stanbic Bank Kenya Limited
39	Standard Chartered Bank Kenya Limited
40	Trans-National Bank Limited
41	UBA Kenya Bank Limited
42	Victoria Commercial Bank Limited

On the same website of Central Bank of Kenya, a “**Directory of Licensed Microfinance Banks**” is provided therein with the following details: -

DIRECTORY OF LICENCED MICROFINANCE BANKS

1	Caritas Microfinance Bank Limited
2	Century Microfinance Bank Limited
3	Choice Microfinance Bank Limited
4	Daraja Microfinance Bank Limited
5	Faulu Microfinance Bank Limited
6	Kenya Women Microfinance Bank Limited
7	Rafiki Microfinance Bank Limited
8	Remu Microfinance Bank Limited
9	SMEP Microfinance Bank Limited
10	Sumac Microfinance Bank Limited
11	U & I Microfinance Bank Limited

DIRECTORY OF LICENCED MICROFINANCE BANKS	
12	Uwezo Microfinance Bank Ltd
13	Maisha Microfinance Bank Limited

From the foregoing, the Board observes that institutions that undertake the business of banking are regulated under the Banking Act whereas institutions that undertake microfinance bank business are regulated under the Microfinance Act, but are registered as companies under the Companies Act owing to the provisions of the preamble of the Companies Act and formalities of registration of a company specified in the said Act. Further, both types of institutions are licensed and supervised by the Central Bank of Kenya. This means that Faulu Microfinance Bank Ltd is a **microfinance bank** owing to the definition of a microfinance bank specified in section 2 of the Microfinance Act and it falls under the list of licensed microfinance banks in Kenya as specified in the Directory of Licensed Microfinance Banks issued by the Central Bank of Kenya. In this regard therefore, Faulu Microfinance Bank Ltd must have been registered as a company pursuant to the provisions of the Companies Act so as to obtain a Licence from the Central Bank of Kenya to undertake microfinance bank business. In the same vein, commercial banks must have been registered as companies pursuant to the Companies Act so as to obtain a license from the Central Bank of Kenya to undertake the business of banking.

As mentioned hereinbefore, the Tender Document required tender security from Commercial Banks registered in Kenya. The Applicant submitted a tender security from a microfinance bank that must have been registered pursuant to the provisions of the Companies Act so as

to obtain a license from the Central Bank of Kenya to undertake microfinance business. Since the Applicant's tender security is not from a commercial bank, it fails to satisfy the criterion under Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document.

The Board has already observed that an evaluation committee must evaluate tenders using the procedures and criteria specified in the tender document and in this instance, Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document required bidders to provide tender security from Commercial Banks registered in Kenya and not Microfinance Banks registered in Kenya.

Section 79 (1) of the Act further states that: -

"A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents"

Eligibility and mandatory requirements as specified in a tender document are mostly considered at the Preliminary Evaluation Stage following which other stages of evaluation are conducted. Bidders found to be non-responsive are excluded from further evaluation, regardless of the merits of their bids for failure to satisfy the eligibility and mandatory requirements specified a tender document.

At paragraph 38 of his decision in **Miscellaneous Civil Application No. 85 of 2018, Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/s Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR**, the Honourable Justice Mativo addressed the importance of requirements in the tender document whilst stating as follows: -

"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions."

The Applicant's failure to provide a tender security from a commercial bank registered in Kenya means that the Evaluation Committee had no option but to find the Applicant's bid non-responsive for failure to satisfy the criterion under Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document.

The Board also considered the Applicant's contention that its tender security was issued by a financial institution approved and licensed by

the Central Bank of Kenya thus satisfied the criterion under Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document. To support its position, the Applicant cited provisions on tender security specified in section 61 (1) of the Act and Regulation 45 (1) of Regulations 2020 as follows: -

"Section 61 (1) An accounting officer of a procuring entity may require that tender security be provided with tenders, subject to such requirements or limits as may be prescribed.

Regulation 45 (1) Where an accounting officer of a procuring entity requires a tender security under section 61(1) of the Act that tender security shall be in the form of—

(a) cash

(b) a bank guarantee

(c) a guarantee by an insurance company registered and licensed by the Insurance Regulatory Authority listed by the Authority or

(d) a guarantee issued by a financial institution approved and licensed by the Central Bank of Kenya"

The Applicant also referred the Board to a letter dated 9th May 2014 written by Central Bank of Kenya and addressed to the Managing Director of Faulu Microfinance Bank Limited. The said letter has the following details: -

"New Products

We refer to your letter dated 24th April 2014 seeking approval to introduce six loan products and three saving accounts products

This is to advise that we have no objection to the introduction of the loan products namely; Faulu Milele Mortgage, Bid & Performance Bonds and Guarantees, Business Chap, Wholesale Loan, Loan Fund Management Facility, Tamba Imara Loan and Saving Accounts namely; Collection Account, Faulu Salary Account and Quick E-Account"

A second letter dated 5th June 2014 attached to the Applicant's Request for Review, written by the Director General of the Authority and addressed to the Chief Executive Officer of Rafiki Deposit Taking Microfinance (K) Ltd, has the following details: -

"We refer to your email received on 16th April 2014 on the above captioned subject.

We have noted your submissions and approval from Central Bank of Kenya allowing your company to issue guarantees. We also note that various procuring entities

have indicated to you the need to have a letter from the Authority on issuance of such guarantees

Your attention is drawn to the Public Procurement and Disposal (Amendment) Regulations, 2013 which recognizes tender guarantees by deposit taking microfinance institutions as one of the forms in which tender security may be provided. Therefore, you do not need any letter from the Authority since the cited legislation is in force."

From the foregoing, the Board notes that Faulu Microfinance Bank Limited and Rafiki Deposit Taking Microfinance (K) Ltd are examples of micro-finance institutions approved by Central Bank of Kenya Limited to provide tender security. The term "**financial institution**" is defined by section 2 of the Central Bank of Kenya Act as "***a body corporate or other body of persons, carrying on, whether on their own behalf or as agent for another, financial business within the meaning of the Banking Act (Cap. 488), whether in Kenya or elsewhere***". On its part, financial business is described in the Banking Act as: -

- "(a) the accepting from members of the public of money on deposit repayable on demand or at the expiry of a fixed period or after notice; and***
- (b) the employing of money held on deposit or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money'***

Having compared the nature of business undertaken by microfinance banks and commercial banks, the Board observes that both institutions fit the definition of financial institutions and as such, a tender security can be provided in form of a guarantee issued by a micro finance bank (which is a financial institution) approved and licensed by the Central Bank of Kenya. That notwithstanding, Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document specified the type of financial institutions that must provide tender security in the subject tender as commercial banks.

The Applicant had full knowledge of the implication of Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document compared to Regulation 45 (1) of Regulations 2020 but failed to seek clarifications from the Procuring Entity as to whether bidders can provide tender securities from financial institutions that are not categorized by the Central Bank of Kenya as commercial banks, or to challenge the criteria under Clause 2.14.1 read together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document before this Board.

Instead, the Applicant participated in the subject procurement process and now seeks to have the evaluation criteria changed to suit its circumstances because its bid was found non responsive on a mandatory requirement that was known to it from the onset. The Applicant is estopped from challenging the criteria under Clause 2.14.1 read

together with Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document because its participation in the subject procurement proceedings shows that the Applicant was well aware of this requirement.

Having noted that some microfinance institutions are approved by the Central Bank of Kenya to issue tender securities, there is need for the Authority to advise procuring entities that they do not need to limit the requirement of tender security to those issued by commercial banks because some bidders may only have relationships with other financial institutions other than commercial banks which would issue tender securities pursuant to Regulation 45 (1) of Regulations 2020.

The Tender Document applicable to the subject procurement process limited the requirement of tender securities to the ones issued by commercial banks registered in Kenya and this criterion was binding to all bidders including the Applicant leaving the Evaluation Committee with no option but to apply the same during evaluation of bids.

Accordingly, the Board finds that the Procuring Entity evaluated the Applicant's bid at the Mandatory Requirements/Preliminary Evaluation Stage in accordance with Clause 2.14.1 and Clause A (2). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document read together with section 79 (1) and 80 (2) of the Act.

As pertains to the third issue framed for determination, the Board studied Section 80 (6) of the Act which specifies the period for evaluation of open tenders as follows: -

"The evaluation shall be carried out within a maximum period of thirty days"

In addressing this issue, the Board is mindful that on several occasions in the past, it has addressed the meaning of the word **"evaluation"** so as to make a determination on the date from which the period of 30 days under section 80 (6) of the Act ought to start running. Having considered provisions of Regulations 2020, the Board observes there is no express provision therein stating the date from which the 30 days for evaluation ought to start running.

In **PPARB Application No. 136 of 2020, Chania Cleaners Limited v. The Accounting Officer, National Social Security Fund & Another** (hereinafter referred to as the "Chania Cleaners Ltd Case"), the Board considered the meaning of **"tender evaluation"** provided in the Third Schedule of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") and held as follows: -

"Tender evaluation — is the process used to identify the most preferred bidder technically and financially. This process should not take more than 30 calendar days... Having established that evaluation is the process of identifying the most preferred bidder technically and financially, it means that the period of 30 days for

evaluation ought to be the number of days taken by an evaluation committee to identify the most preferred bidder that is technically and financially responsive. Therefore, the number of days between commencement of evaluation and signing of the evaluation report would constitute the period taken to determine the preferred bidder that is both technically and financially responsive”

In the Chania Cleaners Limited Case, the Board held that the period of 30 days for evaluation ought to be the number of days taken by an evaluation committee to identify the most preferred tenderer that is technically and financially responsive. In most instances, the Tender Document does not specify the date from which evaluation ought to start running. In addition to this, the Act and Regulations 2020 are silent on the issue, save for the Third Schedule to Regulations 2020 which states that evaluation shall take 30 calendar days.

Turning to the circumstances in the instant Request for Review, the Board observes that Clause 2.24.6 of Section II. Instructions to Tenderers of the Tender Document specified that: -

“The tender evaluation committee shall evaluate tenders within 30 days of the validity period from the date of opening of the tender.”

According to the confidential documents furnished to the Board, tenders were opened on **2nd October 2020**. However, the Evaluation

Committee was only appointed on 8th October 2020. This means that, no evaluation took place between 2nd October and 8th October 2020 and thus the Procuring Entity failed to adhere to their own Tender Document, specifically, Clause 2.24.6 of Section II. Instructions to Tenderers of the Tender Document which required evaluation to commence from the date of tender opening.

The Board is cognizant of the fact that evaluation of bids is done by an Evaluation Committee and thus evaluation can only be undertaken after the appointment of the evaluation committee. As a result, a practical and purposive determination of the period taken for evaluation requires the Board to determine the period when the Evaluation Committee identified the most preferred bidder technically and financially, after their appointment by the accounting officer.

In the instant case, evaluation was concluded by 6th November 2020 as can be seen from the Evaluation Report signed on 6th November 2020. In computing days taken for evaluation of bids in the subject tender, the Board is mindful of section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which guides on the manner in which time ought to be computed for purposes of written law. The said provision states as follows: -

"In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be

exclusive of the day on which the event happens or the act or thing is done”

If the period between 8th October to 6th November 2020 when the evaluation was concluded is taken into consideration, evaluation took 29 days because 8th October 2020 is excluded from computation of time. In essence, evaluation of bids took 29 days, which period was within the maximum period of 30 days specified in section 80 (6) of the Act.

It is worth noting that section 176 (1) (c) of the Act provides that a person shall not: -

“delay without justifiable cause the opening or evaluation of tenders, the awarding of contract beyond the prescribed period or payment of contractors beyond contractual period and contractual performance obligations”

A purposive interpretation of the above provision requires the Procuring Entity to ensure that an evaluation committee is appointed prior to opening of tenders so as to commence evaluation of tenders immediately after the tenders are opened by the Tender Opening Committee. This ensures that the integrity of the procurement process is maintained and that the bids provided are not tampered with after they have been opened.

Having found evaluation of bids in the subject tender took a period of 29 days the Board finds that the Procuring Entity evaluated bids in the

subject tender within the maximum period of 30 days specified in section 80 (6) of the Act.

With respect to the fourth issue for determination, the Board observes that it is not in dispute that the tender validity period of the subject tender has lapsed. With this knowledge and owing to its own admission, the Applicant sought an order of the Board at paragraph 2 of the prayers in the Request for Review for the tender validity to be reinstated. In their Response to the Request for Review, the Procuring Entity did not controvert the Applicant's position that the tender validity period of the subject tender has lapsed neither did it controvert the Applicant's prayer for the tender validity period to be reinstated.

It is worth noting that Clause 2.15.1 of Section II. Instructions to Tenderers of the Tender Document provides that the tender validity period of the subject tender was 90 days after the tender opening date of 2nd October 2020 and thus, the same lapsed on 31st December 2020. The Board was not furnished with any evidence by the Procuring Entity to show that the tender validity period was extended for a further period of 30 days pursuant to section 88 (1) of the Act before expiry of the same. It is also worth noting that the Applicant did not exercise its right to approach this Board before expiry of the tender validity period seeking orders of extension of the said period.

Having found the tender validity period lapsed on 31st December 2020 with no evidence that the same was extended by the Procuring Entity, it

is evident that the Applicant lodged its Request for Review on 26th January 2021 after the subject tender already “died a natural death” on 31st December 2020.

This therefore leads the Board to address the question whether it can re-instate a tender that has lapsed.

At paragraph 70 of his decision in **Judicial Miscellaneous Application 103 of 2019, Republic v Public Procurement Administrative Review Board, Consortium of GBM Projects Limited and ERG Insaat Ticaret Ve Sanayi A.S (interested party) & National Irrigation Board [2020] eKLR**, (hereinafter referred to as “the National Irrigation Board Case”) Justice Mativo dealt with the question whether a tender that has lapsed can be resuscitated while holding as follows: -

"An "acceptable tender" is any tender which in all respects, complies with the specification and conditions of tender as set out in the tender document. The procurement process including the award of the tender must be completed during the tender validity period. Once the tender validity period lapses, it cannot be resuscitated, not even by consent, or an order by the Respondent [Board]. A reading of the bid documents and the act leaves me with no doubt that it cannot be revived once it expires. In addition, the Bid document does not provide for extension to be granted retrospectively, that is, an

extension that will operate to revive an expired tender. This means that, objectively, the bid had expired as at 5th February 2019 when the order was made. Irrespective of the intention of the parties to extend the bid after its expiry as they purported to do so, such an extension could not breathe life into a dead procurement process. [Emphasis by the Board]

The Board observes that the Court in the National Irrigation Board Case addressed two aspects of the tender validity period, that is; (i) once the tender validity period lapses, it cannot be resuscitated, not even by consent, or an order by this Board and (ii) irrespective of an intention to extend the tender validity period after its expiry, such an extension cannot breathe life into a “dead procurement process”. The effect of expiry of the tender validity period was further discussed in the decision of Justice Mativo in the National Irrigation Board Case as follows: -

[71]. Once the validity period of the proposals had expired with no extension of the period being made before the expiry of the validity period, there were no valid bid in existence either for the Procuring Entity to extend it or for the Respondent [Board] to extend as it purported to do. [Emphasis by the Board]

Turning to the instant case, the tender validity period of the subject tender lapsed on 31st December 2020 and the same cannot be reinstated or resuscitated by an order of this Board because such an order would be null and void. The effect of lapse of the tender validity

period of the subject tender on 31st December 2020 is that any action taken by the Procuring Entity after 31st December 2020 renders such actions null and void. Furthermore, the Board cannot issue orders which have the effect of continuing a procurement process with respect to a tender that does not exist.

Even assuming for a moment the Board was asked to extend the tender validity period, an order of extension cannot breathe life into a tender that already lapsed on 31st December 2020 because there is no tender for the Board to extend. The Court of Appeal of South Africa in **Joubert Galpin Searle and Others v. Road Accident Fund and Others [2014] 1 All SA 604 (ECP)** addressed the question whether a tender that has died “a natural death” can be revived through an extension by stating as follows: -

“The central issue to be decided was the effect on the tender process of the expiry of the tender validity period and whether, if the expiry of the tender validity period put an end to the process, it could subsequently be revived.

Once the tender validity period had expired, the tender process had been completed, albeit unsuccessfully. There were then no valid bids to accept and the tender could not be revived by an extension”

It is worth noting that the Board has only extended the tender validity period in instances where a request for review is filed before the expiry of the tender validity period. Pursuant to section 168 of the Act, suspension of procurement proceedings including suspension of the

tender validity period and as such, the tender validity period (which has not lapsed) stops running when a request for review is filed. In **PPARB Application No. 133 of 2019, Med Marine Kilavuzluk Ve Romorkor Hizmetleri Ins. San. Ve Tic. A.S v. The Accounting Officer, Kenya Ports Authority & Another** (hereinafter referred to as "the Med Marine Case"), the Board extended the tender validity period for a further period of 45 days to allow the Procuring Entity to conclude the procurement process because in the Med Marine Case, the Board found that the tender validity period was still in existence at the time the Request for Review was filed. At page 57 of its decision, the Board held as follows: -

"The courts support the view that this Board ought to take the tender validity period of a tender into account so as to avoid issuing orders in vain. In taking such period into account, nothing bars the Board from extending the tender validity period (if such period has not lapsed before review proceedings are lodged before the Board) to ensure a procuring entity can comply with the orders of this Board and that the procurement process is completed to its logical conclusion. As a result, the Board finds it fit to extend the tender validity period"

The circumstances in the Med Marine Case are different from the instant Request for Review where we have found the tender validity period lapsed on 31st December 2020 and no tender existed on 26th January 2021 when the Applicant filed this Request for Review.

It is therefore the finding of this Board that it cannot re-instate the tender validity period of the subject tender given the same lapsed on 31st December 2020.

Having found the tender validity period of the subject tender already lapsed and the same cannot be reinstated, it calls upon the Board to determine the appropriate reliefs to grant in the circumstances as the last issue for determination. The Board has found that the Procuring Entity failed to terminate the subject procurement proceedings in accordance with the substantive and procedural requirements for termination of a tender pursuant to section 63 of the Act. The Board has also found the tender validity period of the subject tender lapsed on 31st December 2020 and that all actions undertaken after 31st December 2020 were null and void. Despite the Board having held the foregoing actions by the Procuring Entity were unlawful, the Board cannot issue orders directing the Procuring Entity to remedy such actions in respect to a tender that has already lapsed.

In determining the appropriate reliefs in the circumstances, the Board observes that at paragraph 157 of his decision in **Miscellaneous Application No. 284 of 2019, Republic v Public Procurement Administrative Review Board, & Another Ex Parte CMC Motors Group Limited [2020] eKLR**, the Honourable Justice Mativo cited the decision of the South African Constitutional Court in **Minister of Health & Others v Treatment Action Campaign & Others (No 2)**

(CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002) where it was held as follows:-

"Perhaps the most precise definition of "appropriate relief" is the one given by the South African Constitutional Court in Minister of Health & Others v Treatment Action Campaign & Others thus: -

"...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."

Having considered the finding in the foregoing case, the Board observes that an appropriate relief in the circumstances ought to be one that ensures the public can still benefit from the services the Procuring Entity sought to procure through the subject tender. Given that the tender validity period lapsed on 31st December 2020 and that no action can be taken by the Procuring Entity in respect of a tender that has lapsed, it is only appropriate for the Procuring Entity to undertake a fresh procurement process for the **Supply, Installation, Testing, Training**

and Commissioning of 1 No. Guillotine Machine.

In totality, the Board issues the following specific orders: -

FINAL ORDERS

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

- 1. The Accounting Officer of the Procuring Entity is at liberty to retender for the Supply, Installation, Testing, Training and Commissioning of 1 No. Guillotine Machine in accordance with the Constitution, the Act and Regulations 2020.**
- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 16th day of February 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB