

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 89/2021 OF 24<sup>TH</sup> JUNE, 2021**

**BETWEEN**

**EAA COMPANY LIMITED ..... APPLICANT**

**-VERSUS-**

**THE ACCOUNTING OFFICER,**

**KENYA BUREAU OF STANDARDS ..... 1<sup>ST</sup> RESPONDENT**

**KENYA BUREAU OF STANDARDS ..... 2<sup>ND</sup> RESPONDENT**

**M/S QUALITY INSPECTION SERVICES**

**INC. JAPAN.....INTERESTED PARTY**

Review against the decision of the Managing Director of Kenya Bureau of Standards in relation to International Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Spare Parts.

**BOARD MEMBERS**

- |                            |              |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa        | -Chairperson |
| 2. Mr. Jackson Awele       | -Member      |
| 3. Ms. Rahab Chacha        | -Member      |
| 4. Arch. Steven Oundo, OGW | -Member      |
| 5. Qs. Hussein Were        | -Member      |

**IN ATTENDANCE**

- |                     |                             |
|---------------------|-----------------------------|
| 1. Mr. Philip Okumu | -The Acting Board Secretary |
|---------------------|-----------------------------|

## **BACKGROUND**

The tender subject of this Request for review has a chequered litigation history before this Board. This is the third Request for Review in respect of the said tender albeit by a different Applicant. In light of the nature of the instant dispute before us, we take the liberty to briefly recap its litigation history and outcomes as follows;

### **The Tendering Process**

Kenya Bureau of Standards (hereinafter referred to as "the Procuring Entity") invited interested and eligible tenderers to submit tenders in response to International Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts (hereinafter referred to as "the subject tender") advertised in the Daily Nation Newspaper and the Procuring Entity's website ([www.kebs.org](http://www.kebs.org)) on Tuesday, 19<sup>th</sup> January 2021.

### **Tender Submission Deadline**

Upon issuance of an Addendum on 3<sup>rd</sup> February 2021, the tender submission deadline was extended to 25<sup>th</sup> February 2021 at 11:00 am.

## **REQUEST FOR REVIEW NO. 12 OF 2021**

Before tender opening, M/s Five Blocks Enterprises Limited lodged a Request for Review dated and filed on 1<sup>st</sup> February 2021 together with a Statement of Support dated and filed on 1<sup>st</sup> February 2021 (hereinafter

referred to as the “1<sup>st</sup> Request for Review”) and a Reply to the Respondents’ Memorandum of Response dated and filed on 12<sup>th</sup> February 2021 seeking the following orders: -

- i. An order annulling the tender in its entirety and terminating/cancelling the procurement process.***
- ii. An order directing the Procuring Entity to initiate a new procurement process for the subject services that comply with the requirements of the Public Procurement and Asset Disposal Act, 2015 and its attendant Regulations, 2020.***
- iii. An order awarding costs of this Request for Review which was necessitated by the incompetence of the Procuring Entity.***

After considering each of the parties’ cases, the documents filed before it, including confidential documents filed pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as “the Act”), the Board issued the following orders on 22<sup>nd</sup> February 2021 in PPARB Application No. 12 of 2021, Five Blocks Enterprises v. The Managing Director, Kenya Bureau Standards & Another (hereinafter referred to as Review No.12 of 2021): -

- 1. The Accounting Officer of the Procuring Entity’s Addendum to the Tender Document in International Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts titled ‘Extension and Clarification of Tenders’ dated 3<sup>rd</sup> February 2021 be and is hereby cancelled and set aside.**

- 2. The Accounting Officer of the Procuring Entity is hereby directed to issue an addendum to amend the Tender document in International Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts to provide for a margin of preference, application of a margin of preference as a criterion for evaluation at the financial evaluation stage and at its discretion, provisions to satisfy the requirements for a framework agreement in accordance with section 114 of the Act read together with Regulation 102 and 103 of the Regulations 2020 or to unbundle the tender to provide for lots, within thirty (30) days from the date of this decision, taking into consideration the findings of this Board in this review.**
- 3. The Accounting Officer of the Procuring Entity is hereby directed to extend the tender submission deadline for a further fourteen (14) days from the date of issuance of the addendum referred to in Order No. 2.**
- 4. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

On 10<sup>th</sup> March 2021, pursuant to the foregoing orders of the Review Board, the Procuring Entity issued Addendum No. 2 amending several provisions of the Tender Document and extending the tender submission deadline to 24<sup>th</sup> March 2021.

## **REQUEST FOR REVIEW NO. 39 OF 2021**

Yet again before the tender submission deadline and opening, M/s Five Blocks Enterprises Limited lodged another Request for Review dated 23<sup>rd</sup> March 2021 and filed on even date together with a Statement in Support of the Request for Review sworn on 23<sup>rd</sup> March 2021 and filed on even date (hereinafter the 2<sup>nd</sup> Request for Review), a Reply to the Respondents' Memorandum of Response, dated 31<sup>st</sup> March 2021 and filed on 1<sup>st</sup> April 2021 and a Supplementary Affidavit sworn on 6<sup>th</sup> April 2021 and filed on even date seeking the following orders: -

- 1. An order annulling the tender in its entirety and terminating the procurement process herein, since it looks like the procuring entity is unable or not willing to implement the decision of the Board;***
- 2. An order directing the Procuring Entity to issue another Addendum that complies with the Board's orders issued earlier; and***
- 3. An order awarding costs of this Request for Review necessitated by incompetence of the Procuring Entity.***

After careful consideration of the parties' pleadings including confidential documents submitted pursuant to section 67 (3) (e) of the Act, the Board issued the following orders on 12<sup>th</sup> April 2021 in PPARB Application No. 39 of 2021, Five Blocks Enterprises v. The Managing Director, Kenya Bureau Standards & Another (hereinafter referred to as Review No.39 of 2021);

**1) The provisions of the Accounting Officer of the Procuring Entity's Addendum No. 2 dated 10<sup>th</sup> March 2021 in so far as it provides for a margin of preference under Clause 9 thereof, amending Clause 2.11.2 (C) of the Appendix to Instructions to Tenderers of the Tender Document for International Tender No. KEBS/T/012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Spare Parts, be and is hereby cancelled and set aside.**

**For the avoidance of doubt, the rest of the provisions in Addendum No. 2 dated 10<sup>th</sup> March 2021 remain valid.**

**2) The Accounting Officer of the Procuring Entity is hereby directed to issue an addendum to amend the Tender document in International Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts within seven (7) days from the date of this decision, whilst taking into consideration the findings of this Board in this Review, to provide for the following:**

**a) The Procuring Entity's intention to establish a framework agreement pursuant to section 114 of the Act; and**

**b) A margin of preference and application of a margin of preference as a criterion for evaluation at the Financial Evaluation stage in accordance with Section 157 (8) (b) of the Act read together with Regulation 164 (c), (d) & (e) and Regulation 77 (2) (d) of Regulations 2020.**

**3) The Accounting Officer of the Procuring Entity is hereby directed to extend the tender submission deadline for a further period of fourteen (14) days from the date of issuance of the addendum referred to in Order No. 2 above.**

**4) Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Pursuant to the aforesaid orders, the Procuring Entity issued Addendum No. 3 dated 20<sup>th</sup> April 2021, which provided at Clause 2.22.3 as follows:-

<b><i>No.</i></b>	<b><i>ITT Reference Clause</i></b>	<b><i>Particulars of Appendix</i></b>
<b><i>11.</i></b>	<b><i>2.22.3 Mode of Award of Contract</i></b>	<b><i>This is a multiple award tender.  KEBS shall award the tender to the tenderer(s) that is (are) responsive to the technical and Financial Bids with the highest royalty fee offer <u>subject to a minimum of seven (7)</u></i></b>

		<p><b><u>tenderers (service providers).</u></b>  <b><i>Where bidders tie in technical scores and are financially responsive both shall be awarded.</i></b>  <b><u>Suppose the tender does NOT</u></b>  <b><u>achieve a minimum of (7) tenderers</u></b>  <b><u>a possible re-tender may be done to</u></b>  <b><u>achieve additional numbers of</u></b>  <b><u>service providers to reach the</u></b>  <b><u>minimum seven (7) service</u></b>  <b><u>providers or even more.</u></b></p>
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The following four tenderers submitted tenders in response to the amended subject tender;

- i) Bidder No. 1 - QISJ
- ii) Bidder No. 2- EAA Company limited
- iii) Bidder No. 3- Autoterminal Japan Limited
- iv) Bidder No. 4- Wilna International

Upon tender opening, the Procuring Entity reached the conclusion that the subject tender did not meet the threshold of responsiveness specified for a framework agreement of a minimum of seven (7) service providers or even more since only four (4) tenderers responded.

The Procuring Entity's Head of procurement function issued her Professional Opinion dated 3<sup>rd</sup> June, 2021, in which she stated that she



had reviewed the Evaluation Committee's Report and in her opinion, the report complies with the Act. She recommended as follows;

- (i) Cancellation of the International Tender for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Spare Parts Tender No. KEBS/TO12/2020-2023; and
- (ii) Re-tender using Restricted Tendering Procurement Methodology as Per Section 102 (1) (c) (d) of the Procurement and Asset Disposal Act 2015 and Public Procurement and Asset Disposal Regulation (PPADR) 2020 Section 89 (6) (8).

The Accounting Officer approved the professional opinion on 4<sup>th</sup> June 2021 and Letters of the termination were issued to tenderers on 5<sup>th</sup> June, 2021 as follows:-

***".....We wish to inform you that the tender was non-responsive and has been cancelled....."***

### **REQUEST FOR REVIEW NO. 89/2021**

The Request for Review dated 23<sup>rd</sup> June, 2021 was lodged on 24<sup>th</sup> June, 2021 by **EAA COMPANY LIMITED** the above-named Applicant (hereinafter referred to as the "subject Review"). The Applicant requests the Board to:

- I. Set aside and cancel the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notification dated 5<sup>th</sup> June 2021 (but communicated by email received on the 11<sup>th</sup> June 2021) and the***

***decision therein that cancelled the 2<sup>nd</sup> Respondent's TENDER FOR THE PROVISION OF PRE-EXPORT VERIFICATION OF CONFORMITY (PVOC) TO STANDARDS SERVICES FOR USED MOTOR VEHICLES, MOBILE EQUIPMENT AND SPARE PARTS, TENDER NO:KEBS/T012/2020-2023 for being non-responsive and direct the Respondents to instead evaluate the bids they received on the 5<sup>th</sup> May 2021, including the Applicant's bid, according to the criteria set out in the tender document, the addenda thereto, the Public Procurement & Asset Disposal Act 2015 and the Constitution 2010 and to thereafter award the tender and the contract to the Applicant if it emerges as the successful and or most competitive bidder.***

***II. Direct and Declare that the Applicant was an eligible bidder under S. 55 Public Procurement & Asset Disposal Act 2015 and the criteria on eligibility in the tender document in TENDER NO:KEBS/T012/2020-2023 and the addenda thereto, having presented its bid before the closure of the tender on the 5<sup>th</sup> May 2021, before any findings in ongoing debarment proceedings against it in Debarment Applications Nos. 1 & 2 of 2021 (consolidated) and investigations by the Directorate of Criminal Investigations referred to in that investigative agency's letter dated 7<sup>th</sup> May 2021 had been made, and the respondents are obligated to***

***evaluate its bid according to the set tender criteria and to award it the tender and contract if its tender emerges successful and or most competitive.***

The subject review is supported by a Supporting Affidavit dated 23<sup>rd</sup> June 2021 and sworn by the Applicant's President.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted and filed with the Board, the following documents:

- (a) Notice of Appointment of Advocates
- (b) Notice of Preliminary Objection, dated and filed on 30<sup>th</sup> June, 2021
- (c) 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response, dated and filed on 30<sup>th</sup> June, 2021

The Applicant filed a Reply to the Respondents' Notice of Preliminary Objection and Memorandum of Response, both dated 30<sup>th</sup> June 2021. The same were filed on 6<sup>th</sup> July 2021.

M/s Quality Inspection Services Inc. Japan, filed a "Memorandum of Response", via an email to the Board on 5<sup>th</sup> July 2021 as an Interested Party.

On 9<sup>th</sup> July 2021, the Applicant further filed written submissions in support of its Request for Review.

Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020 detailing the Board's administrative and contingency management plan to mitigate the spread of Covid-19 pandemic, the Board dispensed with physical hearings and directed all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specifies that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

### **BOARD'S DECISION**

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have raised a jurisdictional objection to the subject Review on two main grounds to wit; that the subject Review is Res judicata and that the Review Application as a whole offends the provisions of Article 10(c) of the Constitution, sections 41, 62, 66(1), (2), (3)(a), (b) of the Act and regulation 22 of the Public Procurement & Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulation 2020". After careful consideration of the said objection, parties' pleadings, submissions and confidential documents submitted by the Respondents to the Board pursuant to section 67 (3) (e) of the Act, the Board has identified the following three issues for determination;

- (i) Whether the Request for Review is Res Judicata;***
- (ii) Whether the Request for Review offends the provisions of Article 10(c) of the Constitution, sections 41, 62, 66(1), (2), (3)(a), (b) of the Act, 2015 and regulation 22 of Regulations 2020.***

***(iii) Whether the Procuring Entity lawfully terminated the procurement proceedings of the subject tender.***

**Whether the Request for Review is Res Judicata**

Vide their notice of preliminary Objection, the Respondents contend that the Applicant's Request for Review dated 23<sup>rd</sup> June 2021 offends the rule of Res Judicata on account of a decision rendered by the 'Public Procurement Administrative Review Board on the said 23<sup>rd</sup> June 2021, to wit: *Debarment decision in Application No. 1 of 2021 and No. 2 of 2021 (consolidated)*. They submit that in the circumstances the Application for Review be struck out with costs.

In its Reply to the Respondents' joint Notice of Preliminary Objection and Memorandum of Response, dated 2<sup>nd</sup> July 2021 and filed on 6<sup>th</sup> July 2021, the Applicant denies that the Request for Review is res judicata for various reasons including; First, that the main issue for consideration in the Request for Review, which has not been considered anywhere else, is whether the Respondents had deliberately set out to fail and whether they deliberately misconstrued and misapplied their own criteria specifically set out in paragraph 11 of its Addendum 3 dated 20<sup>th</sup> April 2021 to cancel the subject tender, and whether the Respondents' decision met the mandatory constitutional principles of fairness, equity, transparency, competitiveness and cost-effectiveness enshrined under Article 227(1) of the Constitution, which applies to all public procurements.

Second, that the debarment proceedings dealt with the issue as to whether the debarment proceedings had established grounds to debar the Applicant for allegedly presenting false information in tenders Nos. EOI/KEBS/53/2010-2011, KEBS/T057/2014-2015, KEBS/T019/2017-2020 and KEBS/T010/2019-2021, whereas the issue for determination in this Request for Review is whether the Respondents illegally cancelled tender No. KEBS/T012/2020-2023. The Applicant argues that the issue herein is whether this Board should set aside that decision cancelling the subject tender and direct that the evaluation of the tenders presented in the subject tender be commenced and concluded and the tender and contract awarded to the successful tenderers.

Third, that the debarment proceedings were considered by a different body i.e. the Public Procurement Regulatory Board (hereinafter referred to as the (Regulatory Board”) whereas this Request for Review is currently before the Public Procurement Administrative Review Board (Board).

Fourth, that the parties in the identified Debarment proceedings to wit; the Auditor General and Dr. Charles Nzai were the Applicants therein and the Applicant herein was the Respondent therein are different from the parties in the subject Review.

Lastly the Applicant argues that the issue set out in paragraph 2 of the Notice of Preliminary Objection as to whether or not the Applicant’s Request for Review offend various provisions of the Constitution, procurement laws or regulations goes to the merit of the said request,

and are contested. The same does not therefore qualify as a preliminary objection. The Applicant thus asserts that the Review Board has jurisdiction to hear and determine the matter before it.

In **Nathaniel Ngure Kihiu v Housing Finance [2018] eKLR** Lady Justice Njuguna L. set out a detailed exposition of the *Res Judicata* rule as follows;

***"14. The plea of re judicata is provided for in section 7 of the Civil Procedure Act (CPA) which reads:***

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

***15. Justice Richard Kuloba (as he then was) set out the definition and essentials of res judicata as a thing or a matter adjudged; a thing judicially acted upon or decided; a thing or a matter settled by judgment. He further observes that, in that expression is found the rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to***

***a subsequent action involving the same claim, demand or cause of action. To be applicable, the rule requires identity in thing sued for as well as identity of cause of action, of persons and parties for or against whom claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided.***

...

***17. A cursory reading of Section 7 of the Civil Procedure Act reveals that there are clear conditions which must be satisfied before Res judicata can successfully be pleaded namely;***

***(i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit.***

***(ii) The former suit must have been a suit between the same parties or between the same parties under whom they or any of them claim.***

***(iii) Such parties must have been litigating under the same title in the former suit.***

***(iv) The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.”***

Having fully considered the preliminary objection, the response thereto, parties' pleadings and submissions alongside the foregoing exposition of



the law on *Res Judicata*, the Board finds that this ground of the Respondents' preliminary objection does not satisfy any of the four conditions outlined above that is to say;

The debarment proceedings alluded to by the Respondents were the subject of proceedings before the Regulatory Board - not this Board and concerned different parties from the parties to these proceedings. We are fortified in our conclusion by the fact that the Board's jurisdiction is unequivocally circumscribed under section 167 read together with section 173 of the Act and particularly does not include the power to entertain debarment proceedings. The said power is, under section 41 of the Act, exclusively reposed in the Public Procurement Regulatory Authority established under section 8 of the Act and the Regulatory Board established under section 10 of the Act both of which are equally not competent to try the matter currently falling for determination by the Board. We are accordingly in agreement with the Applicant that this ground of the preliminary objection lacks merit and is accordingly dismissed.

**Whether the Request for Review offends the provisions of Article 10(c) of the Constitution, sections 41, 62, 66(1), (2), (3)(a), (b) of the Act and regulation 22 of Regulations 2020.**

This ground of the preliminary objection is founded ostensibly on the allegation that the Applicant was debarred from participating in procurement proceedings for a period of three years and is accordingly

not entitled to take part in the procurement proceedings in respect of the subject tender and/or by dint of section 62 of the Act, ought to have disclosed the fact of the said debarment in its tender documents in response to the subject tender. The Respondents contend that the Applicant is in the circumstances non-suited for purposes of these proceedings.

The Applicant has in response filed an Amended Order dated 28<sup>th</sup> June 2021 issued by the High Court (**Hon. Mr. Justice Ngaah**) in **J.R Application No. E067 of 2021** between it and the Regulatory Board and others. The said court ordered inter-alia that the status quo be maintained pending the court's ruling on the Applicant's Application (the nature whereof has not been disclosed) to be delivered on 23<sup>rd</sup> July 2021. The Respondents have not controverted the veracity of the said order or the scope of its application in so far as the debarment proceedings are concerned. The Board accordingly finds that the debarment decision has been stayed and/or is currently the subject of Judicial Review proceedings currently pending before the High Court in JR Application No. E067 of 2021.

In the circumstances, the Board is of the considered opinion, and it so finds, that as at the date of this decision, there is no conclusive debarment decision upon which it can found a determination as to the Applicant's culpability under sections 41, 61 and 66 of the Act. Put differently, the Respondents' allegations against the Applicant in this regard are the

subject of a live dispute before a Superior Court and are in the event *sub judice*.

The Respondents' objection on this ground is in the circumstances not one that would be rightly characterized as one raising a pure point of law. What constitutes a Preliminary Objection is set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696**, where it was held that:

***"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. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."***

**Whether the Procuring Entity lawfully terminated the procurement proceedings in the subject tender**

The Applicant raises twelve (12) grounds of review all of which revolve around the alleged improper cancellation/termination of the subject tender.

The Applicant is aggrieved that being an open tender, the Respondents' evaluation committee was obligated to commence, undertake and conclude the evaluation of the bids received and to recommend the award of the tender and contracts to the successful/ most competitive bidders, in accordance with section 46(4) of the Act.

It is the Applicant's case that the tender was not a framework agreement or contract as envisaged under section 2 and 114 of the Act, as the value of the tender had been determined from the tender forms submitted by the parties which therefore required the Respondents' evaluation committee to evaluate the bids tendered and to award the successful bidder. The Applicant contends that there are no objective and or reasonable grounds given by the Respondents for declaring the subject tender non-responsive. It argues that the decision to terminate the procurement proceedings is in the circumstances in violation of section 45(2)(c) of the Act for failing to strictly adhere to Article 227 of the Constitution.

The Applicant further contends that the Addendum 3 to the Tender Document allowed the Respondents the option to re-tender for additional contractors if the tenders received did not meet the anticipated seven tenders, and the default to receive seven competitive tenders cannot lawfully result in the tender's non-responsiveness. According to the Applicant, the requirement of 7 tenderers by the Respondent is unreasonable, arbitrary and unattainable and is therefore not objective as only four international companies from Japan have the ISO Certification

required by the 2<sup>nd</sup> Respondent to undertake pre-shipment inspections under the subject tender. It submits that there is no justification for having 7 tenderers and for refusing to evaluate the tenders presented even if they were less than the anticipated seven competitive tenders, as the services tendered for have previously been undertaken by only one tenderer save for Tender No. KEBS/T010/2019-2021 where two more contractors were added to increase the number to three, and as currently, only one contractor is providing the pre-shipment inspection services. It contends that the termination is subjective and open to abuse by opting for modes of tendering that are neither open, transparent and competitive such as open tendering. Accordingly, the Applicant submits that the tender was cancelled and/or terminated in breach of sections 2, 3, 45(2)(c), 46(4), 63(1) & (6) and 114, of the Act.

In response, the Respondents submit that pursuant to the decision of the Board dated 12<sup>th</sup> April, 2021 in Review No. 39 of 2021, they issued an addendum on 20<sup>th</sup> April, 2021 to amend the subject tender's document to be an International Open Tender under framework agreement.

The Respondents assert that the Subject Tender was indeed a Framework Agreement tender as stipulated in Addendum 3 on the mode of award; No. Eleven (11) clause 2.22.3 which stipulated that the tender was a multiple award tender and that the minimum tenderers to be considered for award was seven (7). The Respondents contend that the addendum further stated that if seven (7) tenders were not attained, the Respondents may re-tender to achieve seven tenders.

The Respondents avow that the Applicant's assumption that the minimum award to seven tenderers is unreasonable, unattainable and arbitrary constitutes an offence under Section 176(1)(g) of the Act and is aimed at inappropriately influencing tender evaluations. The Respondents further assert that since it was an open international tender under Framework Agreement where only four (4) tenderers responded, the tender was cancelled as per Section 63(1)(a)(i) of the Act. It is their submission that they could not award the tender in the absence of consideration of a minimum of seven (7) tenderers as required by law.

The Respondents further state that under Section 167 (4) of the Act the following matters shall not be subject to the review of procurement proceedings under subsection (1)

***(a) the choice of a procurement method;***

***(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act***

The Interested Party's memorandum of response dated 5<sup>th</sup> July 2021 supports the Respondent's position on substantially the same grounds as the above.

At the outset, it is instructive to bear in mind that in its decision in Application No. 39 of 2021, this Board was emphatic that the second limb of Order No. 2 of the Board's decision in Review No. 12/2021 was

discretionary thus giving the Procuring Entity the option to make provisions in the tender document to satisfy the requirements for a framework agreement or to unbundle the tender to provide for lots.

In the said Review No. 12/2021, the Procuring Entity stated that the subject tender is being undertaken through a framework agreement as observed at page 12 of the Board's decision in Review No. 12/2021 as follows: -

***"In its pleadings before the Board, the Procuring Entity in paragraph 5 and 9 of its Memorandum of Response contends that the choice of a procurement method is the responsibility of the Procuring Entity and shall not be subject to review as stipulated under section 167 (4) (a) of the Act. The Procuring Entity takes the view that it may enter into a framework agreement through open tender pursuant to section 114 (1) of the Act and avers that the subject tender duly satisfies the requirements for use of framework agreements through use of open international tenders."***

In essence, the Board held at page 57 of the decision in Review No. 12/2021 that the Procuring Entity may elect to unbundle the subject tender into lots, with one lot representing a centre in one of the seven (7) countries where the Procuring Entity intends to implement/perform the subject tender. The Procuring Entity would then award the tender to the

lowest evaluated price in accordance with section 86 (1) of the Act with respect to each lot, with one tenderer assigned to a specific lot.

The Procuring Entity however elected to provide for provisions to satisfy the requirements for a framework agreement as opposed to unbundling the subject tender into lots hence the decision of the Board at page 51 of the decision in Review No. 12/2021 that: -

***"Accordingly, a procuring entity entering into a framework agreement through open tender using an invitation to tender, is required to specify the foregoing terms in its invitation to tender, including its intention to establish a framework agreement, the duration of the framework agreement and the number of suppliers or contractors under the said agreement which shall not be less than seven (7) alternative vendors." (emphasis added)***

Consequently, the Review Board in its decision in Review No. 39 of 2021 noted that the Procuring Entity at Clause 10 of Addendum No. 2 dated 10<sup>th</sup> March 2021 provided some requirements for framework agreement on awarding to multiple tenderers as follows: -

***"This is a multiple award tender***

***KEBS shall award the tender to the tenderer (s) that is (are) responsive to Technical and Financial bids with the highest royalty fee offer subject to a minimum of seven (7) tenderers (service providers). Where bidders tie in***



**technical scores and are financial responsive both shall be awarded”**

The Board went on to note however that the Procuring Entity having elected to use framework agreement failed to issue an addendum amending the invitation to tender **specifying its intention to establish a framework agreement**. It stated at page 33 of the said decision as follows

**“Having considered the Board’s finding in Review No. 12/2021, it is our considered view that the Procuring Entity’s action of electing to provide provisions to satisfy the requirements of framework agreement as opposed to unbundling the tender into lots cannot be faulted because in a framework agreement, the Procuring Entity would be entitled to award several successful tenderers (with a minimum of 7 as required by section 114 (1) (c) of the Act) given the expansive scope of work in the subject tender. That notwithstanding, having elected to use framework agreement, then all requirements on framework agreement ought to have been satisfied. The Procuring Entity in this case failed to issue an addendum amending the invitation to tender specifying its intention to establish a framework agreement.”**

In the subject review the Respondents aver at paragraphs 8 & 9 of their Memorandum of Response that in compliance with the Board’s orders they issued an Addendum No. 3 dated 20<sup>th</sup> April 2021, which provided its intention to establish a framework agreement at Clause 2.22.3 as follows:

<b>No.</b>	<b>ITT Reference Clause</b>	<b>Particulars of Appendix</b>
<b>11.</b>	<b>2.22.3 Mode of Award of Contract</b>	<p><b><i>This is a multiple award tender.</i></b></p> <p><b><i>KEBS shall award the tender to the tenderer(s) that is (are) responsive to the technical and Financial Bids with the highest royalty fee offer subject to a minimum of seven (7) tenderers (service providers).</i></b></p> <p><b><i>Where bidders tie in technical scores and are financial responsive both shall be awarded.</i></b></p> <p><b><i>Suppose the tender does NOT achieve a minimum of (7) tenderers a possible re-tender may be done to achieve additional numbers of service providers to reach the minimum seven (7) service providers or even more.</i></b></p>

The Board finds that the above provision that the award of the tender shall be subject to a minimum of 7 tenderers and secondly that where the said number is not achieved a possible re-tender may be done complied with the Board's order No. 2(a) in Review No.39 of 2021. It follows therefore that the Procuring entity was bound by the provisions of the Act

on framework agreement and in particular Section 114(1) (c) of **a minimum of seven alternative vendors are for each category.**

Having considered that the said number had not been achieved at the tender opening stage, the evaluation committee and indeed the Respondents had the option, exercisable at their discretion, to re-tender. The corollary of this discretion is that the Procuring entity had the option to terminate the procurement proceedings and to re-tender as was recommended by their Head of Procurement function in her Professional Opinion dated 3<sup>rd</sup> June, 2021. The Accounting officer approved the said opinion on 4<sup>th</sup> June 2021 and letters of notification cancelling the Subject Tender were issued on 5<sup>th</sup> June 2021.

The bonafides or sufficiency of the procurement method chosen by the Procuring Entity is beyond the Board's jurisdiction by dint of the express proscription of section 167(4)(a) of the Act.

In the circumstances, the Board finds that the Respondents exercised a discretion and power that was open to them in the tender document vide addendum No. 3 of 20<sup>th</sup> April 2021 as above as read with sections 114(1)(c) of the Act and 63(1)(a)(i) of the Act.

Under Section 63(1)(a)(i) of the Act;

**"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;**

...

The substantive justification, provided by the Respondents in their response to this Request for Review, for the decision to cancel and/or terminate the tender cannot therefore be faulted on any of the grounds advanced by the Applicant in the Request for Review.

Procedurally however, the Board is not satisfied that the Letters of Notification of the termination met statutory muster. Section 63 (2), (3) and (4) of the Act is instructive on the procedure to be followed in the termination of procurement proceedings as follows: -

- "(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." (Emphasis added)**

The Board notes that the notification letter sent to the Applicant dated 5<sup>th</sup> June 2021 (received by the Applicant via email on 11<sup>th</sup> June 2021) stated as follows: -

***"We wish to inform you that the tender was non-responsive and has been cancelled....."***

*Ex facie*, the said letter merely notifies bidders of the termination decision without reasons as required by the Act.

We further note that from the confidential documents submitted to the Review Board that the Respondents did not submit a copy of the report, if any, submitted to the Public Procurement Regulatory Authority as per the requirements of section 63(2) and (3) of the Act. Noting that the decision to terminate the procurement proceedings was made on 4<sup>th</sup> June 2021, the inevitable presumption is that the said report was not issued to the Authority within the period and in the manner prescribed under section 63(2) & (3) of the Act.

The upshot of the foregoing is that the request for review partly succeeds to the limited extent that the procuring entity failed to provide reasons for the termination of the request for review and for failing to submit a report on the said termination to the Public Procurement Regulatory Authority in compliance with section 63(2) and (3) of the Act.

## **FINAL ORDERS**

Pursuant to the powers granted to the Board under section 173 of the Act, the Board makes the following final orders;

- i) The preliminary objection dated 30<sup>th</sup> June, 2021 be and is hereby dismissed.**
- ii) The letter of termination issued to tenderers in relation to International Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Spare Parts purporting to cancel the proceedings of the subject tender be and is hereby cancelled and set aside.**
- iii) The 1<sup>st</sup> Respondent is hereby directed to re-issue termination letters of the proceedings of the subject tender to all tenderers who participated in Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Spare Parts in accordance with section 63(4) of the Act and to comply with the provisions of section 63(2) and (3) of the Act.**
- iv) Each Party shall bear its own costs.**

**Dated at Nairobi on this 15<sup>th</sup> day of July 2021.**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**