

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 4/2021 OF 25TH 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 of the Accounting Officer of Numerical Machining Complex Limited with respect to Tender No. NMC/ONT/03/2020-2021 for the Proposed Supply, Installation, Testing, Training and Commissioning of 1 No. Metal Chip Briquetting System.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Eng. Mbiu Kimani, OGW | -Member |
| 3. Mr. Nicholas Mruttu | -Member |
| 4. Ms. Phyllis Chepkemboi | -Member |
| 5. Ms. Rahab Chacha | -Member |

IN ATTENDANCE

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

BACKGROUND TO THE DECISION

The Bidding Process

Numerical Machining Complex Limited (hereinafter referred to as “the Procuring Entity”) invited sealed tenders for Tender No. NMC/ONT/03/2020-2021 for the Proposed Supply, Installation, Testing, Training and Commissioning of 1 No. Metal Chip Briquetting System (hereinafter referred to as “the subject tender”) through an advertisement published in MyGov Newspaper on 1st September 2020. A mandatory site visit was conducted on 7th September 2020 for prospective bidders.

Bid submission deadline and opening of bids

The initial bid submission deadline of 15th September 2020 was extended to 29th September 2020 vide an Addendum dated 11th September 2020. The bids were opened on the said date of 29th September 2020 by a Tender Opening Committee in the presence of bidders’ representatives. The same were recorded as follows: -

Bidder No.	Bidder Name
1	Daniels Outlets Ltd
2	Brainstorm Holdings Ltd
3	Jewels East Africa Ltd
4	Smartways Holdings Ltd
5	Vaghjiyani Enterprises Ltd
6	Formica Investments
7	MKT Investments Ltd

Bidder No.	Bidder Name
8	Kekan Services Ltd
9	Powertronics Engineering Co. Ltd
10	Steadfast Commercial Agencies

Evaluation of bids

According to the Evaluation Report signed on 6th November 2020, evaluation of bids in the subject tender was conducted in the following stages: -

i. Mandatory Requirements/Preliminary Evaluation;

ii. Technical Evaluation; and

iii. Financial Evaluation

1. Preliminary Evaluation

At this stage, the Evaluation Committee subjected the 10 bids received to the criteria outlined in Clause (A). Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document. The following six bidders were found responsive and thus eligible to proceed to Technical Evaluation: -

- Bidder No. 2, Brainstorm Holdings Ltd;
- Bidder No. 4, Smartways Holdings Ltd;
- Bidder No. 5, Waghjiyan Enteprise Ltd;
- Bidder No. 6, Formica Investments;
- Bidder No. 7, MKT Investments Ltd; and
- Bidder No. 8, Kekan Services Ltd.

2. Technical Evaluation

At this stage, the Evaluation Committee subjected the remaining 6 bids to the criteria outlined in Clause (B). Technical Evaluation of the Appendix to Instructions to Tenderers of the Tender Document which required bidders to achieve a minimum technical score of 90% to proceed to Financial Evaluation. At the end of Technical Evaluation, four bidders were found responsive and thus qualified for Financial Evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee subjected the remaining 4 bids to the criteria outlined in Clause (C). Financial Evaluation of the Appendix to Instructions to Tenderers of the Tender Document which required bidders to achieve a pass mark of 15 out of the total score of 20 marks. Award of the subject tender would then be recommended to the bidder who submitted the lowest evaluated price as stated in the Award Criteria specified in the Appendix to Instructions to Tenderers at page 27 of the Tender Document.

Bidder No. 5, M/s Vaghjiyan Enterprises Ltd did not achieve the minimum score of 15 marks and was thus found non-responsive. Bidder No. 7 and Bidder No. 8 proposed tender prices of Kshs. 14,450,000.00 and Kshs. 18,100,690.00 respectively compared to Bidder No. 8 who had a tender price of Kshs. 13,900,000.00. The Evaluation Committee found that the price of Kshs. 13,900,000.00 submitted by Bidder No. 8, M/s Kekan Services Limited was the lowest evaluated price.

Recommendation

The Evaluation Committee previously recommended award of the subject tender to Bidder No. 8, M/s Kekan Services Limited at its price of Kshs. 13,900,000.00, having determined the said bidder submitted the lowest evaluated price. The Evaluation Committee was requested to “relook the financial evaluation and to outline their observations”, through handwritten comments by the Head of Supply Chain Management on the face of the Evaluation Report signed on 6th November 2020. According to the Evaluation Report signed on 20th November 2020, the Evaluation Committee undertook a re-evaluation. During Financial re-evaluation, the Evaluation Committee observed that: -

- *The sales and liabilities figures/data for Bidder No. 7 and Bidder No. 8 for all the requested financial years of 2017, 2018 and 2019 were similar and equal. According to the Evaluation Committee, this similarity and coincidence was a point of concern and proof that the figures specified in the sales and liabilities figures/data for Bidder No. 7 and Bidder No. 8 were fraudulent noting further that their respective CR 12, KRA PIN and Tax Compliance Certificates were different.*
- *As a result, the two bidders were found non-responsive.*

Consequently, the Evaluation Committee recommended award of the subject tender to Bidder No. 4, M/s Smartways Holdings Limited at its price of Kshs. 18,100,690.00, having determined the said bidder submitted the lowest evaluated price and noting further that Bidder No. 5 was already disqualified from further evaluation.

Professional Opinion

In a Professional Opinion dated 24th November 2020, the Procuring Entity's Head of Supply Chain Management reviewed the manner in which the subject procurement process was undertaken and took the view that the same satisfied the statutory requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020"). He further noted that the bid price of the lowest evaluated tenderer was in excess of the Procuring Entity's budget. That notwithstanding he noted the said bid price was not more than 25% of the Procuring Entity's budget and thus recommended that M/s Smartways Holding Ltd be requested to revise its bid by submitting the best and final offer within a period not exceeding 7 days. In another Professional Opinion dated 4th December 2020, the Head of Supply Chain Management abandoned his earlier opinion of 24th November 2020 due to new developments in the tender process that had been brought to his attention indicating that M/s Smartways Holdings Ltd did not attend the mandatory site visit. As a result, he recommended that the subject procurement proceedings be cancelled as per section 63 (1) (i) of the Act, and the tender be re-advertised. The Managing Director approved the recommendation on 9th December 2020.

Notification to Tenderers

In letters dated 22nd December 2020, the Procuring Entity's Managing Director notified tenderers of the outcome of their bids. In addition to this,

the Managing Director informed tenderers that the subject procurement proceedings were terminated because material governance issues were detected during the procurement process.

THE REQUEST FOR REVIEW

M/s Daniels Outlets Limited (hereinafter referred to as “the Applicant”) lodged a Request for Review dated 21st January 2021 and filed on 25th January 2021 together with a Supporting Affidavit sworn on 21st January 2021 and filed on 25th January 2021 through the firm of Andrew Ombwayo & Co. Advocates, seeking the following orders: -

- 1. An order setting aside and cancelling the notification dated 22nd December 2020 (but communicated on the 11th January 2021) and the decision therein that disqualified the Applicant’s tender/bid at the preliminary evaluation stage and terminated and or purported to terminate or cancel the tender;***
- 2. An order re-instating the tender validity and the Applicant’s tender and directing the Respondents to evaluate the Applicant’s tender/bid according to the criteria set out in the Tender Document, the Public Procurement & Asset Disposal Act, 2015, the Regulations thereunder and the Constitution.***
- 3. An order directing the Respondent to pay the costs of this Review to the Applicant.***

In response, the Respondents addressed a letter dated 4th February 2021 to the Acting Secretary of the Board and filed the same on 5th February 2021 while M/s Panorama Engineering & Trading Ltd addressed a letter dated 5th February 2021 to the Acting Secretary of the Board.

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. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged Written Submissions dated 10th February 2021 and filed on 11th February 2021 while the Respondents and M/s Panorama Engineering & Trading Ltd did not lodge written submissions.

BOARD'S DECISION

The Board has considered each of the parties' pleadings including confidential documents submitted to it pursuant to section 63 (1) (e) of the Act and finds that the following issues call for determination: -

- I. Whether the Procuring Entity terminated the subject procurement process 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 above issue: -

- 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 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 30 days specified in section 80 (6) of the Act.***
- IV. Whether the Board can re-instate the Tender Validity Period of the subject tender after its expiry.***
- V. What are the appropriate orders to grant in the circumstances?***

The Board now proceeds to address the above issues 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 subsection 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. The statutory pre-conditions for termination of a tender include substantive and procedural requirements specified in section 63 of the Act 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)

(b) inadequate budgetary provision

(c)

(d)

(e) material governance issues have been detected

(f)

(g)

(h)

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

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

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

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

Having considered parties' pleadings and the confidential documents submitted by the Respondents, the Board observes that (i) in the

Professional Opinion dated 4th December 2020, the Procuring Entity's Head of Supply Chain Management recommended termination of the subject tender pursuant to section 63 (1) (i) of the Act, (ii) in the letters of notification dated 22nd December 2020, the 1st Respondent notified bidders that the subject procurement process was terminated because material governance issues had been detected and (iii) the **"2nd Quarter Termination of Procurement Report for Works, Tender No. NMC/03/2020-2021"** accompanying a letter dated 20th January 2021 addressed to the Director General of the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") cited inadequate budgetary allocation pursuant to section 63 (1) (b) of the Act as the reason why the subject procurement process was terminated. 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. At paragraph 5 of the Request for Review, the Applicant avers that the reason for termination of the subject tender was vague, ambiguous and that the same fails to meet the requirements of section 63 of the Act.

On the first reason cited for termination by the Respondents, the Board observes that the Head of Supply Chain Management recalled his earlier professional opinion of 24th November 2020 recommending M/s Smartways Holdings Ltd to be invited for competitive negotiations due to new developments in the tender process that had been brought to his attention indicating that M/s Smartways Holdings Ltd did not attend the mandatory site visit of 7th September 2020 but attached a signed site visit certificate in

its original bid. As a result, he recommended that the subject procurement proceedings be cancelled as per section 63 (1) (i) of the Act, that is, **“having received subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer”** and the tender be re-advertised.

To support their position, the Respondents submitted a duly completed site visit register dated 7th September 2020 which forms part of the confidential documents submitted to the Board pursuant to section 67 (3) (e) of the Act. Some of the details appearing in the site visit register of 7th September 2020 include the following: -

No	Name of Representative	Firm's Name	Email Address	Telephone No	Signature	Date
1	Moffat Muthechi	Panorama Eng. & Trading Ltd	.....	.....	.....	7/9/2020
2	Amos Odhiambo	Stonefiez Eng. Ltd	.....	.....	.....	7/9/2020
3	John K. Njenga	WeensLyn Ventures Ltd	.....	.....	.....	7/9/2020
4	Catherine Gathigo	Scanlic Enterprise Ltd	.....	.....	.....	7/9/2020
5	Anthony Mwangi	Wayforward Co. Ltd	.....	.....	.....	7/9/2020
6	Charles Kamwele	Brainstorm Holding Ltd	.....	.....	.....	7/9/2020
7	Muli Muthaha	Jewels Ltd	.....	.....	.....	7/9/2020
8	Ann Ngugi	Yato Tools Ltd	.....	.....	.....	7/9/2020
9	Leah Kariuki	Daniels Outlets Ltd	.....	.....	.....	7/9/2020

No	Name of Representative	Firm's Name	Email Address	Telephone No	Signature	Date
10	Tom Waiharo	Apex Projects Ltd	.....	.....	.....	7/9/2020
11	Judith Nyabundi	Jantech Enterprises Ltd	.....	.....	.....	7/9/2020
12	Erick Mwangi	Kekan Services Ltd	.....	.....	.....	7/9/2020
13	Moses Muya	MRT Investments & Trading Ltd	.....	.....	.....	7/9/2020
14	Joseph Mugo	Emco Tech Ltd	.....	.....	.....	7/9/2020
15	Erick Onsomu	Fine Engineering Ltd	.....	.....	.....	7/9/2020
16	Michael Machaga	Raghziyani Ent. Ltd	.....	.....	.....	7/9/2020
17	Penny Karanja	Steadfast Commercial	.....	.....	.....	7/9/2020
18	James Orage	Chronicle Investment Ltd	.....	.....	.....	7/9/2020
19	Stephen Karija	Fontana Ent. Ltd	.....	.....	.....	7/9/2020
20	Alex Karanja	Formica Investment Ltd	.....	.....	.....	7/9/2020
21	Gichu Simon	Prestige Africa Investment	.....	.....	.....	7/9/2020

No	Name of Representative	Firm's Name	Email Address	Telephone No	Signature	Date
22	James Mwangi	ThermoExpert Construction Co.	.....	.....	.....	7/9/2020
23	Faith Chelagat	Nexus Development	.....	.....	.....	7/9/2020

Clause A.19 Mandatory Requirements of the Appendix to Instructions to Tenderers of the Tender Document made it mandatory for bidders to attend the site visit scheduled on 7th September 2020 and to attach the Site Visit Certificate signed by the Procuring Entity, to their original bids. The Board studied the site visit register dated 7th September 2020 but did not find an entry made by a representative of M/s Smartways Holdings Ltd even though a Site Visit Certificate dated 7th September 2020 signed by the Procuring Entity's Representative, one H. Koech can be found at page 3 of the original bid of M/s Smartways Holdings Ltd.

At Clause 1 (b) of the professional opinion dated 4th December 2020, the Head of Supply Chain Management merely stated that ***"the signed site visit certificate signed by Eng. Hannington Koech must have been done days later after the site visit"***, without any evidence to show reasonable steps were taken by the Procuring Entity to establish why Eng. Hannington Koech (or H. Koech) signed a site visit certificate to a bidder who did not attend the mandatory site visit of 7th September 2020. From the Procuring Entity's confidential file, there is no evidence that the Procuring Entity took any reasonable steps to investigate whether or not Eng.

Hannington Koech (or H. Koech) colluded with M/s Smartways Holdings Ltd to obtain a Site Visit Certificate despite having failed to attend mandatory site visit of 7th September 2020. This leads the Board to find that the Head of Supply Chain Management recommended termination of the subject tender pursuant to section 63 (1) (i) of the Act without first establishing whether Eng. Hannington Koech colluded with M/s Smartways Holdings Ltd to obtain a site visit certificate and without specifying any actions taken against the Procuring Entity's representative and/or the bidder upon conclusion of an investigation. Article 73 (2) (b) of the Constitution stipulates that the guiding principles of leadership and integrity include: -

73 (1)

(2)

(a)

(b) *objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices*

Further, section 66 of the Act provides that: -

"(1) A person to whom this Act applies shall not be involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding.

(2) A person referred to under subsection (1) who contravenes the provisions of that sub-section commits an offence.”

The foregoing provisions apply to the Procuring Entity and its representatives in any procurement and asset disposal proceedings undertaken by the Procuring Entity. As a result, the Head of Supply Chain Management should not have rushed to recommend termination of the subject tender without first recommending an investigation to be undertaken against any officers that colluded with M/s Smartways Holdings Ltd so as to gain an unfair advantage over other bidders who attended the mandatory site visit of 7th September 2020 and attached a signed site visit certificate in their original bids. The Respondents have failed to prove to the Board that any investigation was undertaken to establish whether M/s Smartways Holdings Ltd colluded with Eng. Hannington Koech and further appropriate action taken upon conclusion of such investigation.

Accordingly, the Board finds that the Procuring Entity’s Head of Supply Chain Management recommended termination of the subject tender pursuant to section 63 (1) (i) of the Act without any real and tangible evidence that investigation was carried out to establish whether M/s Smartways Holdings Ltd colluded with Eng. Hannington Koech and further appropriate action taken against the said bidder or against the Procuring Entity’s representative after conclusion of an investigation.

On the second reason for termination cited by the Respondents, the Board observes that after the professional opinion of 4th December 2020

recommending termination pursuant to section 63 (1) (i) of the Act was approved by the 1st Respondent on 9th December 2020, bidders were notified of the reasons why their bids were found non-responsive in letters dated 22nd December 2020 and that: -

"the tender proceedings were however terminated because of material governance issues were detected during the procurement process"

Material governance issues is provided for under section 63 (1) (e) of the Act and is not the reason for termination that was cited by the Head of Supply Chain Management. The Board in **PPARB Application No. 50 of 2020, Danka Africa (K) Limited v. The Accounting Officer, Kenya Ports Authority & Another** (hereinafter referred to as the "Danka Africa (K) Limited Case") when faced with a scenario where a procuring entity terminated a tender on the basis of material governance issues, held as follows: -

"According to section 63 (1) of the Act, termination of a procurement process is done by an accounting officer of a procuring entity prior to notification of tender award, without signing a contract. The Procuring Entity must have real and tangible evidence that supports its grounds for termination of a tender, and not merely stating the grounds provided in the aforementioned section. In the Board's view, "material governance issues having been detected" is one of the

grounds requiring real and tangible evidence to support termination based on that ground.”

Having considered the finding of the Board (as was constituted) in the Danka Africa (K) Limited Case, this Board adopts the position that “material governance issues having been detected” is one of the grounds requiring real and tangible evidence to support termination based on that ground. Furthermore, it disenfranchises tenderers if for example, an investigation is undertaken and the outcome of it shows there was no real and tangible evidence to support allegations of material governance issues, yet a procuring entity already terminated a procurement process and in doing so, failed to inform bidders of the specific material governance issue detected.

Even assuming the Respondents viewed evidence of engagement in fraudulent or corrupt practices by a tenderer (section 63 (1) (i) of the Act) to be a material governance issue that may fall under section 63 (1) (e) of the Act, the Respondents did not provide any real and tangible evidence in their confidential file of the steps that were undertaken to investigate the conduct of one of its officers to establish whether such officer colluded with one of the bidders. Furthermore, no explanation was provided in the Respondent’s Response to the Request for Review and the letters of notification dated 22nd December 2020 addressed to bidders of the specific material governance issue that was detected.

This leads the Board to find that the Respondents’ termination of the subject procurement proceedings fails to meet the threshold of section 63 (1) (e) of

the Act because the Respondents merely cited section 63 (1) (e) of the Act without providing real and tangible evidence to support that ground.

The Respondents cited a third reason for termination of the subject tender in their Report on Termination known as **"2nd Quarter Termination of Procurement Report for Works, Tender No. NMC/03/2020-2021"** accompanying a letter dated 20th January 2021 addressed to the Director General of the Authority. The said report states that the subject procurement process was terminated due to 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 1st Respondent 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 initial professional opinion of the Head of Supply Chain Management dated 24th November 2020 states the budget for the subject tender is Kshs. 14,500,000.00. However, the Board was not furnished with any financial documents of the Procuring Entity to ascertain whether indeed the amount of Kshs. 14,500,000.00 was the approved budget for the subject procurement process. Furthermore, the report that was addressed to the Director General of the Authority only mentions the subject procurement proceedings was terminated due to inadequate budgetary allocation without

specifying the Procuring Entity's approved budget and without attaching any financial documentation to ascertain the Procuring Entity's approved budget.

The Head of Supply Chain Management already observed in the initial professional opinion dated 24th November 2020 that M/s Smartways Holdings Ltd qualified for an invitation for competitive negotiation because its bid price of Kshs. 18,100,690.00 was not more than 25% above the Procuring Entity's alleged budget of Kshs. 14,500,000.00. However, the letter of invitation for competitive negotiation dated 30th November 2020 was recalled having received information that the said bidder illegally obtained a mandatory site visit certificate despite its failure to attend the site visit of 7th September 2020. Instead of conducting an investigation based on this information and providing any findings of such investigation to the Director General of the Authority, the Head of Supply Chain Management recommended termination based on section 63 (1) (i) of the Act and this reason was not brought to the attention of the Director General of the Authority.

The Director General was informed the subject procurement process was terminated due to inadequate budgetary allocation pursuant to section 63 (1) (b) of the Act without specifying the Procuring Entity's approved budget in the said report and attaching financial documentation to demonstrate the Procuring Entity's approved budget for the subject procurement proceedings. In essence, the Respondents have 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.

Having considered the three reasons cited by the Respondents in terminating the subject procurement proceedings, the Board finds the Respondents' actions to be mischievous because; (i) the Head of Supply Chain Management recommended termination of the subject procurement process pursuant to section 63 (1) (i) of the Act but this reason was not furnished in the Report dated 20th January 2021 addressed to the Director General of the Authority or the letters of notification dated 22nd December 2020 addressed to bidders (ii) the Director General was informed that the subject procurement proceedings was terminated due to inadequate budgetary provision pursuant to section 63 (1) (b) of the Act, a reason that is not in the professional opinion of 4th December 2020 neither was the same provided to bidders in the letters of notification dated 22nd December 2020 and (iii) bidders were informed that the subject procurement proceedings were terminated pursuant to section 63 (1) (e) of the Act, a reason that is not specified in the professional opinion issued by the Head of Supply Chain Management on 4th December 2020 or the report dated 20th January 2021 addressed to the Director General of the Authority. In essence, the Respondents issued different reasons for termination of the subject tender to different audiences and these actions demonstrate that the Respondents engaged in a fishing expedition so as to ensure the subject procurement proceedings are terminated at all costs. Despite the Board having considered each of those reasons, the Respondents have failed to prove that the reasons for termination met the threshold of section 63 (1) (b), (e) and (i) of the Act for lack of real and tangible evidence.

From the onset, the Respondents failed to prove termination of the subject tender met the substantive requirements under section 63 (1) (b), (e) & (i) of the Act. That alone, renders such termination null and void ab initio. Be that as it may, the Board has an obligation of determining 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 Authority within fourteen days. The Respondents furnished the Board with a **"2nd Quarter Termination of Procurement Report for Works, Tender No.**

NMC/03/2020-2021” accompanying a letter dated 20th January 2021 addressed to the Director General of the Authority without providing evidence of the date the said letter and report were dispatched to the Director General.

The Board is cognizant of the fact that pursuant to section 63 (2) & (3) of the Act, the burden of proving notification of termination was made to the Director General of the Authority rests on the Procuring Entity. The burden of proving such notification was done within 14 days from the date of termination has not been discharged to the satisfaction of the Board because the Respondents merely furnished the Board with a report on the termination with no evidence of dispatch of the same or evidence of the date the said report was received by the Director General of the Authority.

At paragraph 3 of the Respondents’ Response, the Respondents state that notification to all bidders was done through a letter and telephonic communication on 22nd and 23rd December 2020 respectively. On the other hand, the Applicant alleged that the Respondents knowingly withheld notification contrary to section 176 (1) of the Act and as such, the Applicant only received its letter of notification on 11th January 2021.

The Board observes that the Applicant failed to substantiate its case that the Respondents violated section 176 (1) of the Act because the Applicant never provided any evidence of the manner in which it obtained its letter of notification but merely stated the same was received on 11th January 2021. As regards the Respondents’ allegation that notification was made to bidders

on 23rd December 2020 after telephone conversation on 22nd December 2020, the Respondents never provided evidence of dispatch of the letters of notification to bidders, thus failed to also discharge this burden of proof.

This leads the Board to find that the Respondents failed to prove that they complied with the procedural requirements under section 63 (2), (3) & (4) of the Act because the Board was not furnished with evidence of the date of dispatch and/or receipt of the Report of termination dated 20th January 2021 by the Director General of the Authority. Further, no evidence of dispatch was given to support the allegation that notification letters were issued to bidders on 23rd December 2020. Failure to satisfy the procedural requirements for termination means such a termination does not meet the threshold of section 63 (2), (3) & (4) of the Act.

In totality of the foregoing, the Board finds that the Respondents failed to terminate the subject procurement proceedings in accordance with the procedural and substantive 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 other issues framed for determination as follows:-

The second issue for determination revolves around the question whether the tender security provided by the Applicant satisfied the criterion specified in the Tender Document. The Respondents took the view that the Applicant

did not provide a tender security in the form of a Commercial Bank registered in Kenya as required in the Tender Document. The Applicant on the other hand averred that it provided a tender security issued by Faulu Microfinance Bank Ltd and that the same meets the criteria specified in the Tender Document, because Faulu Microfinance Bank Ltd is a recognized financial institution licensed by Central Bank of Kenya.

Apart from informing the Applicant of termination of the subject procurement proceedings, the Applicant's letter of notification dated 22nd December 2020 contains the following details: -

"The above matter refers

I regret to inform you that your company was unsuccessful because

- ***You did not provide bid bond from a Commercial Bank as stipulated in the tender document"***

The criterion on provision of tender security can be found in 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. 250,000.00 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. 250,000.00 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. 250,000.00 valid for 90 days from the date of tender opening from a Commercial Bank registered in Kenya. This prompted the Board to address the question whether Faulu Microfinance Bank Ltd is a Commercial Bank registered in Kenya. The Board studied the provisions of the Banking Act, Chapter 488, Laws of Kenya (Revised 2015), the Central Bank of Kenya Act, Chapter 491, Laws of Kenya and the Microfinance Act, 2006 but did not find the definition of a commercial bank specified therein.

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"

On its part, 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."

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 reasonably concludes

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 but are licensed and supervised by the Central Bank of Kenya. The Respondents referred the Board to a List of **"Central Bank of Kenya Directory of Licensed Commercial Banks, Mortgage Finance Institutions and Authorized Non-Operating Holding Companies"** attached to the Respondent's Response. According to the Respondents, the said list can be found in the official website of the Central Bank of Kenya (www.centralbank.go.ke). This prompted the Board to visit the said website wherein some of the functions of the Central Bank of Kenya is 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 Respondents 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

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

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

From the foregoing, the Board observes that; (i) 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 and (ii) 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. 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.

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"

Bidders often overlook the eligibility and mandatory requirements specified in the Tender Document with full knowledge that the said requirements would be applied during evaluation of bids and that an evaluation committee would have no option but to excluded non-responsive bidders from further evaluation as a result of a bidder's failure to satisfy the eligibility and mandatory requirements specified in the 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.

At this juncture, the Board would like to address 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 all along had knowledge of and was comfortable with 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.

The third issue for determination relates to the period taken by the Evaluation Committee to evaluate bids in the subject tender. Section 80 (6) of the Act 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 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 **29th September 2020**. However, the Evaluation Committee was only appointed on 8th October 2020. This means that, no evaluation took place between 29th September 2020 and 8th October 2020 and thus the Respondents 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 first concluded by 6th November 2020 as can be seen from the Evaluation Report signed on 6th November 2020. The Head of Supply Chain Management directed the Evaluation Committee to conduct a re-evaluation through handwritten comments made on 6th November 2020 and appending his signature thereon to show that as at 6th November 2020, directions were given for re-evaluation to be undertaken. Given that as at 6th November 2020, the Evaluation Committee was directed

to undertake a re-evaluation, then re-evaluation ought to have commenced after such a directive was made because the same Evaluation Committee that conducted the initial evaluation was the same committee directed to conduct evaluation.

In determining the 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 initial evaluation was concluded is taken into consideration, evaluation took 29 days because 8th October 2020 is excluded from computation of time. If the period between 6th November 2020 to 20th November 2020 is considered, evaluation took an additional 14 days because 6th November 2020 is excluded from computation of time. In essence, evaluation of bids took 43 days, which period was outside 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 1st Respondent 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 43 days the Board finds that the Procuring Entity evaluated bids in the subject tender outside the maximum period of 30 days specified in section 80 (6) of the Act.

On 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 re-instated. The Respondents did not controvert this prayer in their Response to the Request for Review.

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 29th September 2020 and thus, the same lapsed on 28th December 2020. The Board was not furnished with any evidence by the Respondents 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 slept on 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 28th 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 25th January 2021 after the subject tender already “died a natural death” on 28th December 2020.

This therefore leads the Board to address the question whether it can reinstate 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 28th 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 28th December 2020 is that any action taken by the Respondents after 28th 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 28th 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 28th December 2020 and no tender existed on 25th January 2021 when the Applicant filed this Request for Review.

The upshot of the foregoing is that the Board cannot re-instate the tender validity period of the subject tender given the same lapsed on 28th 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 Respondents 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 and further failed to carry out evaluation of bids within the statutory period

of 30 days specified in section 80 (6) of the Act. The Board has also found the tender validity period of the subject tender lapsed on 28th December 2020 and that all actions undertaken after 28th December 2020 were null and void. Despite the Board having held the foregoing actions by the Respondents were unlawful, the Board cannot issue orders directing the Respondents 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 28th December 2020 and that no action can be taken by the Respondents in respect to a tender that has lapsed, it is only appropriate for the 1st Respondent to undertake a fresh procurement process for the **Proposed Supply, Installation, Testing, Training and Commissioning of 1 No. Metal Chip Briquetting System.**

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 Proposed Supply, Installation, Testing, Training and Commissioning of 1 No. Metal Chip Briquetting System 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 15th day of February 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB