REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 147 OF 2021 OF 6TH DECEMBER 2021

BETWEEN

NERMAL ENTERPRISES LIMITED ..... APPLICANT

AND

THE COUNTY CHIEF OFFICER,

DEPARTMENT OF AGRICULTURE,

LIVESTOCK AND FISHERIES,

NYANDARUA COUNTY GOVERNMENT ..... 1ST RESPONDENT

NYANDARUA COUNTY GOVERNMENT ..... 2ND RESPONDENT

Review against the decision of the County Chief Officer of Nyandarua County Government, Department of Agriculture, Livestock and Fisheries, Nyandarua County in respect of Tender No. NYA/CG/ALF/KCSAP/ONT/01/2021-2022 for the Proposed Raichiri Water Pan Desilting, Civil and Water Works for Small-Scale Irrigation Project.

BOARD MEMBERS

1. Ms. Faith Waigwa -Chairperson
2. Ms. Phyllis Chepkemboi -Member
3. Eng. Kimani Mbiu -Member
4. Dr. Paul Jilani -Member
5. Mr. Nicholas Mruttu -Member

IN ATTENDANCE

Mr. Philip Okumu -Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

A requisition was made by the Kenya Climate Smart Agriculture Project for the desilting and water works for small scale irrigation project for Raichiri water pan and approved by the Accounting Officer of the Procuring Entity herein, County Chief Officer of Nyandarua County Government, Department of Agriculture, Livestock and Fisheries, Nyandarua County. The tender (Tender No. NYA/CG/ALF/KCSAP/ONT/01/2021-2022 for the Proposed Rachiri Water Pan Desilting, Civil and Water Works for Small-Scale Irrigation Project) was advertised in the Standard newspaper on 6th August 2021 with a Pre bid site visit slated for 16th August 2021 at the Intended site- Raichiri Pan.

Tender Submission Deadline and opening of Tenders

The Procuring Entity received a total of six (6) tenders by the tender submission deadline of 6th September 2021. The same were opened on the same date at 10.00 am and recorded as follows:

No.	Name of Bidder	Contacts	Amount Quoted
B1.	NERMAL ENTERPRISES LTD	P.O. BOX 1442, 00621 NAIROBI	24,099,362/28
B2.	LEGEND TRADING COMPANY LIMITED	P.O. BOX 40198, KAREN	24,143,049/60
B3.	MALTHAMA LIMITED	P.O. BOX 79157, 00400	24,541,973/=
B4.	JOYCOT GENERAL CONTRACTORS LIMITED.	P.O. BOX 2027, NYAHURURU	25,800,002/12
B5.	TRANSWORLD CONSTRUCTION CO. LTD	P.O. BOX 53402-00200 NAIROBI.	33,088,877/55
B6.	ENDS INTERNATIONAL CO. LTD	P.O. BOX 1329, NYAHURURU	26,805,853/01

Evaluation of tenders

Section III. Evaluation and Qualification Criteria of the Tender Document provided that evaluation would be undertaken at the Preliminary, Technical and Financial Evaluation stages. Thereafter, a Due Diligence exercise would be carried out only on the winning tenderer pursuant to

Sub-Clause 4 of Section III. Evaluation and Qualification Criteria of the Tender Document.

Preliminary Evaluation

According to the Evaluation Report, the process and outcome of Preliminary Evaluation of tenders was recorded as follows:

S/No.	Evaluation Criteria	B1	B2	B3	B4	B5	B6
1.	Certificate of incorporation/ registration	YES	YES	YES	YES	YES	YES
2.	Confirmation of site visit attendance	YES	YES	YES	YES	YES	YES
3.	Serialized bid document in all pages	YES	YES	YES	YES	YES	YES
4.	Tax compliance certificate valid as from the date of tender opening	YES	NO	NO	YES	YES	YES
5.	Valid License as a Qualified water Works contractor	YES	YES	NO	YES	YES	YES
6.	NCA Certificate 6 and above for Water Works.	YES	NO	NO	YES	YES	YES
7.	NCA Certificate 76 and above for **Civil Works**	YES	NO	NO	YES	YES	YES
8.	Valid Practicing License from NCA	YES	NO	NO	YES	YES	YES

9.	Audited Certified Accounts for the last 3 Financial year	YES	YES	NO	YES	YES	YES
10.	Dully filled, Signed and Stamped Bidder information form.	YES	YES	YES	YES	YES	YES
11.	Valid Energy and Petroleum Regulatory Authority (EPRA) Certificate.	YES	NO	NO	NO	NO	YES
12.	Tender Security shall be in form of Bank guarantee of Kshs. 500,000/=	YES	NO	NO	YES	YES	YES
13.	***Bidders with Arithmetic errors shall be disqualified at this stage***	***With Errors***	***With Errors***	***With Errors***	***With Errors***	***With Errors***	***With Errors***

The following table indicates the Arithmetic errors found in each of the tenders.

Bidder No. 1: NERMAL ENTERPRISES LIMITED.

Item	Description	Quoted	Actual	Adjust	Remarks
R 1	Preliminaries	530,000/=	530,000/=	0	Okay
R 2	ESS Mitigation	478,600/=	478,600/=	0	Okay
R 3	Expansion of Reservoir	10,249,250/=	10,249,250/=	0	Okay

R 4	Rehabilitation of Embankment	1,825,500/=	1,825,500/=	0	Okay
R 5	Spillway Construction	764,500/=	764,500/=	0	Okay
R 6	Fencing	1,602,520/=	1,737,520/=	135,000/=	Pg 63
R 7	Water Pumping System	525,500/=	525,500/=	0	Okay
R 8	Steel Panel Support	351,500/=	351,500/=	0	Okay
R 9	Power Generation	345,000/=	345,000/=	0	Okay
R 10	Steel water Tower	1,394,100/=	1,196,100/=	-198,000/=	Pg 70-71
R 11	Water Kiosk	440,228/=	512,225/=	+71,997/=	Pg 73 - 74
R 12	5 M Long water Trough	273,500/=	271,100/=	-2,400/=	Pg 77
R 13	Finishes				
R 14	Sanitary	468,560/=	509,560/=	+41,000/=	Pg 81
R 15	Water Reticulation	3,605,600/=	3,605,600/=	0	Okay
	TOTAL	22,854,358/=			22,901,955/
			2% Contingency		458,039.10
			1.5 Supervision		343,529.33

			GRAND TOTAL	**23,703,523.43**

Bidder No. 2: LEGEND TRADING COMPANY.

Item	Description	Quoted	Actual	Adjust	Remarks
R 1	Preliminaries	450,000/=	450,000/=	0	Okay
R 2	ESS Mitigation	1,038,000/=	1,038000/=	0	Okay
R 3	Expansion of Reservoir	8,222,350/=	8,222,350/=	0	Okay
R 4	Rehabilitation of Embankment	2,015,300/=	2,015,300/=	0	Okay
R 5	Spillway Construction	795,000/=	808,500/=	+13,500	Pg 62
R 6	Fencing	1,567,010/=	1,567,010/=	0	Okay
R 7	Water Pumping System	698,025/=	698,025/=	0	Okay
R 8	Steel Panel Support	1,510,000/=	1,510,000/=	0	Okay
R 9	Power Generation	1,101,504/=	1,121,504/=	+20,000	Pg 71
R 10	Steel water Tower	1,236,500/=	1,231,300/=	-5200	Pg 73

R 11	Water Kiosk	485,278/=	485,278/=	0	Okay
R 12	5 M Long water Trough	359,980/=	361,480/=	+1,500/=	Pg 79
R 13	Finishes	485,280/=	271,180/=	-214,100	Pg 83
R 14	Soak pit	322,240/=	322,240/=	0	Okay
R 15	Water Reticulation	3,107,500/=	3,107,500/=	0	Okay
		23,393,967/=		-184,300/=	23,209,667/=
			2% Contingency		464,193.34
			1.5% Supervision		348,145.00
			GRAND TOTAL		**24,022,005.34**

Bidder No. 3: MALTHAMA LIMITED.

Item	Description	Quoted	Actual	Adjust	Remarks
R 1	Preliminaries	370,000/=	370,000/=	0	Okay
R 2	Compliance & Mitigation	1,047,000/=	1,047,000/=	0	Okay
R 3	Expansion & Rehabilitation of Reservoir	8,453,750/=	8,453,750/=	0	Okay

R 4	Rehabilitation of Embankment	2,196,400/=	2,196,400/=	0	Okay
R 5	Spillway Construction	573,500/=	587,000/=	-13,500/=	Pg 62
R 6	Fencing	1,624,920/=	1,624,920/=	0	Okay
R 7	Water Pumping System	1,795,000/=	1,795,000/=	0	Okay
R 8	Power House	2,053,500/=	2,053,500/=	0	Okay
R 9	Solar Power generation & supply	1,092,500/=	1,092,500/=	0	Okay
R 10	Steel Water Tower	1,236,350/=	1,236,350/=	0	Okay
R 11	Water Kiosk	485,261/=	473,261/=	-12,000/=	Pg 76
R 12	Water Trough for Livestock	367,970/=	367,940/=	-30/=	Pg 79
R 13	Finishes	598,650/=	287,380/=	-311,270/=	Pg 81
R 14	Septic Tank	593,420/=	322,240/=	-271,180/=	Pg 85
R 15	Water Reticulation	3,107,500/=	3,107,500/=		
		24,342,521/=	TOTAL		**23,734,541/=**
			2% Contingency		474,690.82
			1.5% Supervision		356,018.12

			GRAND TOTAL	**24,565,249.95**

Bidder No. 4: JOYCOT GENERAL CONTRACTORS LIMITED.

Item	Description	Quoted	Actual	Adjust	Remarks
R 1	Preliminaries	420,000/=	430,000/=	0	Okay
R 2	Compliance & Mitigation	966,000/=	966,000/=	0	Okay
R 3	Expansion & Rehabilitation of Reservoir	8,586,000/=	8,586,000/=	0	Okay
R 4	Rehabilitation of Embankment	1,997,300/=	1,997,300/=	0	Okay
R 5	Spillway Construction	545,000/=	545,000/=	0	Okay
R 6	Fencing	1,350,690/=	1,350,690/=	0	Okay
R 7	Water Pumping System	389,450/=	389,450/=	0	Okay
R 8	Power House	455,720/=	455,720/=	0	Okay
R 9	Solar Power generation & supply	591,200/=	591,200/=	0	Okay
R 10	Steel Water Tower	1,284,000/=	1,284,000/=	0	Okay
R 11	Water Kiosk	609,675/=	573,675/=	+36,000/=	Pg 76

R 13	Water Trough for Livestock	328,100/=	328,100/=	0	Pg 81
R 14	Sanitary Facilities	777,470/=	1,052,870/=	- 275,400/=	Pg 81
R 15	Water Reticulation	6,619,710/=	6,619,710/=	0	Okay
	TOTAL	24,920,315/=		- 149,400/=	**25,069,715/=**
			2% Contingency		501,394.3
			1.5 Supervision		376,045.73
			GRAND TOTAL		**25,947,155.03**

Bidder No. 5: TRANSWORLD CONSTRUCTION LTD.

Item	Description	Quoted	Actual	Adjust	Remarks
R 1	Preliminaries	285,000/=	285,000/=	0	Okay
R 2	Compliance & Mitigation	196,800/=	199,300/=	-2,500/=	Pg 63
R 3	Expansion & Rehabilitation of Reservoir	12,321,750/=	11,960,250/=	+36,150/=	Pg 66
R 4	Rehabilitation of Embankment	4,690,000/=	4,690,400/=	-400	Pg 67
R 5	Spillway Construction	962,500/=	962,500/=	0	Okay
R 6	Fencing	1,509,260/=	1,509,260/=	0	Okay

R 7	Water Pumping System	572,750/=	565,750/=	+7,000/=	Pg 72
R 8	Power House	570,000/=	570,000/=	0	Okay
R 9	Solar Power generation & supply	1,529,900/=	1,529,900/=	0	Okay
R 10	Steel Water Tower	2,321,100/=	2,321,100/=	0	Okay
R 11	Water Kiosk	597,860/=	597,860/=	0	Okay
R 12		0	0	0	
R 13	Water Trough for Livestock	466,400/=	466,400/=	0	Okay
R 14	Sanitary Facilities	684,600/=	684,600/=	0	Okay
R 15	Water Reticulation	5,261,750/=	5,261,750/=	0	Okay
	TOTAL	31,969,930/=		40,250/=	**31,604,330/**
			2% Contingency		632,086.60
			1.5 Supervision		474,064.95
			GRAND TOTAL		**32,710,481.55**

Bidder No. 6: ENDS INTERNATIONAL LIMITED

Item	Description	Quoted	Actual	Adjust	Remarks
R 1	Preliminaries	400,000/=	400,000/=	0	Okay

R 2	ESS Mitigation	1,109,500 /=	1,676,500/ =	+567,000/ =	Pg 58
R 3	Expansion of Reservoir	8,628,000 /=	9,725,500/ =	1,097,500 /=	Pg 60
R 4	Rehabilitation of Embankment	2,176,360 /=	2,755,360/ =	- 577,000/=	Pg 63
R 5	Spillway Construction	678,000/=	678,000/=	0	Okay
R 6	Fencing	1,388,120 /=	1,388,120/ =	0	Okay
R 7	Water Pumping System	402,100/=	402,100/=	0	Okay
R 8	Steel Panel Support	471,050/=	471,050/=	0	Okay
R 9	Power Generation	611,300/=	611,300/=	0	Okay
R 10	Steel water Tower	0	1,334,600/ =	-1,334,600	Pg
R 11	Water Kiosk	613,200/=	606,200/=	+7,000/=	Pg 75
R 12	5 M Long water Trough	125,080/=	125,080/=	0	Okay
R 13	Finishes	416,740/=	416,740/=	0	Okay
R 14	Soak pit	821,960/=	821,960/=	0	Okay
R 15	Water Reticulation	6,924,400 /=	6,924,400/ =	0	Okay
		24,765,81 0/=		232,100/=	28,336,910/=

			2% Contingency	566,738.20
			1.5 Supervision	424,053.65
			GRAND TOTAL	**29,327,701.85**

The Evaluation Committee concluded that all tenders had arithmetic errors hence led to a disqualification of all the tenderers pursuant to Regulation 74 (2) of the Public Procurement and Asset Disposal Regulation 2020 ("Regulations 2020").

Professional Opinion

In a professional opinion dated 8th October 2021, the Procuring Entity's Director, Supply Chain Management Services reviewed the Evaluation Report whilst noting the Evaluation Committee's recommendation that "no tenderer should proceed to the Technical Evaluation stage since they all had arithmetic errors." In her opinion, the subject procurement process satisfied the requirements of Article 227 (1) of the Constitution and the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'). She thus advised the County Chief Officer to approve termination of the subject tender citing Regulation 74 (2) of Regulations 2020.

THE REQUEST FOR REVIEW

On 6th December 2021, Nermal Enterprises (hereafter "the Applicant") lodged a Request for Review dated 29th November 2021 together with a

Statement in Support by Catherine Njeri Kibira on 4th December 2021 of the Request for Review and a Further Affidavit sworn by Catherine Njeri Kibira on 21st December 2021 and filed on even date, seeking the following orders:

a. ***The Respondent's decision not to award Tender No. NYA/CG/ALF/KCSAP/ONT/01/2021-2022 for the proposed Raichiri Water Pan Desilting, civil and Water works for small scale Irrigation project to the Applicant be annulled and set aside;***

b. ***The Respondent's letter undated notifying the Applicant that it was not successful in Tender No. NYA/CG/ALF/KCSAP/ONT/01/2021-2022 for the proposed Raichiri Water Pan Desilting ,civil and Water works for small scale Irrigation project be annulled and set aside;***

c. ***A declaration that the Procuring Entity failed to evaluate the Applicant's bid at the Financial Evaluation stage in accordance with the criteria and procedures provided in the Tender Document in accordance with section 80 (2) and 82 of the Act read together with Regulation 77 of the Regulations;***

d. ***The Respondent be directed to order the Evaluation Committee to re-admit the Applicant's bid at the Financial Evaluation stage and to carry out a re-evaluation of the Applicant's bid at the Financial Evaluation stage noting to observe and apply the criteria in the Tender Document in***

accordance with section 80 (2) and 82 of the Act read together with Regulation 77 of the Regulations;

e. ***Further to prayer (d) above, the Board in exercise of its discretion, to direct the Respondent to conclude the subject procurement process including the making of an award to the lowest evaluated bidder in accordance with section 86 (1) (a) of the Act read together with section 80 (2) and 82 of the Act within a specified time period;***
f. ***The Respondent be compelled to pay to the Applicant the costs arising from/and incidental to this Application; and***
g. ***The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***

In response, the Respondents lodged a Replying Affidavit sworn by Dr. Rose Oyolo on 14th December 2021 and filed on 15th December 2021 together with confidential documents relating to the subject procurement process as required by section 67 (3) (e) of the Act.

Vide letters dated 17th December 2021, the Acting Board Secretary notified tenderers in the subject tender of the existence of the Request for Review and invited them to furnish the Board with any information and arguments touching on the subject tender. Further, the Acting Board Secretary furnished the tenderers in the subject tender with the Board's Circular No. 2/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests 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.

BOARD'S DECISION

The Board has considered each of the parties' pleadings together with their respective annexures and confidential documentation filed by the Procuring Entity pursuant to section 67 (3) (e) of the Act and finds that the following issues crystallize for determination:

I. **Whether the Accounting Officer of the Procuring Entity terminated the subject procurement proceedings in accordance with the substantive and procedural requirements for termination of a tender specified in section 63 of the Act, thus ousting the jurisdiction of the Board.**

Depending on the outcome of the above issue: -

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

Termination of procurement and asset disposal proceedings has been the subject of numerous proceedings before this Board on previous occasions. In all instances, this Board has made reference to section 63 of the Act and held that if the termination meets the requirements of that provision 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."

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

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

A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-

section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.

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

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

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v.

Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act"

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

We note that the Professional Opinion filed before us shows that the Head of Procurement function recommended termination of the subject procurement process. After considering this recommendation, the Accounting Officer approved the same, thus paving way for termination of the subject tender. Consequently, no award was made in respect of the subject tender. With that in mind, it behooves upon us to determine whether the Procuring Entity terminated the subject tender in accordance with the provisions of section 63 of the Act. This determination can only be made by interrogating the reason 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, which comprises of substantive and procedural requirements.

The provisions relating to the Procuring Entity's termination of the subject procurement proceedings fall under section 63 (1), 2, 3 and 4 of the Act which states as follows: -

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

(a) the subject procurement have been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

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

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

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

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

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

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

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

Section 63 (1) of the Act lists nine different circumstances when a tender can be terminated while sub-sections 2, 3 and 4 of the above provision outlines a procedure for terminating a tender. In the present case, the reason cited by the Procuring Entity is not a reason provided in section 63 (1) of the Act.

Even if this Board were to consider the reason cited by the Procuring Entity, that is, ***"no bidder should proceed to the Technical Evaluation as they all had arithmetic errors,"*** *to mean all evaluated tenders were non responsive under section 63(1)(f) of the Act*, the Board

observes that the Procuring Entity relied on Regulation 74 (2) of Regulations 2020 in this respect which provides as follows:

> "***Subject to section 79 (2) (b) of the Act, any errors in the submitted tender arising from miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive."***

Section 79 (2) (b) referenced above states that:

> ***"79. (1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.***
>
> ***(2) A responsive tender shall not be affected by—***
>
> ***(a) .....; or***
>
> ***(b) errors or oversights that can be corrected without affecting the substance of the tender"***

The Board observes that pursuant to section 79 (2) (b) of the Act, a responsive tender is not affected by errors or oversights that can be corrected without affecting the substance of a tender. However, Regulation 74 (2) of Regulations 2020 views any errors from a miscalculation of unit price quantity subtotal and total bid price to be a

major deviation that affects the substance of the tender and would lead to disqualification of the tender as non-responsive.

In considering the provisions cited herein, the Board observes that Regulation 74 (2) of Regulations 2020 is subject to the provision of section 79 (2) (b) of the Act. In the article on **"Solicitors at Risk"** published on November 2013, Andrew Nickels explains the meaning of the phrase **"subject to"** in legal agreements and legislation as follows: -

> ***"Subject to" looks ahead to the exception. It is used in a clause that is secondary to the clause it is expressed to be "subject to". It tells the reader which clause takes priority where there is an overlap"***

In its **"Guide to Legislative Processes in Kenya"** published in 2015, the Kenya Law Reform Commission explains the relationship between subsidiary legislation and a primary legislation (i.e. the parent Act/Statute) as follows: -

> ***"In other words, subsidiary legislation must conform to the primary legislation in all respects"***

Thus, the Board deduces the meaning of **"subject to"** as applied in Regulation 74 (2) of Regulations 2020 to mean that Regulation 74 (2) of Regulations 2020 must conform in all respects with section 79 (2) (b) of

the Act because the primary legislation being the Act, takes priority over Regulations 2020.

Furthermore, section 31 (b) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya provides that: -

> ***"Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation—***
>
> ***(a) .....;***
>
> ***(b) no subsidiary legislation shall be inconsistent with the provisions of an Act"***

Section 24 (2) of the Statutory Instruments Act No. 23 of 2013 further provides that: -

> ***"statutory instrument (i.e. subsidiary legislation) shall not be inconsistent with the provisions of the enabling legislation, or of any Act, and the statutory instrument shall be void to the extent of the inconsistency" [Emphasis by the Board]***

The Court in **Petition No. 20 of 2019, Victor Juma v Kenya School of Law & Council of Legal Education (Interested Party) [2020] eKLR** also addressed the legal relationship between a primary/parent legislation and a subsidiary legislation while comparing provisions of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 and the Kenya School of Law Act, 2016 when it held as follows: -

> ***"I see no reason why the provisions of a subsidiary legislation should override the express provisions of an Act of Parliament. It is therefore my finding that the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 are not applicable in this case, and the relevant legislative instrument to be applied is the KSL Act. This means that the Petitioner cannot benefit from the vertical progression recognized in the Legal Education (Accreditation and Quality Assurance) Regulations, 2016."***

Given that subsidiary legislation should not be inconsistent with provisions of an Act, when such an inconsistency arises, provisions of the Act supersede. In this instance, Regulation 74 (2) of Regulations 2020 states that any errors should lead to disqualification of a tender yet, the said Regulations should only apply to the extent of section 79 (2) (b) of the Act which allows errors or oversights can be corrected without affecting the substance of a tender to be declared responsive. There is therefore an inconsistency, and thus section 79 (2) (b) of the Act must prevail.

The Board is also mindful of section 82 of the Act which states that: -

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

The Board has established certain errors or oversights can be corrected without affecting the substance of a tender. That notwithstanding, the tender sum remains the same and cannot be corrected even if errors or oversights (which are not necessarily arithmetic errors in a tender) may be identified or corrected pursuant to section 79 (2) (b) of the Act. This explains why a tenderer is bound by its tender sum hence ought to be prepared to implement a tender at its tender sum because award is made based on that tender sum. These provisions support the Board's view that the Procuring Entity did not have leeway to apply Regulation 74 of Regulations 2020 without considering provisions of section 79 (2) (b) and 82 of the Act.

Accordingly, the Board finds that Regulation 74 (2) of Regulations 2020 does not vest an automatic action for the Procuring Entity to find tenderers non-responsive as a result of arithmetic errors because the said provision is subject to section 79 (2) (b) of the Act whilst taking into account how a tender sum ought to be treated pursuant to section 82 of the Act.

Having made the foregoing finding, it means, the Evaluation Committee ought not to have applied criterion 13 during Preliminary Evaluation as a basis for disqualifying tenderers. These are unique circumstances where

the Board finds that a procuring entity cannot stipulate a criterion that contradicts provisions of the Act and Regulations 2020 and use it as a basis of disqualifying tenderers just because the criterion is among other mandatory criteria. This is a scenario where any unfair criterion provided in the Tender Document should not be visited upon tenderers but should be used against the Procuring Entity, being the author of the Tender Document.

We are also mindful of Regulation 74 of Regulations 2020, which provides the steps for preliminary evaluation which the Procuring Entity ought to have referred to while conducting preliminary evaluation. The same states as follows:

a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;

b) the tender has been submitted in the required format and serialized in accordance with section 74 (1) (i) of the Act;

c) any tender security submitted is in the required form, amount and validity period, where applicable;

d) the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;

e) the required number of copies of the tender have been submitted;

f) the tender is valid for the period required;

g) any required samples have been submitted; and

h) all required documents and information have been submitted

None of the above listed elements include consideration of arithmetic errors at the Preliminary Evaluation stage.

In addition to this, Financial Evaluation under Regulation 77(1) of Regulations 2020 provide as follows:

77. Financial evaluation

(1) Upon completion of the technical evaluation under regulation 76 of these Regulations, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

(2) The evaluated price for each bid shall be determined by—

1. ***(a) taking the bid price in the tender form;***
2. ***(b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79 (2) (a) of the Act;***
3. ***(c) where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date;***
4. ***(d) applying any margin of preference indicated in the tender document.***

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act.

Even at the financial evaluation stage, where consideration of price is made, "arithmetic errors" (or "mathematical errors") is not considered in the current dispensation as was in the past dispensation of the repealed Public Procurement and Disposal Act, 2005 and the repealed Public Procurement and Disposal Regulations, 2006 and therefore, have no place in the current Act and Regulations 2020. In a nutshell, the Procuring Entity acted in breach of section 82 of the Act because "arithmetic errors" **are not considered** at any stage of the evaluation process, whether preliminary, technical or financial evaluation.

For the foregoing reasons, the Procuring Entity's termination of the subject procurement process is void ab initio. Evidently, (i) none of the reasons cited in section 63 (1) of the Act (including sub-section (f) thereof) applied in the circumstances because tenderers were not rightfully found non-responsive, (ii) the reason referred to by the Procuring Entity cannot be used to disqualify tenderers and (iii) the Procuring Entity acted in breach of section 82 of the Act because "arithmetic errors" **are not considered** at any stage of the evaluation process, whether preliminary, technical or financial evaluation.

While the Board is required to also consider whether the procedural requirements of section 63 (2), (3), and (4) of the Act were followed by the Procuring Entity, we see no need to do so having found that the Procuring Entity's termination was void ab initio. Be that as it may, tenderers were only notified of the outcome of their tenders and not

termination of the subject tender. Further, no evidence was furnished to the Board demonstrating that the Director General of the Public Procurement Regulatory Authority was furnished with a report of the termination within 14 days of such termination. Consequently, the Procuring Entity still falls short of the procedural requirements of section 63 (2), (3), and (4) of the Act.

As a result, the Board finds that the Accounting Officer of the Procuring Entity failed to terminate the subject procurement proceedings in accordance with the substantive and procedural requirements for termination of a tender specified in section 63 of the Act.

This therefore gives the Board jurisdiction to determine the appropriate reliefs in the circumstances as the second issue for determination.

It is evident from the documents filed before this Board that if the Evaluation Committee conducted a Preliminary Evaluation in accordance with the law, then it means responsive tenderers would have proceeded to the Technical Evaluation Stage. It therefore follows that all tenderers who were disqualified as a result of only criterion 13 which states that **"Bidders with Arithmetic errors shall be disqualified at this stage"** were wrongfully evaluated and their tenders ought to be reinstated in the evaluation process.

We note that all tenderers were disqualified with respect to criterion 13. However, four out of the six tenderers had other reasons in addition to criterion 13 for which their respective tenders were disqualified at preliminary evaluation stage. Only the Applicant's and Ends International Co. Ltd's tenders were disqualified for on the basis of criterion 13 alone. The Board therefore finds it appropriate in exercise of the discretion provided by section 173 (b) of the Act to order the Accounting Officer of the Procuring Entity to direct the Evaluation Committee to reinstate the Applicant's tender and Ends International Co. Ltd's tender to the Technical Evaluation stage and evaluate the two tenders at the Technical Evaluation stage.

Thereafter, the Evaluation Committee should proceed to evaluate tenders that are found responsive at the Technical Evaluation stage, at the Financial Evaluation stage and complete the procurement process to its logical conclusion.

Accordingly, the Request for Review succeeds only in respect of the following orders:

FINAL ORDERS

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

1. **The Accounting Officer of the Procuring Entity's Termination of the procurement proceedings be and is hereby cancelled and set aside.**

2. **The Accounting Officer of the Procuring Entity's undated Letters of Notification of Tender No. NYA/CG/ALF/KCSAP/ONT/01/2021-2022 for the Proposed Raichiri Water Pan Desilting, Civil and Water Works for Small-Scale Irrigation Project addressed to all tenderers including the Applicant herein, be and are hereby cancelled and set aside.**

3. **The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to reinstate the Applicant's tender and the Ends International Co. Ltd's tender at the Technical Evaluation stage and evaluate the same at the Technical evaluation stage taking into consideration the Board's findings in this decision.**

4. **Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby ordered to proceed with the subject procurement process to its logical conclusion including the making of an award to the lowest evaluated responsive tenderer subject to a due diligence exercise within Fourteen (14) days from the date of this decision.**

5. **Given that the procurement process is not complete, each party shall bear its own costs of this Request for Review.**

Dated at Nairobi this 24th day of December 2021

.....	.....
CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**