

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATIONS NO. 21/2021 OF 11TH FEBRUARY 2021 AND NO.
22/2021 OF 12TH FEBRUARY 2021 (CONSOLIDATED)

BETWEEN

SKAGA LIMITED.....1ST APPLICANT
ON THE MARK SECURITY LIMITED.....2ND APPLICANT

AND

ACCOUNTING OFFICER,
KENYA REVENUE AUTHORITY.....1ST RESPONDENT
KENYA REVENUE AUTHORITY.....2ND RESPONDENT

Review against the decision of Kenya Revenue Authority with respect to Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers.

BOARD MEMBERS

- | | |
|----------------------------|------------------|
| 1. Arch. Steven Oundo, OGW | -Member Chairing |
| 2. Dr. Joseph Gitari | -Member |
| 3. Mr. Alfred Keriolale | -Member |

IN ATTENDANCE

- | | |
|------------------------|--------------------------------------|
| 1. Mr. Philemon Kiprop | -Holding brief for Acting. Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Kenya Revenue Authority (hereinafter referred to as "the Procuring Entity") invited sealed bids for Tender No. KRA/HQS/NCB-046/2019-

2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers (hereinafter referred to as "the subject tender") through an advertisement on 7th January 2020. A Pre-Bid meeting was held thereafter on 16th January 2020.

Bid Submission Deadline and Opening of Bids

Upon issuance of an Addendum on 24th January 2020, the bid submission deadline was extended to 29th January 2020. The Procuring Entity received two (2) bids by the bid submission deadline through the Procuring Entity's Supplier Relations Management Electronic System. The same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders' representatives and recorded as follows: -

- a) Bidder No. 1: M/s On the Mark Security Limited
- b) Bidder No. 2: M/s Skaga Limited

Evaluation of Bids

The evaluation process was conducted in the following stages: -

- 1) Tender Responsiveness;
- 2) Technical Evaluation;
- 3) Financial Evaluation (Price Schedule).

1. Tender Responsiveness

At this stage of evaluation, the Evaluation Committee applied the criteria specified in Clause (c) of Section VI. Criteria for Selecting Bidders at

page 35 of the Tender Document, which was mandatory for all bidders. Any bidder who failed to submit mandatory documents or meet the mandatory requirements was disqualified at this stage of evaluation.

The mandatory requirements were as follows: -

S/NO	ITEM DESCRIPTION	BIDDERS	
		On The Mark Security Ltd.	Skaga Ltd.
1)	Duly filled, signed and stamped Form of Tender	√	√
2)	Duly filled, signed and stamped Confidential Business Questionnaire	√	√
3)	Power of Attorney (Sole Proprietors Exempted)	√	√
4)	Tender Security of two hundred thousand (Kshs 200,000) valid for 365 days from the tender closing date of 29 th January 2020	√	√
5)	Attach a copy of Certificate of Incorporation or Business Registration Certificate	√	√
6)	Letter of Reference from a bank (The letter should be within the last six (6) months from date of tender closure)	√	√
7)	Copy of Valid Business License/Permit	√	√
8)	Valid Tax Compliance Certificate	√	√
	Remarks	PASS	PASS

The two bidders, that is, M/s On the Mark Security Limited and M/s Skaga Limited met all the mandatory requirements in the subject tender hence qualified to proceed to the next stage of evaluation.

2. Technical Evaluation

At this stage of evaluation, the Evaluation Committee evaluated bids in two categories, that is, Vendor Evaluation and Clause by Clause Technical Evaluation.

2.1. Vendor Evaluation

The Evaluation Committee scrutinized bids to determine the capability/suitability of the bidder in accordance with the technical evaluation criteria specified in Clause (c) of Section VI. Criteria for Selecting Bidders at page 35 of the Tender Document. Bidders were required to attain a total maximum score of 86 points in order to proceed to Financial Evaluation.

The results were recorded as follows: -

Criteria Description	Maximum Score	Cut off Score	On the Mark Security Ltd.	Skaga Ltd
<p>Key Personnel Competency Profiles (trainers)</p> <ul style="list-style-type: none"> • Key Staff Competency Profiles for at least two (2) dog trainers- <ol style="list-style-type: none"> 1) Academic Qualifications At least O Level (KCSE) Certificate. 2) Professional Certification in Dog Training from government institutions like the Kenya police, Kenya Defense Forces or Equivalent (Equivalent means any other recognized institution worldwide) 3) Experience of at least Three (3) years in Dog Training <p>Attach CVs and supporting documents for each trainer (3 marks each).</p>	6	3	6	6
<p>Physical Facilities</p> <p>Proof of physical Facilities and Capacity to deliver Training services:</p> <ol style="list-style-type: none"> 1) State if owned or leased and attach copy of title or lease documents 2) Proof of Training ground (attach photos) 3) Proof of Lecture hall attach photos 4) Provide a set of Five pseudo Training aids for narcotics (cocaine, heroin, meth, marijuana, Ecstasy) 5) Provide a set of Five Pseudo Training aids for explosives (TATP, RDX, TNT, SENTEX, and HMTD) <p>For items 4 and 5 provide relevant document e.g. licenses of possession, importation documents etc.</p>	2	11	2	2
	2		2	2
	2		2	2
	5		5	5
	5		5	5

Experience. Proof of Satisfactory Service in supply and delivery of both narcotic and explosives detector k9s, Submit evidence of recommendation letters from three major clients for each case complete with name of contact person, telephone numbers and email addresses. (2 Marks for each client).	6	4	6	6
Total Score	28	18	28	28
Remarks			PASS	PASS

The Evaluation Committee observed that Bidder No. 1 M/s On the Mark Security Limited did not provide attachment for KCSE Certificate for Solomon Kimeu as a trainer and therefore lost one mark. In addition, detailed information on the pseudo training aids for narcotics and explosives was missing and therefore two marks on each of the aforementioned sub-categories, were deducted.

At the conclusion of this stage of evaluation, both bidders met the individual and overall cut off score hence qualified to proceed to the next stage of evaluation.

2.2. Clause by Clause Technical Evaluation

This stage of evaluation was based on the requirements detailed in the Instructions to Tenderers and the adjustments to clarifications contained in the Addendum issued to bidders on 21st and 24th January 2020. The technical requirements consisted of the following: -

- a) Requirements for Narcotics Sniffer Dogs (Table 1 of the Tender Document);
- b) Requirements for Explosives Sniffer Dogs (Table 2 of the Tender Document);
- c) Requirements for Training and Skills Transfer (Table 3 of the Tender Document).

Below is a summary of the results: -

NO	Requirements	Maximum Score	Cut off Score	Bidders	
				On Mark Security Ltd.	The Skaga Ltd.
1)	Narcotics Sniffer Dogs (Table 1)	32	30	24	32
2)	Explosive Sniffer Dogs (Table 2)	32	30	24	32
3)	Training & Skills Transfer (Table 3)	8	8	8	8
	TOTAL	72	68	56	72
	Remarks			FAIL	PASS

Upon conclusion of this stage of evaluation, Bidder No. 2, M/s Skaga Limited attained the overall minimum technical score and thus qualified to proceed for Financial Evaluation. However, Bidder No. 1, M/s On the Mark Security Ltd failed to meet the cut off score for both Narcotic and Explosive Sniffer Dogs because the bidder failed to provide documentary proof of an internationally recognized kennel club where the dogs are registered. This registration authenticates the origin of the breed which provides critical details about specific history of a dog in regards to health and performance tracking. M/s On the Mark Security Ltd was therefore found non-responsive and therefore failed to qualify for further evaluation.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criteria specified in Clause (c) of Section VI. Criteria for Selecting Bidders at page 35 of the Tender Document wherein award would be made to the bidder who submitted the lowest evaluated price. The Price Schedule composed of the following: -

- a) Prices for supply and delivery of eleven (11) dogs and training of fourteen (14) dog handlers for a period of three (3) months; and
- b) Framework prices for three (3) years.

M/s Skaga Limited, the only bidder who qualified for Financial Evaluation quoted Kshs 18,473,000.00/- as per its Form of Tender.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Skaga Limited** at its total quoted price of **Kshs. 18,473,000.00/- (Eighteen Million, Four Hundred and Seventy-Three Thousand Shillings only)** as the lowest evaluated bidder.

First Due Diligence Exercise

The Evaluation Committee conducted due diligence on M/s Skaga Limited using the following approaches:

- a) Obtaining confidential information on the reference sites in the bid document; and
- b) Site visit to the bidder's offices.

Confidential information was sought from G4S Kenya Limited and Securex Agencies (K) Limited and both confirmed satisfactory performance from the bidder.

The site visit conducted established that the bidder has capacity to supply the dogs, train the handlers and has the relevant documentation as well as the capability to implement the subject tender.

First Professional Opinion

In a professional opinion dated 16th March 2020, the Head of Procurement Function expressed his views on the procurement process stating that the same met the requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and thus, concurred with the Evaluation Committee's recommendation that the subject tender be awarded to M/s Skaga Limited. This professional opinion was thereafter approved by the Accounting Officer.

Notification to Bidders

In letters dated 27th March 2020, the Accounting Officer notified the successful bidder and the unsuccessful bidder of the outcome of their respective bids.

REQUEST FOR REVIEW NO. 51 OF 2020

On the Mark Security Limited lodged Request for Review No. 51 of 2020 dated and filed on 14th April 2020 together with a Statement in Support of the Request for Review sworn and filed on even date, and a Further Statement sworn and filed on 27th April 2020 through the firm of Caroline Oduor & Associates Advocates, seeking the following orders: -

- i. An order cancelling and setting aside the 1st Respondent's decision contained in the letter dated 27th March 2020 and related notifications to other tenderers;*
- ii. An order annulling the subject procurement proceedings undertaken by the 1st Respondents in relation to financial evaluation;*
- iii. An order directing the 1st Respondent to re-admit the Applicant's bid at the Financial Evaluation stage and evaluate their bid together with all other bids eligible for consideration at the financial evaluation stage;*
- iv. An order directing the 1st Respondent to conduct the financial evaluation and make an award to the successful bidder in compliance with section 86 (1) (a) of the Public Procurement and Asset Disposal Act, No 33 of 2015;*
- v. An order directing the 1st Respondent to pay costs of the Review; and*
- vi. Any other necessary orders as are necessary for the ends of justice.*

The Board having considered parties' cases and the documents filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act ordered as follows in its decision dated 5th May 2020 in **PPARB Application No. 51/2020, On the Mark Security Limited v. The Accounting Officer, Kenya Revenue Authority & Another** (hereinafter referred to as "Review No. 51/2020"):

- 1. The Procuring Entity's Letter of Notification of Unsuccessful bid dated 24th March 2020 with respect to**

Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9dogs and training of dog handlers addressed to the Applicant, be and is hereby cancelled and set aside.

- 2. The Procuring Entity's Letter of Notification of Award dated 24th March 2020 with respect to the subject tender addressed to M/s Skaga Limited, the 2nd Respondent herein, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity is hereby directed to re-admit the Applicant's bid and the 2nd Respondent's bid at the Technical Evaluation Stage and re-evaluate the Applicant's bid and the 2nd Respondent's bid at the Technical Evaluation Stage in accordance with the Act and the Constitution, taking into consideration, the Board's findings in this case.**
- 4. Further to Order No. 3 above, the Procuring Entity is hereby directed to conclude the procurement process to its logical conclusion including the making of an award within fourteen (14) days from the date of this decision.**
- 5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Judicial Review Miscellaneous Application 101 of 2020 Republic v Public Procurement Administrative Review Board; Accounting Officer Kenya Revenue Authority & another (Interested Parties) Skaga Limited & another (Ex-Parte Applicant) [2020] eKLR

The Procuring Entity and M/s Skaga Limited lodged judicial review applications at the High Court challenging the decision of the Board in Review No. 51/2020 rendered on 5th May 2020, which applications were subsequently consolidated. On 16th November 2020, the High Court upheld the decision and the orders of the Board as rendered in Review No. 51/2020 and held that the judicial review applications lacked merit and dismissed them forthwith. In essence, the High Court did not interfere with the findings of the Board in Review No. 51/2020 and thus the decision of the Board in Review No. 51/2020 was final and binding to the parties in Review No. 51/2020.

Re-evaluation of Bids

In view of the Board's orders in Review No. 51 of 2020, the Evaluation Committee re-admitted the bids of M/s On the Mark Security Limited and that of M/s Skaga Limited at the Technical Evaluation Stage and conducted a re-evaluation of the two bids at this stage of evaluation as evidenced in the Technical Re-evaluation Report (hereinafter referred to as the 'Technical Re-evaluation Report') signed by the Evaluation Committee on 24th November 2020. The summary of the outcome of Vendor Evaluation (the first limb of Technical Evaluation) from the Technical Re-evaluation Report signed on 24th November 2020 was as follows: -

Criteria Description	Maximum Score	On the Mark Security Ltd.	Skaga Ltd
Total Score	28	28	28
Remarks		PASS	PASS

Both bidders passed this stage of evaluation hence qualified to proceed for Clause by Clause Technical Evaluation.

The summary of the results from the Technical Re-Evaluation Report were as follows: -

NO	Requirements	Maximum Score	Bidders	
			On the Mark Security Ltd.	Skaga Ltd
1	Narcotics Sniffer Dogs (Table 1)	32	25	32
2	Explosive sniffer Dogs (Table 2)	32	25	32
3	Training &Skills Transfer (Table 3)	8	8	8
	TOTAL	72	58	72

Whereas the Evaluation Committee in the initial evaluation process had applied a cut off score at the Technical Clause by Clause Evaluation stage, the Board pointed out that the use of a cut-off at this stage of evaluation was unfair and advised for the use of a maximum score. Consequently, the summary of the results at this stage of evaluation from the Technical Re-evaluation report were as follows: -

No.	Requirements	Maximum Score	Bidders	
			On the Mark Security Ltd.	Skaga Ltd
1	Vendor Evaluation	28	28	28
2	Clause by Clause Scores	72	58	72
	TOTAL	100	86	100
Remarks			PASS	PASS

Both bidders passed this stage of evaluation and thus qualified to proceed for Financial Evaluation.

Financial Re-evaluation

At this stage, the two bidders' price schedules were evaluated and a summary was recorded as follows: -

NO	Description	Quantity	Bidders			
			On the Mark Security Ltd.		Skaga Ltd	
			Unit Cost Kshs	Total Cost inclusive taxes (Kshs)	Unit Cost Kshs	Total Cost inclusive taxes (Kshs)
	Total Cost inclusive of Taxes		15,619,400.00		18,473,000.00	

Bidders were also required to provide framework prices to help in the operationalization of the contract which each bidder provided. A summary of the results of the overall re-evaluation process was recorded as follows: -

Criteria	Maximum Score/Requirement	Cut Off Mark	On the Mark Security Ltd.	Skaga Ltd
Tender Responsiveness	Mandatory	Met	PASS	PASS
Technical Component	100	86	86	100
Bid Price as per Form of Tender (Kshs)			15,619,400.00	18,473,000.00
<i>Remarks</i>			Lowest evaluated	2 nd lowest evaluated

The Evaluation Committee's Recommendation

In view of the re-evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s On the Mark Security Limited** at their quoted tender price of **Kshs. 15,619,400.00/-** being the lowest evaluated bidder.

Second Due Diligence Exercise

The Evaluation Committee conducted a due diligence exercise on M/s On the Mark Security Limited as captured in its due diligence report signed on 27th November 2020. The Evaluation Committee used the following two approaches:

- a) Obtaining confidential information from persons the tenderer had had prior engagement.
- b) Site visit to M/s On the Mark Security Ltd.

The Evaluation Committee contacted the bidder's referees where the bidder had previously carried out similar work, that is, Safaricom PLC, Market Masters Limited and Kenya Revenue Authority.

Safaricom PLC and Mark Masters Limited gave a satisfactory reference. whereas Kenya Revenue Authority (KRA) specifically the Commissioner for Customs & Border Control did not provide a satisfactory response. The Evaluation Committee therefore relied on the response from the user department, that is the Commissioner for Customs & Border Control who were dissatisfied from past delivery and did not recommend acquisition of more dogs from M/s On the Mark Security Ltd. The Evaluation Committee concluded that M/s On the Mark Security Limited failed at the post-qualification stage and therefore did not recommend the bidder for award of the subject tender.

The Evaluation Committee thereafter considered the results of the due diligence exercise conducted on Bidder No. 2, M/s Skaga Limited. Based on the recommendation letters from the referees and the successful site visit conducted by the team on 19th February 2020, the Evaluation

Committee was fully satisfied that Bidder No. 2 M/s Skaga Limited had the capacity to Supply K9 Dogs and Training of Dog Handlers.

The Evaluation Committee therefore recommended award of the subject tender to Bidder No. 2, **M/s Skaga Limited** at their quoted price of **Kshs. 18,473,000.00/-** inclusive of taxes as the lowest evaluated bidder.

REQUEST FOR REVIEW NO. 158 OF 2020

On the Mark Security Limited lodged another Request for Review dated 23rd December 2020 and filed on 24th December 2020 together with a Statement in Support of the Request for Review dated 23rd December 2020 and filed on 24th December 2020, a Verifying Affidavit sworn on 23rd December 2020 and filed on 24th December 2020 and a Statement in Reply to the 1st Respondent's Written Memorandum of Response dated and filed on 7th January 2021 through the firm of Caroline Oduor & Associates Advocates, seeking the following orders: -

- i. An order cancelling and setting aside the 1st Respondent's decision contained in the letter dated 15th December 2020 and related notifications to other tenderers;***
- ii. An order annulling the subject procurement proceedings undertaken by the 1st Respondent in relation to the post qualification stage of the tendering process;***
- iii. An order directing the 1st Respondent to conduct Financial Evaluation and make an award to the Applicant as the successful bidder with the lowest evaluated price in***

compliance with section 86 (1) (a) of the Public Procurement and Asset Disposal Act No. 33 of 2015;

- iv. An order directing the 1st Respondents to pay the costs of the Review;*
- v. Any other orders as are necessary for the ends of justice.*

The Board having considered parties' cases and the documents filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act ordered as follows in its decision dated 14th January 2021 in **PPARB Application No. 158/2020, On the Mark Security Limited v. The Accounting Officer, Kenya Revenue Authority & Another** (hereinafter referred to as "Review No. 158/2020"):

- 1. The Accounting Officer of the Procuring Entity's Letter of Intention to Award a Framework Contract for Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers dated 15th December 2020, addressed to M/s Skaga Limited, be and is hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Unsuccessful Bid for Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers dated 15th December 2020 addressed to the Applicant, be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement process to its**

logical conclusion, including the making of an award, within fourteen (14) days from the date of this decision, taking into consideration the Board’s findings in this review.

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

Third Due Diligence Exercise

The Evaluation Committee conducted a due diligence exercise on Bidder No. 1, M/s On the Mark Security Limited, whereby it sought to verify the information provided by the said bidder from the referenced clients, that is, Safaricom Limited, Market Masters Limited and Polymath Interscience LLC. The results are summarized in the table below: -

Client	Evaluation Criteria	Client Response	KRA Remarks
Safaricom Limited	Additional Information on the dogs supplied by on The Mark security limited as to whether they are Explosives detection dogs as stated in the reference letter	Safaricom confirmed that On The Mark Security Limited has been providing explosive and drugs detection dogs during Safaricom events and Facilities.	The Bidder was found responsive on Safaricom reference site.
Market Masters Limited	Additional Information on the category of dogs supplied by on The Mark security limited as to whether they are Explosives detection dogs or Narcotic detection dogs as stated in the reference letter.	Market Masters Limited confirmed that on The Mark Security Company has been providing dogs to the tribe and trademark Hotels during the Past three years. They affirmed that the dogs can handle whatever they have been trained to do (I, e Narcotics, explosives Security detection and recognition of illegal substance and terrorism) and they used to carry out regular testing where the	The Bidder was found responsive on market Masters site reference site.

		dogs would pass all the time.	
Polymath Interscience LLC,	Qualification requirement for interested vendors was to provide evidence on the training Aids including importation documents. Solomon Kimeu proprietor of On The Mark Security Limited provided Invoice Number Tax ID/EIN/VAT No.:800174935 dated 22nd January, 2020 as evidence of having procured Canine Training Aids from Polymath Interscience LLC.	No Response was obtained via email communication to Polymath Interscience LLC, and the telephone (+1 4109901199) provided in the invoice was not going through.	The Authenticity could not be determined from the outcome of the reference site.

Prior to recommendation of award, the Evaluation Committee verified the Financial Proposal for M/s On the Mark Security Limited and made the following observations: -

- 1) The Evaluation Committee noted the price schedule for M/s On the Mark Security Limited had arithmetic error on the unit cost of 2nd & 3rd year support as Kshs. 1,125,200.00 and Kshs. 1,125,000.00 respectively but did not sum up the cost to the Form of Tender.
- 2) Based on this variance the actual cost would have been Kshs. 17,869,800.00 hence the Evaluation Committee recommended for a disqualification of the firm pursuant to section 82 of the Act which states, *"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 Evaluation Committee therefore recommended due diligence to be undertaken on the second lowest evaluated bidder, M/s Skaga Ltd.

Fourth Due Diligence Exercise

The Evaluation Committee conducted a due diligence exercise on M/s Skaga Limited, whereby it sought to verify the information provided by the said bidder from its referenced clients, to verify if the services rendered to them by the said bidder were satisfactory. The references who included G4S Kenya Limited, Safaricom Limited and Securex Agencies (K) Limited provided positive responses.

The Evaluation Committee proceeded to verify the Financial Proposal for M/s Skaga Limited and made the following observations: -

- 1) The Evaluation Committee detected a calculation computation error on Item No. 2 for (Explosive Detector Dogs) where the unit cost was contrary to the total cost inclusive of tax @16%.
- 2) M/s Skaga Limited provided a total of three (3) dogs at a unit cost of Kshs. 370,000.00 and at a total cost of Kshs 2,960,000.00 instead of Kshs. 1,110,000.00 hence submitting a form of tender of Kshs. 18,473,000.00.
- 3) Based on this variance the actual total cost would have been Kshs. 16,623,000.00 hence the Evaluation Committee recommended for a disqualification of the firm pursuant to section 79 (2) (b) of the Act *"Any errors in the submitted tender arising from a 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."*

In view of the foregoing, the Evaluation Committee confirmed that both M/s On the Mark Security Limited and M/s Skaga Limited had arithmetic

errors that affected the final output of their respective forms of tender. Based on its findings, the Evaluation Committee recommended termination of the subject tender due to the financial errors observed in the two bids received by the Procuring Entity in response to the subject tender.

The Evaluation Committee's Recommendation

In view of the foregoing observations, the Evaluation Committee recommended termination of the subject tender pursuant Regulation 74 (2) of the Public Procurement and Disposal Regulations, 2020 subject to section 79 (2) (b) of the Act.

Second Professional Opinion

The Procuring Entity's Assistant Manager, Supply Chain Management considered the Evaluation Committee's report dated and signed on 28th January 2021 and made the following remarks on the last page of his professional opinion dated 28th January 2021: -

"Recommendation for termination of Procurement Ref. No. KRA/HQS/NCB-046/2020-2021 for Supply and Delivery of K9 Dogs and Training of Dog Handlers for a period of three (3) years in line with section 63 (1) (f) of the PPADA, 2015 which states that "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 all evaluated tenders are non-responsive."

The Assistant Manager, Supply Chain Management concurred with the Evaluation Committee's recommendation for termination of the subject tender, which recommendation was approved by the Accounting Officer on 28th January 2021.

Notification to Bidders

In letters dated 28th January 2021, the Procuring Entity notified bidders of its decision terminating the subject tender.

REQUEST FOR REVIEW NO. 21 OF 2021

M/s Skaga Limited lodged Request for Review No. 21/2020 dated and filed on 11th February 2021 together with a Supporting Affidavit sworn and filed on even date, a Notice of Preliminary Objection dated 25th February 2021 and filed on 1st March 2021 and Written Submissions dated 1st March 2021 and filed on 2nd March 2021, through the firm of Thuita Kiiru & Company Advocates, seeking the following orders: -

- i. An order cancelling/setting aside the Procuring Entity's notification of purported termination of procurement proceedings in Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers dated 28th January 2021 addressed to the Applicant and/or any other bidder who participated in the subject tender process;***
- ii. An order directing the Accounting Officer of the Procuring Entity to conduct a due diligence on the Applicant herein in full compliance with the orders of the Review Board***

issued on 14th January 2021 in Review Application No. 158 of 2020: On the Mark Security Limited – versus – The Accounting Officer, Kenya Revenue Authority & Skaga Limited;

iii. Any other relief that the Board may deem fit and just to grant;

iv. Costs of the Review be awarded to the Applicant.

In response, the 1st and 2nd Respondents lodged a Memorandum of Response dated and filed on 19th February 2021, together with Written Submissions dated 24th February 2021 on even date, through tits Advocate, Ms. Carol Mburugu. M/s On the Mark Security Limited (joined as an Interested Party in Request for Review No. 21/2020) lodged an Interested Party's Memorandum of Response dated and filed on 26th February 2021 and Written Submissions dated 1st March 2021 on even date, through the firm of Ogado & Company Advocates.

REQUEST FOR REVIEW NO. 22 OF 2021

On the Mark Security Limited lodged Request for Review No. 22/2021 dated and filed on 12th February 2021 together with a Statement in Support of the Request for Review filed on 12th February 2021, a Verifying Affidavit filed on 12th February 2021, a Replying Affidavit sworn and filed on 26th February 2021 and Written Submissions dated and filed on 1st March 2020, through the firm of Ogado & Company Advocates, seeking the following orders: -

- i. An order annulling/setting aside the 1st Respondent's decision contained in its letter of 28th January 2021 terminating the tender process;*
- ii. An order substituting the annulled decision with an award of tender to the Applicant following a review of the subject tender process/documents;*
- iii. An order reviewing the order on costs in Application No. 51 of 2020 and 158 of 2020 and award costs thereof to the Applicant;*
- iv. An order awarding costs for the instant application;*
- v. Further orders as the Board may deem fit under the circumstances of this case.*

In response, the 1st and 2nd Respondents lodged a Memorandum of Response dated and filed on 19th February 2021, a Preliminary Objection dated 23rd February 2021 and filed on 24th February 2021 and Written Submissions dated and filed on 24th February 2021, through its Advocate, Ms. Carol Mburugu.

CONSOLIDATION OF THE TWO REQUEST FOR REVIEW APPLICATIONS

Request for Review No. 21/2021 filed by M/s Skaga Limited and Request for Review No. 22/2021 filed by M/s On the Mark Security Limited relate to the same tender advertised by the same procuring entity. Having noted the applicants in Request for Review No. 21/2021 and Request for Review No. 22/2021 participated in the same procurement process

advertised by the same procuring entity lodged two separate request for review applications, the Board addressed its mind on the question whether the circumstances in both Request for Review Applications justify consolidation of the two Request for Review applications.

In addressing this question, the Board considered Regulation 215 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as the 'Regulations 2020') which provides as follows: -

"Where two or more requests for review are instituted arising from the same tender or procurement proceeding, the Review Board may consolidate the requests and hear them as if they were one request for review"

In **Petition No. 14 of 2013, Law Society of Kenya v. Center for Human Rights and Democracy and 12 Others (2014) eKLR**, the Supreme Court of Kenya observed as follows: -

"the essence of consolidation of suits is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties."

Having considered the meaning and purpose of consolidation of cases as explained in the foregoing case, this Board observes that in procurement proceedings, an accounting officer of a procuring entity has the primary responsibility under section 44 (1) of the Act of ensuring a procuring entity complies with the Act. In doing so, the accounting officer must ensure it complies with any directions given to it by this Board pursuant to section 173 (b) of the Act with respect to anything to be done or

redone in the procurement or disposal proceedings. In order to save costs, time and effort, the Board found it convenient to consolidate the two request for review applications pursuant to Regulation 215 of Regulations 2020. Consequently, the parties to the Consolidated Request for Review shall be identified as follows: -

- *M/s Skaga Limited as the 1st Applicant;*
- *M/s On the Mark Security Limited as the 2nd Applicant;*
- *Accounting Officer of Kenya Revenue Authority as the 1st Respondent; and*
- *Kenya Revenue Authority as the 2nd Respondent.*

On 24th March 2020, the Board issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions. The Board further cautioned all parties to adhere to the timelines as specified in its directive as the Board would strictly rely on documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Act.

BOARD'S DECISION

The Board has considered each of the parties' cases, the pleadings and written submissions filed before it, including confidential documents submitted by the Procuring Entity pursuant to section 67 (3) (e) of Act and thus, finds that the following issues call for determination: -

- I. Whether the Request for Review Application filed by the 2nd Applicant was lodged outside the statutory timelines specified under section 167 (1) of the Act read together with Regulation 203 (2) (c) of the Regulations 2020, thus ousting the jurisdiction of the Board to entertain the grounds raised in the 2nd Applicant's Request for Review.**

- II. Whether 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.**

Depending on the determination of the second issue: -

- III. Whether the Procuring Entity complied with the orders of the Board issued on 14th January 2021 in PPARB Application No. 158/2020, On the Mark Security Limited v. The Accounting Officer, Kenya Revenue Authority & Another**

The Board shall now proceed to address the issues framed for determination as follows: -

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

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

This Board therefore deems it necessary to first address the preliminary objections raised before it at this given opportune moment.

The 1st and 2nd Respondents lodged a Preliminary Objection on Points of Law on 24th February 2021 alleging as follows: -

"That the Request for Review No. 22 of 2021 is improperly before the Public Procurement Administrative Review Board by reason of having been filed outside the timelines prescribed by section 167 (1) of the Public Procurement and Asset Disposal Act, 2015.

That the Request for Review No. 22 of 2021 is improperly before the Public Procurement Administrative Review Board by reason of having been filed outside the timelines prescribed by section 167 (4) (b) of the Public Procurement and Asset Disposal Act, 2015."

The 1st Applicant also lodged a Notice of Preliminary Objection on 1st March 2021 objecting to the Request for Review filed by the 2nd Applicant on the following grounds: -

"1. The purported Request for Review is time barred, the same having been filed contrary to the express provisions of section 167 (1) of the Public Procurement and Asset

Disposal Act as read together with rule 203 (2) (c) of the Public Procurement and Asset Disposal Regulations, 2020.

2. The Honourable Board lacks the requisite jurisdiction to take cognizance of hear and determine the purported request for review which has been filed out of time."

The Board observes that the second limb of the 1st and 2nd Respondents' Preliminary Objection relates to the question whether the Board's jurisdiction is ousted by dint of section 167 (4) (b) of the Act. This provision is subject to section 63 of the Act, which deals with termination of procurement proceedings and not the timelines for filing a Request for Review. As such, the Board has the obligation to first determine whether the 2nd Applicant filed its Request for Review within the statutory timelines under section 167 (1) of the Act, so as to clothe the Board with jurisdiction to entertain the grounds raised in the 2nd Applicant's Request for Review.

It has well been an enunciated principle that jurisdiction is everything, following the decision in **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, where Justice Nyarangi held that: -

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction,

there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus: -

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question best taken at inception. "

Further in **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011**, the court had occasion to interrogate the instruments that arrogate jurisdiction to courts and other decision making bodies. The court held as follows: -

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. "

This Board is a creature of statute owing to the provision of Section 27 (1) of the Act which provides that: -

"27. Establishment of the Public Procurement Administrative Review Board

(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

Further, Section 28 of the Act provides as follows: -

"28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes. To invoke the jurisdiction of this Board, a party must file its Request for Review within the timelines specified in section 167 (1) of the Act, which provides as follows: -

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

of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed”

Further, Regulation 203 (2) (c) of the Regulations 2020 provides as follows: -

"(1)

(2) The request referred to in paragraph (1) shall—

(a).....;

(b).....;

(c) be made within fourteen days of—

i) the occurrence of the breach complained of, where the request is made before the making of an award;

ii) the notification under section 87 of the Act; or

iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.”

The Board observes that section 167 (1) of the Act read together with Regulation 203 (2) (c) of the Regulations 2020 has three limbs within which a candidate or tenderer may file a request for review namely;

- **Within fourteen days from the date of occurrence of an alleged breach at any stage of the procurement process, or disposal process prior to making of an award; or**

- **Within fourteen days of notification of award; or**
- **Within fourteen days of the occurrence of the breach complained of, after an award has been made to the successful bidder.**

The Board considered the use of the word 'or' and notes that the Concise Oxford English Dictionary (11 Edition, Oxford University Press) defines "or" as a '*conjunction used to link alternatives.*' Applying the foregoing construction, the Board notes that the use of the word "or" in section 167 (1) of the Act read together with Regulation 203 (2) (c) of the 2020 Regulations connotes a conjunction that gives alternatives. The first option which an aggrieved candidate or tenderer has, is to file its request for review within fourteen (14) days of occurrence of an alleged breach from the date the aggrieved candidate or tenderer learns of the alleged breach by the Procuring Entity at any stage of the procurement process or disposal process, prior to making of an award. The second option is to file a request for review within fourteen (14) days of notification of award and the third option is to file a request for review within fourteen (14) days of the occurrence of an alleged breach that occurs after an award has been made to a successful bidder.

The Procuring Entity took the view that the 2nd Applicant ought to have filed its Request for Review on or before 11th February 2021, because in the Procuring Entity's view, 28th January 2021 is the date the 2nd Applicant received its letter of notification from the Procuring Entity. Since the 2nd Applicant filed its Request for Review on 12th February

2021, it was the Procuring Entity's contention that the 2nd Applicant filed its Request for Review out of time and thus should be struck out forthwith. This position was reiterated by the 1st Applicant who also contends that the Request for Review application filed by the 2nd Applicant is time barred and thus the Board lacks the requisite jurisdiction to entertain the said application. The 2nd Applicant disputes these submissions and depones in paragraph 3 of its Replying Affidavit, that it received its letter of notification from the Procuring Entity dated 28th January 2021 via email on 29th January 2021 and then proceeded to file its Request for Review Application on 12th February 2021. It is therefore the 2nd Applicant's contention that it filed its Request for Review within the statutory period of fourteen days provided under section 167 (1) of the Act.

Having considered parties' rival cases, the Board considered the Procuring Entity's allegation that the 2nd Applicant received its letter of notification on 28th January 2021 and notes that this allegation is not substantiated because the Procuring Entity did not provide any proof demonstrating that the 2nd Applicant was notified on the said date. It is a well-established principle that, the burden of proof lies on the party making an allegation. In the absence of proof, the Board cannot rely on the Procuring Entity's allegation to ascertain the date when the 2nd Applicant received its letter of notification.

The 2nd Applicant's assertion that it received its letter of notification vide an email from the Procuring Entity through the email address of paul.nyathore@kra.go.ke on 29th January 2021 at around 6:36 pm is

supported by a copy of the said email annexed to the 2nd Applicant's Replying Affidavit marked 'SKA' with the following details therein: -

"Douglas Otieno <otieno.douglas1@gmail.com

To: Gordon Ogado gordonogado@gmail.com

10th February 2021 at 17:20

Begin forwarded message:

From: Paul.Nyathore@kra.go.ke

Date: 29 January 2021 at 6:36:36 PM EAT

To: solomon@onthemarksecurity.net

Cc: Reuben.Kiprono@kra.go.ke

Subject: KRA/HQS/NCB-046/2019-2020 – SUPPLY AND DELIVERY OF K9 DOGS AND TRAINING OF DOG HANDLERS FOR A PERIOD OF THREE YEARS

Greetings,

Reference is made to the subject procurement. Kindly find feedback of the procurement proceedings as per the attached file.

You are invited for a debriefing session at the address below on Monday 1st February 2021 at 10am.

Kind regards,

Paul Nyathore

Supply Chain Management

21st Floor, Times Tower

Haile Selassie Avenue"

From this annexure, the Board observes that on 10th February 2021 at 5:20pm, one Douglas Otieno through his email address otieno@douglas1@gmail.com forwarded an email (previously sent on 29th January 2021) to one Gordon Ogado through gordonogado@gmail.com. The email as forwarded was previously sent on 29th January 2021 by one Paul Nyathore, Supply Chain Management through his email paul.nyathore@kra.go.ke to the email address solomon@themarksecurity.net. Further, the email as forwarded made reference to an email attachment with feedback on the subject procurement proceedings and further invited the recipient to a debriefing session on the 21st Floor, Times Tower, Haile Selassie Avenue on Monday 1st February 2021 at 10am. The 2nd Applicant stated that the attachment in the email that was first sent on 29th January 2021, was its letter of notification of termination of the subject procurement proceedings, an allegation that was not controverted by the 1st and 2nd Respondents.

In view of the foregoing, the Board is persuaded that the 2nd Applicant received its letter of notification on 29th January 2021.

In determining the period within which the 2nd Applicant ought to have lodged its Request for Review, section 57 (a) of the Interpretation and General Provisions Act, provides guidance on computation of time as the same 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.

Hence, 29th January 2021 is excluded when computing the fourteen (14) day period within which the 2nd Applicant ought to have lodged its Request for Review under section 167 (1) of the Act. The fourteen-day period would therefore start running on 30th January 2021 and lapse on 12th February 2021. The 2nd Applicant filed its Request for Review on 12th February 2021 within the statutory period stipulated under section 167 (1) of the Act.

Accordingly, the Board finds that the Request for Review filed by the 2nd Applicant on 12th February 2021 was filed within the statutory timelines specified in section 167 (1) of the Act. The effect of this finding is that the 1st Applicant's Notice of Preliminary Objection filed on 1st March 2021 and the first limb of the 1st and 2nd Respondents' Preliminary Objection filed on 24th February 2021, are dismissed.

As already observed by the Board, the second limb of the 1st and 2nd Respondents' Preliminary Objection filed on 24th February 2021 relates to application of section 167 (4) (b) vis-à-vis section 63 of the Act in determining whether the jurisdiction of the Board is ousted and thus, we now proceed to address the same as the second issue for determination.

Termination of procurement and asset disposal proceedings is governed by section 63 of the Act. If such termination meets the requirements of

section 63 of the Act, the jurisdiction of this Board is ousted pursuant to section 167 (4) (b) of the Act which provides as follows: -

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

(a);

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act" [i.e. section 63 of the Act] Emphasis by the Board

In **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR** (hereinafter referred to as "the Selex Sistemi Integrati Case"), the court while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Repealed Act") that dealt with termination of procurement proceedings held as follows: -

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

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

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

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

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

To illustrate the point, the failure by the 2nd Respondent [i.e. the Procuring Entity] to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board

ought to have addressed its mind to the question whether the termination met the threshold under the Act, before finding that it lacks jurisdiction to entertain the case before it on the basis of a mere letter of termination furnished before it.

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

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

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

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

of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.

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

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

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

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

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

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.

In its pleadings before the Board, the 1st Applicant avers that the Procuring Entity's termination of the subject tender was null and void since the Procuring Entity acted contrary to the orders of the Board in Review No. 158/2020. The 1st Applicant avers that in Review No. 158/2020, the Procuring Entity was directed to '*proceed with the procurement process to its logical conclusion, including the making of an award*', which directive did not give the Procuring Entity the discretion to terminate the subject tender. The 1st Applicant's further contends that

the reasons provided by the Procuring Entity for terminating the subject tender are inconsistent with the orders of this Board issued on the two occasions that the subject tender was before this Board, that is, in Review No. 51 of 2020 and Review No. 158 of 2020.

On its part, the 2nd Applicant shares the 1st Applicant's sentiments and further avers that the Procuring Entity's reasons for terminating the subject tender on the basis of differences in the sums quoted for the 2nd and 3rd year and that the said sums were not carried forward to the Form of Tender is unfair, unreasonable, illegal and unconstitutional since the provisions of the Tender Document did not require the said sums to be carried to the form of tender and noting that the 2nd and 3rd year prices are conditional to the need arising, any difference does not amount to an arithmetical error or substantial deviation from the tender price as stated in the form of tender. The 2nd Applicant contends that its bid contains no errors and in any event, it is bound by the tender price as read out at the tender opening, which is final and binding. However, the 2nd Applicant contends the 1st Applicant's bid was properly disqualified from further evaluation since it was rightfully found non-responsive for containing a miscalculation in Item No. 2 of the Schedule of Prices, which error cannot be corrected or amended by either party.

It is also the 2nd Applicant's contention that the 2nd Respondent's invocation of Regulation 74 (4) of Regulations 2020 in its notification of termination to bidders applied the said law in retrospect, noting that the tender in issue commenced on 16th January 2020 and closed on 24th January 2020 long before the Regulations 2020 came into force and

thus the said regulation was not applicable in the subject procurement proceedings. Moreover, the 2nd Applicant contends that the reason provided in the notification of termination of the subject tender holds no water, since the Applicant's tender is substantially responsive. It is therefore the 2nd Applicant's contention that the Procuring Entity is determined to ensure at all costs that it does not award the subject tender to the Applicant and would rather have the procurement proceedings terminated. Further, noting that the Procuring Entity has failed, refused and/or neglected to carry out the orders of this Board as issued in Review No. 158/2020, it is the 2nd Applicant's prayer that the Board resolve this long standing dispute by awarding the tender to the 2nd Applicant without any further direction to the 1st Respondent.

The Procuring Entity disputes these submissions and avers that as directed by the Board in Review No. 158/2020, it duly complied with the orders of the Board and following due diligence on the Applicant, the Procuring Entity obtained a positive response. The Procuring Entity submits that prior to recommendation of award, its Evaluation Committee verified the financial proposal for the 2nd Applicant and observed an arithmetic error on the quoted unit cost of 2nd & 3rd year support as Kshs 1,125,200.00 and Kshs 1,125,000.00 respectively but the 2nd Applicant did not sum up the cost to the Form of Tender. According to the Procuring Entity, based on this variance, the actual cost could have been Kshs 17,869,800.00 and thus the 2nd Applicant's bid was disqualified from further evaluation. The Procuring Entity avers that thereafter, the Evaluation Committee recommended due diligence on the 1st Applicant and obtained a positive response but detected a calculation

computation error on Item No. 2 (Explosive Detector Dogs) where the unit cost was contrary to the total cost inclusive of tax of 16%. It is therefore the Procuring Entity's contention that it terminated the subject tender, following the errors detected in both the 1st Applicant's and 2nd Applicant's bid.

Having considered parties' pleadings, the Board notes that section 63 of the Act specifies the statutory pre-conditions for termination of a tender which include substantive and procedural requirements as follows: -

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

(a)

(b)

(c)

(d)

(e)

(f) all evaluated tenders are non-responsive

(g)

(h)

(i)

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

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

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

The Board studied the 1st Applicant's letter of notification dated 19th January 2021 and notes the same contains the following details: -

"...The Authority has terminated the procurement proceedings for the tender before award because all evaluated bids were non-responsive as described by Regulation 74 (2) of the Public Procurement and Asset Disposal Regulations, 2020 which states that, "subject to section 79 (2) (b) of the Act, any errors in the submitted tender arising from a 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."

Specifically, your bid provided a total of three (3) dogs at a unit cost of Kshs 370,000.00 and at a total cost of Kshs 2,960,000.00 instead of a total cost of Kshs 1,110,000.00.

***The Authority has terminated the procurement proceedings pursuant to section 63 (1) (f) of the Public Procurement and Asset Disposal Act, 2015.....
The Procurement will be re-advertised at a later date."***

The Board also studied the 2nd Applicant's letter of notification dated 19th January 2021 which contains the following details: -

"...The Authority has terminated the procurement proceedings for the tender before award because all evaluated bids were non-responsive as described by Regulation 74 (2) of the Public Procurement and Asset Disposal Regulations, 2020 which states that, "subject to section 79 (2) (b) of the Act, any errors in the submitted tender arising from a 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."

Specifically, your price schedule had arithmetic errors where the unit cost for 2nd year and 3^d year support was indicated as KES. 1,125,200.00 and KES 1,125,000.00

respectively yet the same were not carried forward to the Form of Tender.

***The Authority has terminated the procurement proceedings pursuant to section 63 (1) (f) of the Public Procurement and Asset Disposal Act, 2015.....
The Procurement will be re-advertised at a later date."***

From the two letters of notification, the Board observes that the Procuring Entity terminated the subject tender because all bids were found non-responsive pursuant to Regulation 74 (2) of the Regulations, 2020 read together with section 79 (2) (b) of the Act.

Notably, through Gazette Notice No. 4957 (found in Vol. CXXII —No. 142 of Kenya Gazette of 10th July 2020, the Cabinet Secretary for the National Treasury stated as follows: -

***"THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT
(No.33 of 2015)***

***THE PUBLIC PROCUREMENT AND ASSET DISPOSAL
REGULATIONS***

(LN. No. 53 of 2020)

COMMENCEMENT

IT IS notified for the general information of the public that the Public Procurement and Asset Disposal Regulations, 2020 came into operation on the 2nd July, 2020 following the approval by Parliament under section 180 of the Act.

Dated the 9th July, 2020."

According to the said Gazette Notice, the commencement date for the 2020 Regulations was 2nd July 2020, following approval by Parliament pursuant to section 180 of the Act, which provides as follows: -

"The Cabinet Secretary shall make Regulations for the better carrying out of the provisions of this Act and, without limiting the generality of the foregoing, may make Regulations to facilitate the implementation of this Act, and such regulations shall not take effect unless approved by Parliament pursuant to the Statutory Instruments Act, 2013"

Regulations 2020 came into force on 2nd July 2020 after approval by Parliament pursuant to the Statutory Instruments Act, 2013 as stated in Gazette Notice No. 4957 of 10th July 2020. Regulation 220 of the 2020 Regulations further provides as follows: -

"The Public Procurement and Disposal Regulations, 2006 are hereby revoked."

This means that as at 2nd July 2020, the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the Repealed 2006 Regulations") stood revoked. However, the subject tender was advertised on 7th January 2020 and closed on 29th January 2020. This means that as at 29th January 2020 when tenders received by the Respondents were opened, the Repealed 2006 Regulations were in force because the 2020 Regulations only took effect on 2nd July 2020. In this regard therefore, the Procuring Entity erred in its application of

Regulation 74 (2) of the Regulations 2020 in the subject procurement process.

Given that the Procuring Entity terminated the subject tender because it took the view that all tenders were non-responsive, the Board must now establish whether or not the Procuring Entity rightfully arrived at the decision of responsiveness of the 1st and 2nd Applicant having noted the said bidders challenged the reason why their respective bids were found non-responsive through this Consolidated Request for Review.

The letter of notification dated 28th January 2021 informed the 1st Applicant that its bid was unsuccessful since its bid ***'provided a total of three (3) dogs at a unit cost of Kshs 370,000.00 and at a total cost of Kshs 2,960,000.00 instead of a total cost of Kshs 1,110,000.00.'***

Further, the 2nd Applicant was informed that its bid was unsuccessful for the reason ***'your price schedule had arithmetic errors where the unit cost for 2nd year and 3^d year support was indicated as KES. 1,125,200.00 and KES 1,125,000.00 respectively yet the same were not carried forward to the Form of Tender.'***

In addressing this issue, it is important to point out that the Act changed the manner in which a procuring entity should treat errors found in a tender during Financial Evaluation. Under the Public Procurement and Disposal Act, 2005 (Repealed) (hereinafter referred to as "the Repealed Act"), a bidder in a procurement process would quote a tender price, or what it referred to as the total price of a tender which would be read out

by a procuring entity at the opening of tenders in accordance with section 60 (5) (b) of the Repealed Act which provided as follows: -

"As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register —

(a) the name of the person submitting the tender;

(b) the total price of the tender including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed;

The Board notes that section 66 (4) of the Repealed Act provided that: -

"The successful tender shall be the tender with the lowest evaluated price."

This means that, award of a tender would be based on the lowest evaluated price as determined by the procuring entity at the conclusion of financial evaluation. In arriving at the lowest evaluated price during financial evaluation, a procuring entity would correct arithmetic errors as explained in section 63 of the Repealed Act which provided as follows: -

"(1) The procuring entity may correct an arithmetic error in a tender.

(2) The procuring entity shall give prompt notice of the correction of an error to the person who submitted the tender.

(3) If the person who submitted the tender rejects the correction, the tender shall be rejected and the person's tender security shall be forfeited."

This meant that during the process of financial evaluation of bids, a procuring entity would determine if there were any discrepancies in the amount quoted in a bid. If any discrepancies or errors were detected, a procuring entity would correct arithmetic errors only if the bidder in question accepted the corrections as made by the procuring entity. If the respective bidder rejected the corrections, the bid in question would be rejected at this stage of evaluation.

The process of arriving at the lowest evaluated price was further explained in Regulation 50 of the Repealed 2006 Regulations made pursuant to the Repealed Act. The said provision states as follows: -

"(1) Upon completion of the technical evaluation under Regulation 49, 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-

(a) taking the bid price, as read out at the bid opening;

(b) taking into account any corrections made by a procuring entity relating to arithmetic errors in a tender;

(c) taking into account any minor deviation from the requirements accepted by a procuring entity under section 64(2) (a) of the Act;

(e) where applicable, converting all tenders to the same currency, using a uniform exchange rate prevailing at the date indicated in the tender documents;

(f) applying any discounts offered in the tender;

(g) applying any margin of preference indicated in the tender documents.

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be the tender with the lowest evaluated price in accordance with section 66(4) of the Act (now section 86 (1) in the 2015 Act)

[Emphasis by the Board]

The Repealed 2006 Regulation introduced steps for arriving at the lowest evaluated price during Financial Evaluation. This is due to the fact that, inevitably, a bid may contain arithmetic errors, minor deviations, and there may be need to convert tenders to the same currency using the prevailing exchange rates in the case of international competitive bids, to apply discounts offered by a tender and to apply a margin of preference as specified in the Tender Document and as required by the Act.

As far as corrections were concerned, a procuring entity in determining the evaluated price of a bid would include any corrections made by a

procuring entity relating to arithmetic errors in a tender in accordance with Regulation 50 (2) (b) of the Repealed 2006 Regulations. As explained and outlined hereinbefore in section 63 of the Repealed Act, a procuring entity would correct arithmetic errors only if there was concurrence with the bidder in question. Following acceptance of these corrections by a bidder, and taking into consideration the other factors as listed under Regulation 50 of the Repealed 2006 Regulations, a procuring entity would arrive at the evaluated price of a bid.

A procuring entity would then proceed to rank bidders in order to determine the lowest evaluated bidder in accordance with Regulation 50 (3) of the Repealed 2006 Regulations. An award of tender was therefore made based on the lowest evaluated price pursuant to section 66 (4) of the Repealed Act and which evaluated price would at times be different from the tender price, now known as the tender sum.

The enactment of the Public Procurement and Asset Disposal Act of 2015 changed the manner in which a procuring entity should treat any discrepancies or errors that it may find in a bid during financial evaluation. Section 82 of the Act states as follows: -

"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."

This provision of the Act expressly prohibits any alterations or corrections to the tender sum which remains absolute and final and is not subject to any correction, adjustment or amendment. Accordingly, any corrections made by a procuring entity to a bidder's tender sum

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

At this point, it is important to emphasize that applicability of the Repealed 2006 Regulations to the subject procurement process does not mean that provisions of the Act ought to be ignored by the Procuring Entity, especially in this instance where section 82 of the Act prohibits any correction, adjustment or amendment in any way of the tender sum in the Form of Tender by any person or entity. We say so because it is a well settled position in law that provisions of a subsidiary legislation (in this case, the Repealed 2006 Regulations) cannot override provisions of an Act of Parliament (in this case, the 2015 Act). Section 24 (2) of Statutory Instruments Act, 2013 provides that: -

"A statutory instrument 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."

The Court in **Petition No. 20 of 2019, Victor Juma v Kenya School of Law; Council of Legal Education (Interested Party) [2020] eKLR** had occasion to address the import of section 24 (2) of the Statutory Instruments Act, 2013, where it held as follows: -

"I agree with the decisions of my brothers in the cited cases and only add that the decisions are consistent with the provisions of Section 24 (2) of the Statutory

Instruments Act, 2013 which states that a statutory instrument should 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. 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.”

It is also important for this Board to point out that the Repealed 2006 Regulations were made pursuant to section 140 of the Repealed Act which provided as follows: -

“The Minister shall make regulations generally for the better carrying out of the provisions of this Act [Repealed Act]” Emphasis by the Board

In essence, the Repealed 2006 Regulations should not be inconsistent with its enabling Act (the Repealed Act) and the 2015 Act pursuant to section 24 (2) of the Statutory Instruments Act and where such inconsistency arises, the 2015 Act (which is the Act of Parliament on public procurement and asset disposal proceedings currently in force) must prevail.

It is the Board’s considered view that the mischief the Act has cured is a scenario where a bidder can quote a figure ‘X’ as its tender sum in the

Form of Tender in anticipation of being the lowest evaluated bidder. However, upon realization that such a bidder is not the lowest evaluated bidder, it would collude with a procuring entity to correct arithmetic errors which it 'deliberately' created in its breakdown of prices (i.e. in the Bills of Quantities) so that upon correction, its tender sum is revised downwards, lower than the initial lowest bidder and be awarded the tender based on the corrected figure.

Notably, section 79 (2) (b) of the Act 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"

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. It is the Board's considered view that, certain errors or oversights can be corrected without affecting the substance of a tender as stated in section 79 (2) (b) of the Act. That notwithstanding, the tender sum remains the same and thus any error that leads to correction, adjustment and amendment of the tender sum is prohibited by section 82 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. In this regard therefore, the Procuring Entity herein (assuming they were supposed to undertake financial evaluation) did not have leeway to apply Regulation 74 of Regulations 2020, which is not applicable in the subject tender, without considering the import of section 79 (2) (b) and 82 of the Act as already explained hereinbefore.

In view of the foregoing, the Board finds that there was no room for the Procuring Entity to correct arithmetic errors in tenderers' bids assuming the Procuring Entity was supposed to undertake re-evaluation at the financial evaluation stage. In essence, even assuming the Respondents were required to undertake a re-evaluation at the financial evaluation stage, the Procuring Entity ought to have been guided by section 82 of the Act which makes the tender sums submitted by the 2nd Applicant and the 1st Applicant in their respective Forms of Tender, final and binding to them.

The statutory pre-conditions for termination of a tender requires this Board to consider both substantive and procedural requirements for termination outlined in section 63 of the Act whenever a procuring entity relies on the said provision to terminate a tender. 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 from the date of termination.

The Board observes that in the Procuring Entity’s confidential file, a document titled ‘**Tender Termination Approval Form**’ was prepared by the Procuring Entity’s Deputy Commissioner Supply Chain Management, one Grace Murichu-Kariuki and approved by the Commissioner General, one Githii Mburu, CBS with the following details provided therein: -

"TF: (2015) 2020-2021/

- A. DEPARTMENT: CUSTOMS AND BORDER CONTROL***
- B. DESCRIPTION: SUPPLY AND DELIVERY OF K9 DOGS AND TRAINING OF DOG HANDLERS FOR A PERIOD OF THREE (3) YEARS***
- C. WHY REQUIRED: ENHANCE SECURITY AT JKIA, MIA, KILINDINI, ICDE AND OTHER POINTS OF ENTRY***
- D. WHEN REQUIRED: IMMEDIATELY***

E. TENDER: KRA/HQS/NCB-046/2020-2021

RECOMMENDATION: *Termination of the procurement for Supply and Delivery of K9 Dogs and Training of Dog Handlers for a Period of Three (3) years.*

This is based on section 63 (1) (e) of the Public Procurement and Asset Disposal Act, 2015 that states section 63 (1) (f) of the PPADA, 2015 which states that "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 all evaluated tenders are non-responsive."

Subsequently thereafter, the Procuring Entity prepared a report of termination of the subject procurement proceedings disclosing its reason for termination thereof. However, the Board was not furnished with evidence of dispatch of the said report to the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") or a receiving stamp of the Authority affixed on the face of the said report to demonstrate the same was received by the Authority and the date when it was received. This would have assisted the Board in determining whether the report was indeed received by the Authority within fourteen days of termination of the subject tender.

With respect to section 63 (4) of the Act, the Board observes that letters of notification of termination were issued to both the 1st Applicant and the 2nd Applicant as cited hereinbefore, disclosing the reason for termination of the subject tender. The letters of notification of termination were prepared on 28th January 2021 and as established by the Board, the 2nd Applicant received its letter of notification via email on

29th January 2021. On its part, the 1st Applicant merely stated at paragraph 8 of its Request for Review and paragraphs 2 and 11 of its Written Submissions that its letter of notification was dated 28th January 2021 without clarifying the date when the same was received by it.

In terms of the procedural requirements, the Board notes despite notifying bidders such as the 2nd Applicant, within 14 days from the date of termination, the Board was not furnished with evidence of dispatch of the report on termination to the Authority or a receiving stamp of the Authority to demonstrate the same was received by the Authority within fourteen days of termination of the subject tender.

Accordingly, the Board finds that the Procuring Entity failed to prove that it complied with the procedural requirements under section 63 (2) & (3) of the Act because the Board was not furnished with evidence of dispatch of a report of termination prepared pursuant to section 63 (2) of the Act and issued to the Authority.

It is important to emphasize that both substantive and procedural requirements for termination of a tender must be satisfied for the Board to find such a termination satisfied the statutory pre-conditions for termination specified in section 63 of the Act. The Procuring Entity in this instance, did not have room to disqualify bidders based on Regulation 74 (2) of Regulations 2020 which in any case, did not apply to the subject procurement proceedings and thus, ought not to have been applied in the alleged financial re-evaluation. Furthermore, the procedural requirements under section 63 (2) & (3) of the Act were not satisfied because the Board was not furnished with evidence of dispatch

of a report of termination prepared pursuant to section 63 (2) of the Act and issued to the Authority

Accordingly, the Board finds that the Procuring Entity's decision terminating the subject tender fails to meet the threshold set by section 63 of the Act and thus cannot be allowed to stand.

In totality of the second issue for determination, the Board finds that the Procuring Entity failed to terminate the subject procurement proceedings in accordance with the substantive and procedural requirements provided for in section 63 of the Act thus rendering the said termination null and void. The effect of this finding is that the second limb of the 1st and 2nd Respondents' Preliminary Objection filed on 24th February 2021 is hereby dismissed and the Board finds that it has jurisdiction to address the third issue framed for determination.

The third issue for determination relates to the question whether the Procuring Entity complied with the orders issued on 14th January 2021 in Review No. 158/2020.

Having considered parties' pleadings and submissions, the Board observes that this is the third time that the subject tender has been filed before it. The first time the subject tender was before this Board was in Review No. 51/2020, whereby the 2nd Applicant *inter alia* challenged the Procuring Entity's decision to disqualify its bid at the Technical

Evaluation Stage. In a decision rendered by this Board on 5th May 2020, the Board allowed the Request for Review Application and *interalia* directed the Procuring Entity to re-admit the 1st and 2nd Applicant's respective bids at the Technical Evaluation Stage and conduct a re-evaluation at the Technical Evaluation Stage in accordance with the provisions of the Act, the Constitution and taking into consideration the findings of the Board in that review.

Dissatisfied with the decision of the Board, the Procuring Entity and the 1st Applicant lodged applications for Judicial Review before the High Court, which were consolidated as **Judicial Review Miscellaneous Application 101 of 2020 Republic v Public Procurement Administrative Review Board; Accounting Officer Kenya Revenue Authority & another (Interested Parties) Skaga Limited & another (Ex-Parte Applicant) [2020] eKLR**. At paragraph 103 of her judgment rendered on 16th November 2020, the Honourable Lady Justice Pauline Nyamweya held that the decision of the Board in Review No. 51/2020, was made within the Board's jurisdiction, fairly, reasonably and rationally, and did not take into account irrelevant factors, thus dismissed the judicial review applications forthwith. This means that the decision of the Board in Review No. 51/2020, as rendered on 5th May 2020 was final and binding on all parties to that request for review application, noting that the High Court did not interfere with the orders issued by this Board therein.

The second time the subject tender was before this Board was in Review No. 158/2020 whereby the 2nd Applicant *interalia* contended that the Procuring Entity did not conduct due diligence on it in accordance with

section 83 of the Act. In a decision rendered on 14th January 2021, the Board expunged that part of the due diligence report from the Procuring Entity's user department, giving a negative response on the 2nd Applicant from the Post Qualification /Due Diligence Report signed on 27th November 2020, having established that the Procuring Entity was neither objective nor fair in its consideration of the same. The Board upheld the remaining parts of the Due Diligence Report and directed the 1st Respondent to proceed with the procurement process to its logical conclusion, including making an award within fourteen (14) days from the date of the said decision. Noting that there is no evidence that a judicial review application was filed before the High Court challenging the Board's decision in Review No. 158/2020, the same is final and binding to all parties to that review application.

The Board examined the Procuring Entity's confidential documents submitted pursuant to section 67 (3) (e) of the Act in order to establish whether the Procuring Entity complied with the orders of the Board in Review No. 158/2020 and we therefore proceed to make the following findings: -

According to the Evaluation Committee's Post Qualification/Due Diligence Report dated 28th January 2021, the Evaluation Committee conducted a verification of the information provided by the 2nd Applicant from its referenced clients, whose findings are summarized as captured on page 2 and 3 thereof: -

Client	Evaluation Criteria	Client Response	KRA Remarks
Safaricom Limited	Additional Information on the dogs supplied by on The Mark security limited as to whether they are Explosives detection dogs as stated in	Safaricom confirmed that On The Mark Security Limited has been providing explosive and drugs detection dogs during Safaricom events and	The Bidder was found responsive on Safaricom reference site.

Client	Evaluation Criteria	Client Response	KRA Remarks
	the reference letter	Facilities.	
Market Masters Limited	Additional Information on the category of dogs supplied by on The Mark security limited as to whether they are Explosives detection dogs or Narcotic detection dogs as stated in the reference letter.	Market Masters Limited confirmed that on The Mark Security Company has been providing dogs to the tribe and trademark Hotels during the Past three years. They affirmed that the dogs can handle whatever they have been trained to do (I, e Narcotics, explosives Security detection and recognition of illegal substance and terrorism) and they used to carry out regular testing where the dogs would pass all the time.	The Bidder was found responsive on market Masters site reference site.
Polymath Interscience LLC,	Qualification requirement for interested vendors was to provide evidence on the training Aids including importation documents. Solomon Kimeu proprietor of On The Mark Security Limited provided Invoice Number Tax ID/EIN/VAT No.:800174935 dated 22nd January, 2020 as evidence of having procured Canine Training Aids from Polymath Interscience LLC.	No Response was obtained via email communication to Polymath Interscience LLC, and the telephone (+1 4109901199) provided in the invoice was not going through.	The Authenticity could not be determined from the outcome of the reference site.

From the above summary, the Board observes Safaricom Limited and Market Masters Limited gave a positive response with respect to the 2nd Applicant. However, the Evaluation Committee could not verify the authenticity of an Invoice provided by the 2nd Applicant as evidence of having procured training aids from Polymath Interscience LLC as the said vendor could not be reached.

Further, on page 4 of the said report, the Evaluation Committee made the following observation: -

**"OBSERVATION ON FINANCIAL EVALUATION FOR BIDDER NO.
1**

- 1) The evaluation committee noted the price schedule for On the Mark Security had arithmetic error on the unit cost of 2nd & 3rd year support as KES 1,125,200.00 and Kes 1,125,000.00 respectively but did not sum up the cost to the Form of Tender.**
- 2) Based on this variance the actual cost could have been KES 17,869,800.00 hence the committee recommended for a disqualification of the firm pursuant to section 82 of the PPADA, 2015 which states, "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.**
- 3) The committee therefore recommended due diligence to the second lowest evaluated bidder. M/s Skaga Ltd"**

According to the above excerpt, prior to recommendation of award, the Evaluation Committee examined the 2nd Applicant's price schedule and observed an arithmetic error on the unit cost of 2nd & 3rd year support as Kshs. 1,125,200.00 and Kshs 1,125,000.00 respectively but did not sum up the cost to the Form of Tender. Further, based on this variance and noting that the actual cost could have been Kshs 17,869,800.00, the Evaluation Committee disqualified the 2nd Applicant's bid and recommended that due diligence be carried out on the 2nd lowest bidder, this being the 1st Applicant.

On page 4 of the said report, the Board observes that the Evaluation Committee further conducted a due diligence exercise on the 1st Applicant and obtained positive responses from its referenced clients, that is, G4S Kenya Limited, Safaricom Limited and Securex Agencies (K) Limited. Upon conclusion of this exercise, the Evaluation Committee proceeded to examine the Financial Proposal for the 1st Applicant and observed as follows: -

- 1) The evaluation committee detected some calculation computation error on Item no. 2 for (Explosive Detector Dogs) where the unit cost was contrary to the total cost inclusive of tax @16 %.***
- 2) The bidder provided a total of three (3) dogs at a unit cost of Kshs 370,000.00 and at a total cost of Kshs 2,960,000.00 instead of Kshs 1,110,000.00 hence submitting a form of tender of Kshs 18,473,000.00.***
- 3) Based on this variance the actual total cost could have been KES 16,623,000.00 hence the committee recommended for a disqualification of the firm pursuant to section 79 (2) (b) of the Act "Any errors in the submitted tender arising from a 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.***

The information obtained from the above bidder's confirmed that both had arithmetic errors that affected their final output of Form of Tender. Based on the above findings the committee recommended termination of contract for Supply and Delivery of K9 Dogs and Training of Dog Handlers pursuant to Public Procurement and Disposal Regulations, 2020 74 (2) subject to section 79 (2) (b) of the Act "Any errors in the submitted tender arising from a 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."

Having detected computation errors in the 1st Applicant's bid the Evaluation Committee disqualified the 1st Applicant's bid and recommended a termination of the subject tender pursuant to '***Public Procurement and Disposal Regulations, 2020 74 (2)***'.

The Head of Supply Chain Management in his Professional Opinion signed on 28th January 2021, concurred with this recommendation of termination and made the following remarks on page 5 thereof: -

"Recommendation for termination of Procurement Ref. No. KRA /HQS/NCB-046/2020-2021 for Supply and Delivery of K9 Dogs and Training of Dog Handlers for a period of three (3) years in line with Section 63 (1)(f) of the PPADA, 2015 which states that "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 all evaluated tenders are non-responsive.”

Accordingly, the Procuring Entity terminated the subject tender pursuant to section 63 (1) (f) of the Act.

In addressing the third issue for determination, the Board would like to first reiterate its finding that the Procuring Entity failed to terminate the subject procurement proceedings in accordance with the substantive and procedural requirements for termination of the subject tender as outlined in section 63 of the Act. In making this finding, the Board has established that assuming the Procuring Entity was required to undertake re-evaluation at the financial evaluation stage, the Procuring Entity in this instance did not have room to disqualify bidders based on Regulation 74 (2) of Regulations 2020 which in any case, did not apply to the subject procurement proceedings.

This brings us to the question, whether the Board ordered a re-evaluation of bids at the Financial Evaluation Stage?

The starting point in addressing this question is to point out that the orders issued by the Board in Review No. 158/2020 did not direct a re-evaluation of the 1st Applicant’s bid or the 2nd Applicant’s bid at the Financial Evaluation Stage. To that extent, the re-evaluation of the 1st Applicant’s bid and the 2nd Applicant’s bid at the Financial Evaluation

Stage undertaken by the Respondents was in disobedience of the orders of the Board, in breach of the Act and thus, such a re-evaluation is null and void pursuant to section 175 (6) of the Act.

Secondly, the Board in Review No. 158/2020 observed that the Evaluation Committee recommended award of the subject tender to the 2nd Applicant at its tender price of Kshs. 15,619,400.00 having determined this bidder was the lowest evaluated bidder. A due diligence exercise was then conducted on the 2nd Applicant and the Board in Review No. 158/2020 expunged that part of the due diligence report from the Procuring Entity's user department, giving a negative response on the 2nd Applicant from the Post Qualification /Due Diligence Report signed on 27th November 2020 but upheld the Due Diligence Report signed on 27th November 2020 to the extent of the positive responses received regarding the 2nd Applicant. In its orders, the Board directed the Procuring Entity to proceed with the subject procurement proceedings to its logical conclusion, including the making of an award.

Evidently, the Board did not direct the 1st Respondent to conduct a due diligence exercise on the 1st Applicant or 2nd Applicant. The orders issued by the Board in Review No. 158/2020 specifically directed the 1st Respondent to conclude the subject procurement proceedings by making an award in the subject tender, which ought to have been made on the lowest evaluated tenderer. To that extent, any due diligence exercise conducted on the 1st Applicant and the 2nd Applicant by the Respondents was in disobedience of the orders of the Board, in breach

of the Act and thus, such a due diligence exercise is null and void pursuant to section 175 (6) of the Act.

In this regard therefore, the Procuring Entity did not comply with the Board's orders in Review No. 158/2021, in so far as it conducted a financial re-evaluation and due diligence exercise on the 1st and 2nd Applicants.

The Board is cognizant of section 175 (1) of the Act which provides as that: -

"A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties" [Emphasis by the Board]

Accordingly, the decision of this Board is final and binding to parties to a request for review application unless challenged through judicial review by the High Court within fourteen days from the date the decision is issued by this Board.

The Procuring Entity in this instance, did not challenge the decision of the Board rendered on 14th January 2021 in Review No. 158/2020 and therefore had the obligation to implement the said decision in terms of the specific orders issued therein. This means, the Procuring Entity did not have leeway to conduct a re-evaluation at the financial evaluation stage or a due diligence exercise on the 1st and 2nd Applicants since the

decision and orders issued in Review No. 158/2020 are final and binding to the Respondents.

In so far as compliance with the orders of this Board is concerned, Board would like to point out that the orders of this Board as issued in Review No. 158/2020 must be discharged in terms of the specific directions given by the Board. In **Macfoy vs United Africa Co Ltd [1961] 3 All ER 1169**, Lord Denning delivering the opinion of the Privy Council at page 1172 (I) held as follows:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado; though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

As established by this Board, the Procuring Entity never challenged the Board's decision in Review No. 158/2020 therefore the same remains final and binding to it as stated in section 175 (1) of the Act. Notably, this is the third time that the subject tender is before the Board.

In Judicial Review Miscellaneous Application No. 154 of 2016, Republic v Public Procurement Administrative Review Board Ex

parte Kenya Electricity Generating Company Limited (KENGEN) & 3 others [2016] eKLR, the High Court held that: -

"If in the course of purporting to proceed with the procurement the Procuring Entity made a decision which was contrary to the law, an aggrieved party was of course at liberty to challenge the same as the interested party did in this matter. A failure to comply with a decision of the Review Board or to appeal from such decision leads to blatant disobedience of the orders of a decision making body established by law"

Further in **PPARB Application No. 94 of 2016, Lyape Investments v. Kenya Marine & Fisheries Research Institute & Another**, the Board held that:-

"The Procuring Entity having failed to follow the orders of the Board in Review No. 83 of 2016, this Board cannot fold its hands when faced with a situation where the Procuring Entity fails to obey the orders made by it. The Board will employ the powers conferred upon it by section 173 of the Act and make such orders as will meet the ends of justice in any matter pending before it"

Having considered the above authorities, the Board would like to note that the framers of the Act, in establishing this Board envisioned that public procurement processes would be guided by tenets of the Constitution. This means that the public would benefit from services offered by a procuring entity but that such procuring entity would

uphold the rule of law and constitutional democracy in its procurement process.

The Constitution cannot be upheld where a procuring entity chooses not to comply with orders issued to it by a decision making body established under any written law. The Court in **Petition No. 11 of 2019, Gideon Omare v Machakos University [2019] eKLR** cited with approval, the decision in **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828, Ibrahim, J** (as he then was) where it was held as follows:-

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged".

In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:-

"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged...A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the

suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. As long as a court order exists, it must not be disobeyed”

Courts have exhaustively dealt with the consequences of a party’s failure to comply with the orders of a court or other decision making body established by any written law, for the simple reason that failure to comply with orders issued to a public entity offends the rule of law and constitutional democracy. The Procuring Entity herein blatantly refused to comply with the orders of the Board issued in the decision rendered in Review No. 158/2020, neither did it give any justifiable reason why it did not comply with the Board’s orders.

Accordingly, the Board finds that the Procuring Entity failed to comply with the orders of the Board issued on 14th January 2021 in **PPARB Application No. 158/2020, On the Mark Security Limited v. The Accounting Officer, Kenya Revenue Authority & Another.**

In determining the appropriate orders to grant in the circumstances, the Board observes that one of the prayers made by the 2nd Applicant in its Request for Review is for the Board to “substitute the annulled decision with an award of the tender to the 2nd Applicant”.

The Board is cognizant of section 173 (c) of the Act which provides that:-

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

(a);

(b);

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings"

The Board takes cognizance of the fact that it has only exercised the power under section 173 (c) of the Act in exceptional circumstances where it is clear that there is a remaining bidder at the Financial Evaluation Stage who would be determined to have submitted the lowest evaluated tender, should the Board order a re-evaluation. In the instant case, the orders of the Board in Review No. 158/2020 did not order a re-evaluation at the Financial Evaluation Stage, because the issue under consideration in that case was the conduct of due diligence, after financial evaluation and recommendation of award of the subject tender to the 2nd Applicant had already been made.

The Board in Review No. 158/2020 expunged the report from the Procuring Entity's user department, giving a negative response on the 2nd Applicant from the Post Qualification /Due Diligence Report signed on 27th November 2020, having established that the Procuring Entity was neither objective nor fair in its consideration of the same. The Board upheld the remaining parts of the Due Diligence Report and directed the 1st Respondent to proceed with the procurement process to its logical conclusion, including making an award within fourteen (14) days from

the date of the said decision. In this regard therefore, it is evident that the 2nd Applicant, after conclusion of a satisfactory due diligence exercise as captured in the report signed on 27th November 2020, was eligible for award as the lowest evaluated bidder, having noted the Evaluation Committee had previously recommended the 2nd Applicant for award of the tender at Kshs. 15,619,400.00. It therefore means, the Respondents were supposed to note the findings of due diligence on the 2nd Applicant as upheld by the Board and proceed to award of the subject tender, as opposed to moving backwards to undertake another re-evaluation and due diligence process on the 1st and 2nd Applicant in blatant breach of the Board's orders.

In **Republic vs Public Procurement Administrative Review Board & 2 Others Ex parte Numerical Machining Complex Ltd**, the court held as follows regarding the exercise of the power under section 173 (c) of the Act: -

"...the provisions of section 173 (c) of the 2015 Act cannot be read in isolation to the other provisions of the Act and that the power to substitute the decision of the Procuring Entity cannot be unlimited. It must be exercised lawfully. That power can only be exercised with respect to what the Procuring Entity was lawfully permitted to undertake both substantively and procedurally.

The Supreme Court of South Africa in **Gauteng Gambling Board v Silverstar Development Ltd and Others (80/2004) [2005] ZASCA 19 (29 March 2005)** addressed the meaning of section 8(1)(c)(ii) (aa) of the Promotion of Administrative Justice Act 3. of 2000

of South Africa which contains an almost similar discretionary power enumerated as follows: -

The Review Court may undertake any of the following-

'set aside the procurement decision and remit it for reconsideration or, in exceptional cases, substitute the procurement decision or correct a defect resulting from it.'

In that case, the Supreme Court of South Africa explained the term 'exceptional' as applied in the aforementioned legislation as follows: -

'Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.

The exceptional circumstances in the instant case are that the 2nd Applicant was the lowest evaluated bidder and the Board upheld the positive responses from the due diligence exercise conducted on the 2nd Applicant. The subject procurement proceedings have been delayed for by the Procuring Entity for over one year since its inception in 7th January 2020. The Procuring Entity has constantly devised ways to ensure that the lowest evaluated tenderer is not awarded the subject

tender despite the fact that, the decision in Review No. 51/2020 was not quashed and/or set aside by the High Court and despite the Procuring Entity's failure to challenge the decision of the Board in Review No. 158/2020.

The review before the Board is one of the exceptional circumstances where the Procuring Entity has refused to award the subject tender to the lowest evaluated tenderer, in view of the Procuring Entity's failure to comply with the orders of the Board in Review No. 158/2020 and moreso, proceeding to terminate the subject tender in clear contravention of the provisions of section 63 of the Act.

Article 227 (1) of the Constitution requires procurement of goods and services to be undertaken in a system that is fair, equitable, transparent, competitive and cost-effective. According to Page 27 of the Tender Document, the K9 Narcotics and Explosive sniffer dogs being procured in the subject tender are to be deployed in three major international airports namely; Jomo Kenyatta International Airport-Nairobi, Moi International Airport-Mombasa and Eldoret International Airport as well as the main One Stop Border Posts in Namanga, Malaba and Isebania, upon training of the said K9 dogs to work in the aforementioned different locations.

The Board sees no need to delay the procurement process any further, given that, public money has been used by the Procuring Entity to undertake the subject procurement process and that one year has already lapsed without the same being concluded.

Having established the 2nd Applicant was the lowest evaluated tenderer and that the positive findings on due diligence were upheld by this

Board in Review No. 158/2020, the Board finds that the 2nd Applicant is eligible for award of the subject tender as the lowest evaluated tenderer.

In totality, the Consolidated Request for Review is hereby allowed in terms of the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Consolidated Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification of Termination of Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers dated 28th January 2021, addressed to the 1st Applicant, be and is hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Termination of Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers dated 28th January 2021, addressed to the 2nd Applicant, be and is hereby cancelled and set aside**
- 3. The Accounting Officer of the Procuring Entity is hereby directed to award the subject tender to M/s On the Mark**

Security Limited, the 2nd Applicant herein within seven (7) days from the date of this decision, taking into consideration the Board's findings in this Review.

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

Dated at Nairobi this 3rd Day of March 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB