

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.07/2022 OF 7TH JANUARY 2022

BETWEEN

GENAFRICA ASSET MANAGERS LIMITED APPLICANT

VERSUS

THE ACCOUNTING OFFICER, THE PUBLIC

SERVICE SUPERANNUATION SCHEME 1ST RESPONDENT

THE PUBLIC SERVICE

SUPERANNUATION SCHEME 2ND RESPONDENT

Review against the decision of the Accounting Officer, The Public Service Superannuation Scheme in relation to Tender No: PSSS/002/2020-2021 for Procurement of a Fund Manager for The Public Service Superannuation Fund.

BOARD MEMBERS

1. Ms. Faith Waigwa - Chairperson
2. Mr. Steven Oundo, OGW - Member
3. Mrs. Irene Kashindi - Member
4. Mr. Ambrose Ogeto - Member

IN ATTENDANCE

Mr. Stanley Miheso

- Holding brief for the Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

The 2nd Respondent, as the Procuring Entity, invited sealed tenders from eligible candidates for Tender No: PSSS/002/2020-2021 for Procurement of a Fund Manager for The Public Service Superannuation Fund (hereinafter referred to as the 'subject tender') by way of Open Tendering Method advertised on MyGov Newspaper, the National Treasury's website (www.treasury.go.ke) and at www.tenders.go.ke on 1st June 2021.

Addenda

The 2nd Respondent issued Addendum I dated 15th June 2021 following a virtual pre-tender meeting addressing clarifications sought by prospective tenderers while extending the tender submission deadline from 17th June 2021 to 22nd June 2021. The 2nd Respondent issued Addendum II dated 21st June 2021 addressing further clarifications sought by prospective tenderers while extending the tender submission deadline from 22nd June 2021 to 24th June 2021 at 11.00a.m.

Tender Submission Deadline and Opening of Tenders

At the extended tender submission deadline of 24th June 2021 at 11.00a.m., the 2nd Respondent received ten (10) tenders. The 2nd Respondent's Tender Opening Committee opened the tenders shortly thereafter in the presence of tenderers' representatives present and recorded the following tenderers as having submitted their respective tenders in good time as captured in the minutes of opening of tender of 24th June 2021 (hereinafter referred to as the 'Tender Opening Minutes'):

Tenderer No.	Tenderer Name
1.	M/s Old Mutual Investment Group
2.	M/s Sanlam Investments East Africa Limited
3.	M/s Co-optrust Investment Service Limited
4.	M/s ICEA Lion Asset Management
5.	M/s African Alliance Kenya Investment Bank
6.	M/s Britam Asset Manager Limited
7.	M/s Absa Asset Management Limited
8.	M/s CIC Asset Management Limited
9.	M/s UAP Life Assurance Limited
10.	M/s Gen Africa Asset Managers

Evaluation of Tenders

A Tender Evaluation Committee appointed by the 1st Respondent (hereinafter referred to as the 'Evaluation Committee') evaluated the ten (10) tenders in the following stages:

- i. Preliminary Examination;
- ii. Detailed Technical Evaluation; and
- iii. Financial Evaluation

Preliminary Examination

At this stage, the Evaluation Committee was required to apply the criteria outlined as Mandatory Requirements of Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 34 of 122 and 35 of 122 of the blank tender document issued by the 2nd Respondent to prospective tenderers (hereinafter referred to as the 'Tender Document'). At the end of evaluation at this stage, five (5) tenders were found non-responsive and another five (5) tenders, which included the Applicant's tender, were found responsive. The tenders that were found responsive proceeded to the next stage of evaluation.

Detailed Technical Evaluation

At this stage, the Evaluation Committee was required to apply the criteria outlined as Detailed Tender Evaluation (ITT 35) of Section III – Evaluation and Qualification Criteria at page 35 of 122 to 37 of 122 of the Tender Document. Tenders required to attain a minimum score of 75% to proceed to the next stage of evaluation. At the end of evaluation at this stage, one (1) tender was found non-responsive while four (4) tenders (which included the Applicant's tender having been assigned the highest score of 97%) were

found responsive. Tenders that were found responsive proceeded to the next stage of evaluation.

Evaluation of Financial Proposals

The four (4) tenderers' financial proposals were opened in the presence of tenderers' representatives present on 21st July 2021 at 11:00hrs.

At this stage, the Evaluation Committee was required to apply the criteria outlined as Price evaluation of Section III – Evaluation and Qualification Criteria at page 37 of 122 of the Tender Document read with S/No.4 of Addendum I of 15th June 2021. The Evaluation Committee assigned financial scores of each tender based on the formulae provided in Addendum I of 15th June 2021.

Thereafter, the Evaluation Committee combined the technical scores and financial scores of each of the four (4) tenders and ranked the Applicant's tender as having attained the highest combined technical and financial scores of 97.6%.

Post Qualification

The Evaluation Committee conducted a due diligence exercise in accordance with Section 83 of the Public Procurement and Asset Disposal Act (hereinafter referred to as the 'Act') on the Applicant as the tenderer who

submitted a responsive tender with the highest evaluated combined technical and financial score and found the Applicant qualified for award of the subject tender subject to a physical due diligence exercise being conducted on the Applicant.

Recommendation

The Evaluation Committee recommended the subject tender be awarded to the Applicant for having submitted a responsive tender at the Preliminary, Technical and Financial stages and obtaining the highest evaluated combined score of 97.6% at 0.232% per annum inclusive of VAT for a three (3) year contract period subject to a physical due diligence exercise being conducted on the Applicant.

Professional Opinion

Pursuant to Section 84 of the Act, the Head, Supply Chain Management Services vide a professional opinion dated 9th December 2021, noted, *inter alia*, that the subject tender was captured under the annual procurement plan 2020-2021 budget and funds for the resultant expenditure were confirmed available thus, *inter alia*, recommended the subject tender be awarded to the Applicant for having submitted a responsive tender having obtained the highest evaluated combined score of 97.6% at a quoted tender sum of 0.232% per annum of the fund value inclusive of VAT for a three (3) year contract period with a further possible extension of three (3) years upon

satisfactory performance and requisite approvals by the 1st Respondent subject to a due diligence exercise being conducted on the Applicant.

Termination of the Subject Tender's Procurement Proceedings

The Board of Trustees of the 2nd Respondent, in its 3rd Special Board Meeting of 12th October 2021, observed that in its 13th meeting of 12th August 2021 re-affirmed its resolution to procure three (3) fund managers as resolved in its meeting of 3rd February 2021 and passed a resolution directing the management of the 2nd Respondent to re-advertise the services sought in the subject tender to procure three (3) fund managers to be in tandem with its resolution of 3rd February 2021. Pursuant to this resolution, the 1st Respondent terminated the procurement proceedings of the subject tender.

Notification to Tenderers

In letters dated 20th December 2021, the 1st Respondent notified all tenderers of the termination of the subject tender on account of the need to review the terms of reference to enable procurement of three (3) fund managers while citing Section 63(1)(e) of the Act on material governance issues having been detected.

THE REQUEST FOR REVIEW NO.07 OF 2022

The Applicant lodged a Request for Review dated 7th January 2022 and filed on even date together with a Statement in Support of the Request for Review

signed by Patrick Kariuki Njoroge, the Managing Director of the Applicant, on 7th January 2022 and a Further Statement signed by Patrick Kariuki Njoroge on 19th January 2022 and filed on even date through the firm of Gerivia Advocates LLP, seeking the following orders:

- a) The 1st Respondent's decision terminating Tender Number PSSS/002/2020-2021 for Procurement of a Fund Manager for the Public Service Superannuation Fund be annulled and set aside;**
- b) The 1st Respondent's letter dated 20th December 2021 notifying the Applicant that Tender Number PSSS/002/2020-2021 for Procurement of a Fund Manager for the Public Service Superannuation Fund has been terminated pursuant to Section 63 (1) (e) of the Act be annulled and set aside;**
- c) The Tender Validity period be extended by the Board for such period as it may deem fit beyond the expiry date of 20th January 2022 to allow for conclusion of the procurement process to its logical conclusion as may ordered by this Honourable Board;**
- d) A declaration that the termination of the Tender by the 1st Respondent pursuant to Section 63 (1) (e) of the Act was unprocedural and illegal as the statutory pre-conditions for invoking termination under that Section of the Act have not been met;**
- e) The 1st and 2nd Respondents be directed to proceed with the procurement to its logical conclusion by making award to the**

lowest evaluated bidder/bidder with the highest combined score, in line with its findings of the evaluation of the Applicant's bid;

f) The Respondent's be compelled to pay to the Applicant the costs arising from/and incidental to this Application; and

g) The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

In a Notification of Appeal and a letter dated 7th January 2022, the Acting Board Secretary notified the Respondents of the existence of the Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 7th January 2022.

On 13th January 2022, the Respondents filed a 1st and 2nd Respondent Statement of Response dated 12th January 2022 signed by Dr. Eddyson H. Nyale, OGW, the 1st Respondent herein and the Acting Chief Executive Officer of the 2nd Respondent, on 12th January 2022 together with confidential documents with respect to the subject tender.

Vide letters dated 18th January 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective emails as provided by the 1st and 2nd Respondents, of the existence of the Request for Review while forwarding to the tenderers a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020. Further, all tenderers were invited to submit to the Board any information and arguments about the subject tender within 3 days from 18th January 2022.

Pursuant to the Board's Circular No.2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

On 19th January 2022, the Applicant filed Applicant's Written Submissions dated on even date and on 20th January 2022, the Applicant filed an Applicant's List of Authorities dated 19th January 2021.

APPLICANT'S CASE

The Applicant avers that pursuant to an invitation by the 2nd Respondent on 1st June 2021, it elected to participate in the subject tender by preparing its tender, attending a virtual mandatory pre-bid conference held on 10th June 2021 at 10:00a.m via zoom platform and submitting its tender prior to the extended tender submission deadline of 24th June 2021. Further, that during

the pre-bid conference and upon enquiry from prospective tenderers, the 2nd Respondent confirmed it was procuring one fund manager.

The Applicant avers that by a letter dated 19th July 2021, the 1st Respondent informed it that its tender qualified for Financial Evaluation and invited the Applicant for opening of financial proposals scheduled for 21st July 2021 at 11.00hrs. The Applicant further avers that by a letter dated 21st July 2021, the 2nd Respondent notified it of the 2nd Respondent's intention to conduct due diligence on the Applicant on 22nd July 2021, which according to the Applicant signified that it submitted the lowest evaluated responsive tender, or in this instance, the highest combined score as contemplated under Section 83 of the Act creating a legitimate expectation that the Applicant stood a high chance of being awarded the subject tender. Further, by a letter dated 1st September 2021, the Applicant wrote to the 2nd Respondent inquiring into the status of the procurement process and when the due diligence exercise was to be conducted but to date, no response thereof has been made by the Respondents.

Pursuant to extension of the tender validity by the 1st Respondent for a period of 30 days from 21st December 2021 to 20th January 2022 and a request by the 1st Respondent for tenderers to extend their tender validity and bid security, the Applicant, on 15th December 2021, delivered a letter dated 15th December 2021 from Development Bank of Kenya Ltd confirming

extension of its bank guarantee up to 28th February 2022 and a letter from the Applicant extending its tender validity until 28th February 2022.

However, it is the Applicant's averment that by a letter dated 20th December 2021 and collected by the Applicant from the 2nd Respondent's office on 28th December 2021 upon request, the 1st Respondent notified it of the termination of the procurement proceedings of the subject tender on account of the need to review the terms of reference to enable the procurement of three (3) fund managers while citing Section 63(1)(e) of the Act which provides for termination where material governance issues have been detected.

The Applicant alleges the said termination and reasons thereof is unprocedural and illegal as it violates the Act and Constitution and will result in (i) profound injustice and prejudice on the part of the Applicant leading to unwarranted loss and damage since the 2nd Respondent has already disclosed the technical and financial scores and the financial proposal values, which disclosure of this sensitive commercial information can only work to the disadvantage of the tenderer with the highest combined score and to the advantage of the other tenderers who will use that marking scheme to improve their performance if the tender is re-advertised, (ii) furtherance of an illegality as the Fund continues to operate without a fund manager thus putting members' retirement savings at risk, contrary to the clear provisions of Section 36 of the Public Service Superannuation Scheme Act and the

Retirement Benefits Act, specifically Section 8(2) (gg) of the Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000 which list the duties of trustees to include “*ensuring that scheme funds are being invested by a manager, duly appointed by the trustees, as specified in the Act, these Regulations, and the scheme rules*” and other Regulations under the Retirement Benefits Act which require appointment of a fund manager for schemes and funds; and (iii) waste of public resources since the 2nd Respondent (pursuant to an unlawful termination) is attempting to abandon the process under the subject tender with an intention of re-advertising it thus effectually commencing the process afresh.

The Applicant alleges the reason for termination given as a need to review the terms of reference to enable the procurement of 3 fund managers is unjustifiable, illegal, unprocedural, irrational and defeats the principles of cost effectiveness, fairness, transparency and accountability under Articles 10 and 227 (1) of the Constitution and the principles of efficient use of public finances under Article 201 of the Constitution and that such reason do not amount to material governance issues. According to the Applicant, material governance issues within the meaning of Section 63(1)(e) of the Act refer to significant issues detected by a procuring entity including malpractices such as fraud, corruption or collusive tendering or operational challenges emanating from policy decisions in a procurement process that would amount to material governance issues contrary to the principles of governance and the national values under the Constitution.

The Applicant alleges that since the reasons given for the purported termination are insufficient and are not supported by any real or tangible evidence, they do not meet the threshold under Section 63(1)(e) of the Act, thus resulting to an illegal and unprocedural termination process and any termination process undertaken outside the strictures of the law, like in the present case, is null and void and therefore, the subject tender remains alive.

According to the Applicant, Section 63 of the Act was intended to cater for unforeseen events or deal with governance concerns such as those relating to fraud or corruption that had not or could not have been detected earlier and invocation of Section 63 of the Act based on whim, to accommodate tenderers other than the lowest evaluated responsive tenderer/tenderer with the highest combined score or for convenience of the procuring entity or certain tenderers is an abuse of the provisions of Section 63 of the Act and the Constitution.

The Applicant avers that the advertisement by the 2nd Respondent in the Invitation to Tender for a fund manager (meaning one fund manager) was not an error or oversight on the 2nd Respondent's part that would necessitate termination. Further, that the Invitation to Tender issued on 1st June 2021, the Tender Document and subsequent documents including the Addenda refer to a fund manager with no reference to fund managers in plural. The issue of number of fund managers was discussed during the pre-bid conference where the 2nd Respondent clarified that it was procuring one fund

manager. If the 2nd Respondent wanted more than one fund manager, it would have, subsequent to the pre-bid conference, made amendments to the Tender Document through Addendum I or Addendum II.

The Applicant avers that the Respondents did not express any concerns that the tenderer with the highest combined score would be unable to deliver the required services under the subject tender if awarded as sole fund manager because the Evaluation Committee did not find all tenders non-responsive at the technical evaluation stage for procurement proceedings of the subject tender to be terminated under Section 63(1)(f) of the Act. According to the Applicant, the Tender Document does not contain any exclusivity clauses for the services being procured and the Respondents are not barred from advertising subsequent tenders to recruit more fund managers, beside the successful tenderer.

The Applicant alleges the termination to make room for 3 more fund managers is ill timed, a mischievous afterthought, unfair to the Applicant, unprocedural and illegal for the following reasons: (i) the reason for termination does not fall within Section 63 of the Act (ii) procurement processes are preceded by procurement planning under Section 44 and 53 of the Act where procurement plans are made within the budget in accordance with fiscal objectives and submitted to the National Treasury (iii) Section 60 of the Act provides specific requirements for tenders and the 1st Respondent had an opportunity at this stage of procurement cycle to decide

how many fund managers the 2nd Respondent required (iv) Section 73 of the Act provides for initiation of a procurement process which is subject to procurement planning with Section 74 of the Act providing for contents of an invitation to tender which the 1st Respondent would have used to capture the number of fund managers it required (v) Section 75 of the Act provides for modification of tenders which the Respondents would have used to amend the Tender Document to reflect 3 fund managers.

From the foregoing, the Applicant prays for scrutiny of the whole procurement process by the Board to ensure compliance with the substantive aspects of the purported termination under Section 63(1)(e) of the Act and compliance with the procedural requirements under Section 63(1) to 63(4) of the Act and should the Board find any non-compliance, render the termination null and void and order the Respondents to conclude the procurement process to its logical conclusion and award the tender to the tenderer with the highest combined score.

1ST & 2ND RESPONDENT 'S CASE

The Respondents contend that the Request for Review is time barred for being filed on 7th January 2022 and served upon it on 8th January 2022 after 14 days notification period expired on 2nd January 2022 from the date of the regret letters dated 20th December 2021 contrary to the provisions of Section 167 of the Act.

The Respondents confirm that the subject tender was advertised on 1st June 2021 and that the Applicant having participated in the same, was recommended for award of the subject tender having been determined to have submitted the lowest evaluated tender with a combined technical and financial score of 97.6% at a tender sum of 0.232% per annum of the Fund value inclusive of 16% VAT for a period of 3 years subject to a physical due diligence of the aspects that could not be verified /undertaken online.

The Respondents contend that, on 30th August 2021, the 1st Respondent declined to approve award of the subject tender to the Applicant but instead directed for a re-advertisement of the services being procured in the subject tender because the 2nd Respondent's Board of Trustees had made a resolution to procure 3 fund managers as per the minutes of their two meetings held on 3rd February 2021 and 23rd April 2021 and that appointment of 1 fund manager working with 3 fund custodians is not tenable and is operationally inefficient.

According to the Respondents, on 8th September 2021, the Supply Chain Management Unit advised the subject tender proceeds to its logical conclusion to identify 1 of the 3 fund managers in conformity with the 2nd Respondent's Board's resolution and re-tender for the remaining 2 fund managers. On 12th October 2021, the 1st Respondent requested for the initiation of a procurement process to re-advertise the services of the subject tender to procure 3 fund managers for the 2nd Respondent. Thereafter, on

11th November 2021, the Supply Chain Management Unit provided scenarios on how a tender may be terminated and on 12th November 2021, the 1st Respondent requested for termination of the subject tender and re-advertisement to procure 3 fund managers as per the 2nd Respondent's Board resolutions and on 23rd November 2021, the 1st Respondent requested for termination of the subject tender on account of material governance issues being detected.

The Respondents confirm having requested tenderers to extend their tender validity for a period of 30 days from 21st December 2021 to 20th January 2022 and at the same time extend their bid security validity for an additional 30 days beyond the Tender Validity period.

According to the Respondents, the 1st Respondent approved termination of the subject tender on 9th December 2021 on account of material governance issues had been detected as guided by the resolution of the 2nd Respondent's Board of Trustees on 23rd November 2021 and directed the use of open tendering method to procure 3 fund managers and thereafter, the 1st Respondent notified tenderers of the termination vide letters dated 20th December 2021.

According to the Respondents, the termination of the procurement proceedings was done in accordance with Section 63(1)(e) of the Act on account of material governance issues being detected because of the need

to review the terms of reference to enable the procurement of 3 fund managers.

The Respondents contend that they have not breached Section 3, 44, 63, 87 of the Act or Articles 10 and 227 of the Constitution because they terminated the subject tender in strict adherence with the Act and Constitution.

From the foregoing, the Respondents contend the Request for Review is incompetent, mischevious and an abuse of the Honourable Board and the same should be dismissed with costs to the Respondents as it lacks merit in law and in fact.

APPLICANT'S REJOINDER

In response to the Respondent's 1st and 2nd Respondent Statement of Response, the Applicant reiterates that it collected the letter of termination dated 20th December 2021 on 28th December 2021.

The Applicant alleges that the 14 day period within which it was required to file a request for Review started running on 28th December 2021 and lapsed on 11th January 2022 yet it filed its Request for Review on 7th January 2022 well within the 14 days. Besides this, the Applicant contends that the Respondents have not furnished any evidence to prove when dispatch of the

letters of termination were made thus, 28th December 2021 remains the uncontroverted date of receipt by the Applicant.

The Applicant contends that all through the procurement process, and looking at the timelines for events touching on the subject tender as captured in the 1st and 2nd Respondent Statement of Response, the 2nd Respondent's Board of Trustees and the 1st Respondent had a clear intention to procure service providers for fund management as follows (i) appointment of a fund manager and an administrator through a tender process; and appointment of three fund managers and three custodians through a tendering process. According to the Applicant, the 2nd Respondent's Board of Trustees was clear on recruiting of three fund managers sequentially and not concurrently and that is why in all its meetings despite being aware and approving of a fund manager, it kept insisting of re-advertisement of other fund managers but at no time did it pass a resolution for termination of the subject tender. Further, the Applicant contends with the 1st Respondent being present in all the 2nd Respondent's Board of Trustees meetings and still elect to proceed with advertisement and procurement of a fund manager, confirms that the 1st Respondent was clear that three fund managers would be recruited sequentially as opposed to concurrently.

The Applicant alleges the termination of the subject tender only arose because it was deemed to be successful and was an afterthought and an attempt to alter the outcome of the evaluation of the subject tender.

The Applicant reiterates that the subject tender's termination is illegal and the re-advertisement should only be for purposes of procuring the remaining two (2) Fund Managers and prays for the Request for review to be allowed.

BOARD'S DECISION

The Board has considered each of the parties' cases, documents, pleadings, written submissions, authorities together with confidential documents submitted to it by the 1st and 2nd Respondents pursuant to Section 67 (3) (e) of the Act and finds the issues that arise for determination are as follows:

- 1. Whether the Request for Review was filed within 14 days of notification of award in accordance with Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020 to invoke the jurisdiction of the Board;**

Depending on the determination of the first issue;

- 2. Whether the 1st Respondent terminated the subject tender's procurement proceedings in accordance with Section 63 of the Act on account of material governance issues having been detected to divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act;**

Depending on the determination of the second issue;

3. Whether there is need for the Board to extend the subject tender's validity period;

4. What orders should the Board grant in the circumstances.

The Board will now proceed to address and make a determination on the issues framed.

Whether the Request for Review was filed within 14 days of notification of award in accordance with Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020 to invoke the jurisdiction of the Board;

The 1st and 2nd Respondents contend that the Request for Review having been filed on 7th January 2022 was filed after 14 days from the date of regret letters dated 20th December 2021 which 14 days expired on 2nd January 2022 contrary to Section 167(1) of the Act.

On its part, the Applicant contends that it collected the letters of notification dated 20th December 2021 from the 2nd Respondent's office on 28th December 2021 and in the absence of evidence of when the Respondents dispatched such letters of notification, the 14 days started running from the 28th December 2021 and lapsed on 11th January 2022 yet the Request for

Review was filed on 7th January 2022 within 14 days from letter of notification of termination of the subject tender.

This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides as follows:

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 for the functions and powers of the Board 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.

The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

(1) 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.

(2)

(3)

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

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 [i.e. Section 63 of the Act] of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]

168.

169.

170.

171.

172.

172. Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

173. Powers of Review Board

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

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(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;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before the Board.

It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section

167(1) of the Act, allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

The manner in which an aggrieved tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

203. Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(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.

(d)

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

(4)

Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act by way of a request for review. Further, this request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification under Section 87 of the Act; or (iii) occurrence of breach

complained of, having taken place after making of an award to the successful tenderer.

Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

It is therefore clear from a reading of Section 167(1) & 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach.

In our considered opinion, it was not the intention of the legislature to provide for three instances when an aggrieved candidate or tenderer can approach the Board, only for such an aggrieved candidate or tenderer to await for the last option, that is, after notification of intention to enter into a contract has been made, when the breach complained of, occurred before the notification of intention to enter into a contract had been made. Allowing such a candidate or tenderer to wait until a notification of intention to enter into a contract has been made for them to approach the Board claiming

breach of duty imposed on a procuring entity by the Act and Regulations 2020, when such breach occurred much earlier in the procurement process and before notification of intention to enter into a contract had been issued, is akin to allowing an aggrieved candidate to have its cake and at the same time eat it.

We say so because, if a breach of duty imposed on a procuring entity by the Act and Regulations occurs at the opening of tenders, and an aggrieved candidate or tenderer decides to await until notification of intention to enter into a contract is issued before approaching the Board, we can bet 100% that such an aggrieved candidate or tenderer will cease being aggrieved if it is awarded the tender. However, if such a candidate or tenderer is not successful to be awarded the tender, it is likely to seek cancellation of the entire procurement processes by the Board based on breach of duty imposed on a procuring entity by the Act and Regulations that occurred during opening of tenders, to enable it have a second bite to the cherry by participating afresh in the event the Board orders for a re-tender after cancellation. This in our view, wastes time for procurement proceedings which are ordinarily time bound, by starting afresh when perhaps the Board would have ordered for an addendum to be issued to amend any breach with respect to the contents of a tender document, had an aggrieved candidate or tenderer approached the Board much earlier.

Turning to the circumstances of this review, it is common ground that the 1st Respondent notified the Applicant of the termination of procurement proceedings of the subject tender by a letter dated 20th December 2021 on account of material governance issues having been detected because of the need to review the terms of reference to enable procurement of 3 fund managers. This in our view was a notification of termination issued under Section 63(4) of the Act and not under Section 87 of the Act which provides for notification of intention to enter into a contract as referred in Regulation 203(2)(c)(ii) of Regulations 2020.

Section 63(4) of the Act provides as follows:

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.

It is our considered opinion, no notification of intention to enter into a contract under Section 87 of the Act has been issued thus, the provisions of Regulation 203(2)(c)(ii) & (iii) of Regulations 2020 were not available to the Applicant.

The only way the Applicant would approach the Board to challenge the decision of the 1st Respondent to terminate the procurement proceedings of the subject tender was to invoke the provisions of Regulation 203(2)(c)(i) of

Regulations 2020 which required the Applicant to file its Request for Review within fourteen days of the occurrence of the breach complained of, having taken place before a notification of intention to enter into a contract under Section 87 of the Act was made.

In our considered opinion, the date of occurrence of breach is the date when the Applicant learnt of the breach complained of, and not the date of the letter communicating such breach. It would be absurd to determine that the date of occurrence of breach is the date of the letter communicating such breach even in instances where such a letter is not dispatched to a tenderer. In such instances, how else would a tenderer approach this Board when they know not, of such breach?

The breach complained of by the Applicant is the alleged illegal and unprocedural termination of procurement proceedings of the subject tender. This was known to the Applicant when the Applicant collected the letter of notification of termination dated 20th December 2021 on 28th December 2021 from the 2nd Respondent's office as averred by the Applicant. To prove this, the Applicant has provided evidence of a copy of the letter of notification of termination dated 20th December 2021 bearing the Applicant's received stamp of 28th December 2021. Further, the Applicant in its Further Statement has produced evidence of its letter dated 3rd January 2022 addressed to the 1st Respondent bearing a received stamp of the Procurement Division of the National Treasury of 3rd January 2022 in which the Applicant acknowledged

having received the letter of notification of termination dated 20th December 2021 on 28th December 2021.

It is trite that he who alleges must prove. This principle is firmly embedded in the Evidence Act, Chapter 80, Law of Kenya which stipulates in Section 107 thereof as follows:

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

The same was enunciated by the Honourable Justice Majanja in the case of **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015]eKLR** where he held as follows:

"....as a general preposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issues"

The Respondents having alleged that the Request for Review was filed outside time, bear the burden to prove the same. In the instant review, the Respondents have not discharged this burden by proving that the letter of notification of termination dated 20th December 2021 was dispatched to and

reached the Applicant on the same day of 20th December 2021. In the absence of such proof, we are inclined to find that the date of occurrence of breach complained of, by the Applicant was 28th December 2021 which is the same day that the Applicant learnt of the breach complained of.

In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

57. Computation of time

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;***

In computing time when the Applicant ought to have filed a Request for Review to challenge the alleged illegal and unprocedural termination after learning of the same on 28th December 2021, the 28th December 2021 is excluded pursuant to Section 57(a) of IGPA being the day the Applicant learnt of the breach complained of. This means, 14 days started running from the 29th December 2021 and lapsed on 11th January 2022.

The Applicant filed the Request for Review on 7th January 2022 before the lapse of 14 days from the date it learnt of the breach complained of, thus properly invoked the jurisdiction of this Board pursuant to Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020.

Whether the 1st Respondent terminated the subject tender's procurement proceedings in accordance with Section 63 of the Act on account of material governance issues having been detected to divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act;

Termination of procurement proceedings is governed by Section 63 of the Act and where such termination meets the requirements of Section 63 of the Act, the jurisdiction of this Board is ousted by dint of Section 167 (4) (b) of the Act.

The High Court in **Republic v Public Procurement Administrative Review Board & Another Exparte Selex Sistemi Integrati [2008] eKLR** (hereinafter referred to as "the Selex Sistemi Integrati Case"), Nyamu J, 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 s 100 (4) ousts the jurisdiction of the court in judicial review? 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. 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. This rule was propounded in the landmark decision in Anisminic v Foreign Compensation Commission [1969] I ALL ER 208 where Lord Reid stated:

"It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be undertaken which preserves the ordinary jurisdiction of the Court".

In this instant Case it can be argued that sections 100(4) of Public Procurement and Disposal Act, 2005 cannot possibly be effective in ousting the jurisdiction of the Court. 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." [Emphasis by the Board]

The court in the Selex Sistemi Integrati Case held that it 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.

Further, in **Republic v Public Procurement Administrative Review Board; Leeds Equipments & Systems Limited (Interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR** (hereinafter referred to as “the Kenya Veterinary Vaccines Production Institute case”) P. Nyamweya, J held as follows: -

"29. 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..."

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

- 34. 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.....**
- 35. 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.....**
- 36. 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 the Kenya Veterinary Vaccines Production Institute case 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 dint of Section 167 (4) (b) of the Act.

It is therefore important for this Board to determine whether the 1st Respondent terminated the subject tender in accordance with provisions of Section 63 of the Act, which determination can only be made by interrogating the reason cited for termination by the 1st and 2nd Respondents and whether or not the 1st and 2nd Respondents satisfied the statutory pre-conditions for termination outlined in Section 63 of the Act.

Section 63 of the Act provides as follows: -

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

- (a) the subject procurement has been overtaken by—**
- (i) operation of law; or**
 - (ii) substantial technological change;**
- (b) inadequate budgetary provision;**
- (c) no tender was received;**
- (d) there is evidence that prices of the bids are above market prices;**
- (e) material governance issues have been detected**
- (f) all evaluated tenders are non-responsive;**
- (g) force majeure;**
- (h) civil commotion, hostilities or an act of war; or**
- (i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.**
- (2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.**
- (3) A report under subsection (2) shall include the reasons for the termination.**

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

Section 63 of the Act is instructive on termination of procurement proceedings being undertaken by an accounting officer of a procuring entity at any time before notification of award is made and such termination must only be effected if any of the circumstances enumerated in Section 63(1)(a) to (i) are present. This is the substantive statutory pre-condition that must be satisfied before a termination of procurement proceedings is deemed lawful.

Further, following such termination, an accounting officer is required to give the Public Procurement Regulatory Authority (hereinafter referred to as the 'Authority') a written report on the termination with reasons and notify all tenderers, in writing, of the termination with reasons within fourteen (14) days of termination. This is the procedural statutory pre-conditions that must be satisfied before a termination of procurement proceedings is deemed lawful.

It is only after both the substantive and procedural statutory pre-conditions of termination are satisfied, that a termination of procurement proceedings can be deemed to have been effected in accordance with Section 63 of the Act for the Board's jurisdiction to be ousted by dint of Section 167(4)(b) of the Act.

It is therefore important for the Board to determine the legality, or lack thereof, of the 1st Respondent's decision of terminating the subject tender's procurement proceedings, which determination can only be made by interrogating the reason cited for the impugned termination.

The 1st and 2nd Respondent relied on Section 63 (1) (e) of the Act to justify its decision to terminate the subject tender's procurement proceedings on account of material governance issues having been detected because of the need to review the terms of reference to enable the procurement of 3 fund managers.

The question that now arises is what is 'material governance issues?

Governance and how it relates to public procurement is explained in the book "***Public Procurement: International Cases and Commentary, (2012)*** edited by Louise Knight, as follows: -

"Effective procurement practices provide governments with a means of bringing about social, economic and environmental reform. Conversely, malpractice within public procurement demonstrates a failure of governance and typically arises from corruption and fraud"

From the above definition, the Board notes that principles of governance require procuring entities and tenderers to avoid any form of malpractice that compromise the integrity of a procurement process. Principles of governance that apply in public procurement in Kenya are outlined in the Constitution, some of which include the following: -

"Article 10 (2) (c): The national values and principles of governance include: - good governance, integrity, transparency and accountability

Article 227 (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective."

The answer to the question of what amounts to material governance issues has been the subject of proceedings before this Board. For instance, in **PPARB Application No. 50 of 2020, Danka Africa (K) Ltd v. The Accounting Officer, Kenya Ports Authority & Another**, (hereinafter referred to as “the Danka Africa Case”) the Board deduced the meaning of material governance in public procurement to mean: -

“significant or important governance issues detected in a procurement process that negatively affect the capability of a procuring entity to guarantee compliance with principles of governance, leadership and integrity when procuring for goods and services. Such material governance issues may emanate from malpractice during the procurement process by the bidders, or by the bidder while colluding with a procuring entity, or operational challenges attributed from policy decisions influencing a procuring entity’s procurement process.”

As was held by the Board in the Danka Africa Case, material governance issues may emanate from malpractice during a procurement process by tenderers, or by a tenderer in collusion with a procuring entity and we add or by a procuring entity. Material Governance issues may also include operational challenges attributed from policy decisions influencing a procuring entity’s procurement process.

The Respondents cited Section 63 (1) (e) of the Act to support the 1st Respondent's position that the subject procurement was terminated as a result of material governance issues being detected because of the need to review the terms of reference to enable the procurement of 3 fund managers. The Respondents relied on the minutes of the 2nd Respondents Board of Trustees dated 3rd February 2021, 23rd April 2021 and 12th October 2021 to support the termination.

On the 9th virtual meeting of the 2nd Respondent's Board of Trustees held on 3rd February 2021, the following was deliberated and resolution passed with respect to service providers:

"Min No.68/2020-2021: Status of Service Providers

The Board was informed that the procurement of service providers was in progress.

- ***The tender for procurement of a custodian was opened and was awaiting tender evaluation. The Board would be involved in the evaluation process.***
- ***The tender documents for the Administrator and a Fund Manager were ready for review by the Board.***
- ***The Board unanimously resolved to appoint three Fund Managers and three Custodians and one Administrator. In making the resolution the Board agreed that there would be competition in investment with good returns accruing to***

members. Having multiple service providers also spreads the risk of having to rely on only one service provider.....”

On the 11th meeting of the 2nd Respondent’s Board of Trustees held on 23rd April 2021, the following was deliberated and resolution passed with respect to report on status of procuring fund administrator and fund manager:

“Min 84/4/2021 Report of the Finance, Administration and Human Resource Committee

.....

(iv) Report on the Status of procuring Fund Administrator and Fund Manager

This report is presented to the Board to give the status of procurement of the two service providers to the scheme.

.....

(a) Fund Manager

The management was seeking the services of the Scheme’s Fund Manager. The Board in its 9th virtual meeting held on 3rd February, 2021 under Minute 68/2021 resolved to procure three Fund Managers. The advantages of having more than one Fund Managers offering the services are:

- (i) To mitigate the risks to the Fund***
- (ii) Open up competition in investment to get good returns that will accrue to members.***

The Retirement Benefits Act and Regulations requires the Trustees to engage the services of a Fund Manager or Approved Issuer to invest scheme funds. The invested contributions therefore, attract interest on the basis of net returns declared on the investment portfolio by the Fund Manager. In the interim, the Retirement Benefits Authority granted the Trustees' request to invest scheme funds in Government Securities for a period of ninety (90) days from 11th February 2021.

Committee Observation

The tender documents for procuring Fund Management Services had been reviewed and ready for consideration by the Board and subsequent approval for advertisement of the same by the Procurement Unit in the National Treasury.

Committee Recommendation

The Finance, Administration and Human Resource Committee recommended to the Board to approve for procurement of the Fund Manager and Administrator of the Scheme.

Board Action

The Board approved the recommendation of the Finance, Administration and Human Resource Committee as proposed by Pamela Ochieng and seconded by John Matiang'i....."

On the 3rd special board meeting of the 2nd Respondent's Board of Trustees held on 12th October 2021, the following was deliberated and resolution passed with respect to fund manager:

"Min 118/10/2021 Report of the Finance, Administration & Human Resource Committee

.....

3. Fund Manager

The Board observed that;

- i. Procurement of the Public Service Superannuation Fund Manager that was advertised on 1st June, 2021 and the tender evaluation committee opinioned for one Fund Manager – M/s Gen Africa Asset Managers;**
- ii. Appointment of one Fund Manager to work with three Fund Custodians is not tenable and it was not in the best practice in the pensions industry;**
- iii. The Board of Trustees in its 13th meeting held virtually on 12th August, 2021, re-affirmed the resolution to procure**

three (3) Fund Managers as resolved in the Board meeting of 3^d February, 2021.

Board Resolution

The Board resolved that the management re-advertise the tender for three (3) Fund Managers since it was not in tandem with the Board's resolution of 3^d February, 2021, under Min. No.68/2020-2021....."

From the forgoing minutes of the 2nd Respondent's Board of Trustees, we make the following observations:

- (i) The 1st Respondent was in attendance at all material time having been recorded as present in all the aforementioned minutes;
- (ii) The 2nd Respondent's Board of Trustee was notified that the tender documents for a fund manager (not three fund managers) was ready for its review on 3rd February 2021;
- (iii) The tender documents for procuring fund management services was reviewed by the 2nd Respondent's Finance, Administration and Human Resource Committee, placed before the 2nd Respondent's Board of Trustee for consideration on 23rd April 2021 and subsequent approval for advertisement of the same by the Procurement Unit in the National Treasury.
- (iv) The 2nd Respondent's Board of Trustees approved the recommendation of the 2nd Respondent's Finance, Administration

and Human Resource Committee for procurement of a fund manager (not three fund managers) on 23rd April 2021.

- (v) The 2nd Respondent's Board of Trustees resolved the management re-advertises the tender for three (3) Fund Managers since it was not in tandem with the Board's resolution of 3rd February 2021 on 12th October 2021.

It is clear that at all material time, the 2nd Respondent's Board of Trustees, even though had resolved to procure three funds managers, was aware and approved procurement of one fund manager. We say so because, at no point during the procurement process of one fund manager did the 2nd Respondent's Board of Trustee resolve to terminate the procurement of one fund manager. It is only after being notified that the Applicant was recommended for award of the subject tender that the 2nd Respondent's Board of Trustees resolved to re-advertise the services of a fund manager to incorporate three fund managers. With this, we can confidently deduce that indeed the 2nd Respondent's Board of Trustees wanted three fund managers but this did not stop procurement of each of the three fund managers to be undertaken separately. Further, by the 2nd Respondent's Board of Trustees' conduct of approving the recommendation of the 2nd Respondent's Finance, Administration and Human Resource Committee for procurement of a Fund Manager (not three fund managers) on 23rd April 2021, the 2nd Respondent's Board of Trustees is stopped from renegeing on its approval. Lastly, the subject tender having been conducted by way of open tendering method, the same was known to all and sundry, including the 2nd Respondent's Board

of Trustees, which if indeed did not want each of the three fund managers procured separately (i.e. one fund manager) would have advised the management to issue an addendum to the Tender Document of the subject tender to reflect procurement of three fund managers. This, in our view, we note, was not done.

We note the Head, Supply Chain Management Services, Mr. W. A. Kituyi, in a memo to the 1st Respondent dated 8th September 2021 opined that there is eminent risk for litigation if the process is terminated at the stage where a recommendation of award had been made in favour of the Applicant because the Applicant may be prejudiced since its tender had been exposed to competition and retendering would be to the advantage of other competitors given that the financial proposals were opened and was in the public domain. He went further to recommend for the subject tender to proceed to its logical conclusion to enable the Evaluation Committee complete the due diligence process and eventually recommend award of the subject tender while at the same time initiating a new procurement process to procure two (2) additional fund managers to preempt any grounds for litigation. He ended by confirming that there is no sufficient rationale to terminate the tender in totality even if the 2nd Respondent were to abide by its Board of Trustees resolution to award more than one tenderer and that the subject tender would still lead to identification of one of the three tenderers as the scenario may obtain.

It is worth noting that all procurements by public entities such like the 2nd Respondent are contained in an annual procurement plan prepared by an accounting officer, such like the 1st Respondent, within an indicative or approved budget as provided under Section 53(1) and (5) of the Act. This annual procurement plan stipulates the choice of procurement methods. The 2nd Respondent's annual procurement plan is required to be approved by the 2nd Respondent's Board of Trustees as provided in Regulation 40(4) of Regulations 2020. Therefore, the role of the 2nd Respondent's Board of Trustees is limited to approval of the annual procurement plan and annual budgetary estimates as provided in and perhaps quarterly (after every three months) monitoring of whether procurement is being undertaken in line with the annual procurement plan and within the annual approved budget in each financial year as provided under Regulation 40(6) of Regulations 2020. The implementation or actual procurement is the role of the management and not the Board of Trustees. The management of the 2nd Respondent is headed by the 1st Respondent. Unfortunately, the 2nd Respondent's annual procurement plan approved by its Board of Trustees was not furnished to the Board for the Board to establish whether the annual procurement plan contained procurement of three (3) fund managers.

From the foregoing and taking into consideration what material governance issues are, we are inclined to find that the need to review the terms of reference of the subject tender to enable procurement of three (3) fund managers does not amount to material governance issues having been detected. We say so because, the 2nd Respondent's Board of Trustees

approved procurement of a fund manager (not three fund managers) as demonstrated in its minutes of 23rd April 2021 when it approved the recommendation of the 2nd Respondent's Finance, Administration and Human Resource Committee to procure a fund manager. Clearly, with this approval one cannot claim there was malpractice during the procurement process by tenderers or tenderers colluding with the 2nd Respondent.

In the circumstances, we find that the 1st Respondent has failed to satisfy the substantive statutory pre-condition for termination under Section 63(1)(e) of the Act thus, the termination of the procurement proceedings of the subject tender is unlawful and is therefore null and void. With this, we don't need to waste our ink in addressing the procedural statutory pre-conditions for termination as its resultant, whichever way, will not make the termination lawful.

Accordingly, we find the 1st Respondent did not terminate the subject tender's procurement proceedings in accordance with Section 63(1)(e) of the Act on account of material governance issues having been detected thus the Board's jurisdiction is not divested by dint of Section 167(4)(b) of the Act.

Whether there is need for the Board to extend the subject tender's validity period.

The Applicant has prayed for extension of the subject tender's validity period by the Board and we note the Respondents have not objected.

The tender validity period of the subject tender is 180 days from the extended tender submission deadline of 24th June 2021 as provided in ITT Reference 20.1 of Section II – Tender Data Sheet (TDS) read with Clause 20. Period of Validity of Tenders of Section I – Instructions To Tenderers of the Tender Document.

Guided by Section 57(a) of IGPA, time started running for the tender validity period on 25th June 2021 with the 24th June 2021 being an excluded day and was set to lapse on 21st December 2021. However, the 1st Respondent by letters dated 9th December 2021 issued to tenderers extended the tender validity period for the subject tender for a further 30 days from 21st December 2021. The extended tender validity period was set to lapse on 20th January 2022. However, the Applicant filed its Request for Review on 7th January 2022, which action automatically suspended procurement proceedings of the subject tender, including the running of tender validity period, pursuant to Section 168 of the Act. The running of the extended tender validity period shall commence a day after the date of this decision.

In the circumstances, as at the 7th January 2022, fourteen (14) days of the extended tender validity were still valid. Noting that we have found the termination of the subject tender's procurement proceedings is unlawful, null

and void, 14 days would not be enough to conclude the procurement proceedings of the subject tender because, a contract for the subject tender, if entered into, must be signed within the tender validity period but after the lapse of 14 days from the date when tenderers are notified of the intention to enter into a contract pursuant to Section 135(3) of the Act read with Section 87 and Section 167(1) of the Act.

We therefore deem it fit and just to extend the subject tender's validity period for a further 30 days from 11th February 2022 being the last day when the initial extension of tender validity period is set to lapse having taken into consideration the date of this decision.

What orders should the Board grant in the circumstances.

The Board has found the termination of the procurement proceedings of the subject tender is unlawful and that it is fit and just to extend the tender validity period of the subject tender.

Noting that the Evaluation Committee together with the Head, Supply Chain Management Services have recommended award of the subject tender to the Applicant subject to physical due diligence being conducted on the Applicant, we deem it just to direct the 1st Respondent to proceed with the subject procurement proceedings to the logical conclusion including making of an award to the tenderer who submitted a responsive tender with the

highest evaluated combined technical and financial score subject to physical due diligence being conducted on such a tenderer.

The upshot of our findings is that the Request for Review succeeds with respect to 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, 2015, the Board makes the following orders in the Request for Review dated 7th January 2022:

- 1. The termination of procurement proceedings of Tender No: PSSS/002/2020-2021 for Procurement of Fund Manager for The Public Service Superannuation Fund by the 1st Respondent on 9th December 2021 be and is hereby nullified and set aside.**
- 2. The letters of notification of termination of procurement proceedings of Tender No: PSSS/002/2020-2021 for Procurement of Fund Manager for The Public Service Superannuation Fund dated 20th December 2021 issued to all tenderers in the subject tender by the 1st Respondent be and are hereby nullified and set aside.**
- 3. The 1st Respondent is hereby directed to proceed with the procurement process for Tender No: PSSS/002/2020-2021 for Procurement of Fund Manager for The Public Service**

Superannuation Fund to its logical conclusion including the making of an award to the tenderer determined to have submitted the most responsive evaluated proposal with the highest score determined by combining, for each proposal, in accordance with the procedures and criteria set out in the Tender Document, the scores assigned to the technical and financial proposals within 14 days from the date of this decision subject to physical due diligence conducted on such a tenderer.

- 4. The tender validity period of Tender No: PSSS/002/2020-2021 for Procurement of Fund Manager for The Public Service Superannuation Fund be and is hereby extended by a further period of thirty (30) days form 11th February 2022.**
- 5. Given that the procurement proceedings for Tender No: PSSS/002/2020-2021 for Procurement of Fund Manager for The Public Service Superannuation Fund are not complete, each party will bear its own costs.**

Dated at Nairobi this 28th day of January 2022

CHAIRPERSON

SECRETARY

PPARB

PPARB