

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 9/2022 OF 11TH JANUARY 2022

BETWEEN

INTERTEK TESTING SERVICES (EA) PTY LIMITED .. 1ST APPLICANT

AUTHENTIX, INC 2ND APPLICANT

AND

THE DIRECTOR GENERAL,

ENERGY AND PETROLEUM REGULATORY

AUTHORITY 1ST RESPONDENT

ENERGY AND PETROLEUM REGULATORY

AUTHORITY 2ND RESPONDENT

Review against the decision of the Director General, Energy and Petroleum Regulatory Authority in relation to Tender No. EPRA/SCM/4/3/21-22/032 for provision of petroleum fuel marking & monitoring services.

BOARD MEMBERS

- | | |
|------------------------|--------------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Mrs. Njeri Onyango | - Vice Chairperson |
| 3. Ms. Isabel Juma | - Member |
| 4. Mr. Nicholas Mruttu | - Member |

5. Eng. Mbiu Kimani, OGW - Member

IN ATTENDANCE

Mr. Philip Okumu - Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

The 2nd Respondent, through the 1st Respondent, invited proposals from eligible firms for **Tender No. EPRA/SCM/4/3/21-22/032** for Provision of Fuel Marking and Monitoring Services (hereinafter referred to as the "subject tender") using the Request for Proposal method of tendering re-advertised in the local dailies, MyGov Newspaper, the 2nd Respondent's website (www.epra.go.ke) and the Public Procurement Information Portal (PPIP) (www.tenders.go.ke) on 9th November, 2021.

Tender Submission Deadline and Opening of Tenders

The 2nd Respondent received four (4) tenders by the tender submission deadline of 23rd November 2021 at 11.30a.m. The 2nd Respondent's Tender Opening Committee opened the four (4) tenders shortly thereafter in the presence of tenderers' representatives and recorded the following tenderers as having submitted their tenders in good time in the Tender Opening Minutes of 23rd November 2021:

1. Kenya Bureau of Standards;
2. SGS Kenya Ltd Nairobi;
3. Intertek Testing Services East Africa/Authentix; and
4. Bureau Veritas Kenya Nairobi

Evaluation of Tenders

Going by a Tender Evaluation Report executed by the 2nd Respondent's Evaluation Committee members on 10th December, 2021 (hereinafter referred to as the 'Evaluation Report'), the 2nd Respondent's Evaluation Committee (hereinafter referred to as the 'Evaluation Committee') evaluated tenders with respect to the subject tender in the following three (3) stages:-

1. Preliminary Evaluation;
2. Technical Evaluation; and
3. Financial Evaluation.

Preliminary Evaluation

At this stage, in evaluating tenders, the Evaluation Committee was required to apply the criteria outlined in Clause a) Mandatory Evaluation of 1. Evaluation Criteria at page 80 and 81 of the blank Request for Proposal document (hereinafter referred to as the 'Tender Document'). At the end of evaluation of tenders at this stage, two (2) tenders were found non-responsive and the other two (2) tenders, which included the Applicants' tender, were found responsive. The responsive tenders proceeded to the next stage of evaluation.

Technical Evaluation

At this stage, in evaluating tenders, the Evaluation Committee was required to apply the criteria outlined in Clause b) Technical Evaluation of 1. Evaluation Criteria at page 82 to 84 of the Tender Document. Tenders were required to attain a minimum score of 70 marks out of 100 marks to proceed to the next stage of evaluation. At the end of evaluation of tenders at this stage, the two (2) tenders, which included the Applicants' tender, scored above the minimum score of 70 marks out of 100 marks, thus proceeded to the next stage of evaluation.

Financial Evaluation

At this stage, in evaluating tenders, the Evaluation Committee was required to apply the criteria outlined in Clause c) Financial Evaluation (Weight=20) of 1. Evaluation Criteria at page 84 of the Tender Document. Tender sums of the tenders that made it to this stage of evaluation were required to be weighted using a formulae provided in the Tender Document to determine the financial scores. Thereafter, the technical and financial scores of each tender would be combined to determine the tender with the highest evaluated combined technical and financial scores. At the end of evaluation of tenders at this stage, the Applicants' tender was determined to have the highest evaluated combined score of 91.1% and with a tender sum of USD 4,944,384.00.

Professional Opinion

The Deputy Director, Supply Chain Management, Ms. Loise Thuge, in a Professional Opinion signed on 20th December 2021, opined that the evaluation process with respect to the subject tender was conducted in accordance with the evaluation criteria set out in the Tender Document in compliance with Section 98 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') and further that the same complied with Sections 80, 83 and 128 of the Act. With this, she recommended and requested the 1st Respondent to approve award of the subject tender to the Applicants at a tender sum of USD4,944,384.00 equivalent to Kshs.546,354,432.00 .

On 23rd December 2021, the 1st Respondent declined to approve award of the subject tender to the Applicants on account that the 2nd Respondent should proceed as guided by NDITC in which a Government policy as communicated to the 2nd Respondent vide letter MICNG/SEC.1/43 required integration of the fuel marking program under the IPMAS EGMS.

Notification of Tenders

Vide letters dated 28th December 2021, the 1st Respondent notified all tenderers in the subject tender of the termination of the procurement proceedings of the subject tender pursuant to Section 63 a(i) and 63(e) of the Act on account that the subject tender had been overtaken by operation of law and, further, that material governance issues had been detected.

THE REQUEST FOR REVIEW

The Applicants lodged a Request for Review dated 3rd January 2022 and filed on 11th January 2021 together with a Supporting Affidavit sworn by Miguel Cipriano, the General Manager of the 1st Applicant, on 3rd January 2022 , an Applicant's List of Document dated 3rd January 2022 and a Supplementary Affidavit sworn by Miguel Cipriano on 21st January 2022 and filed on even date through the firm of Muhoro & Gitonga Associates seeking the following orders:-

- a. The termination of procurement proceedings in Tender No. EPRA/SCM/4/2/21-22/032 and any process or steps taken pursuant to the said termination be declared null and void.*
- b. The Procuring entity's letter dated 28th December 2021 terminating the procurement process in Tender No. EPRA/SCM/4/2/21-22/032 be and is hereby quashed for failing to meet the requirements of section 63 of the Act.*
- c. The Respondents be directed to complete the procurement process in Tender No. EPRA/SCM/4/2/21-22/032, in accordance with the Tender document, the Public Procurement and Asset Disposal Act, 2015, the Regulations and the Constitution.*
- d. The Respondents pay the costs of this Review to the Applicants; and,*
- e. Any other relief this honourable Review Board deems just in the circumstances.*

In a Notification of Appeal and a letter dated 11th 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 11th January 2022.

The Respondents filed a Respondent's Response to the Applicant's Request for Review dated 17th January 2022 and filed on even date through the 2nd Respondent's inhouse counsel, Leah Hadidah Jara Advocate.

Vide letters dated 20th January 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective emails as provided by the 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 of 20th 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 also stated that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

The Applicants' filed their Written Submissions dated 21st January 2022 List of Authorities dated 21st January 2022 on even date whilst the Respondents filed their Written Submissions dated 21st January 2022 and List of Authorities dated 21st January 2022 on 24th January 2022.

APPLICANTS' CASE

The Applicants aver that, as a consortium and pursuant to an invitation by the 2nd Respondent, they participated in the subject tender by submitting their tender by the tender submission deadline. Further, that the 2nd Respondent invited them and other tenderers to attend the opening of financial proposals for the subject tender, where, the 2nd Respondent read out the technical and financial scores of tenderers who had qualified for evaluation of financial proposals.

However, the Applicants aver that vide a letter dated 28th September 2021, the 2nd Respondent notified it of the decision to terminate the subject tender citing two reasons i.e. the procurement process had been overtaken by operation of law and the detection of material governance issues pursuant to Section 63 (1) (a)(i) and 63 (1) (e) of the Act respectively.

The Applicants allege this termination of the subject tender was irregular, procedurally unfair, an abuse of power and was in blatant disregard of the Act, the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as the 'Regulations 2020') and other related laws because:

- a. The reasons given by the Respondents for termination of the procurement process are vague, ambiguous and in total contravention of the requirements under Section 63 of the Act.
- b. The Respondents acted in a manner that contravened Section 63 (4) of the Act by merely relying on grounds listed in Section 63 (1) of the Act in relation to the impugned decision; no real and tangible evidence to support the cited grounds were furnished to the Applicant. Thus, the termination of the subject tender failed to meet the threshold set in Section 63 (1) of the Act.
- c. By failing to provide real and tangible reasons for termination of the procurement process, the Respondents usurped powers in purporting to exercise discretion and unfettered powers in total contravention of Section 63 of the Act.
- d. By terminating the procurement process in the manner it did, the Respondents purported to indirectly invite the operation of Section 66 of the Act, while ignoring the procedures set forth by the relevant laws and rules of natural justice.

The Applicants further allege that the Respondents breached their obligations to render fair administrative action as contemplated under Article 47 of the Constitution of Kenya, 2010 (hereinafter referred to as the 'Constitution') read with Section 4, 6 and 7 of the Fair Administrative Action Act, 2015 (hereinafter referred to as the 'FAA Act') and that the termination of the subject tender infringed on the Applicants' right to a fair hearing as contemplated under Article 50 of the Constitution.

From the foregoing, the Applicants pray for grant of the orders sought by it in the Request for Review.

RESPONDENTS' RESPONSE

The Respondents contend that the Request for Review is time barred since letters of termination of the subject tender were sent on 28th December 2021 yet the Request for Review was filed on 11th January 2021; that there is no valid review; that the termination of the subject tender was conducted as per the law and therefore, the Respondents oppose the Request for Review in its entirety and deny in toto all the allegations by the Applicants.

The Respondents contend that the 2nd Respondent is established under Section 2 of the Energy Act, 2019 and is thus a state agency under the umbrella of the National Government particularly within the Ministry of Energy.

The Respondents confirms the subject tender was re-advertised on 9th November 2021 and a pre-bid meeting was convened on 15th November 2021 where prospective tenderers were invited to enquire on and obtain clarifications on the Tender Document. Further, that a Tender Opening Committee appointed by the 1st Respondent opened four (4) tenders that had been received by the 2nd Respondent at the tender submission deadline.

The Respondents contend that an Evaluation Committee appointed by the 1st Respondent conducted evaluation of tenders as per the provisions of the Tender Document, the Act, Regulations 2020, the Constitution and all other applicable laws in three stages namely, preliminary, technical and financial evaluation stages and the resultant Evaluation Report was submitted to the Deputy Director, Supply Chain Management on 10th December 2021.

The Respondents further contend that pursuant to Section 84 (1) of the Act, the Deputy Director, Supply Chain Management prepared a Professional Opinion dated 20th December 2021 recommending and requesting the 1st Respondent to approve award of the subject tender to the Applicants in which the 1st Respondent declined to approve on 23rd December 2021 indicating reasons thereof.

The Respondents contend that a letter dated 1st October 2021 from the Ministry of Interior & Coordination of National Government requested the 2nd Respondent to among other things, nominate three (3) officers to be part of

a Technical Working Group (hereinafter referred to as the 'TWG') whose main objective was to provide information on the 2nd Respondent's programmes that are earmarked for integration under IPMAS. These programmes are:

- i. The Petroleum Fuels Marking and Monitoring Services;
and
- ii. The Liquefied Petroleum Gas Cylinder Businesses

The Respondents contend that the 2nd Respondent through the TWG, participated in several meetings held at the Ministry of Interior & Coordination of National Government's offices geared towards the implementation of the Kenya Revenue Authority's Excisable Goods Management System (hereinafter referred to as 'the KRA's EGMS') which intends to accommodate the business needs of various institutions responsible for product marking and authentication. Further, that in these meetings, the 2nd Respondents explained in detail how the fuel marking and monitoring runs and elaborated on its requirements.

It is the Respondents contention that the Government's inter agencies discussion on product marking and authentication in the country had commenced earlier and even prior to the initiation of the subject tender and was geared to address challenges related to, *inter alia*, duplication of roles among Government institutions, higher cost of enforcement, uneconomical use of public resources, spill-over costs to the counterfeit products.

The Respondents contend that the National Treasury through a letter dated 6th December 2021 communicated to the 2nd Respondent and over twenty other Government agencies including ministries on the essence to migrate to EGMS because the KRA EGMS had been reconfigured to accommodate the business needs of all Ministries, Departments and Agencies (hereinafter referred to as the 'MDA's') responsible for product marking and authentication under IPMAS.

The Respondents contend that the Act under Section 7 (1) provides for the role of the National Treasury in public procurement and assets disposal and that the National Treasury established under Section 11 of the Public Finance Management Act, 2012 (hereinafter referred to as 'PFM Act') is responsible for public procurement and asset disposal policy formulation.

The Respondents contend that the Act under Section 7 (2) (h) further provides for the National Treasury to develop and review policy on procurement of common user items in the public sector both at national and county government levels. Further, that the Act under Section 3 (h) provides for *maximization of value for money* as a guiding principle of public procurement and asset disposal and under Section 7 (3) provides for the National Treasury to prescribe an institutional framework to provide for the procurement, administration and management of common user items for the national government.

The Respondents contend that Regulations, 2020, under Regulation 43 (3) provides for the National Treasury to support the Public Procurement Regulatory Authority (hereinafter referred to as the 'Authority') to execute its function in developing the market price index, obtaining value for money for procuring entities and obtaining synergy.

It is against this background that the Respondents contend the 1st Respondent proceeded to terminate the subject tender based on the letter dated 6th December 2021 from the National Treasury & Planning and that the 2nd Respondent is under an obligation to adhere to the law and policy direction from the National Treasury & Planning and was therefore complying with a policy directive from the National Treasury & Planning in terminating the subject tender and which was intended to result to reduced cost of the marked products to the industry and consumers.

The Respondents confirm terminating the subject tender on 28th December 2021 relying on Sections 63 (a) (i) of the Act as the 2nd Respondent was required to have the marking of fuel and petroleum products integrated under the EGMS of KRA.

According to the Respondents, the Government policy falls within the ambit of Section 63(1)(a)(i) of the Act which permits the 1st Respondent to terminate the subject tender on account of having been overtaken by operation of law.

It is the Respondents contention that in compliance with Sections 63((2), (3) and (4) of the Act, the 1st Respondent submitted a written report on termination of the subject tender with reasons to the Authority vide a letter dated 7th January 2022 and notified tenderers of the termination of the subject tender with reasons vide letters dated 28th December 2021.

According to the Respondents, Section 63(4) of the Act provides for reasons to be given to tenderers of the termination but does not in any manner or form require evidence to be given to support such reasons.

In conclusion, the Respondents pray for dismissal of the Request for review with costs to them.

APPLICANTS' REJOINDER

The Applicants, in response to the Respondents' response contend that the letter of notification of termination dated 28th December 2021 was received by them on email at 5.53pm on 29th December 2021 and not 28th December 2021 as alleged by the Respondents.

The Applicants contend that the letter dated 1st October 2021 from the Ministry of Interior and Coordination of National Government, the letter dated 30th August 2021 from the Ministry of Interior and Coordination of National Government to the Ministry of Energy and the letter dated 6th

December 2021 from the National Treasury to the Ministry of Interior and Coordination of National Government are documents of a public nature which, in some instances, pre-date and are therefore outside the procurement process and there is no reason, other than mischief for the Respondents to refer to those letters and not make them available to the Applicants. Further, that in the absence of the aforesaid letters, it is difficult for the Applicants to authoritatively respond to the allegations raised in the Respondents' response.

The Applicants posit that the Respondents have not presented any policy on procurement of common user items or institutional framework as set out under Section 11(2)(h) and 11(3) and that the letter dated 6th December 2021 cannot be construed as an expression of government policy or an institutional framework and that Regulation 43 of Regulations 2020 pertains to the development of market prices which is unrelated to the subject tender that concerns a request for proposal.

It is the Applicants contention that pursuant to Section 3 of the Energy Act, the 2nd Respondent is established as an independent body and in performance of its functions, the 2nd Respondent is permitted to exercise its powers without the direction or control of any person or authority save for instances specified in the Energy Act.

The Applicants aver that the Respondents gave two reasons for termination namely, the subject tender has been overtaken by operation of law pursuant to Section 63(1)(a)(i) of the Act and that material governance issues have been detected in the subject tender pursuant to Section 63(1)(e) of the Act. However, the Respondents have not addressed the second reason for termination of the subject tender.

The Applicants allege that the 1st Applicant is currently engaged in the provision of Petroleum Fuel Marking and Monitoring Services to the 2nd Respondent pursuant to a contract dated 2nd January 2019 for a period of 3 years covering the period between 1st January 2019 to 31st January 2021. Further, that by a letter dated 29th December 2021 and in response to the 1st Applicant's letter of 17th December 2021, the 1st Respondent expressed his intention to extend the contract dated 2nd January 2019 for a period of three months effective 1st January 2022 to 31st March 2022 at the same terms and conditions as per the contract dated 2nd January 2019 to allow time for adequate consultations with other stakeholders in the National Government on the implementation of the programme and subject to acceptance of the extension by the 1st Applicant.

According to the Applicants, the 1st Applicant by a letter dated 29th December 2021 expressed willingness to pursue extension of the contract dated 2nd January 2019 subject to the 2nd Respondent meeting certain conditions set forth in the said letter which conditions sought to vary the terms and

conditions of the contract dated 2nd January 2019. It is this 1st Applicant's letter dated 29th December 2021 that the Applicants allege triggered the termination of the subject tender and not the reasons offered by the Respondents for termination of the subject tender.

The Applicants posit that Section 92(1) of the Petroleum Act, 2019 (hereinafter referred to as the 'Petroleum Act') prescribes the standards of petroleum products meant for use in Kenya and additionally Section 101(t), empowers the Cabinet Secretary responsible for petroleum matters to make regulations, prescribing the marking of fuels and categories of the petroleum, in which such marking shall be carried out. Further, that the Tender Document communicated to tenderers that marking of petroleum fuels shall be done in line with Legal Notice No.64 of 22nd May 2000 and the objective of the subject tender is to ensure marking of IK meant for local consumption with an invisible chemical marker and thereafter monitoring of PMS and AGO on sale in the market in order to test for the IK marker and thereby identify adulterated motor fuels.

The Applicants contend that the provision of petroleum fuel marking and monitoring services is a requirement under the law and involves, *inter alia*, marking by use of an appropriate chemical marker capable of identifying adulterated motor fuels while the Excise Duty Act No.23 of 2015 (hereinafter the Excise Duty Act establishes the Excise Duty (Excisable Goods Management System) Regulations, 2017 which governs the affixing of excise

stamps on excisable goods, a different regime of the law, distinguished from the law governing the provision of petroleum fuel marking and monitoring services. According to the Applicants, the letter dated 6th December 2021 relates to an entirely different subject matter i.e. affixing of stamps onto products and in any case, the such a letter does not in itself constitute an expression of government policy directive or circular with a binding effect on the 2nd Respondent.

The Applicants pray for the Board to issue orders sought by it.

BOARD'S DECISION

The Board has considered each of the parties' case, pleadings, documents written submissions, authorities and confidential documents submitted to it by the Respondents pursuant to Section 67 (3)(e) of the Act and finds the following issues call for determination:

- 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 the subject tender having been overtaken by operation of law and that 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. What are the appropriate orders to grant in the circumstances?

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 Respondents, in their response, contend that the Request for Review is time barred since the letter of notification of termination of the tender was sent on 28th December 2021 yet the Request for Review was filed on 11th January 2021 (which we believe the Respondents meant 11th January 2022) hence there is no valid review before the Board and more so in light of the termination of tender which the Respondents contends was conducted as per the law.

On its part, the Applicants contend that it received the letter of notification of termination dated 28th December 2021 on 29th December 2021 at 5.53 pm via email and not on 28th December 2021 as alleged by the Respondents.

The Board is alive to the fact that if it makes a determination that the Request for Review is time barred, it will have no jurisdiction to entertain the same. Accordingly, we must first establish whether the Applicants properly invoked the jurisdiction of the Board by filing a Request for Review within time.

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, 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 it.

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 prescribed manner.

The prescribed manner in which an aggrieved tenderer seeks administrative review is provided 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 that an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act will be, by way of a request for review. Further, this request for review is to take the 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.

Turning to the circumstances of this review, it is common ground that the 1st Respondent notified the Applicants of the termination of procurement proceedings of the subject tender by a letter dated 28th December 2021 on account of the subject matter having been overtaken by operation of law and on material governance issues having been detected pursuant to Section 63(1)(a)(i) and 63(1)(e) of the Act respectively. 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 Applicants.

The only way the Applicants 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 Applicants to file its Request for Review within fourteen days of 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 would a tenderer approach this Board when they know not of such breach?

The breach complained of, by the Applicants, is the alleged irregular and unprocedural termination of procurement proceedings of the subject tender. This became known to the Applicants when they received the letter of notification of termination dated 28th December 2021 attached to and via an email of 29th December 2021 at 17:53. To prove this, the Applicants provided evidence of a copy of an email from Mr. Kingoo Mutinda (kingoo.mutinda@epra.go.ke) of 29th December 2021 at 17:53 attached and marked MC5 to the Applicants' Further Affidavit sworn by Miguel Cipriano on 21st January 2022.

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 of proving the same. In the instant review, the Respondents have not discharged this burden because they have not provided any evidence to prove that the letter of notification of termination dated 28th December 2021 was dispatched to and reached the Applicants on the same day of 28th December 2021. In the absence of such proof, we are inclined to find that the date of occurrence of breach complained of, by the

Applicants, occurred on 29th December 2021 which is the same day that the Applicant learnt of the breach complained of.

In computation of 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 Applicants ought to have filed a Request for Review to challenge the alleged irregular and unprocedural termination after learning of the same on 29th December 2021, the 29th December 2021 is excluded pursuant to Section 57(a) of IGPA being the day the Applicants learnt of the breach complained of. This means, 14 days started running from 30th December 2021 and lapsed on 12th January 2022 both days included. Even assuming the Applicants actually received the letter of notification of termination on 28th December 2021, the 28th December 2021 would be an excluded day and time would start running on 29th December 2021 in which, 14 days would lapse on 11th January 2022.

The Applicants filed the Request for Review on 11th 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 and we therefore find the Request for Review is not time barred.

Whether the 1st Respondent terminated the subject tender's procurement proceedings in accordance with Section 63 of the Act on account of the subject tender having been overtaken by operation of law and 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"), 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 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 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 Respondent, by a letter dated 28th December 2021, notified the Applicants of the termination of the procurement proceedings of the subject tender. The said letter of notification of termination dated 28th December 2021 reads as follows in part:

***" RE: TERMINATION OF TENDER NO EPRS/SCM/4/2/21-22/032:
PROVISION OF FUEL MARKING AND MONITORING SERVICES***

.....

This is to notify you that the procurement process has been terminated in line with section 63 of the Public Procurement and Asset Disposal Act 2015.

The tender was terminated pursuant to section 63 a(i) and 63(e) because the subject procurement has been overtaken by operation of law and also material governance issues have been detected in the subject procurement.

.....”

The 1st Respondent terminated and communicated to tenderers of the termination of the procurement proceedings of the subject tender on account of the subject tender being overtaken by operation of law and material governance issues having been detected. We note these reasons fall under the circumstances in which, if present, termination of procurement proceedings may be effected under Section 63(1)(a)(i) and 63(1)(e) of the Act respectively.

It is this letter of notification of termination dated 28th December 2021 and the reasons cited therein that the Applicants are aggrieved with. The Applicants allege the termination of the procurement proceedings of the subject tender by the 1st Respondent is irregular, procedurally unfair and an abuse of power and the decision to terminate was made in blatant disregard of the Act, Regulations and other related laws on the following grounds (a) reasons given for termination are vague and ambiguous and in contravention with Section 63 of the Act, (b) no real and tangible evidence to support the cited reasons for termination was given by the 1st Respondent in

contravention to Section 63(4) of the Act and; (c) the Respondents have indirectly purported to invite the operation of Section 66 of the Act contrary to procedures set forth by relevant laws and rules of natural justice.

On its part, the Respondents, in this review, have attempted to justify the reason for terminating the procurement proceedings of the subject tender on account of the same being overtaken by operation of law pursuant to Section 63(1)(a)(i) of the Act. However, the Respondents, in this review, did not attempt to justify the reason for terminating the procurement proceedings of the subject tender on account of material governance issues having been detected pursuant to Section 63(1)(e) of the Act.

It is the Respondents contention that the Government through the Ministry of Interior and Co-ordination of National Government coordinated an inter-governmental initiative aimed at developing an Integrated Product Marking and Authentication System (IPMAS) geared to address challenges related to, *inter alia*, duplication of roles among Government institutions, higher cost of enforcement, uneconomical use of public resources, spill-over costs to the counterfeit products. To prove this, the Respondents furnished the Board with a letter dated 30th August 2021 from the Ministry of Interior and Co-ordination of National Government to the Ministry of Energy. We note the said letter of 30th August October 2021, which forms part of confidential documents submitted to us by the Respondents pursuant to Section 67(3)(e) of the Act, reads as follows in part:

"

***RE: TECHNICAL REQUIREMENTS AND EXISTING CONTRACTS ON
PRODUCT MARKING AND AUTHENTICATION***

.....

The Ministry of Interior and Coordination of National Government is coordinating an inter-governmental initiative aimed at developing an Integrated Product Marking and Authentication System (IPMAS). This initiative is informed by the realization that there are Ministries, Departments and Agencies (MDAs) involved in product marking and authentication through various track and trace systems. The systems affix marks, labels and stamps aimed at identifying products to mitigate against counterfeits, illicit trade; and promote legitimate trade.

Implementation of these track and trace systems is faced with challenges related to duplication of roles; higher cost of enforcement; uneconomical use of public resources; spill-over costs to the industry and consumers through multiple charges, proliferation of counterfeit products, among others. It is envisaged that implementation of IPMAS will resolve these challenges.

During the meeting of Heads of Agencies Steering Committee on IPMAS held on 17th August, 2021, it was noted that a number of MDAs undertaking product marking and authentication are either directly implementing this service or have leased the same to service providers. The meeting was further informed that as recommended by the Public Investments Committee (PIC) vide its Report in 2019, and as advised by the Attorney General in August 2020, the Excisable Goods Management System (EGMS) implemented by KRA had been enhanced to accommodate the needs of all other MDAs. To ensure seamless migration to the enhanced Excisable Goods Management System (EGMS), and IPMAS, it was recommended that these MDAs provide information with regard to their existing systems for review to ensure that their needs are captured in the enhanced EGMS. Cognizant of the role that the State Department for Energy together with her attendant Agencies including the Energy and Petroleum Regulatory Authority (EPRA) play in product marking and authentication, you are requested to:

- i. Provide information on the name of the product marking system currently being used; name of the service provider; and duration of the contract.*

ii. Provide the technical requirements and business needs of your institution in Preparation for migration to the enhanced EGMS.

It will be appreciated if this information is provided to us not later than 10th September 2021.

.....”

This letter of 30th August 2021 informed the 2nd Respondent’s parent Ministry that the KRA’s EGMS had been enhanced to accommodate the needs of all government ministries, departments and agencies. Cognizant of the role the State Department for Energy together with the 2nd Respondent play in product marking and authentication, requested, *inter alia*, for the technical requirements and business needs of the 2nd Respondent in preparation for migration to the enhanced EGMS.

According to the Respondents, by a letter dated 1st October 2021 from the Ministry of Interior & Co-ordination of National Government, the 1st Respondent was requested to, among other things, nominate three (3) officers to be part of TWG whose main objective was to provide information on the 2nd Respondent’s programmes (i.e. the Petroleum Fuels Marking and Monitoring Services; and the Liquefied Petroleum Gas Cylinder Businesses)

that are earmarked for integration under IPMAS. We note the said letter of 1st October 2021, which forms part of confidential documents submitted to us by the Respondents pursuant to Section 67(3)(e) of the Act, reads as follows in part:

"

**RE: DEVELOPMENT AND IMPLEMENTATION OF THE INTEGRATED
PRODUCT MARKING AND AUTHENTICATION SYSTEM (EPRA)**

.....

It is noted and acknowledged that EPRA conducts marking of export/duty free motorfuels and domestic kerosene at all designated export deports; and monitoring of motorfuels for the presence of the marks at the retail sites.

Cognisant of the ongoing process for the development and implementation of Integrated Product Marking and Authentication System (IPMAS) in line with the recommendations of the Public Investments Committee (PIC) Reports, 2019 as communicated vide, copy of our letter Ref. OP/PA.26/1/3A dated 27 February 2020 herewith attached, therefore, you are required to ensure that EPRA fully participates

in this "Whole-of-government" process aimed at integration of systems.

The integration process is at an advanced stage. Refer to our letter Ref.No.MICNG/SEC.4/59 dated 14 September 2021 (copy attached). A Draft Integrated Government of Kenya Mark Bill 2021 is in place. In accordance with the recommendation of the PIC Report, and the legal advice by the Attorney General, Kenya Revenue Authority (KRA) has enhanced and reconfigured the Excisable Goods Management System (EGMS) as the interim IPMAS to accommodate the business needs of the various institutions responsible for product marking and authentication. As a result, the Heads of Agencies Steering Committee meeting on IPMAS held on 25 June 2021 recommended that all institutions that are responsible for product marking and authentication provide their business needs and technical requirements for integration.

In this regard, therefore, you are:

- i. Requested to nominate three (3) officers competent in Policy, ICT & Systems and Legal matters to the IPMAS Technical Working Group (TWG) and provide their contacts by 6 October 2021 for ease of follow up and engagement.*
- ii. Urged to participate in the Heads of Agencies Steering Committee on IPMAS.*

- iii. Required to ensure EPRA supports and embraces this Whole of Government Approach geared towards improving the ease of doing business.***
 - iv. Required to comply with the resolutions of the Steering Committee in relation to renewal, extension of contracts or launch of new procurement processes for product marking and authentication.***
-

This letter of 1st October 2021 evidences that the Ministry of Interior and Co-ordination of National Government understands one of the mandates of the 2nd Respondent as marking of export/duty free motorfuels and domestic kerosene at all designated export deports; and monitoring of motorfuels for presence of the marks at the retail sites. With this understanding, the Ministry of Interior and Co-ordination of National Government informs the 1st Respondent to ensure the 2nd Respondent participates fully, supports and embraces what is called 'whole-of-government' process aimed at integration of systems pursuant to an ongoing process for the development and implementation of Integrated Product Marking and Authentication System (IPMAS). Further, this letter reveals that the Kenya Revenue Authority has enhanced and reconfigured the Excisable Goods Management System (EGMS) as an interim IPMAS to accommodate the business needs of various

government institutions responsible for product marking and authentication. Our understanding of this is that the EGMS was enhanced and reconfigured to cater for various business needs by taking into consideration that certain marking and monitoring of products by government institutions take the form of stamping such products while others may take different forms like use of chemical markers on such products with an example of marking and monitoring of petroleum.

The 2nd Respondent through TWG, participated in several meetings held at the Ministry of Interior & Coordination of National Government's offices geared towards the implementation of the KRA's EGMS. To prove this, the Respondents furnished the Board with a letter dated 2nd November 2021 from the Ministry of Interior and Co-ordination of National Government to the 1st Respondent. We note the said letter of 2nd November 2021, which forms part of confidential documents submitted to us by the Respondents pursuant to Section 67(3)(e) of the Act, reads as follows in part:

"

**RE: DEVELOPMENT AND IMPLEMENTATION OF THE INTEGRATED
PRODUCT MARKING AND AUTHENTICATION SYSTEM (IPMAS)**

.....

The Technical Working Group on IPMAS is in the process of finalizing the harmonization of business needed for various institutions in readiness for integration into reconfigured Excisable Goods Management System (EGMS).

However, it is noted that Energy & Petroleum Regulatory Authority (EPRA) provided business needs to enable marking of LPG products only, thereby excluding the marking of fuel and petroleum products. This is an area of concern taking cognizance of the safety and security challenges presented by proliferation of adulterated fuel and petroleum products in the Kenyan market.

It is further noted that EPRA is seeking the services of a service provider for the marking of fuel products. This process appears to go against the spirit of "Whole of Government Approach" envisaged under the IPMAS, whose National Development Technical Implementation Committee (NDTIC) is already seized of.

Against this background, therefore, you are invited to a meeting on 10th November, 2021 at 10.00 a.m. at Harambee House, 5th floor Boardroom with a view to discuss the development and implementation of IPMAS.

....."

This letter of 2nd November 2021 raised a concern on failure by the 2nd Respondent to provide its business needs to enable marking of fuel and petroleum products (taking cognizance of the safety and security challenges presented by proliferation of adulterated fuel and petroleum products in the Kenyan market) yet the TWG on IPMAS was in the process of finalising the harmonization of business needs for various government institutions in readiness for integration into the reconfigured EGMS.

According to the Respondents, The National Treasury & Planning through a letter dated 6th December 2021 communicated to the 1st and 2nd Respondent and over twenty other Government agencies including ministries who were copied therein, on the essence to migrate to EGMS on account that KRA EGMS had been reconfigured to accommodate the business needs of all MDAs responsible for product marking and authentication under IPMAS. We note the said letter of 6th December 2021, which forms part of confidential documents submitted to us by the Respondents pursuant to Section 67(3)(e) of the Act, reads as follows in part:

".....

RE: IMPLEMENTATION OF THE PUBLIC INVESTMENTS COMMITTEE (PIC) REPORT ON EXCISABLE GOODS MANAGEMENT AND INTEGRATED PRODUCT MARKING AND AUTHENTICATION SYSTEM (IPMAS):

***REQUEST FOR AUTHORITY TO USE SPECIALLY PERMITTED
PROCUREMENT PROCEDURE***

***Reference is made to your letter Ref. No. MJCNG/SEC.4/59 dated
15th November 2021 on the above captioned subject.***

We have reviewed your letter and noted the following: -

- 1. That the Public: Investment Committee (PIC) inquired into the
procurement of the Excisable Goods Management System
(EGMS) by Kenya Revenue Authority (KRA) and observed that
there was duplication of Product markings with several
institutions of government requiring affixing of stamps as a
way of ensuring compliance with their requirements, thereby
increasing the cost of the marked products to the industry and
consumers;***
- 2. That in view of these findings, PIC recommended that: -***
 - i. KRA should share their current Excisable Goods
Management System (EGMS) with Kenya Bureau of
Standards (KEBS) and Anti-Counterfeit Authority (ACA)
at no extra cost to the manufacturers;***

ii. Upon expiry of the existing EGMS Contract, KRA, KEBS and ACA should develop a multi-functional stamp for use by the three government Agencies or any other that will need the system which will ensure efficient, monitoring and reduced wastage of public funds utilized by developing different stamps;

1. That EGMS has since been reconfigured and enhanced to accommodate the business needs of all the MDAs responsible for product marking and authentication under IPMAS. The affected agencies have already provided their business needs, whose integration is ongoing;

2. That this system has been presented to the National Development Technical Implementation Committee (NDTIC) and found to be viable;

3. That the Attorney General provided legal guidance vide letter Ref: AG/CONF/21/66/ Vol II(17) dated 13th August 2021 where he underscored the need to seek the approval of the National Treasury to use the Specially Permitted Procurement Procedure, to allow the relevant Government Agencies whose contracts with service providers have

expired or will expire soon, procure the services of the contractor under KRA EGMS contract with re-configured and Enhanced system, KRA has re-negotiated the framework contract vide the addendum dated 4th May 2021.

Furtherance to the above, I confirm that the National Treasury will review and consider all applications for use of Specially Permitted Procurement Procedures from all MDAs in respect to integrated Product Marking and Authentication System in line with the provisions of the law and advisory of the Attorney General.

....."

This letter of 6th December 2021 informed the Respondents that it will review and consider all applications for use of Specially Permitted Procurement Procedures from all MDAs in respect to Integrated Product Marking and Authentication System in line with the provisions of the law and advisory of the Attorney General.

Being alive to the role of The National Treasury and Planning in policy formulation for public procurement under Section 7(1) of the Act read with Section 11 of PFM Act and being cognizant of the public procurement principle of maximization of value for money under Section 3(h) of the Act,

the 1st Respondent proceeded to terminate the subject tender. The Respondents contend that the 2nd Respondent was under an obligation to adhere to the law and policy direction from The National Treasury and Planning and in terminating the subject tender's procurement proceedings was doing so in compliance with a policy directive from The National Treasury and Planning and which policy directive was intended to result to reduced cost of the marked products to the industry and consumers. We understand the Respondents to mean that it is this policy directive especially the 'whole-of-government' approach and process aimed at integration of systems toward improving ease of doing business that resulted to the subject tender being overtaken by operation of law.

The question that now arises is what is 'operation of law'?

The Black's Law Dictionary defines the phrase 'law' and 'operation of law' as: -

'law is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force.'

In essence, that which must be obeyed and followed by citizens subject to sanctions or legal consequence is a law.

'operation of law is the means by which a right or a liability is created for a party regardless of the party's actual intent.'

Simply put, operation of law is a legal outcome that automatically occurs whether or not the affected party intends it to.

Henry Campbell Black in his book **A Law Dictionary Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern (1995)** defined the phrase 'operation of law' as follows: -

"This term expresses the manner in which rights, and sometimes, liabilities devolve upon a person by the mere application to the particular transaction of the established rules of law, without the act or cooperation of the party himself"

From the above definitions, the Board deduces the meaning of 'operation of law' to mean the manner in which a person, whether a natural or legal person, may acquire certain rights or liabilities in any procurement process through no action, inaction or cooperation on his/her part, but merely by the application of the established legal rules to the procurement process in question. The application of these legal rules thus changes the manner in which the procurement process ought to be handled.

Such operation of law may also arise when a new law or regulation comes into force that affects the conduct or manner in which a procurement process ought to be undertaken.

Our understanding of a policy in the context of public procurement is the general principles by which the government is guided in its management of public affairs with respect to public procurement. With this understanding, we do not agree with the Respondents that a policy directive may cause a tender to be overtaken by operation of law. We say so because, a policy is not law even though policies would at times inform or lead to new laws being enacted. In the circumstances, if indeed the letter of 6th December 2021 from the National Treasury copied to the 1st Respondent is a policy directive, the same was incapable of rendering the subject tender as having been overtaken by operation of law. Accordingly, this reason for termination of the subject tender's procurement proceedings (i.e. the subject tender has been overtaken by operation of law) was not available to the 1st Respondent for purposes of terminating the subject tender.

The other reason given to tenderers for termination of the subject tender's procurement proceedings was that material governance issues have been detected.

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 on 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.

We note, from the confidential documents furnished to the Board pursuant to Section 67(3)(e) of the Act, the 2nd Respondent had at all material times participated in the process of Integrated Product Marking and Authentication System (IPMAS) in line with the Public Investments Committee (PIC) Reports, 2019 which is a whole-of-government approach and process aimed at integration of systems geared towards improving the ease of doing business by implementing a track and trace system for product marking and authentication which would address the challenges related to duplication of roles; higher cost of enforcement; uneconomical use of public resources; spill-over costs to the industry and consumers through multiple charges, proliferation of counterfeit products, among others.

We further note that the Respondents have all along been aware that the Excisable Goods Management System (EGMS) implemented by Kenya Revenue Authority (KRA) had been enhanced to accommodate the needs of all other government Ministries, Departments and Agencies (MDAs) and the 2nd Respondent was to ensure seamless migration to the enhanced EGMs.

We also note that despite the 2nd Respondent being aware that seeking the services of a service provider for marking of fuel products goes against the spirit of the whole-of-government approach and process envisaged under

the IPMAS, the 2nd Respondent proceeded with the subject procurement from 9th November 2021 until when the same was terminated by the 1st Respondent on 28th December 2021.

The said letter of 6th December 2021 by The National Treasury and Planning addressed issues touching on implementation of the Public Investments Committee (PIC) Report on; (i) Excisable Goods Management and (ii) Integrated Product Marking and Authentication System (IPMAS). With this, it is our understanding that the Excisable Goods Management System by KRA is an interim system of the Integrated Product Marking and Authentication System founded on improved and enhanced Kenya Revenue Authority's previous Excisable Goods Management System. What this means is that, the improved and enhanced Excisable Goods Management System has taken into consideration all the business needs of the government's ministries, departments and agencies to accommodate both stamping or any other form e.g. chemical marking of products as a form of marking, tracing and authentication of products.

With respect to Excisable Goods Management, The National Treasury and Planning communicated that affected government agencies have already provided their business needs, whose integration into the Excisable Goods Management System was ongoing.

With respect to Integrated Product Marking and Authentication System, the National Treasury promised to review and consider all applications for use of Specially Permitted Procurement Procedures from all government Ministries, Departments and Agencies in line with the provisions of the law and advisory of the Attorney General.

From the confidential documents furnished to us by the Respondents pursuant to Section 67(3)(e) of the Act, the records confirm that there is a government policy, whole-of-government approach and process, on marking, tracing and authentication of products by government Ministries, Departments and Agencies in an integrated system which aims at, *inter alia*, deal with the challenges of duplication of roles; higher cost of enforcement; uneconomical use of public resources; spill-over costs to the industry and consumers through multiple charges, proliferation of counterfeit products, among others. This policy in our view when implemented will promote the principles of procurement of maximization of value for money under Section 3(h) of the Act and cost-effectiveness of a procurement system under Article 227(1) of the Constitution.

In our considered view, since the 2nd Respondent was at all times aware of the said government policy, it was a malpractice on its part to commence the procurement proceedings of the subject tender knowing very well that implementation of the subject tender may encounter operational challenges

attributed to the said government policy of integrating marking, tracing and authentication of products by government Ministries, Departments and Agencies.

To this end, we find the malpractice on the part of the 2nd Respondent and the imminent operational challenges attributed to the said government policy during the implementation of the subject tender are significant issues that cannot be overlooked and warrant termination of the procurement proceedings of the subject tender under Section 63(1)(e) of the Act.

However, we note that the procedural statutory pre-conditions for termination of the procurement proceedings were not fully satisfied by the 1st Respondent. We say so because, despite a written report being furnished to the Director General of the Authority by the 1st Respondent vide a letter dated 7th January 2022, the reasons given therein for termination of the subject tender's procurement proceedings were mere recital of the provisions of the Act without any real or tangible evidence to support such reasons. Similarly, the reasons given to tenderers for termination of the procurement proceedings of the subject tender by the 1st Respondent vide a letter dated 28th December 2021 were mere citation of the provisions of the Act without any real and tangible evidence to support such reasons.

The High Court in **Republic v Public Procurement Administrative Review Board & another Ex-Parte SGS Kenya Limited [2017] eKLR** held as follows:

".....

40. It is my view that section 63 of the Act imposes a statutory obligation upon the first interested party to terminate the tender award only on any of the grounds stated therein, and that those grounds are not stated therein for cosmetic purposes.

41.

42. I is my considered view that the mere recitation of the statutory language of the ground(s); as has happened in this case is not sufficient for the first interested party to show that there exists 'technological change. Nor are mere ipse dixit affidavits proffered by the first interested party. This recognizes that the tender process and in particular, the termination, must be done in a transparent and accountable and legal manner as the law demands.

43.

44. In addition, the scheme of the act is such that procurement process must strictly conform to the constitutional dictates of transparency, openness, accountability, fairness and generally the rule of law and such rights cannot be narrowly construed. And what is more, the public body terminating the

tender bears the onus of establishing that the termination meets all these constitutional dictates.

.....”

From the foregoing case, the 1st Respondent has an obligation to give tenderers in the subject tender sufficient reasons for termination which should be backed by evidence that supports such reasons other than merely reciting the provisions of the Act. This in our view will go a long way in promoting transparency and accountability in procurement proceedings and will be in accordance with Article 47(1) of the Constitution. Evidence backing the reasons for termination would allow a tenderer to weigh its option by making an informed decision as to whether to challenge such termination.

In the circumstances, we find the procedural statutory pre-conditions under Section 63(3) and (4) of the Act were not satisfied when terminating the procurement proceedings of the subject tender.

What are the appropriate orders to grant in the circumstances?

Having found that the 1st Respondent was justified to terminate the subject tender under Section 63(1)(e) of the Act on account of material governance issues having been detected and having found that the statutory pre – conditions of termination of procurement proceedings under Section 63(3) and (4) of the Act were not satisfied, the Board deems it fair and just to

cancel the letters of notification of termination dated 28th December 2021 issued to tenderers by the 1st Respondent and direct the 1st Respondent to issue new letters of notification of termination of the subject tender's procurement proceedings in accordance with Section 63 of the Act.

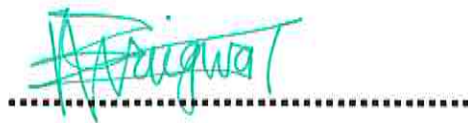
FINAL ORDERS

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 3rd January 2022:

- 1. The letters of notification of termination of procurement proceedings of Tender No. EPRA/SCM/4/3/21-22/032 for provision of petroleum fuel marking & monitoring services dated 28th December 2021 issued to all tenderers in the subject tender by the 1st Respondent be and are hereby cancelled and set aside.**
- 2. The 1st Respondent is hereby directed to issue new letters of notification of termination of procurement proceedings of Tender No. EPRA/SCM/4/3/21-22/032 for provision of petroleum fuel marking & monitoring services in accordance with Section 63 of the Act withing 7 days from the date of this decision, taking into consideration the findings of the Board in this review.**

3. Given the outcome of this review, each party will bear its own costs.

Dated at Nairobi this 1st day of February 2022.



CHAIRPERSON

PPARB



SECRETARY

PPARB