

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO.05/2022 OF 6<sup>TH</sup> JANUARY 2022 CONSOLIDATED**  
**WITH APPLICATION NO. 08/2022 OF 10<sup>TH</sup> JANUARY 2022**

**BETWEEN**

**KOREA EXPRESSWAY CORPORATION (KEC)/  
KOREA CONSULTANTS INTERNATIONAL CO. LTD. (KCI); &  
APEC CONSORTIUM LIMITED ..... 1<sup>ST</sup> APPLICANT  
TECNICA Y PROYECTOS, S.A. &  
GIBB AFRICA LIMITED CONSORTIUM ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DIRECTOR GENERAL**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
KENYA NATIONAL HIGHWAYS AUTHORITY ..... 2<sup>ND</sup> RESPONDENT  
RIFT VALLEY HIGHWAY LIMITED ..... 3<sup>RD</sup> RESPONDENT  
INGEROP SYSTRA- CAS ..... 1<sup>ST</sup> INTERESTED PARTY  
DAR-YUKSEL-AMA ..... 2<sup>ND</sup> INTERESTED PARTY**

Review against the decision of the Director General, Kenya National Highways Authority in relation to Tender Number: KeNHA/PPP/2473/2021 for the Selection of the Independent Expert for Nairobi-Nakuru-Mau Summit Highway Design, Build, Finance, Operate, Maintain and Transfer.

**BOARD MEMBERS**

1. Ms. Faith Waigwa - Chairperson

2. Mrs. Njeri Onyango - Vice Chairperson
3. Dr. Paul Jilani - Member
4. Eng. Kimani Mbiu, OGW - Member

### **IN ATTENDANCE**

Mr. Philemon Kiprop - Holding brief for the Acting Board Secretary

### **BACKGROUND TO THE DECISION**

#### **The Tendering Process**

The 1<sup>st</sup> Respondent invited sealed tenders from competent local and international firms or consortia for Tender No: KeNHA/PPP/2473/2021 for the Selection of the Independent Expert for Nairobi-Nakuru-Mau Summit Highway Design, Build, Finance, Operate, Maintain and Transfer (hereinafter referred to as the 'subject tender') by way of Request for Proposal (RFP) involving more than one envelope in an advertisement published in the Daily Nation Newspaper, Standard Newspaper, Public Procurement Information Portal ([www.tenders.go.ke](http://www.tenders.go.ke)) and the 2<sup>nd</sup> Respondent's website ([www.kenha.co.ke](http://www.kenha.co.ke)) on 9<sup>th</sup> September 2021.

#### **Addenda**

Three (3) Addenda were issued by the 2<sup>nd</sup> Respondent on 7<sup>th</sup> October 2021 (Addendum No.1), 14<sup>th</sup> October 2021 (Addendum No.2) and 29<sup>th</sup> October 2021 (Addendum No.3) amending the Request for Proposal tender document (hereinafter referred to as the 'Tender Document') arising from clarifications sought by prospective tenderers while revising the tender submission

deadline from 18<sup>th</sup> October 2021 to 8<sup>th</sup> November 2021 and the tender security submission deadline from 15<sup>th</sup> October 2021 to 5<sup>th</sup> November 2021.

### **Clarifications**

Three (3) Clarifications were issued by the 2<sup>nd</sup> Respondent on 7<sup>th</sup> October 2021 (Clarification No.1), 14<sup>th</sup> October 2021 (Clarification No.2) and 29<sup>th</sup> October 2021 (Clarification No.3) providing clarifications to queries raised by prospective tenderers.

### **Tender Submission Deadline and Opening of Tenders**

By the tender submission deadline of 8<sup>th</sup> November 2021 at 11:00hrs, the 2<sup>nd</sup> Respondent received seven (7) tenders in the subject tender. The seven (7) tenders' proposals other than financial proposals were opened shortly thereafter on a virtual platform by a Tender Opening Committee in the presence of tenderers' representatives present and the following tenderers were recorded in the Tender Opening Minutes signed by all the members of the Tender Opening Committee on 8<sup>th</sup> November 2021 as having submitted their tenders:

<b>Tenderer No.</b>	<b>Tenderer Name</b>
1.	Ingerop Conseil et Ingenierie / SYSTRA SA / CAS Consultants Limited
2.	SMEC International (PYT) Limited in JV with Ochieng Abuodha & Associates Ltd & Bureau Veritas Kenya Ltd
3.	TYPSA – GIBB
4.	Korea Expressway Corporation (KEC) /

- Korea Consultants International (KCI) / APEC Consortium Limited
5. Meinhardt (Singapore) Pte Limited in a joint venture with Consulting Engineers Group Limited (CEG) and Wanjohi Mutonyi Consult Limited
  6. Zutari (PTY) Limited and ITEC Engineering Limited
  7. Dar-Al-Handasah Consultants (Shair and partners in JV with Yukselk P roje A.S & AMA Consulting Engineers Ltd

### **Evaluation of Tenders**

A Tender Evaluation Committee appointed by the 1<sup>st</sup> Respondent comprising of representatives of the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondent evaluated tenders in the following three (3) stages:

- i. Completeness and Compliance Check
- ii. Technical Evaluation; and
- iii. Financial Evaluation.

### **Completeness and Compliance Check**

At this stage, the Evaluation Committee was required to apply the criteria outlined in Clause (a) Evaluation of the Qualification Documents at page 34 of the Tender Document and checked for completeness and compliance with requirements of the Tender Document. At the end of evaluation at this stage, three (3) tenders were found non-responsive and therefore could not

proceed to the next stage of evaluation. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants' tenders and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties' tenders were the four (4) tenders found responsive at this stage thus, proceeded to the next stage of evaluation.

### **Technical Evaluation**

At this stage, the Evaluation Committee was required to apply the criteria outlined in Clause (b) Evaluation for Technical Proposal and assigning of the Technical Scores at page 35 of the Tender Document. Tenders were required to be weighted against the criteria for evaluation and attain a minimum score of 70% to qualify to proceed to the next stage of evaluation. At the end of evaluation at this stage, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties tenders attained the minimum score of 70% thus, proceeded to the next stage of evaluation. The four (4) tenderers' tenders scored the following technical scores:

<b>Tenderer No.</b>	<b>Tenderer Name</b>	<b>% Score</b>	<b>Technical</b>
1.	Ingerop Conseil et Ingenierie / SYSTRA SA / CAS Consultants Limited	77.5	
3.	TYPSA – GIBB	91.9	
4.	Korea Expressway Corporation (KEC) / Korea Consultants International (KCI) / APEC Consortium Limited	81.2	

7. Dar-Al-Handasah Consultants (Shair 78.2 and partners in JV with Yukselk P roje A.S & AMA Consulting Engineers Ltd

### **Financial Evaluation**

The four (4) tenderers' financial proposals were opened on virtual platform and in the presence of tenderers' representatives present on 9<sup>th</sup> November 2021 at 11:00hrs.

At this stage, the Evaluation Committee was required to apply the criteria outlined in Clause (c) Evaluation of the Financial Proposals and assigning of the Financial Scores at page 37 of the Tender Documents. The Evaluation Committee recorded the total tender amount for the four (4) tenders as follows in the combined technical and financial evaluation report of December, 2021 (hereinafter referred to as the 'Evaluation Report'):

<b>Tenderer No.</b>	<b>Tenderer Name</b>	<b>Total Tender Sum in KES</b>
1.	Ingerop Conseil et Ingenierie / SYSTRA SA / CAS Consultants Limited	1,392,745,305
3.	TYPSA – GIBB	1,771,736,507
4.	Korea Expressway Corporation (KEC) /	1,971,317,917

- Korea Consultants International (KCI) /  
APEC Consortium Limited
7. Dar-Al-Handasah Consultants (Shair 1,218,522,700  
and partners in JV with Yuksek P roje  
A.S & AMA Consulting Engineers Ltd

The Evaluation Committee noted the exchange rate from USD to KES was 110 as per the Tender Document, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties did not quote reimbursable expenses in USD and the quoted tender sums for the 2<sup>nd</sup> Applicant and the 2<sup>nd</sup> Interested Party included indirect taxes (VAT).

The Evaluation Committee thereafter checked the professional fees quoted by the four (4) tenderers and found all had complied with a requirement in Clause 4 at page 18 for sourcing 30% of the total consultancy fees (less reimbursable/PC sums) to a local/citizen consultant.

However, the Evaluation Committee found three (3) out of the four (4) tenders non-compliant with a requirement in Clause 3(b) at page 11 to 17 of the Tender Document and only the 2<sup>nd</sup> Interested Party's tender was compliant with regard to availability of key personnel to perform their roles during the contract (at least 30% of the contract duration for the Project Director and 60% for other key personnel) based on the time input for key personnel in computation of remuneration. The Evaluation Committee members representing the 3<sup>rd</sup> Respondent opposed this analysis, arguing

that staff resourcing had been evaluated at the technical evaluation stage. With this opposing view, the Evaluation Committee was unable to conclude the financial evaluation. This process stalled, leading to an alleged expiry of the evaluation period, thus rendering the process invalid.

### **Recommendation**

The Evaluation Committee recommended termination of the subject tender on account of alleged expiry of evaluation period.

### **Professional Opinion**

In a Professional Opinion dated 14<sup>th</sup> December 2021, the Deputy Director Supply Chain Manager concurred with the recommendations of the Evaluation Committee for the subject tender to be terminated on account of the alleged expiry of tender evaluation period which alleged expiry was occasioned by stalemate following dissenting opinions of members of the Evaluation Committee.

### **Notification to Tenderers**

In letters dated 24<sup>th</sup> December 2021, the 1<sup>st</sup> Respondent notified all tenderers of the termination of the subject tender on account that the evaluation process had been invalidated by lapse of the statutory evaluation period and which lapse was occasioned by dissenting opinions among members of the Evaluation Committee.

**CONSOLIDATION OF REQUEST FOR REVIEW NO.05/2022 OF 6<sup>TH</sup>  
**JANUARY 2022 AND REQUEST FOR REVIEW NO.08/2022 OF 10<sup>TH</sup>  
**JANUARY 2022******

The Board observes the tender in issue in Request for Review Applications No.05/2022 of 6<sup>th</sup> January 2022 (hereinafter referred to as Request for Review No.05/2022) and Request for Review No.08/2022 of 10<sup>th</sup> January 2022 (hereinafter referred to as Request for Review No.08/2022) is the same, that is, the subject tender.

Regulation 215 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') provides as follows: -

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

The two request for review applications are instituted with respect to the subject tender with the Respondents being the same and the grounds for review revolve around the same subject tender. The Board is satisfied the two request for review applications meet the requirement for consolidation under Regulation 215 of Regulations 2020.

Accordingly, the Board hereby consolidates Request for Review Application No.05/2022 and Request for Review No.04/2022 and proceeds to determine them as one Request for Review Application with the following parties:

KOREA EXPRESSWAY CORPORATION (KEC)/  
KOREA CONSULTANTS INTERNATIONAL CO. LTD. (KCI); &  
APEC CONSORTIUM LIMITED ..... 1<sup>ST</sup> APPLICANT  
TECNICA Y PROYECTOS, S.A. &  
GIBB AFRICA LIMITED CONSORTIUM ..... 2<sup>ND</sup> APPLICANT  
DIRECTOR GENERAL  
KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
KENYA NATIONAL HIGHWAYS AUTHORITY ..... 2<sup>ND</sup> RESPONDENT  
RIFT VALLEY HIGHWAY LIMITED ..... 3<sup>RD</sup> RESPONDENT  
INGEROP SYSTRA- CAS ..... 1<sup>ST</sup> INTERESTED PARTY  
DAR-YUKSEL-AMA ..... 2<sup>ND</sup> INTERESTED PARTY

### **REQUEST FOR REVIEW NO.05 OF 2022**

The 1<sup>st</sup> Applicant lodged a Request for Review dated 5<sup>th</sup> January 2022 and filed on 6<sup>th</sup> January 2022 together with a Statement of Fact signed by Engineer J. M. Karanja, Director of APEC Consultants Limited and a member of the 1<sup>st</sup> Applicant, on 5<sup>th</sup> January 2021 through the firm of C.N. Kihara & Company Advocates, seeking the following orders:

- 1. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents decision carried out in the letter dated 24<sup>th</sup> December, 2021, of notification of the termination***

- of the subject tender, addressed to the Applicants and all other bidders, be and are hereby canceled and set aside.*
- 2. The 1<sup>st</sup> and 3<sup>d</sup> Respondents as the Procuring Entities be directed to complete the procurement process to its logical conclusion including if necessary concluding the evaluation process (with or without dissenting) and issue the notification letter of the outcome to the Applicant as the successful bidders, (and/or to such other validly evaluated as successful of the bidders) in compliance with the Request for Proposal document, the Public Procurement and Assets Disposal Act, 2015, the Constitution and any other applicable law and/or regulation, within such time as the Board, may deem fair and just.*
  - 3. The Honorable Court to Grant any other Order, directives and/or guidance, as may find fair and just.*
  - 4. Award costs of these proceedings to the Applicant.*

In a Notification of Appeal and a letter dated 6<sup>th</sup> January 2022, the Acting Board Secretary notified the Respondents of the existence of the Request for Review No.05/2022 and the suspension of procurement proceedings for the subject tender while forwarding to the Respondents a copy of the Request for Review No.05/2022 together with the Board's Circular No.02/2020 dated 24<sup>th</sup> 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 No.05/2022 and

the 1<sup>st</sup> Respondent requested to submit confidential documents concerning the subject tender within 5 days from 6<sup>th</sup> January 2022.

On 11<sup>th</sup> January 2022, the 1<sup>st</sup> Respondent filed a Notice of Preliminary Objection dated 10<sup>th</sup> January 2022 and a 1<sup>st</sup> Respondent's Memorandum of Response sworn by Eng. Kefa Seda, the Deputy Director, Public Private Partnership of the 2<sup>nd</sup> Respondent, on 10<sup>th</sup> January 2022 through the 2<sup>nd</sup> Respondent's inhouse counsel, Lawrence Maruti, Advocate. On 19<sup>th</sup> January 2022, the 1<sup>st</sup> Respondent filed a 1<sup>st</sup> Respondent's Further Memorandum of Response sworn by Eng. Kefa Seda on 19<sup>th</sup> January 2022 through the 2<sup>nd</sup> Respondent's inhouse counsel, Lawrence Maruti, Advocate.

On 11<sup>th</sup> January 2022, the 3<sup>rd</sup> Respondent filed a 2<sup>nd</sup> Respondent's Grounds of Opposition dated 11<sup>th</sup> January 2022 through the firm of Kaplan & Stratton Advocates.

Vide letters dated 12<sup>th</sup> January 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective emails as provided by the 1<sup>st</sup> Respondent, of the existence of the Request for Review No.05/2022 while forwarding to the tenderers a copy of the Request for Review No.05/2022 together with the Board's Circular No.02/2020 dated 24<sup>th</sup> March 2020. Further, all tenderers were invited to submit to the Board any information and arguments touching on the subject tender within 3 days from 12<sup>th</sup> January 2022.

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

The 1<sup>st</sup> Applicant filed Applicant's Skeleton Written Submissions on 19<sup>th</sup> January 2022 while the 1<sup>st</sup> Respondent filed 1<sup>st</sup> Respondent's (Procuring Entity's) Submissions on 19<sup>th</sup> January 2021.

### **APPLICATION FOR REVIEW NO.08 OF 2022**

The 2<sup>nd</sup> Applicant lodged a Request for Review dated 7<sup>th</sup> January 2022 and filed on 10<sup>th</sup> January 2022 together with a Statement in Support of the Request for Review sworn by Joaquin Barba Zalvide, the Managing Director (Africa) of Tecnica Y Proyectos, S.A. the Lead Member of the 2<sup>nd</sup> Applicant, on 7<sup>th</sup> January 2022 through the firm of Kihara & Wyne Advocates, seeking the following orders:

- 1. An order annulling and setting aside the decision of the 1<sup>st</sup> and 3<sup>d</sup> Respondents contained in the letter dated 24<sup>th</sup> December 2021 terminating the procurement of Tender No.KeNHA/PPP/2473/2021 for the Selection of the Independent Expert for NAIROBI-NAKURU-MAU SUMMIT HIGHWAY DESIGN, BUILD, FINANCE, OPERATE, MAINTAIN AND TRANSFER.***

- 2. An Order that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents actions have resulted in the 2<sup>nd</sup> Applicant being treated unfairly.***
- 3. An order that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents breached Article 227 (1) of the Constitution and the provisions of the Public Procurement and Asset Disposal Act, 2015.***
- 4. An order that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents termination of the tender was not in accordance with Section 63 (1) of the Public Procurement and Asset Disposal Act, 2015.***
- 5. An order that the 1<sup>st</sup> Respondent is in breach of Section 44 of the Public Procurement and Asset Disposal Act, 2015.***
- 6. An order directing the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to complete the evaluation process in accordance with the terms set out in the Request for Proposals.***
- 7. Any other relief that the Board may deem fit and just to grant;  
and***
- 8. An order awarding costs to the 2<sup>nd</sup> Applicant.***

In a Notification of Appeal and a letter dated 10<sup>th</sup> January 2022, the Acting Board Secretary notified the Respondents of the existence of the Request for Review No.08/2022 and the suspension of procurement proceedings for the subject tender while forwarding to the Respondents a copy of the Request for Review No.08/2022 together with the Board's Circular No.02/2020 dated 24<sup>th</sup> 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 No.08/2022 and

the 1<sup>st</sup> Respondent requested to submit confidential documents concerning the subject tender within 5 days from 10<sup>th</sup> January 2022.

Vide letters dated 12<sup>th</sup> January 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective emails as provided by the 1<sup>st</sup> Respondent, of the existence of the Request for Review No.08/2022 while forwarding to the tenderers a copy of the Request for Review No.08/2022 together with the Board's Circular No.0/2020 dated 24<sup>th</sup> March 2020. Further, all tenderers were invited to submit to the Board any information and arguments touching on the subject tender within 3 days from 12<sup>th</sup> January 2022.

On 17<sup>th</sup> January 2022, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Notice of Preliminary Objection dated 17<sup>th</sup> January 2022 and a 1<sup>st</sup> & 2<sup>nd</sup> Respondent's Memorandum of Response sworn by Eng. Kefa Seda on 17<sup>th</sup> January 2022 through the 2<sup>nd</sup> Respondent's inhouse counsel, Lawrence Maruti, Advocate. On 19<sup>th</sup> January 2022, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a 1<sup>st</sup> & 2<sup>nd</sup> Respondent's Further Memorandum of Response sworn by Eng. Kefa Seda on 19<sup>th</sup> January 2022 through the 2<sup>nd</sup> Respondent's inhouse counsel, Lawrence Maruti, Advocate.

On 17<sup>th</sup> January 2022, the 3<sup>rd</sup> Respondent filed a 3<sup>rd</sup> Respondent's Grounds of Opposition dated 17<sup>th</sup> January 2022 through the firm of Kaplan & Stratton Advocates.

On 19<sup>th</sup> January 2022, the 1<sup>st</sup> Applicant filed a Response to the Request for Review dated 7<sup>th</sup> January 2022 through the firm of C. N. Kihara & Company Advocates.

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

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed 1<sup>st</sup> and 2<sup>nd</sup> Respondent's (Procuring Entity's) Submissions on 19<sup>th</sup> January 2021.

### **1<sup>ST</sup> APPLICANT'S CASE**

The 1<sup>st</sup> Applicant avers it tendered for the subject tender as a consortium pursuant to an invitation by the 1<sup>st</sup> Respondent, which was governed by the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'). It is the Applicant's averment that the Tender Document at Clause 5(c) required tenderers to submit three (3) covers in a single-stage process containing the following (i) Cover 1-Qualification Documents; (ii) Cover 2-Technical Proposal; and (iii) Cover 3-Financial Proposal.

According to the Applicant, it was adjudged by the 2<sup>nd</sup> Respondent to have met the minimum qualifications under Cover 1-Qualification Documents on a basis of pass/fail and upon evaluation of its Cover 2-Technical Proposal, it met the requirements in the Tender Document and was assigned a score of the Technical Proposal of 81.2%. The 1<sup>st</sup> Applicant avers that it protested this score since it was much lower than the first ranked tenderer being the 2<sup>nd</sup> Applicant by a letter dated 10<sup>th</sup> December 2021.

The 1<sup>st</sup> Applicant avers that on 9<sup>th</sup> December 2021, financial proposals were opened and its representative observed that there was lack of clarity with the proposed costs submitted by other tenderers while noting other tenderers remuneration costs were not reasonable to cover the minimum personnel inputs defined at conditions of eligibility for key personnel requiring inputs of key personnel to be at least 30% of the contract duration for the Project Director and 60% for the Key Personnel.

The 1<sup>st</sup> Applicant avers that vide a letter dated 24<sup>th</sup> December 2021, the 1<sup>st</sup> Respondent notified it of the termination of the procurement proceedings of the subject tender on account of invalidation of the tender evaluation process by lapse of statutory evaluation period which was occasioned by dissenting opinions amongst members of the Evaluation Committee.

According to the Applicant, this termination does not satisfy the requirements of Section 63 of the Act read with Section 126 (3) of the Act

because the letter of termination is vague and unclear as to whether the Evaluation Committee prepared an Evaluation Report containing a summary of evaluation and comparison of tenders, as prescribed by law, and submitted to the persons responsible for the procurement.

As a consequence, the 1<sup>st</sup> Applicant avers that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents have not complied with the provisions of Section 63 of the Act and Articles 3 and 47(1) & (2) of the Constitution 2010 (hereinafter referred to as the 'Constitution') with respect to the termination and the reasons thereof.

The 1<sup>st</sup> Applicant's support's the 2<sup>nd</sup> Applicant's Request for Review Application No.08/2022 save for prayer 2 sought therein by the 2<sup>nd</sup> Applicant with regard to the 2<sup>nd</sup> Applicant being treated unfairly, if it is on the basis, of other factors other than on grounds 1 and 2 raised by the 2<sup>nd</sup> Applicant in the Request for Review No.08/2022.

The 1<sup>st</sup> Applicant prays for grant of orders sought by it.

## **2<sup>ND</sup> APPLICANT'S CASE**

The 2<sup>nd</sup> Applicant avers it tendered for the subject tender as a consortium pursuant to an invitation by the 1<sup>st</sup> Respondent, which was governed by the Act, by submitting three (3) covers containing the following (i) Cover 1-

Qualification Documents; (ii) Cover 2-Technical Proposal; and (iii) Cover 3-Financial Proposal on the tender submission deadline of 8<sup>th</sup> November 2021.

Vide an email of 8<sup>th</sup> November 2021, the 2<sup>nd</sup> Applicant was invited for opening of the Financial Proposal (Cover 3) scheduled for 9<sup>th</sup> December 2021 and that at the virtual opening of the Financial Proposals, an announcement of technical scores of the four (4) consortia that passed the Technical Evaluation stage was made with the 2<sup>nd</sup> Applicant announced as having scored the highest at 91.90%.

It is the 2<sup>nd</sup> Applicant's averment that the Chairman of Evaluation Committee at the opening of the Financial Proposals announced that the minutes of the opening would be issued later on the same day, 9<sup>th</sup> December 2021, and the outcome of the entire evaluation process would be communicated on or before 10<sup>th</sup> December 2021.

In the absence of the minutes of the opening of the Financial Proposals and communication of the outcome of the entire evaluation process, the 2<sup>nd</sup> Applicant wrote to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on 21<sup>st</sup> December 2021 enumerating the technical scores while noting that based on the award criteria set out in the Tender Document, it had achieved the highest combined score and therefore awaited to be invited for contract negotiations.

However, the 2<sup>nd</sup> Applicant received a letter dated 24<sup>th</sup> December 2021 from the 1<sup>st</sup> Respondent informing it that the subject procurement proceedings had been terminated on account of invalidation of the tender evaluation process by lapse of statutory evaluation period which was occasioned by dissenting opinions of members of the Evaluation Committee. Being surprised by the termination of the subject procurement proceedings, the 2<sup>nd</sup> Applicant wrote to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents on 29<sup>th</sup> December 2021 seeking clarification of the contents of the letter of termination and which clarification the 2<sup>nd</sup> Applicant has not received to date.

The 2<sup>nd</sup> Applicant avers that the grounds for termination do not comply with the reasons provided under Section 63(1) of the Act rendering the termination null and void for using extraneous consideration to arriving at a decision to terminate and which reason is not clear.

According to the 2<sup>nd</sup> Applicant, the 2<sup>nd</sup> Respondent has in a similar procurement, the Nairobi Expressway project, carried out the procurement process for a period much longer than for the subject tender, by extending the validity period of proposals three times yet in the subject procurement, the 2<sup>nd</sup> Respondent has treated the Applicant differently by terminating the procurement well within the initial tender validity period, which is scheduled to expire on 8<sup>th</sup> March 2022.

It is the 2<sup>nd</sup> Applicant's averment that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents unfairly, unlawfully and without good cause terminated the subject tender's procurement proceedings breaching Article 227(1) of the Constitution while unfairly denying the 2<sup>nd</sup> Applicant an award of the subject tender as one with the highest combined score in breach of Article 27 and 227 of the Constitution and failing to promote and enforce transparency, effective management and accountability contrary to Section 44(2)(e) of the Act.

Consequently, the 2<sup>nd</sup> Applicant prays for grant of the orders sought by it.

### **1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS' CASE**

The 1<sup>st</sup> Respondent has objected to the hearing of the Request for Review No.05/2022 and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have objected to the hearing of the Request for Review No.08/2022 seeking the same to be dismissed *in limine* on grounds that the Request for Review No.05/2022 and Request for Review No.08/2022 are fatally defective as they offend the mandatory provisions of Section 167(4)(b) of the Act and the Board has no jurisdiction to hear and determine a termination of a procurement or asset disposal proceedings done in accordance with Section 63(1)(a)(i) of the Act.

Further the 1<sup>st</sup> Respondent in Request for Review No.05/2022 and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in Request for Review No.08/2022 contend that as per its mandate for the management, development, rehabilitation and maintenance of national trunk roads, entered into a Project Agreement under

the Public Private Partnership Act, 2013 (hereinafter referred to as the 'PPP Act') with the Respondent, as the Project Company, on 30<sup>th</sup> September 2020 for the Design, Build, Finance, Operate, Maintain and Transfer of Nairobi-Nakuru-Mau Summit Highway (hereinafter referred to as the 'Project').

According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, it was a term of the Project Agreement that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents would jointly procure an Independent Expert to offer consultancy services during the Construction and the Operation and Maintenance Period of the Project. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents commenced the process of appointing an Independent Expert, by inviting experienced, suitable and eligible firms requesting for proposals to assist in the implementation of the Project, pursuant to the provisions of the Project Agreement and by way of advertisement of the subject tender in the dailies on 9<sup>th</sup> September 2021.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that in the absence of guidelines envisaged under Regulations 56 of the Public Private Partnerships Regulations, 2014(hereinafter referred to as the 'PPP Regulations 2014') for appointment of the Independent Experts, they undertook the subject tender's procurement process in accordance with the provisions of the Act and its attendant Regulations 2020.

According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, seven (7) tenders were received and opened on the extended tender submission deadline of 8<sup>th</sup> November

2021 at 11.00am. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that the evaluation of tenders, at the Completeness and Compliance Check stage and Technical Evaluation stage, commenced on 19<sup>th</sup> November 2021 and was conducted pursuant to Section 80(2) of the Act and the criteria set out in the Tender Document by an Evaluation Committee whose membership comprised of representatives of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as appointed by the 1<sup>st</sup> Respondent on 15<sup>th</sup> November 2021. The results of this evaluation was that three (3) tenderers out of seven (7) did not proceed to Technical Evaluation stage having been considered non-responsive at the Completeness and Compliance Check stage. Thereafter, the four (4) tenderers were subjected to Technical Evaluation and were all found responsive having all attained the required minimum score of 70%, thus proceeded to the Financial Evaluation stage.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents aver that financial proposals for the four (4) tenderers who were found responsive at the Technical Evaluation stage were opened on 9<sup>th</sup> December 2021 at 1100Hrs and evaluation was carried out in accordance with the provisions of the Tender Document. According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Tender Document at Clause 3(b) thereof, required each key personnel to be available to perform their roles during the contract (at least 30% of the contract duration for the Project Director and 60% for other Key Personnel) while deputies to key staff were required to be available full time during the entire contract duration. Further, that the Tender Document at Clause 4 thereof, required where a tenderer is not a Kenyan registered entity nor has a local representative company in Kenya,

to, mandatorily, sustainably promote local industry through sourcing of at least 30% relevant part of the total consultancy fees (less reimbursable/PC Sums) to a local/citizen consultant thus, professional fees quoted by tenderers were checked for compliance with the Tender Document requirement.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that only one tenderer complied with the time input for key staff and their deputies in computation of the remuneration which was critical in determining local content and ensuring all tenders were evaluated on the same basis as instructed in the Tender Document.

However, members of the Evaluation Committee had dissenting opinions with regard to conduct of the financial proposals evaluation stemming from a gap in the Tender Document that caused difference in interpretation of the Tender Document. Arising from this, the Evaluation Committee was unable to conclude financial evaluation, the process stalled leading to expiry of evaluation period rendering the process invalid for taking more than 21 days contrary to Section 126(3) of the Act. Pursuant to Section 63(1)(a)(i) of the Act, the Evaluation Committee recommended for termination of the evaluation process on account of expiry of the evaluation process.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that pursuant to Section 63(4) of the Act, the 2<sup>nd</sup> Respondent vide a letter dated 24<sup>th</sup> December 2021 notified all

tenderers in the subject tender of the termination within fourteen (14) days of termination.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend the termination process and evaluation criteria was followed by the 2<sup>nd</sup> Respondent and no bidder can claim *mala-fide*, favouritism or unequal footing as the evaluation criteria as well as the applicable regulations and laws were communicated to all tenderers. The 2<sup>nd</sup> Respondent denies all the allegations of unfairness and failure to act in accordance with the law as alleged by the Applicants or at all and contends the entire process was fair, equitable, transparent, competitive and cost effective in accordance with Article 227(1) of the Constitution.

The 1<sup>st</sup> Respondent prays for dismissal of the Request for Review No.05/2022 with costs to the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> Respondent pray for dismissal of Request for Review No.08/2020 with costs to the 2<sup>nd</sup> Respondent for being baseless, unsupported in law and fact.

### **3<sup>RD</sup> RESPONDENT'S CASE**

The 3<sup>rd</sup> Respondent opposes the Request for Review No.05/2022 and Request for Review No.08/2022 on grounds that the orders sought therein are incapable of being granted by the Board because the tender process was invalidated by operation of law for failure to complete the evaluation process within 21 days as stipulated in Section 126(3) of the Act.

Consequently, the 3<sup>rd</sup> Respondent prays for Request for Review No.05/2022 and Request for Review No.08/2022 to be dismissed with costs for lack of merit.

### **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 1<sup>st</sup> and 2<sup>nd</sup> Respondents pursuant to Section 67 (3) (e) of the Act and finds the issues that arise for determination are as follows:

- 1. Whether the 1<sup>st</sup> Respondent terminated the subject tender's procurement proceedings in accordance with Section 63 of the Act on account that the subject procurement has been overtaken by operation of law to divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act;**

Depending on the determination of the first issue;

- 2. Whether the Evaluation Committee appointed by the 1<sup>st</sup> Respondent failed to conclude the evaluation of proposals in the subject tender within a maximum period of twenty-one (21) days provided under Section 126(3) of the Act;**

Depending on the determination of the second issue;

**3. Whether the subject tender's procurement proceedings was invalidated by the evaluation of proposals not being concluded within a maximum period of twenty-one (21) days provided under Section 126 (3) of the Act;**

Depending on the determination of the third issue;

**4. What criteria for evaluation should the Evaluation Committee apply at the Financial Evaluation stage when evaluating tenders in the subject tender.**

**5. What orders should the Board grant in the circumstances.**

The Board will now proceed to address and make a determination on the issues framed by addressing the preliminary objections raised by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as part of the substantive Request for Review No.05/2022 and Request for Review No.08/2022 and render one decision in accordance with Regulation 209(4) of Regulations 2020, if the preliminary objections fail. However, if the preliminary objections succeed, we shall down our tools at that point and we will not proceed to hear and determine the substantive Request for Review No.05/2022 and Request for Review No.08/2022.

**Whether the 1<sup>st</sup> Respondent terminated the subject tender's procurement proceedings in accordance with Section 63 of the Act on account that the subject procurement has been overtaken by**

**operation of law to divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act;**

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have objected to the hearing and determination of the Request for Review No.05/2022 and Request for Review No.08/2022 on account that the Board lacks jurisdiction to hear the same because the 1<sup>st</sup> Respondent terminated the subject tender on account of having been overtaken by operation of law in accordance with Section 63 (1)(a)(i) of the Act. To justify the termination, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that the Evaluation Committee was unable to conclude financial evaluation due to dissenting opinions and which action stalled the process leading to expiry of evaluation period, rendering the process invalid for taking more than 21 days contrary to Section 126(3) of the Act.

The 1<sup>st</sup> Applicant contends that the 1<sup>st</sup> Respondent did not satisfy the requirements of Section 63 of the of the Act and that the reason given for termination is vague and unclear as to whether an Evaluation Report was prepared and submitted to persons responsible for procurement. With this, the 1<sup>st</sup> Applicant contends that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents breached Article 3, 47(1) and (2) of the Constitution as regards the termination and reasons thereof. The 1<sup>st</sup> Applicant submits that no sufficient evidence has been put forth by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to justify and support the ground for termination relied on and the burden of proof to justify the purported termination lies with the 2<sup>nd</sup> Respondent.

The 2<sup>nd</sup> Applicant on its part contends that extraneous considerations were made in terminating the subject tender other than the reasons provided under Section 63 of the Act rendering the purported termination null and void.

It is trite that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) eKLR**, Nyarangi, JA held that:

***"..... I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..... "***

Similarly, in the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

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

***and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain....”***

The Supreme Court in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] eKLR** pronounced itself with respect to where the jurisdiction of a court or any other decision making body flows from when it held as follows:

***“(68) A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings....”***

The decision of the Supreme Court in *Samuel Kamau Macharia Case* is very critical in determining where the jurisdiction of this Board flows.

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 specific 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 its 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.

However, the Board's jurisdiction is ousted by dint of Section 167(4) of the Act where proceedings before it relate to a choice of procurement, termination of procurement proceedings effected in accordance with Section 63 of the Act or where a contract is signed in accordance with Section 135 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 pursuant to 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 2<sup>nd</sup> 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 Section 167 (4) (b) of the Act.

It is therefore important for this Board to determine whether the 1<sup>st</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> Respondents and whether or not the 1<sup>st</sup> and 2<sup>nd</sup> 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 but 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-condition 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 under Section 167(4)(b) of the Act.

It is therefore important for the Board to determine the legality, or lack thereof, of the 1<sup>st</sup> 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. It is only then, that a determination whether or not the Board has jurisdiction can be made.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondent relied on Section 63 (1) (a)(i) of the Act to justify its decision to terminate the subject tender's procurement proceedings on account of the subject procurement being overtaken by operation of law. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that the subject tender has been overtaken by operation of law because the Evaluation Committee did not conclude evaluation of tenders within a maximum period of 21 days required under Section 126(3) of the Act due to dissenting opinions among its members which led to invalidation of the evaluation process.

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

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

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

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 may deduce 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.

It is important for us to understand what evaluation of tenders is before determining whether evaluation of tenders in the subject tender was concluded within or outside 21 days.

The Black's Law Dictionary, 6<sup>th</sup> Edition defines "Bid Evaluation" as follows:-

**After the submission deadline, the process of examining, and evaluating bids to determine the bidders' responsiveness, and other factors associated with selection of a bid for recommendation for contract award.**

Section 85 of the Act further provides that:-

**Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers.**

From the above provisions and having noted the ordinary meaning of tender (bid) evaluation, it is the Board's considered view that evaluation is conducted with a view of recommending a tenderer for award of a tender.

Section 80 (4) of the Act is instructive on the document that marks the end of evaluation. It states as follows:-

**The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.**

An evaluation committee having conducted an evaluation of tenders is able to recommend a tenderer for award of a tender. The recommendation envisioned by the Head of Procurement function is only in respect of his/her professional opinion given pursuant to Section 84 of the Act advising the accounting officer on the appropriate action to take.

In essence, evaluation of tenders ends once the Evaluation Committee prepares and signs an Evaluation Report containing a summary of evaluation and comparison of tenders and recommendation of award in the absence of any evidence of a contrary action taken by Evaluation Committee. It therefore follows that the evaluation of tenders does not include all other processes after the conclusion of an evaluation process as contained in the Evaluation Report that is prepared and signed by the Evaluation Committee.

It is worth noting that the period of evaluation of tenders does not include a post qualification evaluation pursuant to Section 83 of the Act, a professional opinion rendered by the Head of Procurement Function pursuant to Section 84 of the Act and award of tenders by an accounting officer pursuant to Section 87 of the Act.

The Board observes that the tender in issue is a Request for Proposal and Section 126 (3) of the Act is instructive on the timelines for evaluation of proposals which reads as follows: -

**The evaluation shall be carried out within a maximum of twenty-one days, but shorter periods may be prescribed in the Regulations for particular types of procurement**

The Board observes, from the confidential documents submitted to it by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents pursuant to Section 67 (3)(e) of the Act, that even though Cover 1-Qualification Documents and Cover 2-Technical Proposals submitted by the seven (7) tenderers in the subject tender were opened on 8<sup>th</sup> November 2021, the evaluation of tenders only commenced on 19<sup>th</sup> November 2021 following appointment of an Evaluation Committee by the 1<sup>st</sup> Respondent on 15<sup>th</sup> November 2021. It is not clear when the evaluation of technical proposals of the four (4) tenderers who made it to the Technical Evaluation stage was finalized. We say so because, the Board has only had sight of a combined technical and financial evaluation report (Evaluation

Report) of December 2021. However, the Professional Opinion by the Deputy Director Supply Chain Manager dated 14<sup>th</sup> December 2021 and approved by the 1<sup>st</sup> Respondent on even date, at page 7 thereof, divulges that there is a technical evaluation report that was approved by the 1<sup>st</sup> Respondent on 7<sup>th</sup> December 2021.

The Board further observes, individual members of the Evaluation Committee save for Eng. Kefa Seda signed their individual technical evaluation scores on 3<sup>rd</sup> December 2021 signifying the end of evaluation at the Technical Evaluation stage whilst Eng. Kefa Seda signed his individual technical evaluation scores on 7<sup>th</sup> December 2021. This we find is quite strange because good practice requires all members of an evaluation committee evaluate tenders at the same time while individually recording the outcome of evaluation and comparison of tenders as an individual. Be as it may, and in the absence of a singular technical evaluation report by the Evaluation Committee, we could make an assumption that evaluation of tenders at the Technical Evaluation stage was completed on 7<sup>th</sup> December 2021 when Eng. Kefa Seda signed his individual technical evaluation scores.

In computing time taken by the Evaluation Committee to conduct evaluation of tenders with respect to Cover 1-Qualification Documents and Cover 2-Technical Proposals, the Board is guided by Section 57(a) of the

Interpretation of General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter referred to as 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;***

A reading of the above provision and taking the circumstances of the instant review, the 19<sup>th</sup> of November 2021 is excluded from computation of time, and time started running on the 20<sup>th</sup> November 2021. With this, we deduce the Evaluation Committee took 18 days to evaluate tenders with respect to Cover 1-Qualification Documents and Cover 2-Technical Proposals from 19<sup>th</sup> November 2021 to 7<sup>th</sup> December 2021 under the assumption that evaluation of tenders at the Technical Evaluation stage was concluded on 7<sup>th</sup> December 2021.

With respect to evaluation of tenders as regards Cover 3-Financial Proposals, it is common ground that financial proposals of the four (4) tenders found

responsive at the Technical Evaluation stage and eligible for financial evaluation, were opened on 9<sup>th</sup> December 2021.

The Board observes, from a trail of emails submitted to it by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, some members of the Evaluation Committee commenced and completed evaluation of tenders at the Financial Evaluation stage on the same day when the financial proposals were opened on 9<sup>th</sup> December 2021. The said emails state as follows:

An email from Allan Munyua, a member of the Evaluation Committee, dated 9<sup>th</sup> December 2021 at 17:07 sent to the following members of the Evaluation Committee, Eng. Kefa Seda, Mr. Isaac Kamotho, Ms. Norah A. Odingo, Ms. Brandao Cecile, Mr. Peter K. Ndichu and Ms. Susan K. Cherono, reads as follows in part:

***"Dear All,***

***Please see the attached analysis on local content.***

***Thanks***

***....."***

A subsequent email was sent by Allan Munyua to the members of the Evaluation Committee dated 9<sup>th</sup> December 2021 at 18:53 reading as follows in part:

***"Dear All,***

***Please see the attached our full analysis of the financial proposals with the full scores and ranking.***

***Thanks***

***....."***

An email from Eng. Kefa Seda dated 10<sup>th</sup> December 2021 at 09.42 sent to members of the Evaluation Committee but addressing Mr. Allan Munyua and Ms. Brandao Cecile reads as follows in part:

***"Dear Cecile/Allan***

***We acknowledge receipt of your analysis .***

***However as discussed yesterday, Bidder No.1, 2, 3 and 4 did not comply with the time inputs for Keys Staff and Deputies as provided in the RFP (refer to the attached analysis). With such difference/non-compliance, it does not provide a fair competing platform for purposes of comparing bid prices.***

***In this respect we shall only have Bidder No.7 proceeding to financial scoring. Nonetheless, we may exercise discretion on Bidder 4 (which can be negotiated) who only missed time input for the Deputy Project Director and have two bidders proceed to financial scoring.***

***Kindly review and amend the analysis to only accommodate bidder 7 and if you also chose to exercise discretion then you add bidder 4 and resend to us for compilation.***

***Your earliest response would be appreciated to allow us conclude the exercise today.***

***We also noted some errors in Bidder's 3 Annex 5B where the KES amount in words were different from the KES amount in figures.***

***Regards***

***....."***

An email from Ms. Cecile Brandao dated 10<sup>th</sup> December 2021 at 10:48 sent to Eng. Kefa Seda reads as follows in part:

***"Dear Eng. Kefa,***

***We strongly disagree with the approach proposed in your email below to conclude that Bidders 1, 3 and 4 should be excluded from***

***the scoring and ranking on the basis of non-compliance with respect to time inputs for key staff and deputies.***

***The compliance of the Bidders' estimates on time inputs for their experts was determined at the Technical Proposal evaluation stage and scored accordingly and on the basis, 4 Bidders were formerly notified of the acceptance of their Technical Proposals. According to the laid out procedures in the RFP, the only item drawing from the technical proposals that required to be checked at the Financial Proposal evaluation stage was that Bidders must meet a minimum of 30% local content by value – we have performed this analysis and are clear that all Bidders complied with this requirement and have subsequently been scored and ranked.***

***The comparison of financial proposals must be made on the basis of the total costs which are reflected in Annex 5C. Please note that in the preparation of the Financial Evaluation Results worksheet shared with you yesterday, we have reconciled Annex 5B to Annex 5C for all the Bidders and conclude there was no discrepancy.***

***We stand by our evaluation of the Financial Proposals and resubmit our analysis with the full scores and ranking as shared yesterday.***

***Best regards,***

***.....”***

An email from Eng.Kefa Seda dated 10<sup>th</sup> December 2021 at 15:15 sent to Brandao Cecile and copied to other members of the Evaluation Committee reads as follows in part:

***"Dear Cecile***

***The matter is question is a compliance issue and cannot be overlooked even if we are passed technical evaluation.***

***The other option which the law allows is to correct the discrepancy and seek for bidders concurrence with the resultant adjustments.***

***Kindly let us know your position on this.***

***....."***

An email from Brandao Cecile dated 10<sup>th</sup> December 2021 at 3:30 P.M sent to Eng. Kefa Seda reads as follows in part:

***"Dear Eng. Kefa***

***As indicated in our previous email, the only compliance check to be made at the Financial Proposal evaluation stage is, as per the RFP, the one related to Local Content and this has been properly done. Other compliance checks requested as per the RFP were done by all members of the Evaluation Committee during the evaluation of***

***the qualification documents and during the evaluation of the Technical Proposals.***

***The Evaluation Committee have then concluded that 4 bidders met the completeness and compliance requirements stipulated in the RFP, attained the minimum technical score and therefore were qualified to proceed to financial evaluation. This has been duly notified to the Bidders in letters signed on behalf of the Director General KeNHA.***

***The Project Company stands by its evaluation of the financial proposals already communicated to you yesterday and reiterated this morning.***

***Best regards.....”***

We note the evaluation of tenders at the Financial Evaluation stage by some members of the Evaluation Committee was completed on 9<sup>th</sup> December 2021 and by others on 10<sup>th</sup> December 2021. Even though members of the Evaluation Committee differed on evaluation of tenders at the Evaluation Committee, members stuck with their different positions and evaluated tenders at the Financial Evaluation by 10<sup>th</sup> December 2021 negating the allegation that evaluation of tenders was not completed or was completed on 14<sup>th</sup> December 2021 when only members of the Evaluation Committee

representing the 2<sup>nd</sup> Respondent signed the combined evaluation report whilst those representing the 3<sup>rd</sup> Respondents did not sign the Evaluation Report.

From the foregoing and taking into consideration Section 57(a) of the Act, the Evaluation Committee evaluated the financial proposals in the subject tender in one (1) day from 9<sup>th</sup> to 10<sup>th</sup> December 2021 with 9<sup>th</sup> December 2021 being excluded from computation of time.

From this narrative of events, it is evident that the total number of days the Evaluation Committee evaluated tenders in the subject tender was a maximum period of nineteen (19) days made up of eighteen (18) days of evaluation of tenders with respect to Cover 1-Qualification Documents, Cover 2-Technical Proposals and Cover 3-Financial Proposals and one (1) day of evaluation of tenders with respect to Cover 3-Financial Proposals which period of nineteen (19) days is within the required maximum period of 21 days under Section 126(3) of the Act.

In the circumstances, this reason was not available for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to justify termination of the subject tender's procurement proceedings on account of a purported evaluation that was not completed within 21 days. Accordingly, we find the termination of the subject tender's

procurement proceedings by the 1<sup>st</sup> Respondent was not terminated in accordance with Section 63 of the Act and the same is therefore null and void. Consequently, the preliminary objections raised by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents fail, the Board's jurisdiction has not been ousted by dint of Section 167(4)(b) of the Act. In the circumstances, we shall proceed to address the other issues framed for determination.

Having found that the evaluation of tenders in the subject tender was conducted in a record nineteen (19) days, we note this finding has rendered the second and third issue framed for determination moot and shall therefore proceed to address the fourth issue framed for determination.

**What criteria for evaluation should the Evaluation Committee apply at the Financial Evaluation stage when evaluating tenders in the subject tender.**

We have hereinbefore, in verbatim, reproduced a trail of emails among members of the Evaluation Committee expressing their different understanding on how evaluation of tenders should be conducted at the Financial Evaluation stage and the two different positions taken by members of the Evaluation Committee on the same.

We deem it necessary to guide the Evaluation Committee on how it should conduct evaluation of tenders at the Financial Evaluation stage.

The Board is cognizant of Article 227 of the Constitution which provides for the kind of system the 2<sup>nd</sup> Respondent is required to apply when contracting for goods or services as follows:

***Article 227. Procurement of public goods and services***

- (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.***
- (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –***
  - (a) .....***
  - (b) .....***
  - (c) ..... and***
  - (d) .....***

The Act of Parliament envisaged in Article 227(2) of the Constitution is the Act. Section 80 of the Act is instructive on how evaluation of tenders should be conducted and provides as follows:

**Section 80. Evaluation of tenders**

**(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected .**

**(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.**

**(3) .....**

**(4) .....**

**(5) .....**

**(6) .....**

**(7) .....**

The import of Section 80 (1) and (2) of the Act read with Article 227 (1) of the Constitution requires an evaluation committee to evaluate tenders in a system that is fair using the criteria and procedure laid out in a tender document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers because such criteria was provided for in a tender document issued to tenderers by a procuring entity.

We have carefully studied the Tender Document, original submitted to us by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and copies attached in the 1<sup>st</sup> and 2<sup>nd</sup> Applicant's Request for Review applications, and note the criteria for evaluation of the subject tender is contained in Clause (a), (b), (c) and (d) at page 34 to 37 of the Tender Document. With respect to evaluation of financial proposals and determination of the successful tenderer, the Tender Document provides as follows at Clause (c) Evaluation of the Financial Proposals and assigning of the Financial Scores and Clause (d) Determination of the Total Score and determination of the Successful Bidder at page 37 of the Tender Document:

***(c) Evaluation of the Financial Proposals and assigning of the Financial Scores***

***The Financial Proposals of those Bidders who have secured Technical Scores above 70 (seventy) out of 100 (one hundred) shall be opened and evaluated by the CA and the PC jointly on the designated time and at the designated venue.***

***The financial cost contained under the Financial Proposal shall be assessed as the total cost of the Bid based on the assumed construction schedule set out in Appendix 1, assumed USD: KSH exchange rates as set out in Appendix 6, and the assumed volumes of work on Additional Services as set out in Appendix 5C.***

***The formula for determining the financial scores ( $S_f$ ) of all the Bids is calculated as following:***

***The lowest evaluated Financial Proposal( $F_m$ ) shall be given the maximum financial score ( $S_f$ ) of 100.***

***$S_f = 100 \times F_m / F$ , in which " $S_f$ " is the financial score, " $F_m$ " is the lowest price, and " $F$ " the price of the proposal under consideration.***

***(d) Determination of the Total Score and determination of the Successful Bidder***

***The weights given to the Technical (T) and Financial (P)***

***Proposals are:***

***T = 70; and***

***P = 30***

***Bids are ranked according to their combined technical ( $S_t$ ) and financial ( $S_f$ ) scores using the weights (T = the weight given to the Technical Proposal; P = the weight given to the Financial Proposal; T + P = 1) as follows:***

$$\text{Total Score (S)} = S_t \times T\% + S_f \times P\%$$

***The CA and the PC shall evaluate the Bids and their decision shall be final and binding. The Bidder who shall score the highest Total Score shall be declared as Successful Bidder by the CA and PC jointly.***

The Tender Document communicated to tenderers that evaluation of tenders at the Financial Evaluation stage will be based on use of a formulae provided therein to assign each financial proposal a score with the lowest evaluated financial proposal being assigned the maximum score of 100. Thereafter, tenders are to be ranked according to their combined technical and financial score using a weighting formula provided in the Tender Document. The tenderer who submitted a tender with the highest total score arrived at combining the technical and financial scores will then be determined as the successful tenderer.

There is no criteria for Local Content Analysis (which, in any case, all the four (4) tenders that made it to the Financial Evaluation stage complied with) and Key Staff Time Input Analysis provided for at the Financial Evaluation stage as alleged by some of the members of the Evaluation Committee. Applying these analysis' would be introducing extraneous or extrinsic criteria at the Financial Evaluation stage contrary to Article 227 of the Constitution and Section 80(2) of the Act. We say so because, these two analysis, even though some of the members of the Evaluation Committee indicate were given as instructions to tenderers, the same were not specifically provided

for as a criteria for evaluation at the Financial Evaluation stage. In the circumstances, the Evaluation Committee should be guided by and strictly apply the criteria for evaluation while evaluating financial proposals at the Financial Evaluation stage as provided in the Tender Document in line with Article 227 of the Constitution and Section 80(2) of the Act.

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

The Board has found the termination of the subject tender's procurement process null and void. Further, the Board took note of the different interpretation of the criteria for evaluation at the Financial Evaluation stage by members of the Evaluation Committee.

In the circumstances, the board finds it just and fair to cancel and set aside the termination of the subject tender's procurement proceedings and order the 1<sup>st</sup> Respondent to direct the Evaluation Committee to re-evaluate the subject tender at the Financial Evaluation stage as guided hereinbefore.

The upshot of the Board's findings herein, is that the Request for Review No.05/2022 and Request for Review No.08/2022 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 No.05/2022 and Request for Review No.08/2022:

- 1. The termination of procurement proceedings of Tender Number: KeNHA/PPP/2473/2021 for the Selection of the Independent Expert for Nairobi-Nakuru-Mau Summit Highway Design, Build, Finance, Operate, Maintain and Transfer by the 1<sup>st</sup> Respondent on 14<sup>th</sup> December 2021 be and is hereby cancelled and set aside.**
- 2. The letters of notification of termination of procurement proceedings of Tender Number: KeNHA/PPP/2473/2021 for the Selection of the Independent Expert for Nairobi-Nakuru-Mau Summit Highway Design, Build, Finance, Operate, Maintain and Transfer dated 24<sup>th</sup> December 2021 issued to all tenderers in the subject tender by the 1<sup>st</sup> Respondent be and are hereby cancelled and set aside.**
- 3. The 1<sup>st</sup> Respondent is hereby ordered to direct the 2<sup>nd</sup> Respondent's Evaluation Committee to conduct a re-evaluation at the Financial Evaluation stage of all the financial proposals of the tenderers who made it to the Financial Evaluation stage in accordance with Section 80(2) of the Act taking into consideration the findings of the Board in this decision.**
- 4. Further to Order 3, the 1<sup>st</sup> Respondent is hereby directed to complete the procurement process for Tender Number: KeNHA/PPP/2473/2021 for the Selection of the Independent**

**Expert for Nairobi-Nakuru-Mau Summit Highway Design, Build, Finance, Operate, Maintain and Transfer to its logical conclusion including the making of an award to the tenderer determined to have submitted the responsive 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.**

- 5. Given that the procurement proceedings for Tender Number: KeNHA/PPP/2473/2021 for the Selection of the Independent Expert for Nairobi-Nakuru-Mau Summit Highway Design, Build, Finance, Operate, Maintain and Transfer are not complete, each party will bear its own costs.**

**Dated at Nairobi this 27<sup>th</sup> day of January 2022**



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



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