

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO.10/2022 OF 9<sup>TH</sup> FEBRUARY 2022**

**BETWEEN**

**SIGMUND PEAK INTERNATIONAL LIMITED ..... APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**COMMUNICATIONS AUTHORITY OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**COMMUNICATIONS AUTHORITY OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**TILIL TECHNOLOGIES LIMITED ..... INTERESTED PARTY**

Review against the decision of the Director General, Communications Authority of Kenya in relation to Tender No: CA/PROC/RFP/02/2021-2022 for Re-tender for Provision of Consultancy Services for National Roaming, Telecommunications Tower Sharing and Termination Rates Network Cost Study.

**BOARD MEMBERS**

1. Ms. Faith Waigwa - Chairperson
2. Mr. Jackson Awele - Member
3. Dr. Joseph Gitari - Member
4. QS Hussein Were - Member
5. Mr. Nicholas Mruttu - Member

**IN ATTENDANCE**

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

## **BACKGROUND TO THE DECISION**

### **The Tendering Process**

The 2<sup>nd</sup> Respondent, as the Procuring Entity, invited sealed tenders from eligible candidates for Tender No: CA/PROC/RFP/02/2021-2022 for the Re-tender for Provision of Consultancy Services for National Roaming, Telecommunications Tower Sharing and Termination Rates Network Cost Study (hereinafter referred to as the 'subject tender') by way of Request for Proposal using the open tender method of procurement through an advertisement on MyGov Newspaper, the 2<sup>nd</sup> Respondent's website ( <http://ca.go.ke/about-us/do-business-with-us/open-tenders> ) and the Public Procurement Information Portal [www.tenders.go.ke](http://www.tenders.go.ke) on 14<sup>th</sup> December 2021.

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

The 2<sup>nd</sup> Respondent received four (4) tenders by the tender submission deadline of 12<sup>th</sup> January 2022 at 10.30 am. The 2<sup>nd</sup> Respondent's Tender Opening Committee opened the tenders shortly thereafter in the presence of tenderers' representatives present and recorded the following tenderers as having submitted their respective tenders in good time as captured in the tender opening minutes of 12<sup>th</sup> January 2022 (hereinafter referred to as the 'Tender Opening Minutes'):

#### **No. Tenderer Name**

- B1. Tilil Technologies Ltd
- B2. Decision Analysis Partners/ Sigmund Peak Ltd
- B3. Seven Delta Consulting

B4. Kobby Technology Ltd

### **Evaluation of Tenders**

The 2<sup>nd</sup> Respondent's Tender Evaluation Committee (hereinafter referred to as the 'Evaluation Committee') evaluated the four (4) tenders in the following stages:

- i. Mandatory Evaluation Stage;
- ii. Technical Capacity Evaluation; and
- iii. Financial Evaluation

### **Mandatory Evaluation Stage**

At this stage, the Evaluation Committee was required to apply the mandatory criteria outlined in Clause 22.1 Preliminary and Mandatory Evaluation Criteria of Section 2(B). Data Sheet of the blank tender document issued to prospective tenderers by the 2<sup>nd</sup> Respondent (hereinafter referred to as the 'Tender Document'). Evaluation of tenders was to be conducted on a pass/fail basis and any tender failing in any of the eleven mandatory requirements would not proceed to the next stage of evaluation. At the end of evaluation at this stage, all the four (4) tenders including that of the Applicant were found responsive and proceeded to the next stage of evaluation as captured in the evaluation report dated 21<sup>st</sup> January 2021 (hereinafter referred to as the 'Evaluation Report').

### **Technical Capacity Evaluation**

At this stage, the Evaluation Committee was required to apply the criteria outlined in Clause 22.2 Technical Capacity Evaluation of the Tender Document. Evaluation of the tenders was to be conducted by assigning scores and tenders required to attain a minimum technical score of 60 out of 80 to proceed to the next stage of evaluation. At the end of evaluation at this stage, two (2) tenders were found non-responsive while two (2) tenders including the Applicant's tender were found responsive. Tenders that were found responsive proceeded to the next stage of evaluation.

In letters dated 21<sup>st</sup> January 2022, the 1<sup>st</sup> Respondent wrote to the two (2) tenderers whose tenders were found responsive at the technical capacity evaluation stage, inviting them for the opening of their financial proposals on 24<sup>th</sup> January 2022 at 10.00 am. On the same 21<sup>st</sup> January 2022, the 1<sup>st</sup> Respondent also wrote to the tenderers whose tenders were found non-responsive at the technical capacity evaluation stage, informing them of their tenders' unsuccessfulness and that their un-opened financial proposals would be returned to them once the tender evaluation process was finalized.

### **Financial Evaluation**

At this stage, the Evaluation Committee was required to apply the criteria outlined under Clause 29.1 (QCBS only) of Section 2 (B). Data Sheet of the Tender Document. Evaluation of tenders was to be conducted by way of determining the financial scores using a formula provided in the Tender Document and the lowest evaluated financial proposal was to be assigned the maximum financial score of 100. Thereafter, weighting of the technical and financial proposal was to be done and the Evaluation Committee was

required to combine the technical and financial scores of each tender. At the end of evaluation at this stage, the Applicant's tender was found to have attained the lowest combined technical and financial scores of 87.67% whilst that of the Interested Party was found to have attained the highest combined technical and financial scores of 97.51%.

### **Recommendation**

The Evaluation Committee recommended the subject tender be awarded to Interested Party for having submitted a tender with the highest evaluated combined score of 97.51%.

### **Professional Opinion**

Pursuant to Section 84 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), the Ag. Assistant Director Procurement of the 2<sup>nd</sup> Respondent one Jane Rotich, vide a professional opinion dated 27<sup>th</sup> January 2022, noted *inter alia*, (i) that during the financial opening, the tender opening committee inadvertently failed to disclose to tenderers the technical scores as required under Clause 23.4 of the Tender Document and Regulation 122 (2) (b) (ii) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') and instead, the technical scores were only shared by the 2<sup>nd</sup> Respondent on 25<sup>th</sup> January 2022 and (ii) that the available budget was Kshs.70,000,000/= yet the successful tenderer quoted Kshs.76,566,193/=. With this, Ms. Jane Rotich, recommended termination of the subject tender in line with Section 63(1)(b) due to inadequate budget.

The 1<sup>st</sup> Respondent agreed to terminate the subject tender's procurement proceedings on 28<sup>th</sup> January 2022.

### **Notification to Tenderers**

In letters dated 31<sup>st</sup> January 2022, Ms. Jane Rotich on behalf of the 1<sup>st</sup> Respondent notified all tenderers of the termination of the subject tender on account of operation of law and inadequate budgetary provision.

### **REQUEST FOR REVIEW NO.10 OF 2022**

The Applicant lodged the instant Request for Review dated 7<sup>th</sup> February 2022 and filed on 9<sup>th</sup> February 2022 together with an Affidavit/ Statement in Support of Request for Review sworn by Nyambega Ombuki, PhD, the Chief Executive Officer of the Applicant, on 8<sup>th</sup> February, 2022 through the firm of Makalla Law Advocates LLP, seeking the following orders:

- a) The decision of the Procuring Entity purporting to terminate the Re-retender Ref CA/PROC/RFP/02/2021-2022 for Provision of Consultancy Services for National Roaming, Telecommunications Tower Sharing and Termination Rates Network Cost Study and as communicated to the Applicant vide the Procuring Entity's letter dated 31<sup>st</sup> January 2022 and 22<sup>nd</sup> January 2022 be and are hereby declared null and void, and the same be and are hereby set aside.**

- b) An order do issue that the Procuring Entity is hereby directed to re-admit and re-evaluate the Applicant's bid in accordance with the Act and the Constitution, taking into consideration, the Board's findings in this case;**
- c) An order do issue directing the Procuring Entity to pay costs of the Review; and**
- d) Any other necessary orders as are necessary for the ends of justice and under the circumstances of the case herein as provided by Section 173 of the Act.**

In a Notification of Appeal and a letter dated 9<sup>th</sup> February 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 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 together with confidential documents concerning the subject tender within 5 days from 9<sup>th</sup> February 2022.

Vide a letter dated 14<sup>th</sup> February 2022, the 1<sup>st</sup> Respondent wrote to the Acting Board Secretary in response to the Request for Review and furnished the Board with confidential documents with respect to the subject tender. On 28<sup>th</sup> February 2022, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Notice of Appointment of advocates dated 28<sup>th</sup> February 2022 appointing Igeria & Ngugi Advocates.

Vide letters dated 17<sup>th</sup> February 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective emails as provided by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, of the existence of the Request for Review while forwarding to tenderers a copy of the Request for Review 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 concerning the subject tender within 3 days from 17<sup>th</sup> February 2022.

On 24<sup>th</sup> February 2022, the Interested Party filed an Interested Party's Reply to the Applicant's Request for Review and Procuring Entity's Response sworn by Vincent Kemboi on 23<sup>rd</sup> February 2022 through the firm of CK Advocates.

On 28<sup>th</sup> February 2022 the Applicant filed a Notice of Preliminary Objection, dated on even date, to the Interested Party's Reply.

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 requests for review applications be canvassed by way of written submissions. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

The Applicant filed its Written Submissions on 1<sup>st</sup> March 2022. The Respondents filed a 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Written Submissions on 2<sup>nd</sup>

March 2022 together with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents List of Authorities through the firm of Igeria & Ngugi Advocates. The Interested Party filed its Written Submissions together with its List and Bundle of Authorities on 25<sup>th</sup> February 2022.

### **APPLICANT'S CASE**

The Applicant avers that the 2<sup>nd</sup> Respondent floated the subject tender which closed on 12<sup>th</sup> January 2022, after terminating a similar tender on account of all evaluated tenders in the previous tender were non responsive, and that it did submit its technical and financial proposal separately in line with the Tender Document. According to the Applicant the previous tender's tender document and the subject tender's Tender Document were similar in scope of requirements with nominal changes and that the subject tender was to remain valid for 150 days after tender submission deadline.

It is the Applicant's averment that on 21<sup>st</sup> January 2022 it was notified that its technical proposal was successful, making it eligible to proceed for financial evaluation and was invited to witness opening of the financial proposals scheduled for 24<sup>th</sup> January 2022 at 10:00am which was less than 5 business days from the date of notification of the results of the technical evaluation contrary to Instructions to Consultants (ITC) 23.4 Opening of Financial Proposal of the Tender Document which required the opening date of the financial proposals not to be less than 5 business days from the date of notification of the results of the technical evaluation.

The Applicant avers that no technical scores of each tenderer was read out loud at the time of opening of the financial proposals and no official communication was made by the 2<sup>nd</sup> Respondent to tenderers on the technical scores contrary to Instructions to Consultants (ITC) 23.4 of the Tender Document which required the overall technical scores of the tenderer who made it to the financial evaluation stage read out loud and sent to all tenderers. The Applicant alleges that on 26<sup>th</sup> January 2022 it received a letter dated 22<sup>nd</sup> January 2022 from the 2<sup>nd</sup> Respondent informing it of the technical scores of the tenderers who made it to the financial evaluation stage. Strangely, the letter dated 22<sup>nd</sup> January 2022 was dated 2 days before the opening of financial proposals and admitted to the 2<sup>nd</sup> Respondent inadvertently failing to disclose the technical scores as required during the opening of financial proposals on 24<sup>th</sup> January 2022. According to the Applicant, it attained a score of 67.67 at the Technical Evaluation stage whilst the Interested Party attained a score of 79.3.

The Applicant avers that on 31<sup>st</sup> January 2022, the 2<sup>nd</sup> Respondent notified it of the termination of the subject tender on account of operation of law and inadequate budgetary allocation. According to the Applicant, during the intervening duration between the termination of the previous tender and the termination of the subject tender, the 2<sup>nd</sup> Respondent never published notices on any development in law which adversely impacted on the subject tender. The Applicant reads mischief in the 2<sup>nd</sup> Respondent termination of the subject tender on account of inadequate budgetary provision yet Paragraph 2 of Section 1 (A) – Request for Proposal (RFP) of the Tender Document confirms that the 2<sup>nd</sup> Respondent set aside funds in its budget

towards the cost of the subject tender. According to the Applicant, the technical and financial tenders of the previous terminated tender was already known to the 2<sup>nd</sup> Respondent. Therefore, the 2<sup>nd</sup> Respondent was in a better position to evaluate prior to floating the subject tender that the available budget was adequate to finance the subject tender.

According to the Applicant, the 2<sup>nd</sup> Respondent had the option to conduct negotiations with the successful tenderer under Section 131 and 132 of the Act and Regulation 100 of Regulations 2020 if the successful tenderer's responsive tender was in excess of the available budget.

The Applicant alleges that the decision to terminate the subject tender by the 2<sup>nd</sup> Respondent was arbitrarily and unlawfully effected to the detriment of the Applicant within the validity duration.

The Applicant alleges the said termination and reasons thereof was mischievous and in gross violation of the provisions of Regulations 2020, the Act and the Constitution of Kenya, 2010 (hereinafter referred to as the 'Constitution') specifically as follows;

- a) Section 3 (a) of the Act requires the 2<sup>nd</sup> Respondent to be guided by the national values and principles provided for under Article 10 of the Constitution;
- b) Section 58(2) of the Act requires a tender document issued by the 2<sup>nd</sup> Respondent to contain sufficient information to allow fair, equitable,

transparent, cost-effective and competition among all those who wish to submit their tender applications;

- c) Section 78(6) of the Act read with Regulation 122(2)(b)(ii) of Regulations 2020 require, on the opening of a tender, the name of the tenderer, the total price where applicable and any tender security submitted by a tenderer be read out loud and the same be recorded in the tender opening register;
- d) Section 80(2) requires evaluation and comparison to be done using the procedures and criteria set out in a tender document;
- e) Article 47 of the Constitution guarantees the right to fair administrative action;
- f) Article 227 of the Constitution provides for a system of procurement that is fair, equitable, transparent, competitive and cost-effective;

It is the Applicant's averment that it has invested and expended time and human resource in preparing its tender for submission and has suffered and stands to suffer monumental financial loss and damage unless the Board nullifies the 2<sup>nd</sup> Respondent's termination of the subject tender.

In conclusion the Applicant prays for the grant of orders it has sought in the Request for Review.

### **1<sup>ST</sup> & 2<sup>ND</sup> RESPONDENTS' RESPONSE**

In response to the Request for Review, in a letter dated 14<sup>th</sup> February 2022, the 1<sup>st</sup> Respondent responded to the Acting Board's Secretary's letter dated

9<sup>th</sup> February 2022 which notified the Respondents of the existence of a Request for Review in respect to the subject tender. The 1<sup>st</sup> Respondent confirmed that the subject tender was advertised on 14<sup>th</sup> December 2021 and that the 2<sup>nd</sup> Respondent received a total of four (4) tenders which included the Applicant's tender.

The 1<sup>st</sup> Respondent confirms that technical proposals were opened on 12<sup>th</sup> January 2022 at 10.30 am. whilst the financial proposal were opened on 24<sup>th</sup> January 2022. The 1<sup>st</sup> Respondent confirms that at the opening of the financial proposals, the technical scores were inadvertently not disclosed to tenderers but nevertheless, the 2<sup>nd</sup> Respondent on 25<sup>th</sup> January 2022 issued letters to the two tenderers who made it to the financial evaluation stage disclosing to them the technical scores though the letter was erroneously dated 22<sup>nd</sup> January 2022.

According to the 1<sup>st</sup> Respondent, the evaluation committee evaluated all the tenders and recommended award of the subject tender based on the tender that qualified at the Technical Capacity Evaluation stage and was subjected to the Quality Cost Based Selection (QCBS) evaluation as stipulated in the Tender Document.

However, it is the 1<sup>st</sup> Respondent's contention that vide a professional opinion, the 2<sup>nd</sup> Respondent's Head of Procurement, recommended that the 1<sup>st</sup> Respondent terminates the subject tender based on omission that had been witnessed at the opening of the financial proposals where the

Evaluation Committee failed to contemporaneously disclose the technical scores to tenderers and which omission the 1<sup>st</sup> Respondent considered legally fatal to subsequent process despite the 2<sup>nd</sup> Respondent's best intentions to address this issue and further that the successful tenderer had quoted above the budget.

Pursuant to the recommendation of the Head of Procurement, the 1<sup>st</sup> Respondent approved termination of the subject tender and vide letters dated 31<sup>st</sup> January 2022, the 2<sup>nd</sup> Respondent communicated to all tenderers of the termination of the subject tender whilst returning the unopened financial proposals of the tenderers who had not made it to financial evaluation stage.

The 1<sup>st</sup> Respondent contends that he is allowed to terminate or cancel procurement without entering into a contract at any time before notification of tender award, that the termination of the subject tender was done in accordance with Section 63 of the Act and the reasons given for termination were well within the law.

According to the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent treated all tenderers fairly and complied with the Constitution, the Act and Regulations 2020.

## **INTERESTED PARTY'S RESPONSE**

The Interested Party confirms that it participated in the subject tender by submitting its technical and financial proposal as required under the Tender Document and pursuant to an invitation to tender by the 2<sup>nd</sup> Respondent.

The Interested Party's contention is that the 1<sup>st</sup> Respondent notified it of the technical scores of the tenderers who qualified for technical capacity evaluation on 25<sup>th</sup> January 2022. With this, the Interested Party contends that the 2<sup>nd</sup> Respondent should not be faulted for failure to read out loud the technical scores of tenderers that passed for financial opening.

The Interested Party confirms that by a letter dated 31<sup>st</sup> January 2022, the 1<sup>st</sup> Respondent notified it of the decision to terminate the subject tender citing operation of law and inadequate budgetary provision as reasons for termination. According to the Interested Party, such termination process by the 2<sup>nd</sup> Respondent was unlawful because the 2<sup>nd</sup> Respondent has not presented any evidence that it complied with substantive and procedural requirements set out under the provisions of Section 63 of the Act to warrant termination of the subject tender's procurement process including evidence that the 1<sup>st</sup> Respondent gave the Director General of the Public Procurement Regulatory Authority (hereinafter referred to as the 'Authority') a written report of the termination within 14 days of termination.

According to the Interested Party, the 2<sup>nd</sup> Respondent cannot advertise for the subject tender and then turn around at the end of the process to terminate a procurement process after tenders have been submitted,

evaluated and recommended for award on account of inadequate budgetary provision yet the 1<sup>st</sup> Respondent is under an obligation to satisfy himself that there are sufficient funds to meet obligations arising from any contract that may be entered into pursuant to the subject procurement process before commencing the subject tender's procurement process under Section 53(8) of the Act and that it is an offence to commence a procurement process without first ascertaining that the subject tender was budgeted for as provided under Section 53(9) of the Act.

It is the Interested Party's contention that in the event the tenderer recommended for award had surpassed the budget, parties would have negotiated the price before entering a contract by virtue of Sections 131 and 132 of the Act and Regulation 100 of Regulations 2020.

The Interested Party in essence supports the Request for Review and prays for the Request for Review to be allowed only to the extent that the 2<sup>nd</sup> Respondent be ordered to re-admit both the Applicant's and Interested Party's tenders and make an award in compliance with the award criteria provided in the Tender Document.

### **APPLICANT'S NOTICE OF PRELIMINARY OBJECTION**

The Applicant raises a preliminary objection to the Interested Party's Reply to the Applicant's Request for Review on the following grounds of opposition (i) the issues in the Interested Party's Response are time barred as it had another defined statutory dispute resolution avenue through institution of its

own request for review under Section 167(1) of the Act, and (ii) the Interested Party's response is an abuse of the process of the Board since it seeks the Board to limit legitimate orders sought by the Applicant without establishing proper locus; and have effectively presumed themselves a party to the instant review in contravention of Section 170 of the Act.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, documents, pleadings list and bundle of 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 crystalize for determination are as follows:

- 1. Whether the allegation raised by the Applicant with respect to the 2<sup>nd</sup> Respondent's failure to read out loud the technical scores of the tenderers who made it to the financial evaluation stage at the opening of financial proposals on 24<sup>th</sup> January 2022 is time barred pursuant to Section 167 (1) of the Act read with Regulation 203(2)(c) of Regulations 2020 which requires the same to have been raised within 14 days of notification of award or date of occurrence of alleged breach at any stage of the procurement process to invoke the jurisdiction of the Board.**
  
- 2. Whether the procurement proceedings of the subject tender were terminated in accordance with Section 63 of the Act on account of the subject procurement having been overtaken by operation of law and on account of inadequate budgetary**

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

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

We would like to first address the preliminary objection raised by the Applicant with respect to the locus standi of the Interested Party and the orders sought by the Interested Party.

We have in the background to this decision established that all tenderers to the subject tender were invited to respond to the Request for Review by the Acting Board Secretary vide a letter dated 17<sup>th</sup> February 2022. It is pursuant to this invitation that the Interested Party filed its Reply to the Request for Review on 24<sup>th</sup> February 2022 and Written Submissions on 25<sup>th</sup> February 2022 as an Interested Party.

The Black's Law Dictionary, 9<sup>th</sup> Edition at page 1232 defines an interested party as;

***"A party who has a recognizable stake (and therefore standing) in the matter"***

The 'Mutunga Rules', the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, Legal Notice No. 117 of 2013, defines an interested party as;

***"A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation"***

In the case of *Trusted Society of Human Rights Alliance v Mumo Matemu [2014] e KLR*, the Supreme Court held that:

***"An interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or herself appears in the proceedings, and champions his or her cause...."***

In the instant Request for Review, the Interested Party has demonstrated that it was a tenderer in the subject tender and we have in the background of this decision established that the 2<sup>nd</sup> Respondent's Evaluation Committee of the subject tender recommended award of the subject tender to the Interested Party prior to the purported termination of the proceedings of the subject tender.

Section 170 of the Act provides who can be a party to a request for review as follows:

***170. Parties to review***

***The parties to a review shall be—***

***(a) the person who requested the review;***

***(b) the accounting officer of a procuring entity;***

***(c) the tenderer notified as successful by the procuring entity;  
and***

***(d) such other persons as the Review Board may determine.***

Section 170(d) of the Act grants the Board the discretion to determine any other person who can be a party to a request for review other than a person who has requested for a review, the accounting officer of a procuring entity and a tenderer notified as successful by a procuring entity. This in our view is similar to Rule 7 (2) of the Mutunga Rules which provide as follows:

***Interested party***

***1. ....***

***2. A court may on its own motion join any interested party to the proceedings before it.***

Joinder of a party to a request for review proceedings as an interested party is at the discretion of the Board and in the instant Request for Review, the Board on its own volition and through its Acting Board Secretary invited the Interested Party to respond to the Request for Review because the Interested Party and all the tenderers in the subject tender have a stake in

the Request for Review proceedings and will be affected one way or another by this decision. In the circumstances the Interested Party is a proper party to the Request for Review under Section 170(d) of the Act.

In our considered opinion, the role of the Interested Party in the instant Request for Review is limited to either supporting the Applicant's case or supporting the Respondents' response to the Applicant's case. We therefore agree with the Applicant that the Interested Party has no locus to limit the orders sought by the Applicant in the Request for Review and more so cannot seek new prayers for its own benefit and which prayers were not sought by the Applicant in the Request for Review. We say so because, the Request for Review is hinged on the breach of duty on the part of the Respondents and which breach has caused or is likely to cause loss and damage to the Applicant. In the event the Interested Party wished to seek orders from this Board to its own benefit and which prayers have not been sought in the Request for Review, the Interested Party ought to have approached the Board by way of a Request for Review within 14 days of notification of termination of the procurement proceedings of the subject tender being 31<sup>st</sup> January 2022 and which time lapsed on 14<sup>th</sup> February 2022. To this extent, we agree with the Applicant that the Interested Party has no locus to limit the orders sought by the Applicant in the Request for Review. We also find that the Interested Party has no locus to seek new orders in addition to some of the orders sought by the Applicant in the Request for Review because doing so, will be allowing the Interested Party to seek administrative review through the backdoor without the benefit of paying the filing fees and contrary to the provisions of Section 167(1) of the Act for being time barred.

In the circumstances, the additional orders sought by the Interested Party and which orders had not been sought by the Applicant in the request for review cannot be granted.

It is trite law 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 63 of this Act; and***

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

***168. ....***

***169. ....***

***170. ....***

***171. ....***

**172. ....**

**172. Dismissal of frivolous appeals**

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

**173. Powers of Review Board**

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

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;***
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***
- (e) order termination of the procurement process and commencement of a new procurement process.***

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

It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

Section 2 of the Act assigns the meaning of a candidate and a tenderer as follows:

***"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity;***

***"tenderer" means a person who submitted a tender pursuant to an invitation by a public entity;***

The manner in which an aggrieved tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and

Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

***PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS***

***203. Request for a review***

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

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

***(a) .....***

***(b) .....***

***(c) be made within fourteen days of —***

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

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

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

***(d) .....***

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

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

Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act will be by way of a

request for review. Further, this request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

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

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

***87. Notification of intention to enter into a contract***

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

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

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

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

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

In our considered opinion, it was not the intention of the legislature to provide for three instances when an aggrieved candidate or tenderer can approach the Board, only for such an aggrieved candidate or tenderer to await for the last option, that is, after notification of intention to enter into a contract has been made, when the breach complained of, occurred before the notification of intention to enter into a contract had been made. Allowing such a candidate or tenderer to wait until a notification of intention to enter into a contract has been made for them to approach the Board claiming breach of duty imposed on a procuring entity by the Act and Regulations 2020, when such breach occurred much earlier in the procurement process and before notification of intention to enter into a contract had been issued, is akin to allowing an aggrieved candidate to have its cake and at the same time eat it.

We say so because, if a breach of duty imposed on a procuring entity by the Act and Regulations 2020 occurs at the opening of tenders, and an aggrieved candidate or tenderer decides to await until notification of intention to enter into a contract is issued before approaching the Board, we can bet 100% that such an aggrieved candidate or tenderer will cease being aggrieved if it is awarded the tender. However, if such a candidate or tenderer is not successful to be awarded the tender, it is likely to seek cancellation of the entire procurement processes by the Board based on breach of duty imposed on a procuring entity by the Act and Regulations that occurred during opening of tenders, to enable it have a second bite to the cherry by participating afresh in the event the Board orders for a re-tender after

cancellation. This in our view, wastes time for procurement proceedings which are ordinarily time bound, by starting afresh when perhaps the Board would have ordered for an addendum to be issued to amend any breach with respect to the contents of a tender document, had an aggrieved candidate or tenderer approached the Board much earlier. This is just one of the many analogies we have come across while determining tendering Request for Review.

**Whether the allegation raised by the Applicant with respect to the 2<sup>nd</sup> Respondent's failure to read out loud the technical scores of the tenderers who made it to the financial evaluation stage at the opening of financial proposals on 24<sup>th</sup> January 2022 is time barred pursuant to Section 167 (1) of the Act read with Regulation 203(2)(c) of Regulations 2020 which requires the same to have been raised within 14 days of notification of award or date of occurrence of alleged breach at any stage of the procurement process to invoke the jurisdiction of the Board.**

Turning to the circumstances of this case, the subject tender was floated on 14<sup>th</sup> December 2022 as a request for proposal using the open tendering method which required tenderers to submit their technical and financial proposals in separate sealed envelopes. The technical proposals were then opened on 12<sup>th</sup> January 2022 and first evaluated at the preliminary & mandatory evaluation stage and at the technical capacity evaluation stage. It is only the financial proposals of tenderers who were successful at the

technical capacity evaluation stage that were subsequently opened on 24<sup>th</sup> January 2022 and evaluated at the financial evaluation stage.

It is common ground that the technical scores of the tenderers who made it to the financial evaluation stage were not read out loud at the opening of the financial proposals on 24<sup>th</sup> January 2022 contrary to Regulation 122(2)(b)(ii) of Regulations 2020 read with clause 23.4 of Section 2. Instructions to Consultants and Data Sheet of the Tender Document.

Regulation 122(2)(b)(ii) of Regulations 2020 provides as follows:

**122. (2) A bid submitted under the Quality and Cost Based Selection (qcbs) method shall be submitted under the two envelopes submission method and evaluated to determine the –**

**(a) .....**

**(b) only bids which have attained the minimum technical score shall proceed to the opening of the financial bid which shall be conducted as follows –**

**(i) .....**

**(ii) during the opening of financial bids, the procuring entity shall read out the technical score to all bidders who attained the minimum technical scores;**

Clause 23.4 of Section 2. Instructions to Consultants and Data Sheet of the Tender Document provides as follows:

.....

**The Financial Proposals shall be opened publicly by the Procuring Entity's opening committee in the presence of the representatives of the Consultants and anyone else who chooses to attend. Any interested party who wishes to attend this public opening should contact the Procuring Entity as indicated in the Data Sheet. At the opening, the names of the Consultants, and the overall technical scores, including the break-down by criterion, shall be read aloud. The Financial Proposals will then be inspected to confirm that they have remained sealed and unopened. These Financial Proposals shall be then opened, and the total prices read aloud and recorded. Copies of the record shall be sent to all Consultants who submitted Proposals.**

The Applicant contends that no official communication was issued by the 2<sup>nd</sup> Respondent to tenderers on technical scores, however the 1<sup>st</sup> Respondent contends that vide a letter erroneously dated 22<sup>nd</sup> January 2022 it on 25<sup>th</sup> January 2022 informed the tenderers who made it to the financial evaluation stage of the technical scores.

We note the breach complained of by the Applicant is failure by the 2<sup>nd</sup> Respondent to read out loud the technical scores of the tenderers who made it to the financial evaluation stage at the opening of the financial proposals on 24<sup>th</sup> January 2022. The date the alleged breach occurred was thus 24<sup>th</sup> January 2022. This means, the Applicant who claims to have suffered or risks suffering loss or damage due to the said allege breach of duty imposed on the 2<sup>nd</sup> Respondent by Regulations 2020 ought to have sought administrative

review before the Board within 14 days of learning of occurrence of such alleged breach. The Applicant admits that its representatives was present at the opening of the financial proposals on 24<sup>th</sup> January 2022 thus admitting that it learnt of the occurrence of the alleged breach on 24<sup>th</sup> January 2022.

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

**57. Computation of time**

***In computing time for the purposes of a written law, unless the contrary intention appears—***

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***
- (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days,***

***excluded days shall not be reckoned in the computation of the time.***

In computing time when the Applicant should have sought administrative review before the board with respect to failure by the 2<sup>nd</sup> Respondent to read out loud the technical scores of the tenderers who made it to the financial evaluation stage at the opening of the financial proposals on 24<sup>th</sup> January 2022, the 24<sup>th</sup> January 2022 is excluded pursuant to Section 57(a) of IGPA being the day which the Applicant learnt of the occurrence of such alleged breach. This means, 14 days started running from the 25<sup>th</sup> January 2022 and lapsed on 7<sup>th</sup> February 2022. In essence, the Applicant had between the 24<sup>th</sup> January 2022 and 7<sup>th</sup> February 2022 to seek administrative review before the Board with respect to the 2<sup>nd</sup> Respondent's failure to read out loud the technical scores of the tenderers who had made it to the financial evaluation stage.

However, the Applicant only filed its Request for Review on 9<sup>th</sup> February 2022, two (2) days after the lapse of the 14 days from when the Applicant learnt of occurrence of the alleged breach with respect to the 2<sup>nd</sup> Respondent's failure to read out loud the technical scores of the tenderers who had made it to the financial evaluation stage.

In our considered view, the allegation raised by the Applicant with respect to the 2<sup>nd</sup> Respondent's failure to read out loud the technical scores of the tenderers who made it to the financial evaluation stage at the opening of financial proposals on 24<sup>th</sup> January 2022 is time barred for having been

raised after the lapse of 14 days of occurrence of alleged breach contrary to Section 167 (1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020.

In summary of the findings on this issue, we find the Board lacks jurisdiction only to the extent of hearing and determining the allegation raised by the Applicant with respect to the 2<sup>nd</sup> Respondent's failure to read out loud the technical scores of the tenderers who made it to the financial evaluation stage at the opening of financial proposals on 24<sup>th</sup> January 2022.

**Whether the procurement proceedings of the subject tender were terminated in accordance with Section 63 of the Act on account of the subject procurement having been overtaken by operation of law and on account of inadequate budgetary provision to divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act.**

The Applicant contends that the 2<sup>nd</sup> Respondent without any justification purported to terminate the procurement process for the subject tender vide a letter dated 31<sup>st</sup> January 2022 citing operation of law and inadequate budgetary provision as reasons for termination despite there being no developments in law that adversely impacted the subject tender. The Applicant reads mischief on the part of the 2<sup>nd</sup> Respondent in purporting to terminate the subject tender on account of inadequate budgetary provision because the 2<sup>nd</sup> Respondent had knowledge of the financial proposals in a previous tender that was cancelled and which previous tender was similar in scope requirements to the subject tender save for nominal changes and

ought to have used such knowledge to evaluate the adequacy of the available budget for the subject tender.

On his part, the 1<sup>st</sup> Respondent contends that he has discretion to terminate the subject tender at anytime before notification of award without entering into a contract and that he terminated the subject tender in accordance with Section 63 of the Act and the reasons for termination were well within the law.

We have hereinbefore established that the Board is a creature of the Act and its jurisdiction flows from Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board. On the other hand, Section 172 and 173 of the Act 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)(b) of the Act where proceedings before it relate to termination of procurement proceedings effected in accordance with Section 63 of the Act. In specific, Section 167(4)(b) of the Act provides as follows:

***167. Request for a review***

***(1) .....***

***(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]*

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 High 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. The High Court further held that failure by a procuring entity to render reasons for the decision to terminate a tender makes such decision amenable to review by the court since giving of reasons is one of the fundamental tenets of the principle of natural justice.

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") Justice P. Nyamweya, 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 held 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 us to determine whether the procurement proceedings of the subject tender were terminated in accordance with the provisions of Section 63 of the Act, which determination can only be made

by interrogating the reason cited for termination by the Respondents and whether or not such termination satisfied the statutory pre-conditions outlined in Section 63 of the Act.

Section 63 of the Act provides as follows: -

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

**(a) the subject procurement has been overtaken by—**

**(i) operation of law; or**

**(ii) substantial technological change;**

**(b) inadequate budgetary provision;**

**(c) no tender was received;**

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

**(e) material governance issues have been detected**

**(f) all evaluated tenders are non-responsive;**

**(g) force majeure;**

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

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

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

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

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

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

Further, following such termination, an accounting officer is required to give the Public Procurement Regulatory Authority (hereinafter referred to as the 'Authority') a written report on the termination with reasons and notify all tenderers, in writing, of the termination with reasons within fourteen (14) days of termination. This is the procedural statutory pre-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 us to determine the legality, or lack thereof, of the decision to terminate the subject tender's procurement proceedings, which determination can only be made by interrogating the reasons cited for the impugned termination and whether the procedural statutory requirements under Section 63 of the Act were met. It is only then, that a determination whether or not the Board has jurisdiction can be made.

In a letter dated 31<sup>st</sup> January 2021 (hereinafter referred to as the 'the letter of notification of termination'), the 2<sup>nd</sup> Respondent notified all tenderers in

the subject tender of the completion of tender evaluation process and termination of the subject tender on account of operation of law and inadequate budgetary provision. The said letter of 31<sup>st</sup> January 2021 read as follows in part:

**RE-TENDER FOR REQUEST FOR PROPOSALS FOR PROVISION OF CONSULTANCY SERVICES FOR NATIONAL ROAMING, TELECOMMUNICATIONS TOWER SHARING AND TERMINATION RATES NETWORK COST STUDY.**

---

.....

**The tender evaluation process has been completed and we regret to inform you that the Authority has terminated the above tender because of the following reasons.**

- **Operation of law.**
- **Inadequate budgetary provision.**

.....

**Yours faithfully**

**Ms. Jane Rotich**

**FOR: DIRECTOR GENERAL**

We observe that the 1<sup>st</sup> Respondent did not sign the letter of notification of termination but the same was signed for the 1<sup>st</sup> Respondent by Ms. Jane Rotich whom we have hereinafter established is the 2<sup>nd</sup> Respondent's Acting Assistant Director Procurement. The Director General of the 2<sup>nd</sup> Respondent, Mr. Ezra Chiloba, is the Accounting Officer of the 2<sup>nd</sup> Respondent.

In **Judicial Review Miscellaneous Application No. 390 of 2018 Republic v Public Procurement Administrative Review Board Ex-parte Kenya Revenue Authority (2019) eKLR** (hereinafter referred to as the 'Kenya Revenue Authority case') the High Court held as follows:

***"the person mandated to terminate procurement proceedings (the tender) is the Accounting Officer. The same is provided under section 63(1) of the Act.***

***The letter dated 16<sup>th</sup> August 2018 notifying all the 13 bidders that the tender had been terminated was signed by one Nicholas Njeru who was the Head of Procurement to the Ex-parte Applicant. The***

**Ex-parte Applicant failed to demonstrate to the Review Board that Mr. Nicholas Njeru was indeed the Accounting Officer referred under section 63(1) of the Act or he had acted with express authority of the Accounting Officer in terminating the subject tender.”**

We deduce from the Kenya Revenue Authority, that a letter of notification of termination should be signed by an accounting officer of a procuring entity or by a person with the express authority of an accounting officer of a procuring entity. An express authority of an accounting officer in our view would be the accounting officer’s delegated authority being exercised by a person to whom such authority is delegated to.

It is not lost to us that in exercise of his function as a public officer, the 1<sup>st</sup> Respondent is bound by principles of good governance, integrity, transparency and accountability under Article 10 of the Constitution. Article 232(1) of the Constitution outlines accountability for administrative acts as a value and principle of public service. Section 5 (d) of the Public Service (Values and Principles) Act No.1 A of 2015, requires a public officer to maintain high standards of professional ethics by accounting for such public officer’s actions.

To meet the national values and principles of governance, the 1<sup>st</sup> Respondent needed to specify the tender for which the delegated authority was given to Ms. Jane Rotich to curb any abuse that may occur without his knowledge. A general delegated authority is open to abuse and the person to whom the authority is delegated to, may use such delegated authority to undermine an accounting officer.

It is our view that to achieve the underlying principles and national values of governance, the delegated authority by an accounting officer must be in writing and specific to a particular tender to avert any abuse by the person to whom authority has been delegated to that may undermine the accounting officer.

We have already established that Ms. Jane Rotich signed the letter of notification of termination for the 1<sup>st</sup> Respondent. However, there is no proof that Ms. Jane Rotich in signing the letter of notification of termination, acted with the express authority of the 1<sup>st</sup> Respondent.

In the absence of such proof, we find, the letter of notification of termination does not meet the procedural statutory requirement under Section 63(4) of the Act which requires an accounting officer to issue and sign such a letter of notification of termination.

The reasons given for termination of the procurement proceedings of the subject tender as outlined in the letter of notification of termination is operation of law and inadequate budgetary provision. It is not just enough to give reasons for termination to show there is existence of the circumstances outlined in Section 63(1)(a) to (i) of the Act. This was held by the High Court in **Republic v Public Procurement Administrative Review Board & another Ex-Parte SGS Kenya Limited [2017] eKLR** (hereinafter referred to as the 'SGS Kenya Ltd case') 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. It 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.***

***.....”***

We deduce from the SGS Kenya Ltd case, that the 1<sup>st</sup> 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 Section 63(1)(a) to (i) 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.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondent relied on Section 63 (1) (a)(i) and (b) of the Act to justify the decision to terminate the subject tender’s procurement proceedings on account of the subject procurement being overtaken by operation of law and on account of inadequate budgetary provision. The 1<sup>st</sup> Respondent contends that the inadvertent omission by the 2<sup>nd</sup> Respondent not to disclose the technical scores of the tenderers who made it to the

financial evaluation stage at the opening of financial proposals on 24<sup>th</sup> January 2022, was a major oversight that was legally fatal to subsequent process despite the 2<sup>nd</sup> Respondent's best intentions to address the same and that the omission placed the legitimacy of the process into question. Further, the 1<sup>st</sup> Respondent contends that the successful tenderer quoted above the budget.

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 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.

The Board observes that the Respondents have not demonstrated how the 2<sup>nd</sup> Respondent's failure to read out loud the technical scores of the tenderers who made it to the financial evaluation stage at the opening of the financial proposals on 24<sup>th</sup> January 2022 was an application of established legal rules that led to the Respondents acquiring rights or liabilities through no action, inaction or cooperation on the part of the Respondents warranting termination of the subject tender's procurement proceedings on account of the same having been overtaken by operation of law. Further, the Respondents have not tendered any evidence to prove that there are developments in law that have adversely affected the manner in which the subject tender's procurement process ought to be undertaken.

In the absence of proof that the subject tender's procurement has been overtaken by operation of law, this reason for termination was not available to the Respondents to warrant termination of the subject tender's procurement proceedings.

With respect to the reason for termination on account of inadequate budgetary provision. The budget for the subject tender was not disclosed to tenderers, in the letter of notification of termination or in the 1<sup>st</sup> Respondent's letter dated 14<sup>th</sup> February 2022 addressed to the Acting Board Secretary in response to the Request for Review, and neither were tenderers informed that the successful tenderer had quoted in excess of available approved budget. However, we note from the professional opinion dated 27<sup>th</sup> January 2022 issued by the Ag. Assistant Director Procurement of the 2<sup>nd</sup> Respondent, Ms. Jane Rotich, the available budget for the subject tender was Kshs.70,000,000/= whilst the tender sum as quoted by the successful tenderer is Kshs.76,566,193/=. It is for this reason that the Ms. Jane Rotich recommended to the 1<sup>st</sup> Respondent to terminate the procurement proceedings of the subject.

Section 53(8) and (9) of the Act obligates an accounting officer to commence procurement proceedings only when satisfied that sufficient funds meet the obligations of the resulting contracts is reflected in a procuring entity's approved budget estimates and any accounting officer who knowingly

commences procurement process without ascertaining whether the service is budgeted for, commits an offence under the Act.

The 1<sup>st</sup> Respondent has not tendered evidence to prove that Kshs.70,000,000/= was actually the approved budget for the subject tender. Proof of this could be by way of furnishing the Board with the 2<sup>nd</sup> Respondent's approved budget estimates highlighting the specific budget line for the subject tender.

In the absence of proof that the budget approved for the subject tender was Kshs. 70,000,000/=, the reason that there is inadequate budgetary provision was not available for termination of the procurement proceedings for the subject tender.

We also note that the 1<sup>st</sup> Respondent has not tendered any proof that he gave the Public Procurement Regulatory Authority a written report on the termination of the subject tender's procurement proceedings within fourteen days with reasons as required under Section 63(2) and (3) of the Act.

In the circumstances, the Board finds the termination of the procurement proceedings of the subject tender on account of the subject procurement having been overtaken by operation of law and on account of inadequate budgetary provision was not effected in accordance with Section 63 of the

Act and was thus unlawful, null and void and cannot divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act.

The Applicant contends that the 2<sup>nd</sup> Respondent had an option to conduct negotiations with the successful tenderer as prescribed if the successful tenderer's tender was in excess of the available budget as provided under Section 131 and 132 of the Act and Regulation 100 of Regulations.

Section 131 and 132 of the Act provides as follows:-

***131. Competitive Negotiations***

***An accounting officer of a procuring entity may conduct competitive negotiations as prescribed where—***

- (a) there is a tie in the lowest evaluated price by two or more tenderers;***
- (b) there is a tie in highest combined score points;***
- (c) the lowest evaluated price is in excess of available budget; or***
- (d) there is an urgent need that can be met by several known suppliers.***

### **132. Procedure for Competitive Negotiations**

**(1) In the procedure for competitive negotiations, an accounting officer of a procuring entity shall—**

**(a) identify the tenderers affected by tie;**

**(b) identify the tenderers that quoted prices above available budget; or**

**(c) identify the known suppliers as prescribed.**

**(2) In the case of tenderers that quoted above the available budget, an accounting officer of a procuring entity shall—**

**(a) reveal its available budget to tenderers; and**

**(b) limit its invitation to tenderers whose evaluated prices are not more than twenty five percent above the available budget.**

**(3) An accounting officer of a procuring entity shall request the identified tenderers to revise their tenders by submitting their best and final offer within a period not exceeding seven days.**

**(4) The revised prices shall not compromise the quality specifications of the original tender.**

**(5) Tenders shall be evaluated by the evaluation committee appointed in the initial process.**

Our interpretation of the provisions of Section 131 and 132 of the Act, in the circumstances of the subject tender with respect to the successful tenderer's evaluated price being in excess of available budget, is that an accounting officer of a procuring entity may conduct competitive negotiations by (i) identifying the tenderers in the subject tender that quoted prices above available budget, (ii) reveal the procuring entity's available budget with respect to the subject tender and (iii) limit its invitation for competitive competition to tenderers whose evaluated prices are not more than 25% above the available budget.

The subject tender was a request for proposal for Consultancy Services for National Roaming, Telecommunications Tower Sharing and Termination Rates Network Cost Study and the tenderer that achieved the highest combined technical and financial score was to be notified and invited for negotiations as provided under Clause 29.1 of Section 2. Instructions to Consultants and Data Sheet of the Tender Document which is in line with Section 127 and 128 of the Act that requires a successful proposal in a request for proposal method of tendering to be the responsive proposal with the highest score determined and grants an accounting officer the discretion to negotiate with the tenderer who submitted the successful proposal.

We do note therefore, if the 1<sup>st</sup> Respondent was to conduct any competitive negotiations in the subject matter, the same would only be permissible if there was a tie (between two or more tenderers) in the highest combined

score points and not the lowest evaluated price in excess of available budget because the successful tenderer in the subject tender, which is a request for proposal, would only be a tenderer with the highest combined score points and not a tenderer with the lowest evaluated price.

We therefore do not agree with the Applicant's contention that the 1<sup>st</sup> Respondent would conduct competitive negotiations under Section 131 and 132 of the Act with the successful tenderer in the subject tender.

We are alive to the provisions of Part X of the Act which provides for application of Part X of the Act to request for proposals methods of tendering with respect to procurement of consultancy services such like in the subject tender. Section 127, 128 and 129 of the Act which fall under Part X of the Act provide as follows:

***PART X-PROCUREMENT OF CONSULTANCY SERVICES***

***115. ....***

***116. ....***

***117. ....***

***118. ....***

**119. ....**

**120. ....**

**121. ....**

**122. ....**

**123. ....**

**124. ....**

**125. ....**

**126. ....**

**127. Successful proposal**

***The successful proposal shall be the responsive proposal with the highest score determined by an accounting officer in accordance with procedure and criteria set out under section 86 of this Act.***

**128. Negotiations with successful request for proposal tenderer**

***(1) The accounting officer may negotiate with the person who submitted the successful proposal and may request and permit changes, subject to section 129(1).***

***(2) If the negotiations with the person who submitted the successful proposal do not result in a contract, the accounting officer may negotiate with the second person who submitted the***

***proposal that would have been successful had the successful proposal not been submitted.***

***(3) Despite subsection (1) and (2) of this section, an offer made to any other person shall not have any price advantages over the earlier one.***

#### ***129. Contract requirements***

***(1) The contract may not vary from the requirements of the terms of reference, the request for proposals or the terms of the successful proposal except in accordance with the following—***

***(a) the contract may provide for a different price but only if there is a proportional increase or reduction in what is to be provided under the contract; and***

***(b) the variations shall be such that if the proposal, with those variations, was evaluated again under section 127, the proposal would still be the successful proposal.***

***(2) The contract, which shall be in writing, shall set out either—***

***(a) the maximum amount of money that can be paid under the contract; or***

***(b) the maximum amount of time that can be paid for under the contract.***

Our interpretation of the above mentioned provisions of the Act with respect to the subject tender is that the 1<sup>st</sup> Respondent had an option to negotiate with the successful tenderer in the subject tender, in accordance with Section 128 of the Act and subject to the provisions of Section 129 of the Act. Indeed, the Tender Document recognized the need for negotiations by elaborately providing for negotiations in Clauses 32 to 33 of D. Negotiations and Award of Section 2. Instructions to Consultants and Data Sheet of the Tender Document. In our considered view, the negotiations with the successful tenderer under Section 128 of the Act were available to the 1<sup>st</sup> Respondent with respect to the subject tender, if needed.

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

We have hereinbefore found that the termination of the subject tender's procurement proceedings was unlawful thus null and void for failure to comply with the statutory preconditions of Section 63 of the Act. We have further held that negotiations with the successful request for proposal tenderer may be carried out by the 1<sup>st</sup> Respondent, if need be under Section 128 of the Act subject to the provisions of Section 129 of the Act.

In the circumstances, we deem it fair and just to nullify the termination of the procurement proceedings of the subject tender, cancel and set aside all the letters of notification of termination issued to tenderers in the subject tender and direct the 1<sup>st</sup> Respondent to complete the procurement process of the subject tender to its logical conclusion.

## **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 7<sup>th</sup> February 2022:

- 1. The termination of the procurement proceedings of Tender No: CA/PROC/RFP/02/2021-2022 for Re-tender for Provision of Consultancy Services for National Roaming, Telecommunications Tower Sharing and Termination Rates Network Cost Study be and is hereby nullified and set aside.**
  
- 2. The letters of notification of termination of the procurement proceedings of Tender No: CA/PROC/RFP/02/2021-2022 for Re-tender for Provision of Consultancy Services for National Roaming, Telecommunications Tower Sharing and Termination Rates Network Cost Study dated 31<sup>st</sup> January 2022 addressed to all tenderers in the subject tender be and are hereby cancelled and set aside.**
  
- 3. The 1<sup>st</sup> Respondent is hereby directed to proceed with and complete the procurement process for Tender No: CA/PROC/RFP/02/2021-2022 for Re-tender for Provision of Consultancy Services for National Roaming, Telecommunications Tower Sharing and Termination Rates Network Cost Study to its logical conclusion within 14 days**

from the date hereof taking into consideration the findings of the Board in this Decision.

4. Given the procurement proceedings are not complete, each party will bear its own costs.

Dated at Nairobi this 2<sup>nd</sup> day of March 2022.



.....  
**CHAIRPERSON**

**PPARB**



.....  
**SECRETARY**

**PPARB**

