

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO.21/2022 OF 3<sup>RD</sup> MARCH 2022**

**BETWEEN**

**CATHEMAX INVESTMENTS LIMITED..... APPLICANT**

**AND**

**THE COUNTY GOVERNMENT OF NYAMIRA..... 1<sup>ST</sup> RESPONDENT**

**THE ACCOUNTING OFFICER,**

**COUNTY GOVERNMENT OF NYAMIRA.....2<sup>ND</sup> RESPONDENT**

Review against the decision of the County Government of Nyamirain relation to Tender Number CGN/KDSP/T003/2021-2022 for Construction and Completion of a Psychiatric Hospital at Riomegoin Magwagwa Ward.

**BOARD MEMBERS**

- |                      |                    |
|----------------------|--------------------|
| 1. Ms. Faith Waigwa  | - Chairperson      |
| 2. Ms. Njeri Onyango | - Vice Chairperson |
| 3. Mr. Ambrose Ogeto | - Member           |
| 4. Dr. Joseph Gitari | - Member           |
| 5. Ms. Isabella Juma | - Member           |

**IN ATTENDANCE**

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

## **BACKGROUND TO THE DECISION**

### **The Tendering Process**

The County Government of Nyamira being the Procuring Entity and the 1<sup>st</sup> Respondent herein, through its County Chief Officer, Department of Finance, ICT and Economic Planning, invited tenders from all qualified and interested tenderers for Tender Number CGN/KDSP/T003/2021-2022 for Construction and Completion of a Psychiatric Hospital at Riomego in Magouny Chief Officer, Department of Finance wagwa Ward (hereinafter referred to as the 'subject tender') by way of Open Competitive National Tendering Method advertised on the 1<sup>st</sup> Respondent's website ([www.nyamira.go.ke](http://www.nyamira.go.ke)), Public Procurement Information Portal ([www.tenders.go.ke](http://www.tenders.go.ke)) and at IFMIS Supplier Portal ([www.supplier.treasury.go.ke](http://www.supplier.treasury.go.ke)) on 22<sup>nd</sup> November 2021.

### **Addendum No.1**

The 1<sup>st</sup> Respondent's, County Chief Officer, Department of Finance, ICT and Economic Planning issued Addendum No.1 dated 2<sup>nd</sup> December 2021 following a discovery in the Bill of Quantities, that the elements of Mechanical and Electrical Services were inadvertently omitted from the blank Tender Document of the subject tender that had been issued to prospective tenderers by the Respondents (hereinafter referred to as the 'Tender Document'). This Addendum amended the Bill of Quantities of the Tender Document, extended the tender submission deadline from 6<sup>th</sup>

December 2021 at 10:30a.m to 10<sup>th</sup> December 2021 and gave a description of the subject tender.

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

At the extended tender submission deadline of 10<sup>th</sup> December 2021 at 10:30a.m., the 1<sup>st</sup> Respondent received a total of thirteen (13) tenders. The Tender Opening Committee appointed by the 2<sup>nd</sup> Respondent opened the quotations and tenders shortly thereafter from the IFMIS system and IFMIS platform respectively and recorded the following tenderers as having submitted their respective tenders in the minutes of the tender opening committee dated 10<sup>th</sup> December 2021 (hereinafter referred to as the 'Tender Opening Minutes').

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

1. Afriwise Enterprises Limited
2. Buprom Solutions Limited
3. Cathemax Investments Limited
4. Edono Kenya Limited
5. Getrans Solutions Limited
6. Jinsing Enterprise East Africa Limited
7. Lake Shore Construction and Civil works Limited

8. Reamic Investment Limited
9. Samodam Holding Limited
10. Saumo Enterprise
11. Session Blue Contractors Limited
12. Waaso Construction Limited
13. Wayleaf Limited

### **Evaluation of Tenders**

A Tender Evaluation Committee appointed by the 2<sup>nd</sup> Respondent (hereinafter referred to as the 'Evaluation Committee') evaluated the thirteen (13) tenders in the following stages as captured in Tender Evaluation & Recommendation Report signed by all members of the Evaluation Committee on 14<sup>th</sup> January 2022:

- i. Mandatory Evaluation;
- ii. Technical Evaluation; and
- iii. Financial/ Commercial Evaluation

### **Mandatory Evaluation**

At this stage, the Evaluation Committee was required to apply the criteria as outlined as Mandatory Requirements of Clause 2.0 Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 22 of the Tender Document. Tenders

were required to meet all the mandatory requirements at this stage to proceed to the next stage of evaluation.

At the end of evaluation at this stage, the Evaluation Committee determined seven (7) tenders to be non-responsive thus could not proceed to the next stage of evaluation while six (6) tenders which included the Applicant's tender, were determined to be responsive thus proceeded to the next stage of evaluation.

### **Technical Evaluation**

At this stage, the Evaluation Committee was required to apply the criteria as outlined as Technical Evaluation of Clause 3.0 Tender Evaluation (ITT 35) of Section III- Evaluation and Qualification Criteria at page 23 to 24 of the Tender Document. Tenders were required to attain a minimum pass mark of 70% to proceed to the next stage of evaluation.

At the end of evaluation at this stage, the Evaluation Committee determined two (2) tenders non-responsive for failing to attain the minimum pass mark thus could not proceed to the next stage of evaluation while four (4) tenders which included the Applicant's tender, were determined to be responsive for having attained the minimum pass mark thus proceeded to the next stage of evaluation.

### **Financial Evaluation**

At this stage, the Evaluation Committee was required to apply the criteria outlined as Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 24 to 25 of the Tender Document. The winning tender was to be the tender with the lowest evaluated tender that meets the requirements of the 1<sup>st</sup> Respondent.

The Evaluation Committee ranked the four (4) tenders as follows:

<b>S/NO.</b>	<b>Tenderer Name</b>	<b>AMOUNT QUOTED</b>	<b>Ranking</b>
1.	Waaso Construction Limited	123,222,335	4
2.	Getrans Solutions Limited	119,872,653	3
3.	Cathemax Investments Limited	106,495,410	1
4.	Session Blue Contractors Limited	109,859,155	2

### **Recommendation**

The Evaluation Committee recommended award of the subject tender to the Applicant at Kshs.106,495,410/= inclusive of all applicable taxes for being the lowest evaluated responsive tender as reported at page 8 of 8 of the Professional Opinion dated 8<sup>th</sup> February 2022 prepared by Jared Mogeni, the 1<sup>st</sup> Respondent's Ag. Director Supply Chain Management Unit subject to due diligence being conducted.

**Professional Opinion**

Pursuant to Section 84 of the Act, the Ag. Director Supply Chain Management Unit, Jared Mogeni, vide a professional opinion dated 8<sup>th</sup> February 2022 (hereinafter referred to as the 'Professional Opinion') observed, after thorough analysis of the Evaluation Committee's findings, that the committee and the process itself did not adhere to Section 80(1) &(2) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') because the winning tenderer, the Applicant herein, did not meet Mandatory Requirement (MR14) which required tenderers to attach NCA5 for building works both practicing and registration licenses yet the Applicant attached NCA2.

Mr. Jared Mogeni, proceeded to outline what NCA category, each tenderer whose tender made it to the Financial Evaluation attached as follows:

<b>S/NO.</b>	<b>Tenderer Name</b>	<b>NCA NUMBER</b>	<b>NCA NUMBER</b>
1.	Cathemax Investments Limited	NCA 2	48310/B/0319
2.	Session Blue Contractors Limited	NCA 1	31043/B/0517
3.	Getrans Solutions Limited	NCA 4	36040/B/1217

4. Waaso Construction Limited NCA 2 24277/B/0616

Mr. Jared Mogeni thereafter recommended for retender of the subject tender while forwarding the Professional Opinion accompanied with the Evaluation Report and Procurement File to the 2<sup>nd</sup> Respondent for the 2<sup>nd</sup> Respondent's review, consideration and approval pursuant to Section 84 of the Act.

Vide a letter dated 9<sup>th</sup> February 2022, the 2<sup>nd</sup> Respondent while confirming having considered the Professional Opinion and having verified that the tenderers did not meet the threshold set out in Section 80 of the Act, approved therecommendation for retender after cancelation of the procurement proceedings of the subject tender pursuant to Section 63 (1) (f) of the Act.

**Notification to Tenderers**

In letters dated 9<sup>th</sup> February 2022, the 1<sup>st</sup> Respondent states that he notified tenderers of the outcome of evaluation of their respective tenders while informing tenderers of the termination of the subject tender because all tenderers who participated in the tendering process were non responsive.

**REQUEST FOR REVIEW NO.21 OF 2022**

The Applicant lodged a Request for Review dated 4<sup>th</sup> March2022 and filed on 9<sup>th</sup> March2022 together with a Statement in Support of the Request for

Reviews signed by Catherine N. Nyang'au, the Applicant's Director on 4<sup>th</sup> March 2022, the Applicant's List and Bundle of Documents dated 4<sup>th</sup> March 2022 and Further Statement in Support of the Applicant's Request for Review signed by Catherine N. Nyang'au on 24<sup>th</sup> March 2022 filed on 25<sup>th</sup> March 2022 through the firm of Morara Omoke Advocates, seeking the following orders:

- 1. Pending the hearing and determination of this Request for Review, the Respondents supply both the Applicant and the Review Board with the quotations of each bidder, the evaluation report, scores of individual bidders evaluated and the professional opinion for Tender Number CGN/KDSP/Too3/2021-2022 for Construction and Completion of Psychiatric Hospital at Riomego (Magwagwa).**
- 2. Pending the hearing and determination of this Request for Review, the Respondents are hereby barred from advertising a fresh Tender for Construction and Completion of Psychiatric Hospital at Riomego (Magwagwa).**
- 3. The purported termination of Tender Number CGN/KDSP/Too3/2021-2022 for Construction and Completion of Psychiatric Hospital at Riomego (Magwagwa) by the Respondents is hereby canceled.**
- 4. The Respondents are hereby ordered to disclose the successful bidder of Tender Number CGN/KDSP/Too3/2021-2022 for Construction and Completion of Psychiatric Hospital at Riomego (Magwagwa) to the Review Board, the**

**Applicant and all other bidders as per the evaluation report prepared by the tender Evaluation Committee.**

- 5. The Applicant be ordered to declare the Applicant the successful bidder and award it Tender Number CGN/KDSP/Too3/2021-2022 for Construction and Completion of Psychiatric Hospital at Riomego (Magwagwa).**
- 6. An order compelling the 2nd Respondent to enter into a written contract with the Applicant pursuant to Tender Number CGN/KDSP/Too3/2021-2022 for Construction and Completion of Psychiatric Hospital at Riomego (Magwagwa) to the Applicant herein.**
- 7. Costs of the Request for Review be awarded to the Applicant.**
- 8. Any other relief that the Review Board deems fit to grant under the circumstances.**

In a Notification of Appeal and a letter dated 9<sup>th</sup> March 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') notified the County Secretary of the 1<sup>st</sup> Respondent of the existence of the Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the County Secretary of the 1<sup>st</sup> Respondent 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 County Secretary of the 1<sup>st</sup> Respondent was 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> March 2022.

On 21<sup>st</sup> March 2021, the 2<sup>nd</sup> Respondent filed a Response dated 18<sup>th</sup> March 2022.

Vide letters dated 21<sup>st</sup> March 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective addresses as provided by the 2<sup>nd</sup> Respondent, 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 about the subject tender within 3 days from 21<sup>st</sup> March 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 requests for review applications be canvassed by way of written submissions. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

On 25<sup>th</sup> March 2022, the Applicant filed its Written Submissions dated 24<sup>th</sup> March 2022.

### **APPLICANT'S CASE**

The Applicant avers that the Respondent invited interested tenderers to tender for the subject tender on 22<sup>nd</sup> November 2021 and subsequently issued an addendum dated 2<sup>nd</sup> December 2021 with a submission deadline of 10<sup>th</sup> December 2021. The Applicant avers that it received an acknowledgement from IFMIS after making an online tender submission on 10<sup>th</sup> December 2021.

However, it is the Applicant's averment that after failing to receive a notification beyond the statutorily stipulated period of 30 days, it proceeded to enquire from the 1<sup>st</sup> Respondent on the status of the tender vide a letter dated 16<sup>th</sup> February 2022 and which letter it copied the Public Procurement Regulatory Authority (hereinafter referred to as the 'Authority'), Western Region, to bring to the attention of the Authority, the Respondent's failure to communicate the status of the tender.

The Applicant avers that the Authority, Western Region, enquired into the complaint and subsequently informed the Applicant via a letter dated 2<sup>nd</sup> March 2022 that the 1<sup>st</sup> Respondent had terminated the subject tender and that a decision had purportedly been communicated to the Applicant via letter dated 9<sup>th</sup> February 2022 and the reason given for rejecting the Applicant's tender was *'MR14-You attach NCA 2 for Building Works both Practicing and Registration Licenses while the requirement was you attach NCA 5 for Building Works both Practicing and Registration Licenses'*.

Being aggrieved by the aforementioned happenings and decision of the Respondents rejecting the Applicant's tender and purporting to terminate the subject tender; the Applicant filed the instant Request for Review.

In general, the Applicant, alleges that the Respondents are in breach of the Act, the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020'), the Fair Administrative Actions Act, the Constitution of Kenya, 2010 (hereinafter referred to as the 'Constitution') and various provisions of the Tender Document. Further, that the tender process initiated and carried out by the Respondents was devoid of fairness, equitability, transparency, competitiveness and discriminatory contrary to Article 47 and 227 of the Constitution of Kenya.

In specific, the Applicant alleges that the Respondents are in breach of the duties imposed upon them by the Act and Regulations as follows. First, the Respondents have failed to carry out evaluation of tenders within the maximum period of 30 days as per Section 80(6) of the Act. Secondly, the Respondents failed to notify the Applicant that the Applicant's tender was not successful, failed to disclose the successful tenderers as appropriate with reasons thereof as per Section 87 of the Act and Regulation 82 of Regulations 2020. Thirdly, the Respondents breached Section 63(4) of the Act that requires notification of termination of tender to be made within 14 days because the Applicant learnt of the purported termination on 2<sup>nd</sup> March 2021 after lodging a complaint with the Authority, Western Region. Fourth, the reason for finding the Applicant's tender unsuccessful was

invalid because the Respondents implied that the Applicant who is registered under Category NCA2 cannot handle a tender under Category NCA5 which approach totally ignores national standards in violation of Section 60(3) (b) of the Act. Fifth, the Respondents erred in law by failing to award the subject tender to the Applicant despite the Applicant's tender being substantially responsive to the subject tender contrary to Section 79 and 86(1) of the Act. Six, by purporting to terminate the subject tender the 1<sup>st</sup> Respondent was unable to apply the criteria defined in the Tender Document contrary to Section 80 of the Act. Seven, the Respondent's purported cancellation of the subject tender was illegal and unlawful as it was not done in accordance with Section 63 of the Act because no notification of termination of the subject tender was issued within 14 days of termination to the Applicant and all other tenderers in the subject tender as required under Section 63(4) of the Act and no written report on termination of the subject tender with reasons was furnished to the Authority within 14 days of termination as required under Section 63(2) and (3) of the Act. Eight, the 2<sup>nd</sup> Respondent failed to uphold Section 44(1) and 44(2)(g) of the Act which requires the 2<sup>nd</sup> Respondent to ensure compliance with the Act.

Given the foregoing, the Applicant avers that the instant Request for Review is merited and prays for the Board to verify whether tenders were indeed non-responsive and to carefully analyze the manner the purported cancellation was carried out to eliminate the Respondents' mischief calculated to oust the jurisdiction of the Board.

## **RESPONDENTS' RESPONSE**

The Respondents contend that the allegations of breach set out by the Applicant at paragraphs 1 to 14 of the instant Request for Review are not true. Further, the Respondents contend that they followed all laid down laws and procedures of procurement process, the evaluation was conducted within the timelines provided in the Act and Regulations 2020, the attachment of NCA5 by tenderers was a mandatory requirement as per the Tender Document and no tenderer raised an issue of the said requirement before tender closing date.

The Respondents object to paragraph 15 of the instant Request for Review and contend that the instant Request for Review is not merited, the Board should not grant the prayers sought therein but should instead dismiss the same in its entirety with costs.

## **APPLICANT'S REJOINDER**

The Applicant acknowledges having received the Respondents' Response on 21<sup>st</sup> March 2022 at 3.38 p.m. but contends that none of the annexures to the said response were availed to the Applicant's Advocates thus the Applicant is unable to respond to paragraphs 2 and 3 of the Respondents' Response unless it is granted access to the annexures mentioned therein.

The Applicant contends that paragraphs 1 and 5 of the Respondents' Response are bare denials and do not offer any explanation to controvert the Applicant's averments.

The Applicant reiterates that the 1<sup>st</sup> Respondent did not comply with Section 63(2), (3) and (4) of the Act because the notification letters attached to the Respondents' Response do not bear any evidence of delivery, are not accompanied by any evidence of delivery either and there is no attempt to controvert the Applicant's allegation that the notification of cancelation was never delivered to the Applicant by providing proof of delivery.

Further, the Applicant contends that it has not been supplied with the tender termination report to the Authority that is said to be dated 17<sup>th</sup> February 2022 and urges the Board to verify whether the same was supplied to the Authority and at what point it was delivered.

The Applicant's contention is that the termination report was only prepared as an afterthought and as a cover up after the Applicant complained to both the 1<sup>st</sup> Respondent and the Authority, Western Region, vide a letter dated 16<sup>th</sup> February 2022 and if the letters to various tenderers were purportedly written on 9<sup>th</sup> February 2022, why was the communication to the Authority issued 8 days later?

The Applicant concludes by stating that NCA5 requirement was a minimum requirement therefore a tenderer with a higher NCA ranking was entitled to present its higher ranking as the Applicant which presented NCA2 and that it is totally absurd to require a highly qualified contractor to present lesser credentials.

### **BOARDS DECISION**

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

- 1. Whether the Respondent terminated the procurement proceedings of the subject tender in accordance with Section 63 of the Act on account that all evaluated tenders were non-responsive 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 Applicant's tender satisfied the criterion for evaluation set out as MR14 of Mandatory Requirement (MR) of Clause 2.0 Preliminary Examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 22 of the Tender Document requiring**

**provision and attachment of valid NCA 5 Building Works Registration Certificate and Practicing license; and**

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

The Board shall now proceed to make a determination on the issues framed as follows.

**Whether the Respondent terminated the procurement proceedings of the subject tender in accordance with Section 63 of the Act on account that all evaluated tenders were non-responsive to divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act;**

The Applicant requests the Board to carefully analyze the manner in which the purported termination/cancellation of the subject tender was carried out to eliminate the Respondents' mischief calculated to oust the jurisdiction of the Board. We however note that the Respondents have not challenged nor objected to the Board's jurisdiction to consider and determine the instant Request for Review.

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

**(b) a termination of a procurement or asset disposal proceedings in accordance with Section 63 of this Act; and**

**(c).....**

The Board has jurisdiction to interrogate whether the 2<sup>nd</sup> Respondent in arriving at his decision to terminate the procurement proceedings of the subject tender met the statutory pre-conditions for termination set out under Section 63 of the Act. In the event that we find the termination of procurement proceedings of the subject tender by the 2<sup>nd</sup> Respondent met the statutory pre-conditions for termination set out in Section 63 of the Act, then the Board's jurisdiction will be ousted by dint of Section 167(4)(b) of the Act in which case we shall down our tools at that stage. However, if we find that the decision to terminate the procurement proceedings of the subject tender by the 2<sup>nd</sup> Respondent did not meet the statutory pre-conditions for termination set out in Section 63 of the Act, we will deem

such termination not to be in accordance with Section 63 of the Act, illegal and thus shall proceed to consider and determine the issues raised in the instant Request for Review having found that the Board's jurisdiction has not been ousted by dint of Section 167(4)(b) of the Act.

We support this finding relying on a High Court decision 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") where 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 High 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.

In **Republic v Public Procurement Administrative Review Board & another Ex-Parte SGS Kenya Limited [2017]** (hereinafter referred to as the SGS Kenya Limited’s case) Justice John Mativo addressed the detailed evidence the Board would require to consider when determining the propriety of a termination of procurement proceedings under the provisions of Section 63 of the Act and 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. In order to discharge its burden under section 63 of the Act, the interested party must provide evidence that there is real and substantial technological change. The proper approach to the question whether a party invoking the said provision has***

*discharged its burden under section 63 is therefore to ask whether such a party has put forward sufficient evidence for a court to conclude that, on the probabilities, the technological change cited is of such a nature that it renders it imprudent for the contract to proceed on the original terms and the nature of the change and how it substantially affects the contract ought to be clearly stated. To me, that was the intention of the draftsman and the scheme and architecture of the Act so as to prevent or protect innocent bidders from being unfairly disadvantaged or deprived of the tender on flimsy grounds.*

*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. The evidence tendered before the Review Board must provide sufficient information to bring the grounds within the provisions of the law. 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. Ultimately, the question whether the information put forward is sufficient to place the termination within the ambit of the law as claimed will be determined by the nature of the reasons given. The question is not whether the best evidence to justify termination has been provided, but whether the evidence provided is sufficient for a reasonable tribunal or body to*

*conclude, on the probabilities, that the grounds relied upon falls within any of the grounds under section 63 of the Act. If it does, then the party so claiming has discharged its burden under section 63. If it does not, then the body in question has only itself to blame.*

**44. What must be borne in mind is that public procurement has a constitutional underpinning as clearly stated in Article 227 and disputes arising from procurement processes are concerned with constitutional rights which include the Right to reasonable expectation once a bidder is successful. 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."**

In the SGS Kenya Limited's case, the High Court held that the mere recitation of the statutory provisions on termination was not enough to render a termination lawful. What is required of a procuring entity is to support the reason for termination with real, tangible and sufficient evidence before the Board.

At this juncture, this Board will proceed to determine whether the 2<sup>nd</sup> Respondent terminated the procurement proceedings of the subject tender 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 2<sup>nd</sup> Respondent and whether or not the 2<sup>nd</sup> Respondent 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 precondition that must be satisfied before 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 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 2<sup>nd</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 and whether the procedural statutory pre-conditions under Section 63(2), (3) and (4) of the Act were satisfied before the purported termination of the subject tender's procurement proceedings can be deemed lawful. It is only then, that a determination whether or not the Board has jurisdiction can be made.

While approving the Professional Opinion which recommended for retendering of the works of the subject tender, the 2<sup>nd</sup> Respondent cited Section 63(1)(f) of the Act as the reason for cancelation/termination of the procurement proceedings of the subject tender due to all evaluated tenders being non-responsive. According to the 2<sup>nd</sup> Respondent, MR 14 requiring tenderers to provide and attach valid NCA 5 Building Works Registration Certificate and Practicing license was a mandatory requirement as per the Tender Document and no tenderer raised an issue on the same before the tender submission deadline, as extended. According to the 1<sup>st</sup> Respondent's Ag. Director, Supply Chain Management Unit and as captured in the Professional Opinion, the Applicant did not satisfy the requirement of MR 14 and neither did the other three (3) tenderers whose tenders made it to the Financial Evaluation stage.

On the other hand, the Applicant argues that the termination of the procurement proceedings of the subject tender was unlawful and illegal because the requirement for tenderers to provide and attach all valid NCA5 Building Works Registration Certificate and Practicing license should be treated as a minimum requirement because it would be an egregious mockery of merit to disqualify tenderers possessing higher qualifications. In trying to justify its argument, the Applicant explained that NCA classifications rank contractors based on the maximum value of tenders that they can handle. For instance, the Applicant who is ranked as NCA2 has capacity to handle contracts of upto Kshs.500,000,000.00 and is

therefore fully equipped to handle a contract for the subject tender at Kshs.106,495,410.20. With this, the Applicant argues that it is totally absurd to require a highly qualified contractor to present lesser credentials.

Section 80(1) and (2) of the Act provides as follows with respect to evaluation and comparison of tenders by an evaluation committee:

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

From the above provisions of the law it is clear that the evaluation committee is the organ mandated to evaluate and compare tenders. This mandate is not given to the head of procurement function. Secondly, the evaluation committee in evaluating and comparing tenders, it is guided by the criteria and procedures set out in the tender document.

We note the criterion set out as MR14 of Mandatory Requirement (MR) of Clause 2.0 Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 22 of the Tender Document provides as follows:

***"Must provide and attach all valid NCA 5 BUILDING WORKS Registration Certificate and Practicing license"***

This in our considered view was a mandatory requirement and tenderers ought to have satisfied the same before proceeding for evaluation at the Technical Evaluation stage.

We have carefully studied the Applicant's original tender which forms part of the confidential documents submitted to us by the 2<sup>nd</sup> Respondent pursuant to Section 67(3)(e) of the Act and note that at page 84 thereof the Applicant provided and attached a National Construction Authority (NCA) Certificate of Registration, Reg.No.48310/B/0319 issued on 24<sup>th</sup> August 2021 in favour of the Applicant as a duly registered Building Works contractor of category NCA2 and valid until 30<sup>th</sup> June 2022. Further, at page 85 of the Applicant's original tender, the Applicant provided and attached a National Construction Authority (NCA) Contractor Annual

Practicing License, Reg.No.48310/B/0319 issued on 24<sup>th</sup> August 2021 in favour of the Applicant as a duly registered Building Works contractor of category NCA2 for a period of one (1) year starting 1<sup>st</sup> July 2021 and ending 30<sup>th</sup> June 2022.

The Evaluation Committee determined the Applicant's tender as responsive at the Mandatory Evaluation stage, meaning, the Applicant's tender satisfied the criterion outlined as MR14 of Mandatory Requirement (MR) of Clause 2.0 Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 22 of the Tender Document because the Applicant's tender proceeded to be evaluated by the Evaluation Committee at the Technical and Financial Evaluation stages and determined to be the lowest evaluated responsive tender.

However, the 1<sup>st</sup> Respondent's Ag. Director, Supply Chain Management Unit opined in his Professional Opinion that the Applicant did not meet the criterion outlined as MR14 of Mandatory Requirement (MR) of Clause 2.0 Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 22 of the Tender Document because the Applicant provided an NCA2 for building works as opposed to the required NCA5 for building works. The 1<sup>st</sup> Respondent's Ag. Director, Supply Chain Management Unit further outlined the categories of construction works of the other three tenderers whose tenders made it to the Financial Evaluation stage in which they were registered with a view to

showing that none of them met the criterion outlined as MR14 of Mandatory Requirement (MR) of Clause 2.0 Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 22 of the Tender Document. It is on this basis that the 2<sup>nd</sup> Respondent terminated the procurement proceedings of the subject tender on grounds that all evaluated tenders were non-responsive and approved the Ag. Director, Supply Chain Management Unit’s recommendation to retender the works of the subject tender.

In a view to understand the categorization of contractors on various classes of construction works, we have had sight of Form NCA 1a, an Application Form for Contractor’s Registration-(Kenyan Firms)-Regulation 3 and 4 and which is a public document by the National Construction Authority that is used by Kenyan contractors to apply for categorization of various classes of construction works. Annex1.11 at page 15 of 15 of the said Form NCA 1a, provides for the following categories of registration according to capability:

<b>1.</b>	<b>Contractors (Building)</b>		
		<b>Category</b>	<b>Value Limit (Kshs.)</b>
	1.	NCA1	Unlimited
	<b>2.</b>	<b>NCA2</b>	<b>Upto 500,000,000.00</b>
	3.	NCA3	Upto 300,000,000.00
	4.	NCA4	Upto 200,000,000.00
	<b>5.</b>	<b>NCA5</b>	<b>Upto 100,000,000.00</b>

	6.	NCA6	Upto 50,000,000.00
	7.	NCA7	Upto 20,000,000.00
	8.	NCA8	Upto 10,000,000.00
<b>2.</b>	<b>Specialist Contractors</b>		
	1.	NCA1	Unlimited
	2.	NCA2	Upto 250,000,000.00
	3.	NCA3	Upto 150,000,000.00
	4.	NCA4	Upto 100,000,000.00
	5.	NCA5	Upto 50,000,000.00
	6.	NCA6	Upto 20,000,000.00
	7.	NCA7	Upto 10,000,000.00
	8.	NCA8	Upto 5,000,000.00
<b>3.</b>	<b>Roads and other Civil Works</b>		
	1.	NCA1	Unlimited
	2.	NCA2	Upto 750,000,000.00
	3.	NCA3	Upto 500,000,000.00
	4.	NCA4	Upto 300,000,000.00
	5.	NCA5	Upto 200,000,000.00
	6.	NCA6	Upto 100,000,000.00
	7.	NCA7	Upto 50,000,000.00
	8.	NCA8	Upto 20,000,000.00

What we deduce from the categories outlined in the above table is that a contractor registered under NCA8 whether for building, specialist or roads and other civil works is one who is allowed to perform the least valued

works whilst a contractor registered under NCA1 is allowed to perform works that are unlimited including the least valued works. For example, a contractor registered under NCA2 for building works can perform building works valued from Kshs.1.00 to Kshs.500, 000,000.00 whilst a contractor registered under NCA5 for building works can perform building works valued from Kshs.1.00 to Kshs.100, 000,000.00. In essence, a contractor registered under NCA2 for building works is more qualified than the one registered under NCA5 for building works by virtue of the contractor registered under NCA2 being able to perform buildings works of a contractor registered under NCA5 i.e. Kshs.1.00 to Kshs.100,000,000.00 and more while the contractor registered under NCA5 cannot perform building works for a contractor registered under NCA2 other than building works valued for or less than Kshs.100,000,000.00 because building works under NCA2 are valued upto Kshs.500,000,000.00.

Given the foregoing, we are of the considered opinion that the Applicant satisfied the criterion outlined as MR14 of Mandatory Requirement (MR) of Clause 2.0 Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 22 of the Tender Document as determined by the Evaluation Committee in the Tender Evaluation & Recommendation Report of 14<sup>th</sup> January 2022. We say so because, even though the 1<sup>st</sup> Respondent required tenderers to attach valid NCA5 for building works registration certificate and practicing license which catered for works valued upto Kshs.100,000,000.00, it did not bar tenderers who were qualified to perform works valued for more than

Kshs.100,000,000.00 to provide and attach valid NCA4 to NCA1 for building works registration certificates and practicing licenses. What this means is that a contractor registered as a building works contractor in category NCA5, NCA4, NCA3, NCA2 and NCA1 and was able to provide and attach the respective valid registration certificate and practicing license satisfied the criterion outlined as MR14 of Mandatory Requirement (MR) of Clause 2.0 Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 22 of the Tender Document. Secondly, the Ag. Director, Supply Chain Management Unit had no mandate to find the Applicant's tender or any other tender non-responsive because he is not mandated to evaluate tenders which is the prerogative of the Evaluation Committee. The mandate of the head of procurement function of any procuring entity with respect to a professional opinion is to review the tender evaluation report and provide a signed professional opinion to the accounting officer on procurement proceedings. Where there is dissenting opinion between tender evaluation and award recommendation the head of procurement function would provide guidance in the aforesaid professional opinion. In our considered view, where the head of procurement function finds that an evaluation was not conducted in accordance with the criteria and procedures provided in the tender document, he or she may opine as such and recommend to the accounting officer to direct for a re-evaluation of tenders in accordance with the criteria and procedures provided in a tender document by the same evaluation committee or a different evaluation committee with reasons.

In the circumstances and having found that the Applicant's tender satisfied the criterion outlined as MR14 of Mandatory Requirement (MR) of Clause 2.0 Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 22 of the Tender Document, we find that the reason for termination of procurement proceedings of the subject tender on account of all evaluated tenders were non-responsive was not available for use as a reason by the 2<sup>nd</sup> Respondent in purporting to terminate the procurement proceedings of the subject tender. With this alone the 2<sup>nd</sup> Respondent failed to satisfy the substantive statutory pre-condition for termination of procurement proceedings set out in Section 63(1)(f) of the Act.

With respect to the procedural statutory pre-conditions of termination of procurement proceedings of the subject tender, the Applicant alleges that, to date, it has not received the notification of termination of the procurement proceedings of the subject tender from the Respondents as required under Section 63(4) of the Act and that the Respondents have failed to prove having delivered the letter of regret dated 9<sup>th</sup> February 2022 to the Applicant. However, the Applicant admits having knowledge of the purported termination of procurement proceedings of the subject tender as communicated to it by the Authority, Western Region; vide a letter dated 2<sup>nd</sup> March 2022.

On the other hand, the 2<sup>nd</sup> Respondent denies that the Applicant was never notified of the purported termination of the subject tender and proceeds to provide a copy of letter of regret addressed to the Applicant and dated 9<sup>th</sup> February 2022.

We note that the purported termination of the procurement proceedings of the subject tender was effected on 9<sup>th</sup> February 2022 by the 2<sup>nd</sup> Respondent vide a letter dated 9<sup>th</sup> February 2022 addressed to the Director, Supply Chain Management Unit of the 1<sup>st</sup> Respondent.

In computing timewhen the 14 days the Applicant was required to be notified of the purported termination of the subject tender's procurement proceedings in accordance with Section 63(4) of the Act lapsed,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 of law and taking the circumstances of the instant Request for Review, the 9<sup>th</sup> of February 2022 is excluded from computation of time being the date termination of procurement proceedings of the subject tender was effected, and time started running on the 10<sup>th</sup> February 2022. With this, we deduce 14 days within which the Applicant was to be notified of the termination of the procurement proceedings of the subject tender, lapsed on 23<sup>rd</sup> February 2022.

The Respondents contend that a letter of regret was issued to the Applicant dated 9<sup>th</sup> February 2022. The burden to prove that such letter was sent and or delivered to the Applicant lies with the Respondents because he who alleges must prove as provided under Section 107 the Evidence Act, Chapter 80 of the Laws of Kenya (hereinafter referred to as the 'Evidence Act').

The Evidence Act is an Act of Parliament in Kenya that declares the law of evidence. Section 107, 108 and 112 of the Evidence Act falls under Part 1 of Chapter IV -Production and Effect of Evidence of the Evidence Act and provide as follows:

**107. Burden of proof**

***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

**108. Incidence of burden**

***The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.***

**109. ....**

**111.....**

**112. Proof of special knowledge in civil proceedings**

***In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

Our understanding of the aforementioned provisions of the Evidence Act is that (i) he who alleges must prove, (ii) the burden of proof lies on the person who would fail if no evidence is given on either side and (iii) the burden of proving or disproving a fact is upon a person who has any fact especially within their knowledge in civil proceedings.

In a plethora of cases, courts have interpreted the above mentioned provisions of the Evidence Act. The Supreme Court of Kenya in **Petition No. 12 of 2019 Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR**(hereinafter referred to as Samson Gwer's case) held as follows with respect to the principle of burden of proof in civil claims:

***"[47] It is a timeless rule of the common law tradition <sup>3</sup>/<sub>4</sub> Kenya's juristic heritage <sup>3</sup>/<sub>4</sub> and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the "balance of probability". Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of which the Court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part.***

***[48].....***

***[49] Section 108 of the Evidence Act provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side"***

The Supreme Court in the Samson Gwer's case recognized that a party making an averment in validation of a claim is always the one to establish the veracity of such claim and that in civil claims, the standard of proof is on a balance of probability which requires evidence.

We note that the Respondents have failed to discharge the burden of proof that the letter of regret addressed to the Applicant and dated 9<sup>th</sup> February 2022 was actually sent and/or delivered to the Applicant on or before 23<sup>rd</sup> February 2022 because the Respondents have failed to tender evidence on the mode it used to dispatch the said letter of regret to the Applicant. No evidence of email, postage or any other mode of transmission was tendered by the Respondents to prove that the said letter of regret was actually dispatched and delivered to the Applicant. In the absence of such proof, we find the allegation by the Respondents that a letter of regret dated 9<sup>th</sup> February 2022 was issued to the Applicant is unsubstantiated and find that the Applicant was not notified of the termination of the procurement proceedings of the subject tender in accordance with Section 63(4) of the Act. Accordingly, this procedural statutory pre-condition of termination of procurement proceedings under Section 63(4) of the Act was not satisfied by the Respondents.

With respect to furnishing a report with reasons on termination of the subject tender's procurement proceedings to the Authority within 14 days of the purported termination, the Board notes that the 1<sup>st</sup> Respondent's Deputy Director Supply Chain Management, who is not the accounting officer of the 1<sup>st</sup> Respondent, furnished a report in writing to the Authority dated 2<sup>nd</sup> March 2022 and received by the Authority's Kisumu Office on 4<sup>th</sup> March 2022. As already held, 14 days from the date the purported termination of the procurement proceedings of the subject tender lapsed

was on 23<sup>rd</sup> February 2022. In essence, the Respondents' report on termination of the procurement proceedings of the subject tender dated 2<sup>nd</sup> March 2022 and received by the Authority's Kisumu office on 4<sup>th</sup> March 2022 was issued and delivered to the Authority's Kisumu office on the 21<sup>st</sup> and 23<sup>rd</sup> day from the date the purported termination was effected on 9<sup>th</sup> February 2022 respectively contrary to Section 63(2) of the Act read with Section 63(3) of the Act. Accordingly, these procedural statutory pre-conditions of termination of procurement proceedings under Section 63(2) and (3) of the Act were not satisfied by the Respondents.

Having found that the Respondents did not satisfy and/or meet both the substantive and procedural statutory pre-conditions of termination of procurement proceedings outlined in Section 63 of the Act, we find the purported termination of procurement proceedings of the subject tender by the 2<sup>nd</sup> Respondent was unlawful and illegal.

Accordingly, we find the termination of the subject tender's procurement proceedings by the 2<sup>nd</sup> Respondent was not effected in accordance with Section 63 of the Act and the same is therefore null and void. Consequently, the Board's jurisdiction has not been ousted by dint of Section 167(4)(b) of the Act and in the circumstances, the Board has jurisdiction and shall proceed to address the other issues framed for determination.

Having also found that the Applicant's tender satisfied criterion set out as MR14 of Mandatory Requirement (MR) of Clause 2.0 Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 22 of the Tender Document, we note this finding has rendered the second issue framed for determination moot and we therefore shall proceed to determine the orders the Board should grant in the circumstances.

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

The Board has found the decision by the 2<sup>nd</sup> Respondent to terminate the subject tender's procurement proceedings is null and void. We find it just to nullify and set aside, which we hereby do, the decision of the 2<sup>nd</sup> Respondent to terminate the procurement proceedings of the subject tender together with the antecedent letters of regret dated 9<sup>th</sup> February 2022 addressed to tenderers by the 2<sup>nd</sup> Respondent.

The Board has found that the 1<sup>st</sup> Respondent's Ag. Director, Supply Chain Management Unit had no mandate to determine the Applicant's tender as non-responsive as captured in the Professional Opinion and that the Applicant satisfied the criterion set out as MR14 of Mandatory Requirement (MR) of Clause 2.0 Preliminary examination for Determination of Responsiveness of Section III – Evaluation and Qualification Criteria at page 22 of the Tender Document. We find it just to uphold and which we

hereby uphold the Evaluation Committee's Tender Evaluation & Recommendation Report of 14<sup>th</sup> January 2022 with respect to evaluation of the Applicant's tender.

There being no evidence that due diligence was conducted on the lowest evaluated responsive tenderer and noting that the Evaluation Committee did recommend for due diligence to be conducted, we find it just to order and which we hereby order the Evaluation Committee to proceed and conduct due diligence on the lowest evaluated responsive tenderer in accordance with Section 83 of the Act.

No evidence was tendered before the Board to prove that retendering of the works of the subject tender has commenced. However, the Board would like to reiterate that the purported termination of the procurement proceedings of the subject tender by the 2<sup>nd</sup> Respondent is null and void. The effect of this is that the procurement proceedings of the subject tender are alive and any purported retender for works of the subject tender cannot be lawful when the subject tender is still in existence.

The upshot of our findings is that the instant Request for Review is allowed with respect to the following specific orders.

## **FINAL ORDERS**

In exercise of the powers conferred upon it under Section 173 of the Act, the Board makes the following orders with respect to the Request for Review dated 4<sup>th</sup> March 2022:

- 1. The decision to terminate the procurement proceedings of Tender Number CGN/KDSP/T003/2021-2022 for Construction and Completion of a Psychiatric Hospital at Riomego in Magwagwa Ward by the 2<sup>nd</sup> Respondent be and is hereby nullified and set aside.**
- 2. The letters of regret containing notification of termination of proceedings of Tender Number CGN/KDSP/T003/2021-2022 for Construction and Completion of a Psychiatric Hospital at Riomego in Magwagwa Ward by the 2<sup>nd</sup> Respondent dated 9<sup>th</sup> February 2022 addressed to all tenderers in the subject tender be and are hereby cancelled and set aside.**
- 3. The 2<sup>nd</sup> Respondent is hereby ordered to ensure the procurement proceedings of Tender Number CGN/KDSP/T003/2021-2022 for Construction and Completion of a Psychiatric Hospital at Riomego in Magwagwa Ward proceeds to its logical conclusion including the making of award to the successful tenderer within fourteen (14) days from the date of this decision subject to a due diligence exercise being conducted on the lowest**

evaluated responsive tenderer and taking into consideration the Board's findings herein.

4. Given that the procurement proceedings of the subject tender are not complete, each party shall bear its own costs in this Request for Review.

Dated at Nairobi this 30<sup>th</sup> Day of March 2022.



.....

**CHAIRPERSON**

**PPARB**



.....

**SECRETARY**

**PPARB**