

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 46/2022 OF 24TH MAY 2022

BETWEEN

RAYS STIMA SERVICES LIMITED APPLICANT

AND

ALEX GITARI, ACCOUNTING OFFICER,

KENYA AIRPORTS AUTHORITY 1ST RESPONDENT

KENYA AIRPORTS AUTHORITY 2ND RESPONDENT

Review of the decision of the Kenya Airports Authority in relation to Tender No. KAA/RT/JKIA/00098/2020-2021 for Provision of Maintenance Service for Runway Rubber and Paint Removal for Jomo Kenyatta International Airport.

BOARD MEMBERS

- | | |
|------------------------|----------|
| 1. Mrs. Irene Kashindi | - Member |
| 2. QS. Hussein Were | - Member |
| 3. Dr. Paul Jilani | - Member |
| 4. Mr. Nicholas Mruttu | - Member |

IN ATTENDANCE

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

BACKGROUND TO THE DECISION

Tendering Process

Kenya Airports Authority (KAA), the Procuring Entity and the 2nd Respondent herein invited prospective tenderers through a restricted tendering process vide invitation letters to submit proposals for Tender No. KAA/RT/JKIA/00098/2020-2021 for Provision of Maintenance Service for Runway Rubber and Paint Removal for Jomo Kenyatta International Airport hereinafter referred to as the 'subject tender'). The 2nd Respondent also published a notice on its website on 21st June 2021 (www.kaa.go.ke).

Addenda

Through Addendum No.1 of 12th July 2021 and Addendum No.2 of 19th July 2021, the 2nd Respondent made clarifications sought by tenderers and extended the tender submission deadline to 29th July 2021.

Tender Submission Deadline and Opening of Tenders

A Tender Opening Committee opened tenders shortly after the tender submission deadline in the presence of tenderer's representatives present.

Evaluation of Tenders

An Evaluation Committee evaluated tenders in three stages, namely;

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

Preliminary Evaluation

At this stage, the Evaluation Committee evaluated tenders against the criteria outlined in Clause A. Preliminary Evaluation Criteria of Section III-Evaluation and Qualification Criteria of the Tender Document. At the end of evaluation at this stage the Applicant's tender was found responsive thus proceeded to the Technical Evaluation stage.

Technical Evaluation

At this stage, the Evaluation Committee subjected tenders to a technical evaluation against the criteria outlined in Clause B. Technical Evaluation of Section III-Evaluation and Qualification Criteria of the Tender Document. At the end of evaluation at this stage the Applicant's tender was found responsive thus eligible to proceed to Financial Evaluation.

Financial Evaluation

At this stage, the Evaluation Committee evaluated tenders in accordance with the criteria outlined in Clause I. Financial Evaluation of Section III-Evaluation and Qualification Criteria of the Tender Document. At the end of evaluation at this stage, Roadgrip Limited JV Airside Solutions Limited was determined to be the lowest evaluated tenderer at its tender sum of USD417,600.00 (USD Four Hundred and Seventeen Thousand Six Hundred) only.

Recommendation

The Evaluation Committee recommended award of the subject tender to Roadgrip Limited JV Airside Solutions Limited having been determined to be the lowest evaluated tenderer.

Due Diligence

Due diligence was carried out and following a positive outcome, in a due diligence report dated 9th September 2021, the Evaluation Committee recommended award of the subject tender to Roadgrip Limited JV Airside Solutions Limited at its tender sum of USD417,600.00 (USD Four Hundred and Seventeen Thousand Six Hundred) only subject to confirmation of availability of funds and the immediate establishment of a Contract Implementation Team.

Professional Opinion

In a Professional Opinion dated 10th September 2021, the 2nd Respondent's General Manager, Procurement and Logistics reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the Evaluation Committee's recommendation on award of the subject tender and recommended that the Accounting Officer approves the Professional Opinion.

The 1st Respondent subsequently approved the Professional Opinion.

Notification to Tenderers

Vide letters dated 10th September 2021, the 2nd Respondent notified all tenderers of the outcome of their respective tenders.

REQUEST FOR REVIEW NO.116 OF 2021

On 23rd September 2021, the Applicant lodged a request for review dated 22nd September 2021 seeking the following prayers:

- a. That the Board be pleased to make a declaration that the conduct of the Respondents is unfair, illegal and unlawful;***
- b. That the Board be pleased to disqualify the 3rd Respondent (Roadgrip Limited JV Airside Solutions Limited) from executing or entering into a contract with the 2nd Respondent in Tender No. KAA/RT/JKIA/0098/2020-2021 for Provision of maintenance services for runway rubber and paint removal at Jomo Kenyatta International Airport;***
- c. That the Board be pleased to award the tender to the 2nd most responsive bidder (the Applicant herein);***
- d. That the Board be pleased to order the 1st, 2nd and 3rd Respondents to meet the cost of these proceedings;***

IN THE ALTERNATIVE,

- e. That the Respondent be compelled to pay damages in the sum United States Dollars Four Hundred and Forty Four Thousand Nine Hundred and Ninety Nine twenty cents (USD. 444,999.20) being the bid offered by the Applicant;***

- f. That the Honorable Board be pleased to make any such further Orders as the ends of justice may require.***

The Board considered each party's case and pleadings filed before it including confidential documents submitted by the 2nd Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') and in exercise of its powers under Section 173 of the Act made the following orders on 14th October 2021;

- 1. The award of the tender to the 3rd Respondent (Roadgrip Limited JV Airside Solutions Limited) with respect to Tender No. KAA/RT/JKIA/0098/2020-2021 for Provision of Maintenance Services for Runway Rubber and Paint Removal at Jomo Kenyatta International Airport be and is hereby quashed in its entirety.***
- 2. The Procuring Entity (2nd Respondent herin) be and is hereby directed to exclude the 3rd Respondent (Roadgrip Limited JV Airside Solutions Limited) from the procurement proceedings and proceed to award the tender to the next lowest evaluated tenderer bearing in mind the findings of the Board in this decision.***
- 3. The Accounting Officer of the Procuring Entity is directed to proceed with the subject procurement process including the making of an award within 14 days from the date of this decision.***
- 4. Given that the procurement proceedings are not yet concluded; each party shall bear their own costs in the Request for Review.***

HIGH COURT JUDICIAL REVIEW APPLICATION NO.E145 OF 2021

Dissatisfied with the orders of the Board of 14th October 2021 in Request for Review No.116 of 2021, Roadgrip Limited and Airside Solutions Limited sought judicial review by the High Court in Judicial Review Application No.E145 of 2021.

Hon. Justice Mr. Ngaah Jairus in considering the judicial review application held, in his judgment of 17th December 2021, that he is not satisfied that Roadgrip Limited and Airside Solutions Limited made out a case deserving any judicial review orders sought. Consequently, he dismissed with costs the notice of motion application dated 5th November 2021. The effect of this was that the orders of the Board of 14th October 2021 became binding and final to all parties in Request for Review No.116 of 2021.

REQUEST FOR REVIEW NO.46 OF 2022

Rays Stima Services Limited, the Applicant herein, lodged a Request for Review dated 20th May 2022 and filed on the 24th May 2022 together with a Statement in Support of Request for Review sworn on 20th May 2022 by Janet Kaari Mbijiwe, a director of the Applicant, through the firm of C.K. Musyoki & Co. Advocates seeking for the following orders:

a) That the Board be pleased to make a declaration that the conduct of the Respondents is in contempt of court and or contempt of the orders of the Board issued on the 14th October 2021;

- b) That the Board be pleased to quash the decision of the 1st and 2nd Respondents dated 13th May 2022 in respect of Tender No. KAA/RT/JKIA/0098/2020-2021 for Provision of Maintenance Services for runway rubber and paint removal at Jomo Kenyatta International Airport;***
- c) That the Board be pleased to award Tender No. KAA/RT/JKIA/0098/2020-2021 for Provision of Maintenance Services for runway rubber and paint removal at Jomo Kenyatta International Airport to the Applicant having been the second lowest bidder;***
- d) That the Board be pleased to order the 1st and 2nd Respondents to meet the costs of these proceedings;***

IN THE ALTERNATIVE

- e) That the Respondents be compelled to pay damages in the sum United States Dollars Four Hundred and Forty-Four Thousand Nine Hundred and Ninety-Nine Twenty Cents (USD. 444,999.20) being the bid offered by the Applicant;***
- f) That the Honorable Board be pleased to make any or such further orders as the ends of justice may require.***

In a Notification of Appeal and a letter dated 24th May 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') notified the Respondents of the existence of the Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular

No.02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 24th May 2022.

On 30th May 2022, the 2nd Respondent filed a Response dated 30th May 2022, on behalf of the 1st Respondent and itself. Further, the 2nd Respondent submitted to the Board confidential information and documents with respect to the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 31st May 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective email addresses as provided by the 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 24th March 2020. Further, all tenderers were invited to submit to the Board any information and arguments on the subject tender within 3 days from 31st May 2022.

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

APPLICANT'S CASE

The Applicant alleges that the 1st and 2nd Respondents disregarded orders issued by the Board in PPARB Application No.116 of 2021, Rays Stima Services Limited versus Alex Gitari, Kenya Airports Authority and Roadgrip-JV-Airside Solutions Limited and which decision according to the Applicant was affirmed by the High Court in Judicial Review No.E145 of 2021, Roadgrip Limited and Airside Solutions Limited versus The Public Procurement Administrative Review Board, Alex Gitari, Kenya Airport Authority and Rays Stima Services Limited.

It is the Applicant's case, that vide a letter dated 7th February 2022, it demanded for the 2nd Respondent to comply with the decisions of the Board and the High Court in awarding the tender to it being the second lowest evaluated tenderer in the subject tender. However, the Respondents in their attempt to scuttle the aforesaid decisions of the Board and High Court invoked Section 63 (1) (e) of the Act in an attempt to terminate the subject tender on 13th May 2022. The Applicant argues that the Respondents' purported action of terminating the subject tender is illegal being that it was contrary to the aforesaid decisions of the Board and the High Court and should be deemed a nullity in law and the Board is seized with jurisdiction to entertain the instant Request for Review.

With this, the Applicant raises issue with the manner in which the Respondents sought to terminate the subject tender arguing that the same was not done in adherence to Section 63 (1) (e) of Act.

It is the Applicant's understanding that the Respondents terminated the subject tender on grounds that the Applicant had failed to adhere to the requirements of the Tender Document by not providing two similar works within the last ten (10) years with an average value of not less than USD Five Hundred Thousand (USD 500,000) each being evidenced by contract, together with their respective copies of Defects Liability certificates, Copies of Certificates of Completion of not less than 70% and also failing to have their Power of Attorney certified by a Commissioner of Oaths.

It is the Applicant's case that the Respondents had never initially raised any issue on the responsiveness of the Applicant's tender at the preliminary and technical stage of the initial evaluation thus contending that the same had been sufficiently addressed to the satisfaction of the Respondents.

It is also the Applicant's assertion that had the Respondents found issue with its tender, they should have afforded it an opportunity to be heard on the same.

Given the foregoing the Applicant alleges that the Respondents have breached and acted contrary to the provisions of the Constitution of Kenya, the Act, Regulations and the decisions of both the Board and the High Court.

RESPONDENTS' RESPONSE

The Respondents contend that they did not breach the decisions of the Board and High Court in the subject tender but they legally terminated the tender in adherence to Section 63 (1) (e) of the Act.

It is the Respondents' case that their decision to terminate the tender does not disrespect the decision of the Board and High Court, since the same was terminated before the issuance of any Notification of Award in line with Section 63 of the Act and thus valid.

The Respondents argue that they were in the process of re-evaluating the Applicant's tender before proceeding to award the Applicant the same in accordance with the decision rendered by the Board and the High Court. During the said re-evaluation, the Respondents contend that the Applicant failed to adhere to the mandatory evaluation requirements stipulated in the Tender Document by not providing two similar works within the last ten (10) years with an average value of not less than USD Five Hundred Thousand (USD 500,000) each being evidenced by contract, together with their respective copies of Defects Liability certificates and Copies of Certificates of Completion of not less than 70%.

The Respondents also contend that the Applicant did not have its written Power of Attorney certified by a Commissioner for Oaths but by an Advocate.

Accordingly, the Respondents contend that they terminated the procurement proceedings of the subject tender vide a letter dated 13th May 2022 using

the grounds of the detection of material governance issues provided for under Section 63 (1) (e) of the Act.

This being the case, the Respondents urge the Board to uphold their decision to terminate the subject tender as they acted within the purview of the law by respecting both the provisions of the Act together with the decision rendered by the Board and affirmed by the High Court.

BOARD'S DECISION

The Board has considered each of the parties' case, pleadings and confidential documents submitted by the 2nd Respondent to the Board pursuant to Section 67 (3) (e) of the Act and finds the following issues call for determination: -

- 1. Whether the Respondent terminated the subject tender's procurement proceedings in accordance with Section 63 of the Act on account of material governance issues were detected to divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act;**
- 2. Whether the Respondents complied with the Orders of the Board of 14th October 2021 in Request for Review No.116 of 2021**

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

We shall now proceed to make a determination of each of the aforementioned issues.

The subject tender is before the Board for the second time having initially been before the Board in Request for Review No.116 of 2021. The Board rendered a decision on the same on 14th October 2021. Dissatisfied with the decision of the Board in Request for Review No.116 of 2021, Roadgrip Limited and Airside Solutions Limited unsuccessfully sought judicial review by the High Court in Judicial Review No.E145 of 2021 where the judicial review application was dismissed with costs on 17th December 2021. No appeal against the dismissal with costs of the judicial review application was preferred at the Court of Appeal thus the Board's orders of 14th October 2021 in Request for Review No.116 of 2021 are final and binding to all parties in Request for Review No.116 of 2021 which includes the Applicant and the Respondents herein who were equally the Applicant and Respondents respectively in Request for Review No.116 of 2021.

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

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

The High Court in **Republic v Public Procurement Administrative Review Board & Another Exparte Selex Sistemi Integrati [2008] eKLR** (hereinafter referred to as "the Selex Sistemi Integrati Case"), while determining the legality of Sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Repealed Act") that dealt with termination of procurement proceedings held as follows: -

"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005 s 100 (4) ousts the jurisdiction of the court in judicial review? That question can be answered by a close scrutiny of section 36 (6) of the said Act which provides: -

"A termination under this section shall not be reviewed by the Review Board or a court."

In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of

Smith v. East Elloe Rural District Council [1965] AC 736 Lord Viscount Simonds stated as follows: -

"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."

It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. This rule was propounded in the landmark decision in Anisminic v Foreign Compensation Commission [1969] I ALL ER 208 where Lord Reid stated:

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

In this instant Case it can be argued that sections 100(4) of Public Procurement and Disposal Act, 2005 cannot possibly be effective in ousting the jurisdiction of the Court. The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures. To illustrate the point, the failure by the 2nd Respondent [i.e. the Procuring Entity] to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the

Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice.”[Emphasis by the Board]

The court in the Selex Sistemi Integrati Case held that it had the duty to question whether a decision by a procuring entity terminating a tender met the threshold of Section 100 (4) of the Repealed Act.

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

"29. The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement...

33. A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory precondition that first needs to be satisfied in the said subsection namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were

satisfied, before the jurisdiction of the Respondent can be ousted.

- 34. As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A- Light Ltd [2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body which is the primary decision maker, in this instance the Applicant as the procuring entity, to determine if the statutory pre-conditions and circumstances in section 63 exists before a procurement is to be terminated.....**
- 35. However, the Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard.....**
- 36. The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant’s Accounting Officer’s conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v. Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that**

the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act”

The Court in the Kenya Veterinary Vaccines Production Institute case affirmed the decision of the Court in the Selex Sistemi Integrati Case that this Board has the obligation to first determine whether the statutory pre-conditions of Section 63 of the Act have been satisfied to warrant termination of a procurement process, in order to make a determination whether the Board’s jurisdiction is ousted by dint of Section 167 (4) (b) of the Act.

It is therefore important for this Board to determine whether the Respondent terminated the subject tender in accordance with provisions of Section 63 of the Act, which determination can only be made by interrogating the reason cited for termination by the Respondents and whether or not the 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 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) of the Act are present. This is the substantive statutory pre-condition that must be satisfied before a termination of procurement proceedings is deemed lawful.

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

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

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

We have studied the confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and note that the 1st Respondent, by a letter dated 13th May 2022 addressed to Rays Stima Services Ltd, notified the Applicant of the termination of procurement proceedings of the subject tender. The said letter of notification of termination dated 13th May 2022 reads as follows in part:

"RE: PROVISION OF MAINTENANCE SERVICES FOR RUNWAY RUBBER AND PAINT REMOVAL AT JOMO KENYATTA INTERNATIONAL AIRPORT

TENDER NO: KAA/RT/JKIA/0098/2020-2021

Reference is made to PPARB ruling on 14th October, 2021 quashing the previous award dated 10th September, 2021 and directing the Authority to exclude the awarded bidder from the procurement proceedings.

This is to notify you that the procurement proceedings for the subject tender have been terminated due to material governance issues detected pursuant to section 63(1)(e) of the PPAD Act, 2015.

It is noted that:

- ***You did not provide proof of two similar works within the last ten years with an average value of not less than USD 500,000 each evidenced by a contract and: copy of Defects Liability Certificates, copy of certificate of completion, or Interim Payment Certificate of not less than 70%. In addition, no copy of Defects Liability Certificates, copy of certificate of completion, or Interim Payment Certificate of not less than 70% was provided.***
- ***The written power of Attorney authorizing the signatory of the tender to commit the Tenderer provided was not certified by a Commissioner for Oath but an advocate.***

.....”

The 1st Respondent terminated and communicated to tenderers of the termination of the procurement proceedings of the subject tender on account of material governance issues being detected. We note the reason, material governance issues have been detected, fall under the circumstances in which, if present, termination of procurement proceedings may be effected under Section 63(1)(e) of the Act.

The Applicant alleges that the reasons given for termination of the subject tender do not lie under Section 63(1)(e) of the Act and are invalid.

On their part, the Respondent have attempted to justify the reason for terminating the procurement proceedings of the subject tender on account of material governance issues having been detected pursuant to Section 63(1)(e) of the Act.

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

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

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

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

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

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

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

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

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

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

"

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

41.

42. 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.

.....”

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

We note, from the confidential documents furnished to the Board pursuant to Section 67(3)(e) of the Act, there is no evidence of any malpractice during the procurement process by tenderers, or a tenderer colluding with the

Procuring Entity, or by the 2nd Respondent or operational challenges attributed from policy decisions influencing the 2nd Respondent's procurement process.

The Respondents in this matter cited Section 63 (1) (e) of the Act to support their position in terminating the subject procurement proceedings as a result of material governance issues on account of the Applicant's failure in providing mandatory documents required under the Tender Document, discussed above. The Respondents do not indicate how the Applicant's failure to provide proof of two similar works within the last ten years with an average value of not less than USD 500,000 and Applicant's failure to have its written power of attorney certified by a commissioner of oaths was a form of malpractice by the Applicant or the Respondents that affected the integrity of the subject procurement process.

It is the responsibility of the Respondents to indicate the grounds relied on fall under the provisions of section 63 of the Act as was held in the case of **Republic v. Public Procurement Administrative Review Board ex parte Nairobi City Water Sewerage Company; Webtribe Limited t/a Jambopay Limited (Interested Party) (2019) eKLR** as follows: -

"The question is not whether the best reasons to justify termination has been provided, but whether the reasons provided are sufficient for a reasonable tribunal or body to conclude, on the probabilities, that the grounds relied upon fall 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.

To this end, we find the reason for termination as material governance issues having been detected was not a reason available to the Respondents for purposes of terminating the procurement proceedings for the subject tender. Further, no evidence of malpractice on the part of the Applicant, Respondents or both have been adduced by the Respondents before the Board.

In the circumstances, we find the substantive statutory pre-condition under Section 63 of the Act was not satisfied when the Respondent purported to terminate the procurement proceedings of the subject tender on account of material governance issues having been detected. Accordingly, the Board's jurisdiction is not ousted by dint of Section 167(4)(b) of the Act.

Whether the Respondents complied with the Orders of the Board of 14th October 2021 in Request for Review No.116 of 2021

The Board in Request for Review No.116 of 2021 framed the following issues for determination:

I. Whether the Board has jurisdiction to entertain the request for review.

Depending on the outcome of the first issue;

- II. Whether the Procuring Entity ought not to have awarded the subject tender to the 3rd Respondent on account of conflict of interest.*
- III. What are the appropriate orders to grant in the circumstances?*

On the first issue framed for determination, at page 13 of the Board's Decision of 14th October 2021 in Request for Review No.116 of 2021, the Board held that it had jurisdiction to entertain the request for review no.116 of 2021.

On the second issue framed for determination, at page 25 of the Board's Decision of 14th October 2021 in Request for Review No.116 of 2021, the Board held that the perceived or potential conflict arising out of Mr. Mutiso's previous membership of the board of the 2nd Respondent and the subsequent involvement of Airside Solutions Limited associated with Mr. Mutiso soon after his tenure ended, ought to have been disclosed and considered accordingly by the 2nd Respondent.

On the third issue framed for determination, at page 26 of the Board's Decision of 14th October 2021 in Request for Review No.116 of 2021, the Board overruled the Roadgrip Limited JV Airside Solutions Limited's preliminary objection and partially allowed request for review no.116 of 2021 to the extent of directing the Respondents to exclude Roadgrip Limited JV Airside Solutions Limited from the subject tender's procurement proceedings.

In exercise of the powers conferred upon the Board under Section 173 of the Act, the Board made the following final orders on 14th October 2021 with respect to the Request for Review dated 22nd September 2021 in PPARB Application No.116 of 2021:

- 1. The award of the tender to the 3rd Respondent (Roadgrip Limited JV Airside Solutions Limited) with respect to Tender No. KAA/RT/JKIA/0098/2020-2021 for Provision of Maintenance Services for Runway Rubber and Paint Removal at Jomo Kenyatta International Airport be and is hereby quashed in its entirety.*
- 2. The Procuring Entity (2nd Respondent herein) be and is hereby directed to exclude the 3rd Respondent (Roadgrip Limited JV Airside Solutions Limited) from the procurement proceedings and proceed to award the tender to the next lowest evaluated tenderer bearing in mind the findings of the Board in this decision.*
- 3. The Accounting Officer of the Procuring Entity is directed to proceed with the subject procurement process including the making of an award within 14 days from the date of this decision.*
- 4. Given that the procurement proceedings are not yet concluded; each party shall bear their own costs in the Request for Review.*

We have studied the confidential documents forwarded to us by the Respondent pursuant to Section 67(3)(e) of the Act and note that the Respondents excluded Roadgrip Limited JV Airside Solutions Limited from the subject tender's procurement proceedings and in proceeding to award the subject tender to the Applicant sought to verify and confirm the written power of attorney submitted by the Applicant through a due diligence exercise.

We are alive to the provisions of Section 83 of the Act that allows a procuring entity to conduct due diligence on the tenderer who presented the lowest evaluated responsive tender to confirm and verify the qualifications of such a tenderer. On the other hand, Regulation 80 (2) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020) allow for instances where the lowest evaluated tenderer is determined not qualified after due diligence is conducted, such a tenderer shall be rejected and a similar confirmation of qualifications conducted on a tenderer who submitted the next responsive tender.

With this in mind and noting that the lowest evaluated tenderer on whom a due diligence exercise had been conducted upon, was excluded from the subject tender's procurement proceedings pursuant to order 2 of the Board's Decision of 14th October 2021, the next lowest evaluated tenderer was the Applicant. Pursuant to Section 83 of the Act read with Regulation 80 of Regulations 2020, we find nothing wrong with the Respondents seeking to confirm and verify the qualification of the Applicant's qualification prior to awarding the subject tender to the Applicant. We say so because, Order 3 read with Order 2 of the Board's Decision of 14th October 2021 directed the 1st Respondent to proceed with the subject procurement process including the making of an award to the next evaluated tenderer. The purposive interpretation of the said orders of the Board is that in proceeding with the procurement process, the Respondents will conduct the subject procurement process in line with the principle of fairness enshrined in Article 227(1) of the Constitution which meant subjecting the Applicant to a due diligence exercise prior to awarding the subject tender to it the same way a due

diligence exercise had been conducted on the lowest evaluated tenderer who was subsequently excluded from the procurement proceedings of the subject tender pursuant to the Board's decision of 14th October 2021.

We note that the due diligence exercise on the Applicant resulted in a negative outcome against the Applicant.

Clause 35- Evaluation of Tenders of Section I- Instructions to Tenderers of the Tender Document provides as follows: -

' 35. Evaluation of Tenders

35.1 The Procuring Entity shall use the criteria and methodologies listed in this ITT and Section III, Evaluation and Qualification Criteria. No other evaluation criteria or methodologies shall be permitted. By applying the criteria and methodologies, the Procuring Entity shall determine the Most Advantageous Tender. This is the Tender of the Tenderer that meets the qualification criteria and whose Tender has been determined to be:

- a) Substantially responsive to the tendering document; and***
- b) The lowest evaluated cost'***

The criteria mentioned above is further expounded under Clause 1- General Provisions of Section III- Evaluation and Qualification Criteria which provides as follows: -

'This section contains the criteria that the Employer shall use to evaluate tender and qualify tenderers. No other factors, methods or criteria shall be used other than specified in this tender document. The Tenderer shall provide all the information requested in the forms included in Section IV, Tendering Forms. The Procuring Entity should use the Standard Tender Evaluation Report for Goods and Works for evaluating Tenders.'

Clause 2- Preliminary Examination for Determination of Responsiveness, part (a) – Preliminary Evaluation Criteria of Section III- Evaluation and Qualification Criteria of the Tender Document provides a tabulated criteria of requirements needed to qualify for the next stage of evaluation. Requirement 8 thereof reads as follows: -

No.	Requirement	
8.	A written Power of Attorney authorizing the signatory of the tender to commit the tenderer certified by a commissioner for oath. The requirement is not applicable to Sole Proprietorships.	Must Meet

The Tender Document proceeds to provide that a failure to meet any of the requirements listed in the table would lead to an automatic disqualification making a tender ineligible for technical evaluation.

Clause 2- Preliminary Examination for Determination of Responsiveness, part (b) – Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria of the Tender Document provides as follows in requirement 1 thereof: -

No.	Requirement	Compliance
1.	<p>Proof of two (2) similar works completed within the last 10 years each with an average value of not less than USD. 500,000 each evidenced by a contract and;</p> <ul style="list-style-type: none"> • Copy of Defects Liability Certificates; or • Copy of completion certificates; or • Interim payment certificate of not less than 70 % value of the contract; 	Must Provide

The foregoing considered, the Respondents argue that the Applicant failed to have their Power of Attorney signed by a Commissioner of Oath and instead had it signed by an Advocate. Moreover, they argue that the Applicant did not provide the documents listed under Technical Evaluation Criteria 1. Accordingly, they posit that the Applicant failed to adhere to the above mandatory requirements, and was on this basis disqualified.

The Applicant contends that none of the foregoing issues had been raised by the Respondents in the initial evaluation indicating that they had proceeded all the way up to the financial stage. To this end, it finds it both

unfair and illegal for the Respondents to raise the aforesaid concerns at the point of the Board having issued them orders to award them the tender, being the next lowest evaluated tenderer.

We note the Respondents wrote to the Law Society of Kenya vide a letter dated 6th April 2022 seeking confirmation on whether, Nicole W. Kihara, the advocate who commissioned the written power of attorney submitted by the Applicant was an authorized Commissioner for Oaths in Kenya.

The Law Society of Kenya responded vide a letter dated 10th May 2022, confirming that Nicole Wanjiru Kihara Advocate was **not** a Commissioner for Oaths and that she stamped documents as an Advocate and not as a Commissioner for Oaths. We are aware that an Advocate of the High Court of Kenya may be or may not be a Commissioner for Oaths. It is therefore not wrong for the Evaluation Committee to have found the Applicant responsive at the Preliminary Evaluation stage on account of having submitted a written power of attorney certified by an Advocate. We say so because evaluation at the preliminary evaluation stage is based on evaluating documents submitted by tenderers on face value. However, confirmation and verification of such documents can only be done at due diligence stage where third parties may be involved to verify and confirm the authenticity or lack thereof of such documents. An example is on the face value, an evaluation committee may find a tenderer responsive for having submitted a valid tax compliance certificate because the date on the face of such a tax compliance certificate shows that the same had not expired.

However, a procuring entity is at liberty to confirm and verify such tax compliance certificate with the Kenya Revenue Authority Tax Compliance Certificate Checker online or by writing to Kenya Revenue Authority for confirmation of the same. This confirmation and verification is not done at the preliminary evaluation stage but at due diligence exercise stage.

To this extend, we agree with the Respondents that in so far as it is now established and confirmed by the Law Society of Kenya that one Nicole Wanjiru Kihara Advocate is not a Commissioner for Oaths yet she is the one who certified the written power of attorney submitted by the Applicant, the Respondents were right to reject the Applicant's tender inline with Section 83(1) of the Act read with Regulation 80(2) of Regulations 2022.

Given the forgoing and in the circumstances, we do not find the Respondents to have disobeyed the Decision of the Board of 14th October 2021 in Request for Review No.116 of 2021.

What orders should the Board grant in the circumstances.

We have found that material governance issues having been detected was not a reason available for use by the Respondents' in purporting to terminate the procurement proceedings of the subject tender thus such termination by the Respondents was null and void.

We have also found that the Respondents were right and within the law to reject the Applicant's tender following a negative outcome of a due diligence exercise on the Applicant. In the circumstances, the law requires that the Respondents proceed to award the next lowest evaluated tenderer after the Applicant, subject to a due diligence exercise being conducted on such next lowest evaluated tenderer.

However, only two tenderers' tenders made it to the financial evaluation stage namely, the Applicant's tender and that of the lowest evaluated tenderer who was excluded from the subject tender's procurement proceedings pursuant to the Board's Decision of 14th October 2021 in Request for Review No.116 of 2021. Now that the Applicant's tender has been rightfully been rejected following a due diligence exercise, there is no other tender that would be the next lowest evaluated tender for award of the subject tender to be made to the tenderer who submitted such a tender.

In the circumstances, all tenders submitted in response to the subject tender have been determined to be non-responsive and therefore, the Respondents have no option but to terminate the procurement proceedings of the subject tender on grounds that all evaluated tenders were non-responsive in accordance with Section 63(1)(f) of the Act while ensuring that both the statutory and procedural pre-conditions of termination are adhered to in accordance with Section 63 of the Act read with Regulation 48 of Regulations 2020.

We therefore deem it fit and just to nullify the termination of procurement proceedings on account of material governance issues having been detected and directing for termination of the subject tender's procurement proceedings on account of all evaluated tenders were non-responsive.

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 20th May 2022: -

- 1. The Respondents termination of procurement proceedings for Tender No. KAA/RT/JKIA/00098/2020-2021 for Provision of Maintenance Service for Runway Rubber and Paint Removal for Jomo Kenyatta International Airport be and is hereby nullified and set aside.**
- 2. The Letter of Notification of Termination dated 13th May 2022 for Tender No. KAA/RT/JKIA/00098/2020-2021 for Provision of Maintenance Service for Runway Rubber and Paint Removal for Jomo Kenyatta International Airport addressed to the Applicant and all other tenderers in the subject tender by the 1st Respondent be and are hereby cancelled and set aside.**
- 3. The 1st Respondent is hereby directed to terminate the procurement proceedings of Tender No. KAA/RT/JKIA/00098/2020-2021 for Provision of Maintenance Service for Runway Rubber and Paint Removal**

for Jomo Kenyatta International Airport in accordance with Section 83 of the Act read with Regulation 48 of Regulations 2020 taking into consideration the findings of the Board in this decision.

4. Given the findings herein, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 14th day of June 2022



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CHAIRPERSON

SECRETARY

PPARB

PPARB