

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO.63 OF 2022 OF 6thJULY, 2022

BETWEEN

ON THE MARK SECURITY LIMITED.....APPLICANT

VERSUS

THE ACCOUNTING OFFICER,

KENYA REVENUE AUTHORITY..... 1ST RESPONDENT

KENYA REVENUE AUTHORITY..... 2ND RESPONDENT

SKAGA LIMITED..... INTERESTED PARTY

Review against the decision of Kenya Revenue Authority contained in the letter dated 15th June 2022 with respect to Tender Number KRA/HQS/NCB -046/2019-2020 for the Supply and Delivery of K9 dogs and training of dog handlers.

BOARD MEMBERS

- | | |
|-----------------------|---------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Steven Oundo, OGW | - Member |
| 3. Dr. Joseph Gitari | - Member |
| 4. Ms. Isabella Juma | - Member |
| 5. Mrs Irene Kashindi | - Member |

IN ATTENDANCE

- | | |
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| Mr. Philemon Kiprop | - Holding brief for the Acting Board Secretary |
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BACKGROUND TO THE DECISION

The Tendering Process

Kenya Revenue Authority the Procuring Entity and the 2nd Respondent herein invited sealed tenders for Tender No. KRA/HQS/NCB-046/2019- 2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers (hereinafter referred to as "the subject tender") through an advertisement on 7th January 2020. A Pre-Bid meeting was held thereafter on 16th January 2020.

Addendum, Tender Submission Deadline and Opening of Bids

Upon issuance of an addendum on 24th January 2020, the tender submission deadline was extended to 29th January 2020. The Procuring Entity received two (2) tenders by the tender submission deadline through the Procuring Entity's Supplier Relations Management Electronic System.

The subject tender was opened by a Tender Opening Committee in the presence of tenderers' representatives and recorded as follows:

- a) Bidder No. 1: M/s On the Mark Security Limited
- b) Bidder No. 2: M/s Skaga Limited

Evaluation of Tenders

The evaluation process was conducted in the following stages:

- 1) Tender Responsiveness;
- 2) Technical Evaluation;
- 3) Financial Evaluation (Price Schedule).

1. Tender Responsiveness

At this stage of evaluation, the Evaluation Committee applied the criteria specified in Clause (c) of Section VI. Criteria for Selecting Bidders at page 35 of

the Tender Document, which was mandatory for all tenderers. Any bidder who failed to submit mandatory documents or meet the mandatory requirements was disqualified at this stage of evaluation.

The mandatory requirements were as follows:

S/NO	ITEM DESCRIPTION	BIDDERS	
		On The Mark Security Ltd.	Skaga Ltd.
1)	Duly filled, signed and stamped Form of Tender	√	√
2)	Duly filled, signed and stamped Confidential Business Questionnaire	√	√
3)	Power of Attorney (Sole Proprietors Exempted)	√	√
4)	Tender Security of two hundred thousand (Kshs 200,000) valid for 365 days from the tender closing date of 29 th January 2020	√	√
5)	Attach a copy of Certificate of Incorporation or Business Registration Certificate	√	√
6)	Letter of Reference from a bank (The letter should be within the last six (6) months from date of tender closure)	√	√
7)	Copy of Valid Business License/Permit	√	√
8)	Valid Tax Compliance Certificate	√	√
	Remarks	PASS	PASS

The two tenderers, that is, M/s On the Mark Security Limited and M/s Skaga Limited met all the mandatory requirements in the subject tender hence qualified to proceed to the next stage of evaluation.

1. Technical Evaluation

At this stage of evaluation, the Evaluation Committee evaluated tenders in two categories, that is, Vendor Evaluation and Clause by Clause Technical Evaluation.

1.1. Vendor Evaluation

The Evaluation Committee scrutinized tenders to determine the capability/suitability of the tenderer in accordance with the technical evaluation criteria specified in Clause (c) of Section VI. Criteria for Selecting Bidders at page 35 of the Tender Document. Tenderers were required to attain a total maximum score of 86 points in order to proceed to Financial Evaluation.

The Evaluation Committee observed that Bidder No. 1, M/s On the Mark Security Limited, did not provide attachment for KCSE Certificate for Solomon Kimeu as a trainer and therefore lost one mark. In addition, detailed information on the pseudo training aids for narcotics and explosives were missing and therefore two marks on each of the aforementioned sub-categories, were deducted.

At the conclusion of this stage of evaluation, both tenderers met the individual and overall cut off score hence qualified to proceed to the next stage of evaluation.

1.2. Clause by Clause Technical Evaluation

This stage of evaluation was based on the requirements detailed in the Instructions to Tenderers and the adjustments to clarifications contained in the Addendum issued to tendererson 21st and 24th January 2020. The technical requirements consisted of the following: -

- a) Requirements for Narcotics Sniffer Dogs (Table 1 of the Tender Document);
- b) Requirements for Explosives Sniffer Dogs (Table 2 of the Tender Document);
- c) Requirements for Training and Skills Transfer (Table 3 of the Tender Document).

Below is a summary of the results:

NO	Requirements	Maximum Score	Cutoff Score	Bidders	
				OnThe Mark Security Ltd.	Skaga Ltd.
1)	Narcotics Sniffer Dogs (Table 1)	32	30	24	32
2)	Explosive Sniffer Dogs (Table 2)	32	30	24	32
3)	Training & Skills Transfer (Table3)	8	8	8	8
	TOTAL	72	68	56	72
	Remarks			FAIL	PASS

Upon conclusion of this stage of evaluation, Bidder No. 2, M/s Skaga Limited attained the overall minimum technical score and thus qualified to proceed for

Financial Evaluation. However, Bidder No. 1, M/s On the Mark Security Ltd failed to meet the cut off score for both Narcotic and Explosive Sniffer Dogs because the tenderer failed to provide documentary proof of an internationally recognized kennel club where the dogs were registered. This registration authenticates the origin of the breed which provides critical details about specific history of a dog in regards to health and performance tracking. M/s On the Mark Security Ltd was found non-responsive and therefore failed to qualify for further evaluation.

2. Financial Evaluation

At this stage, the Evaluation Committee applied the criteria specified in Clause (c) of Section VI. Criteria for Selecting Bidders at page 35 of the Tender Document wherein award would be made to the tenderer who submitted the lowest evaluated price. The Price Schedule composed of the following

- a) Prices for supply and delivery of eleven (11) dogs and training of fourteen (14) dog handlers for a period of three (3) months; and
- b) Framework prices for three (3) years.

M/s Skaga Limited, the only tenderer who qualified for Financial Evaluation quoted Kshs 18,473,000.00/- as per its Form of Tender.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s Skaga Limited** at its total quoted price of **Kshs. 18,473,000.00/- (Eighteen Million, Four Hundred and Seventy-Three Thousand Shillings only)** as the lowest evaluated tenderer.

First Due Diligence Exercise

The Evaluation Committee conducted due diligence on M/s Skaga Limited using the following approaches:

- a) Obtaining confidential information on the reference sites in the tender; and
- b) Site visit to the tenderer's offices.

Confidential information was sought from G4S Kenya Limited and Securex Agencies (K) Limited and both confirmed satisfactory performance from the tenderer.

The site visit conducted established that the tenderer has capacity to supply the dogs, train the handlers and has the relevant documentation as well as the capability to implement the subject tender.

First Professional Opinion

In a professional opinion dated 16th March 2020, the Head of Procurement Function expressed his views on the procurement process stating that the same met the requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and thus, concurred with the Evaluation Committee's recommendation that the subject tender be awarded to M/s Skaga Limited. This professional opinion was thereafter approved by the Accounting Officer.

Notification to Tenderers

In letters dated 27th March 2020, the Accounting Officer notified the successful tenderer and the unsuccessful tenderer of the outcome of their respective tenders.

A. 1) REQUEST FOR REVIEW NO. 51 OF 2020

On the Mark Security Limited lodged request for review No. 51/2020 filed on 11th April 2020 seeking the following orders:

- i. An order cancelling and setting aside the 1st Respondent's decision contained in the letter dated 27th March 2020 and related notifications to other tenderers;*
- ii. An order annulling the subject procurement proceedings undertaken by the 1st Respondents in relation to financial evaluation;*
- iii. An order directing the 1st Respondent to re-admit the Applicant's bid at the Financial Evaluation stage and evaluate their bid together with all other bids eligible for consideration at the financial evaluation stage;*
- iv. An order directing the 1st Respondent to conduct the financial evaluation and make an award to the successful bidder in compliance with section 86 (1) (a) of the Public Procurement and Asset Disposal Act, No 33 of 2015;*
- v. An order directing the 1st Respondent to pay costs of the Review; and*
- vi. Any other necessary orders as are necessary for the ends of justice.*

The Board having considered parties' cases and the documents filed before it, including confidential documents submitted to it pursuant to Section 67 (3) (e) of the Act ordered as follows in its decision dated 5th May 2020:

- 1. The Procuring Entity's Letter of Notification of Unsuccessful bid dated 24th March 2020 with respect to Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9dogs and training of dog handlers addressed to the Applicant, be and is hereby cancelled and set aside.***
- 2. The Procuring Entity's Letter of Notification of Award dated 24th March 2020 with respect to the subject tender addressed to M/s Skaga Limited, the 2nd Respondent herein, be and is hereby cancelled and set aside.***
- 3. The Procuring Entity is hereby directed to re-admit the Applicant's bid and the 2nd Respondent's bid at the Technical Evaluation Stage and re-evaluate the Applicant's bid and the 2nd Respondent's bid at the Technical Evaluation Stage in accordance with the Act and the Constitution, taking into consideration, the Board's findings in this case.***
- 4. Further to Order No. 3 above, the Procuring Entity is hereby directed to conclude the procurement process to its logical conclusion including the making of an award within fourteen (14) days from the date of this decision.***
- 5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.***

2.) JUDICIAL REVIEW MISCELLANEOUS APPLICATION 101 OF 2020

Dissatisfied with the decision of the Board in Review No.51 of 2020, the 2nd Respondent and the Interested Party unsuccessfully sought judicial review by the High Court in Judicial Review Miscellaneous Application 101 of 2020 Republic v Public Procurement Administrative Review Board; *Ex parte* Skaga Limited (1st *ex parte* Applicant); Accounting Officer – Kenya Revenue Authority & Another (interested parties) [2020] eKLR and Judicial Review Miscellaneous Application 102 of 2020 Republic v Public Procurement Administrative Review Board *Ex parte* Kenya Revenue Authority (2nd *ex parte* Applicant); Skaga Limited & another (interested parties) [2020] respectively which were subsequently consolidated and the 1st *ex parte* Applicant filed its Notice of Motion dated 26th May 2020 and the 2nd *ex parte* Applicant filed its Notice of Motion dated 22nd May 2020.

Justice P. Nyamweya in her Judgment delivered on 16th November 2020 dismissed the *ex parte* Applicants Notices of Motion dated 26th May 2020 and 22nd May 2020 with no orders as to costs. There was no appeal against the High Court's decision in effect making the decision of the Board in Request for Review 51 of 2020 dated 5th May 2020 final and binding to all parties therein.

Re-evaluation of Bids

In view of the Board's orders in Review No. 51 of 2020, the Evaluation Committee re-admitted the tenders of M/s On the Mark Security Limited and that of M/s Skaga Limited at the Technical Evaluation Stage and conducted a re-evaluation of the two tenders at this stage of evaluation as evidenced in the Technical Re-evaluation Report (hereinafter referred to as the 'Technical Re-evaluation Report') signed by the Evaluation Committee on 24th November 2020.

The summary of the outcome of Vendor Evaluation (the first limb of Technical Evaluation) from the Technical Re-evaluation Report signed on 24th November 2020 was as follows:

Criteria Description	Maximum Score	On the Mark Security Ltd.	Skaga Ltd
Total Score	28	28	28
Remarks		PASS	PASS

Both tenderers passed this stage of evaluation hence qualified to proceed for Clause by Clause Technical Evaluation.

The summary of the results from the Technical Re-Evaluation Report were as follows:

NO	Requirements	Maximum Score	Bidders	
			On the Mark Security Ltd.	Skaga Ltd
1	Narcotics Sniffer Dogs (Table 1)	32	25	32
2	Explosive sniffer Dogs (Table 2)	32	25	32
3	Training & Skills Transfer (Table 3)	8	8	8
	TOTAL	72	58	72

Whereas the Evaluation Committee in the initial evaluation process had applied a cut off score at the Technical Clause by Clause Evaluation stage, the Board pointed out that the use of a cut-off at this stage of evaluation was unfair and advised for the use of a maximum score. Consequently, the summary of the

results at this stage of evaluation from the Technical Re-evaluation report were as follows:

No.	Requirements	Maximum Score	Bidders	
			On the Mark Security Ltd.	Skaga Ltd
1	Vendor Evaluation	28	28	28
2	Clause by Clause Scores	72	58	72
	TOTAL	100	86	100
Remarks			PASS	PASS

Both tenderers passed this stage of evaluation and thus qualified to proceed for Financial Evaluation.

Financial Re-evaluation

At this stage, the two tenders' price schedules were evaluated and a summary was recorded as follows:

NO	Description	Quantity	Bidders			
			On the Mark Security Ltd.		Skaga Ltd	
			Unit Cost Kshs	Total Cost inclusive taxes (Kshs)	Unit Cost Kshs	Total Cost inclusive taxes (Kshs)
	Total Cost inclusive of Taxes		15,619,400.00		18,473,000.00	

Tenderers were also required to provide framework prices to help in the

operationalization of the contract which each tender provided. A summary of the results of the overall re-evaluation process was recorded as follows:

Criteria	Maximum Score/Requirement	Cut Off Mark	On the Mark Security Ltd.	Skaga Ltd
Tender Responsiveness	Mandatory	Met	PASS	PASS
Technical Component	100	86	86	100
Bid Price as per Form of Tender (Kshs)			15,619,400.00	18,473,000.00
<i>Remarks</i>			Lowest evaluated	2 nd lowest evaluated

The Evaluation Committee's Recommendation

In view of the re-evaluation process, the Evaluation Committee recommended award of the subject tender to **M/s On the Mark Security Limited** at their quoted tender price of **Kshs. 15,619,400.00/-** being the lowest evaluated tenderer.

Second due Diligence Exercise

The Evaluation Committee conducted a due diligence exercise on M/s On the Mark Security Limited as captured in its due diligence report signed on 27th November 2020. The Evaluation Committee used the following two approaches:

- a) Obtaining confidential information from persons the tenderer had,

had prior engagement.

b) Site visit to M/s On the Mark Security Ltd.

The Evaluation Committee contacted the tenderer's referees where the tenderer had previously carried out similar work, that is, Safaricom PLC, Market Masters Limited and Kenya Revenue Authority.

Safaricom PLC and Mark Masters Limited gave a satisfactory reference whereas Kenya Revenue Authority (KRA) specifically the Commissioner for Customs & Border Control did not provide a satisfactory response. The Evaluation Committee therefore relied on the response from the user department, that is the Commissioner for Customs & Border Control who were dissatisfied from past delivery and did not recommend acquisition of more dogs from M/s On the Mark Security Ltd. The Evaluation Committee concluded that M/s On the Mark Security Limited failed at the post-qualification stage and therefore did not recommend the tenderer for award of the subject tender.

The Evaluation Committee thereafter considered the results of the due diligence exercise conducted on Bidder No. 2, M/s Skaga Limited. Based on the recommendation letters from the referees and the successful site visit conducted by the team on 19th February 2020, the Evaluation Committee was fully satisfied that Bidder No. 2 M/s Skaga Limited had the capacity to Supply K9 Dogs and Training of Dog Handlers.

The Evaluation Committee therefore recommended award of the subject tender to Bidder No. 2, **M/s Skaga Limited** at their quoted price of

Kshs. 18,473,000.00/- inclusive of taxes as the lowest evaluated bidder.

3.)REQUEST FOR REVIEW NO. 158 OF 2020

On the Mark Security Limited lodged Request for Review No. 158 of 2020 filed on 24th December 2020 seeking the following orders:

- i. An order cancelling and setting aside the 1st Respondent's decision contained in the letter dated 15th December 2020 and related notifications to other tenderers;*
- ii. An order annulling the subject procurement proceedings undertaken by the 1st Respondent in relation to the post qualification stage of the tendering process;*
- iii. An order directing the 1st Respondent to conduct Financial Evaluation and make an award to the Applicant as the successful bidder with the lowest evaluated price in compliance with section 86 (1) (a) of the Public Procurement and Asset Disposal Act No. 33 of 2015;*
- iv. An order directing the 1st Respondents to pay the costs of the Review;*
- v. Any other orders as are necessary for the ends of justice.*

The Board having considered parties' cases and the documents filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act in its decision dated 14th January 2021 ordered as follows :

- 1. The Accounting Officer of the Procuring Entity's Letter of*

Intention to Award a Framework Contract for Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers dated 15th December 2020, addressed to M/s Skaga Limited, be and is hereby cancelled and set aside.

- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Unsuccessful Bid for Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers dated 15th December 2020 addressed to the Applicant, be and is hereby cancelled and set aside.*
- 3. The Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion, including the making of an award, within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this review.*
- 4. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.*

Third Due Diligence Exercise

The Evaluation Committee conducted a due diligence exercise on Bidder No. 1, M/s On the Mark Security Limited, whereby it sought to verify the information provided by the said tenderer from the referenced clients, that is, Safaricom Limited, Market Masters Limited and Polymath Interscience LLC. The results are summarized in the table below:

Client	Evaluation Criteria	Client Response	KRA Remarks
Safaricom Limited	Additional Information on the dogs supplied by on The Mark security limited as to whether they are Explosives detection dogs as stated in the reference letter	Safaricom confirmed that On The Mark Security Limited has been providing explosive and drugs detection dogs during Safaricom events and Facilities.	The Bidder was found responsive on Safaricom reference site.
Market Masters Limited	Additional Information on the category of dogs supplied by on The Mark security limited as to whether they are Explosives detection dogs or Narcotic detection dogs as stated in the reference letter.	Market Masters Limited confirmed that on The Mark Security Company has been providing dogs to the tribe and trademark Hotels during the Past three years. They affirmed that the dogs can handle whatever they have been trained to do (I, e Narcotics, explosives Security detection and recognition of illegal substance and terrorism) and they used to carry out regular testing where the dogs would pass all the time.	The Bidder was found responsive on market Masters site reference site.

Polymath Interscience LLC,	Qualification requirement for interested vendors was to provide evidence on the training Aids including importation documents. Solomon Kimeu proprietor of On The Mark Security Limited provided Invoice Number Tax ID/EIN/VAT No.:800174935 dated 22nd January, 2020 as evidence of having procured Canine Training Aids from Polymath Interscience LLC.	No Response was obtained via email communication to Polymath Interscience LLC, and the telephone (+1 4109901199) Provided in the invoice was not going through.	The Authenticity could not be determined from the outcome of the reference site.
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Prior to recommendation of award, the Evaluation Committee verified the Financial Proposal for M/s On the Mark Security Limited and made the following observations:

- 1) The Evaluation Committee noted the price schedule for M/s On the Mark Security Limited had arithmetic error on the unit cost of 2nd& 3rd year support as Kshs. 1,125,200.00 and Kshs. 1,125,000.00 respectively but did not sum up the cost to the Form of Tender.
- 2) Based on this variance the actual cost would have been Kshs. 17,869,800.00 hence the Evaluation Committee recommended for a disqualification of the firm pursuant to section 82 of the Act which states, *"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of*

correction, adjustment or amendment in any way by any person or entity."

The Evaluation Committee therefore recommended due diligence to be undertaken on the second lowest evaluated tenderer, M/s Skaga Ltd.

Fourth Due Diligence Exercise

The Evaluation Committee conducted a due diligence exercise on M/s Skaga Limited, whereby it sought to verify the information provided by the said tenderer from its referenced clients, to verify if the services rendered to them by the said tenderer were satisfactory. The references included G4S Kenya Limited, Safaricom Limited and Securex Agencies (K) Limited who provided positive responses.

The Evaluation Committee proceeded to verify the Financial Proposal for M/s Skaga Limited and made the following observations:

- 1) The Evaluation Committee detected a calculation computation error on Item No. 2 for (Explosive Detector Dogs) where the unit cost was contrary to the total cost inclusive of tax @16%.
- 2) M/s Skaga Limited provided a total of three (3) dogs at a unit cost of Kshs. 370,000.00 and at a total cost of Kshs 2,960,000.00 instead of Kshs. 1,110,000.00 hence submitting a form of tender of Kshs. 18,473,000.00.
- 3) Based on this variance the actual total cost would have been Kshs. 16,623,000.00 hence the Evaluation Committee recommended for a disqualification of the firm pursuant to section 79 (2) (b) of the Act *"Any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major*

deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive."

In view of the foregoing, the Evaluation Committee confirmed that both M/s On the Mark Security Limited and M/s Skaga Limited had arithmetic errors that affected the final output of their respective forms of tender. Based on its findings, the Evaluation Committee recommended termination of the subject tender due to the financial errors observed in the two tenders received by the Procuring Entity in response to the subject tender.

The Evaluation Committee's Recommendation

In view of the foregoing observations, the Evaluation Committee recommended termination of the subject tender pursuant to Regulation 74 (2) of the Public Procurement and Disposal Regulations, 2020 subject to section 79 (2) (b) of the Act.

Second Professional Opinion

The Procuring Entity's Assistant Manager, Supply Chain Management considered the Evaluation Committee's report dated and signed on 28th January 2021 and made the following remarks on the last page of his professional opinion dated 28th January 2021:

"Recommendation for termination of Procurement Ref. No. KRA/HQS/NCB-046/2020-2021 for Supply and Delivery of K9 Dogs and Training of Dog Handlers for a period of three (3) years in line with section 63 (1) (f) of the PPADA, 2015 which states that "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 all evaluated tenders are non-responsive."

The Assistant Manager, Supply Chain Management concurred with the Evaluation Committee's recommendation for termination of the subject tender, which recommendation was approved by the Accounting Officer on 28th January 2021.

Notification to Tenderers

In letters dated 28th January 2021, the Procuring Entity notified tenderers of its decision to terminate the subject tender.

B. 4.) REQUEST FOR REVIEW NO. 21 OF 2021 AND REQUEST FOR REVIEW NO. 22 OF 2021

M/s Skaga Limited lodged Request for Review No. 21/2020 filed on 11th February 2021 seeking the following orders:

- i. An order cancelling/setting aside the Procuring Entity's notification of purported termination of procurement proceedings in Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers dated 28th January 2021 addressed to the Applicant and/or any other bidder who participated in the subject tender process;*
- ii. An order directing the Accounting Officer of the Procuring Entity to conduct a due diligence on the Applicant herein in full compliance with the orders of the Review Board issued on 14th*

January 2021 in Review Application No. 158 of 2020: On the Mark Security Limited – versus – The Accounting Officer, Kenya Revenue Authority & Skaga Limited;

- iii. Any other relief that the Board may deem fit and just to grant;*
- iv. Costs of the Review be awarded to the Applicant.*

On the Mark Security Limited lodged Request for Review No. 22/2021 dated and filed on 12th February 2021, seeking the following orders:

- i. An order annulling/setting aside the 1st Respondent's decision contained in its letter of 28th January 2021 terminating the tender process;*
- ii. An order substituting the annulled decision with an award of tender to the Applicant following a review of the subject tender process/documents;*
- iii. An order reviewing the order on costs in Application No. 51 of 2020 and 158 of 2020 and award costs thereof to the Applicant;*
- iv. An order awarding costs for the instant application;*
- v. Further orders as the Board may deem fit under the circumstances of this case.*

CONSOLIDATION OF THE TWO REQUESTS FOR REVIEW APPLICATIONS

Request for Review No. 21/2021 filed by M/s Skaga Limited and Request for Review No. 22/2021 filed by M/s On the Mark Security Limited related to the same tender advertised by the same procuring entity. Having noted

the Applicants in Request for Review No. 21/2021 and Request for Review No. 22/2021 participated in the same procurement process advertised by the same procuring entity, the Board consolidated the two Request for Review applications.

The Board having considered parties' cases and the documents filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and in exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No.33 of 2015, ordered as follows in its decision dated 3rd March 2021 in the consolidated Review Applications No. 21/2021 filed on 11th February 2021 and No.22/2021 filed on 12th February 2021, Skaga Limited and On the Mark Security Limited v. The Accounting Officer, Kenya Revenue Authority & Another (hereinafter referred to as "Review No. 21 of 2021 and 22 of 2021"):

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification of Termination of Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers dated 28th January 2021, addressed to the 1st Applicant, be and is hereby cancelled and set aside.***
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Termination of Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers dated 28th January 2021, addressed to the 2nd Applicant, be and is hereby cancelled and set aside***
- 3. The Accounting Officer of the Procuring Entity is hereby directed to award the subject tender to M/s On the Mark Security Limited, the 2nd Applicant herein within seven (7)***

days from the date of this decision, taking into consideration the Board's findings in this Review.

4. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Consolidated Request for Review.

5.) HIGH COURT JUDICIAL REVIEW CASE NO. E038/2021

On 16th March 2021 Skaga Ltd, the Interested Party herein, and sought judicial review by the High Court in Judicial Review Application No. E038 of 2021. On 17th March 2021 directions were issued with respect to the Judicial Review Application and stay granted against the Board's decision of 3rd March 2021. The Interested Party was directed to file and serve a substantive motion together with their submissions and serve the same within 3 days. The Application was to be mentioned on 24th March 2021. On the 24th of March 2021 the Court was not sitting and the ex parte applicant had not complied with court orders. The matter was mentioned on 20th April 2021 and Justice Nyamweya directed the matter to be further mentioned on 10th May 2021 virtually to confirm status of the Judicial Review matter and for further directions after receipt of reasons of Judgment in Civil Appeal 39 of 2021 and in light of the non-compliance by parties with the directions given by Justice Ng'aa on 17th March 2021 as the court may not have the time to deliver judgment in the Judicial Review.

6.) COURT OF APPEAL CIVIL APPEAL (APPLICATION) NO E232 OF 2021.

The Interested Party lodged a Notice of Appeal dated 26th April 2021

together with a Record of Appeal dated 27th April 2021 at the Court of Appeal in Civil Appeal (Application) No E232 of 2021. This was an appeal from the Orders of 20th April 2021 by Justice Nyamweya in the High Court of Kenya at Nairobi High Court Judicial Review No. E038 of 2021. The appeal was opposed by the Applicant herein through a Notice of Motion dated 20th May 2021 seeking to strike out the Appeal for having been filed without leave of the court and thus incompetent. Having considered parties' arguments, the Court of Appeal on 3rd December 2021 held that:

"We are satisfied that this appeal was instituted without leave and does not therefore lie. Consequently, we strike out the notice of appeal and the entire record of appeal with costs to the 4th Respondent."

In light of the Court of Appeal decision, the Board's Orders in the consolidated Review Number 21 and 22 of 2021 were upheld and the Procuring Entity was required as directed to comply and award the subject tender within seven (7) days.

The Applicant notified the 1st Respondent of the outcome of the Appeal vide letter dated 3rd May 2022 wherein it sought compliance with the orders of this Board of 3rd March 2021 in the consolidated Review Applications No. 21 and 22 of 2021.

Third Professional Opinion

The Procuring Entity's Deputy Commissioner Supply Chain Management, Mrs Grace Murichu Kariuki, signed a third professional opinion on 6th June 2022 which has been availed to the Board as part of the Respondents confidential documents.

The opinion considered the Evaluation Committee's report, the legal aspects of the subject tender and the chronology of the procurement process. The opinion noted that the tender validity for the subject tender was 335 days up to 29th December 2020. The tender validity has been extended by an additional thirty days up to 28th January 2021. The opinion further noted that there was a standstill period when the subject tender was a subject of review before the Appeals Board, the High court and the Court of Appeal and computed the stand still period as 522 days.

It was noted that after the Court of Appeal delivered its Ruling on 3rd December 2021, the Procuring Entity was directed to award the subject tender within seven days from date of the Ruling and to ensure full compliance with the Board's Orders in the consolidated Review Application No. 21 and 22 of 2021 which directed award of the subject tender to On the Mark Security Limited.

The Opinion further noted that the Commissioner C&BC wrote to Commissioner LS & BC citing the occurrence of a force majeure event due to delays in the procurement process. The department engaged the National Police Service at the Border Stations to provide K9 services being a critical service in border security. The department further commenced the establishment of a puppy breeding & training facility to bridge the gap created by uncertainties in the legal process undertaken by the interested parties in the procurement proceedings. The opinion stated that the Legal Services and Board Coordination advised the Commissioner General to terminate the procurement proceedings pursuant to PPADA Section 63 (1)(g).

The Professional opinion detailed that arising from the outcome of the judicial process and the current status of affairs in the user department,

termination was appropriate pursuant to Section 63(1) of the Act. The recommendation to the Accounting Officer for approval or rejection as indicated on page 5 and 6 was that:

- The procurement proceedings took longer than expected due to court appeals.
- This created uncertainties and a force majeure event in the user department because the K9 services were for border security. This was a critical service for the Authority and the Country as it helped deter smuggling of illicit goods and drugs into the country. The user department had no option but to seek service from the National Police Services.
- The K9 services that were required from the tender were no longer useful and did not meet any objective of the user department.
- Termination of the procurement proceedings pursuant to Section 63(1)(b) of the Act which stipulated that 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 (g) force majeure;
- The Commissioner LS&BC was directed to inform the lawyers of the appellant Ogado and Company Advocates on the current status of implementation of the Court ruling.

C. REVIEW 63 OF 2022 DATED 6TH JULY 2022

M/s On the Mark Security Limited (the Applicant herein), through the firm of Ogado & Company Advocates, lodged Request for Review No. 63/2022 dated and filed on 6th July 2022 against the decision of Kenya Revenue Authority

contained in the letter dated 15th June 2022 with respect to Tender Number KRA/HQS/NCB -046/2019-2020 for the Supply and Delivery of K9 dogs and training of dog handlers. The said request is accompanied by a statement in support of the request for review dated and filed on even date, signed by Mr. Solomon Kimeu, the sole director of the Applicant. The Orders sought are:

- a. The 1st Respondent's decision contained in its letter of 15th June 2022 terminating the tender process be annulled and set aside.**
- b. The Honourable Board be pleased to review the subject tender process/documents and substitute the annulled decision with an award of the tender to the Applicant.**
- c. The Honourable Board be pleased to review its orders on costs in Application No. 51 of 2020, 158 of 2020 and 22 of 2021 award costs thereof to the Applicant.**
- d. The Honourable Board be pleased to award costs for the instant Application.**
- e. The Honourable Board be pleased to make any further orders as it may deem fit under the circumstances of this case.**

In a Notification of Appeal and a letter dated 6th July 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 suspension of procurement proceedings for the subject tender while forwarding 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 1st Respondent was requested to submit a response to the Request for Review

together with confidential documents concerning the subject tender within 5 days from 6th July 2022.

In opposition of the Request for review, the Respondents filed their written Memorandum of Response dated 13th July 2022 filed on even date through the 2nd Respondent's in-house counsels, Elisha Nyapara and Pius Nyaga Advocates.

Vide letter and notification of appeal dated 18th July 2022, the Acting Board Secretary notified the interested party, via their email as provided by the Respondents in the confidential documents, of the existence of the Request for Review while forwarding to the interested party a copy of the Request for Review together with the Board's circular No. 02/2020 dated 24th March 2020. The tenderer was invited to submit to the Board any information and arguments about the subject tender within 3 days from 18th July 2022.

M/s Skaga Limited, the Interested Party herein, filed their Memorandum of Response to the Request for Review on 20th July 2022 through the firm of Sigano and Omollo LLP Advocates.

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 avers that the 1st Respondent previously on two occasion and in outright violation of the law failed to comply with the valid orders of the Board arising from the Applications for Review No. 151 (*meant to read 51*) ;ReviewNo. 158 of 2020; and Review No. 21 and 22 of 2021.

The Applicant avers that in Application for Review No. 21 and 22 of 2021 the Board ordered the 1st Respondent, *inter alia*, to award the Applicant the subject tender within 7 days from 3rd March 2021. Subsequently, both the Interested Party and the Procuring Entity unsuccessfully sought judicial review by the High Court and further, unsuccessfully sought an appeal at the Court of Appeal rendering the decision of the Board of 3rd March 2021 in consolidated Review Applications No.21 and 22 of 2021 final and binding to all parties therein.

The Applicant states that it urged the Respondents to comply with the decision and Orders of the Honourable Board in the Consolidated Review Applications No. 21 and 22 of 2021 but the Respondents ignored, neglected and or otherwise refused to comply with the said Orders.

Vide a letter dated 15th June 2022 albeit in response to the Applicant's letter of 3rd May 2022, the Respondent purportedly terminated the procurement proceedings of the subject tender on grounds that due to force majeure arising from the judicial process in the course of finalizing the tender. The letter further stated that the Respondents had obtained the services the subject of the tender, from the National Police Service.

It is the Applicant's case that the 1st Respondent's decision to terminate the procurement proceedings of the subject tender is illegal, unjust, unfair and unconstitutional as it is in violation of the provisions of Article 227 of the Constitution, Section 63 read with Regulation 74 of the Public Procurement and Asset Disposal Act and Regulations 2020 (hereinafter referred to as 'Regulations 2020') respectively.

The Applicant avers that the Respondents have demonstrated their unwillingness and/or in ability to comply with the lawful orders of the Board and the Constitution of Kenya and more specifically are in contempt of the Boards Order to award and enter into a contract with the Applicant as per the Decision of the Board

The Applicant claims that as a result of the Respondents' decision there is a violation of the Applicant's rights to a fair administrative action and due process of administrative action and the Applicant's right to participate in competitive tendering process and render service to the procurement entity under the Constitution of Kenya and the Public Procurement and Assets Disposal Act.

The Applicant is of the view that the Respondents' decisions in relation to this tender have been biased unconstitutional and were carried out with a view of circumventing the Procurement Law and the Constitution of Kenya.

As a result of the continued and illegal breach of the Constitution and the laws of Kenya the Applicant has incurred costs for filing and hiring advocates to urge and enforce their rights as stipulated in the Act. The Respondent's conduct is illegal and unconstitutional and the entire procurement entities procedures should be subject to thorough audit with sanctions against the offending officers.

The Applicant avers that the costs of filing applications for reviews No. 51 of 2020, 158 of 2020 and 22 of 2021 is Kshs. 177,144/= being filing fees of Kshs.

59,048/= in each review and a sum of Kshs.(*not indicated*) being legal fees and other expenses incurred.

RESPONDENTS' CASE

The 2nd Respondent confirms that it is the procuring entity and that the purpose of the Tender was to introduce a non-intrusive verification tools such as scanners, K9s and the activation of the risk profiling tools at the points of entry and exit with the aim of improving security at the border stations and reducing the level of identified contrabands/illicit trade. This was in compliance with the 2nd Respondent's 7th Corporate Plan initiated in the FY 2019/2020 to equip the 2nd Respondent's Border stations with K9s to ensure 100% implementation of the initiative outlined in the 7th corporate plan.

On the 11th November, 2020 the Respondents states that it extended the tender validity period by an additional Thirty (30) days from 29th December 2020 to 28th January 2021.

The Respondents submits a summary of the chronology of events of the judicial interventions on the subject tender as follows:

PPARB APPEAL/JUDICIAL REVIEW	DATE APPEAL WAS FILED	DATE DECISION/RULING WAS MADE	NO OF DAYS
Application No. 51 of 2020 PPRA/ARB/7/51/2020	14 th April,2020 On the Mark Security contested award to M/s Skaga	5 th May, 2020 PPARB recommended both bidders to be re-admitted	22 days

	Limited		
Judicial Review Case No.102/1 of 2020	8 th May, 2020 KRA requested for judicial review	16 th November, 2020 High Court upheld the decision by the PPARB on both bidders to be readmitted back.	193 days
Application No. 158 of 2020	23 rd December,2020 On the Mark Security contested again the award decision to M/S Skaga Limited	14 th January, 2021 PPARB ruled that the letter of award to M/S Skaga be cancelled and regret letter to On The Mark Limited be cancelled and set aside.	23 days
Application No. 21 of 2021 and Application No. 22 of 2021	11 th February, 2021 Skaga Limited and On the Mark Security Limited requested for a review of the Procurement proceeding	3 rd March,2021 PPARB ruled that the letters of termination issued to on the Mark and Skaga be cancelled and set aside. Further KRA was ordered to award the tender to on The Mark Security Limited.	21 days
Judicial Review Case No. E038/2021 & COA Civil Appeal (Application) No E 232 of 2021.	16 th March 2021 (for No. E038/2021 Skaga Ltd Lodged a JR Application to the High Court <u>26th and 27th April 2021</u> (COA Civil	3 rd December,2021 KRA is directed to award the tender within seven (7) days and ensure full compliance with the Board's Orders in Review No. 21 and 22 of 2021	263 days

	Appeal (Application) No E232 of 2021., Skaga Ltd lodged a notice and record of Appeal at the court of appeal		
Total No. of days			522 days

The Respondents claim that through the Applicant's letter dated 3rd May, 2022, the Applicant sought compliance with the orders of the Board dated 3rd March, 2021 in Review Applications No. 21 and 22 of 2021. Consequently, the 2nd Respondent, vide letters dated 15th June, 2022 and 5th July, 2022 responded to the Applicant's letter dated 3rd May, 2022 wherein it communicated its reasons for noncompliance amongst them being that the award of the tender had been frustrated by intervening events which also included protracted judicial interventions.

The Respondent avers that its action to terminate the tendering processes was within the law. It relies on Section 63(1) of the Act which authorizes the 1st Respondent to terminate the procurement proceedings prior to entering a contract where there is inadequate budgetary provision and as a result of intervening events that makes it impossible to conclude the tendering contracts.

It avers that the termination of the tender proceedings is not out of fault of the Respondents but due to protracted judicial disputes which took 522 days and the funds allocation for procurement for the tender No. KRA/HQS/NCB-

046/2019-2020 which was meant for the FY 2019/2020 had been depleted and reallocated to other activities.

That contrary to the Applicant's assertion, the Respondents at every stage of the Applications before this Board and the court as enumerated above, had fully complied with such orders to the latter and without any exemption therefrom.

The Respondents states that it undertakes crucial public functions that require high-level intelligence and security at the core of its operations. That in the interim, with the protracted judicial interventions with respect to the tender, and security provision being a key public interest, no vacuum could be left and accordingly, the National Police Service took over the aspect of security services at the Border Stations to ensure continuity of its operations and mitigate illicit trade.

The 2nd Respondent avers that it has since improved its internal capacity and established puppy breeding and training facility as the long term solution to the security issue at the border stations aimed at reducing the level of identified contrabands/illicit trade and in compliance with its 7th Corporate Plan hence the procurement for the supply and delivery of K9 and training of dog handlers is no longer required and has been overtaken by events.

The Respondents claim that if the prayers sought are granted, the Board will be saddling the procuring entity with extra costs for services that it no longer requires which in itself will defeat the provisions and objectives of the Act.

In regard to costs, the Respondents state that the Board has previously stated that since the procurement process with regard to tender no. KRA/HQS/NCB-046/2019-2020 has not been completed, costs cannot be awarded. Accordingly, due to the frustration of the tendering process and the tender being cancelled in accordance with the law, costs in the previous applications and this current application ought not to be granted.

For the reasons above, the Respondents seek for their decision contained in the letter dated 15th June, 2022 to be upheld and for the dismissal of the instant Request for Review with no orders as to costs.

INTERESTED PARTY'S CASE

The Interested Party, in response to the Request for Review dated 6th July 2022, prays that the Board dismiss the same with costs on the grounds that:

The Request for Review was filed out of time in so far as compliance by the Respondents to the Orders issued by the Board on 3rd March 2021 and as upheld by the Court of Appeal on 3rd December 2021.

The interested Party states that the Applicant has been aware of the alleged breaches regarding "deliberate delay of awarding the tender" at least as of 3rd May 2022 when the Applicant wrote to the Respondents seeking compliance. On this limb, the Interested Party relies on the case of **Republic v Public Procurement Administrative Review Board & 2 others Ex Parte Kenotrade Investment Limited [2018] eKLR**.

Additionally, the Interested Party claims that the procurement proceedings regarding the subject tender have been terminated and hence the Board lacks the requisite jurisdiction to take cognizance of, hear and determine the

Applicant's Request for Review by dint of the express provisions of Section 167(4)(b) of the Act.

The Interested Party states that the subject tender died a natural death upon lapse of the tender validity period and the Applicant's prayers on being awarded the subject tender is untenable following the lapse of the tender validity period.

On the issue of Costs, the Interested Party states that the Board having rendered its decisions in Review Application No. 51 of 2020 on 5th May 2020; Review Application 158 of 2020 on 14th January 2021; Review Application 22 of 2021 on 3rd March 2021 has become *functus officio* and therefore lacks jurisdiction to review its own orders on costs as sought by the Applicant.

The Interested Party states that the request for review is frivolous and vexatious and ought to be dismissed in accordance with Section 172 of the Public Procurement and Asset Disposal Act.

The Applicant did not file a rejoinder and none of the parties filed submissions as at the date of this decision.

BOARD DECISION

The Board notes that this is the fourth time it has been called upon to decide on the subject tender. The Board has considered each of the Parties case, pleadings, documents, written submissions, authorities, and confidential documents submitted by the Respondents pursuant to Section 67 (3)(e) of the Act and finds the following issues call for determination:

1. Whether the Board has jurisdiction to hear and determine the instant Request for Review.

In making a determination on Issue 1, the Board will make a determination on the following sub-issues:

- a. Whether the Request for Review was filed out of time.**
- b. Whether the termination of the procurement proceedings of the subject tender was in accordance with Section 63 of the Act.**

2. Whether the interested party has substantiated that the tender validity period of the subject tender has lapsed and if the determination is in the affirmative, whether the Board can grant the Orders sought in the Request for Review.

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

DETERMINATION OF ISSUES

1. Whether the Board has jurisdiction to hear and determine the instant Request for Review..

We will begin by addressing ourselves to the question of jurisdiction and thereafter proceed to consider the substantive merits of each sub-issue considered therein.

It is trite law that jurisdiction is everything and when the question arises the Court or tribunal seized of the matter must as a matter of prudence enquire into it before doing anything concerning the matter in respect of which it is raised.

Black's Law Dictionary, *8th Edition*, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

In his book, "Words and Phrases Legally Defined", Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court [or other decision making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not

possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.” [Emphasis by the Board]

The 'locus classicus' case on jurisdiction is the celebrated case of The Owners of the Motor Vessel “Lillians” -V- Caltex Oil Kenya Ltd (1989) KLR 1 where Nyarangi J.A. held:

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

The Supreme Court of Kenya in the case of Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011, held that:

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

cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

Similarly, in the case of Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:

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

Such is the centrality of jurisdiction that the Court of Appeal has held in Isaak Aliaza v Samuel Kisiavuki [2021] eKLR, that:

"Whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter."(Emphasis ours).

This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

(1) *There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board.*

Further, Section 28 of the Act provides for the functions of the Board as:

- (1) The functions of the Review Board shall be—**
 - (a) reviewing, hearing and determining tendering and asset disposal disputes; and**
 - (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.”**

The jurisdiction of this Board flows from Section 167(1) of the Act which provides that:

"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."

The above provisions clearly demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes. To invoke the jurisdiction of this Board, a party must file its Request for Review within the timelines specified in section 167 of the Act.

Further, **Regulation 203 (2) (c) of the Regulations 2020** provides as follows:

"(1)

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

(a)... ;

(b)... ;

(c) be made within fourteen days of—

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

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

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

The Board notes that **section 167 (1) of the Act read together with Regulation 203 (2) (c) of the Regulations 2020** has three limbs within which a candidate or tenderer may file a request for review namely;

- Within fourteen days from the date of occurrence of an alleged breach at any stage of the procurement process, or disposal process prior to making of an award; or
- Within fourteen days of notification of award; or
- Within fourteen days of the occurrence of the breach complained of, after an award has been made to the successful bidder.

The Board considers the use of the word 'or' and notes that the Concise Oxford English Dictionary (11 Edition, Oxford University Press) defines "or" as a '*conjunction used to link alternatives.*'

Applying the foregoing construction, the Board notes that the use of the word "or" in section 167 (1) of the Act read together with Regulation 203 (2) of the 2020 Regulations connotes a conjunction that gives alternatives. The first option

which an aggrieved candidate or tenderer has, is to file its request for review within fourteen (14) days of occurrence of an alleged breach from the date the aggrieved candidate or tenderer learns of the alleged breach by the Procuring Entity at any stage of the procurement process or disposal process, prior to making of an award. The second option is to file a request for review within fourteen (14) days of notification of award and the third option is to file a request for review within fourteen (14) days of the occurrence of an alleged breach that occurs after an award has been made to a successful bidder.

This Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches. In **PPARB Application No. 01 of 2022 of 3rd January 2022 consolidated with Application No. 04 of 2022 of 5th January 2022** the Board stated as follows:

"In our considered opinion, it was not the intention of the legislature to provide for three instances when an aggrieved candidate or tenderer can approach the Board, only for such an aggrieved candidate or tenderer to await for the last option, that is, after notification of intention to enter into a contract has been made, when the breach complained of occurred before the notification of intention to enter into a contract has been made. Allowing such a candidate or tenderer to wait until a notification of intention to enter into a contract has been made for them to approach the Board claiming breach of duty imposed on a procuring entity by the Act and Regulations 2020, when such

breach occurred much earlier in the procurement process and before notification of intention to enter into a contract has been issued, is akin to allowing an aggrieved candidate to have its cake and at the same time eat it.

We say so because, if a breach of duty imposed on a procuring entity by the Act and Regulations occurs at the opening of tenders, and an aggrieved candidate or tenderer decides to await until notification of intention to enter into a contract is issued before approaching the Board, we can bet 100% that such an aggrieved candidate or tenderer will cease being aggrieved if it is awarded the tender. However, if such a candidate or tenderer is not successful to be awarded the tender, it is likely to seek cancellation of the entire procurement process by the Board based on breach of duty imposed on a procuring entity by the Act and Regulations that occurred during opening of tenders, to enable it have a second bite to the cherry by participating afresh in the event the Board orders for a re-tender after cancellation. This in our view, wastes time for procurement proceedings which are ordinarily time bound, by starting afresh when perhaps the Board would have ordered for an addendum to be issued to amend any breach with respect to the contents of a tender document, had an aggrieved candidate or tenderer approached the Board much earlier."

a. Whether the Request for Review was filed out of time.

Having regard to provisions of Section 167(1) as read together with Regulation 203 (2) (2)(c), the Interested Party contends that the Request for Review was

filed out of time for the reason that the alleged breaches by the Respondents and the deliberate delay of awarding the subject tender was known to the Applicant as at 3rd May 2022. The Applicant has not responded to this contention by the interested party. The Board notes that Request for Review is on failure by the Respondents to comply with the Orders of the Board dated 3rd March 2021 in the consolidated Requests for Review No.21 and 22 of 2021 and challenges the purported termination of procurement proceedings of the subject tender and the review of the Board's orders on costs in previous application No. 51/2020; No. 158/2020; and consolidated Nos. 21 & 22 of 2021.

The rules of evidence dictate that he who alleges must prove pursuant to **Section 107 (1) of the Evidence Act (Chapter 80 of the Law of Kenya), which provides:**

"107. (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..."

The burden of proof lies upon the party who invokes any legal right or liability and substantially asserts the existence of some facts. It is hence upon the parties to prove their allegations failure to which this Board is forced to only consider the facts before. Additionally, **Section 109 of the Evidence Act** states:

"109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR** had this to say:

"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."

On the issue of compliance with the Board's Orders, once the Court of Appeal rendered its decision in Civil Appeal No. E232 of 2021 on 3rd December 2021, the Respondent ought to have awarded the subject tender to the Applicant on the 10th December 2021. As such, noting that the Respondents did not comply, a breach occurred and the Applicant is expected to have filed a Request for Review within 14 days from the 10th December 2021.

Assuming that the Respondents were not aware of the Court of Appeal's decision, and noting that it was not until the 3rd May 2022 that the Applicant allegedly wrote to the Respondents notifying them of the Court of Appeals ruling and urging the Respondents to comply with this Board's decision of 3rd March 2021, the Respondents ought to have awarded the subject tender to the Applicant on 10th May 2022. The Respondent not having complied by awarding the subject tender to the Applicant breached the Board's Orders of 3rd March 2022 and the Applicant should have filed a Request for Review on or before the 25th May 2022 in compliance with provisions of the Act.

The second aspect of termination of the subject tender is that time started running when the Applicant received the notice of termination from the Respondents on 15th June 2022. The Respondents claim that vide letters dated 15th June, 2022 addressed to the Applicant and 5th July, 2022 addressed to the Applicant's Advocates, they notified the Applicant that the subject tender had been terminated. It is not clear to this Board when the Applicant received the termination letter dated 15th June 2022.

If the Applicant is assumed to have received the said letter dated 15th June 2022 on the same day, then it ought to have filed its Request for Review on or before the 29th June 2022. However, since there is no proof as to when the letter dated 15th June 2022 was dispatched and received by the Applicant we cannot efficiently compute when the 14 days started running.

The only letter that has evidence of receipt is the Respondent's letter addressed to the Applicant's advocates dated 5th July, 2022 and received on 6th July 2022 as noted therein. The Applicant filed this Request for Review on 6th July 2022 and was within the stipulated timelines as provided for under the Act.

This Board has also considered the issue of costs raised by the Interested Party contesting that having rendered its decisions in Review Application No. 51 of 2020 on 5th May 2020; Review Application 158 of 2020 on 14th January 2021; and Review Application 21 & 22 of 2021 on 3rd March 2021, the Board *is functus officio* and therefore lacks jurisdiction to review its own orders on costs as sought by the Applicant. This issue does not have any effect on the time factor nor on the Board's jurisdiction to hear and determine the instant review in accordance to Section 167 of the Act.

It is therefore the Board's informed opinion that the instant review has been properly brought before it within the statutory period and as such we shall proceed to determine the second sub-issue.

b. Whether the termination of procurement proceedings of the subject tender was in accordance with Section 63 of the Act.

The interested party contests the Board's jurisdiction to hear and determine the Review by dint of the express provisions of **Section 167 (4)(b)** of the Act which states:

"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 provision above provides that the Board's jurisdiction is ousted under the above Section of the Act where a termination of a procurement or asset disposal proceedings is in accordance with Section 63 of the Act. However, it is important to note that the mere fact that a procurement proceeding has been terminated does not automatically oust the jurisdiction of the Board. The provisions of Section 167 (4) (b) of the Act is conditional on such a termination being in accordance with Section 63 of the Act. Our understanding is that the Board must review, as mandated under Section 28 of the Act, whether the termination and reasons given by the procuring entity are in accordance with Section 63 for its jurisdiction to be ousted.

Section 63 of the Act imposes a statutory obligation upon procuring entities to terminate procurement proceedings only on the stipulated grounds stated therein. A procuring entity must provide evidence that there are real and substantial reasons to warrant the ground relied on for termination of procurement or asset disposal proceedings.

Section 63 of the Act specifies the statutory pre-conditions for termination of a tender which include substantive and procedural requirements 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 have 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.

In Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR (hereinafter referred to as "JR No. 142 of 2018") the court held as follows:

"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...

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 pre-condition that first needs to be satisfied in the said sub-section 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.

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...

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...

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"

On the procedural aspect, the Board notes that the Respondents terminated the subject tender through the letter addressed to the Applicant dated 15th June 2022. They contend in their Memorandum of Response that the termination of the subject tender proceedings is not out of their fault but due to protracted judicial disputes.

The Respondents have further stated in their Response under paragraph 29 that with the protracted judicial interventions with respect to the subject tender and security provisions being a key public interest, no vacuum could be left and accordingly, the National Police Service took over the aspect of security services at the Borders Stations to ensure continuity of its operations and mitigate illicit trade. That the Respondent has since improved on its internal capacity and established puppy breeding and training facility as the long term solution to the security issue at the border stations aimed at reducing the level of identified contrabands/illicit trade and in compliance with its 7th Corporate Plan thereby the procurement for the supply and delivery of K9 and training dog handlers is no longer required and has been overtaken by event. The Respondents have also indicated that the funds allocation for procurement of the subject tender which was meant for the FY 2019/2020 had been depleted and reallocated to other activities.

The Board has studied the Respondent's letter dated 15th June 2022 addressed to the Applicant notifying it of termination of the tender for supply and delivery of K9 dogs and training dog handlers for a period of three years. The said letter contains the following details:

"...

The Authority has terminated the Procurement Proceedings for the above referenced tender due to force majeure arising from the judicial process in the course of finalizing the tender. The Authority obtained the services that are the subject of this procurement from the National Police Service, in addition to the establishment of a puppy breeding & Training Facility to bridge the gap created by the judicial process undertaken by the interested parties in the procurement proceedings. The Services are critical for the Authority and the Country because it helps deter the smuggling of illicit goods and drugs into the Country. The Authority has therefore terminated the procurement proceedings pursuant to PPADA 2015 Section 63(1)(g) which provides that (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: force majeure."

From this letter, the Board infers that the reason advanced by the Respondent to the Applicant for termination of the subject tender was due to force majeure arising from the judicial process on the course of finalizing the tender.

Additionally, as observed from the availed confidential documents, the Procuring Entity allegedly reported the termination of the subject tender to the Director General of the Public Procurement Regulatory Authority vide its letter dated 27th June 2022 where it indicated reasons for termination to be that:

"...All the submitted bids were Non-Responsive {Section 63 1 (g) of the Act} Force Majeure".

However, there is no proof before this Board of receipt of the said letter by the Director General of the Public Procurement Regulatory Authority.

This Board must now address the question whether the Respondents met the substantive requirements and discharged their burden under Section 63 of the Act for the Board to conclude that on a balance of probabilities the procurement process was terminated due to an occurrence of force majeure as argued.

Black's Law Dictionary defines 'Force Majeure' as

"an event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g floods and hurricanes) and acts of people."

The concept of force majeure can be explained to be an extraordinary event rendering the legal obligations between two or more contractually bound parties impossible to fulfill. The type of event must be entirely beyond the parties' anticipation and reasonable control and the contracting parties must prove their reasonable efforts to mitigate the circumstances that have rendered the fulfillment of their duties impracticable.

Force Majeure will not typically cover any occurrences that a party anticipates and has reasonable control over since the event must be an extraordinary occurrence not reasonably foreseeable. Common examples of force majeure events include acts of war, terrorist attacks, epidemics, pandemics like Covid-19,

labor strikes, riots, acts of God, natural disasters (like blizzards, earthquakes, or hurricanes), or acts of terrorism. From the above we have established that to constitute force majeure, the occurrence must be uncontrollable and unforeseen.

The concept of force majeure was deliberated in the leading South African case of Peters, Flamman & Co v Kokstad Municipality 1919 AD 427 *the brief facts of which are that the appellants contracted with Kokstad Municipality (the respondents) to provide it with acetylene gas lighting for a period of twenty years. Whilst the contract had several years still to run the appellants were incarcerated as enemy subjects during a time of war. Their business was ordered by the State (the Treasury) to be wound up. In carrying out this order the liquidator cut off the power supply. The Respondents brought an action for damages and ancillary relief. The court from which the matter was heard rejected the municipality's claim for damages on the basis that the firm's partners had been deprived by the action and authority of the State of the power to carry out their obligations under the contract to provide lighting to the streets. On cross appeal, the Appellate Division upheld the court a quo's dismissal of the municipality's claim for damages for breach of contract.*

The Appellants in the above quoted case could not have foreseen the occurrence of war and its effects on their business and had no control over the States' Order to wind up their business. The contract had to come to an end due to *force majeure* and consequently, no action would lie for damages for breach of contract.

The Board opines that for the judicial processes claimed by the Respondents involving the subject tender to amount to an event of force majeure they must have been uncontrollable and unforeseen.

Section 175 of the Act provides for the right to judicial review in procurement disputes and stipulates the strict timelines that must be met by the High Court and the Court of Appeal when making a determination in a matter involving a procurement dispute. It provides as follows:

(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

(3) The High Court shall determine the judicial review application within forty five days after such application.

(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.

(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.

(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.

(7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.

In view of the above clear provisions on timelines , the Board is not convinced that *force majeure* arose from the stipulated judicial processes involving the subject tender to warrant termination of the same under Section 63 (1)(f) of the Act. Time being of the essence in determination of procurement disputes, **the Respondents could foresee the time likely to be taken in determination of each Review Application before the Board, Judicial Review proceedings before the High Court, and appeals before the Court of Appeal.**

The Court of Appeal in ***ADK Technologies Ltd in Consortium with Computer Technologies Ltd v Public Procurement Administrative Review Board & 4 others (Civil Appeal E598 of 2021) [2022] KECA 407 (KLR) (Civ) (4 March 2022)*** while addressing the provisions of Section 175 noted that:

"Section 175 has been the subject of consideration by this Court in Aprim Consultants v Parliamentary Service Commission & Another, CA. No. E039 of 2021 ("the Aprim case") and in The Consortium of TSK Electronica Y Electricidad S.A. & Ansaldo energia v. PPARB & 3 Others, CA. No. E012 of 2022 ("the TSK

Electronica case”). Indeed, the last decision was delivered barely three days ago, on 28th February 2022. In the Aprim case, the Court stated that section 175 was couched in mandatory terms. The Court expressed itself thus: “A perusal of section 175 of the Act reveals Parliament’s unmistakable intention to constrict the time taken for the ruling, hearing and determination of public procurement disputes in keeping with the Act’s vowed intent and object of expeditious resolution of those disputes. Parliament was thus fully engaged and intentional in setting the timelines in the Section. But it did not stop there. In one of the rarer instances where all discretion is totally shut out, Parliament expressly enacted a consequence to follow default or failure to file or to decide within the prescribed times: the decision of the Board would crystallize and be invested with finality. Our reading of the Act is that the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time-bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended, the jurisdiction also ended. Thus, any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law. ___” (Emphasis added)”

Additionally, the Board notes the provisions of, Section 171 (2) of the Act which stipulates that:

“In no case shall any appeal under this Act stay or delay the procurement process beyond the time stipulated in this Act or the Regulations made thereunder”

The Board observes that Section 168 of the Act stipulates that Procurement proceedings are suspended once a Request for Review is filed, a fact that the Respondents could clearly foresee and anticipate the repercussions on the subject tender.

Section 168 of the Act clearly indicates that

"Upon receiving a request for review under Section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such a manner as may be prescribed."

The Procuring Entity on receipt of the Board Secretary's letters and Notifications of Appeal in the Review applications was made aware of suspension of procurement proceedings regarding the subject tender. As such, their claim of the judicial processes amounting to force majeure has no justification.

The Board consequently holds that the Respondents did not meet the substantive requirements to justify termination of the subject tender due to force majeure as provided for under Section 63 of the Act. To this extent, the termination of the subject tender was unlawful and this Board has jurisdiction to hear and determine the instant review.

The Board wishes to point out that public procurement has a constitutional underpinning to it as clearly stated in **Article 227 of the Constitution** which stipulates:

"Where 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."

Additionally, the Act dictates that procurement processes including cancellation of tender process must strictly conform to the constitutional principles of transparency, openness, accountability, fairness, and generally the rule of law.

2. Whether the interested party has substantiated that the tender validity period of the subject tender has lapsed and if the determination is in the affirmative, whether the Board can grant the Orders sought in the Request for Review.

The Interested Party claims that the subject tender died a natural death upon lapse of the tender validity period and that the Applicant's prayer to be awarded the subject tender is untenable following the lapse of the tender validity period. The Board takes cognizance of the fact that once the tender validity period has expired, the tender process is completed, albeit unsuccessfully.

The burden of proof lies upon the party who invokes any legal right or liability and substantially asserts the existence of some facts. Section 107 (1) of the Evidence Act stipulates that 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.

It is up to the Interested Party to prove that the tender validity period has lapsed and as such the Board ought not to issue the Orders sought. We note

that the Interested party has not availed any proof or computation on the tender validity period that would propel its' averment that the tender validity period has lapsed. As such we find it difficult to conclusively determine that the tender validity period of the subject tender has lapsed.

The Board takes note of the remarks made in the third Professional Opinion at page 3 indicating that the tender validity for the subject tender was 335 days up to 29th December 2020 which was then extended by an additional thirty days up to 28th January 2021 noting the standstill period during the procurement process.

It is no doubt that the Applicant had a legitimate expectation that upon delivery of the Court of Appeal's ruling, the Respondents would comply with the Board's Orders of 3rd March 2021 in the consolidated Request for Review 21 and 22 of 2021 and award the subject tender during the tender validity period according to the provisions of Section 87 of the Act which provides:

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

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

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

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

The Board observes that creation of procurement contracts is governed by Section 135 of the Act and that any procurement contract must be signed within the tender validity period as provided for under **Section 135(3) of the Act.**

Section 135(3) of the Act states that:

"(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period."

What are the appropriate Orders to issue in the circumstances?

The Board observes it to be trite law that courts and decision-making bodies such as this Board can only act in cases where they have jurisdiction. We have made a determination that the instant Request for Review was filed within the stipulated timelines and that termination of the subject tender by the Respondents herein was unlawful. As such, this Board has Jurisdiction to hear and determine the Request for Review herein.

We have also found that no proof has been presented before this Board on the allegation that the tender validity period has lapsed.

It is only fair and just for the Board to nullify the termination of the subject tender and in view of the fact that the Board had previously ordered on 3rd March 2021 that the subject tender be awarded to the Applicant in the Consolidated Review Applications 21 of 2021 filed on 11th February 2021 and 22

of 2021 filed on 12th February 2021, the Board deems it fit to subsequently order the Procuring Entity to enter into a contract with the Applicant in accordance with Section 135 of the Act.

The Board also notes the Applicant's prayer for costs not awarded in previous review applications and holds that under *the doctrine of functus officio* as considered by the Court of Appeal in **Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited)** [2014] eKLR, the Court of Appeal held that:

"Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon."

As such, the Board will only consider costs relating to the instant request for review.

We wish to point out that in establishing this Board; the framers of the Act envisioned that public procurement processes would be guided by tenets of the Constitution. This means that the public would benefit from services offered by a procuring entity but that such procuring entity would uphold the rule of law and constitutional democracy in its procurement process.

The Constitution cannot be upheld where a procuring entity chooses not to comply with orders issued to it by a decision making body established under any written law. The Court in **Petition No. 11 of 2019, Gideon Omare v Machakos University** [2019] eKLR cited with approval, the decision in **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another** [2005] 1 KLR 828, Ibrahim, J (as he then was) where it was held as follows:

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged".

In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged...A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. As long as a court order exists, it must not be disobeyed"

Therefore, parties are advised to note that the Act has laid out offences and Sanctions under Part XVI as follows:

Section 176 (1) (j) of the Act provides that a person shall not knowingly withhold the notification of award to a successful tenderer. Further **Section 176 (1) (m) of the Act** states that a person shall not contravene a lawful order of the Authority given under Part IV or the Review Board under Part XV.

Regulation 223 under the Act also stipulates that where a public officer or a state officer unreasonably fails to comply with specified timelines or fails to implement preference and reservation schemes or any other administrative obligation under these regulations, that person may be subjected to disciplinary measures in accordance with the Act, these Regulations or prevailing service regulations.

The Penalty provided for contravening Section 176(1) of the Act has been stipulated under **Section 176 (2) of the Act** which states:

"(2) A person who contravenes the provisions of subsection (1) of this section, commits an offence and shall be liable upon conviction—

(a) if the person is a natural person, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both; (b) if the person is a body corporate, to a fine not exceeding ten million shillings."

This Board takes cognizance that the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") is mandated under Section 9(m)(v) to create a central repository or database that includes state organs and public entities that are non-compliant with procurement laws and under Section 9(n) to inform, as applicable, the Cabinet Secretary, Parliament, the relevant County Executive member for finance, the relevant County Assembly or Auditor-General on issues of non-compliance with procurement laws once the relevant State Organ or public entity ignores the written directives of the Authority, including material breaches of the measures established under the Act.

In **PPARB Application No. 94 of 2016, Lyape Investments V Kenya Marine & Fisheries Research Institute & Another**, the Board held that:

"The Procuring Entity having failed to follow the orders of the Board in Review No. 83 of 2016, this Board cannot fold its hands when faced with a situation where the Procuring Entity fails to obey the orders made by it. The Board will employ the powers conferred upon it by section 173 of the Act and make such orders as will meet the ends of justice in any matter pending before it"

We deem it fit to share this decision, which we hereby do, with the Authority through the Director General of the Authority for its knowledge and further action under the Act so as to ensure compliance with Orders issued.

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 6th July 2022:

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification of Termination of Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers dated 15th June 2022, addressed to the Applicant, be and is hereby nullified and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Termination of Tender No. KRA/HQS/NCB-046/2019-2020 for the Supply and Delivery of K9 Dogs and Training of Dog Handlers dated 15th June 2022, addressed to the Interested Party, be and is hereby nullified and set aside.**

3. The Accounting Officer of the Procuring Entity is hereby directed to award the Applicant the subject Tender in accordance with Section 87(1) as read with Section 86 of the Act within a period of Seven(7) days and subsequently enter into a contract with the Applicant in accordance with provisions of Section 135 of the Act within a period of fifteen (15) days from the date of award taking into consideration the Board's findings herein.
4. The Board Secretary is hereby directed to share this decision with the Director General, Public Procurement Regulatory Authority, for purposes of ensuring compliance with the orders of this Board.
5. In view of the Board's findings and orders above, we order that the Procuring Entity shall bear the Applicant's costs of this Request for Review amounting to Kshs. 109,048/- (Kenya One Hundred and Nine Thousand and Forty-Eight) only

Dated at Nairobi this 27th Day of July, 2022



.....
CHAIRPERSON
PPARB



.....
SECRETARY
PPARB