

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 86 OF 2022 OF 30<sup>TH</sup> SEPTEMBER 2022**

**BETWEEN**

**TOP CHOICE SURVEILLANCE LIMITED..... APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**MINISTRY OF AGRICULTURE, LIVESTOCK,**

**FISHERIES AND COOPERATIVES**

**(STATE DEPARTMENT FOR FISHERIES**

**AQUACULTURE AND BLUE ECONOMY) .....1<sup>ST</sup> RESPONDENT**

**THE PROCURING ENTITY,**

**MINISTRY OF AGRICULTURE, LIVESTOCK,**

**FISHERIES AND COOPERATIVES**

**(STATE DEPARTMENT FOR FISHERIES**

**AQUACULTURE AND BLUE ECONOMY) ..... 2<sup>ND</sup>RESPONDENT**

Review against the decision of the Accounting Officer of the Ministry of Agriculture, Livestock, Fisheries and Cooperatives (State Department for Fisheries, Aquaculture and Blue Economy in relation to Tender No. MOALF&C/SDFA&BE/04/2022-2023 for the Supply and Installation of two (2No.) Lifts at the Proposed National Aquaculture Technology Development and Innovations Transfer Centre in Sagana, Kirinyaga County.

## **BOARD MEMBERS PRESENT**

- |                       |              |
|-----------------------|--------------|
| 1. Ms. Faith Waigwa   | -Chairperson |
| 2. Eng. Mbiu Kimani   | -Member      |
| 3. Ms. Irene Kashindi | -Member      |
| 4. Ms. Njeri Onyango  | -Member      |
| 5. QS. Hussein Were   | -Member      |

## **IN ATTENDANCE**

- |                   |                                    |
|-------------------|------------------------------------|
| 1. Ms. Sarah Ayoo | -Holding brief for Board Secretary |
|-------------------|------------------------------------|

## **BACKGROUND OF THE DECISION**

The Ministry of Agriculture, Livestock, Fisheries and Cooperatives (State Department for Fisheries, Aquaculture and Blue Economy, the Procuring Entity and the 2<sup>nd</sup> Respondent herein, invited eligible tenders in response to Tender No. MOALF&C/SDFA&BE/04/2022-2023 for the Supply and Installation of two (2No.) Lifts at the Proposed National Aquaculture Technology Development and Innovations Transfer Centre in Sagana, Kirinyaga County (hereinafter referred to as the 'subject tender') using an open tender method and by way of an advertisement in the PPIP portal and on the Ministry's website on 24<sup>th</sup> August 2022.

## **Submission of Tender and Tender Opening**

A total of four (4) tenderers submitted their tenders in response to the subject tender within the tender submission deadline and which tenders were opened on 6<sup>th</sup> September 2022 in the presence of officials from the State Department for Fisheries, Aquaculture and the Blue Economy and bidders' representatives present at Maji House 6<sup>th</sup> Floor Conferenceroom at 10:30 a.m. The bidders were as follows: -

<b>Bid No</b>	<b>Firm Name</b>	<b>Tender Amount</b>
1.	M/s Top Choice Surveillance Ltd.	18,385,378.00
2.	M/s Mombasa Lifts and Escalators Limited	17,694,899.00
3.	M/s Schindler Limited	18,478,901.00
4.	M/s Elevonic Lift Services Limited	23,441,975.00

### **Evaluation of Tenders**

A Tender Evaluation Committee (hereinafter referred to as the 'Evaluation Committee') appointed by the 1<sup>st</sup> Respondent undertook evaluation of the four (4) tenders in the following four stages and as captured in an Evaluation Report dated September 2022 (hereinafter referred to as the 'Evaluation Report'):

- i. Qualification form
- ii. Preliminary Evaluation;
- iii. Technical Evaluation; and
- iv. Financial Evaluation.

## Qualification Form

The evaluation was conducted following the qualification criteria in the Tender Document. In the end, all the bidders were considered and found responsive thus proceeded for preliminary evaluation.

## Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee was required to apply the mandatory criteria outlined as a) Preliminary Eligibility Evaluation of the blank tender document issued by the 2<sup>nd</sup> Respondent to prospective tenderers (hereinafter referred to as the 'Tender Document'). Evaluation of tenders at this stage was the of meeting all the criteria for evaluation. Tenders that did not satisfy all the criteria at this stage of evaluation, were to be considered non-responsive and would not be considered further.

At the end of evaluation at this stage, two (2) tenders were found to be non-responsive and the other two (2) tenders, which included the Applicant's were found responsive. The tenders that were found responsive proceeded to the Technical Evaluation stage. The table below shows the reasons for non-responsiveness.

<b>Bidder</b>	<b>Reasons for disqualification</b>
No. 2, M/s	✓ The Bidder did not attach EPRA certificate

Mombasa Lifts and Escalators Limited	<ul style="list-style-type: none"> <li>✓ The form of tender was stamped but not signed</li> <li>✓ The Bidder's Tender Security was obtained from an Insurance company (Heritage Insurance) against the requirement that it be a Bank guarantee</li> </ul>
No. 3, M/s Schindler Limited	<ul style="list-style-type: none"> <li>✓ The Bidder had not certified the attached copies of the following certificates; <ul style="list-style-type: none"> <li>▪ Certificate of Incorporation</li> <li>▪ CR12</li> <li>▪ Tax Compliance Certificate</li> </ul> </li> <li>✓ The Bidder did not duly fill form CON-2</li> <li>✓ The form of tender was signed but not stamped</li> <li>✓ The Bidder did not duly fill the confidential business questionnaire</li> <li>✓ The Bidder did not duly fill forms EL 1.1&amp; 1.2</li> </ul>

## Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to apply the criteria outlined in the Tender Document. At the end of evaluation at this stage, one (1) tenderer was found to be non-responsive while the Applicant, was found responsive. The Applicant proceeded to the Financial Evaluation stage. The table below shows the reasons for non-responsiveness:

Bidder	Reasons for disqualification
Bidder No. 4, M/S Elevonic Lifts Services Limited	<ul style="list-style-type: none"> <li>✓ The Bidder did not provide evidence in form of completion certificates for experience of the firm in similar projects of similar nature, complexity or magnitude.</li> <li>✓ The Bidder did not provide information on their litigation history. The Form CON-2 had not been duly filled.</li> </ul>

### Financial evaluation

At this stage of evaluation, the Evaluation Committee was required to apply the criteria outlined in the Tender Document. The Evaluation Committee did an arithmetic check for M/s Top Choice Surveillance Ltd and the results are as shown below:

<b>Bi d No</b>	<b>Name of The Firm</b>	<b>Total Bid Amount</b>	<b>Corrected Tender Sum</b>	<b>Arithme tic Error</b>	<b>% Error</b>	<b>Remarks</b>
1	Top Choice Surveillance Ltd	18,385,378	18,385,378 .00	N/A	0%	No arithmetic errors.

The Evaluation Committee observed that the prices quoted by the Bidder No.1 for items to be supplied were largely within the prevailing market rates. Following further analysis of the bidder, the Evaluation Committee observed that the tender was largely balanced i.e. no front –loading.

### **Evaluation Committee’s Recommendation**

The Evaluation committee recommended the bid by Bidder No. 1;(**M/S Top Choice Surveillance Ltd of P O Box 1218-00618, NAIROBI**) for consideration for award of the contract for supply and installation of 2No. Passenger Lifts at The Proposed National Aquaculture Technology Development and Innovations Transfer Centre in Sagana, Kirinyaga County at a tender price **of Kshs.18,385,378.00 (Kenya Shillings Eighteen Million, Three Hundred Eighty-Five Thousand, Three Hundred Seventy-Eight Cents Nil)** only being the lowest evaluated responsive bidder.

### **Professional Opinion**

In a Professional Opinion dated 16<sup>th</sup> September 2022 (hereinafter referred to as the ‘Professional Opinion’), the Head of Supply Chain Management Services of the 2<sup>nd</sup> Respondent, Mr. Sammy Okonji, indicated that he had done a memo to the head of finance on availability of funds before awarding the subject tender. In his response, the head of finance indicated that they had initially planned for Ksh. 20,000,000 for the subject tender but the National Treasury reduced the amount to Ksh. 3,000,000 and

therefore there is inadequate funds to defray the resultant expenditure from this project if awarded.

The Head of Supply Chain Management Services therefore recommended that the procurement proceedings be terminated due to inadequate funds in line with Section 63(1)(b) of the Public Procurement and Asset Disposal Act 2015. The Accounting Officer, Dr. F.O. Owino PhD, CBS, who is the 1<sup>st</sup> Respondent herein, approved the termination of the subject tender on even date.

### **Letters of Notification**

Vide letters dated 16<sup>th</sup> September 2022, the 1<sup>st</sup> Respondent notified the Applicant and other tenderers of the termination of the subject tender due to inadequate funds.

### **REQUEST FOR REVIEW**

M/s Top Choice Surveillance Ltd, the Applicant herein, lodged a Request for Review dated 30<sup>th</sup> September 2022 together with a Statement in Support of the Request for Review thereof dated 26<sup>th</sup> September 2022 seeking the following orders:

- a) A declaration that the Respondents breached the provisions of Article 227(1) of the Constitution and Sections 63, and 79 of the Public Procurement and Asset Disposal Act;***
- b) The decision of the Respondents contained in the letter dated 16th September, 2022 to terminate the procurement proceedings with respect of Tender No. MOALF&C/SDFA&BE/04/2022-2023; supply and installation of (2NO) passenger lists at the proposed national aquaculture technology development and innovations transfer centre Sagana, Kirinyaga County be annulled and set aside.***
- c) The Invitation to Tender via ANY intended re-advertisement or re-advertisement of the tender and the subsequent re-tendering process be quashed and set aside forthwith.***
- d) The procurement process to be completed and the Applicant be evaluated as per the provisions of Section 80 of the Act.***
- e) The applicant be awarded the tender at the cost of Kshs 18,385,378.00 as submitted.***
- f) The Respondents be compelled to pay the costs of this review to the Applicant.***

***g) The Honourable Board be pleased to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***

In a Notification of Appeal and letter dated 30<sup>th</sup> September 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board") notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No. 02/20 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 30<sup>th</sup> September 2022.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Replying Affidavit sworn on 5<sup>th</sup> October 2022 by the 1<sup>st</sup> Respondent, Dr. Francis O. Owino, and filed on even date.

## **APPLICANT'S CASE**

The Applicant avers that the Respondents are in complete breach of the Public Procurement and Asset Disposal Act as read with Articles 50 and 227 of the Constitution as detailed herein below.

The Applicant avers that the Procuring Entity failed to offer sufficient reason as to why it terminated the procurement proceedings as required under Section 63 of the Act. The applicant further claims that the Procuring Entity failed to take into account the fact that the it had prepared its bid in accordance with the Invitation to Tender and Instructions to Tenderers, as issued under the Tender Document and observing the relevant legal provisions especially the Act and the Regulations thereto and its tender was totally responsive.

The Applicant avers that the Procuring Entity failed to comply with the provision of Section 53(8) of the Act requiring the accounting officer to ensure that there are sufficient funds before commencement of procuring proceedings and further failed to disclose in the letter of termination of the tender process the exact amount exceeded by the Applicant vis-à-vis the amount allocated.

The Applicant avers that by not following the due procedure on termination of procurement proceedings, the Respondents failed to uphold and promote the principles of fairness, equitability, transparency,

competitiveness and cost effectiveness as stipulated under Article 227(1) of the Constitution.

Applicant avers that the respondents prejudiced the applicant's legitimate expectation to be awarded the tender as per the provision of Section 80 of the Act.

The applicant avers that the purported termination of procurement proceedings by the Respondents denies the applicant a fair evaluation and is an attempt to ensure the tender is awarded to another entity to the detriment of the Applicant.

The applicant also claims that it has suffered loss and damage because It has been denied the opportunity to be awarded the subject Tender and lost the right to be evaluated and to compete fairly in the award of the subject tender.

## **RESPONDENT'S CASE**

In response, the Procuring Entity maintains that the provision for termination is expressly provided for under the Act and the Accounting Officer invoked the powers granted to him as per law and that the allegations by the Applicant that the Procuring Entity contravened the Constitution, The Public Procurement and Asset Disposal Act, the Fair Administrative Action Act and the Public Procurement & Asset Disposal Regulations 2020 is not true as the Accounting Officer has chronologically

elaborated and explained the due process followed so far in their Replying Affidavit.

In response to the allegation of breaching Section 53(8) of the Public Procurement and Asset Disposal Act, the Procuring Entity states that the procurement item was projected in the annual procurement plan for F/Y 2022/2023. And the Head of Finance responded via his Memo dated 16<sup>th</sup> September, 2022 and indicated that they had initially planned for Ksh. 20,000,000/- (Kenya Shillings Twenty Million) but unfortunately the National Treasury reduced the amount to Ksh. 3,000,00/- (Kenya Shillings Three Million).

In response to the allegation of breach of Section 80 of the Public Procurement and Asset Disposal Act, the Procuring Entity states that, the Accounting officer appointed a Tender Evaluation Committee for the purposes of evaluation of the submitted bids. The applications were opened and evaluated on 6<sup>th</sup> September, 2022 at 10.00a.m.

In response to the allegation that the Applicant has suffered loss and damage, the Procuring Entity maintained that it complied with all the provisions of the law especially the Public Procurement and Asset Disposal Act, The Fair Administrative Action Act No. 4 of 2015, The Public Procurement and Asset Disposal Regulations, 2020 and all the provisions of the Constitution specifically (Articles 10 and 227) contrary to the allegations of the Applicant/ Bidder No. 1.

In the penultimate, the Respondents raised a Preliminary Objection within the Replying Affidavit. They aver that the Act expressly provides for issues that can be determined and entertained by Board, as provided under section 167 (4) of the Public Procurement and Asset Disposal Act, 2015 among the issues that are precluded are where a tender has been terminated by the Procuring Entity. The Respondents therefore pray that the appeal requesting for review be dismissed and the Applicant pays costs.

### **BOARD'S DECISION**

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

- a) Whether the Board is divest of jurisdiction to entertain the instant Request for Review by dint of Section 167(4)(b) of the Act the subject tender having been terminated ;**

Depending on the determination of the second sub-issue of the first issue;

**b) Whether the termination of procurement proceedings is valid?**

**c) What orders should the Board grant in the circumstances?**

We now proceed to address and make a determination on the aforesaid issues. In answering the first issue the Board shall have wholly answered the Preliminary Objection raised by the Respondent at Paragraphs 24 and 25 of its Replying Affidavit.

**Whether the Board's has jurisdiction to hear and determine the instant Request for Review;**

Jurisdiction is defined in Halsbury's Laws of England (4 th Ed.) Vol. 9 as "*...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 decision.*"

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]**

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

***".....So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts***

***out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."***

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).

In consideration to the foregoing, we observe it to be trite law that courts and decision-making bodies such as the Board can only act in cases where they have jurisdiction. Nyarangi, JA stated as follows in the *locus classicus* case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) eKLR**:

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

**tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.**" [Emphasis is ours]

Assumption of jurisdiction by courts and other decision-making bodies in Kenya is a subject regulated by the Constitution, by statute law, or both.

The instant preliminary objection that has been raised by the Respondents is challenging the jurisdiction of the Board to entertain the instant Request for Review by dint of Section 167(4) (b) of the Act. The import of this preliminary objection is that if it succeeds, it will divest the jurisdiction of this Board.

The provisions of Section 167(4) (b) of the Act is conditional on such termination of a procurement or asset disposal proceeding being in accordance with Section 63 of the Act.

Section 63 of the Act reads as follows:

***63. (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) .....***

***(b) inadequate budgetary provision:***

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

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

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

As shown above, termination of procurement and asset disposal proceedings is governed by section 63 of the Act. Further, if such termination meets the requirements of Section 63 of the Act, the jurisdiction of this Board is ousted pursuant to section 167 (4) (b) of the Act which provides as follows: -

***"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"***

Emphasis by the Board

In **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR** (hereinafter referred to as "the Selex Sistemi Integrati Case"), the court while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Repealed Act") that dealt with termination of procurement proceedings held as follows: -

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

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

*In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of *Smith v. East Elloe Rural District Council [1965] AC 736* Lord Viscount Simonds stated as follows: -*

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

***It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures.***

***To illustrate the point, the failure by the 2<sup>nd</sup> Respondent [i.e. the Procuring Entity] to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether the termination met the threshold under the Act, before finding that it lacks jurisdiction to entertain the case before it on the basis of a mere letter of termination furnished before it."***

The court in the Selex Sistemi Integrati Case held that this Board (as was constituted then) had the duty to question whether a decision by a Procuring Entity terminating a tender met the threshold of section 100 (4) of the Repealed Act, and that the Board's jurisdiction was not ousted by mere existence of a letter of termination furnished before it.

Further, 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") it was 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 precondition that first needs to be satisfied in the said subsection namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were*

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

*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”***

The **Court in JR No. 142 of 2018** affirmed the decision of the Court in the *Selex Sistemi Integrati Case* that this Board has the obligation to first determine whether the statutory pre-conditions of section 63 of the Act have been satisfied to warrant termination of a procurement process, in order to make a determination whether the Board’s jurisdiction is ousted by section 167 (4) (b) of the Act.

In a more recent decision of the High Court in **Judicial Review No. 117 of 2020, Parliamentary Service Commission vs. Public Procurement Administrative Review Board and Another**; Hon. Lady Justice Nyamweya at Paragraph 51 held as follows:

***“...this being the case, the Respondent and this Court upon an application for review have jurisdiction to determine whether or not the statutory pre-condition was satisfied...”***

***Therefore, from the onset, the Respondent [Review Board] has jurisdiction to determine if the conditions of Section 63 have been met when a tender is terminated on any of the grounds listed thereunder, and a termination under this section does not***

***automatically oust the Respondent's jurisdiction. It is only upon a finding that the termination was conducted in accordance with Section 63 of the Act that the Respondent is then divested of jurisdiction and obliged to down its tools."***

It is therefore important for this Board to determine whether the Procuring Entity terminated the subject tender in accordance with provisions of section 63 of the Act, which determination can only be made by interrogating the reason(s) cited by the Procuring Entity and whether or not the Procuring Entity satisfied the statutory pre-conditions for termination outlined in section 63 of the Act. The determination of whether the subject tender was terminated in accordance with the Act, will in essence answer issue no. 2 for determination which is, **'whether the termination of procurement proceedings is valid'**

Section 63 (1) (b), 2, 3 and 4 of the Act states 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) .....***

***(b) inadequate budgetary provision;***

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

**(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.**

The Procuring Entity relied on Section 63 (1) (b) of the Act to support its position that it terminated the subject procurement process due to inadequate budgetary provision. On its part, the Applicant alleged at paragraph 17 (c) of its Request for Review that, if the budgetary provision for the subject tender is inadequate as alleged by the Respondents, then such inadequacy can only be attributed to the 1<sup>st</sup> Respondent's failure to comply with mandatory provision of Section 53(8) that requires the accounting officer to ensure that there are sufficient funds before commencement of procurement proceedings thereby is in breach of section 53 (8) of the Act.

Having considered the foregoing averments, the Board deems it necessary to first address its mind on the responsibilities of an accounting officer of a

Procuring Entity under section 44 (1) and (2) (a) of the Act which provides as follows: -

- "(1) An accounting officer of a public entity shall be primarily responsible for ensuring that the public entity complies with the Act.***
- (2) In the performance of the responsibility under subsection (1), an accounting officer shall—***
- (a) ensure that procurements of goods, works and services of the public entity are within approved budget of that entity"***

An Accounting Officer has the primary responsibility of ensuring a Procuring Entity complies with the provisions of the Act. In doing so, one of the obligations vested upon such accounting officer is to ensure that procurements of goods, works and services of a public entity are within approved budget of that entity. Section 53 of the Act further provides that:

- "(1) All procurement by State organs and public entities are subject to the rules and principles of this Act.***
- (2) An accounting officer shall prepare an annual procurement plan which is realistic in a format set out in the Regulations within the approved budget prior to***

*commencement of each financial year as part of the annual budget preparation process.*

*(3) .....*

*(4) .....*

*(5) A procurement and asset disposal planning shall be based on indicative or approved budgets which shall be integrated with applicable budget processes and in the case of a State Department or County Department, such plans shall be approved by the Cabinet Secretary or the County Executive Committee member responsible for that entity.*

*(6) .....*

*(7) .....*

*(8) Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.*

*(9) An accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offence under this Act"*

Having considered the foregoing provisions, the Board notes that prior to commencement of each financial year, an accounting officer ought to prepare an annual procurement plan which is realistic and within the approved budget. Furthermore, an accounting officer can only commence any procurement proceeding if satisfied that sufficient funds are available to meet the obligations of the resulting contract and are reflected in its approved budget estimates. This means that, the 1<sup>st</sup> Respondent is required by the Act to commence a procurement process only if he is satisfied that sufficient funds are available for the procurement process as reflected in the Procuring Entity's approved budget.

The Board would like to note that when preparing an annual procurement plan, the Accounting Officer will base the procurement plan on estimates. However, in certain circumstances, the approved budget may turn out to be lower than the amount the accounting officer had estimated in his procurement plan and thus the Procuring Entity will only use the approved budget to commence a procurement process.

This therefore leads the Board to address the question; what was the approved budget of the Procuring Entity for the subject procurement process. The Board studied the Procuring Entity's confidential file and notes that the Head of Supply Chain Management Services in its Professional Opinion dated 16<sup>th</sup> September 2022, it is stated as follows: -

***"a memo done to the head of finance to confirm availability of funds for this project prior to awarding. The head of***

***finance unit has in its memo dated 16<sup>th</sup> September, 2022 responded indicating that they had initially planned for Kshs. 20,000,000 (Kenya Shillings Twenty Million) but unfortunately the National Treasury reduced the amount to Kshs. 3,000,000 (Kenya Shillings Three Million) and therefore there is inadequate funds to defray the resultant expenditure from this project if awarded."***

The Procuring Entity furnished the Board with the memo that is referred to in the professional opinion above and the same reads as follows:

***"...reference is made to your memo Ref No. MOALF&C/SDFA&BE/04/2022-23 dated 15<sup>th</sup> September 2022 on the above subject.***

***This is to inform you that the State Department of Fisheries Aquaculture and the Blue Economy had budgeted Kshs. 20 million under Vote 11666-1-1004-0103111119- Purchase of Lifts. However, the National Treasury has since reduced the budget figures and therefore only Kshs.3 million is available for the Purchase of Lifts***

***Forwarded for your information and further necessary action.***

***Signed***

***Martin Kanyuaigwa Mwamwea.***

Having considered the foregoing documentation, the Board observes that whereas there is reference to reduction in budgetary allocation by the National Treasury in internal memo and correspondence between the Head of Supply Chain Management Services, the Senior Chief Finance Officer, the Principal Secretary herein the 1<sup>st</sup> Respondent, and the notifications for termination to the bidders, the Procuring Entity/Respondent has not any evidence to support the reason. There is no single schedule submitted before the Board emanating from the National Treasury that clearly indicates the requested amounts under the subject tender Vote vis-à-vis a reduced allocation as alleged.

The Board observes that even though an accounting officer may exercise discretion under Section 63 (1) of the Act, such discretion must be exercised in accordance with the procedural requirements for termination of procurement proceedings. In **Republic v. Public Procurement Administrative Review Board & another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR**, the court held that: -

***"In a nutshell therefore, the Procuring Entity is under duty to place sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Procuring Entity must in addition to providing sufficient evidence also demonstrate that it has complied***

**with the substantive and procedural requirements set out under the provisions of section 63 of the Public Procurement and Asset Disposal Act, 2015”**

Having considered the finding in the foregoing case, the Board notes that, in addition to citing any of the reasons listed in section 63 (1) of the Act, a Procuring Entity must also comply with the procedural requirements for termination of a tender specified in section 63 (2), (3) and (4) of the Act. Section 63 (2) and (3) of the Act gives the Procuring Entity an obligation to submit a written report on the termination to the Public Procurement Regulatory Authority (hereinafter referred to as “the Authority”) within fourteen days. The Board has neither been supplied with such a written report nor is there any reference to any such report having been filed in the Respondents’ Replying Affidavit. Needless to add that if the impugned termination were to stand then the 14 days required by dint of Section 63(2) and (3) of the Act began to run from 16<sup>th</sup> September 2022 and lapsed on 30<sup>th</sup> September 2022. We have seen as part of the annexures filed by the Procuring Entity and captured under paragraph 20 of its Replying Affidavit a document that is allegedly filed on the Public Procurement Information Portal (PPIP) website allegedly reporting the termination of the subject tender. We note that there is no evidence of service of a report, whatever the format it may assume, on the Public Procurement and Regulatory Authority as required by Section 63(2) of the Act.

In the absence of any information to the contrary by the Procuring Entity, the Board finds that the Procuring Entity did not submit the required written report of Termination of the subject procurement process to the Director-General of the Authority. In the circumstances, the termination of the procurement proceedings of the subject tender was not done in accordance with Section 63(1)(b) of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act.

Accordingly, we find the Board has jurisdiction to hear determine the instant Request for Review. 1<sup>st</sup> Respondent did not terminate the subject tender's procurement proceedings in accordance with Section 63(1)(b) of the Act on account of inadequate budgetary provision thus the Board's jurisdiction is not divested by dint of Section 167(4)(b) of the Act. With this finding and the reasoning detailed in this decision for arriving at this conclusion the Board finds it inevitable to conclude that the termination of the subject tender is invalid. In our considered opinion, it is impossible to establish the real reason let alone the motive behind the termination of the subject tender. We note that giving of reasons is one of the fundamental principles of natural justice and the reasons will aid any aggrieved party in seeking a remedy. Failure to adduce demonstrable reasons runs afoul to the principles of transparency and openness in public procurement.

We note that the Applicant alleged a breach of Section 80 of the Act. The said section provides for the evaluation of tenders. We have perused the

Evaluation Report submitted to the Board and have found nothing to show that the same is contrary with the Tender Document and the relevant law. We are satisfied based on the documents before us, inter alia, the Evaluation Report that the same was carried out within the law. Even judging from the instant Request for Review we note that the Applicant is aggrieved by the decision not to award the subject tender and instead terminating the same. This termination, in our considered view, does not emanate from any finding in the Evaluation Report but rather other sources and reasons as detailed elsewhere in this decision. We say no more about this subject.

### **What orders should the Board grant in the circumstances?**

Having held that the termination of the subject tender was not substantially and procedurally sound and that the same failed the provisions of Section 63 of the Act, we find merit to allow and we hereby allow the prayer to annul and set aside the decision of the Respondents contained in the notification letters dated 16<sup>th</sup> September 2022.

The upshot of our finding is that the Request for Review dated 30<sup>th</sup> September 2022 succeeds with respect to only the specific orders outlined hereinafter.

## **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 30<sup>th</sup> September 2022: -

- 1. The letters of Notification of Termination of Tender No. MOALF&C/SDFA&BE/04/2022-2023 for the Supply and Installation of two (2No.) Lifts at the Proposed National Aquaculture Technology Development and Innovations Transfer Centre in Sagana, Kirinyaga County issued by the 1<sup>st</sup> Respondent and dated 16<sup>th</sup> September 2022 to the Applicant and to any unsuccessful tenderer be and are hereby nullified and set aside.**
  
- 2. The 1<sup>st</sup> Respondent herein is hereby ordered to ensure that the procurement process with respect to Tender No. MOALF&C/SDFA&BE/04/2022-2023 for the Supply and Installation of two (2No.) Lifts at the Proposed National Aquaculture Technology Development and Innovations Transfer Centre in Sagana, Kirinyaga County, proceeds to its logical conclusion within 14 days from the date hereof, whilst taking into account the findings made in this decision.**
  
- 3. Given the findings herein, each party shall bear its own costs in the Request for Review.**

**Dated at NAIROBI, this 21<sup>st</sup> Day of October, 2022.**



.....  
**CHAIRPERSON**

**PPARB**



.....  
**SECRETARY**

**PPARB**