

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 06/2023 OF 30<sup>th</sup> JANUARY 2023**

**BETWEEN**

**STANFFORD CONSTRUCTION CO. LTD ..... APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**LAKE VICTORIA SOUTH**

**WATER WORKS DEVELOPMENT AGENCY ..... 1<sup>ST</sup> RESPONDENT**

**LAKE VICTORIA SOUTH**

**WATER WORKS DEVELOPMENT AGENCY ..... 2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer, Lake Victoria South Water Works Development Agency in relation to Tender No. LVSWWDA/CWS/T/13/2022-2023-R for Construction of Mong'ane - Gotichaki Water Supply Project in South Mugirango Constituency, Kisii County.

**BOARD MEMBERS PRESENT**

- |                     |   |             |
|---------------------|---|-------------|
| 1. Ms. Faith Waigwa | - | Chairperson |
| 2. Dr. Paul Jilani  | - | Member      |
| 3. CPA Isabel Juma  | - | Member      |

**IN ATTENDANCE**

- 1. Ms. Sarah Ayoo - Holding Brief for Acting Board Secretary
- 2. Ms. Maureen Kiyundo - Secretariat

**PRESENT BY INVITATION**

**APPLICANT**

- **STANFFORD CONSTRUCTION CO. LTD**

Ms. Halima

- Advocate, Halima & Associates

**RESPONDENTS**

- **THE ACCOUNTING OFFICER,  
LAKE VICTORIA SOUTH  
WATER WORKS  
DEVELOPMENT AGENCY &  
LAKE VICTORIA SOUTH  
WATER WORKS  
DEVELOPMENT AGENCY**

Mr. Pamphil Oundo

- Advocate & Corporation Secretary  
& Manager Legal Services

**BACKGROUND OF THE DECISION**

**The Tendering Process**

Lake Victoria South Water Works Development Agency, the Procuring Entity and the 2<sup>nd</sup> Respondent herein, invited sealed tenders from qualified and interested tenderers in response to Tender No. LVSWWDA/ T/2/2022-2023 for Construction of Mong'ane - Gotichaki Water Supply Project in South Mugirango Constituency, Kisii County (hereinafter referred to as the "1<sup>st</sup> tender") using an open national method of tendering and by way of an advertisement on 5<sup>th</sup> August 2022 on the 2<sup>nd</sup> Respondent's website [www.lvswwda.go.ke](http://www.lvswwda.go.ke), on the Public Procurement Information Portal (PPIP) (<https://tenders.go.ke>) and on the 2<sup>nd</sup> Respondent's Notice Boards. The 1<sup>st</sup> tender's submission deadline was set for 26<sup>th</sup> August 2022 at 10.00 a.m.

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

According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 26<sup>th</sup> August 2022, a total of four (4) tenderers submitted their tenders. The said four (4) tenders were recorded in the Tender Opening Minutes as follows:

<b>No.</b>	<b>Name of Firm</b>
1.	Stanfford Construction Company Limited
2.	Aberdare Mobile Limited
3.	Dankenson Research & Construction Limited
4.	Insignia Scandic Limited

## **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 as captured in an Evaluation Report signed by members of the Evaluation Committee on 15<sup>th</sup> September 2022 (hereinafter referred to as the "Evaluation Report").

The Evaluation Committee examined tenders at the Preliminary Examination of tenders using the criteria set out under Clause 8B: Qualification Criteria as Mandatory Requirements of Section III-Evaluation and Qualification Criteria at page 33 of the Tender Document. Tenders were required to satisfy all the 10 mandatory requirements at this stage to qualify to proceed for detailed examination-technical responsiveness. Failure to satisfy any one of the 10 mandatory requirements would lead to automatic disqualification from further evaluation.

At the end of evaluation at this stage, two (2) tenders were found to be non-responsive, while two (2) tenders which included the Applicant's tender were found responsive. Only the responsive tenders proceeded for evaluation at the Detailed Examination of Accepted Bids Technical Responsiveness stage.

At the Detailed Examination of Accepted Bids Technical Responsiveness stage, tenders were further examined on their technical aspects and the Evaluation Committee was required to examine tenders using the criteria set out under Clause 8B: Qualification Criteria as Technical Evaluation of Section

III-Evaluation and Qualification Criteria at page 33 to 35 of the Tender Document. Tenders were required to attain a minimum technical score of 80% to proceed for further evaluation at the Financial Evaluation Stage.

At the end of evaluation at this stage, one (1) of the two (2) tenders which had made it to this stage was found non-responsive while the tender submitted by the Applicant, having scored 81 marks was found responsive to the detailed evaluation criteria.

### **Evaluation Committee's Conclusion and Recommendation**

The Evaluation Committee concluded that the tender offered by the Applicant was the lowest evaluated technically responsive tender and recommended award of the subject tender to the Applicant at the tender price of Kenya Shillings Thirty-Seven Million, Ninety Thousand and Three Shillings only (Kshs.37, 090,003.00) subject to due diligence being carried out on its past work experience.

### **Professional Opinion**

The Senior Supply Chain Management Officer, Ms. Wilfred Obae, on 19<sup>th</sup> September 2023 signed a Professional Opinion (hereinafter referred to as "the Professional Opinion") reviewing the manner in which the procurement process was undertaken including evaluation of tender and due diligence conducted on the Applicant, concurred with the recommendations of the Evaluation Committee with respect to award of the 1<sup>st</sup> tender.

The award of the 1<sup>st</sup> tender to the Applicant was approved and signed off on 23<sup>rd</sup> September 2022 by the Acting CEO, Mr. Chrispine O. Juma.

### **Notification to Tenderers**

Tenderers were notified of the outcome of evaluation of the 1<sup>st</sup> tender vide letters of Notification of Intention to Award dated 25<sup>th</sup> October 2022 signed by the 1<sup>st</sup> Respondent, Mr. Chrispine O. Juma, HSC, Ag. Chief Executive Officer.

### **Second Professional Opinion**

In a Professional Opinion, as an internal memo, dated 15<sup>th</sup> December 2022,(hereinafter referred to as "the Second Professional Opinion") the Manager Supply Chain Management, Mr. Martin Mayi, reviewed the manner in which the subject procurement process was undertaken including opening and evaluation of tenders and noted that the Evaluation Committee recommended award of the subject tender to the Applicant, being the lowest evaluated tenderer, at a quoted tender sum of Kenya Shillings Thirty-Seven Million, Ninety Thousand and Three Shillings only (Kshs.37, 090,003.00)inclusive of VAT. He further noted that (a) the 2<sup>nd</sup> Respondent had noted that the recommended tender was within the Engineers estimate but was above budget and sought commitment from the Ministry of Water, Sanitation and Irrigation before award; (b) the 2<sup>nd</sup> Respondent undertook due diligence to ascertain authenticity of documents evidencing experience of the Applicant and it was established that some of the work experiences

provided by the Applicant in support of its tender were invalid; and (c) in accordance with section 63(1)(i) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"), the procurement proceedings of the subject tender may be terminated and new procurement proceedings initiated.

Mr. Mayi opined that the subject procurement process in the subject tender does not meet the threshold of Article 227 (1) of the Constitution and the statutory requirements of the Act and recommended termination of the procurement proceedings and initiation of new procurement proceedings.

Thereafter, the Second Professional Opinion was approved via a signature denoting it had been signed by the Chief Executive Officer on 15<sup>th</sup> December 2022.

### **Notification of Termination of Procurement Proceedings**

Vide a letter dated 15<sup>th</sup> December 2022 and signed by the 1<sup>st</sup> Respondent, Mr. Chrispine O. Juma, HSC, Ag. Chief Executive Officer, the Applicant was notified of termination of procurement proceedings in the subject tender.

## **REQUEST FOR REVIEW**

On 30<sup>th</sup> January 2023, the Applicant filed a Request for Review dated 27<sup>th</sup> January 2023 together with a Supporting Affidavit sworn by Stephen Ngotho Sila, its Director, on 27<sup>th</sup> January 2023 through the firm of Halima & Associates Advocates seeking the following orders from the Board in verbatim:

- a) An order directing the Respondents to execute with the Applicant Tender No. LVSWWDA/T/2/2022-2023.***
- b) An order extending the tender validity period to enable the Respondents to finalize with the tendering process by executing the contract with the Applicant;***
- c) An order recalling and or nullifying the advertisement inviting tenders on Tender Number LVSWWDA/CWS/T/13/2022-2023-R***
- d) An extension to the Bid Bond (Validity) to a further 180 days;***
- e) An order awarding costs of the Request for Review to the Applicant;***

In a Notification of Appeal and a letter dated 30<sup>th</sup> January 2023, Mr. James Kilaka, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board"), notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 1<sup>st</sup> and 2<sup>nd</sup> 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> January 2023.

In opposition to the Request for Review, Mr. Pamphil Oundo, on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, filed on 3<sup>rd</sup> February 2023 a Notice of Appointment of Advocate dated 3<sup>rd</sup> February 2023 and a Respondents' Memorandum of Response sworn by Mr. Chrispine O. Juma, the 1<sup>st</sup> Respondent herein, on 3<sup>rd</sup> February 2023 together with confidential documents concerning the subject tender pursuant to section 67(3)(e).

On 24<sup>th</sup> March 2020, the Board had issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all requests for review applications be

canvassed by way of written submissions. The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with Section 171 of the Act. 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.

However, vide a Hearing Notice dated 6<sup>th</sup> February 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of online hearing of the instant Request for Review slated for 9<sup>th</sup> February 2023 at 12:00 noon, through the link availed in the said Hearing Notice.

On 8<sup>th</sup> February 2023, the Applicant filed a Further Affidavit sworn by Stephen Ngotho Sila, it Director, on 6<sup>th</sup> February 2023.

None of the parties filed written submissions.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

During the online hearing, Counsel for the Applicant, Ms. Halima submitted that following advertisement of the 1<sup>st</sup> tender by the 2<sup>nd</sup> Respondent on 5<sup>th</sup>

August 2022, the Applicant participated in the tendering process by submitting its tender and was issued with a Notification of Intention to Award on 25<sup>th</sup> October 2022, which it accepted in writing on even date. Ms. Halima further submitted that there was a standstill period of fourteen (14) days and when the said fourteen (14) days lapsed, the Respondents failed to issue any information to the Applicant with regard to signing of the contract in the 1<sup>st</sup> tender since the contract was required to be signed upon lapse of the standstill period.

Ms. Halima submitted that on 19<sup>th</sup> January 2023 the Respondents, in disregard of the letter of Notification of Intention to Award the 1<sup>st</sup> tender sent to the Applicant, advertised the 1<sup>st</sup> tender as Tender No. LVSWWDA/CWS/T/13/2022-2023-R for Construction of Mong'ane - Gotichaki Water Supply Project in South Mugirango Constituency, Kisii County (hereinafter referred to as "the 2<sup>nd</sup> tender"). Ms. Halima further submitted that this 2<sup>nd</sup> tender was the same as the 1<sup>st</sup> tender and that the Respondents advertised it without cancelling or issuing any notice to the Applicant on termination of the 1<sup>st</sup> tender pursuant to section 63 of the Act.

Ms. Halima submitted that the Applicant sent a letter to the Respondents on 24<sup>th</sup> January 2023 requesting for reasons why they failed to communicate upon termination of the subject tender but the same did not elicit a response from the Respondents.

Ms. Halima submitted that the Respondents are in breach of Article 10, 201, 227, and 234 of the Constitution and section 63 of the Act and requested the Board to issue the orders prayed in the instant Request for Review.

### **Respondents' submissions**

In response, Counsel for the Respondents, Mr. Oundo, fully relied on the Respondent's Memorandum of Response sworn by Chrispine Juma on 3<sup>rd</sup> February 2023. Mr. Oundo submitted that the letter of Intention to Award issued to the Applicant is not similar to a Notification of Award and that the Respondents had all the right to terminate the procurement proceedings as it did upon conducting due diligence which revealed that the Applicant had acted unfairly and it was on unjust basis that the Applicant won the tender in question.

Mr. Oundo submitted that the Applicant submitted false information in regard to experience in execution of work and this led the 2<sup>nd</sup> Respondent to inform it together with the Authority of its intention to terminate the tendering process on the ground that the Applicant had submitted false information in its tender. Mr. Oundo further submitted that this decision was communicated to the Applicant on 21<sup>st</sup> December 2023 through a letter sent via Posta EMS whose specific code is highlighted in Exhibit marked as "CJ 1a and b".

Mr. Oundo submitted, as a preliminary objection, that the Applicant having been notified on 21<sup>st</sup> December 2022 filed the instant Request for Review outside the statutory period of fourteen (14) days provided for under section

167 of the Act ousting the jurisdiction of the Board to hear the matter. In support of his preliminary objection, Mr. Oundo submitted that the delivery of the Respondents' letter was at the point the same was submitted to an authorized posting agency, in this case being Posta, and that it is assumed that the letter was served upon the recipient the moment it was handed over to the registered posting agency.

Mr. Oundo submitted that in the event the Board found that it had jurisdiction, it would be important for the Board to note that the only reason why the procurement proceedings were terminated was purely under section 63 of the Act as can be seen from the Respondent's annexure proving that the Applicant misrepresented themselves with respect to their experience and necessitated termination of the procurement proceedings and even assuming an award had been made, nothing would have prevented the Respondents from terminating the procurement proceedings at that particular stage.

Mr. Oundo submitted that where an illegality or alleged illegality had been notified, the Board cannot order award of contract in the subject tender unless an investigation into an illegality had been completed.

Upon enquiry by the Board on how the letter of notification was communicated to the Applicant and whether proof of EMS delivery had been

shared with the Board, Mr. Oundo in response submitted that what was communicated to the Applicant was a letter of Intention to Award and not a Notification of Award and this was sent via email. He further submitted that the Respondents had attached an invoice from EMS which proved when the letter was delivered and also bore a code for each and every letter delivered to the other parties and to the Applicant on 21<sup>st</sup> December 2022.

Upon further enquiry by the Board on why there was a delay in responding to the Respondents' letter of due diligence dated 6<sup>th</sup> July 2022 which was responded to on 10<sup>th</sup> November 2022, Mr. Oundo in response submitted that he did not know the reason for the delay but the intention of the Respondents was very clear having issued the Applicant with a letter of Intention to award the subject tender and it was upon receipt of the due diligence response and further internal consultations that a decision was made to terminate the procurement process.

### **Applicant's Rejoinder**

In a rejoinder, Ms. Halima submitted that the Respondents usual mode of communication to the Applicant was through email which was used to communicate the letter of Intention to Award the subject tender dated 25<sup>th</sup> October 2022 and it was uncanny that the Respondent decided to communicate their decision to terminate the subject tender through Posta instead of email. Ms. Halima further submitted that it was only after filing

the instant Request for Review that the Respondents sent a copy of the letter of termination through email.

Ms. Halima submitted that the Request for Review was not time barred and that section 167 of the Act dictates that an application for review ought to be made within the standstill period of fourteen (14) days upon noticing a breach and the Applicant only came to learn of the Respondents breach of duty when they saw the re-advertisement of the subject tender on 19<sup>th</sup> January 2023 and promptly proceeded to file the instant Request for Review application.

Ms. Halima concluded by stating that the Act dictates that due diligence ought to be done before any communication is done to any tenderer as well as before preparation of a Professional Opinion and the reason why the Applicant was issued with a letter of Notification of Intention to Award was because the Respondents had evaluated tenders followed with a due diligence exercise which gave positive feedback hence preparation of the professional opinion concurring with the recommendation to award the subject tender to the Applicant.

Ms. Halima submitted that the memo dated 15<sup>th</sup> December 2022 indicating the reason the Respondents decided to carry out another due diligence

exercise was because the Applicant's tender price was above budget is false since they ought to have conducted Financial Evaluation before they issued a letter of Notification of Intention to Award the subject tender to the Applicant.

Upon enquiry from the Board on when the Applicant realized the 2<sup>nd</sup> Respondent had re-advertised the tender, Ms. Halima responded by submitting that the Applicant got notice of it on 19<sup>th</sup> January 2023 and sought clarification from the Respondents on 24<sup>th</sup> January 2023 vide letter received by the Respondents on 25<sup>th</sup> January 2023 yet the Respondents did not respond.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 30<sup>th</sup> January 2023 was due to expire on 20<sup>th</sup> February 2023 and that the Board would communicate its decision on or before 20<sup>th</sup> February 2023 via email.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, documents, pleadings, together with confidential documents submitted to the Board by the 2<sup>nd</sup> Respondent pursuant to Section 67(3)(e) of the Act and finds that the following issues call for determination.

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

In determining this issue, the Board will make a determination on whether the instant Request for Review was filed outside the statutory period of 14 days contrary to Section 167(1) of the Act read with Regulation 203(2)(c)(iii) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") thus ousting the jurisdiction of the Board.

Depending on the determination of the first issue;

**2. Whether the 1<sup>st</sup> tender's procurement proceedings were lawfully terminated in accordance with Section 63 of the Act read with Article 227(1) of the Constitution.**

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

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

The Respondents in opposition of the instant Request for Review contend that the Applicant is time barred in challenging the decision to terminate the 1<sup>st</sup> tender and to advertise the 2<sup>nd</sup> tender for filing the Request for Review outside the statutory period of fourteen (14) days contrary to section 167(1) of the Act. Mr. Oundo on behalf of the Respondents submitted that the letter of Termination of Procurement Proceedings of the 1<sup>st</sup> tender dated 15<sup>th</sup>

December 2022 was delivered to the Applicant via Postal EMS code No. ef024435925ke on 21<sup>st</sup> December 2022 hence the Applicant ought to have filed the Request for Review within fourteen (14) days from 21<sup>st</sup> December 2022.

In its rejoinder, the Applicant submitted that it never received the letter of termination of procurement proceedings from the Post Office as alleged by the Respondents notifying it of termination of the 1<sup>st</sup> tender. The Applicant submitted that it only came to learn of the Respondents breach of duty when it saw the advertisement of the 2<sup>nd</sup> tender on 19<sup>th</sup> January 2023 and that it wrote to the Respondents on 24<sup>th</sup> January 2023 requesting them to recall the advertisement of the 2<sup>nd</sup> tender and having not received a response, promptly proceeded to file the instant Request for Review application.

- a) Whether the instant Request for Review was filed outside the statutory period of 14 days contrary to Section 167(1) of the Act read with Regulation 203(2)(c)(iii) of Regulations 2020 thus ousting the jurisdiction of the Board.

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction and when a question arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a 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."***

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]**

The *locus classicus* case on the question of 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 draws tools in respect of the matter before it the moment it holds that it is without jurisdiction."***

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."***

It is therefore necessary for the Board to determine whether the Applicant complied with the statutory timelines required to seek administrative review

by the Board so as to invoke the Board's jurisdiction to hear and determine the instant Request for Review.

The Supreme Court in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others [2012] eKLR** pronounced itself regarding the source of jurisdiction of a court or any other decision making body as follows:

***"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."***

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 the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

## ***PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS***

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

***(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged***

*breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.*

*(2) .....*

*(3) .....*

*(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—*

*(a) the choice of a procurement method;*

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

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

*168. ....*

*169. ....*

*170. ....*

*171. ....*

*172. ....*

*172. Dismissal of frivolous appeals*

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

### ***173. Powers of Review Board***

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

***(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;***

***(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***

***(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***

***(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***

***(e) order termination of the procurement process and commencement of a new procurement process.***

Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Section 172 and 173 of the Act which donates powers to the Board with

respect to an administrative review of procurement proceedings before the Board.

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

The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act will be by way of a request for review. This request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request

for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification under Section 87 of the Act; or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

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

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

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

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

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

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

It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued, the same is only complained of after notification to enter into a contract has been issued. We say so because there would be no need to provide the three instances within which a Request for Review may be filed.

We understand the Respondents contention to be that the decision to terminate procurement proceedings in the subject tender ought to have been challenged by the Applicant before the Board within fourteen (14) days from 21<sup>st</sup> December 2022 when it alleges to have delivered its letter of Termination of Procurement Proceedings dated 15<sup>th</sup> December 2022 to the Applicant via Postal EMS code No. ef024435925ke as evidenced by the Exhibit marked as "CJ 1a and b" at paragraph 5(ii) of the Respondents' Memorandum of Response sworn by the 1<sup>st</sup> Respondent on 3<sup>rd</sup> February 2023. On the other hand, the Applicant contends at paragraph 5 (d) of the Further Affidavit sworn by Stephen Ngotho Sila on 6<sup>th</sup> February 2023 that it is the Respondent's practice to communicate through email since the letter of Notification of Intention to Award dated 25<sup>th</sup> October 2022 was transmitted through email and the letter of termination of procurement proceedings was also sent through email after the Applicant filed the instant Request for Review.

The Board observes that under section 87(1) of the Act, the Respondents bear the duty to notify all tenderers of the outcome of the procurement process. We note that the Respondents notified the Applicant via email dated 1<sup>st</sup> November 2022 that it was the successful tenderer in the 1<sup>st</sup> tender vide a letter of Notification of Intention to Award dated 25<sup>th</sup> October 2022. The Applicant acknowledged receipt of the said letter of Notification of Intention to Award via email on 1<sup>st</sup> November 2022. The Applicant contends that the

breach complained of arose on 19<sup>th</sup> January 2023 when it came to learn of the invitation to tender advertised on the 2<sup>nd</sup> Respondent's website [www.lvswwda.go.ke](http://www.lvswwda.go.ke) as well as the Government Tender Portal [www.tenders.go.ke](http://www.tenders.go.ke) inviting tenderers to submit sealed tenders in respect to the 2<sup>nd</sup> tender, which was similar to the 1<sup>st</sup> tender. The Board notes that this advertisement took place after the written Notification of Intention to Award the 1<sup>st</sup> tender had been issued to the Applicant and the Applicant had acknowledged the same. Hence what comes into play is an occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

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

***57. Computation of time***

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

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall***

*include the next following day, not being an excluded day;*

*(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;*

*(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.*

In computing time when the Applicant ought to have sought administrative review before the Board with respect to challenging the advertisement of the 2<sup>nd</sup> tender by the Respondents, the 19<sup>th</sup> January 2023 is excluded pursuant to Section 57 (a) of IGPA being the day which the Applicant learnt of the occurrence of the alleged breach by the Respondents. This means 14 day started running from 20<sup>th</sup> January 2023 and lapsed on 2<sup>nd</sup> February 2023. In essence, the Applicant had between the 20<sup>th</sup> January 2023 and 2<sup>nd</sup> February 2023 to seek administrative review before the Board with respect to challenging the advertisement of the 2<sup>nd</sup> tender by the Respondents. The instant Request for Review was filed on 30<sup>th</sup> January 2023 which was the 12<sup>th</sup> day from the date of the advertisement of the 2<sup>nd</sup> tender and was

therefore filed within the statutory period of 14 days prescribed under section 167(1) of the Act read with Regulation 203(2)(c)(iii) of Regulations 2020.

However, we note in an attempt to substantiate its claim that the instant Request for Review is time barred, the Respondents annexed to the Respondents' Memorandum of Response an Exhibit marked as "CJ 1(b)" consisting of an invoice from Postal Corporation of Kenya received by the 2<sup>nd</sup> Respondent on 20<sup>th</sup> January 2023 together with Postal Corporation of Kenya Acceptance Note details of Mail Transaction Details for the period of 01/12/2022 to 31/12/2022 where the 2<sup>nd</sup> Respondent's account Number is captured as EMS/NYZ/018/2020 and wherein items No. 51 to 55 are indicated to have been dispatched on 21<sup>st</sup> December 2022 at 15:07 hrs and amongst these, item No. 52 indicates the name of the Applicant as the addressee and reads as follows:

<b>SI No</b>	<b>Item ID</b>	<b>Addressee</b>	<b>Booki ng Office</b>	<b>Desti nation</b>	<b>Bo oki ng Date</b>	<b>Quanti ty Weigh t</b>	<b>To tal Char ges (V IP)</b>	<b>VA T</b>
****	*****	*****	*****	*****	****	**	****	****

52	Ef024 43592 5ke	STANFORD CONSTRUCTI ON CO LTD	Kisum u	Nairo bi EMS	21 De c 22 15 :0 7	1	20 0	42 0	57 .9 3
****	*****	*****	*****	*****	****	***	***	****	***
****	*****	*****	*****	*****	****	***	****	****	***
****	*****	*****	*****	*****	****	***	****	****	****
****	*****	*****	*****	*****	****	***	****	****	****

However, from the above excerpt of the Postal Corporation of Kenya Acceptance Note details of Mail Transaction Details for the period of 01/12/2022 to 31/12/2022, we note that there is no indication or proof that the letter being dispatched to the Applicant was the letter of termination of procurement proceedings dated 15<sup>th</sup> December 2022 and if at all it was the said letter, there is no indication that it was addressed to the Applicant's postal address as neither the postal address or physical address has been captured. The Respondents have also not adduced any evidence to prove that the EMS delivery by the Post Office was received by the Applicant.

Further, having carefully studied the confidential documents submitted to the Board pursuant to section 67(3)(e) of the Act, we note that the Respondents forwarded as part of their confidential documents a photocopy of a leaf of what they refer to as "Dispatch of Termination letter" capturing, inter alia, the following:

<b>DATE</b>	<b>TO</b>	<b>REF</b>	<b>SUBJECT</b>	<b>SIGN</b>
21/12/22	.....	.....	.....	.....
21/12/22	.....	.....	.....	.....
21/12/22	Stanfford Construction Co. Ltd P.O. Box 22839-00400 Nairobi Information House 5 <sup>th</sup> Flr, Room 531 Mfangano Street, Nairobi	=	EF02 443 592 5 KE	signed
21/12/22	.....	.....	.....	.....
22/12/22	.....	.....	.....	.....
.....	.....	.....	.....	.....

From the above excerpt we note that despite entry of the Applicant's postal address and the subject referring to the Posta EMS Code, there is no reference or indication that the entry was in reference to the letter of termination of procurement proceeding.

It is trite law that 'he who alleges, must prove'. This principle is firmly embedded in the Evidence Act, Chapter 80, Laws of Kenya which stipulates in section 107 thereof as follows: -

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

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

The same was enunciated by the Honourable Justice Majanja in the case of **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** where he stated as follows: -

***"...As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue."***

This means that the burden of proving whether or not the letter of Termination of Procurement proceedings dated 15<sup>th</sup> December 2022 was

received by the Applicant lies with the Respondents and that the Respondents have failed to discharge this burden. We note that the Applicant annexed to its Supporting Affidavit sworn by Stephen Ngotho Sila on 27<sup>th</sup> January 2023 an Exhibit marked "SCT -6" being a letter dated 24<sup>th</sup> January 2023 addressed to the 1<sup>st</sup> Respondent requesting him to recall the advertisement of the 2<sup>nd</sup> tender issued on 19<sup>th</sup> January 2023. Having not received any response to its request, it proceeded to file the instant Request for Review on 30<sup>th</sup> January 2023 and it was not until the 30<sup>th</sup> January 2023 that the Respondents responded to the said letter via email on 30<sup>th</sup> January 2023 as evidenced by Exhibit marked as "SCT-7" annexed to the Applicant's Further Affidavit sworn by Stephen Ngotho Sila on 6<sup>th</sup> February 2023. As such, it is clear to the Board that the Applicant received the letter of Termination of Procurement Proceedings on 30<sup>th</sup> January 2023, being the same date of filing the instant Request for Review.

The Board is of the considered view that the Applicant was well within its right to approach it on 30<sup>th</sup> January 2023 upon learning of the alleged breach of duty by the Respondents from the 2<sup>nd</sup> tender advertisement notice of 19<sup>th</sup> January 2023. In the circumstances, the Board is inclined to find that the Request for Review was filed within the statutory period provided in section 167(1) of the Act read with Regulation 203(2)(c)(iii) of Regulations 2020 and thus has jurisdiction to hear and determine the instant Request for Review.

**Whether the 1<sup>st</sup> tender's procurement proceedings were lawfully terminated in accordance with Section 63 of the Act read with Article 227(1) of the Constitution.**

Termination of procurement proceedings is governed by Section 63 of the Act and where the procurement proceedings have been terminated in accordance with Section 63 of the Act, the Board is divested of its jurisdiction by dint of Section 167(4)(b) of the Act. The provisions of Section 167(4)(b) of the Act are conditional on such termination being in accordance with Section 63 of the Act and 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***  
***(c)....."***

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

***"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005, s 100 (4) ousts the jurisdiction of the court in judicial review 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 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 cited above, held that the Board has the duty to question whether a decision by a procuring entity terminating a tender meets the threshold of section 63 of the Act, and that this Board's jurisdiction is not ousted by the mere fact of the existence of a letter of notification terminating procurement proceedings.

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** the High 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 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 High Court in the Kenya Veterinary Vaccines Production Institute Case affirmed the decision of the Court in the *Selex Sistemi Intergrati* Case that

this Board has the obligation to first determine whether the statutory and procedural pre-conditions of section 63 of the Act have been satisfied to warrant termination of a procurement process, in order to make a determination whether the Board's jurisdiction is ousted by section 167(4)(b) of the Act.

It is therefore important for this Board to determine whether the 1<sup>st</sup> Respondent terminated the subject tender in accordance with provisions of section 63 of the Act, which determination can only be made by interrogating the reason cited by the Respondents and whether or not the 1<sup>st</sup> Respondent satisfied the statutory and procedural pre-conditions for termination outlined in section 63 of the Act.

Section 63 of the Act provides as follows:

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

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

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

***(ii) substantial technological change;***

- (b) inadequate budgetary provision;***
  - (c) no tender was received;***
  - (d) there is evidence that prices of the bids are above market prices;***
  - (e) material governance issues have been detected;***
  - (f) all evaluated tenders are non-responsive;***
  - (g) force majeure;***
  - (h) civil commotion, hostilities or an act of war; or***
  - (i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.***
- (2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.***
- (3) A report under subsection (2) shall include the reasons for the termination.***
- (4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination."***

Section 63 (1) of the Act stipulates that termination of procurement proceedings is done by an accounting officer prior to award of a tender and when any of the pre-conditions listed in sub-section (a) to (i) exist. Additionally, Section 63 (2), (3), and (4) of the Act outlines the procedure to be followed by a procuring entity when terminating a tender. It is trite law that for the termination of procurement proceedings to pass the legal muster, a Procuring Entity must demonstrate compliance with both the substantive and procedural requirements under Section 63 of the Act.

In essence, Section 63 of the Act is instructive on termination of procurement proceedings being undertaken by an Accounting Officer of a procuring entity at any time before notification of award is made and such termination must only be effected if any of the pre-conditions enumerated in Section 63(1) (a) to (i) of the Act are present. This is the substantive statutory pre-condition that must be satisfied before a termination of procurement proceedings is deemed lawful. Further, following such termination, an accounting officer is required to give the Public Procurement Regulatory Authority (hereinafter referred to as the 'Authority') a written report on the termination with reasons and notify all tenderers, in writing, of the termination with reasons within fourteen (14) days of termination. These are the procedural statutory pre-conditions that must be satisfied before a termination of procurement proceedings is deemed lawful.

In **Judicial Review Miscellaneous Application No. 496 of 2017 Republic –vs- The Public Procurement Administrative Review Board, Intertek Testing Services (E.A) Limited Exparte SGS Kenya Ltd**, Justice John M. Mativo set out the test and the nature of the information and evidence that the Board 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 Learned Judge *inter alia* held as follows at pages 13 and 14 of the said decision.

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

***.....the evidence tendered before the Review Board must provide sufficient information to bring the grounds within the provisions of the law. This recognizes that the tender process and in particular the termination must be done in a transparent and accountable and legal manner as the law demands.***

***Ultimately, the question whether the information put forward is sufficient to place the termination within the ambit of the law as claimed will be determined by the nature of the reasons given. The question is not whether the best evidence to justify termination has been provided, but whether the evidence***

***provided is sufficient for a reasonable tribunal or body to conclude, on a balance of probabilities that the grounds relied upon fall within any of the grounds under Section 63 of the Act. If it does, then the party so claiming has discharged its burden under Section 63. If it does not, then the body in question has only itself to blame”.***

In a nutshell therefore and based on the above decided cases where the decision of a procuring entity to terminate a procurement process is challenged before the Board, the Procuring Entity is under a duty to place sufficient reasons and evidence before the Board to justify and support the 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 the procedural requirements set out under the provisions of Section 63 of the Act.

It is therefore important for the Board to determine the legality, or lack thereof, of the Respondents’ decision to terminate the procurement proceedings of the subject tender which then will inform the legality or lack thereof of the Respondents’ decision to advertise the 2<sup>nd</sup> tender.

We note that the 1<sup>st</sup> Respondent cited section 63(1)(i) of the Act as the reason for termination of the 1<sup>st</sup> tender’s procurement proceedings in its

letter of Termination of Procurement Proceedings dated 15<sup>th</sup> December 2022 addressed to the Applicant which reads in part as follows:

".....

***In compliance with Section 63(1)(i) of the Public Procurement and Asset Disposal Act 2015, we regret to inform you that the procurement proceedings for the above mentioned tender in which you participated has been terminated.***

***The reason for termination is that some of the work experiences you had attached in support of your bid were confirmed to be invalid.***

....."

Additionally, the Board notes that according to (a) paragraph 5(i) of the Respondents' Memorandum of Response, the 1<sup>st</sup> Respondent depones that the termination of the procurement process was as a result of violation by the Applicant of section 63(1)(i) of the Act and (b) paragraph 5(iv) of the Respondents' Memorandum of Response, the 1<sup>st</sup> Respondent depones that due diligence carried out on the Applicant's tender during the standstill period revealed that the Applicant had misrepresented facts and falsified information with regard to its previous assignments and experience.

We have established that the provisions under Section 63 of the Act categorizes reasons for termination of procurement proceedings under

Section 63(1)(a) to (i). We note that the Respondents relied on section 63(1)(i) of the Act to justify terminating the procurement proceedings in the 1<sup>st</sup> tender on the basis that some of the work experiences attached in support of its tender were confirmed invalid. We further note that the aforementioned reasons given by the 1<sup>st</sup> Respondent justifying termination of the procurement proceedings in the subject tender are neither cogent nor specific to any of the pre-conditions enumerated in Section 63(1) (a) to (i) of the Act for the termination to be deemed lawful meaning that the Respondents failed to meet the statutory pre-conditions that must be satisfied before termination of procurement proceedings can be deemed lawful. We say so because for the Respondents to effect a lawful termination of the procurement proceedings of the 1<sup>st</sup> tender, the 1<sup>st</sup> Respondent must have (a) terminated in writing procurement proceedings in the 1<sup>st</sup> tender prior to issuance of a notification of tender award to the successful tenderer and (b) must have issued real, cogent and tangible reasons for termination. It is not enough for the 1<sup>st</sup> Respondent to have quoted the provisions of section 63(1)(i) of the Act in its letter of Termination of Procurement Proceedings but it was also required to give reasons with regard to provisions of section 63(1)(i) of the Act and categorically state which of the submitted work experiences attached in the Applicant's tender was confirmed to be invalid.

We have established that Section 63 (2), (3), and (4) of the Act dictates that the 1<sup>st</sup> Respondent must give the Authority a written report detailing reasons for termination, within fourteen (14) days and must also notify all tenderers

who submitted tenders in the 1<sup>st</sup> tender of the termination within fourteen (14) days of termination and such notification must contain the reason for termination. We note that in the Respondents' Memorandum of Response, the Respondents attempted to prove that the 1<sup>st</sup> Respondent submitted a written report to the Director General of the Authority on the termination of the procurement proceedings in the subject matter within fourteen (14) days of its decision to terminate the procurement proceedings in the 1<sup>st</sup> tender as evidenced by the letter dated 15<sup>th</sup> December 2022 marked as "Exhibit CJ 2" annexed to the Respondents' Memorandum of Response sworn on 3<sup>rd</sup> February 2023. However, there is no proof of when the said letter was dispatched or received by the Authority to demonstrate that the Respondents satisfied the procedural statutory pre-conditions under section 63 (2) and (3) of the Act before termination of procurement proceedings of the 1<sup>st</sup> tender for the said termination to be deemed lawful. Additionally, having carefully studied the confidential documents submitted by the Respondents to the Board pursuant to section 67(3)(e) of the Act, we note that there are no letters addressed or received by the other tenderers notifying them of termination of procurement proceedings in the subject tender contrary to section 63(4) of the Act and we have hereinbefore held that the Applicant was notified of the alleged termination via an email of 30<sup>th</sup> January 2023 which was more than 14 days from the date when the purported termination was done i.e. 15<sup>th</sup> December 2022.

The Board notes that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

**"227. Procurement of public goods and services**

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

**(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –**

- a) .....**
- b) .....**
- c) ..... and**
- d) ....."**

Further to the above provision, the national values and principles of governance under Article 10 of the Constitution apply to State organs and public entities contracting for goods and services. Article 10 provides as follows:

**"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—**

***(a) applies or interprets this Constitution;***

***(b) enacts, applies or interprets any law; or***

***(c) makes or implements public policy decisions.***

***(2) The national values and principles of governance include—***

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

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

***(c) good governance, integrity, transparency and accountability” [Emphasis ours].***

Efficient good governance in public procurement proceedings provides tenderers with an assurance that public procurement and asset disposal processes are operating effectively and efficiently. Such processes are also underpinned by broader principles such as the rule of law, integrity, transparency and accountability amongst others.

In the instant Request for Review, we have found that the 1<sup>st</sup> Respondent terminated the subject tender’s procurement process without considering the implication of provisions of Section 63 of the Act read with Article 10 and 227(1) of the Act. It is the Board’s considered view that tenderers ought to be issued with proper reasons for termination of procurement proceedings as outlined under section 63 of the Act.

We have noted that the Respondents' contend that no notification of intention to award the subject tender was issued to the Applicant by the 1<sup>st</sup> Respondent to warrant acceptance and signing of a contract in the subject tender within two weeks of the letter of notification of intention to award dated 25<sup>th</sup> October 2022. On the other hand, the Applicant submitted that pursuant to Section 87 of the Act, the Respondents communicated via email confirming that it had been successful in the subject tender by sending it a letter of intention to award it the subject tender and that in compliance with section 87(1), the Applicant responded via email accepting the award.

Section 87 of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and provides as follows:

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

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

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

***(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that***

***their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.***

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

Section 87 of the Act recognizes that notification of the outcome of evaluation of a tender is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation ought to be done simultaneously to the successful tenderer(s) and the unsuccessful tenderer(s). A disclosure of who is evaluated as the successful tenderer is made to the unsuccessful tenderer with reasons thereof in the same notification of the outcome of evaluation.

The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

***"82. Notification of intention to enter into a contract***

***(1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.***

***(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.***

***(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act.”***

In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes that an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price the successful tenderer was awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

We note that the Notification of Intention to Award dated 25<sup>th</sup> October 2022 addressed to the Applicant by the 1<sup>st</sup> Respondent reads in part as follows:

".....

***RE: NOTIFICATION OF INTENTION TO AWARD***

1.....

2.....

3.....

(i).....

(ii).....

(iii).....

(iv).....

(v).....

***This Notification of Intention to Award (Notification) notifies you of our decision to award the above contract. The transmission of this Notification begins the Standstill Period. During the Standstill period, you may:***

.....

***a) The successful tenderer***

***(i) Name of successful Tender: Stanfford Construction Company Limited***

***(ii) Address of successful Tender P.O. Box 22839-00400, Nairobi***

***(iii) Contract price of the successful Tender Ksh. 37,090,003.50 (Kenya Shillings: Thirty-Seven Million, Ninety Thousand, Three Shillings Cents Fifty, Only)***

***b) Other Tenderers***

.....”

From the above letter of Notification of Intention to Award, we note that despite the argument by the Respondents that the above letter of Notification of Intention to Award was not a Notification of Award, it is evident that the said letter of Notification of Intention to Award dated 25<sup>th</sup> October 2022 (a) was issued by the 1<sup>st</sup> Respondent in writing in line with provisions of Section 87(1) of the Act and the 1<sup>st</sup> Respondent informed the Applicant that its tender was successful; and (b) was simultaneously issued by the 1<sup>st</sup> Respondent on 25<sup>th</sup> October 2022 to other tenderers notifying them that their tenders were not successful while indicating the reasons why their tenders were not successful, notifying the unsuccessful tenderers of the successful tenderer, and its tender price. As such, other than failing to disclose the reason why the Applicant’s tender was successful, the letter of Notification of Intention to Award dated 25<sup>th</sup> October 2022 addressed to the Applicant partly met the requirements stipulated in section 87 of the Act read with regulation 82(3) of Regulations 2020.

It is our considered view that the a notification of award was issued prior to the decision by the 1<sup>st</sup> Respondent to terminate the subject tender vide letter dated 15<sup>th</sup> December 2022 since the letter of Notification of Intention to Award dated 25<sup>th</sup> October 2022 was in all aspects a decision by the 2<sup>nd</sup> Respondent to award the Applicant the 1<sup>st</sup> tender despite the heading of that letter reading ***"Notification of Intention to Award"*** and the said

notification satisfied the requirements that ought to be met prior to notification to tenderers pursuant to Section 87 of the Act.

The Board observes that in a Professional Opinion, as an internal memo, dated 15<sup>th</sup> December 2022,(hereinafter referred to as "the Second Professional Opinion") the Manager Supply Chain Management, Mr. Martin Mayi, reviewed the manner in which the subject procurement process was undertaken including opening and evaluation of tenders and noted that the Evaluation Committee recommended award of the subject tender to the Applicant, being the lowest evaluated tenderer, at a quoted tender sum of Kenya Shillings Thirty-Seven Million, Ninety Thousand and Three Shillings only (Kshs.37, 090,003.00)inclusive of VAT. He further noted that (a) the 2<sup>nd</sup> Respondent had noted that the recommended tender was within the Engineers estimate but was above budget and sought commitment from the Ministry of Water, Sanitation and Irrigation before award; (b) the 2<sup>nd</sup> Respondent undertook due diligence to ascertain authenticity of documents evidencing experience of the Applicant and it was established that some of the work experiences provided by the Applicant in support of its tender were invalid; and (c) in accordance with section 63(1)(i) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"), the procurement proceedings of the subject tender may be terminated and new procurement proceedings initiated.

Mr. Mayi opined that the subject procurement process in the subject tender does not meet the threshold of Article 227 (1) of the Constitution and the statutory requirements of the Act and recommended termination of the procurement proceedings and initiation of new procurement proceedings.

Thereafter, this Second Professional Opinion was approved via a signature denoting it had been signed by the Chief Executive Officer on 15<sup>th</sup> December 2022.

A balance ought to be made between the remedies sought by a tenderer before this Board and the duty imposed on a Procuring Entity to act fairly and not arbitrarily when grave allegations are made after notification of award to a particular tenderer. We say so because, a Procuring Entity is required to award a tender to a tenderer who meets all tender conditions during evaluation and after positive responses are received after a due diligence exercise. It is however important to emphasize that in certain circumstances, adverse information on the qualification of a successful tenderer may come to the knowledge of a procuring entity after award of a tender but prior to the signing of a contract.

Turning to the instant Request for Review, allegations were made against the qualification of the Applicant after notification of intention to award the subject tender to it which necessitated termination of the procurement proceedings of the 1<sup>st</sup> Tender. However, the specifics of the allegations made

against the qualification of the Applicant was never disclosed to the Applicant in the Termination of Procurement Proceedings dated 15<sup>th</sup> December 2022 and received by the Applicant via email on 30<sup>th</sup> January 2023.

Justice Odunga in **Miscellaneous Civil Application No. 338 of 2016, Republic v Kenya Airports Authority Ex-Parte Seo & Sons Limited [2018] eKLR** when considering the import of section 66 of the Public Procurement and Asset Disposal Act, 2015 held as follows:

***"In this case it is clear that vide a letter dated 20<sup>th</sup> July, 2016, the Respondent herein terminated the award of the subject tender while expressing itself inter alia as hereunder:***

***Upon receipt of a report on further due diligence, a decision has been made to terminate the award based on misrepresentation in respect of your qualification for the award of tender; constituting an offence under section 66 (2), (3) and 83 of the Public Procurement and Asset Disposal Act.***

***Kindly note that the aforementioned Award is hereby terminated.***

***For avoidance of doubt the legal provisions that were relied upon provide as hereunder:***

***66 (1) A person to whom this Act applies shall not be involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding.***

***(2) A person referred to under subsection (1) who contravenes the provisions of that sub-section commits an offence.***

***(3) Without limiting the generality of the subsection (1) and (2), the person shall be—***

***(a) disqualified from entering into a contract for a procurement or asset disposal proceeding; or***

***(b) if a contract has already been entered into with the person, the contract shall be voidable.***

***As regards section 66, it is clear that the same can only be invoked where it is found that a person to whom an award of a tender is given is involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; or conflicts of interest in any procurement or asset disposal proceeding.”***

It is clear from the above decision of the High Court that; if a contract has already been entered into with a person engaged in fraud or misrepresentation, the contract is voidable pursuant to section 66 (3) (b) of the Act.

Hence, in the event an adverse report is received by a Procuring Entity regarding a successful tenderer during the procurement proceedings, the procuring entity may elect to cancel the award to the successful tenderer and issue the said tenderer with cogent reasons for cancellation of the

award. Thereafter, the Procuring Entity is at liberty to award the 2<sup>nd</sup> most responsive tenderer and proceed to notify other tenderers of the said award in line with provisions of Section 87 of the Act. It is our considered view that cancellation of an award is not the same as termination of procurement proceedings and we say so because cancellation of an award to a successful tenderer denies only that tenderer the tender but termination of the procurement proceedings affects all tenderers as it eliminates the entire tender and denies a tenderer who could have been the next successful tenderer award of the tender.

Having found that the Respondents did not satisfy both the substantive and procedural statutory pre-conditions of termination of procurement proceedings outlined in section 63 of the Act, the Board finds and holds that the purported termination of procurement proceedings of the 1<sup>st</sup> tender and advertisement of the 2<sup>nd</sup> tender on 19<sup>th</sup> January 2023 by the 1<sup>st</sup> Respondent was unlawful and illegal.

Accordingly, we find that the termination of the 1<sup>st</sup> tender's procurement proceedings by the 2<sup>nd</sup> Respondent was not effected in accordance with section 63 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act to hear and determine the instant Request for Review and that the termination of the procurement proceedings of the 1<sup>st</sup> tender by the 1<sup>st</sup> Respondent was unlawful having been effected contrary to Section 63 of the Act read with Article 227(1) of the Constitution.

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

The Board has found that it has jurisdiction to hear and determine the instant Request for Review having established that the Request for Review was filed within the statutory period provided in section 167(1) of the Act read with Regulation 203(2)(c)(iii) of Regulations 2020 and the termination of the 1<sup>st</sup> tender's procurement proceedings by the 2<sup>nd</sup> Respondent was not effected in accordance with section 63 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act

Having found that the decision of the 1<sup>st</sup> Respondent to terminate the 1<sup>st</sup> tender's procurement proceedings is null and void, we find it just to nullify and set aside, which we hereby do, the decision of the 1<sup>st</sup> Respondent to terminate the procurement proceedings of the subject tender. It therefore follows, the advertisement of the 2<sup>nd</sup> tender, which was anchored on and flowed from the nullified termination of the procurement proceedings of the 1<sup>st</sup> tender, is null and void. Consequently, the advertisement of the 2<sup>nd</sup> tender has to be nullified and set aside.

From the foregoing, it is our considered view that there is need for extension of the subject tender's validity period to enable the Respondents comply with the orders of the Board herein noting that by dint of Section 88 and 173 of the Act, the Board has the power to extend the subject tender's validity

period. Section 88 of the Act provides for extension of tender validity period as follows:

***"88. Extension of tender validity period***

- (1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.***
- (2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.***
- (3) An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.***
- (4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1)."***

In essence, the accounting officer of a Procuring Entity (a) may extend the tender validity period before expiry of such period;(b) give a written notice to tenderers of the extension of the tender validity period; (c) is restricted to extending the tender validity period for not more than thirty (30) days; and (d) is restricted to only extending the tender validity period once.

Further, Section 173 of the Act donates wide discretionary powers to the Board and in considering whether the Board has the power to extend the

tender validity period, we take cognizance of the holding of the Court of Appeal in **Civil Appeal No. 510 of 2022 Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others [2022] KECA 982 eKLR** which referred to the decision of **Onyiego, J. in Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex Parte Kenya Ports Authority & Another [2021]** in addressing the power of the Board to direct a procuring entity to extend the validity period of the tender and held as follows:

*"39. The crux of the issue in controversy is whether the Respondent (Review Board) has powers in law to order or direct the accounting officer of the Ex-parte Applicant as a procuring entity to extend the validity period of the subject tender more than once. Section 88 of the Act (PPDA) provides for the extension of the tender validity period...*

*40. What was the intention of the drafters of this legislation and in particular the inclusion of Section 88? In my view, this provision was intended to guard against any possible mischief or abuse of office or power by accounting officers especially where uncontrolled timelines will give them a free hand to temper with the tendering process to favour their friends or closely related persons. In other words, once the already extended validity period for a period of 30 days lapses, the*

*tendering process in respect of that tender becomes moot or rather it extinguishes (sic). Upon lapsing, the Procurement entity is at liberty to re-advertise for fresh tendering and the process then follows the full circle like it was never tendered for before.*

- 41. Therefore, the foregoing provision permits extension of a tender validity period by an accounting officer only once and that extension must be made before the expiry of the already stipulated tender validity period. It is common knowledge that one cannot extend time that has already lapsed...*
- 48. From the plain reading of that Section, it is only applicable and binding on the accounting officer and nobody else. Nothing would have been easier than [for] the legislators to include or provide the Review Board's mandate under that section. To that extent, I do agree with counsel for the I/Party that Section 88(3) of the Act does not bar the Review board from making decisions that are deemed to be necessary for the wider attainment of substantive justice...*
- 49. Under section 173(a)(b) & (c) of the Act, the Board has wide discretionary powers for the better management of tendering system to direct the doing or not doing or redoing certain acts done or omitted from being done or wrongly done by the accounting officer. Although the Act does not expressly limit the powers of the Board from extending tender validity period*

**more than once, one can imply that the powers conferred upon the Review board includes powers to extend validity period to avert situations where the accounting officer can misuse powers under Section 88 to frustrate tenderers or bidders not considered favourable.”[Emphasis ours]**

The import of the aforementioned Court of Appeal case is that the Board has the powers to extend the tender validity period to avert situations where an Accounting Officer of a Procuring Entity misuses the powers under Section 88 of the Act to frustrate tenderers or to frustrate the procurement process. As such, we have deemed it fit and just to extend the subject tender’s validity period with a further one hundred and twenty days (120) days from 24<sup>th</sup> November 2022 to enable the Procuring Entity conclude the subject tender’s procurement proceeding’s taking into consideration the Boards finding and to give effect to principle of public procurement and article 227 of the Constitution.

The upshot of our decision is that the Request for Review dated 27<sup>th</sup> January 2023 and filed on 30<sup>th</sup> January 2023 succeeds with respect to the following specific orders:

### **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 27<sup>th</sup> January 2023 and filed on 30<sup>th</sup> January 2023:

- 1. The Invitation to Tender dated 19<sup>th</sup> January 2023 with respect to Tender No. LVSWWDA/CWS/T/13/2022-2023-R for Construction of Mong'ane - Gotichaki Water Supply Project in South Mugirango Constituency, Kisii County closing on 31<sup>st</sup> January 2023 be and is hereby cancelled and set aside.**
  
- 2. The decision by the 1<sup>st</sup> Respondent to terminate the procurement proceedings of Tender No. LVSWWDA/T/2/2022-2023 for Construction of Mong'ane - Gotichaki Water Supply Project in South Mugirango Constituency, Kisii County be and is hereby nullified and set aside.**
  
- 3. The Letter of Termination of Procurement Proceedings dated 15<sup>th</sup> December 2023 issued by the 1<sup>st</sup> Respondent and addressed to the Applicant and any other tenderer on the termination of the procurement proceedings of Tender No. LVSWWDA/T/2/2022-2023 for Construction of Mong'ane - Gotichaki Water Supply Project in South Mugirango Constituency, Kisii County be and is hereby nullified and set aside.**

4. The tender validity period of Tender No. LVSWWDA/T/2/2022-2023 for Construction of Mong'ane - Gotichaki Water Supply Project in South Mugirango Constituency, Kisii County be and is hereby extended for a further one hundred and twenty days (120) days from 24<sup>th</sup> November 2022.

5. The 1<sup>st</sup> Respondent is hereby ordered to ensure that the procurement proceedings for the subject tender proceeds to its logical conclusion in accordance with the provisions of the Tender Document, the Act and the Constitution within fourteen (14) days from the date of this decision taking into consideration the Board's findings herein.

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

Dated at NAIROBI, this 20<sup>th</sup> Day of February 2023.



.....  
**CHAIRPERSON**

**PPARB**



.....  
**SECRETARY**

**PPARB**

