REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 43/2023 OF 16TH MAY 2023

BETWEEN

EBM AFRICA INSURANCE AGENCY COMPANY LTD.....APPLICANT

AND

ACCOUNTING OFFICER

NATIONAL HEALTH INSURANCE FUND.....RESPONDENT

BOARD DECISION

Review against the decision of the Accounting Officer, National Health Insurance Fund in relation to Tenders No. (RFP) NHIF/002/2022-2023; for Provision for consultancy to provide Actuarial Services; NHIF/032//2022-2023; NHIF/033//2022-2023; NHIF/035/2022-2023;Provision for Supply, Delivery and Implementation of endpoint solution and email security; NHIF/033/2022-2023; Provision for Insurance and Brokerage Services; NHIF/035/2022-2023; Provision for Co-Insurance and facultative insurance services for Group Personal Accident and WIBA Insurance Services (consortium) for Civil Servants and National Youth Service; NHIF/036/2022-2023; Provision for Co-Insurance and facultative insurance services for Group Life & Last Expense Insurance Services (consortium) for Civil Servants and National Youth Service; NHIF/037/2022-2023; Provision for emergency road evacuation services for National Health Insurance Fund Scheme Members.

BOARD MEMBERS PRESENT

1. Mr. Jackson Awele - (member in chair)
2. Mrs. Irene Kashindi - Member
3. CPA Isabella Juma - Member
4. Mr. Daniel Langat - Member
5. Dr. Susan Mambo - Member

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

PRESENT BY INVITATION

APPLICANT	**- EBM AFRICA INSURANCE AGENCY COMPANY LTD**
Mr. Duncan Okubasu	-Odero & Partners Advocates
RESPONDENTS	**-ACCOUNTING OFFICER, NATIONAL HEALTH INSURANCE FUND**
Ms. Ruth Makallah	-Head of Legal Services, National Health Insurance Fund

BACKGROUND OF THE DECISION

The Tendering Process

National Health Insurance Fund, the Procuring Entity together with the1st Respondent herein, invited sealed tenders in response to Tenders No. (RFP) NHIF/002/2022-2023; for Provision for consultancy to provide Actuarial Services; NHIF/032//2022-2023; NHIF/033//2022-2023; NHIF/035/2022-2023; Provision for Supply, Delivery and Implementation of endpoint solution and email security; NHIF/033/2022-2023; Provision for Insurance and Brokerage Services; NHIF/035/2022-2023; Provision for Co-Insurance and facultative insurance services for Group Personal Accident and WIBA Insurance Services (consortium) for Civil Servants and National Youth Service; NHIF/036/2022-2023; Provision for Co-Insurance and facultative insurance services for Group Life & Last Expense Insurance Services (consortium) for Civil Servants and National Youth Service; NHIF/037/2022-2023; Provision for emergency road evacuation services for National Health Insurance Fund Scheme Membersusing the open competitive method. The invitation was by way of an advertisement published on the Procuring Entity's website www.nhif.or.keand the Public Procurement Information Portal www.tenders.go.keas wellas My Gov Publication of 30th May 2023. The subject tender submission deadline was Wednesday, 14thJune2023 at 10:00 a.m.

Addenda

The Procuring Entity issued multiple Addenda in response to multiple clarifications that were sought by candidates who wished to participate in the subject tenders.

Termination of the tenders

On 9th June 2023 the Director General, Public Procurement Regulatory Authority (hereinafter interchangeably "PPRA) or "the Authority") wrote a letter of even date to the Procuring Entity raising concerns with the tender documents the Procuring Entity was using in the subject tenders, specifically the eligibility requirements and evaluation criteria in the tender documents.

Subsequently on 13th June 2023 the Acting CEO of the Procuring Entity wrote a letter to the Director General of the Authority confirming that the Procuring Entity had arrived at a decision to cancel the subject tenders.

Notification to Tenderers

Tenderers were notified of the termination of the subject tender vide Notification letters dated and signed on 13th May 2023, by theRespondent.

REQUEST FOR REVIEW

On 16thJune2023, the Applicant filed a Request for Review dated 15th June 2023and a Supporting Affidavit in support of the Request for Review sworn on 15th June 2023 by Christopher Simbi Onguolo, seeking the following orders from the Board in verbatim:

1. ***An order prohibiting further extension of contracts byservice providers in respect of/in relation to services for which Tenders No. rep NHIF/002/20222-2023; NHIF/032/2022-2023; NHIF/033//2022-2023; NHIF/035//2022-2023; NHIF. 036/ NHIF 037//2022-2023 is procured.***

2. ***An order quashing the decision published on 13th June 2023 cancelling Tenders No. rep NHIF/002/20222-2023; NHIF/032/2022-2023; NHIF/033//2022-2023; NHIF/035//2022-2023; NHIF. 036/ NHIF 037//2022-2023***

3. ***An order prohibiting the procuring entity from re-issuing the purportedly cancelled Tender No. rep NHIF/002/20222-2023; NHIF/032/2022-2023; NHIF/033//2022-2023; NHIF/035//2022-2023; NHIF. 036/ NHIF 037//2022-2023***

4. ***An order compelling the procuring Entity to continue with Tender No. rep NHIF/002/20222-2023; NHIF/032/2022-2023; NHIF/033//2022-2023; NHIF/035//2022-2023; NHIF. 036/ NHIF 037//2022-2023 to its conclusion.***

5. ***The Respondent be ordered to pay the costs of and incidental to these proceedings***

6. ***For any other relief that the Review Board deems fit to grant, having regard to the circumstances of this case in order to give effect to the Board's Order.***

In a Notification of Appeal and a letter dated 16th June 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd 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 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 1st and 2nd Respondents were requested to submit a

response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 16th June 2023.

On 21st June 2023, in response to the Request for Review, the Respondent, through Dr. Samson Kuhora, the Acting CEO of the Procuring Entity, fileda letter dated 20thJune 2023. The Respondents also submitted to the Board a confidential file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide a Hearing Notice dated 27thJune 2023, the Acting Board Secretary, notified parties in the subject tender that the hearing of the instant Request for Review would be by online hearing on 29thJune 2023 at 12.00 p.m., through the link availed in the said Hearing Notice.

When the matter came up for hearing on 29thJune 2023 at 12.00 noon the parties were represented by their Advocates Mr. Duncan Okubasu for the Applicant and Ms. Ruth Makalla for the Respondent.

Before the hearing, the Board made a disclosure that one of its panel members Mrs. Irene Kashindi was a Partner at the firm Muthama Munyao & Kashindi Advocates, which firm was on the Procuring Entity's panel of Advocates. Mrs. Kashindi disclosed under Regulation 212 of the 2020 Regulations that neither she nor her firm had any direct interest in the instant Request for Review.

The Board then invited parties' submissions on the disclosure.

Mr. Okubasu objected to the participation of Mrs. Kashindi as a panel member citing the relationship between the panel member and the Procuring Entity. Counsel submitted that there was a real likelihood of bias citing that nobody can be a judge in their own cause and that justice must not only be done but also seen to be done.

Counsel argued that if the Board would dismiss the instant Request for Review, the Applicant would be inclined to believe that it was because of the participation of Mrs. Kashindi in the matter. He submitted that the perception of bias would not be waded away by Regulation 212 of the Regulations 2020.

Mr. Okubasu also raised a preliminary issue citing the Response by the Procuring Entity alluded to 7 documents that had not been furnished upon the Applicants and that this would limit the Applicant's participation in the matter. These documents included: i.e., Requisition letters from various departments; The specifications for all the requirements; the tender advert- 30th May 2023; The clarifications from the bidders Letter from PPRA dated 9th June 2023; Letter from NHIF to PPRA on cancellation of tenders and Advert communicating the cancellation.

Ms. Makalla did not object to the participation of Mrs. Kashindi as a panel member citing that they were not representing the Procuring Entity in the instant Request and thus no conflict existed.

Upon considering the submissions made on behalf of each party, the Board returned a Ruling allowing Mrs. Irene Kashindi to sit on the panel while reserving the detailed reasons as part of part of the Decision in the

matter.On the documents referred to by Mr. Okubasu, the Board observed that the said documents were confidential documents under Section 67 of the Act and thus are of a nature that would not be availed to the Applicant.

Subsequently, the Board assigned each party 10 minutes to advance their case with the Applicant being assigned an extra 5 minutes to offer a rejoinder, if any.

PARTIES' SUBMISSIONS

Applicant's Case

During the online hearing, Counsel for the Applicant, Mr. Okubasu submitted that the Applicant was a prospective tenderer who had downloaded tender documents with a view of participating in the subject tenders. Counsel pointed out that on the eve of the submission of its bid, the Applicant encountered a notification on the Procuring Entity's website that the tenders it intended to participate in had all been cancelled.

Counsel argued that there was no reason on the notification on what had informed the said cancellation and that the word"CANCELLED"had been placed across the initial tender notice with the addition that the said tenders would be re-advertised in due course.

It was Counsel's contention that the media andmembers of the public had raised specific concerns about the subject tenders, a fact that led to the Procuring Entity issuing a Press Release. In the release, the Procuring Entityacknowledged the media and public for their vigilance and informed them that it would rectify the problems and any shortcomings to uphold the public trust. He indicated that the Procuring Entity then issued a very

lengthy addendum addressing the concerns that had been raised by the public.

Mr. Okubasu submitted that it would have been expected that the concerns that existed had been addressed through the addenda but to the surprise of the Applicant, the subject tenders were cancelled

He submitted that section 63(1)(e) of the Act is not a port of call for any Procuring Entity to use to cancel a tender without a valid reason.Counsel reiterated that cancellation is an important matter for which the Act made provision for under section 63 and that a Procuring Entity could only cancel a tender while adhering to the said provision.

Mr. Okubasu pressed on that according to the Applicant the addenda issued in the subject tenders adequately addressed the concerns that existed in the tenders.

He also added that material governance issues are complex matters that are beyond the reach and scope of a Procuring Entity having exercised proper due diligence in the tender process. He mentioned issues like breakdown in technology, resignation of members of the Evaluation Committee as examples of material governance issues. It was his contention that it is not enough for a Procuring Entity to saythat material governance issued were detected without demonstrating the same.

Counsel argued that if any such material errors existed then they ought to have been addressed through addendum.

Mr. Okubasu pointed out that the Applicant was not privy to the confidential documents submitted to the Board but had reason to believe that the cancellation of the subject tenders was irregular and that Regulation 48(1) of the Regulations 2020 had not been complied with.

Counsel took issue with the response by the Procuring Entity citing that it only says that issues were raised and in order to mitigate the issues and in consultation with the Director General of the Authority a decision was made to cancel the tender.

Counsel submitted that the last paragraph of the Respondent's response indicates that the Procuring Entity had now addressed all issues and now wished to have the tender re-advertised and questioned the speed at which the said governance issues had been addressed.

Mr. Okubasu argued that the Respondent's reasons for termination of the subject tenders were not sincere and were only meant to accord advantage to a party expected to participate in the tenders to be re-advertised. He concluded that an extension of contracts for the pre-existing suppliers in respect of the subject tenders would be an illegality. The Applicant therefore sought that the Board quashes the decision to cancel the subject tenders.

The Respondent's Case.

Counsel for the Respondent, Ms. Makalla indicated that the Procuring Entity advertised the subject tenders out of need for the services outlined in the respective tenders. She argued that the procurement was done in compliance with Article227 of the Constitution

Ms. Makalla noted that upon publishing of the subject tenders, material concerns were raised by members of the public and it was established that the tender documents contained errors that could not be rectified through addenda that had been provided.

Counsel submitted upon consultation with the Authority, the Procuring Entity was advised that the material errors could not be addressed through addenda as had been done. Ms. Makalla submitted that the Procuring Entity was therefore required to cancel the subject tenders to allow for a fresh advertisement upon rectification of the errors that had been highlighted.

Counsel argued that the Procuring Entity gave sufficient notice of the cancellation of the tender and that the notice was uploaded in the Public Procurement Information Portal as required in the interest of ensuring that the identified gaps were addressed.

It was Counsel's contention that the reasons for cancellation of the subject tender were sufficiently captured undersection 63(1)(e) of the Act which allow an Accounting Officer of a Procuring Entity to terminate a tender prior to notification of an award without entering to a contract. She argued

that the Procuring Entity wanted to address the material governance issues that had been detected to ensure that the subject tenderswere fair for all participants.

Counsel refuted the claims that the cancellation was geared towards extending an advantage to anyone but affirmed that it was meant to offer a level ground for all who wished to participate in the tender to be re-advertised.

Ms. Makalla concluded seeking for the Procuring Entity to be allowed to re-advertise the subject tenders.

Applicant's Rejoinder

In a brief rejoinder Mr. Okubasu pointed out that the Act does not define material governance issues but stated that material governance issues could not be equated to errors. He submitted that the Respondent had not made reference to the material governance issues or errors that led to the cancellation of the subject tenders. For this, Counsel invited the Board to interrogate the letter dated 9th June 2023 alluded to by the Procuring Entity to establish whether the decision to cancel the subject tenders was sanctioned by the Director General of the Authority.

According to Counsel, the Procuring Entity issued addenda that addressed the concerns in respect of the tender documents.

CLARIFICATIONS

The Board sought a clarification from the Procuring Entity to identify the documents that the Board would consider to identify the errors which in the Procuring Entity's view were the material governance issues that informed the cancellation of the subject tenders. Ms. Makalla responded that the material errors would be found at the various Addenda and the tender specifications in the tender documents.

The Board also sought clarification from the Applicant on what was its basis for submitting that that the Respondent was not compliant with Regulation 48(1) of the Regulations 2020.Mr. Okubasu responded that the Respondent's response did not say that the decision was influenced by a recommendation by the head of procurement.

The Board also sought clarityfor the Applicant to point it to the document supporting their submission that the cancellation of the subject tenders was meant to give advantage to another party. Mr. Okubasu indicated that the submission was just a speculation arising from the conduct of the Procuring Entity since the addenda it had issued concerned only 2 of the subject tenders but the Procuring Entity proceeded to cancel all the subject tenders.

The Board also inquired on why the Applicant took the viewthat because the addenda previously issued only related to 2 of the subject tenders, then the rest of the tenders ought not to have been cancelled. Mr. Okubasu indicated that members of the public raised concerns with respect two tenders i.e., WIBA and Group Personal Accident cover and therefore if

there was any cancellation then it ought to have applied to the 2 tenders and not the rest.

The Board also sought to know whether the Applicant intended to participate in all the 6 tenders to which Mr. Okubasu answered in the affirmative.

At the conclusion of the online hearing, the Board informed the Applicant that the instant Request for Review having been filed on 16th June 2023 had to be determined by 7thJuly 2023 and that the Board would communicate its decision on or before 7thJuly 2023 to all parties via email.

BOARD'S DECISION

The Board has considered all documents, pleadings, oral submissions, and authorities together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

1. **Whether Ms. Irene Kashindi is conflicted to hear this Application.**
2. **Whether the subject tender was terminated in compliance with section 63of the Act.**
3. **Whether the letter dated 9th June 2023 is a confidential document.**
4. **Final orders.**

1) Whether Ms. Irene Kashindi is conflicted to hear this Application.

During the hearing of the instant Request for Review, Counsel for the Applicant made an application for recusal of Irene Kashindi (herein after referred to as the "**Board Member**"), one of the Board Members panelled to hear this case. This followed the Board Member's disclosure, made before the hearing commenced, that her law firm was in the panel of Advocates for the Procuring Entity but that the Board Member had no direct or indirect interest in the Request for Review within the meaning of 212 of the Public Procurement and Asset Disposal Regulations 2020 ("the 2020 Regulations").

We have herein before captured in detail the oral submissions of all parties with respect to the said application and confirmed that the said application was dismissed but the reasons for dismissal were reserved to be contained in this decision. We shall now give our reasons for dismissing the Applicant's oral application for recusal of the Board Member and the oral prayer by the Applicant for reconstitution of the panel to hear and determine the instant Request for Review.

The genesis of this application emanates from the disclosure by the Board Member to all present at the hearing of the instant Request for Review that (a) the Board Member is an Advocate and a partner in Munyao Muthama & Kashindi Advocates, (b) her law firm was in the panel of Advocates of the Procuring Entity, (c) the Board Member had no direct or indirect interest in the subject of the Request for Review.

Article 50(1) of the Constitution guarantees every person the right to have a dispute determined by an impartial court and provides:

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

Further, Article 47(1) of the Constitution provides:

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

In essence, every person has a right to have any dispute that can be resolved by the application of law decided in an expeditious, efficient, lawful, reasonable, and procedurally fair manner by an impartial court, tribunal or administrative body.

This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides:

"(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 and powers of the Board as follows:

"(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."

By operation of law accordingly, the Board is envisaged as a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

The composition of the Board is provided under section 29 of the Act as:

"(1) The Review Board shall comprise of the following 15 members who shall be appointed by the Cabinet Secretary taking into account regional and gender balance –

(a) a chairperson whose qualifications and experience shall be as that of a Judge of the High Court;

(b) seven other members whose qualifications and experience shall be as prescribed in the regulations; and

(c) seven other persons appointed by the Cabinet Secretary.

(2) A person appointed as a member under subsection (1) shall be nominated by the following professional bodies from amongst their members as follows –

(a) two persons nominated by the Law Society of Kenya;

(b) one person nominated by the Chartered Institute of Arbitrators, Kenya Chapter;

(c) one person nominated by the Kenya Institute of Supplies Management;

(d) one person nominated by the Institute of Certified Public Accountants of Kenya;

(e) one person nominated by the Institute of Engineers of Kenya; and

(f) one person nominated by the Architectural Association of Kenya.

(3) The procedure for nominating the persons mention under subsection (2) shall be as prescribed."

Section 30 further sets out the qualifications of members of the Review Board as follows:

"(1) A person shall not be appointed as a member of the Review Board under section 29 unless that person –

(a) possesses a university degree from a university recognised in Kenya;

(b) has knowledge and experience of not less than seven years in the relevant field;

(c) is a professional of good standing in his or her respective professional body; and

(d) meets the requirements of Chapter Six of the Constitution.

(2) The Chairperson appointed under this Act shall be a person who qualifies to be a judge of the High Court and shall meet the requirements of Chapter Six of the Constitution."

Regulation 207 of Regulations 2020 provides for constitution of a panel to hear and determine a request for review filed before the Board and reads:

"(1) The Review Board Secretary, in consultation with the chairperson of the Review Board, may constitute a panel of at

least three members to hear and determine a request for review and the Review Board chairperson shall chair the panel.

(2) .....

(3) The quorum of a Review Board panel established under paragraph (1), shall be chairperson and at least two other member.

....."

Further, Section 171 of the Act provides strict timelines within which the Board ought to hear and determine a request for review application filed before it and reads:

"(1) The Review Board shall complete its review within twenty-one days after receiving the request for review.

(2) In no case shall any appeal under this Act stay or delay the procurement process beyond the time stipulated in this Act or the Regulations made thereunder."

We have endeavoured to set out the above provisions in detail to demonstrate the unique nature of the composition and operations of the board. In essence, once a panel has been constituted to hear and determine a request for review filed before the Board, that panel is required to complete its review of the request for review within 21 days from the date of filing of the request for review application. This goes to the constitutional requirement of expeditious and efficient disposal of public procurement and asset disposal disputes noting that public procurement processes are time sensitive as each tender has a provision

for a tender validity period within which the tendering process ought to have been completed.

In addition, this Board has a mandate to ensure procedural fairness as stipulated under Article 47(1) of the Constitution hereinabove while making its determination and rendering its decision in a request for review application. In ***Judicial Review Miscellaneous Application No. 36 of 2016 Republic v National Police Service Commission Exparte Daniel Chacha Chacha [2016] eKLR*** the Justice Odunga, as he then was, while addressing the elements of procedural fairness referred to the case by the Supreme Court of Canada in **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held that:

> ***"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.***
>
> ***53. The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3)***

The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker.
[Emphasis ours]

It is thus not lost to us that we have a duty to discharge our constitutional mandate independently and impartially and be seen to be doing so. Indeed, it is a well-established principle that justice must not only be done but should always be seen to be done. Yet the recusal and disqualification are a weighty matter which should not be casually entertained without cogent and/or reasonable evidence of actual or perceived conflict. In the case of ***Alliance Media Kenya Limited –vs- Monier 2000 Limited & Njoroge Regeru HCCC No. 370 of 2007 (eKLR)*** Warsarme J stated:

"In my understanding, the issue of disqualification is a very intricate and delicate matter. It is intricate because the attack is made against a person who is supposed to be the pillar and fountain of justice.....justice is deeply rooted in the public having confidence and trust in the determination of disputes before the court. It is of paramount importance to ensure that the confidence of the public is not eroded by the refusal of judges to disqualify themselves when an application has been made"

In particular, as regards the functions of the Board, the PPADA Regulations provide a clear guideline that a board member should only recuse him/herself if he/she has a direct or indirect interest in the matter before

him or her. In the instant Request for Review, conflict of interest and bias have been alleged on the basis of the Board Member's law firm being on the panel of Advocates of the Procuring Entity. No other reason or evidence has been provided of the Board member's involvement in this matter other than in her capacity as a member of this panel.

The Court of Appeal in ***Republic v Mwalulu & Others [2005] 1KLR*** (hereinafter referred to as "the Mwalulu case") when addressing the question of disqualification of a judge stated:

"i. When the courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must specifically be alleged and established.

ii. In such cases the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their case they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to bias in the mind of the Judge, Magistrate or Tribunal.

iii. The court dealing with the issue of disqualification is not; indeed, it cannot, go into the question of whether the officer is or will actually be biased. All the court can do is to carefully examine the facts which are alleged to show bias and from those facts

draw an inference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased.

iv. The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself."

The import of this holding in the instant Request for Review is that the Applicant bore an obligation to specifically allege and establish cogent facts constituting bias by the Board Member to justify her recusal from hearing and determining the instant Request for Review. It is our considered view that mere apprehension of bias is not sufficient factual evidence to prove bias by the Board Member in the instant Request for Review.

We note that the Constitutional Court of South Africa in ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147; 1999 (7) BCLR 725 (CC)*** articulated the proper approach on recusal of judicial officers as follows:

> ***"... The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear***

or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

In essence, in considering an application for recusal, (a) there is a rebuttable presumption that judicial officers are impartial in adjudicating disputes, (b) the applicant bears the onus of rebutting the presumption of judicial impartiality, and (c) the presumption of judicial impartiality requires cogent or convincing evidence to be rebutted.

In ***Gladys Boss Shollei v Judicial Service Commission & another [2018] eKLR,*** the Supreme Court was considering an application by the Judicial Service Commission for recusal of various judges, on grounds that the judges had participated in related deliberations before it, i.e. Justice Ojwang' had pending disciplinary cases, while Justice Njoki Ndung'u had pending litigation against it. The Court, however, took the opportunity to make some relevant pronouncements relating to recusal as per the following excerpts:

"We have considered the above rival submissions. The Supreme Court has a special constitutional mandate which cannot be delegated to any other forum in the entire governance set-up. The Court is firmly guided by certain precious values, which provide the context within which it takes ultimate responsibility for matters of dispute settlement, in accordance with the law. This scenario is objectively depicted by the late Lord Denning (1899-1999) of England who thus spoke of the candour and trust associated with the judicial appointment.

"[E]very Judge on his appointment discards all politics and all prejudices. Someone must be trusted. Let it be the Judges" [see Allan C. Hutchinson, Laughing at the Gods: Great Judges and How they made the Common Law (Cambridge: University Press, 2012), p.156"

Further, Justice Ibrahim concurred as follows:

"Another truth, which is a reality now, is that among the Supreme Court Judges, we shall/may have former JSC Commissioners. It cannot therefore be stated in general terms that any Supreme Court Judge who sits/sat in the JSC will, as a matter of cause, not adjudicate in a matter where the JSC is a party. Such a pronouncement will be a total mockery of the Sovereign will of the People of Kenya who established the two institutions in the Constitution and willed that they carry out their various functions simultaneously.

Tied to the constitutional argument above, is the doctrine of the duty of a judge to sit. Though not profound in our jurisdiction, every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every judge takes an oath of office: "to serve impartially; and to protect, administer and defend the Constitution." It is a doctrine that recognizes that having taken the oath of office, a judge is capable of rising above any prejudices, save for those rare cases when he has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a court of law.

In respect of this doctrine of a judge's duty to sit, Justice Rolston F. Nelson; of the Caribbean Court of Justice in his treatise – "Judicial Continuing Education Workshop: Recusal, Contempt of Court and Judicial Ethics; May 4, 2012; observed:

"A judge who has to decide an issue of self-recusal has to do a balancing exercise. On the one hand, the judge must consider that self-recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, a judge has a duty to sit in the cases assigned to him or her and may only refuse to hear a case for an extremely good reason"

...

From my readings, it is not lost to my mind that there is a criticism of this doctrine for being subject of abuse by judges, so

as to sit in matters when it is blatantly clear that they are biased and ought not to have sat. <u>However, where judiciously invoked, this doctrine of the duty to sit is a key component of Constitutionalism</u>. I will invoke that doctrine in this matter and hold that all Judges of the Supreme Court of Kenya, members of the Judicial Service Commission or former members, have a duty to sit in this matter so as to affirm Constitutionalism."

Justice Njoki Ndung'u similarly opined:

"<u>Additionally, to find that membership of a Judge in the 1st respondent, automatically disqualifies him or her on the basis of perceived bias from hearing and determining any matter relating to the 1st respondent would be to stretch the perception of bias too far.</u>

...

<u>It must always be remembered that there is a presumption of impartiality of a Judge</u>. In The President of the Republic of South Africa & 2 others v South African Rugby Football Union & 3 others, (CCT16/98) [1999] the South African Constitutional Court held that there was a presumption of impartiality of judges by virtue of their training. Therefore, they would be able to disabuse themselves of any irrelevant personal beliefs or predispositions when hearing and determining matters."

From the above case, we note that there is a hard balance between the duty to sit and recusal of oneself from hearing and determining a matter. On one hand, as an adjudicator, one must consider that recusal aims at

maintaining the appearance of impartiality and on the other hand, one has a constitutional duty to sit in cases assigned to him or her and can only refuse to hear a case for good reason.

In ***Petition No. 295 of 2018 Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party) [2018] eKLR***, the Court held that:

> ***"In our view, a party alleging a conflict of interest bears the burden of presenting clear evidence that the person said to be acting in conflict of interest is acting in a manner prejudicial to the interests of the other party."***

This Board is cognizant of provisions of Regulation 212 of Regulations 2020 which require disclosure of interest by members of the Board members which reads:

> ***"(1) Where any member of the Review Board has a direct or indirect interest in any matter before the Review Board, he or she shall declare his or her interest in the matter and shall not participate in the hearing or decision-making process of the Review Board in relation to that particular matter.***
>
> ***(2) Such a disclosure shall be recorded in a conflict of interest disclosure register."***

Our interpretation of the above provision of Regulations 2020 is that where any member of the Board has a direct or indirect interest in any request for

review application, he or she has an obligation to declare his or her interest in the application, and ought not to participate in the review, hearing or determination of such request for review application. This is basically in line with the principles of natural justice. In ***R –vs- Bow Street Metropolitan Stipendiary magistrate exparte Pinochet Ugarte (No.2) 1999 I ALL ER 577***Browne Wilkinson LJ held that the rule of natural justice, *nemo judex in causa sua*, (meaning no person can judge a case in which they have an interest) has two implications. It would be applied literally if the judge is a party to the litigation or has financial or proprietary interest in the outcome of the case. Secondly, a person may indirectly be a judge in his own cause if his conduct or behavior gives rise to a real suspicion that he is not impartial.

Turning to the circumstances in the instant Request for Review, the matter before the Board concerns Tenders No. rep NHIF/002/2022-2023; NHIF 032//2022-2023; NHIF 033//2022-2023; NHIF 035//2022-2023; NHIF.036/; and NHIF 037//2022-2023. The Board Member, before commencement of the hearing of the instant Request for Review, disclosed to all parties to the Request for Review that her law firm was in the panel of Advocates of the Procuring Entity. Additionally, the Board Member categorically disclosed that she had no direct or indirect interest in the instant Request for Review or the subject tender in question. The Applicant bears the burden of presenting clear evidence that the Board Member is biased against it for her to recuse herself from hearing and determining the instant Request for Review.

It is important to note that Section 31(1) of the Act provides for the tenure of office of the chairperson and members of the Board and reads as follows:

"(1) The Chairperson and members of the Review Board shall hold office for a term of three years and shall be eligible for a further term of three years."

Section 32 provides for the terms and conditions of the members of the Board and reads:

"(1) The terms and conditions of service of the Review Board shall be determined by the Cabinet Secretary and the Salaries and Remuneration Commission.

(2) The members of the Review Board shall serve on a part time basis."

In essence, members of the Board are part-timers who hold office for a term of three years and are eligible for a further term of three years. We note from the provisions of Section 29 and 30 of the Act that members of the Board are professionals who are not barred from running businesses to earn a living independently from their duties at the Board. It is against this background that the Chairperson and other members of the Board are required to disclose any direct or indirect interest in any matter before the Board and refrain from participating in the hearing or decision making process of that particular matter and for such disclosure to be recorded in a conflict of interest disclosure register.

In the instant Request for Review, the Board Member in her disclosure, categorically informed all parties to the instant Request for Review that she has no direct or indirect interest in the instant Request for Review. We are cognizant of the holding in the case of ***Charles John Macharia Mbuthia v Standard Chartered Bank Kenya Limited [2021] eKLR*** which referred to the case of ***Republic v Independent Electoral and Boundaries Commission & 3 others Exparte Wavinya Ndeti [2017]eKLR*** where Justice Odunga held that:

> ***"We, Judges are made of flesh and bones. We are not created in a lab and incubated until our rise to the bench. We were all members of the bar and have studied, practiced, trained and worked with others and more often other members of the Bar. If every Judge were to recuse themselves from matters where they are acquainted with an Advocate appearing before them or even worked with or for them, then we would see no end to recusals. The overriding objective of the Court to facilitate the just, expeditious, efficient and proportionate resolution of disputes pursuant to Article 159 of the Constitution and reiterated in Section 3 of the Employment and Labour Relations Court Act would be rendered academic."***

Further, in ***Dari Limited & 5 others v East African Development Bank (Civil Appeal 70 of 2020) [2023] KECA 454 (KLR),*** (hereinafter referred to as "the Dari Limited case") the Appellants challenged the recognition of a foreign judgment from England on the basis that, among others, the judge in the English court had been biased due to sharing

chambers with the Respondent's counsel. The Court of Appeal declined to find a bias in this instance. The relevant excerpt is as follows:

> ***"Having found that the question of Judge Toledano's alleged bias was to be determined by the lex fori, and applying the above principles, the issue becomes, could a reasonable, fair-minded and informed person, aware of all the circumstances and knowledge of the practice of English chambers as well as the impartiality obligations of a judge, apprehend that Judge Toledano would be biased merely because of sharing chambers with counsel for the respondent? We would not think so, and this much is confirmed by the fact that when the appellants applied for leave to appeal citing that ground, the English Court of Appeal found that particular contention to be utterly without merit."***

The Court of Appeal in the Dari Limited case also cited with approval the Supreme Court of Canada case, **R. v S. (R.D.) [1997] 3 SCR 484**, which held as follows:

> ***"The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be***

reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence."

This establishes that a mere association between the adjudicator and the parties or their counsel is not a good ground for declaring bias. Guided by the holdings in the cases cited above and the unique composition and operational circumstances of the Board, it is our considered view that the Applicant has not made out a case to prove or establish a conflict of interest or bias to warrant recusal of the board member. We are guided by the case of: ***Nathan Obwana v Robert Bisakaya Wanyera & 2 others[2013] eKLR***, where the Court stated as follows:

"I do find that there has been no proof of bias. The apprehension by the applicant that he will not get justice in this court is a normal apprehension whereby each party who has a matter in court is apprehensive as to the decision the court would make. The court may find in his or her favour and that uncertainty makes parties to be apprehensive. If a party interprets his apprehension and conclude that the court would be biased, then that is taking the wrong dimension unless allegations of bias are proved by facts. The aspect of judging encompasses the unpredictability of the decision. If that aspect is missing, then parties will be able to make their own predictions and make conclusions as to how the court is likely to decide a matter."

It is important to note that this Board is not the only administrative body or tribunal comprised of part time members. We have specialized tribunals and administrative bodies established by various statutes such as the Public Private Partnership Petition Committee. The implication of a member of this Board recusing herself especially where conflict of interest and bias has not been substantiated would without doubt have repercussions on members operating on part time basis in other specialized tribunal. In the circumstances, we find that the Applicant has failed to prove the allegation of conflict of interest and bias to warrant the recusal of the Board Member from hearing and determining the instant Request for Review.

2) Whether the subject tender was terminated in compliance with section 63of the Act.

Section 167 of the Act affords room to candidates and tenderers disgruntled in the manner in which a tender by a Procuring Entity has been undertaken to approach the Board for redress. However, subsection (4) of the Section divests the jurisdiction of the Board on several instances including the termination of a procurement process from the in the following terms:

"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."

Termination of public procurement proceedings is governed by Section 63 of the Act which provides as follows:

"63. Termination or cancellation of procurement and asset disposal

proceedings

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

(a) the subject procurement have been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

There is however a large body of case law of theapplicability of section 63 of the Act to the effect that before the jurisdiction of the Board is ousted by dint of section 63 as read with section 167(4) Act, the Board must satisfy itself that the preconditions for termination under section 63 have been met.

In ***Nairobi High Court Judicial Review Misc. Application No. 390 of 2018; R v Public Procurement Administrative Review Board & Ors Ex parte Kenya Revenue Authority***, the High Court considered a judicial review application challenging the decision of this Board. The Board had dismissed a preliminary objection that had cited that it lacked jurisdiction to hear a Request for Review before it on account of the fact that it related to the termination of a proposal process under section 63 of the Act. In dismissing the judicial review application, the Court affirmed that the Board has jurisdiction to establish whether the preconditions for termination under section 63 have been met before downing its tools:

33. A plain reading of Section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted...

43. Consequently, the Respondent was justified in holding that there was no valid termination of the suit tender to begin with, and the purported termination as conveyed in the letter dated 16th August 2018 was a nullity, hence the tender was still alive. As a result, the provisions of section 167(4) (b) had not crystalized to oust the jurisdiction of the Respondent, hence the Respondent was within its jurisdiction as provided under Section 173 of the Act when it entertained the request for review.

This is the position that was also taken in ***Nairobi High Court Judicial Review Misc. Application No. 117 of 2020; Parliamentary Service Commission v Public Procurement Administrative Review Board & Ors v Aprim Consultants*** where the High Court considered a judicial review application in which the Ex-parte Applicant was challenging the decision of this Board to hear and determine an application challenging the Procuring Entity's termination of a tender under section 63 of the Act. The Ex-parte Applicant had raised a Preliminary Objection before the Board but the same was dismissed. The High Court in affirming that the Board was correct in its decreed that;

48. A plain reading of section 167(4)(b) is to the effect that a termination that is in accordance with section 63 (and not section 62 as stated therein) of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of

section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted...

51. This being the case, the Respondent and this Court upon an application for review have jurisdiction to determine whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made in this regard by applying the principles that apply to judicial review. Therefore, from the outset, the Respondent 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 the section does not automatically outs 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.

The above judicial pronouncements mirror the position of this Board in its previous decisions in ***PPARB Application No. 29 of 2023; Craft Silicon Limited v Accounting Officer Kilifi County Government & anor; PPARB Application No. 50 of 2020; Danka Africa (K) Limited v Accounting Officer, Kenya Ports Authority*** and ***PPARB Application No. 9 of 2022; Intertek Testing Services (EA) PTY Limited & Anor v The Director General, Energy and Petroleum Regulatory Authority & Anor.***

In relation to the instant application, the question that arises is what material governance issues are and whether the Respondent met the preconditions of section 63(1)(e) in terminating the tender.

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

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

From the above definition, the Board notes that principles of governance require procuring entities and tenderers to avoid any form of malpractice that compromises the integrity of a procurement process. Principles of governance that apply in public procurement in the Kenyan context are outlined in the Constitution of Kenya, 2010 some of which include:

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

Article 47: Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

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

This Board inits Decision ***PPARB Application No. 50 of 2022;Danka Africa (K) Limited v Accounting Officer, Kenya Ports Authority***also offered a description of material governance issues under section 63 of the Act at page 42 as follows:

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

We have reviewed the rival pleadings and submissions filed in the application alongside the confidential documents and note as follows; Counsel for the Respondent, Ms. Makalla indicated that the Procuring Entity advertised the subject tenders out of need for the services outlined in the respective tenders but that upon publishing of the subject tenders, material concerns were raised by members of the public and it was established that

the tender documents contained errors that could not be rectified through addenda that had been provided.

Counsel submitted that upon consultation with the Authority, the Procuring Entity was advised that the material errors could not be addressed through addenda as had been done hence the decision to cancel the subject tenders to allow for fresh advertisement. Counsel argued that the Procuring Entity gave sufficient notice of the cancellation of the tender and that the notice was uploaded in the Public Procurement Information Portal as required in the interest of ensuring that the identified gaps were addressed. It was Counsel's contention that the reasons for cancellation of the subject tender were sufficiently captured under section 63(1)(e) of the Act which allow an Accounting Officer of a Procuring Entity to terminate a tender prior to notification of an award without entering to a contract. The Board sought a clarification from the Procuring Entity to identify the documents that the Board would consider to identify the errors which in the Procuring Entity's view were the material governance issues that informed the cancellation of the subject tenders. **Ms. Makalla responded that the material errors would be found at the various Addenda and the tender specifications in the tender documents. (emphasis ours)**

The Board notes that a procuring entity which seeks to terminate a procurement process on account of detection of material governance issues bears the burden of establishing with specificity what the said material governance issues are and how they ***affect its capability to guarantee***

compliance with principles of Article 227 of the Constitution of Kenya in the procurement process. The onus lies squarely at the Respondent's doorstep to demonstrate what these material governance issues were as to leave no room for conjecture in the minds of tenderers why the tender was terminated. This reasoning accords with the principle of transparency and accountability which are envisaged as essential cogs in any public procurement process in Kenya. This jurisprudential position has been settled by this Board in a litany of decisions including ***Saro Holdings Limited vs Accounting Officer Kenya Rural Roads Authority & Another Application No. 41 of 2023 and PPARB Application No. 50 of 2020; Danka Africa (K) Limited v Accounting Officer, Kenya Ports Authority.***

In this regard, Justice Mativo in **Republic v. Public Procurement Administrative Review Board ex parte Nairobi City Water Sewerage Company; Webtribe Limited t/a Jambopay Limited (Interested Party) (2019) eKLR** (hereinafter referred to as "the Nairobi City Water Case") provides useful guidance on the onus and standard of proof of termination of a tender under section 63 of the Act. At paragraph 45 of the said decision, Justice Mativo held as follows:-

"The question is not whether the best reasons to justify termination has been provided, but whether the reasons provided are sufficient for a reasonable tribunal or body to conclude, on the probabilities, that the grounds relied upon fall within any of the grounds under section 63 of the Act. If it does, then the party so claiming has discharged its burden under section 63".

At paragraphs 43 and 45, the Honourable Judge held as follows:-

"My understanding of section 63 of the Act is that there must be evidence that there is real and substantial technological change. A party invoking the said provision must put forward sufficient evidence for a court to conclude that, on the probabilities, the technological changes cited is of such nature that it renders it imprudent for the contract to proceed on the original terms, and the nature of the change and how it substantially affects the contract ought to be clearly stated. Differently put, the report to the Director General did not provide reasons to support the existence of substantial technological change.

The mere recitation of the statutory language, as has happened in this case is not sufficient to establish the grounds or sufficient reasons. The reasons for the termination must provide sufficient information to bring the grounds within the provisions of the law. This is because the tender process and in particular, termination must be done in a transparent and accountable and legal manner as the law demands. This is because the question whether the information put forward is sufficient to place the termination within the ambit of the law will be determined by the nature of the reasons given. The question is not whether the best reasons to justify termination has been provided, but whether the reasons provided are sufficient for a reasonable tribunal or body to conclude, on the probabilities, that the grounds relied upon fall within any of the grounds under section 63 of the Act. If it does,

then the party so claiming has discharged its burden under section 63".

From the foregoing, the Board observes that the court was dealing with termination ofprocurement proceedings pursuant to section 63 (1) (a) (ii) of the Act that deals with a procurement having been overtaken by substantial technological change.

In that regard, the Court found that the technological changes cited should have been of such nature that it rendered it imprudent for the contract to proceed on the original terms, and the nature of the change and how it affected the contract ought to have been clearly stated. The court proceeded to conclude that a mere recitation of the statutory language is not sufficient to establish the grounds or sufficient reasons for a termination.

The Honourable Judge proceeded to hold that, undue regard should not be given on whether a procuring entity has provided the best reasons, but regard must be given to whether ***sufficient*** reasons have been provided. This explains why according to Justice Mativo, a mere recitation of the statutory language, for example, material governance issues have been detected is not sufficient to establish the grounds for termination of a tender or the reasons therefrom.

The Applicant further cited the decision in **Republic v. Public Procurement Administrative Review Board & another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR**, where it was held as follows:-

"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".

The Board notes the emphasis placed by the court in the above case that a procuring entity should provide sufficient reasons and evidence to justify and support the ground for terminating a procurement process. In the Board's view, sufficient reasons, including real and tangible evidence require the Respondent to particularize the material governance issue or issues detected, that prevents it from awarding the subject tender and thereafter executing a procurement contract with a successful bidder. It is therefore not a sufficient ground, as noted in the ***Nairobi City Water Case***, to merely recite or reproduce the provision as expressed in section 63 (1) (e) of the Act as was done by the Respondent in its termination notice.

As alluded to elsewhere in this decision, the import of full disclosure by the Procuring entity is to ensure that the right to fair administrative action is achieved in public procurement processes. Article 47 of the Constitution states that:-

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"

Further, section 5 of the Fair Administrative Actions Act No. 4 of 2015 provides as follows:-

"(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights of interests of a group of persons or the general public, an administrator shall:-

(a) .....;

(b) .....;

(c) .....;

(d) where the administrator proceeds to take the administrative action proposed

(i) give reasons for the decision of administrative action as taken"

On its part, section 6 of the Fair Administrative Actions Act, 2015 states as follows:-

"(1) Every person materially or adversely affected by any administrative action has a right to be supplied with such

information as may be necessary to facilitate his or her application for an appeal or review

(2) The information referred to in subsection (1) may include:-

(a) the reasons for which the action was taken

(b) any other relevant documents relating to the matter"

The constitutional right to fair administrative action including the right to provide a person with sufficient reasons and information following anadministrative action is codified in section 5 and 6 of the FairAdministrative Actions Act. It was never the intention of the legislature for a procuring entity to hide behind section 67 (1) of the Act when it fails to particularize the specific reasons and information for its administrative action.

Section 3 of the Act, which cites the principles that guide public procurement processes provides that:-

"Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

(a) the national values and principles provided for underArticle 10;

(b) .....;

(c) .....;

(d) .....;

(e) .....;

(f) the values and principles of public service as provided for under Article 232"

In addition to the above principles, Article 73 (1) of the Constitution that was cited by the Applicant provides that:-

"73. Responsibilities of leadership

(1) Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution;

(ii) .....;

(iii) .....; and

(iv) promotes public confidence in the integrity of the office"

Whereas the Respondent may have been motivated by honest concerns raised by tenderers and the PPRA, the Respondent would have done better to promote public confidence in the integrity of the subject procurement process by providing more specific reasons for the termination to all tenderers. The Board reiterates that the filing of a Request for Review should not be the only reason that motivates a procuring entity to disclose the specific reasons (in its confidential file) why it has taken an administrative action affecting bidders. The information relating to termination of a procurement process should be availed to bidders

beforehand for them to elect whether to challenge such administrative action.

All bidders, including the Applicant herein had legitimate expectation and commercial interests when submitting their bids in response to the tender advertisement. Therefore, if the conclusion of the procurement processthrough the making an award is affected by factors leading to a termination, such bidders ought to be afforded sufficient reasons in the form of real and tangible evidence explaining the material governance issue that was detected by the Respondent.

The Board observes that section 63 of the Act further provides a procedure for termination, which ought to be applied as follows:-

According to section 63 (1) of the Act, termination of a procurement process is done by an accounting officer of a procuring entity prior to notification of tender award, without signing a contract. The Procuring Entity must have real and tangible evidence that supports its grounds for termination of a tender, and not merely stating the grounds provided in the aforementioned section. In the Board's view, "material governance issues having been detected" is one of the grounds requiring real and tangible evidence to support termination based on that ground.

Secondly, the Accounting Officer must submit a report to the Public Procurement Regulatory Authority within 14 days from the date of termination of a tender. Such a report must contain the reasons for termination of the tender.

Fourthly, all persons who submitted tenders must be notified within fourteen days from the date of termination and such notice must contain sufficient reasons for termination, to afford bidders the right to fair administrative action as stipulated in Article 47 of the Constitution read together with sections 5 and 6 of the Fair Administrative Actions Act, and not merely reciting the statutory language as expressed in section 63 (1) of the Act.

The Respondent submitted that it followed the procedure under section 63 (1) of the Act to the latter upon terminating the subject tender. The Respondent's letter dated 20th June 2023 in response to the instant Application states in part that the Procuring Entity undertook to file a report within 14 days from the date of termination of the tender. It goes without saying that the Board is yet to sight the said report and cannot therefore confirm whether the same has been done or not. Nonetheless, in the Board's view, following the procedure under section 63 is not sufficient, especially in this instance where the Applicant was not informed of the specific material governance issues detected by the Procuring Entity.

In totality of the foregoing, the Board finds that the Respondent failed to terminate the subject procurement process in accordance with section 63 of the Act read together with section 5 and 6 of the Fair Administrative Actions Act, 2015 and Article 10, 47, 73, 227 and 232 of the Constitution, given its failure to provide specific and sufficient information to the Applicant(s) that would have demonstrated real and tangible evidence of the material governance issue detected in the subject procurement process.

The effect of this is that thetermination notice of the subject procurement process published in MyGov.com on 13th June 2023 is null and void, hence, the Boardhas jurisdiction to entertain the Request for Review and now proceeds to address the third issue for determination.

3) Whether the letter dated 9th June 2023 is a confidential document

One of the preliminary issues raised by Mr. Okubasu, learned counsel for the Applicant, is that they required to be supplied with the documents enumerated in the Respondent's response to the Request for review and in particular the letter dated 9th June 2023 from the PPRA. It was the Respondent's submission, however, that the said letter constitutes confidential information and is accordingly protected from disclosure under section 67 of the Act.

The Board has had sight of the said letter and notes that it raises a raft of issues that the PPRA considers significant for purposes of ensuring he tender meets the principles of fairness and competitiveness contemplated under section 227 of the Act. The said letter was addressed to the Respondent and copied to the Insurance Regulatory Authority as the regulator of insurance business in Kenya ostensibly for the information of all persons falling under its regulatory ambit.

The Board has further considered the provisions of section 67(1) of the Act and notes that a holistic consideration of its provisions suggest that the same was intended to apply to information concerning evaluation of tenders with objective of ensuring confidentiality of competing bids to

ensure competitiveness and fairness in the evaluation of rival bids. The said section provides;

During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—

(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

(b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;

(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

(d) the contents of tenders, proposals or quotations.

The Respondent did not cite the specific provision under which the letter would fall. Noting however that the evaluation of tenders had not yet began as at the date of the request for review and further noting that the letter did not concern itself with the contents of rival bids the Board finds that the same is not a confidential document contemplated under section 67(1) of the Act and is accordingly not protected from disclosure. Indeed, a reading of the said letter shows that it was written by the Director General in the public interest and copied to players in the insurance industry

through their regulator. The question that then arises is how should the said letter be disclosed or supplied to parties?

Section 68(3) of the Act provides that ***After a contract has been awarded to any person or the procurement proceedings have been terminated, the procuring entity shall, on request, make the records for the procurement available to a person who submitted a tender, proposal or quotation, or any interested member of the public where such information held is aligned to the principle of public interest or, if direct procurement was used, a person with whom the procuring entity was negotiating.***

The Board's interpretation of the above provision is that on the application and upon payment of such fees as the Procuring entity may require, any person is entitled to any record relating to the terminated procurement process where such information is inter-alia aligned to the principle of public interest. As we have stated above, the information contained in the letter dated 9th June 2023 was issued by the Director General PPRA in the public interest to ensure fairness and competitiveness in the tendering process. The Applicant however chose to apply for the said information from the Board and not from the Procuring Entity as contemplated under section 68(3) above. In the event that it made the request and was denied the said information, the Board's jurisdiction would've been correctly invoked to compel the Respondent to provide the same. The Applicant was accordingly the author of its own misfortune and the Board cannot come to its rescue where the procedure clearly laid out for access to the said information was not followed.

MrOkubasu for the Applicant submitted that the termination of the subject tender was for contravening Regulation 48(1) of the Regulations 2020. The Board did not find material presented by the Applicant to support this assertion. When asked by the Board to substantiate the contravention, MrMr. Okubasu responded that the Respondent's response did not state that the decision was influenced by a recommendation by the head of procurement as required by Regulation 48. We find this assertion speculative and are not to agree with MrOkubasu's submissions.

What orders should the Board grant in the circumstances

In light of our holding on issue number 2 above, we do not think it necessary to address the other reliefs sought in the application for review save to state, for the avoidance of doubt, that the Board has no jurisdiction to issue orders touching on an existing contract. The extension or otherwise of existing contracts by service providers is accordingly outside our purview by dint of section 167(4)(c) of the Act.

Similarly, the Board cannot issue an order whose effect would be to tie down the Respondent to the current procurement process *in any event.* The Board is cognizant of a myriad of reasons in law why a tender may be re-issued some of which have not been the subject of the instant request for review. To pre-empt the same as the Applicant alludes to in the prayers sought in the Request for Review would be ultravires the Board's powers and we decline the invitation to that end. In the event that the Applicant's apprehensions come to pass, this Board remains available to address the same should any party aggrieved by such action demonstrate that the same was afoul of the law.

Given the above, the Board will now make the following final 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 15th June 2023:

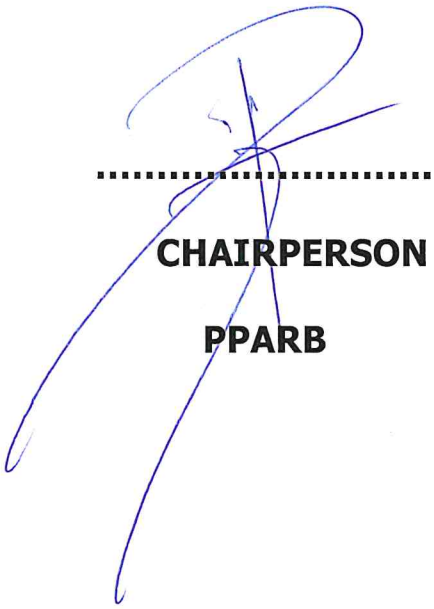
1) **A declaration be and is hereby issued that the termination of Tenders No. NHIF/002/20222-2023; NHIF/032/2022-2023; NHIF/033//2022-2023; NHIF/035//2022-2023; NHIF. 036/ NHIF 037//2022-2023 was not in accordance with section 63of the Act and is accordingly null and void.**

2) **An order quashing the decision published on 13th June 2023 terminating Tenders No. NHIF/002/20222-2023; NHIF/032/2022-2023; NHIF/033//2022-2023; NHIF/035//2022-2023; NHIF. 036/ NHIF 037//2022-2023.**

3) **The Respondent is directed to proceed with the procurement process in strict compliance with the Applicable lawtaking into considerations the findings of the Board made in this decision**

4) **As the procurement process is still ongoing, each party to bear its costs.**

Dated at NAIROBI, this 7thDay of July2023.



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CHAIRPERSON

PPARB

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SECRETARY

PPARB