REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 60/2023 OF 22ND AUGUST 2023

BETWEEN

CANDY AND CANDY CLEAN SERVICES LIMITED .... APPLICANT

AND

CHIEF PRINCIPAL/COUNCIL SECRETARY

THE KISUMU NATIONAL POLYTECHNIC .... 1ST RESPONDENT

THE KISUMU NATIONAL POLYTECHNIC ....2ND RESPONDENT

Review against the decision of the Chief Principal/Council Secretary, The Kisumu National Polytechnic in relation to Tender No. TKNP/T/2023/2024/9 for Provision of Cleaning Services.

BOARD MEMBERS PRESENT

1. Mr. George Murugu - Chairperson
2. Ms. Alice Oeri - Member
3. CPA Isabel Juma - Member
4. Mr. Jackson Awele - Member
5. Eng. Lilian Ogombo - Member

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

PRESENT BY INVITATION

APPLICANT	**CANDY AND CANDY CLEAN SERVICES LIMITED**
Mr. Ojijo	-Ojijo Senaji & Associates Advocates
RESPONDENTS	**CHIEF PRINCIPAL/ COUNCIL SECRETARY, THE KISUMU NATIONAL POLYTECHNIC & THE KISUMU NATIONAL POLYTECHNIC**
1. Ms. Sarah Juma	-Office of the Attorney General
2. Ms. Catherine Kelonye	- Chief Principal/County Secretary

BACKGROUND OF THE DECISION

The Tendering Process

1. The Kisumu National Polytechnic, the Procuring Entity and the 2nd Respondent herein, invited sealed tenders from qualified and interested tenderers in response to **Tender No. TKNP/T/2023/2024/9 for Provision of Cleaning Services (hereinafter referred to as the "subject tender").**

2. The Invitation to Tender was by way of an advertisement dated 9th June 2023 placed in print media, in the 2nd Respondent's website www.kisumupoly.ac.ke and on the Public Procurement Information

Portal (PPIP) (www.tenders.go.ke) where the blank tender document for the subject tender issued to tenderers by the 2nd Respondent (hereinafter referred to as the 'Tender Document') was available for download. The Tender Notice/Prequalification/ Registration of Suppliers **referred to Tender No. TKNP/T/2023/2024/9 for Provision of General Cleaning Services. Also referred to as Tender Name: Provision of Cleaning and Ground Maintenance Services**. The subject tender's submission deadline was scheduled for 23rd June 2023 at 11.00 a.m.

Submission of Tenders and Tender Opening

3. According to the Minutes of the subject tender's opening held on 23rd June 2023 signed by members of the Tender Opening Committee (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1stRespondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'),a total of seventeen (17) tenders were submitted in response to Tender No. TKNP/T/2023/2024/9 for Provision of General Cleaning Services and a total of eight (8) tenders were submitted in response to a tender referred to as No. TKNP/T/2023/2024/15 for Provision of Ground Maintenance Services.

4. The said seventeen (17) tenders that were submitted in response to Tender No. TKNP/T/2023/2024/9 for Provision of General Cleaning Services and opened in the presence of tenderers' representatives present at the tender opening session were recorded as follows:

No.	Name of Tenderer
1.	Vijan Supplies
2.	Jepco Services
3.	Saham Cleaning Services Ltd
4.	Neat Hygiene Services
5.	Vinstar Express Services
6.	Outlands Express Services Ltd
7.	Candy and Candy Clean Services Ltd
8.	Tenday Express Ltd
9.	Crystal Consolidated Ltd
10.	Asonet Cleaning Co. Ltd
11.	Kanjo Investments
12.	Garbage Hero Ltd
13.	Ice Clean Care GR. Co. Ltd
14.	Goshen Point Cleaning Services Ltd
15.	Colnet Ltd
16.	Topler Global Ltd
17.	Joymax Enterprises

5. The said eight (8) tenders that were submitted in response to reference TKNP/T/2023/2024/15 for Provision of Ground Maintenance Services and opened in the presence of tenderers' representatives present at the tender opening session were recorded as follows:

No.	Name of Tenderer
1.	Vitalico Enterprises
2.	Neat Hygiene Services Ltd
3.	Garbage Hero Ltd
4.	Joymax Enterprises
5.	Kanjo Investments
6.	Ice Clean Care GR. Co. Ltd
7.	Colinet Ltd
8.	Getros Co. Ltd

Evaluation of Tenders

6. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the seventeen (17) tenders that were submitted in response to Tender No. TKNP/T/2023/2024/9 for Provision of General Cleaning Services and eight (8) tenders that were submitted in response to a Tender referred to as No. TKNP/T/2023/2024/15 for Provision of Ground Maintenance Services as captured in a Tender Evaluation Report

and Recommendation for Award of Contract for Provision General Cleaning Services Tender No. TKNP/T/2023/2024/9 and a Tender Evaluation Report and Recommendation for Award of Contract for Provision Ground Maintenance Services TKNP/T/2023/2024/15 both signed by members of the Evaluation Committee on 9th August 2023 (hereinafter referred to as the "Evaluation Reports") in the following stages:

i Preliminary Examination;

ii Technical Evaluation; and

iii Financial Evaluation.

Preliminary Examination

7. The Evaluation Committee carried out a Preliminary Examination and examined tenders for responsiveness using the criteria provided under Clause 2. Mandatory Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 30 to 31 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the Technical Evaluation stage.

8. At the end of evaluation at this stage, in Tender No. TKNP/T/2023/2024/9 for Provision of General Cleaning Services seven (7) tenders were determined non-responsive and ten (10) tenders including the Applicant's tender were determined responsive while in Tender No. TKNP/T/2023/2024/15 for Provision of Ground Maintenance Services eight (8) tenders were determined non-responsive and eight

(8) tenders were determined responsive. All the responsive tenders at this stage proceeded to Technical Evaluation.

Technical Evaluation

9. At this stage of evaluation, the Evaluation Committee examined tenders using the criteria set out under Clause 2 Tender Evaluation (ITT 35) of Section III- Evaluation and Qualification Criteria at page 31 to 32 of the Tender Document. Tenders were required to score at least 70 points out of maximum possible 100 points to proceed to Financial Evaluation.

10. At the end of evaluation at this stage, in Tender No. TKNP/T/2023/2024/9 for Provision of General Cleaning Services seven (7) tenders were determined non-responsive and three (3) tenders including the Applicant's tender were determined responsive while in Tender No. TKNP/T/2023/2024/15 for Provision of Ground Maintenance Services one (1) tender was determined non-responsive and three (3) tenders were determined responsive. All the responsive tenders at this stage proceeded to Financial Evaluation.

Financial Evaluation

11. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 2 Price Evaluation of Section III- Evaluation and Qualification Criteria at page 32 of the Tender Document. The Evaluation Committee noted that award was to be made on the basis of the lowest evaluated tenderer and that tenderers quoted as follows:

a) In Tender No. TKNP/T/2023/2024/9 for Provision of General Cleaning Services

Table 6 C. Financial Evaluation

Tender No.	***Tenderer's Name***	***Read-out Tender Price(s)***		***Exchange rate used in KES***	***Corrected Tender Price(s) in KES***	***ERROR in KES***	***% ERROR***	***ERROR MAJOR /NOT MAJOR***	***Remarks***
TKNP/T/2023/2024/9	***Provision of General Cleaning Services***	***Description of services***	***Currencies Amount(s) inclusive of discounts (Ksh)***						
		A	***B***	***C***	***D***	***E***	***F***	***G***	***H***
7	***CANDY AND CANDY CLEAN SERVICES LTD***		***710,000.00 p.m.***		***710,000.00 p.m.***				***Recommended***
17	***JOYMACX ENTERPRISES***		***970,456.00 p.m.***		***970,456.00 p.m.***				***3***
12	***GARBAGE HERO LTD***		***900,000.00***		***900,000.00 p.m.***				***2***

b) In Tender No. TKNP/T/2023/2024/15 for Provision of Ground Maintenance Services

Table 6 C. Financial Evaluation

Tender No.	***Tenderer's Name***	***Read-out Tender Price(s)***		***Exchange rate used in KES***	***Corrected Tender Price(s) in KES***	***ERROR in KES***	***% ERROR***	***ERROR MAJOR /NOT MAJOR***	***Remarks***
TKNP/T/2023/2024/15		***Provision of ground maintenance services***	***Currencies Amount(s) inclusive of discou***						

			nts (Ksh)						
		A	***B***	***C***	***D***	***E***	***F***	***G***	***H***
2	***NEAT HYGIENE SERVICES LTD***		***4,320,000 p.a.***		***360,000 p.m.***				***Recommended***
3	***GARBAGE HERO LTD***		***4,800,000 p.a.***		***400,000 p.m.***				
4	***JOYMAX ENTERPRISES***		***451,959.00 p.m.***		***451,959.00 p.m.***				

12. Based on the above, the Applicant's tender was found to be the lowest evaluated tender under Tender No. TKNP/T/2023/2024/9 for Provision of General Cleaning Services at Kenya Shillings Seven Hundred and Ten Thousand only (Kshs. 710,000.00) per month and was recommended for award while the tender by Neat Hygiene Services Ltd was found to be the lowest evaluated tender under Tender No. TKNP/T/2023/2024/15 for Provision of Ground Maintenance Services at Kenya Shillings Four Million Three Hundred and Twenty Thousand only (Kshs. 4,320,000.00) per annum and was recommended for award

Evaluation Committee's Recommendation

13. The Evaluation Committee determined the tender submitted by the Applicant with respect to Tender No. TKNP/T/2023/2024/9 for Provision of General Cleaning Services was the lowest evaluated responsive tender and recommended award to the Applicant at the total cost of Kenya Shillings Seven Hundred and Ten Thousand only (Kshs.

710,000.00) per month and also determined that the tender submitted by Neat Hygiene Services Ltd with respect to Tender No. TKNP/T/2023/2024/15 for Provision of Ground Maintenance Services was the lowest evaluated responsive tender and recommended award to Neat Hygiene Services Ltd at the total cost of Kenya Shillings Four Million Three Hundred and Twenty Thousand only (Kshs. 4,320,000.00) per annum.

First Professional Opinion

14. In a Professional Opinion dated 9th August 2023 (hereinafter referred to as the " First Professional Opinion"), in reference to Tender No. TKNP/T/2023/2024/9 for Provision of General Cleaning Services, the Supply Chain Manager, Mr. Milton Omollo, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and noted that the recommended price for the subject tender was above budget and had not satisfied the constitutional requirement of Article 227(1) and statutory requirements of the Act. He recommended termination of the procurement proceedings pursuant to Section 63(1)(b) of the Act.

15. Thereafter, the 1st Respondent herein, approved the Professional Opinion on 17th August 2023 indicating at the comment section that the tender proceedings stand cancelled.

Second Professional Opinion

16. In a Professional Opinion dated 9th August 2023 (hereinafter referred to as the " Second Professional Opinion"), in reference to Tender No.

TKNP/T/2023/2024/15 for Provision of Ground Maintenance Services, the Supply Chain Manager, Mr. Milton Omollo, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and noted that the recommended price for the subject tender was above budget and had not satisfied the constitutional requirement of Article 227(1) and statutory requirements of the Act. He recommended termination of the procurement proceedings pursuant to Section 63(1)(b) of the Act.

17. Thereafter, the 1st Respondent herein, approved the Second Professional Opinion on 17th August 2023 indicating at the comment section that the tender proceedings stand cancelled.

Notification to Tenderers

18. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 18th August 2023 signed by the 1st Respondent.

REQUEST FOR REVIEW NO. 60 OF 2023

9. On 22nd August 2023, the Applicant filed a Request for Review dated 22nd August 2023 together with a letter 21st August 2023 signed by Charles Sind, its Chief Executive Officer (hereinafter referred to as the 'Request for Review') through the firm of Wachira Gachoka & Company Advocates seeking the following orders from the Board in verbatim:

a) Tender be awarded as there is sufficient budget and our bid amount is within the estimated procurement plan 2023/2024.

b) Set aside the decision of the Procuring Entity to cancel the proceeding.

10. In a Notification of Appeal and a letter dated 22nd August 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 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 22nd August 2023.

11. On 28th August 2023, in opposition to the Request for Review, the Respondents, through Catherine Kelonye, the 1st Respondent herein, a letter in response to the request for review dated 25th August 2023 together with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.

12. Vide letters dated 28th August 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days from 28th August 2023.

13. Vide a Hearing Notice dated 31st August 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 6th September 2023 at 1:00 PM, through the link availed in the said Hearing Notice.

14. On 1st September 2023, the Applicant filed through Ojijo Senaji & Associates Advocates a Notice of Change of Advocates dated 31st August 2023 together with a letter dated 1st September 2023.

15. On 5th September 2023, the Applicant filed through Ojijo Senaji & Associates Advocates a Further Affidavit sworn on 5th September 2023 by Charles Sindi, its Chief Executive Officer.

16. On 5th September 2023, the Respondents filed, via email, through Callen Masaka, Principal Litigation Counsel for the Attorney General a Memorandum of Appearance dated 5th September 2023 together with a Response to Request for Review dated 5th September 2023.

17. At the hearing of the instant Request for Review, parties confirmed that they had exchanged pleadings and all filed documents in the instant Request for Review. The Board directed that the Applicant who would be heard on its case and thereafter the Respondents would be heard on their case followed by a rejoinder by the Applicant on issues of law only. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submissions

18. Mr. Ojijo submitted that the Applicant is a reputable company incorporated in Kenya and deals with cleaning services. He further submitted that the 2nd Respondent advertised the subject tender on 9th June 2023 in print media as well as its website and subsequently, the Applicant tendered for the same by submitting its tender documents on 23rd June 2023.

19. Counsel added that upon tendering, evaluation of tenders submitted in the subject tender was done and recommendation of award made as confirmed at paragraph 3 of the Respondents response dated 25th August 2023 where the recommended award amount for the general cleaning services was Kshs. 8,520,000.00 which was within range of financial bid by the Applicant.

20. Mr. Ojijo submitted that on 18th August 2023 after evaluation was done, a letter of cancellation was sent to the Applicant on grounds of inadequate budgetary provision pursuant to Section 63(1)(b) of the Act. Mr. Ojijo's contention was that the letter cancelling the tendering process did not indicate when this decision to cancel/terminate the tendering process was made since such notification ought to be done within 14 days of determination, and that the reason issued in the said letter dated 18th August 2023 bears only one simple sentence yet according to Section 63 of the Act there is need for reasons for termination which are sufficient, detailed and convincing in nature. He referred the Board to the holding of the Court of Appeal in *Prof. Ndungu vs EACC [2018] Eklr.*

21. Mr. Ojijo pointed out that there was a clear indication on the 2nd Respondent's portal that there was a sufficient budget and that there is no proof of a detailed report issued to the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") as required by Section 63 of the Act.

22. Counsel took issue with the Respondents' rebuttal that the budget allocation on the website was not an offer and was not binding and submitted that where a public institution has published on its website a report that any citizen uses to make a decision, such repot is binding and the Respondents position on this issue was invalid.

23. Counsel further took issue with the Respondents' rebuttal that the reason for insufficient budgetary provision is that the budget was

required to be for two tenders and submitted that according to the subject tender's advert, the two tenders were advertised separately. Mr. Ojijo further submitted that the tender the Applicant submitted was in regard to Tender No. TKNP/T/2023/2024/9 for Provision of General Cleaning Services and that the Respondents were insinuating that the budget was for another tender referenced as Tender No. TKNP/T/2023/2024/15 for Provision of Ground Maintenance Services.

24. Counsel submitted that the two tenders were not related either in class or services offered and each tender had its own budget as per the Respondents' financial reports where the budget was set at Kshs. 8,571,400.00 in reference to the subject tender and it was not to be mixed with any other tender. Mr. Ojijo further submitted that the tender number would have covered the two tenders with a reference either as section b or part 2 with an indication of allocation of a shared budget.

25. Mr. Ojijo submitted that since the Respondents do not disclose when the approved budget was issued and who approved the same their argument was an afterthought, the process was unfair and as such, the cancellation ought to be place aside.

Respondents' Submissions

26. Counsel for the Respondents, Ms. Juma, submitted that a budget plan had been posted on the Respondents portal which had provided for outsourced cleaning services at a budget of Kshs. 8,571,400.00. She

further submitted that when the Respondents advertised for the open subject tender, it was their intention that both the cleaning and maintenance would amount to a total of Kshs. 8,571,400.00.

27. Counsel contented that the Respondents had discovered that tenders recommended for award superseded the approved budget by treasury and the budget in their portal and as such, there was a need to rectify this issue since there was inadequate funds and a budget deficit of Kshs. 4,268,600.00

28. Ms. Juma submitted that according to Section 53 of the Act, a budget plan is just an invitation and not an offer and hence not binding parties and it was the responsibility of the 1st Respondent to ensure that all tenders awarded are within the approved budget.

29. Counsel pointed out that pursuant to Section 63 of the Act, it is in order to cancel or terminate procurement proceedings due to inadequate funds and that the Applicant and tenderers were notified of the inadequacy.

30. Ms. Juma submitted that the Respondents were to notify the Authority of the termination of the procurement proceedings but discovered upon receipt of the instant Request for Review and Notification of Appeal that the procurement proceedings had been suspended.

31. Upon enquiry by the Board on whether any written report was given to the Authority on the termination of the subject tender within 14 days, Ms. Juma submitted that tenders were cancelled on 18th August 2023 and on 22nd August 2023, the Respondents were served with the instant Request for Review together with a Notification of Appeal notifying them that all proceedings in the procurement process stood suspended and as such, they saw no need of preparing a separate notice and giving a detailed response on why the tender was terminated.

32. The Board sought clarification on whether the Respondents considered negotiations to bring down proposed tender prices to which Ms. Juma submitted that the Respondents did not but considered re-advertising the tender for the outsourced services to be re-advertised as one.

33. Upon enquiry by the Board on whether the two tenders regarding the general cleaning services and ground maintenance were related and if so, why they were not harmonized, Ms. Juma submitted that both tenders, though separate, were under the outsourced cleaning services category, had one budget and were required to amount to a total of Kshs. 8,571,400.00. She further stated that the Respondents did not harmonize them since they wanted two separate service providers for efficiency.

34. When asked to clarify to the Board whether the Approved Budget had any provision for ground maintenance, Ms. Juma submitted that there were none and only outsourced services was provided for. She further submitted that there was no separate budget for general cleaning services.

Applicant's Rejoinder

35. In a rejoinder, Counsel for the Applicant, Mr. Ojijo submitted that Section 63(1) of the Act cannot stand on its own if not read with Section 63 (2), (3), and (4) of the Act. He further pointed out that Section 53(2) of the Act provides who is responsible for preparation of the budget and who is responsible for issuing a professional opinion.

36. Counsel submitted that Article 227 of the Constitution provides a framework within which a public entity ought to conduct itself which the 2nd Respondent has failed to uphold.

37. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 22nd August 2023 was due to expire on 11th September 2023 and that the Board would communicate its decision on or before 11th September 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

38.The Board has considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination.

A. **Whether the termination of the procurement proceedings in the subject tender was valid in accordance with Section 63 of the Act?**

B. **What are the appropriate orders to grant in the circumstances?**

Whether the termination of the procurement proceedings in the subject tender is valid?

39.Central to the instant Request for Review is the manner in which the Respondents terminated the procurement proceedings in the subject tender. It is the Applicant's case that it participated in the tendering process and its submitted tender was within the estimated market price as contained in the 2nd Respondent's Consolidated Annual Procurement Plan for the financial year 2023/2024 dated 26th July 2023 and which was published on the 2nd Respondent's website in line with Executive Order No. 2 of 2018 and the Authority's guidelines. During the hearing, counsel for the Applicant Mr. Ojijo submitted that the Respondent's decision to terminate the procurement proceedings in the subject tender failed to uphold the principles envisioned under Article 227(1) of the Constitution and that the termination of the subject tender was unfair and ought to be set aside.

40. On the other hand, it is the Respondents case that in the financial year 2023/2024 the approved budget provided for outsourced cleaning services at an estimate of Kshs. 8,571,400.00 only which included both general cleaning services for buildings and ground maintenance. The Respondents contend that during the initiation of the procurement process, these services were advertised separately as (a) Tender No. TKNP/T/23/24/9-General Cleaning Services and (b) Tender No. TKNP/T/23/24/15-Ground Maintenance. The Respondents further contend that the due process was observed in evaluation of submitted tenders and the recommended prices for both general cleaning services and ground maintenance services gave a total of Kshs. 12,840,000.00 resulting to a budget deficit of Kshs. 4,268,600.00 leading to termination of the procurement proceedings by virtue of Section 63(1)(b) of the Act and this was communicated to all tenderers in the subject tender.

41. During the hearing counsel for the Respondents submitted that in terminating the subject tender, the Respondents considered re-advertisement of the subject tender where the two services would be consolidated as one.

42.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) ...."

43. Further to the above, 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 of the Constitution 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].

44. 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.

45. Termination of procurement proceedings is governed by Section 63 of the Act and we note that 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.

46.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."

47. Section 63 (1) of the Act stipulates that termination of procurement proceedings is only done 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) 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, <u>a procuring entity must demonstrate compliance</u> with both the substantive and procedural requirements under Section 63 of the Act.

48. 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 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.

49. 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 Respondent's decision to re-advertise the subject tender.

50. We note from the confidential documents submitted by the 1st Respondent to the Board pursuant to Section 67(3)(e) of the Act that the 2nd Respondent had an Approved Detailed Budget for the Financial Year 2023/2024 which consisted of an Approved Statement of Recurrent and Expenditure budget whereby Outsourced Services-Cleaning was approved at a total amount of Kshs. 8,571,400.00

51. We further note that the Respondents issued a Tender Notice/Prequalification/Registration of Suppliers dated 9th June 2023 advertising for the following tender:

TENDERS 2023/2024

Tender No.	***Item Description***	***Category***
....	*......................*	*........................*
....	*......................*	*........................*
TKNP/T/2023/2024/9	***Provision of General Cleaning Services***	***Open***
....	*....................*	*..................*
....	*....................*	*..................*

52. Subsequently, the 2nd Respondent invited sealed tenders for the Provision of Cleaning Services under reference number TKNP/T/2023/2024/9 being the subject tender under challenge in the instant Request for Review. According to the Tender Document we note that:

a) Page ix of the Tender Document provides for an Invitation to Tender whereby the subject tender is described to be for the Provision of Cleaning Services;

b) Page viii of the Tender Document describes the tender name as Provision of Cleaning and Ground Maintenance Services under Invitation to Tender (ITT) No. TKNP/T/2023/2024/9.

c) Section II- Tender Data Sheet (TDS) under ITT 1.1 at page 26 of the Tender Document provides the reference number for the tender as TKNP/T/2023/2024/9 describing the tender to be for Provision of Cleaning Services.

d) Page 59 of the Tender Document provided for Work Schedules and Specifications made up of, inter alia, Cleaning of Lavatories/Washrooms in the Various Buildings, Cleaning of Offices in the Various Buildings, and Cleaning of Classrooms & Workshops in the Various Buildings.

e) Page 60 of the Tender Document provided tenderers with the Specifications and Priced Activity Schedule as follows:

The Specifications and Priced Activity Schedules

Date____ ITT No:_____, Alternative No:__________Page No___of________						
1	***2***	***3***	***4***	***5***	***6***	***7***
Service No.	***Description of Services***	***Unit***	***Delivery Date***	***Quantity and Physical Unit***	***Unit Price***	***Total Price per Service(Col. 5*6)***

Service line 1	***Cleaning of offices, Buildings' within the Institutions per Month***					
Service line No. 2	***Maintenance all planted/developed open area including trees, lawns, shrubs, flowering plants, flower tables etc.***					
SITE VISIT MANDATORY					***Total Tender Price***	

Name of Tenderer [insert complete name of Tenderer] Signature of Tenderer [signature of person signing the Tender] Date [insert date]

53. Our interpretation of the aforementioned Approved Budget of the 2nd Respondent, Tender Notice, and provisions of the Tender Document is as follows:

a) the 2nd Respondent's Approved Budget provided for outsourced contracted cleaning services at a budget of Kshs. 8,571,400.00 with no categorization of what the outsourced cleaning services entailed;
b) the 2nd Respondent invited tenderers to submit tenders in response to one tender being Tender No. TKNP/T/2023/2024/9 for Provision of General Cleaning Services.
c) in response to Tender No. TKNP/T/2023/2024/9 for Provision of General Cleaning Services, tenderers were required to submit their tenders in line with the provisions of the 2nd Respondent Tender Document and in consideration of the both the Work Schedules and Specifications and the Specifications and Priced Activity Schedules;
d) tenderers were under an obligation to have attended a mandatory site visit prior to filling in and submitting the Specifications and Priced Activity Schedules forming part of their tender documents;
e) in submitting its tender document, a tenderer could provide a quote for service line 1 described as cleaning of offices, Buildings within the institution per month or for service line 2 described as maintenance all planted/ developed open areas including trees, lawns, shrubs, flowering plants, flower tables e.t.c or both while filling in the total tender price for the service(s) tendered; and
f) the total tender price for either service line 1 or service line 2 or both were required to be within the Approved Budget for

outsourced contracted cleaning services provided at Kshs. 8,571,400.00

54.Turning to the circumstances in the instant Request for Review, according to the Applicant's original tender submitted to the Board as part of the confidential file pursuant to Section 67(3)(e) of the Act, the Applicant tendered for Provision of Cleaning and Ground Maintenance with its reference as Tender No. TKNP/T/2023/2024/9.

55.We note that the Applicant provided at page 00005 of it tender a scope of work as follows:

"SCOPE OF WORK

We are going to cover the following areas by cleaning & maintenance:

- ***Dust and disinfect (where appropriate) furniture, include desktops, computer equipment, telephone, doors, window, glass surfaces, wooden surfaces, tiles, tables and chairs with appropriate detergent***
- ***Dust vertical blinds***
- ***Remove cobwebs both inside and outside the buildings***
- ***Clean all restrooms, mirrors, hand-wash basins, urinal basins with appropriate detergents***
- ***Clean floors (terrazzo, cement, granite, tiles) with appropriate detergent and clothe***
- ***Vacuum all carpets when required***
- ***Cleaning of stairways***

- *Clean compound and paths around the offices*
- *Clearing of the sewer/unblocking and disposal of waste*
- *Disinfecting and cleaning dustbins*
- *Sweeping and cleaning of all the parking's in offices, depots and staff residential*
- *Cleaning of all the parking area (concrete and cabro)*
- *Weeding and Watering flowers*
- *Removal of stains from the wall*
- *Fill paper towel dispensers and toilet paper to holders"*

56. The Applicant also provided at page 00023 the Specifications and Priced Activity Schedules as follows:

The Specifications and Priced Activity Schedules

Date 23rd June 2023 ITT No:TKNP/T/2023/2024/9, Alternative No:___NOT__Page No_62__of________						
1	***2***	***3***	***4***	***5***	***6***	***7***
Service No.	***Description of Services***	***Unit***	***Delivery Date***	***Quantity and Physical Unit***	***Unit Price***	***Total Price per Service(Col. 5*6)***
Service line 1	***Cleaning of offices, Buildings' within the***	***30***	***5th of every month***	***30***	***710,000.00***	***710,000.00***

	Institutions per Month					
Service line No. 2	***Maintenance all planted/developed open area including trees, lawns, shrubs, flowering plants, flower tables etc.***	***15***	***5th of every month***	***15***	***560,510.17***	***560,510.17***
SITE VISIT MANDATORY					***Total Tender Price***	***1,270,510.17***

57.In essence, the Applicant tendered for both Service Line 1 Cleaning of offices, Buildings within the Institutions per Month and Service Line 2 Maintenance all planted/developed open areas including trees, lawns, shrubs, flowering plants, flower tables as provided under Tender No. TKNP/T/2023/2024/9.

58.We have carefully studied the Evaluation Reports submitted to the Board pursuant to Section 67(3)(e) of the Act and note that despite the Applicant having tendered for both service line 1 and service line

2 as provided for in the Tender Document, it was only evaluated for under the evaluation conducted for Provision of General Cleaning Services and was not evaluated nor considered under the evaluation conducted for the Provision of Ground Maintenance Services.

59.It is also imperative to note that a close look at the original tender of Neat Hygiene Services Ltd, being the tenderer recommended for award of Provision of Ground Maintenance Services by the Evaluation Committee, indicates that Neat Hygiene Services Ltd in its Specifications and Priced Activity Schedules at page 318 of its tender only tendered for Service Line 2 Maintenance all planted/developed open areas including trees, lawns, shrubs, flowering plants, flower tables as provided under Tender No. TKNP/T/2023/2024/9 at a total tender price of Kshs. 660,000/= per month VAT inclusive totaling to Kshs. 7,920,000/= per annum as indicated in its Form of Tender at page 99 of its tender.

60.However, according to the both the Tender Opening Register and the Evaluation Report bearing the tender description as Provision of Ground Maintenance Services, both the Tender Opening Committee and the Evaluation Committee noted at the Financial Evaluation stage that Neat Hygiene Services Ltd provided a tender price of Kshs. 360,000/= p.m. totaling to Kshs. 4,320,000/= per year. This shows a huge discrepancy or inconsistency between the price submitted by Neat Hygiene Services Ltd in its tender and the price recorded and considered for evaluation by the 2nd Respondent's Evaluation Committee.

61. Without going through all other tenders submitted by tenderers in the subject tenders, doubts arise as to how evaluation and comparison of tenders was conducted by the 2nd Respondent's Evaluation Committee.

62. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

> ***"80. Evaluation of tenders***
>
> ***(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.***
>
> ***(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.***

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.

(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations.

(6) The evaluation shall be carried out within a maximum period of thirty days.

(7). The evaluation report shall be signed by each member of evaluation committee."

63. Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.

64. With the foregoing in mind, for the Respondents to rightly establish that there was inadequate budgetary provision in the subject tender, it ought to have carried out proper evaluation and comparison of all tenders submitted in the subject tender resulting to a correct recommendation in terms of the lowest evaluated tenderers for either service line 1 described as cleaning of offices, Buildings within the institution per month or for service line 2 described as maintenance all planted/ developed open areas including trees, lawns, shrubs, flowering plants, flower tables e.t.c or both in fulfillment of the substantive requirements for termination of procurement proceedings as required by Section 63 of the Act.

65. During the hearing of the instant Request for Review, the Respondents admitted to having not issued a written report to the Director General of the Authority on termination of the subject tender within fourteen days outlining the reasons why the subject tender was terminated. As such, the Respondents have not fulfilled the procedural statutory pre-conditions for the termination of procurement proceedings as required by Section 63 of the Act.

66. We note that this Board in **PPARB Application 94 of 2022** referred to the holding in **Republic v Public Procurement Administrative Review Board & another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR**, where the court held that:

> ***"In a nutshell therefore, <u>the procuring entity is under a 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</u>." [Emphasis ours]***

67. 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 subject tender was unlawful and illegal.

68. Accordingly, we find that the termination of the subject tender's procurement proceedings by the 1st Respondent was not effected in accordance with Section 63 of the Act and the same is therefore null and void.

What are the appropriate orders to grant in the circumstances?

69. The Board has found that the decision of the Respondents to terminate the subject 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 1st Respondent to terminate the procurement proceedings of the subject tender.

70. We find it just and fit to order the 1st Respondent to direct the Evaluation Committee to re-evaluate all tenders submitted in response to Tender No. TKNP/T/2023/2024/9 for Provision of Cleaning Services taking into consideration the findings of this Board and the provisions of the Tender Document, the Act and the Constitution.

71. This Board is cognizant of provisions under Section 131 and 132 of the Act which gives room to the Accounting Officer and a tenderer to

engage in competitive negotiations where the lowest evaluated price exceeds the available budget. Section 131 of the Act provides as follows:

131. Competitive Negotiations

An accounting officer of a procuring entity may conduct competitive negotiations as prescribed where—

(a) ...

(b) ...

(c) <u>the lowest evaluated price is in excess of available budget;</u>

72. The procedure for the competitive negotiations is outlined in Regulation 100 of the Regulations 2020 as follows:

"100. Procedure for competitive negotiations

(1) In using competitive negotiations as provided for under section 131 of the Act and in applying the procedure set out in section 132 of the Act, an accounting officer of a procuring entity shall appoint an ad hoc evaluation committee pursuant to section to 46(4) of the Act to negotiate with the bidder on the recommendation of the head of the procurement function.

(2) Tenders shall be evaluated by the evaluation committee constituted in the initial phase of the proceedings.

(3) The accounting officer of a procuring entity shall request the identified vendors to revise their bids by submitting the best and final offer within a period not exceeding seven days.

(4) The revised prices shall not compromise the quality or specifications of the original tender.

(5) The members of the evaluation committee conducting the negotiation under paragraph (1) shall prepare a report of the negotiation and submit it to the head of procurement function for professional opinion and onward submission to the accounting officer for approval.

(6) The report prepared under paragraph (5) shall form part of the procurement records.

(7) A procuring entity shall, prior to applying the procedure referred to in this regulation, invite the concerned suppliers to submit their bids for competitive negotiations.

73. The import of the above provisions is that the 2nd Respondent may conduct competitive negotiations where on conclusion of evaluation of submitted tenders, the lowest evaluated price is in excess of the available budget. Should such competitive negotiations fail, it is at liberty to proceed and terminate the subject tender in accordance with the provisions of Section 63 of the Act.

74. The upshot of our findings is that the instant Request for Review succeeds with respect to the following specific orders:

FINAL ORDERS

75. 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 22nd August 2023:

1. **The Letters dated 18th August 2023 issued by the 1st Respondent terminating Tender No. TKNP/T/2023/2024/9 for Provision of Cleaning Services on grounds of inadequate budgetary provision be and are hereby nullified and set aside.**

2. **The 1st Respondent is hereby ordered to direct the 2nd Respondent's Evaluation Committee to re-admit all tenders submitted in response to Tender No. TKNP/T/2023/2024/9 for Provision of Cleaning Services and proceed with re-evaluation of all tenders submitted in response to Tender No. TKNP/T/2023/2024/9 for Provision of Cleaning Services in accordance with the provisions of the Tender Document, the Act, Regulations 2020, Article 227 of the Constitution within 14 days from the date hereof while taking into consideration the Board's findings in this Request for Review.**

3. Further to Order No. 2 above, the Respondents are at liberty to engage in competitive negotiations if the lowest evaluated tender price(s) exceeds the available budget in accordance with Section 131 of the Act read with Regulation 100 of Regulations 2020.

4. Further to Order No. 3 above, should the Respondents opt not to pursue competitive negotiations or competitive negotiations fail, the Respondents may terminate the procurement proceedings in the subject tender in line with the provisions of Section 63 of the Act.

5. Given that the procurement process for the subject tender is not complete each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 11th Day of September 2023.

....	....
CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**