

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 75/2023 OF 11TH OCTOBER 2023

BETWEEN

ASTRONEA CONSTRUCTION LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

COUNTY GOVERNMENT OF BOMET1ST RESPONDENT

COUNTY GOVERNMENT OF BOMET 2ND RESPONDENT

BIOMAX AFRICA LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer, County Government of Bomet in relation to Tender No. CGB/TETII/001/2023/2024 for Proposed Construction of County Aggregation and Industrial Parks.

BOARD MEMBERS PRESENT

- | | |
|-------------------------------|-------------------|
| 1. Mr. George Murugu, FCI Arb | Panel Chairperson |
| 2. Mr. Jackson Awele | Member |
| 3. Dr. Susan Mambo | Member |
| 4. Dr. Paul Jilani | Member |
| 5. Mr. Daniel Langat | Member |

IN ATTENDANCE

- | | |
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| 1. Mr. James Kilaka | - Acting Board Secretary |
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PRESENT BY INVITATION

APPLICANT

ASTRONEA CONSTRUCTION LIMITED

Ms. Caroline Oduor

Advocate, Caroline Oduor & Associates

RESPONDENTS

**THE ACCOUNTING OFFICER,
COUNTY GOVERNMENT OF BOMET &
COUNTY GOVERNMENT OF BOMET**

Mr. Cosmas Koech

Advocate, County Government of Bomet

INTERESTED PARTY

BIOMAX AFRICA LIMITED

Mr. Sang

Advocate, Chege & Sang Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. County Government of Bomet, the Procuring Entity and the 2nd Respondent herein, invited sealed tenders from qualified and interested tenderers in response to Tender No. CGB/TETII/001/2023/2024 for Proposed Construction of County Aggregation and Industrial Parks (hereinafter referred to as the "subject tender"). Tendering was conducted under open competitive method (National) and the invitation

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was by way of an advertisement in the Daily Nation Newspaper on 11th August 2023 and on the 2nd Respondent's website www.bomet.go.ke and on the Public Procurement Information Portal (PIIP) (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 subject tender's submission deadline was scheduled for Tuesday, 22nd August 2023 at 11.00 a.m.

Submission of Tenders and Tender Opening

2. According to the Minutes of the subject tender's opening held 22nd August 2023 signed by members of the Tender Opening Committee on 22nd August 2023 (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 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of seven (7) tenders were submitted in response to the subject tender. The said seven (7) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

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No.	Name of Tenderer	Code
1.	Kalexis Limited	B1
2.	Wak Construction Limited	B2
3.	Cathemax Investment Ltd	B3
4.	Sahjanad Construction	B4
5.	Biomax Africa Ltd	B5
6.	Cremona Investment Ltd	B6
7.	Astronea Construction Ltd	B7

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the seven (7) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 5th September 2023 (hereinafter referred to as the "Evaluation Report") in the following stages:

- i Preliminary Evaluation;
- ii Technical Evaluation; and
- iii Financial Evaluation.

Preliminary Evaluation

4. At this stage of evaluation, the Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for

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responsiveness using the criteria provided under Preliminary Evaluation Criteria/Mandatory Requirements for Main Contractor of Section III- Evaluation and Qualification Criteria at page 21 to page 22 of the Tender Document; Stage 1: Preliminary Evaluation of Section A Instructions To Technical Evaluation Criteria at page A/2 of Vol. 2 of 3 Tender Specifications & Bills of Quantities for Supply, Installation, Testing and Commissioning of Electrical Installation Works of the Tender Document; and Stage 1: Preliminary Evaluation of Section A: Tender Evaluation Criteria at page 4 of Vol. 2 of 3 – Tender Specifications and Bills of Quantities for Supply, Delivery, Testing and Commissioning of water Storage, Internal Plumbing, Internal Drainage, Cold Storage and Borehole Drilling & Equipping and Installation Works of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the Technical Evaluation stage.

5. At the end of evaluation at this stage, five (5) tenders were determined non-responsive while two (2) tenders being tenderers B5 and B7 were found responsive and therefore proceeded to the Technical Evaluation stage.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria provided under Technical and Financial Evaluation Criteria. Minimum Technical Score of 70% of Section III- Evaluation and Qualification Criteria at page 26 to page 27

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of the Tender Document; Stage 2: Technical Evaluation of Section A Instructions To Technical Evaluation Criteria at page A/3-A/6 of Vol. 2 of 3 Tender Specifications & Bills of Quantities for Supply, Installation, Testing and Commissioning of Electrical Installation Works of the Tender Document; and Technical Evaluation for Mechanical Works of Section A: Tender Evaluation Criteria at page 5-6 of Vol. 2 of 3 – Tender Specifications and Bills of Quantities for Supply, Delivery, Testing and Commissioning of water Storage, Internal Plumbing, Internal Drainage, Cold Storage and Borehole Drilling & Equipping and Installation Works of the Tender Document.

7. Tenderers were required to attain a minimum score of 70% for the Main & Civil works, 70% for Electrical Works and 75% for Mechanical Works at this stage to proceed to the Financial Evaluation stage.
8. At the end of evaluation at this stage, both tenderers B5 and B7 were found responsive having met all the technical requirements and scored above the minimum score set and therefore proceeded to the Financial Evaluation stage.

Financial Evaluation

9. At this stage of evaluation, the Evaluation Committee was required to apply the criteria provided under Clause 30 Tender Evaluation (ITT 35) of Section III- Evaluation and Qualification Criteria at page 23 of the Tender Document. Tenders would be checked for any errors arising from miscalculation of unit price, quantity, subtotal, and total bid price.

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The tender with the lowest evaluated price would be considered for award.

10. Price comparison was carried out as can be discerned at page 20 of 21 of the Evaluation Report as follows:

S/ NO	TENDERER	ESTIMATE D COST	QUOTED SUM	DEVIATI ON IN KSHS.	% DEVIAT ION
1	BIDDER 7: M/S ASTRONEA CONSTRU CTION LIMITED	500,000,0 00.00	495,576,1 84.94	4,423,81 5.06	0.885
2	BIDDER 5: M/S BIOMAX AFRICA LIMITED	500,000,0 00.00	496,948,1 71.60	3,051,82 8.40	0.610

11. At the end of evaluation at this stage, the Evaluation Committee recommended award of the subject tender to M/S Astronea Construction Limited, the Applicant herein, at the tender sum of Kenya Shillings Four Hundred and Ninety-Five Million Five Hundred and

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Seventy-Six Thousand One Hundred and Eighty-Four and Ninety-Four cents only (Kshs. 495,576,184.94).

Evaluation Committee's Recommendation

12. The Evaluation Committee recommended award of the subject tender to the Applicant at the tender sum of Kenya Shillings Four Hundred and Ninety-Five Million Five Hundred and Seventy-Six Thousand One Hundred and Eighty-Four and Ninety-Four cents only (Kshs. 495,576,184.94).

Due Diligence

13. According to a Post Qualification Report dated 14th September 2023 and signed by members of the Evaluation Committee on even date, the Evaluation Committee conducted a due diligence exercise on the tenderer recommended for award, being the Applicant, owing to the nature and complexity of the works and being guided by the provisions of Section 83 of the Act. A visit to the Applicant's main office and site visit in Kisumu were made on 11th August 2023 followed by the Applicant's sub-contractors office and site visit in Nairobi on 13th August 2023.

14. The scope of due diligence entailed checking and evaluating the capacity of the Applicant, giving a detailed report on the overall past and current performance of the Applicant, scrutinizing vital information including the project files and statutory documents (and obtaining hard

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copies of statutory and project files), and visiting and establishing the existence of the projects listed in the Applicant's tender.

15. The methodology used to achieve the objective of the due diligence exercise was checking the original copies as given out in the tender in the presence of the Applicant, a physical check of completed and on-going projects, a general site observation and photos taken, report writing and report submission.

16. At the end of the due diligence exercise, the Evaluation Committee observed that the Applicant's office together with its subcontractors' offices were available and active, the works executed by the Applicant and its subcontractors' were satisfactory and of good quality, the projects quoted and established to be complete were similar in nature with the subject tender based on the physical size and complexity of the projects and methodology and technology employed, the Applicant's completed projects together with its subcontractors' completed projects were a true reflection of the details submitted in its tender document.

17. Based on its findings, the Evaluation Committee recommended the Applicant for award of the subject tender.

Professional Opinion

18. In a Professional Opinion dated 22nd September 2023 (hereinafter referred to as the "Professional Opinion") and signed on 26th September

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2023, the Ag. Director Supply Chain Management, Ms. Beatrice C. Laboso, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and the due diligence exercise. On the Legal and Practical Aspect of the subject tender, she observed that:

"Though the project is cost shared between the Ministry of Investments, Trade and Industry (State department for Industry) and the County Government of Bomet, the department of Trade provided only Kshs. 50 million (Fifty Million) shillings in their budget and Procurement plan for the FY 2023/2024 without specifying whether the contract was a multi-year project nor giving a roadmap on how to finance the remaining amount taking into consideration the project cost of Kshs 500million (Five hundred Million Shillings). Further, the department failed to incorporate the amount of Ministry's share into their budget and the Procurement plan as required by the PFM Act."

19. With regard to the due diligence, she observed that"

"The Committee however concentrated on interviews and observations of the main contractor and subcontractors but failed to interview the past clients of those particular contractors hence making it difficult to

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ascertain their work efficiency and general performance during the period of contract.”

20. In conclusion, she recommended for the subject tender to be cancelled and a clear roadmap on the financing of the project be developed by the department before a re-advertisement is made.

21. Thereafter, Mr. Paul K. Mutai, Chief Officer, Department of Trade, Energy, Tourism, Industry and Investment of the Procuring Entity, approved the Professional Opinion on 27th September 2023.

Notification to Tenderers

22. Vide letters dated 28th September 2023, Mr. Paul Mutai, Chief Officer, Department of Trade, Energy, Tourism, Industry and Investment of the Procuring Entity notified tenderers of cancellation of the subject tender due to inadequate budgetary provision.

REQUEST FOR REVIEW NO. 75 OF 2023

23. On 11th October 2023, the Applicant filed a Request for Review dated 11th October 2023 together with a Statement in Support of Request for Review sworn on 11th October 2023 by Anup Jethwa, its Director (hereinafter referred to as the 'instant Request for Review') through the firm of Caroline Oduor & Associates seeking the following orders from the Board in verbatim:

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- a) The Respondents decision contained in the letter dated 28th September 2023 2020 and related notifications to any other tenderers be nullified and set aside;***
- b) The 1st Respondent be directed to award Tender No. CGB/TETII/001/2023-2024 for proposed construction of the County Aggregation and Industrial Park to the Applicant and issue the requisite letter of notification in accordance with the law within 14 days from the date of the Board's decision.***

In the Alternative

- c) The Respondents be directed to continue the subject procurement proceedings to its logical conclusion and award Tender No. CGB/TETII/001/2023-2024 for proposed construction of the County Aggregation and Industrial Park within 14 days from the date of the Board's decision.***
- d) The Respondents do pay the cost of the Review.***
- e) The Board be pleased to make such further orders as are necessary for the ends of justice in the matter.***

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24. In a Notification of Appeal and a letter dated 11th October 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 11th October 2023.

25. On 19th October 2023, the Respondents filed through John Mark Langat & Cosmas Koech Advocates a Respondent's Memorandum of Response dated 18th October 2023 together with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.

26. Vide letters dated 23rd October 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 23rd October 2023.



27. Vide a Hearing Notice dated 23rd October 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 25th October 2023 at 11.00 a.m., through the link availed in the said Hearing Notice.
28. When the matter first came up for hearing on 25th October 2023 at 11.00 a.m., counsel for the Respondents, Mr. Cosmas Koech was not able to join and participate in the online proceedings due to technological challenges. The Board considered submissions made by parties present at the hearing and directed that the instant Request for Review would be canvassed by way of written submissions and (a) directed the Interested Party, Biomax Africa Limited, to file and serve upon all parties its written submissions strictly limited to points of law by 10.00 a.m. on 26th October 2023, (b) directed the Applicant, Astronia Construction Limited, to file and serve upon all parties its written submissions and list of authorities, if any, by 5.00 p.m. on 26th October 2023, (c) directed the Respondents, the Accounting Officer County Government of Bomet and County Government of Bomet, to file and serve upon all parties their Written Submissions by 2.00 p.m. on 27th October 2023 and (d) granted the Applicant commensurate leave to file and serve upon all parties a written rejoinder, if any, on points of law by 3.00 p.m. on 27th October 2023. Parties were cautioned to adhere to the strict timelines as specified in the Board's directions since the Board would rely strictly on the documentation filed before it in

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rendering its decision. The directions were emailed to all parties vide letter dated 25th October 2023 by the Acting Board Secretary.

29. On 26th October 2023, the Interested Party filed through Chege & Sang Company Advocates a Notice of Appointment dated 26th October 2023 and Submissions by Biomax Africa Limited to Points of Law dated 26th October 2023.

30. On 27th October 2023, the Applicant filed through its advocates Written Submissions dated 27th October 2023 and a List of Authorities dated 27th October 2023.

31. On 30th October 2023, the Respondents filed Written Submissions dated 30th October 2023.

PARTIES' SUBMISSIONS

Applicant's case

32. It is the Applicant's case that it was notified vide letter dated 28th September 2023 of termination of the procurement proceedings in the subject tender due to inadequate budgetary provisions as stipulated under Section 63(1)(b) of the Act.

33. Whereas the Applicant acknowledges that a procuring entity may terminate procurement proceedings under justifiable circumstances pursuant to Section 63 of the Act, it avers that the Respondent's

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proposition that it has inadequate budgetary allocation is unsubstantiated by evidence and is just but a deliberate attempt to subvert the subject procurement proceedings hence an abuse of the law by the 1st Respondent.

34. The Applicant submits that the Respondent has demonstrated a clear understanding of procurement law from the several provisions of the Act quoted in its Memorandum of Response and is therefore familiar with Section 53(8) and (9) of the Act. The Applicant further submits that the subject tender's procurement proceedings commenced vide a re-advertisement meaning that the process had started much earlier than the date of the re-advertisement and as such, the 1st Respondent must have been well aware and satisfied that sufficient funds existed to meet the anticipated cost of the tender project before commencing the procurement proceedings.

35. The Applicant further submits that the 1st Respondent was well aware of the estimated costs of the subject tender as evidenced by the provisions of ITT39 Paragraph 7 Post qualification & Contract award at page 26 of the Tender Document which required tenderers to demonstrate access to liquid assets, unencumbered real assets, lines of credit and other financial means sufficient to meet construction cash flow of Kenya Shillings 147,000,000/- and a minimum average annual construction turnover of Kenya Shillings 1,287,000,000.00/- within the last three years.

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36. The Applicant pointed out that the Tender Document at page 26 required bidders to attach two contracts of a similar nature executed within Kenya or the East African Community that have been satisfactorily completed as a prime contractor, or joint venture member or sub-contractor each of minimum value Kshs. 412,000,000.00 and as such even before bids were submitted, the Respondents knew that a project of such magnitude would exceed the purported budget of Kshs. 50,000,000.00.

37. The Applicant contends that the Respondents have deliberately failed to give a true and proper account of budgetary support from the National Government in relation to the subject tender since the project was a joint project between the procuring entity and the National Government and if the action of the Respondents was well intended within the meaning of Section 63 of the Act, nothing would have prevented them from making full disclosure of this information including actual evidence of the extent of funding by the government.

38. The Applicant further contends that failure to produce evidence on the proposal for financing any anticipated budget deficit was contrary to Article 220(1)(b) of the Constitution, offended the principles of public finance under Article 201(d) of the Constitution and Section 149(1)(b) of the Public Finance Management Act 2012, and Section 109 of the Evidence Act.

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39. The Applicant questioned why the Respondents went to the extent of carrying a post qualification exercise for which the Respondents incurred further expenditure when the Respondents had full knowledge of the Applicant's tender price if at all the budget provision was inadequate.

40. The Applicant urged the Board to find that the chain of events in the procurement proceedings of the subject tender confirm availability of enough funds for the Respondent to proceed with the tendering process to conclusion and relied on the provisions of Section 119 of the Evidence Act in support of this argument. The Applicant submitted that the Board is empowered by law to interrogate the 1st Respondent's decision to terminate the procurement proceedings in the subject tender on account of inadequate budgetary allocation and referred the Board to the holding in *Judicial Review Misc. Application No. 142 of 2018 R v Public Procurement Administrative Review Board & Another Ex parte Kenya Veterinary Production Institute (2018) eKLR* and *PPARB Application 127 of 2020 Agile Business Solutions Limited vs The Accounting Officer Agricultural Development Corporation*.

41. The Applicant further submitted that the Respondents have failed to demonstrate the existence of statutory pre-conditions and circumstances under Section 63 of the Act to warrant termination of the subject tender and that such termination ought to be exercised as a matter of last resort. The Applicant points out that the Respondents





are by law estopped from relying on the Applicant's tender price as the reason for terminating the subject tender and that it had a legitimate expectation to be awarded the subject tender.

42. In conclusion, the Applicant urged the Board to allow the Request for Review as prayed.

Respondents' Case

43. The Respondents contend that the gist of the instant Request for Review is lack of sufficient budgetary allocation and whether termination founded on Section 63(1)(b) of the Act where sufficient reasons have been given can be challenged taking into account the available budget of Kshs. 50,000,000/- against the tenderer's quotation of Kshs. 495,576,184.94/-.

44. The Respondents referred the Board to its holding in *Application No. 41 of 2021 Biomax Africa Limited and County Government of Bomet and others* and urged the Board to consider whether (a) the Respondents approved a budgetary allocation for the Construction of County Industrial and Aggregation Industrial Park and (b) the Procurement Plan for the same period.

45. It is the Respondents case that the prayers sought by the Applicant constitute unlawful compulsion of award of tender where the expenses to be incurred are not authorized for lack of budgetary allocation and that to require the award of the tender on part of the 1st Respondent

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is to sanction him to commit an illegality punishable by law. In support of this argument, the Respondents referred the Board to the provisions of Section 149(1) (a) and 2(b) of the Public Finance Management Act, 2012.

46. The Respondents contend that the prayers sought by the Applicant are illegal and unenforceable for violating Section 44 (2) of the Act for lack of an approved budget and have the effect of (a) rendering the 1st Respondent liable for loss of public funds if he approves the same pursuant to Article 226(5) of the Constitution and (b) violating Article 201 of the Constitution on Principles of Public Finance. The Respondents contend that they forwarded an approved budget and procurement plan to the Board as evidence of having an inadequate budget allocation.

47. The Respondents further contend that termination of the tendering process pursuant to Section 63(1)(b) of the Act does not constitute a violation of Article 47 and 227(1) of the Constitution.

48. The Respondents point out that the averments made by the Applicant on its legitimate expectation to be awarded the subject tender are fallacious as all bidders were desirous to be awarded the subject tender but such expectations must be within the confines of the Act and the subject to the approved budget.

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49. The Respondents urged the Board to dismiss the Request for Review with costs.

Interested Party's case

50. The Interested Party referred the Board to the provisions of Article 227 of the Constitution and urged the Board to consider if the reasons furnished by the Respondents for terminating the procurement proceedings in the subject tender are in compliance with Article 227 of the Constitution in terms of fairness, equitability, and transparency.

51. The Interested Party also urged the Board to consider the 2nd Respondent's budgetary provision for the subject tender and make a determination on whether there was an inadequate budgetary provision as the law permits termination of procurement proceedings in such circumstances.

52. The Interested Party submitted that it would be unreasonable to compel the Respondent to commit to a tender that has not been budgeted for and that granting the orders sought by the Applicant would be compelling the Respondents to go against the provisions of Section 44(2)(a) of the Act.

53. The Interested Party referred to the holding in *Republic v County Government of Lamu & 2 others Ex parte Superserve Limited (2021) Eklr* and submitted that the Applicant had not proven any illegality, irrationality or procedural unfairness on the part of the Respondents.

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54. In a letter dated 25th October 2023, the Board informed parties that the instant Request for Review having been filed on 11th October 2023 was due to expire on 1st November 2023 and that the Board would communicate its decision on or before 1st November 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

55. The Board has considered each of the parties' cases, documents, pleadings, 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 that the following issues call for determination.

A. Whether procurement proceedings in the subject tender were lawfully terminated?

B. What orders should the Board grant in the circumstances?

Whether procurement proceedings in the subject tender were lawfully terminated?

56. The Applicant in the instant Request for Review is aggrieved by the decision of the 1st Respondent to terminate the procurement proceedings in the subject tender as communicated in the Regret

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Letter/Cancellation of Procurement Proceedings dated 28th September 2023 which reads:

**"RE: REGRET LETTER/CANCELLATION OF
PROCUREMENT PROCEEDINGS**

The above subject matter refers:

The County Government of Bomet Regret to inform you that the tender for the PROPOSED CONSTRUCTION OF BOMET COUNTY AGGREGATION AND INDUSTRIAL PARK, TENDER NUMBER: CGB/TETII/001/2023/2024 has been cancelled due to inadequate provision as stipulated by Sec 63(b) of the PPDA 2015 and its attendant Regulation No. 48(1 & 2) of 2020.

We intend to re-advertised the tender the soonest.

Thank you for showing interest to work with us and we also look forward to working with you in future. Attached is a copy of your bid security....."

57. From the contents of the above letter, the Respondents terminated the subject tender due to inadequate budgetary provision and in doing so, relied on Section 63(b) of the Act as read with Regulation 48 (1&2) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020").

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58. The question that the Board is called to answer is whether the termination of the procurement proceedings in the subject tender is valid.

59. The Board is cognizant of the objective of public procurement which is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which reads:

"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)"***

60. Justice Mativo (as he then was) in **Nairobi High Court Misc. Application No. 60 of 2020; Republic vs. The Public**

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Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR (hereinafter referred to as "Misc. Application No. 60 of 2020") spoke to the principles under Article 227 of the Constitution as follows:

"45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness."

61. Further to the provisions of Article 227 of the Constitution, 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 reads:

"(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)

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(b);

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

62. 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.

63. 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.

64. 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—

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(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.

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(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."

65. Regulation 48 of Regulations 2020 provides:

"(1) Prior to the cancellation or termination of a procurement and asset disposal proceedings under section 63 of the Act, an accounting officer may take into account the recommendations of the head of procurement function.

(2) The report required under section 63(2) and (3) of the Act shall be made in accordance with the guidelines issued by the Authority."

66. In **Republic v Public Procurement Administrative Review Board; Leeds Equipment & Systems Limited (Interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR**, the High Court held that:

"In a nutshell therefore and based on the above-cited cases where the decision of a procuring entity to terminate procurement process is challenged before the Board the procuring entity is to place sufficient reasons

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and evidence before the Board 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 Act”.

67. In essence, whether there are valid substantive reasons for the termination of procurement proceedings prior to award of a tender is a question of fact that must be made out by sufficient evidence the onus whereof is on the procuring entity terminating the procurement proceedings. Additionally, Section 63 (2), (3), and (4) outlines the procedure to be followed by a procuring entity when terminating a tender to wit; 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.

68. The long and short of it is that for termination of procurement proceedings to pass legal muster, a procuring entity must demonstrate compliance with both the substantive and procedural requirements under Section 63 of the Act. This position is now settled in our decisional laws and follows a long line of authorities dating back to decisions of the High court on similar provisions of the repealed procurement Act. In this regard, **Miscellaneous Civil Application**

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

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

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

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

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

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

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

69. It is therefore important for the Board to determine the legality, or lack thereof, of the Respondents' decision to terminate the procurement

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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 at a later date.

With regard to substantive requirements for termination of procurement proceedings in the subject tender

70. We have perused the confidential documents submitted by the 1st Respondent to the Board pursuant to Section 67(3)(e) of the Act and note that the Respondents submitted in the confidential file a photocopy of 'the budget for the Approved Estimates FY 2023/2024 regarding Trade, Tourism and Industry.' It reads as follows:

TRADE, TOURISM AND INDUSTRY

<i>Sub Item</i>	<i>Sub Item Name</i>	<i>APPROVED ESTIMATES FY 2023/2024</i>
<i>.....</i>	<i>.....</i>	<i>.....</i>
<i>.....</i>	<i>.....</i>	<i>.....</i>
	<i>P4. Industry Development</i>	
<i>3110504</i>	<i>S.P.4.1. Industrial Development and Support (Industrial Park)</i>	<i>50,000,000</i>




2211006	S.P. 4.2 Equipping of Jua Kali sheds	-
	Total Expenditure Programme 4	50,000,000
.....
.....
.....
	Total Development Budget	110,500,000
	Total Recurrent	11,226,738
	GRAND TOTAL	121,726,738

71. Going by the said document, the board notes that Industrial Development and Support (Industrial Park) was approved at a total estimate amount of Kshs. 50,000,000 for Financial Year 2023/2024. Further, the 2nd Respondent's total development budget was approved at an estimate amount of Kshs. 110,500,000.

72. The 1st Respondent also submitted a photocopy of 'the Procurement Plan titled "PROCUREMENT PLAN 2023/2024 TETII" which provides as follows:

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Item /Ser vice Code	Item /Ser vice Description	Estimated Cost	Unit of Issue	Quantity	Total	Procedure	Charge	Source	Reservations for Target Group %				Margin of Preference for Local Contractors %	Timing of Activities (Quarterly Basic)						
									YOUTH	WOMEN	PWD	CITIZENS		1st Quarter	2nd Quarter	3rd Quarter	4th Quarter			
	RECU																			
	RRE																			
	NT &																			
	DEVE																			
	LOP																			
	MEN																			
	T																			
	ITEM																			
	S																			

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73. From the said document, we note that Industrial Development and Support had been budgeted for at a total cost of Kshs. 50,000,000.00 and was to be procured by open method of tendering.

74. We have also carefully perused the subject tender's advert also submitted in the confidential file by the 1st Respondent and note that the same provides as follows:

"COUNTY GOVERNMENT OF BOMET DEPARTMENT OF TRADE, ENERGY, TOURISM, INDUSTRY AND INVESTMENT

RE-ADVERTISEMENT OF TENDER

S/N	TENDER NO	TENDER DESCRIPTION	CLOSING DATE	BID SECURITY	ELIGIBILITY
1.	CGB/TETII/001/2023-2024	PROPOSED CONSTRUCTION OF COUNTY AGGREGATION AND INDUSTRIAL PARK	Tuesday 22nd August 2023	Kshs 9,000,000	OPEN

The County Government of Bomet on behalf of the Council of Governors and in conjunction with the Ministry of

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Investments, Trade and Industry (state department for Industry) wish to re-invite sealed bids from interested and eligible bidders to bid for the following listed tender due to Non-responsiveness in the initial process.

.....”

75. A closer look at the Tender Advert above reveals that (a) this was a re-advertisement of the subject tender meaning the same had earlier on been advertised and terminated due to non-responsiveness; and (b) the re-advertisement was by the County Government of Bomet on behalf of the Council of Governors and in conjunction with the Ministry of Investments, Trade and Industry (State Department for Industry).

76. Collins Dictionary of English defines the word '*on behalf of*' to mean '*speaking for; representing.*' It further defines the word '*in conjunction*' to mean '*if one thing is done or used in conjunction with another, the two things are done or used together.*' Taking these definitions into account, it can be said that the re-advertisement of the subject tender was made by the County Government of Bomet representing the Council of Governors and; together with the Ministry of Investments, Trade and Industry (State Department for Industry).

77. Notably, the introduction at page 3 of 21 of the Evaluation Report submitted by the 1st Respondent pursuant to Section 67(3)(e) of the Act made reference to the Council of Governors and the Ministry of

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Investments, Trade and Industry (State Department for Industry) as follows:

" 1.0 Introduction

In order to create an all-inclusive job creating economic model that invest in Kenya's rich Agro Resources, the national government through the Ministry of investments, Trade and Industry and devolved Governments through Council of Governors (COG) have established the County Aggregation and Industrial Parks (CIPS) in line with bottom-up economic transformation agenda. This is a farmer centric and export-oriented approach to ensure small scale farmers and producers contribute to aggregation, marketing, and export of produce from across the country. CIPS will boost overall national Agro-processing, increase farmer income, create jobs, reduce post-harvest loss, connect counties through commodity exchange (KOMEX) & warehouse receipting, and consolidate Kenya produce for the export market.

CAIPS are clusters of independent aggregation Centre across the country to gain economies of scale for bulk purchasing and selling of various Agro produce in Kenya. These centers (CAIPS) will be located in each county within proximity to production areas to serve farmers

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and primary producers through collection, storage and sorting and even primary processing and value addition. Each CIAPS will have minimum of four manufacturing sheds of 4,000 sqms, thus devolving manufacturing capacity to each of 47 counties. In addition, there will be an aggregation center of 4,000 sqms which shall have cold storage facilities to prevent post-harvest losses.

On this background, the Council of Governors and the State Department for Industry on behalf the County of Bomet invited sealed bids for the construction of Proposed County Aggregation and Industrial Parks as tender number CGB/TETII/001/2023/2024, which was re-advertised on 10th August 2023 and the closing date was on 22nd August 2023.

78. In view of the foregoing, it would appear that the subject tender was the result of joint efforts of the procuring entity and two other entities being the state department of trade and the council of governors. We are fortified in our opinion by the Professional Opinion prepared by Ms. Beatrice C Laboso, the Ag. Director Supply Chain Management that the project was cost shared between the Ministry and the 2nd Respondent herein.

79. Section 44 of the Act provides as follows:

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(1) An Accounting officer of a public entity shall be primarily responsible for ensuring that the public entity complies with the Act.

(2) In the performance of the responsibility under subsection (1), an accounting officer shall –

(a) ensure that procurement of goods, works and services of the public entity are within approved budget of that entity;

(b) constitute all procurement and asset disposal committees within a procuring entity in accordance with the Act;

(c) ensure procurement plans are prepared in conformity with the medium term fiscal framework and fiscal policy objectives and, subject to subsection (3), submit them to the National Treasury;

(d)

(e) ensure compliance with sections 68,147,148, and 149 of the Public Finance Management Act, 2012 (No. 18 of 2012)

....."

80. Section 53 of the Act provides that:

"(1) All procurement by State organs and public entities are subject to the rules and principles of this Act.

(2) An accounting officer shall prepare an annual procurement plan which is realistic in a format set out in

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the Regulations within the approved budget prior to commencement of each financial year as part of the annual budget preparation process.

(3) Any public officer who knowingly recommends to the accounting officer excessive procurement of items beyond a reasonable consumption of the procuring entity commits an offence under this Act. (4) All asset disposals shall be planned by the accounting officer concerned through annual asset disposal plan in a format set out in the Regulations.

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

(6) All procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups.

(7) Multi-year procurement plans may be prepared in a format set out in the Regulations and shall be consistent with the medium term budgetary expenditure

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framework for projects or contracts that go beyond one year.

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

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

(10) For greater certainty, the procurement and disposal plans approved under subsection (5) shall include choice of procurement and disposal methods and certain percentages referred to under subsection (6).

(11) Any state or public officer who fails to prepare procurement and disposal plans shall be subject to internal disciplinary action.

(12) Upon submission of the procurement plans to the National Treasury pursuant to section 44(2)(c) of this Act, the accounting officer of a procuring entity shall publish and publicize its approved procurement plan as invitation to treat on its website.

(13) On receipt of the procurement plans submitted by the procuring entities, the National Treasury shall publish and publicize the procurement plans as invitation to treat on the state tender portal.”

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81. The import of the above provisions is that it is the primary responsibility of an accounting officer to ensure that a procuring entity complies with the provisions of the Act. In particular, an accounting officer is responsible for preparation of an **annual procurement plan** which ought to be within **the approved budget** and should not commence any procurement proceedings until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in **the approved budget estimates**. An accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for commits an offence under the Act.

82. The Public Finance Management Act No. 18 of 2012 further provides for procurement by County Government entities and stipulates under Section 121 that:

"For the purposes of this Act, all procurement of goods and services and disposal of assets, required for the purposes of the county government or a county government entity are to be carried out in accordance with Article 227 of the Constitution and the Public Procurement and Disposal Act"

83. Turning to the circumstances in the instant Request for Review, has the Respondent provided sufficient reasons to demonstrate that the

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subject procurement has inadequate budgetary allocation? In answering this question, the board is of the considered opinion that the best evidence that a procuring entity ought to provide to demonstrate availability or otherwise of adequate budgetary allocation for a procurement process are the approved procurement plan and budget estimates approved by the national treasury contemplated by law under section 44(2)(b) and 53(5) of the Act.

84. Taken together with the express proscription against commencement of a procurement process without ascertaining whether the good, work or service is budgeted for and the requirement in regulation 71 of the regulations that the head of the user department shall initiate the procurement process through a requisition as per the approved procurement plan, there is a strong rebuttable presumption that the subject tender herein was within the Respondent's approved budget and procurement plan hence the decision to re-advertise the same and to proceed with evaluation proceedings all the way to the due diligence stage.

85. Indeed, it is not lost to the Board that the Ag. Director Supply Chain Management, Ms. Beatrice Laboso, prepared a Recommendation For Appointment dated 24th August 2023, as a Memo to the Chief Officer, Trade, Energy, Tourism, Industry and Investment, wherein she proposed members to be appointed to the Adhoc Evaluation Committee to evaluate the re-advertised subject tender as follows:

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Pursuant to Sec 46 of the PPDA 2015 and its attendant Regulation No:33 (h) of 2020 I hereby propose the following members to be appointed to the Adhoc Evaluation Committee to evaluate the re-advertised tenders for the Proposed Construction of County Aggregation and Industrial Park Tender No: CGB/TETII/001/2023/2024

The proposed members are as follows:

- 1.***
- 2.***
- 3.***
- 4.***
- 5.***
- 6.***

In attendance

- 1.***

They are expected to work professionally and exhibit high level of integrity.

(signed)

Ag. Director Supply Chain Management County Government of Bomet."

86. We note that vide a letter dated 25th August 2023, the Chief Officer – TETII, Mr. Paul Mutai, proceeded to appoint the members of the Adhoc Evaluation Committee as recommended above to evaluate the subject

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tender urging them to exercise professionalism and exhibit high level of integrity while undertaking their assigned duty.

87. It therefore beats logic that the Ag. Director Supply Chain Management, Ms. Beatrice Laboso would now turn around and recommend in her Professional Opinion for cancellation of the subject tender on account of inadequate budgetary allocation. Prudent use of public funds dictates that the Ag. Director Supply Chain Management, Ms. Beatrice Laboso would arrest the issue of whether or not there was an adequate budgetary allocation for the subject tender prior to proposing appointment of members to the Adhoc Evaluation Committee.

88. The question that then follows is whether the Respondent supplied the Board with its procurement plan and approved budget estimates to rebut the presumption that indeed there was inadequate budgetary allocation for the subject tender. The Board has established that in the confidential documents supplied to the Board, there is what appears to be a photocopy of the Procurement Plan and approved budget. Regrettably however, the Board notes that the documents provided by the respondents via the confidential file in the name of **procurement plan and budget** do not bear the respondent's letter head nor were the same shown to have been approved or signed by the authorized officers in law to signify their authenticity in law.

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89. Under section 53 of the Act, a procurement plan shall be prepared by an accounting officer. Under regulation 40(4), the accounting officer is required to prepare the procurement plan as a consolidated annual procurement plan comprising the procurement plans of user departments and the same shall be approved, in the case of the county government, by the executive committee member of finance. Under regulation 41 and 42 of the regulations, the consolidated procurement plan should contain inter-alia the estimated cost for procurement of items which shall include insurance, clearing and forwarding, demurrage charges, warehousing, advertisement and all other incidental costs where applicable and shall be prepared in the format prescribed in the third schedule of the Act. A cursory look at the format provided for in the third schedule shows that the format of a procurement plan makes provision for execution by both the accounting officer and the CEC finance, in the case of a county government.

90. As regards budgets, section 129(1)(a) of the Public Finance Management Act designates the county executive committee with the responsibility of approving budget estimates submitted to it by the County Executive Committee member for finance. Under Section 129(2)(a) of the Public Finance Management Act as read with 8(1) of the County Governments Act, county budget estimates shall be approved by the county assembly and it is on the basis of the approved budgets that an appropriation bill would be passed.

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91. It follows therefore that a procurement plan and an approved budget are prescribed documents that have the force of law.

92. Taking into account the foregoing express provisions of law, it is evident to the board that whether the documents described earlier in this decision and presented as the procurement plan and approved budget are the documents contemplated under section 44(2)(b) and 53(5) of the Act is at best a matter of conjecture that leaves the board with no other plausible conclusion other than that the Respondent has not provided sufficient reasons to prove that indeed it has no or no adequate budgetary provisions for the re-advertised tender. If indeed the Respondent lacks adequate funding for the subject tender, nothing would be easier than for it to demonstrate the same by exhibiting the complete procurement plan and approved budget (including supplementary budgets if any) of both the Respondent and the State department of trade, with whom the subject tender was to be executed, to enable all parties and the board verify its assertions. Absent these documents, an inference may drawn that the said evidence if tendered would be adverse to the Respondent. In **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others** [2012] eKLR the court stated as follows:

“Section 112 of the Evidence Act Chapter 80 of the laws of Kenya provides:

‘In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.’



Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

93. In the premises, the Board finds and holds that the Respondents have failed to fulfill the substantive requirements for the termination of procurement proceedings in the subject tender as required by Section 63(1)(b) of the Act and the aforecited decisional laws since they have not provided sufficient evidence of inadequate budgetary allocation justifying termination of the subject tender. See ***the Kenya Veterinary Vaccines Production Institute and the Selex Sistemi Integrati Cases (Supra)***

With regard to procedural requirements for termination of procurement proceedings in the subject tender

94. From the confidential file, we note that all tenderers in the subject tender were notified of termination of the subject tender vide letters dated 28th September 2023. The board has had sight of a payment receipt copy indicating that the said letters were posted to all the tenderers on 3rd October 2023 at 11:07. However, we have had no sight of any written report addressed to or submitted to the Public Procurement Regulatory Authority notifying it of termination of the

subject tender and reasons thereof in accordance with Section 63(2) & (3) of the Act. As such, the procedural statutory pre-conditions that must be satisfied before a termination of procurement proceedings is deemed lawful as required by Section 63(2) & (3) of the Act have not been met by the Respondents.

95. Having established that the Respondents failed to satisfy both the substantive statutory pre-conditions of termination of procurement proceedings, the Board finds and holds that the Respondents failed to terminate the procurement proceedings of the subject tender in accordance with Section 63 of the Act.

96. The upshot of our findings therefore is that the instant Request for Review succeeds.

FINAL ORDERS

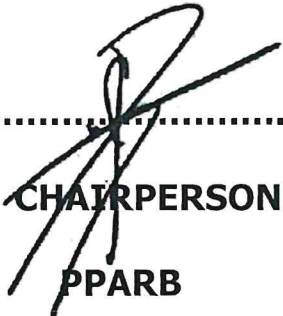
97. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 11th October 2023 and filed on even date:


A. The decision by the 1st Respondent to terminate the procurement proceedings of Tender No. CGB/TETII/001/2023/2024 for Proposed Construction of County Aggregation and Industrial Parks be and is hereby quashed and set aside.



- B. The Procuring Entity's Letter dated 28th September 2023 issued to the Applicant and other tenderers in the subject tender communicating the decision to terminate the procurement proceedings with respect to Tender No. CGB/TETII/001/2023/2024 for Proposed Construction of County Aggregation and Industrial Parks be and is hereby nullified and set aside.**
- C. The 1st Respondent is hereby ordered to ensure the procurement process with respect to Tender No. CGB/TETII/001/2023/2024 for Proposed Construction of County Aggregation and Industrial Parks proceeds to its logical conclusion within 14 days of this decision taking into consideration the Board's findings herein and the provisions of the Act, the Constitution and Regulations 2020.**
- D. In view of the Board's findings and orders above, each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI, this 1st Day of November 2023.


.....
CHAIRPERSON
PPARB


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SECRETARY
PPARB