

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 88/2023 OF 7TH NOVEMBER 2023

BETWEEN

JAMPUAM COMPANY LIMITED.....APPLICANT

AND

THE DIRECTOR GENERAL,

COMMUNICATIONS AUTHORITY OF KENYA.....RESPONDENT

Review against the decision of the Accounting Officer, Communications Authority of Kenya in relation to Tender No. CA/SCM/OT/03/2023-2024 for Supply and Delivery of Bottled Drinking Water at CA Centre and Regional Offices (Reserved for PWDs Owned Firms)

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCArb. - Chairperson
2. Ms. Alice Oeri - Member
3. Dr. Susan Mambo - Member

IN ATTENDANCE

- Ms. Sarah Ayoo - Secretariat
- Mr. Anthony Simiyu - Secretariat



PRESENT BY INVITATION

APPLICANT

JAMPUAM COMPANY LIMITED

Mr. Anthony Kiprono

-Advocate, A.E. Kiprono & Associates.
Advocates

RESPONDENTS

**THE DIRECTOR GENERAL,
COMMUNICATIONS AUTHORITY OF
KENYA**

Mr. Kelvin Mbogo

-Advocate, Robson Harris Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

1. The Communications Authority of Kenya, the Procuring Entity together with the Respondent herein, invited submission of sealed tenders in response to Tender No. CA/SCM/OT/03/2023-2024 for Supply and Delivery of Bottled Drinking Water at CA Centre and Regional Offices (Reserved for PWDs Owned Firms) using an open competitive tender method. The subject tender's submission deadline was Wednesday, 4th October 2023 at 10:30 a.m.

Addenda

2. On 25th September 2023 and 29th September 2023, the Procuring Entity issued Addendum No. 1 and Addendum 2 respectively offering clarifications in respect of the subject tender while retaining the tender submission deadline of 4th October 2023.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Minutes for 4th October 2023 under the Confidential File submitted by the Procuring Entity, the following 16 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

No.	Name of Tenderer
1.	Gvil Contractors and General Supplies
2.	Stevan Contractors Limited
3.	Wonder B-Double Investment
4.	Romcar Construction and Supplies
5.	Peesan Limited
6.	Prunne Glean Limited
7.	Shakito Limited
8.	Superium Limited
9.	Zoom Space Limited
10.	Wolfenbery Logistics Limited
11.	Kiumbu Online Store
12.	Richmatt Investments
13.	Twin Escapes Limited
14.	Sifteugleum Enterprises
15.	Jampuam Company Limited
16.	Silkan &Saku Springs JV

Evaluation of Tenders

4. The Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the 16 tenders in the following 2 stages as captured in the Evaluation Report
 - i. Preliminary Stage
 - ii. Financial Stage

Preliminary Evaluation

5. At this stage of the evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out as Preliminary examination for Determination of Responsiveness (Mandatory Evaluation) under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 29 to 30 of the Tender Document.
6. The evaluation was to be on a Pass/Fail basis and tenderers who failed to meet any criteria outlined at the Preliminary Evaluation Stage would be disqualified from further evaluation at the Financial Evaluation Stage.
7. At the end of the evaluation at this stage, 15 tenders were found unresponsive with only 1 tender i.e. the Applicant qualifying for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Stage 2: Financial

Evaluation under Section III– EVALUATION AND QUALIFICATION CRITERIA on pages 30 to 31 of the Tender Document.

9. According to the Tender Document, the tenderer submitting the lowest evaluated tender would be considered for award of the subject tender.
10. At the end of the evaluation at this stage, the Evaluation Committee found that since the Applicant's tender was the only one that made it for Financial Evaluation, it was the lowest evaluated tender. Further, the Applicant's tender price of Kshs. 24,560,400.00 was also within the Procuring Entity's budget of Kshs. 29,700,000.00.

Evaluation Committee's Recommendation

11. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Applicant at its tender sum of **Kenya Shillings Twenty-Four Million Five Hundred and Sixty Thousand Four Hundred only (Kshs. 24,560,400.00)** inclusive of taxes.
12. The Committee also recommended the Applicant for the award of Supply and delivery of branded 500 ml bottled water packed in a carton of 24 bottles as and when needed at a total cost of Kshs. 1,400 and the prices would be valid for 3 years.

Professional Opinion

13. In a Professional Opinion dated 17th October 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Acting Director, Supply Chain Management, Ms. Jane Rotich, reviewed the manner in which the subject procurement process was undertaken including the

evaluation of tenders and noted that though the Applicant was the lowest evaluated tender, some of the items it tendered for were quoted at above the market rates. She noted that the Applicant's quotation for hiring of water dispensers was similar to that of buying a new dispenser at market rates and that the Applicant's quotation for branded 1L reusable drinking water bottles was also above market rates.

14. Accordingly, Ms. Jane Rotich recommended the termination of the subject tender and retendering for the supply and delivery of drinking water. She also recommended that an outright purchase of dispensers with disposable cups and for branded bottles be competitively sourced under promotional items.
15. On 18th October 2023, the Respondent concurred with the Professional Opinion recommending the termination of the subject tender.

Notification to Tenderers

16. Accordingly, tenderers were notified of the termination of the subject tender vide letters dated 24th October 2023.

REQUEST FOR REVIEW

17. On 7th November 2023, the Applicant through the firm of A.E. Kiprono & Company Advocates filed a Request for Review dated 7th November 2023 supported by a Supporting Affidavit sworn on 7th November 2023 by Faith Muthoni Njoki, a Director at the Applicant, seeking the following orders from the Board in verbatim:

1. An order annulling and setting aside the Respondent's letter to the Applicant dated 24th October 2023;

- 2. An order annulling and setting aside the Respondent's decision to terminate Tender No. CA/SCM/OT/03/2023-2024, for supply and delivery of bottled drinking water at CA Centre and its Regional Offices;***
- 3. A declaration that the Respondent's decision to evaluate the Applicant's tender prices for each of the items in the Tender Separately was erroneous, contrary to the tender document, null and void;***
- 4. A declaration that having evaluated individual items in the Tender contrary to the provisions of the tender document, and found that the prices for two (2) items were above market prices, the Respondent acted unfairly by not awarding the Applicant the tender to supply and deliver the two (2) remaining items;***
- 5. An order directing the Respondent to re-instate the Applicant's tender and re-evaluate the same at the financial evaluation stage in accordance with the provisions of the tender document, Section 82 of the Act and Regulation 77(2)(a) of the Regulations of PPAD Regulations and the Board's directions in this Request for Review;***
- 6. In the alternative the Review Board be pleased to declare the Applicant the lowest evaluated tenderer in view of the Respondent's declaration that none of the other bids were responsive;***
- 7. Costs of the Request for Review be granted to the Applicant;***
- 8. Any other relief that the Review Board deems fit to grant under the circumstances.***

18. In a Notification of Appeal and a letter dated 7th November 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent 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 Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 7th November 2023.
19. On 20th November 2023, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 22nd November 2023 at 11:00 a.m. through the link availed in the said Hearing Notice.
20. In response to the Request for Review, on 21st November 2023, the Respondent through the law firm of Robson Harris Advocates LLP filed a Notice of Appointment of Advocates, Notice of Preliminary Objection, a Memorandum of Response, all dated 21st November 2023. The Respondent also submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.
21. On the same day, 21st November 2023, the Applicant filed Written Submissions together with a Further Affidavit sworn on 20th November 2023 by Faith Muthoni Njoki.

22. On the morning of 22nd November 2023, the Respondent filed Written Submissions dated 22nd November 2023.
23. Later on the same day, 22nd November 2023 at 11:00 a.m. parties through their respective Advocates joined the online hearing session. The Board noted that since the Respondent had filed a Notice of Preliminary Objection, this would be heard as part of the substantive Request for Review. This was in line with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of the substantive Request for Review and render one decision.
24. The Board read out to the parties the documents that had been filed in the Request for Review and sought for parties' confirmation that those were the documents that had been filed and served upon them. Parties confirmed having filed and been served with the said documents.
25. The Board also gave directions on the order of address of the Board as follows:
 - i. First, the Respondent would submit on their Notice of Preliminary Objection in 3 minutes
 - ii. The Applicant would submit on their Request for Review as well as in response to the Notice of Preliminary Objection in 13 minutes.
 - iii. Thereafter, the Respondent would offer their rejoinder to the Preliminary Objection and offer a response to the request for Review in 11 minutes.
 - iv. Lastly, the Applicant would then have 1 minute to offer a rejoinder on the Request for Review.

PARTIES SUBMISSIONS

Respondent's Submissions on their Notice of Preliminary Objection

26. Counsel for the Respondent, Mr. Mbogo submitted that the Request for Review as filed was contrary to Section 167(4)(b) of the Act which excludes termination of tenders from the jurisdiction of the Board.
27. Relying on the cases of ***Samuel Kamau Macharia & anor v Kenya Commercial Bank Limited & Ors [2012]eKLR; Owners of Motor Vessel Lilian S v Caltex Oil (Kenya) Limited [1989]KLR1; Orange Democratic Party v Yusuf Ali Mohammed & 5 Ors [2018]eKLR and Republic v Public Procurement Administrative Review Board Ex parte Numerical Machining Complex Limited [2016]eKLR***, he argued that jurisdiction was everything and that in the present Request for Review the Board was divested of the jurisdiction.
28. Counsel argued that the subject tender was terminated on account of the tender prices received in respect of the subject tender from the lowest evaluated tender i.e. the Applicant being above market prices.
29. Mr. Mbogo submitted that Section 84 of the Act empowers the Head of the Procurement Function to review the procurement process and carry out market surveys. He indicated that in the present case, upon conducting a market survey, the Applicant's tender quotes were found to be way above the market prices as can be seen from the Professional Opinion.

30. He contended that the Act and Regulations 2020 allow an Accounting Officer to take into consideration the recommendations in the Professional Opinion.
31. Counsel submitted that in terminating the subject tender, both the procedural and substantive thresholds for termination of the tender were met. He indicated that the notification of the said termination was done to the Applicant and all the tenderers who participated in the subject tender.

Applicant's Submissions on the Notice of Preliminary Objection and the Request for Review

32. Counsel for the Applicant, Mr. Kiprono submitted that for the Board to establish whether it had jurisdiction over the instant Request for Review, it had to look into the circumstances under which the subject tender was terminated.
33. He argued that a Procuring Entity could only terminate a procurement process under Section 63 of the Act upon satisfying both procedural and substantive requirements. For this, he placed reliance on the cases of ***Republic v Public Procurement Administrative Review Board & Anor Ex parte SGS Kenya Limited [2017]eKLR; PPARB No. 84 of 2017; Baraki International Limited v Kenya Urban Roads Authority; PPARB No. 88 of 2017; Spring Engineering Group Limited v Sports Kenya and PPARB Transpower Energy Solutions Limited v Kenya Pipeline Company Limited***

34. Counsel argued that in the instant case, the Respondent in terminating the subject tender could not demonstrate that both the procedural and substantive requirements under Section 63 of the Act had been satisfied.
35. Mr. Kiprono submitted that the Applicant requested to be supplied with the Procuring Entity's summary of Financial Evaluation but this was not supplied. Accordingly, Counsel surmised that there was no evidence to support the Respondent's assertion that the Board has to determine whether the grounds of termination had been crystallized.
36. Counsel contended that it was common ground that the Evaluation Committee recommended the award of the subject tender to the Applicant but the Head of the Procurement Function decided to conduct a market survey that allegedly found the Applicant's tender quotes to be above market prices without providing any such evidence.
37. Counsel argued that Section 84 of the Act allows the Head of Procurement Function to review the procurement process but not to overrule the recommendation of the Evaluation Committee. He submitted that under Section 85 the Head of the Procurement Function was required to refer back the process to the Evaluation Committee and not to re-evaluate the tenders.
38. He further argued that the Market survey as conducted by the Head of Procurement Function did not meet the qualitative and quantitative test. He posited that the contract in respect of the subject tender was to last for 3 years and therefore the off-the-shelf prices used by the Head of Procurement would not be a good comparison as these prices did not take into account the cost of branding and transportation of the water bottles.

39. Mr. Kiprono also observed that the Applicant's quoted tender price of Kshs. 24,560,400.00 was within the Procuring Entity's budget of Kshs. 29,720,000.00.
40. Accordingly, Counsel urged the Board to find that there were no good reasons advanced for the termination of the subject tender.

Respondents' Rejoinder on their Preliminary Objection and Response to the Request for Review

41. Counsel for the Respondent, Mr. Mbogo submitted that once the Board determines that a termination of a procurement process was in line with Section 63 of the Act, then it has no jurisdiction over the Request for Review.
42. Counsel submitted that the Applicant did not have a problem with the Accounting Officer terminating the subject tender but only took issue with the Professional Opinion. He therefore questioned how the Applicant accessed the contents of the Professional Opinion as this was a confidential document.
43. Counsel argued that all procurement proceedings should comply with the statutory and constitutional principles of fairness, equality, transparency, and cost-effectiveness. He contended that Article 201(d) of the Constitution requires public funds to be utilized prudently and responsibly.
44. Additionally, he urged that the law provides for post-evaluation processes that once a recommendation has been made under Section 84 of the Act, the Head of Procurement is bound to offer a Professional Opinion.

45. Counsel contended that Section 54(2)(a) of the Act allows the conduct of market surveys so that Procuring Entities do not pay above market prices in respect of supplies made to it. Further Regulation 78(4) of the Regulations 2020 prescribes the format of the Professional Opinion which includes a provision as to whether the tender price is within market prices.
46. Counsel therefore submitted the Head of the Procurement Function was within their duty to conduct the market survey which yielded that some of the items in the Applicant's tender were quoted with above market prices. He further added that the Professional Opinion only gave recommendations including the termination of the subject tender and did not in any way overrule the Evaluation process as carried out by the Evaluation Committee.
47. He also argued that Section 54(1) of the Act forbids the splitting of tenders and concluded that the termination of the subject tender met the requirements of Section 63 of the Act.

Applicant's Rejoinder on the Request for Review

48. Counsel for the Applicant, Mr. Kiprono waived his right to offer any rejoinder.

CLARIFICATIONS

49. The Board sought for the Respondent to clarify the parameters that were used in conducting the market survey and whether branding and transportation costs were also considered. Mr. Mbogo indicated that all costs were considered and he invited the Board to look at the Professional Opinion.

50. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 7th November 2023 had to be determined by 28th November 2023. Therefore, the Board would communicate its decision on or before 28th November 2023 to all parties via email.

BOARD'S DECISION

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

I. Whether the Procuring Entity terminated the subject procurement process in accordance with Section 63 of the Act thereby ousting the jurisdiction of the Board?

In determining this issue, the Board will determine whether the Respondent terminated the subject tender as per the requirements under Section 63 of the Act

II. What orders should the Board issue in the circumstance?

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

52. Vide a Notice of Preliminary Objection dated 21st November 2023, the Respondent challenged the jurisdiction of the Board to hear and determine the instant Request for Review. In his Preliminary Objection, the Respondent argued that the instant Request for Review was in respect of termination of the subject tender yet Section 167(4)(b) excluded termination proceedings from the jurisdiction of the Board.

53. Counsel for the Respondent, Mr. Mbogo was emphatic that the Respondent complied with both the procedural and substantive requirements under Section 63 of the Act. It was submitted on behalf of the Respondent that the tender was terminated on account of the lowest evaluated tenderer's tender bearing quotations on certain items being above market rates. Further, that a Written Report on the termination had been sent to the Public Procurement Regulatory Authority, and the tenderers in the subject tender were notified of the termination of the subject tender.
54. On the flip side, the Applicant affirmed that this Board has jurisdiction over the instant Request for Review while inviting the Board to interrogate the circumstances under which the subject tender was terminated.
55. Counsel for the Applicant, Mr. Kiprono urged that a Procuring Entity could only terminate a procurement process upon satisfying both procedural and substantive requirements under Section 63 of the Act. He pointed out that this was not the case in the instant circumstance.
56. Mr. Kiprono urged that since the Applicant requested to be supplied with the Procuring Entity's summary of Financial Evaluation but this was not supplied, there was no evidence to support the Respondent's assertion that its quoted tender prices were above market rates. Counsel also assailed the Head of Procurement Function's recommendation for termination citing that it was in essence a re-evaluation of the tenders submitted in the subject tender, a role reserved for the Evaluation Committee. He further argued that the Market survey as conducted by the Head of Procurement Function did not meet the qualitative and quantitative test. He posited that the contract in respect of the subject

tender was to last for 3 years and therefore the off-the-shelf prices used by the Head of Procurement would not be a good comparison as these prices did not take into account the cost of branding and transportation of the water bottles.

57. From the foregoing, the Board is invited to interrogate the circumstances under which the tender was terminated.

58. For starters, this Board is alive to the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction, and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

59. Black's Law Dictionary, 8th Edition, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

60. On its part, Halsbury's Laws of England (4th Ed.) Vol. 9 defines jurisdiction as:

"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

61. The locus classicus case on the question of jurisdiction is the celebrated case of *The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1* where Nyarangi J.A. made the oft-cited dictum:

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

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

"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings are concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

63. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

"(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

64. Further, Section 28 of the Act provides for the functions of the Board as:

***The functions of the Review Board shall be—
reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

65. The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the powers the Board can exercise upon completing a review as follows:

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

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

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

(2)

(3)

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

(a) the choice of a procurement method;

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

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

168.

169.

170.

171.

172.

172. Dismissal of frivolous appeals

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

173. Powers of Review Board

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

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;***
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;***
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and***
- (e) order termination of the procurement process and commencement of a new procurement process.***

66. Section 167 of the Act above affords room to candidates and tenderers disgruntled with a public tender process to approach the Board for redress. However, subsection (4) of the Section divests the Board jurisdiction on a myriad of subject matters including the termination of a procurement process.
67. Termination of public procurement proceedings is governed by Section 63 of the Act.
68. Superior Courts of this country have on numerous occasions offered guidance on the interpretation of Section 167(4) of the Act and the ousting of the Board's jurisdiction on account of the subject matter relating to termination of tenders:

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

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

See also Nairobi High Court Judicial Review Misc. Application No. 117 of 2020; Parliamentary Service Commission v Public Procurement Administrative Review Board & Ors v Aprim Consultants

70. The above judicial pronouncements mirror the position of this Board in its previous decisions in ***PPARB Application No. 29 of 2023; Craft***

Silicon Limited v Accounting Officer Kilifi County Government & anor; PPARB Application No. 50 of 2020; Danka Africa (K) Limited v Accounting Officer, Kenya Ports Authority and PPARB Application No. 9 of 2022; Intertek Testing Services (EA) PTY Limited & Anor v The Director General, Energy and Petroleum Regulatory Authority & Anor.

71. Drawing from the above judicial pronouncements, this Board will first interrogate the termination of the subject tender to establish whether the termination of the subject tender was in accordance with the requirements under Section 63 of the Act. It is only upon satisfying itself that the said requirements have been met that the Board can down its tools in the matter. However, where any requirement has not been met, the Board will exercise its jurisdiction, hear, and determine the Request for Review.

72. Section 63 of the Act, on termination of tenders provides as follows:

"63. Termination or cancellation of procurement and asset disposal Proceedings

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

(a) ...

(b) ...

(c) ...

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

(e) ...

(f) ...

(g) ...

(h) ...

(i) ...

(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.

73. From the foregoing, for an Accounting Officer of a Procuring Entity to validly terminate a procurement or asset disposal proceedings (i) the termination must be based on any of the grounds under section 63(1) (a) to (f) of the Act; (ii) the Accounting Officer should give a Written Report to the Public Procurement Regulatory Authority within 14 days of termination giving reasons for the termination; and (iii) the Accounting Officer should within 14 days of termination give a Written notice to the tenderers in the subject tender communicating the reasons for the termination.

74. Effectively, an Accounting Officer is under a duty to provide sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Accounting Officer must

also demonstrate that they have complied with the substantive and procedural requirements set out under the provisions of section 63 of the Act.

75. On the one hand, the substantive requirements relate to a Procuring Entity outlining the specific ground under section 63(1) as to why a tender has been terminated and the facts that support such termination.
76. On the other hand, the procedural requirements include the requirements under Section 63(2), (3), and (4) of the Act i.e. (i) the submission of a Written Report to the Authority on the termination of a tender within 14 days of such termination and (ii) the issuance of notices of termination of tender to tenderers who participated in the said tender outlining the reasons for termination within 14 days of such termination.
77. The Board shall now interrogate the circumstances under which the subject tender was terminated.
78. The Respondent indicated that the Head of Procurement, Ms. Jane Rotich, while preparing her Professional Opinion carried out a market survey that yielded that some of the items indicated in the Applicant's tender bore prices that were above the market prices. It is these above market prices that the Respondent indicates informed the termination of the subject tender.
79. Section 63(d) enlists evidence that prices of the tenders received in any tender are above market prices as one of the grounds for which an Accounting Officer could terminate a procurement process.

80. Accordingly, the ground raised for the termination of the subject tender is one of the grounds for the termination of tender proceedings enumerated under section 63(1) of the Act. However, to fully satisfy the substantial requirement under Section 63, the Accounting Officer had to demonstrate that there was evidence that the price of the Applicant was above market rates.

81. The Board has studied the Professional Opinion submitted as part of the Confidential and finds it appropriate to reproduce excerpts of the Opinion

"4.0 Market survey

Section 54(2) and (2A) of the Public Procurement and Asset Disposal Act, 2015 on procurement pricing provides that:

(2) Standard goods, services, and works with known market prices shall be procured at the prevailing market price"

(2A) the head of the procurement function carried out market surveys from different suppliers (Supermarkets) as shown in

Table 7:

No.	Item Description	Quantity	Lowest Bidder Amount (Kshs)	Quickmart	Naivas	Carrefour	Remarks
1	Supply and delivery of 18.9 Liter bottle mineral water (114	5,928 bottles per year x 3 years	621.92	590	605	599	Within the market rates

	<i>bottles x 52 weeks</i>						
<i>2</i>	<i>Supply and delivery of branded one (1) litre reusable drinking water bottles with CA Logo- to be replenished after every six months</i>	<i>1200 per year x3 years</i>	<i>2300</i>	<i>-</i>	<i>1900</i>	<i>1950</i>	<i>Higher than market rate.</i>
<i>3</i>	<i>Hire of water dispenser</i>	<i>60 per year x3 years</i>	<i>24,000</i>	<i>22,700</i>	<i>24,895</i>	<i>24,895</i>	<i>Higher than market rates. The cost of hiring one dispenser per annum is equivalent to the cost of</i>

							<i>buying a new one</i>
4	<i>Annual maintenance and servicing of 60 water dispensers to be done on a quarterly basis</i>	<i>Servicing of 60 bottles per year x3 years</i>	<i>5000 per dispenser</i>	-	-	-	<i>N/A</i>
5	<i>Supply and delivery of branded 500 ml bottled water packed in a carton of 24 bottles. Orders to be placed as and when need arises and not to be transferred</i>	<i>1 x24 pcs</i>	<i>58.3</i>	<i>65</i>	<i>55</i>	<i>39</i>	<i>Within market rate</i>

	to the form of tender						
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"...Considering the above observations, the Evaluation Report and Market Surveys undertaken I recommend as follows:

1. The tender be terminated pursuant to Section 63(1)(d) of the Public Procurement and Asset Disposal Act, 2015 because there is evidence that prices of some of the items are above market prices. It is worth noting that although some of the items are within the market rates, the same may not be isolated and awarded considering that Section 82(1) of PPADA provides that "the tender sum submitted and read out during the tender opening is absolute and final and shall not be the subject of correction, revision, adjustment or amendment in any way by any person entity"

2. That Human Resource and Administration Department may wish to consider the following;

a. Outright purchase of the dispensers with disposable cups.

b. The branded bottles be sourced competitively under promotional items.

3. Retendering for supply and delivery of drinking water after cancellation of the tender"

82. The Board has also seen as part of the Confidential Documents submitted to it by the Respondent, Request for Market Survey forms sent to Quickmart, Naivas, and Carrefour Supermarkets in respect of the items under the subject tender. We have scrutinized the details filled in the

forms Request for Market Survey forms sent to Quickmart, Naivas, and Carrefour Supermarkets alongside the Professional Opinion as prepared by Ms. Jane Rotich.

83. From the Professional Opinion, the Board has noticed certain inaccuracies:

- I. Whereas Ms. Jane Rotich remarks that the Applicant's tender quote of Kshs. 2,300 for the Supply and delivery of 600 branded one (1) litre reusable drinking water *bottles with CA Logo- to be replenished after every six months* was above market rates, the quotations sought from the 3 supermarkets tell a different story:
 - i. In response to the market survey conducted by the Head of Procurement, Quickmart Supermarket provided a quote of Kshs. 2,000 to 2,400 for unbranded bottles. The Applicant's tender quote of Kshs. 2,300 is within the range provided by Quickmart Supermarket. Additionally, the Applicant's quote factors in branding which element Quickmart Supermarket indicates that its quoted range of 2,000 to 2,400 does not factor.
 - ii. In response to the market survey conducted by the Head of Procurement, Carrefour Supermarket provided quoted Kshs. 1,950 to 2,450 for unbranded bottles. The Applicant's tender quote of Kshs. 2,300 fits within the range provided by Carrefour Supermarket and also factors in branding which element Carrefour acknowledges is not part of its quotation.
 - iii. In response to the market survey conducted by the Head of Procurement Naivas Supermarket quoted Kshs. 1900 for unbranded bottles. Though the Applicant's tender quote of Kshs.

2,300 is higher than the quote by Naivas Supermarket, the latter's quote does not factor in the element of branding.

II. Whereas Ms. Rotich remarks that the Applicant's tender quote of Kshs. 24,000 on the tender item Hire of water dispensers as being above market rates, the Officer's market analysis speaks otherwise.

i. Naivas Supermarket presented 2 quotes of Kshs. 22,995 and 24,995 for the Mika and Von brands. The Applicant's tender quote of Kshs. 24,000 falls within the range of the two quotes provided by Naivas Supermarket.

ii. Carrefour Supermarket gave 2 quotes of Kshs. 21,399 and 24,895 for Ramtons and Von brands. The Applicant's tender quote of Kshs. 24,000 falls within the range of the two quotes provided by Naivas Supermarket.

84. From the foregoing it is apparent that the conclusions that the Head of Procurement made in respect of the market survey were faulty. This is because the Applicant's tender quotes in respect of the above tender items were within market prices and not outside as concluded by the Head of Procurement. Accordingly, it was erroneous for a recommendation to be made to the Respondent to terminate the procurement proceedings in the subject tender based on the faulty conclusions on the market survey.

85. Sections 84 of the Act spells out the role of the head of procurement in the preparation of a Professional Opinion in the following terms:

"84. Professional opinion

(1) The head of the procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.

(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.

(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1)."

86. From the above section, it is clear that the head of Procurement ought to review the Evaluation Report as prepared by the Evaluation Committee and thereafter prepare a Professional Opinion to the Accounting Officer on the procurement proceedings of a particular tender. The Head of Procurement is also obligated to provide guidance in the event of dissenting opinions between tender evaluation and award recommendations.
87. Indeed, this Board has in its past decisions pronounced itself on the scope of the role of the head of procurement in instances he notices non-compliance with the law or provisions of the Tender Document on the part of the Evaluation Committee.

88. In ***PPARB Application No. 23 of 2023; Apex Projects Limited v Kenya Meat Commission & 2 Ors***, the Board decreed that where the head of procurement notes any non-compliance by the Evaluation Committee, the head of procurement should recommend to the accounting officer for the Evaluation Committee to re-evaluate the tenders:

"If upon review, Mr. Joakim Boli noted any non-compliance with the provisions of the Constitution, the Act, and the Tender Document by the Evaluation Committee in evaluating and comparing of tenders, this non-compliance should be made known to the 2nd Respondent with a recommendation for re-evaluation of tenders by the Evaluation Committee in order to comply with the provisions of the Constitution, the Act and the Tender Document when re-evaluating the tenders. In such circumstances, if the 2nd Respondent approved the re-evaluation, the 2nd Respondent would direct the Evaluation Committee to re-evaluate the tenders while taking into consideration the contents contained in the Professional Opinion. We say so because, only the Evaluation Committee is mandated with evaluation and comparison of tenders. The Head of Procurement Function does not evaluate tenders"

89. Guided by the above, it was equally erroneous on the part of the Head of Procurement, Ms. Jane Rotich to make a recommendation for the termination of the subject tender when the Evaluation Committee had recommended the award of the subject tender to the Applicant. Ms. Jane Rotich, if in her view the Evaluation Committee erroneously conducted the evaluation process, ought to have recommended to the Respondent

herein to direct the Evaluation Committee to re-evaluate the Applicant's tender quote bearing in mind the findings of the Market Survey as contained in the Professional Opinion.

90. Based on the above analysis, the Board takes the position that the Respondent has not satisfied the substantive requirement under section 63(d). This is because there was no evidence that the Applicant's quote on the identified items was above market rates. If anything, the Board has observed that the Applicant's quotes were within the sampled quotations gathered from the 3 Supermarkets identified by the Head of Procurement.

91. Further, the Board has found great difficulty in following the Respondent's argument that the recommendation for the termination of the subject tender was in line with the constitutional and statutory principle of cost-effectiveness in the expenditure of public funds. We say so because, first the Applicant's tender as the lowest evaluated tender was recommended for award of the subject tender at its tender price of Kshs. 24,560,400.00 which amount was within the Procuring Entity's budget of Kshs. 29,720,000.00. In addition to cost-effectiveness, Article 227 of the Constitution entrenches the principles of fairness, equality, transparency, and competitiveness as forming part of public procurement processes. Thus, during the evaluation process, though the cost of a tendered item or service is a consideration, it is not the only consideration and **this is why tenders are awarded to the lowest evaluated tenders and not just the lowest tenders.**

92. The Board has also keenly perused the confidential file to verify the Respondent's compliance with the procedural requirements under Section 63 of the Act on issuance of a Written Report to the Public Procurement Regulatory Authority and letter of notification to tenderers on termination of the subject tender.
93. We have seen a letter dated **30th October 2023** by the Respondent addressed to the Director General, Public Procurement Regulatory Authority. The letter outlines that the subject tender had been terminated under Section 63(1)(d) of the Act and attached to it is (i) an extract of the subject tender's procurement plan; (ii) the Head of Procurement's signed recommendations for termination; (iii) Accounting Officer's Approval for the Termination and (iv) Termination notifications to the tenderers.
94. The Board has also sighted letters dated **24th October 2023** addressed to the tenderers in the subject tender. These letters communicate to the tenderers the shortcomings that led to their disqualification as well as notification that the subject tender had been terminated pursuant to Section 63(1)(d) of the Act that that same would be retendered.
95. We are therefore satisfied that the Respondent has satisfied the procedural requirement under Section 63 of the Act. However, because the Respondent has fallen short of meeting the substantive requirements under Section 63 of the Act, the termination of the procurement proceedings in the subject tender was irregular.
96. Accordingly, the Board therefore finds that the Procuring Entity did not terminate the subject procurement process in accordance with Section 63

of the Act. Accordingly, the instant Request for Review is subject to the jurisdiction of this Board.

What orders the Board should grant in the circumstances?

97. The Board has found that it has jurisdiction to hear and determine the instant Request for Review.
98. The upshot of our finding is that the Request for Review dated 7th November 2023 in respect of Tender No. CA/SCM/OT/03/2023-2024 for Supply and Delivery of Bottled Drinking Water at CA Centre and Regional Offices (Reserved for PWDs Owned Firms) succeeds in the following specific terms:

FINAL ORDERS

99. 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 7th November 2023:


- 1. The Respondents' Notice of Preliminary Objection dated 21st November 2023 be and is hereby dismissed.**
- 2. The Respondent's Letters dated 24th October 2023 and addressed to tenderers and terminating Tender No. CA/SCM/OT/03/2023-2024 for Supply and Delivery of Bottled Drinking Water at CA Centre and Regional Offices (Reserved for PWDs Owned Firms) be and are hereby cancelled and set aside.**
- 3. The Respondent be and is hereby directed to reconvene the Evaluation Committee for purposes of re-evaluating the Applicant's submitted tender and any other qualifying tender at**

the Financial Evaluation Stage in respect of Tender No. CA/SCM/OT/03/2023-2024 for Supply and Delivery of Bottled Drinking Water at CA Centre and Regional Offices (Reserved for PWDs Owned Firms) and conclude the re-evaluation within 7 days of this Decision while taking into account the findings of the Board herein.

4. The Respondent ensure that the procurement proceedings in respect of Tender No. CA/SCM/OT/03/2023-2024 for Supply and Delivery of Bottled Drinking Water at CA Centre and Regional Offices (Reserved for PWDs Owned Firms) proceeds to its lawful and logical conclusion taking into account the findings of the Board herein.
5. Given the Board's finding above, and the incompleteness of the procurement process in respect of Tender No. CA/SCM/OT/03/2023-2024 for Supply and Delivery of Bottled Drinking Water at CA Centre and Regional Offices (Reserved for PWDs Owned Firms) each party shall bear its own costs.

Dated at NAIROBI, this 28th Day of November 2023.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB

