

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 104/2023 OF 8TH DECEMBER 2023

BETWEEN

MWANGI MUSANGO & COMPANY ADVOCATES APPLICANT

AND

CHIEF EXECUTIVE OFFICER, UNIVERSITIES

FUND ACCOUNTING OFFICER/ 1ST RESPONDENT

UNIVERSITIES FUND PROCURING ENTITY/2ND RESPONDENT

Review against the decision of the Accounting Officer, Universities Fund in relation to Tender No. UF/RFP/005/2023-2024 for Request for Proposal for Provision of Legal Compliance & Governance Audit.

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb - Chairperson
2. Mr. Joshua Kiptoo - Member
3. Dr. Susan Mambo - Member

IN ATTENDANCE

1. Ms. Sarah Ayoo - Holding Brief for the Board Secretary
2. Ms. Evelyn Weru - Secretariat



PRESENT BY INVITATION

APPLICANT

**MWANGI MUSANGO & COMPANY
ADVOCATES**

Mr. Og'anda Junior

-Advocate, Mwangi Musango & Company
Advocates

RESPONDENTS

**CHIEF EXECUTIVE OFFICER, UNIVERSITIES
FUND & UNIVERSITIES FUND**

Mr. Mbogo

- Robson Harris Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

1. The Universities Fund, the Procuring Entity and the 2nd Respondent herein, invited proposals from five (5) pre-qualified service providers in response to Tender No. UF/RFP/005/2023-2024 for Request for Proposal for Provision of Legal Compliance & Governance Audit (hereinafter referred to as the "subject tender") by sending out letters of request for proposals on 8th September 2023 and issuing the blank tender document for the subject tender (hereinafter referred to as the 'Tender Document') to the said tenderers. Tenderers were required to submit the Financial Proposal together with the Technical Proposal in separate envelopes.

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Submission of Tenders and Tender Opening

2. According to the Minutes of the subject tender's opening held on 20th September 2023 signed by members of the Tender Opening Committee (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 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 three (3) tenders were submitted in response to the subject tender. The said three (3) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1.	M/s Ndolo and Associates Advocates
2.	M/s Mwangi-Musango and Company Advocates
3.	M/s Adah Atieno Associates

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the three (3) tenders as captured in a Tender Evaluation Report for the subject tender signed by members of the Evaluation Committee

(hereinafter referred to as the "Evaluation Report") in the following stages:

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

Preliminary Evaluation

4. The Evaluation Committee was required to carry out a Preliminary Evaluation and examined tenders for responsiveness using the criteria provided under Section 2(A). Instructions to Consultants (ITC) and Section 2(B). Data Sheet 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, two (2) tenders were determined non-responsive, while one (1) tender, being the Applicant's tender, was determined responsive and proceeded to Technical Evaluation.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Section 2(A). Instructions to Consultants (ITC), Section 2(B). Data Sheet and Section 3. Technical Proposal – Standard Forms of the Tender Document. The maximum score attainable at this stage was 100 marks and only bidders with a technical score of 70% and above would proceed to the Financial Evaluation stage.

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7. At the end of evaluation at this stage, the Applicant's tender was determined responsive to proceed to the Financial Evaluation stage having achieved a technical score of 82 marks.

Evaluation Committee's Recommendation

8. The Evaluation Committee recommended for the Applicant to be invited for the opening of its financial proposal in order for the financial evaluation to be completed and further recommended for the two (2) non-responsive tenderers to be invited to collect their unopened financial proposals.

Opening of Financial Proposal

9. The Applicant's Financial proposal was opened on 12th October 2023 and recorded as follows:

No.	Firm	Bidder	Tender Price Quoted (Kshs) Inclusive of Taxes
1.	M/s Mwangi-Musango & Company Advocates	B3	2,400,000

Financial Evaluation

10. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Section 2(A). Instructions to Consultants (ITC), Section 2(B). Data Sheet, and Section 4. Financial Proposal – Standard Forms of the Tender Document. Tenderers would be selected under Quality Cost Based Selection method and in a format described under ITT 29.1 of Section 2(B). Data Sheet at page 19 of the Tender Document.

11. At the end of evaluation at this stage, the Applicant's bid was ranked as follows:

<i>Description</i>	<i>Bidder Number</i>
	2
<i>Tender Price Quoted (Kshs) Inclusive of Taxes</i>	2,398,200
<i>Financial Score (Sf)</i>	100
<i>Technical Score (St)</i>	82
<i>Combined Technical and Financial Score (S)</i>	0.874
<i>Ranking</i>	1

Evaluation Committee's Recommendation

12. The Evaluation Committee recommended the award of the subject tender to the Applicant being the highest ranked responsive bidder as per the evaluation criteria at a cost of Kenya Shillings Two Million, Three

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Hundred and Ninety-Eight Thousand, Two Hundred only (Kshs. 2,398,200/-) as per the Terms of Reference in its bid.

Professional Opinion

13. In a Professional Opinion dated 27th November 2023 (hereinafter referred to as the "Professional Opinion"), the Supply Chain Manager reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and stated that the Evaluation Committee evaluated the subject tender using the procedures and criteria as set out in the Tender Document pursuant to Section 126 of the Act.

14. With regard to whether adequate funds were set aside and budgeted for the subject tender, the professional Opinion indicated as follows:

"The items are provided for in the Annual Work Plan and Budget for FY 2023-2024 pursuant to Section 53(2) and 53(9) of the Public Procurement and Asset Disposal Act, however, due to emerging issues caused by unforeseen litigation petition of against the New Funding Model Case No: HCCHRPET/E412/2023, delays in release of capitation from the Government and budget cuts Ref. No: MOE/11/1/VOL.IV/160 dated 17th October 2023, the allocated legal budget will not be sufficient enough to cater for the Legal and Governance Audit during this quarter until after reallocation of the Budget for FY 2023-2024."

15. Subsequently, a recommendation was made for cancellation of the subject tender pursuant to Section 63(1)(b) of the Act read with Regulation 48 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020").

16. Thereafter, the Professional Opinion was approved as can be discerned by the word "Approved" and signature inscribed at the bottom left of the second page of the Professional Opinion.

Notification to Tenderers

17. Tenderers were notified of cancellation of the subject tender vide letters dated 27th November 2023.

REQUEST FOR REVIEW NO. 104 OF 2023

18. On 8th December 2023, Mwangi Musango & Company Advocates, the Applicant herein, filed a Request for Review dated 1st December 2023 together with a Statement dated 1st December 2023 and a Supporting Affidavit sworn on 1st December 2023 by Alex Musyoki, its Authorized Representative (hereinafter referred to as the 'instant Request for Review') seeking the following orders from the Board in verbatim:

a) THAT a stay of execution do issue against the 1st and 2nd Respondent from proceeding with the advertisement/advertisement or commencement of any

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procurement process relating to the Provision of Consultancy services for Legal and Governance Audit or related services pending the hearing and determination of this suit.

b) AN ORDER annulling and setting aside the Respondents decision to cancel Tender No. UF/RFP/005/2023-2024.

c) A DECLARATION that the decision by the Accounting Officer declaring the Applicants financial bid cancelled as enumerated in the letter dated vide the Respondents letter dated 29th November 2023 is illegal, null and void and therefore quashed.

d) THAT the Board Orders the financial evaluation and all subsequent tender processes proceed to their legal conclusion.

e) THAT the Board orders that the Public procurement Regulatory Authority conduct investigations on the tender pursuant Section 35 of the Act for possible fraudulent acts and take appropriate disciplinary actions against any parties found culpable.

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f) THAT the Applicant be awarded the cost of this Request for Review which was necessitated by the incompetence of the procuring entity.

g) Any other reliefs that the Honorable Board deems fit.

19. In a Notification of Appeal and a letter dated 8th December 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 8th December 2023.

20. On 13th December 2023, the Respondents filed through Robson Harris Advocates LLP a Notice of Appointment of Advocates dated 13th December 2023, a Memorandum of Response dated 13th December 2023, an Affidavit Verifying the Contents of the Memorandum of Response sworn on 13th December 2023 by Mr. Geoffrey Monari, its Chief Executive Officer, together with a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

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21. Vide letters dated 14th December 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.

22. Vide a Hearing Notice dated 15th December 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 20th December 2023 at 12 noon, through the link availed in the said Hearing Notice.

23. When the matter came up for hearing on 20th December 2023, the Board read out pleadings filed in the matter and allocated time for each party to proceed and highlight its case. Thus the Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submissions

24. Mr. Ongand'a submitted that the Procuring Entity terminated the subject tender because of inadequate budgetary provision and this position was illegal since Section 53(8) of the Act expressly requires an accounting officer not to commence any procurement proceeding until satisfied that sufficient funds to meet any obligations of a resulting contract are reflected in its approved budget estimates. He further pointed out that



Section 53(9) of the Act makes it an offence for an accounting officer to knowingly commence any procurement process without ascertaining whether the good, work or service is budgeted for.

25. Mr. Ong'anda submitted that the budget available for any procurement process is known by a Procuring Entity before it advertises a tender and such budget having been allocated ought not to be tampered with and should be locked for that process to proceed to its logical conclusion.

26. Counsel further submitted that it beats the legitimate expectation of any bidder to go through a procurement process and be recommended for award only to be told that the allocated budget has been used for something else. He pressed on that the reasons for termination of the subject tender do not meet the criteria set by the Board in its previous decisions and the courts on what amounts to a legal termination process of a tender.

27. He urged the Board to allow the Request for Review as prayed.

Respondents' Submissions

28. In his submissions, counsel for the Respondents, Mr. Mbogo, relied on the Memorandum of Response dated 13th December 2023, the Affidavit Verifying the Contents of the Memorandum of Response sworn on 13th December 2023 by Mr. Geoffrey Monari, its Chief Executive Officer, together with a file containing confidential documents concerning the

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subject tender pursuant to Section 67(3)(e) of the Act that were filed before the Board.

29. Mr. Mbogo submitted that the Respondents were guided by the principles developed over time on cancellation of procurement proceedings pursuant to Section 63(1) of the Act and indicated that should the Board find that the procurement proceedings were terminated in accordance with Section 63(1) of the Act, the Board to find that it doesn't have jurisdiction pursuant to Section 167(4) of the Act.

30. He pointed out that it is not in dispute that a procurement process commenced and that until November 2023, the Procuring Entity was ready and committed towards completion of the procurement process though along the way, developments happened to the funds as detailed at paragraphs 13, 14, 15, 16, 17, and 18 of the Memorandum of Response.

31. On the issue of legality of termination of the procurement proceedings, counsel argued that termination was legal noting that Section 53(8) of the Act requires availability of funds in meeting obligations of the Procuring Entity while Section 63(1)(b) of the Act allows termination of procurement proceedings where a procuring entity doesn't have sufficient funds to meet obligations out of a procurement process.

32. He referred the Board to annexure marked AM6 being the Procurement Plan 2023/2024 and pointed out that Item No. 40 indicated as Legal

related consultancies was a budget for an entire legal department catering to any issues from the said department which was provided at Kshs. 4,290,000/=. He pressed on that the 2nd Respondent enjoys a very slim budget as allocated by treasury and being under the Ministry of Education, it is subject to ministerial directions.

33. Mr. Mbogo referred the Board to its first annexure in its bundle of documents being a letter dated 17th October 2023 from the Principal Secretary Ministry of Education addressed to the Principal Secretary National Treasury whose effect is to reduce budgetary allocation for the 2nd Respondent herein. He pointed out that from the 2nd Respondent's budget of Kshs. 4,290,000/=, there were emerging litigation issues to be met as can be observed from orders issued by Justice Mwita on 23rd October 2023 in the High Court at Nairobi in the petition of *Kenya Human Rights Commission and Elimu Bora Working Group and 2 others v HELB and Cabinet Secretary for Education and 3 others* and that the costs of the instant proceedings are also to be met from the said budget of Kshs. 4,290,000/=.

34. Mr. Mbogo submitted that the Applicant's tender sum is in the region of Kshs. 2,900,000/= which takes away more than half of the Respondent's budget noting that the litigation emanating from the instant Request for Review was not foreseen and neither were the budgetary cuts.

35. Counsel further submitted that there are serious delays by the National Treasury in giving out funds allocated to the Procuring Entity and looking



at the role and duty of the accounting officer which is to ensure sufficiency of funds and consideration of the head of procurement, the Procuring Entity proceeded and terminated the procurement proceedings for the subject tender due to inadequacy of funds.

36. In support of his arguments, counsel relied on the holding by the High Court in *Republic vs Public Procurement Administration Review Board ex-parte Pelican insurance (Interested party) ex-parte Kenya Revenue Authority (2019) eKLR* and *PPARB Application No. 88 of 2023* where the Board elaborated the procedure for termination under Section 63 of the Act entailing substantive reasons for termination where evidence must be given and procedure to be followed in termination. He pressed on that the Respondents had adduced sufficient evidence from state department on termination of the subject tender and had followed the laid down procedure by notifying tenders in the subject tender of termination of the procurement proceedings in the subject tender and a report to the Authority issued. Further, that the cancellation was done prior to notification of award.

37. Mr. Mbogo submitted that the issues raised in the Applicant's Further Replying Affidavit do not negate the reasons provided for cancellation of the subject tender by the Respondents and on the claim by the Applicant that there is no evidence of a letter to undertake litigation on behalf of the Respondents, counsel pointed out that the presence of Robson Harris shows that there is counsel on record representing the Procuring Entity.



38. He urged the Board to dismiss the Request for Review with costs and argued that the fund would be committing an offence by committing to a contract without adequate funds.

Applicant's Rejoinder

39. In a rejoinder, Mr. Ong'anda addressed the Respondents submission that there was a ministerial direction leading to re-allocation of funds and submitted that the 1st Respondent has a higher duty to comply with the Act and anything commenced pursuant to the Act enjoys superiority based on provisions of Section 5 of the Act. He further submitted that the provisions of the Act must be complied with and the duty was higher to comply the law as opposed to ministerial directions and as such the termination of the subject tender ought to be deemed unlawful.

BOARD'S DECISION

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

- i Whether the procurement proceedings of the subject tender were terminated in accordance with Section 63 of the Act to divest the Board of its jurisdiction to hear and**

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determine the instant Request for Review by dint of Section 167(4)(b) of the Act;

ii What orders should the Board grant in the circumstances?

Whether the procurement proceedings of the subject tender were terminated in accordance with Section 63 of the Act to divest the Board of its jurisdiction to hear and determine the instant Request for Review by dint of Section 167(4)(b) of the Act;

41. The Board has on numerous occasions noted that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

"227. Procurement of public goods and services

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

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

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

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

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

(a) applies or interprets this Constitution;

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

(c) makes or implements public policy decisions.

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

(a)

(b)

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

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43. 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.

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

"167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

(2)

(3)

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(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.”

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

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

(a) the subject procurement has been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

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

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46. Further, 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."

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

48. In essence, Section 63 of the Act is instructive on termination of procurement proceedings being undertaken by an Accounting Officer of a procuring entity at any time before notification of award is made and such termination must only be effected if any of the pre-conditions

enumerated in Section 63(1) (a) to (i) of the Act are present. This is the substantive statutory pre-condition that must be satisfied before a termination of procurement proceedings is deemed lawful. Further, following such termination, an accounting officer is required to give the Authority a written report on the termination with reasons and notify all tenderers, in writing, of the termination with reasons within fourteen (14) days of termination. These are the procedural statutory pre-conditions that must be satisfied before a termination of procurement proceedings is deemed lawful.

49. It is therefore important for the Board to determine the legality, or lack thereof, of the Respondents' decision to terminate the procurement proceedings of the subject tender. In saying so, we are guided by the holding in **Judicial Review Application No. 117 of 2020, Parliamentary Service Commission v Public Procurement Administrative Review Board and another** where Hon. Lady Justice Nyamweya at paragraph 51 held as follows:

".... this being the case, the Respondents and this Court upon an application for review have jurisdiction to determine whether or not the statutory pre-condition was satisfied...."

Therefore, from the onset, the Respondent [Review Board] has jurisdiction to determine if the conditions of Section 63 have been met when a tender is terminated on any of the



grounds listed thereunder, and a termination under this section does not automatically oust the Respondent's jurisdiction. It is only upon a finding that the termination was conducted in accordance with Section 63 of the Act that the Respondent is then divested of jurisdiction and obliged to down its tools."

50. Further, 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 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"

As to the substantive requirements for termination of procurement proceedings in the subject tender;

51. The Applicant in the instant Request for Review is aggrieved by the Procuring Entity's decision to terminate the subject tender as communicated in the letter of notification of cancellation of the subject tender dated 27th November 2023 which reads in part as follows:

"
Reference is made to the above tender in which you participated.

Following the conclusion of above captioned Tender for Provision of Consultancy services for Legal and Governance Audit to Universities Fund, we regret to inform you that the Tender has been cancelled due to inadequate budgetary provisions.

We would like to thank you for the time and effort spent in submitting your proposal and assure you that this cancellation will not affect any tenders you may submit for any future procurements issued by the Fund.

....."

52. Having carefully perused the confidential documents filed by the 1st Respondent pursuant to Section 67(3)(e) of the Act, we note that the

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Applicant was among three (3) tenderers who submitted bids in the subject tender. Upon evaluation of tenders, the Applicant's tender being responsive at both the Preliminary Evaluation stage and the Technical Evaluation stage proceeded for evaluation at the Financial Evaluation stage and was recommended for award of the subject tender by the Evaluation Committee at its tender sum of Kenya Shillings Two Million, Three Hundred and Ninety-Eight Thousand, Two Hundred only (Kshs. 2,398,200/-) as per the Terms of Reference in its bid.

53. However, in a Professional Opinion dated 27th November 2023 a recommendation was made to the 1st Respondent to terminate the procurement proceedings of the subject tender pursuant to Section 63(1)(b) of the Act read together with Regulation 48 of Regulations 2020. We note that this recommendation came about following the requirement for the Head of Procurement to confirm if adequate funds were budgeted for the procurement of the subject tender and in response, it was indicated that:

"The items are provided for in the Annual Work Plan and Budget for FY 2023-2024 pursuant to Section 53(2) and 53(9) of the Public Procurement and Asset Disposal Act, however, due to emerging issues caused by unforeseen litigation petition of against the New Funding Model Case No: HCCHRPET/E412/2023, delays in release of capitation from the Government and budget cuts Ref.

No: MOE/11/1/VOL.IV/160 dated 17th October 2023, the allocated legal budget will not be sufficient enough to cater for the Legal and Governance Audit during this quarter until after reallocation of the Budget for FY 2023-2024.”

54. The Respondents subsequently proceeded to terminate the subject tender due to inadequate budgetary provisions as communicated in the aforementioned letter dated 27th November 2023.

55. We note that the Applicant at ground No. 6 of the Request for Review dated 1st December 2023 challenges the purported termination of the subject tender and argues that the Procuring Entity breached the provisions of Section 63(1)(b) of the Act as inadequacy of funds is not a sufficient ground for termination of the procurement process of the subject tender since the Procurement Plan denotes that funds for the tender in question as budgeted for are still available and the tender process has already commenced. The Applicant contends that the abrupt unavailability of funds when such funds had already been set apart and apportioned can only point to an illegal and unprocedural deviation from the 2nd Respondent's approved Procurement Plan annexed and marked as exhibit AM-6 which provides in part as follows:



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.....(Procuring Entity's logo).....

CONSOLIDATED PROCUREMENT PLAN – 2023/2024 (GOODS, WORKS & SERVICES) SUMMARY

FINANCIAL YEAR – 2023/2024

PROCUREMENT OF GOODS, WORKS AND SERVICES: CONSOLIDATED

PROCUREMENT PLAN

No.	Item description	Unit	Qty	Q	Pro	Sou	Unit	Esti	Time	Inv	Bid	Bid	Ten	Noti	Cont	Total	Date
		Cost			cur	orce	Cost	mat	e	ite	ope	eval	der	ficat	ract	time	for
		Kshs.			em	of	'000	ed	Pro	/	nin	uati	awa	ion	signi	to	comple
					ent			Cost	ces	Ad	g	on	rd	of	ng	contra	tion of
					Me	Fun		Kshs	s	ver				aw		act	contra
					tho	ds		'000		tise				rd		signa	ct
					d					Ten					ture		
1	2	6	7	8	9	10	11	12	13	14	15	16					
....

40.	Legal related consultancies	E a c h	1	RF P	GO K	4,290,000	4,290,000	Planned Days	1 day	5 days	14 days	1 day	6 Days	5-7 days	1 day	1 day		
								Actual Days										
								Variance										

(signed)

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56. According to the above Procurement Plan, we note that Item No. 40 provided for Legal related consultancies which was to be procured by way of the request for proposal procurement method and the estimated cost provided as Kenya Shillings Four Million, Two Hundred and Ninety Thousand only (Kshs. 4,290,000/=). This is what guided the Procuring Entity in inviting bids on 8th September 2023 from prequalified service providers in response to Tender No. UF/RFP/005/2023-2024 for Request for Proposal for Provision of Legal Compliance & Governance Audit, being the subject tender herein.

57. On their part, the Respondents pleaded at paragraph 12 of the Memorandum of Response dated 13th December 2023 that:

"the financial proposals were opened on 12th October, 2023 at 11.00 am at the Procuring Entity's premises wherein it was established that the Applicant had quoted a financial proposal of Kshs. 2,398,200.00 thereby emerging as the lowest responsive evaluated bidder and was recommended for an award of the tender."

58. Further at paragraph 13 of the Memorandum of Response dated 13th December 2023, the Respondents pleaded that:

"however, in the intervening period various unforeseeable issues arose on the part of the Procuring Entity making it impossible to proceed with the tender to logical conclusion.

i. On or about 17th October, 2023, the 2nd Respondent received a circular on budget cuts on various



departments in the Ministry of Education with the Respondent being one of the affected departments some of its funds having been re-allocated to other departments thereby constricting its budget and eventual expenditure. That against a total budgetary allocation of Kshs. 255,106,411.00, Kshs. 2,551,064.00 translating to about 1% of the budget was re-allocated from the Respondent.

ii. That further, the Respondent has been hit by unforeseen litigation in the recent times which have eaten into its budget for the legal department and as such have very minimal funds left for the operations of the legal department and not in a position to continue with the procurement of the services for legal compliance and governance audit.

iii. That there is persistent delay in disbursement of the allocated funds by the national treasury making it difficult for the Respondent to meet its statutory obligations commit to a substantial financial project like the instant procurement process.”

59. In essence, the Respondents contend that they were unable to proceed with the subject tender to its logical conclusion due to emerging issues being (a)unforeseen litigation which has eaten up its budget for the legal



department and as such have very minimum funds left for operation of the legal department; (b) delays in release of capitation from the Government; (c) budget cuts Ref. No: MOE/11/1/VOL.IV/160 dated 17th October 2023 hence the allocated legal budget will not be sufficient enough to cater for the Legal and Governance Audit during current quarter until after reallocation of the Budget for FY 2023-2024. We note that during the hearing, counsel for the Respondents, Mr. Mbogo, submitted that Item No. 40 in the Procurement Plan described as 'Legal related consultancies' whose estimated cost was provided as Kshs. 4,290,000/= was a budget for the entire Legal Department to cater for any issues from the said department.

60. We have not had sight of the circular referred to by the Respondent on budget cuts since what has been adduced before the Board is a letter dated 17th October 2023 Ref. No: MOE/11/1/VOL.IV/160 from Dr. Beatrice Muganda Inyangala, Principal Secretary Ministry of Education State Department for Higher Education and Research addressed to the Principal Secretary, the National Treasury which reads in part as follows:

"....."

Attn: Director of Budget

***REQUEST FOR THE NATIONAL TREASURY'S APPROVAL
TO REALLOCATE FUNDS***

The above matter refers.

***The State Department for Higher Education & Research
was allocated Ksh. 286 Million in FY 2023/24 approved
budget for Operations and Maintenance of which the***

National Treasury has rationalized Ksh. 62 Million in the Supplementary Estimates No. 1 leaving a balance of Ksh. 214 Million. The State Department has carryovers from FY 2022/23 budget amounting to Ksh. 78 Million and expenditure to date of Ksh. 59 Million. The amount available to the end of the Financial Year is Ksh.88 Million which will adversely affect the operations of the State Department.

In view of the foregoing, the State Department has held consultations with its SAGAs who have indicated areas of savings that can be reallocated to the State Department as follows:

<i>Budget Head</i>	<i>Name of SAGA</i>	<i>Approved Budget</i>	<i>Amount to be reallocated</i>
<i>106500301-2630101</i>	<i>National Commission for Science, Technology and Innovation (NACOSTI)</i>	<i>202,841,804</i>	<i>30,426,271</i>
<i>1065001501-2630101</i>	<i>Higher Education Loans Board</i>	<i>171,598,080</i>	<i>25,739,712</i>

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	(HELB) – Operations Grant		
1065003301- 2630101	National Research Fund (NRF)	323,037,923	16,151,896
1065003801- 2630101	National Research Fund (NRF)	323,037,923	16,151,896
1065003801- 2630101	Universities Funding Board (UFB) – Operations Grant	255,106,411	2,551,064
Total		952,584,218	74,868,943

The purpose of this letter therefore, is to request for your consideration and approval for reallocation of funds to facilitate operations of State Department for Higher Education and Research from October 2023 to June 2024.

.....”

61. The contents of the above letter dated 17th October 2023 refer to a request for the National Treasury’s approval of reallocation of funds by the Ministry of Education State Department for Higher Education and Research and the Procuring Entity, being one of its SAGAs, indicated its

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area of saving that can be reallocated to the State Department as the Universities Funding Board (UFB) – Operations Grant and the amount to be reallocated as Kshs. 2,551,064. Hence, there is no indication that the amounts estimated in the Procurement Plan under Item No. 40 for Legal related consultancies were to be reallocated. Additionally, no evidence been adduced before the Board to show that the National Treasury approved the above request for reallocation of funds.

62. From the foregoing, it is our considered opinion that what the Procuring Entity's Procurement Plan provided for was procurement of legal related consultancies which informed the invitation of proposals for the subject tender **and not** procurement for the Procuring Entity's Legal Department expenditures such as the alleged unforeseen litigations which are said to have eaten into the said department's budget. We note that the Procuring Entity did not avail its budget for the FY 2023-2024 which has allegedly faced budget cuts nor the proposed budget following the request for reallocation of funds to show how the funds estimated for the subject tender have been affected leading to inadequate budgetary allocation for the said tender. Neither have we had sight of any cogent evidence regarding the alleged persistent delay in disbursement of allocated funds by the National Treasury.

63. The Board notes that a procuring entity which seeks to terminate a procurement process on account of inadequate budgetary provision bears the burden of establishing with specificity how the inadequate budgetary provision came about and how it affects its capability to guarantee



compliance with the principles of Article 227 of the Constitution in the procurement process of a tender. The onus hence lies squarely on the Procuring Entity to demonstrate the inadequate budgetary provision so as to leave no room for conjecture in the minds of tenders why the tender was terminated. This reasoning accords with the principle of transparency and accountability which are envisaged as essential cogs in any public procurement process in Kenya.

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

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

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

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

The mere recitation of the statutory language, as has happened in this case is not sufficient to establish the grounds or sufficient reasons. The reasons for the termination must provide sufficient information to bring the grounds within the provisions of the law. This is because the tender process and in particular, termination must be done in a transparent and accountable and legal manner as the law demands. This is because the question whether the information put forward is sufficient to place the termination within the ambit of the law will be determined by the nature of the reasons given. The question is not whether the best reasons to justify termination has been provided, but

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whether the reasons provided are sufficient for a reasonable tribunal or body to conclude, on the probabilities, that the grounds relied upon fall within any of the grounds under section 63 of the Act. If it does, then the party so claiming has discharged its burden under section 63”.

65. From the foregoing, the Board observes that the court was dealing with termination of procurement proceedings pursuant to section 63 (1) (a) (ii) of the Act that deals with a procurement having been overtaken by substantial technological change. In that regard, the Court found that the technological changes cited should have been of such nature that it rendered it imprudent for the contract to proceed on the original terms, and the nature of the change and how it affected the contract ought to have been clearly stated. The court proceeded to conclude that a mere recitation of the statutory language is not sufficient to establish the grounds or sufficient reasons for a termination. The Honourable Judge proceeded to hold that, undue regard should not be given on whether a procuring entity has provided the best reasons, but regard must be given to whether ***sufficient*** reasons have been provided.

66. The import of full disclosure by a procuring entity is to ensure that the right to fair administrative action is achieved in public procurement processes. Article 47 of the Constitution states that:-

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

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

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

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

(a)

(b)

(c)

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

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

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

"(1) Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review

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

(a) the reasons for which the action was taken

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

69. The constitutional right to fair administrative action including the right to provide a person with sufficient reasons and information following an administrative action is codified in section 5 and 6 of the Fair Administrative Actions Act.

70. Section 44 of the Act provides as follows:

(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)**
-"**

71. 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 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**

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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 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."

72. 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. The accounting officer is also responsible for preparation of an annual procurement plan which ought to be within the approved budget and should not commence any procurement

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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.

73. Turning to the circumstance in the instant Request for Review, it is our considered view that the Respondents have not provided sufficient reasons and evidence to demonstrate that the subject procurement has inadequate budgetary allocation having failed to supply with the Board with sufficient evidence of the approved budget for FY 2023-2024 which has allegedly faced budget cuts nor the proposed budget following alleged budget cuts and approval of the request for reallocation of funds to show how the funds estimated for the subject tender have been affected leading to inadequate budgetary allocation.

74. In the circumstances, 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 aforementioned case laws since they have not provided sufficient evidence of inadequate budgetary allocation justifying termination of the subject tender.

As to the procedural requirements for termination of procurement proceedings in the subject tender;

75. From the confidential file, we note that all tenderers in the subject tender were notified of termination of the subject tender vide letters dated 27th November 2023. We also note from an extract of the Public Procurement Information Portal that the Respondents submitted a report notifying the Public Procurement Regulatory Authority on 27th November 2023 of termination of the subject tender at the stage of issuance of a Professional Opinion to the 1st Respondent. To this end, the Procuring Entity met 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.

76. From the foregoing, despite the Respondents having met the procedural statutory pre-conditions stipulated under Section 63(2), (3), and (4) of the Act, it is our considered view that the substantive requirements to justify termination of the subject tender as stipulated under Section 63(1)(b) of the Act were not met by the Respondents to deem the alleged termination of the subject tender lawful. In the circumstances, we find and hold that the subject tender has not been terminated as stipulated in Section 63 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(b) to hear and determine the instant Request for Review.

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What orders should the Board grant in the circumstances?

77. We have established that the Respondents failed to satisfy the substantive statutory pre-conditions of termination of procurement proceedings in the subject tender and as such, the Respondents failed to terminate the procurement proceedings of the subject tender in accordance with Section 63 of the Act to divest the Board of its jurisdiction by dint of Section 167(4)(b) of the Act to hear and determine the instant Request for Review.

78. It is therefore our considered view that the most appropriate orders in these circumstances is to order the 1st Respondent to direct the Evaluation Committee to re-admit the Applicant's tender to the Financial Evaluation stage, being the only responsive tender at that stage and proceed with the subject procurement process to its logical conclusion including issuance of notification letters to all bidders of the outcome of the evaluation process in accordance with the provisions of the Request for Proposal Document, the Act and the Constitution and taking into consideration the findings of the Board in this matter.

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

FINAL ORDERS

80. 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 1st December 2023 and filed on 8th December 2023:


- A. The decision by the 1st Respondent to terminate the procurement proceedings of Tender No. UF/RFP/005/2023-2024 for Request for Proposal for Provision of Legal Compliance & Governance Audit be and is hereby annulled and set aside.**
- B. The Procuring Entity's Letter dated 27th November 2023 issued to the Applicant and other tenderers in the subject tender communicating the decision to terminate procurement proceedings with respect to Tender No. UF/RFP/005/2023-2024 for Request for Proposal for Provision of Legal Compliance & Governance Audit be and is hereby nullified and set aside.**
- C. The 1st Respondent is hereby ordered to direct the Evaluation Committee to re-admit the Applicant's tender at the Financial Evaluation stage and to complete the procurement process to its lawful and logical conclusion including issuance of notification letters of the outcome with respect to Tender No. UF/RFP/005/2023-2024 for Request for Proposal for Provision of Legal Compliance & Governance Audit in**

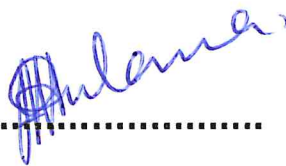


accordance with the Tender Document, the Act, and Regulations 2020 the Constitution within 14 days of this decision taking into consideration the Board's findings herein.

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 29th Day of December 2023.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB