

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 5/2024 OF 12TH JANUARY 2024

BETWEEN

SELUK INVESTMENTS LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER/CHIEF OFFICER

DEPARTMENT OF URBAN DEVELOPMENT

COUNTY GOVERNMENT OF MACHAKOS 1ST RESPONDENT

COUNTY GOVERNMENT OF MACHAKOS 2ND RESPONDENT

TURIN ENTERPRISE LIMITED 3RD RESPONDENT

Review against the decision of the Accounting Officer/Chief Officer
Department of Urban Development County Government of Machakos in
relation to Tender No. GMC/KUSP/MKS MUN/01/2022-2023 Negotiation No.
1300044-2022-2023 for Upgrading of Wholesale and Retail Market Loop
Roads, St. Mary's Girls Primary School to KWFT Link Road in Machakos
Municipality KUSP FY 2022-2023.

BOARD MEMBERS PRESENT

- | | | |
|-------------------------------|---|-------------|
| 1. Mr. George Murugu, FCI Arb | - | Chairperson |
| 2. Ms. Alice Oeri | - | Member |

3. CPA Alexander Musau - Member

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT

WETANGULA, ADAN & COMPANY

ADVOCATES

Mr. Irungu

- Advocate, Wetangula, Adan & Company
Advocates

RESPONDENTS

**THE ACCOUNTING OFFICER/CHIEF OFFICER
DEPARTMENT OF URBAN DEVELOPMENT
COUNTY GOVERNMENT OF MACHAKOS &
COUNTY GOVERNMENT OF MACHAKOS**

Mr. Collins Adipo

- Chief Officer – Urban Development, County
Government of Machakos

BACKGROUND OF THE DECISION

The Tendering Process

1. The County Government of Machakos Department of Housing and Urban Development – Machakos Municipality, the Procuring Entity and

the 2nd Respondent herein, invited sealed tenders from eligible contractors in response to Tender No. GMC/KUSP/MKS MUN/01/2022-2023 Negotiation No. 1300044-2022-2023 for Upgrading of Wholesale and Retail Market Loop Roads, St. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2022-2023 (hereinafter referred to as the "1st tender") by use of open competitive method. The invitation was by way of an advertisement in the Daily Nation Newspaper and Standard Newspaper scheduled to run from 5th June 2023 to 12th June 2023, on the Procuring Entity's website www.machakos.go.ke and the Public Procurement Information Portal www.tenders.go.ke where the blank tender document for the 1st tender issued to tenderers by the Procuring Entity (hereinafter referred to as the '1st Tender Document') was available for download. The 1st tender's submission deadline was scheduled on 12th June 2023. Completed tenders were required to be submitted through the IFMIS portal <https://supplier.treasury.go.ke> and bidders were advised to monitor the tender opening process through the same portal.

Submission of Tenders and Tender Opening

2. According to the Tender Opening Minutes held on 12th June 2023 at 11.00 a.m. signed by members of the Tender Opening Committee on 12th June 2023 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 thirteen (13) tenders were submitted through the IFMIS portal in response to the 1st tender and were recorded in the Tender Opening Minutes as follows:

Bidder No.	Name
1.	Zulatech Enterprises
2.	Antovic Investments Ltd
3.	Stepal Builders Co. Ltd
4.	Lagoon Apex Company
5.	Whitespan Enterprises
6.	Joymac Kenya Ltd
7.	M and J Holding Ltd
8.	Turin Enterprises Ltd
9.	Road Track Solutions Ltd
10.	Kunta Kinte Enterprises Ltd
11.	Seluk Investments Ltd
12.	Adawa Investments Company Ltd
13.	Galleyr Investments Ltd

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the thirteen (13) tenders as captured in a Tender

Evaluation Report for the 1st tender signed by members of the Evaluation Committee on 14th June 2023 (hereinafter referred to as the "Evaluation Report") and as captured in the GOK IFMIS Evaluation Matrix Report dated 14th June 2023 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 examine tenders for responsiveness using the criteria provided under Preliminary Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 29 to 30 of the 1st Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.
5. At the end of evaluation at this stage, eight (8) tenders were determined non-responsive, while five (5) tenders, including the Applicant's tender, were 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 Clause 3 Tender Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 30 to 31 of the 1st Tender Document. Evaluation at this

stage was on a Yes or No basis and only responsive bidders would proceed to the Financial Evaluation stage.

7. At the end of evaluation at this stage, three (3) tenders were determined non-responsive, while two (2) tenders, including the Applicant's tender, were determined responsive and proceeded to Financial Evaluation.

Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 4 Price Evaluation of Section III- Evaluation and Qualification Criteria at page 31 of the 1st Tender Document. The successful tenderer would be the tenderer determined to be substantially responsive having submitted the lowest evaluated tender.

9. At the end of evaluation at this stage, tenders were ranked as follows:

<i>S/No</i>	<i>Name of Firm</i>	<i>Bid Amount</i>	<i>Rank</i>
<i>B3</i>	<i>Stepal Builders Company Ltd</i>	<i>Kshs. 80,137,935.90</i>	<i>2</i>
<i>B11</i>	<i>Seluk Investments Ltd</i>	<i>Kshs. 79,958,817.00</i>	<i>1</i>

Evaluation Committee's Recommendation

10. The Evaluation Committee recommended the award of the 1st tender to the Applicant being the lowest evaluated and most responsive bidder as per the evaluation criteria at a cost of Kenya Shillings Seventy-Nine Million Nine Hundred and Fifty-Eight Thousand Eight Hundred and Seventeen only (Kshs. 79, 958,819.00).

Due Diligence

11. In a Due Diligence Report signed by members of the Evaluation Committee on 14th June 2023, the Evaluation Committee as part of the evaluation process undertook a due diligence exercise on the Applicant, being the recommended successful tenderer with the aim of establishing whether (a) the contractor is in construction industry and has a physical office, (b) the contractor has satisfactorily and substantially completed projects of similar nature in the past, (c) the contractor has the technical capability and capacity to undertake the proposed works successfully.
12. At the end of the due diligence exercise, the Evaluation Committee observed that the Applicant had undertaken construction projects and satisfactorily completed the same in good timelines, good quality and workmanship and therefore qualified for the work in the 1st tender and recommended the Applicant to be considered for award of the 1st tender.

Professional Opinion in the 1st tender

13. In a Professional Opinion, as an internal memo dated 16th June 2023 (hereinafter referred to as "the Professional Opinion in the 1st tender"), the Acting Head Supply Chain Manager, Mr. Stephen Mbithi reviewed the manner in which the subject procurement process in the 1st tender was undertaken including evaluation of tenders and due diligence and confirmed that the Evaluation Committee evaluated the 1st tender using the procedures and criteria as set out in the Tender Document pursuant to the provisions of the Act and that the amount quoted by the lowest responsive bidder was within the estimated budgetary estimate.
14. Mr. Mbithi further pointed out that in a letter dated 15th June 2023, the Machakos Municipal Manager, Mr. Boniface Kamende wrote a letter addressed to the 1st Respondent regarding a serious omission that was required to be incorporated in the bill of quantities on integrated solar streetlights in the 1st tender and asked the 1st Respondent to take account of the same while considering the recommendation to award the 1st tender.

RE-ADVERTISEMENT AND ISSUANCE OF THE 2ND TENDER

15. In a letter dated 16th October 2023, Mr. Boniface Kamende the 2nd Respondent's Municipal Manager requisitioned (vide a Purchase/Facilitation Requisition for FYR 2023/2024 dated 10th October 2023) for upgrading of roads in Machakos town under item description

'upgrading of wholesale and retail market loop roads, St. Mary's Girls Primary School to KWFT link road in Machakos Municipality'.

16. Subsequently, the 1st Respondent invited sealed tenders from eligible Suppliers/Contractors in response to Tender No. GMC/KUSP/MKS MUN/01/2023-2024 for Upgrading of wholesale and retail market loop roads, St. Mary's girls primary school to KWFT link road in Machakos Municipality KUSP FY 2023-2024 (hereinafter referred to as "the 2nd tender") by way of an advertisement on the Procuring Entity's website www.machakos.go.ke where the blank tender document for the 2nd tender issued to tenderers by the Procuring Entity (hereinafter referred to as the '2nd Tender Document') was available for download. The 2nd tender's submission deadline was scheduled on 30th October 2023 and bidders were required to submit physical hard copies of their bid documents at the 2nd Respondent's department of Lands, Housing Urban Development and Energy.

17. On 30th October 2023, the 1st Respondent appointed a Tender Opening Committee to conduct the opening activity of the 2nd tender.

18. According to the Tender Opening Attendance Register for the 2nd tender, a total of seven (7) tenderers submitted tenders in the 2nd tender and were recorded as follows:

Bidder No.	Name
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1.	Stepal Builders Co. Ltd
2.	World Plus Ltd
3.	Turin Enterprise Ltd
4.	Zuhari Africa Ltd
5.	Syntech Investment Ltd
6.	Jowhar Investment Limited
7.	Whitespan Enterprise Limited

19. Evaluation of the seven (7) tenders was undertaken in three stages using the criteria set out under Section III- Evaluation and Qualification Criteria of the 2nd Tender Document comprising of a Preliminary, Technical and Financial Evaluation and the Evaluation Committee recommended award of the 2nd tender to M/s Turin Enterprises Ltd, the 3rd Respondent herein, at its quoted sum of Kenya Shillings Eighty Eight Million Seven Hundred and Eighty Four Thousand and Eight Hundred and Twenty Four only (Kshs. 88,784,824.00).

20. In a Professional Opinion, as an internal memo dated 22nd November 2023 (hereinafter referred to as "the Professional Opinion in the 2nd tender"), the Director Procurement, Mr. Mathuki reviewed the manner in which the subject procurement process in the 2nd tender was undertaken including evaluation of tenders and confirmed that the Evaluation Committee evaluated the 2nd tender using the procedures and criteria as set out in the 2nd Tender Document pursuant to the provisions of the Act and that the amount quoted by M/s Turin

Enterprises Ltd was within the estimated budgetary estimate. He concurred with the recommendations of the Evaluation Committee with respect to award of the 2nd tender.

21. Thereafter, the Professional Opinion in the 2nd tender was approved by the 1st Respondent, Mr. Collins Adipo, on 22nd November 2023.

22. Tenderers were notified of award of the 2nd tender vide letters dated 7th December 2023.

REQUEST FOR REVIEW NO. 5 OF 2024

23. On 12th January 2024, Seluk Investments Limited, the Applicant herein, filed a Request for Review dated 10th January 2024 together with a Statement in Support of the Request for Review sworn on 10th January 2024 by Mohamed Rashid Ali Haji, its Director (hereinafter referred to as the 'instant Request for Review') seeking the following orders from the Board in verbatim:

a) The procuring entity's decision made on the 7th day of December, 2023 declaring the 3^d Respondent the successful bidder and granting the notification of award on bid for Upgrading of Wholesale and Retail Market Loop Roads, St. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2023-2024 for a

sum of Kshs. 88,784,824.10.00 be and is hereby set aside.

b) An Order be and is hereby made putting to a halt and or suspending the execution of contract for the Upgrading of Wholesale and Retail Market Loop Roads, St. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2023-2024.

c) An order be and is hereby issued to the effect that the Applicant be declared to be the successful bidder for tender no. GMC/KUSP/MKS MUN/01/2022-2023 NEGOTIATION NO. 1300044/2022-2023 for Upgrading of Wholesale and Retail Market Loop Roads ST. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2022-2023 and the procurement entity be directed to issue the Applicant with a notification that the Applicants tender has been accepted under Section 87(1) of the Public Procurement and Asset Disposal Act, 2015.

d) The Applicant be awarded cost of this review application.

e) Such other or further reliefs as the board shall deem fit, just and expedient to give.

24. In a Notification of Appeal and a letter dated 12th January 2024, 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 12th January 2024.
25. On 17th January 2024, the 1st Respondent filed a letter dated 17th January 2024 requesting for more time to file the Respondents response.
26. Vide a Hearing Notice dated 19th January 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 25th January 2024 at 2.00 p.m., through the link availed in the said Hearing Notice.
27. On 22nd January 2024, the Respondents filed via email soft copies of documents forming part of the confidential file which included, *inter alia*, the list of bidders who participated in the 1st tender.

28. Vide letters dated 22nd January 2024, 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.
29. On 25th January 2024, the Respondents filed a Notice of Preliminary Objection dated 23rd January 2024, a 1st and 2nd Respondents Memorandum of Response to the Applicant's Request for Review dated 22nd January 2024, a Statement in Opposition to the Applicant's Request for Review dated 22nd January 2024 signed by Mr. Adipo Collins Otieno in his capacity as the 1st Respondent and on behalf of the 2nd Respondent, together with a physical file containing confidential documents concerning the 1st tender pursuant to Section 67(3)(e) of the Act.
30. When the matter first came up for hearing on 25th January 2024 at 2.00 p.m., the Board read out pleadings filed in the matter and counsel for the Applicant, Mr. Irungu, indicated that he had not had sufficient time to go through pleadings filed by the Respondents as the same had just been served upon him before the hearing. He sought for an adjournment to enable him file a Further Affidavit and requested to be served with a copy of the re-advertisement with regard to the 2nd tender. On his part, Mr. Adipo submitted that a copy of the re-

advertisement of the 2nd tender was attached in the Respondents' response and was also on the Procuring Entity's website. In a rejoinder, Mr. Adipo indicated that he had served the Applicant with the complete set of the Respondents' pleadings.

31. Having considered parties' submissions, the Board directed (a) the Applicant to file and serve its Further Affidavit by 2.00 p.m. on 26th January 2024, (b) the Respondents to file with the Board all the confidential documents with respect to the 1st tender and the 2nd tender by 10.00 a.m. on 29th January 2024, (c) the Respondents to file written submissions, if any, by 3.00 p.m. on 29th January 2024 and (d) the Applicant to file written submissions, if any, by 5.00 p.m. on 29th January 2024.

32. Vide a Hearing Notice dated 25th January 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 30th January 2024 at 2.00 p.m., through the link availed in the said Hearing Notice.

33. On 26th January 2024, the Applicant filed a Further Affidavit sworn on 26th January 2024 by Mohammed Rashid Ali Haji, its Director.

34. On 27th January 2024, the Respondents filed via email soft copies of documents forming part of the confidential file in the 1st tender pursuant to Section 67(3)(e) of the Act.

35. On 30th January 2024, the Respondents filed further documents forming part of the confidential file in the 2nd tender pursuant to Section 67(3)(e) of the Act together with written submissions dated 30th January 2023.

36. At the hearing of the instant Request for Review on 30th January 2024 at 2.00 p.m., the Board read out pleadings filed in the matter, allocated time for each party to proceed and highlight its case and directed that the hearing of the preliminary objections by the Respondents would be heard as part of the substantive Request for Review. This was in accordance 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 a substantive request for review and deliver one decision.

37. Thus the Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Respondents' Submissions on their preliminary objection

38. In his submissions, Mr. Adipo submitted that the Request for Review as filed on 12th January 2024 was filed 36 days after the notification of award to the 3rd Respondent dated 7th December 2023 had been issued contrary to Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 which require administrative reviews to be sought

within 14 days of notification of award or date of occurrence of the alleged breach.

39. Mr. Adipo submitted that the bone of contention in the instant Request for Review was on the issue of termination of procurement proceedings and asked the Board to make a determination on the issue of lapse of the tender validity period provided at 120 days in the 1st tender in view of the provisions of the Act where no action has been taken by an accounting officer on the same.

40. Mr. Adipo submitted that where a tender's validity period lapses, the said tender cease to exist. He urged the Board to look into the prayers sought by the Applicant in the instant Request for Review while considering the documents submitted to the Board with respect to the 1st and 2nd tender.

Applicant's Submissions

41. In his submissions, Mr. Irungu submitted that the Applicant did not receive a notification from the 1st Respondent that an award had been issued with regard to the 1st and 2nd tenders and that it was only at the time that the Applicant learnt of the issuance of an award by the Procuring Entity with regard to the 2nd tender that it moved the Board. He further submitted that it was impossible for the Applicant in the absence of a notification of award to move the Board within the stipulated statutory period of 14 days.

42. Counsel referred the Board to Section 26 of the Limitations of Actions Act and indicated that the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it. He submitted that it was clear that the Applicant learnt of the award of the 2nd tender in January 2024 and moved the Board within a period of 5 days from the time it learnt of the said award and as such, the Respondents should not stand to benefit from their inaction to the detriment of the Applicant.
43. Mr. Irungu submitted that the 1st and 2nd tenders were related and pointed out that when the 1st tender was floated, the Applicant participated in the procurement proceedings of the 1st tender which was submitted electronically through the IFMIS system and according to the said system, the Applicant had the most responsive tender in terms of scores, evaluation and pricing.
44. Counsel pressed on that to date, there has been no communication from the Procuring Entity to the Applicant either electronically or in writing indicating the outcome of its bid or that the 1st tender had been cancelled. Mr. Irungu reiterated that from the IFMIS portal, it remains active that the Applicant was the most responsive bidder in the 1st tender and that pursuant to Section 87 of the Act, the 1st Respondent has a duty to communicate to all tenderers which was not done.
45. Counsel objected to the submission by the 1st Respondent that the 1st tender died a natural death following lapse of the tender validity period

and submitted that this was a deliberate action from the 1st Respondent since the 1st Respondent wrote to the Head of Procurement requesting for a Professional Opinion which was not issued despite the same requiring to be issued within a day as per Regulation 78(2) of Regulations 2020.

46. Counsel pointed out that while the 1st Respondent sought a Professional Opinion from the Head of Procurement on 14th June 2023, it was relying, in support of its case, on a letter dated 15th June 2023 from the Municipal which indicates that after public participation was done on 14th June 2023, it was realized that integrated street lights had been omitted from the 1st Tender Document which begs the question why float a tender and later conduct a public participation after bid opening and a tenderer has been evaluated and found to be the most responsive tenderer. He indicated that such actions point to a deliberate action to frustrate the award of the 1st tender to the Applicant.

47. Counsel submitted that the impact of lack of communication by the 1st Respondent is that to date the Applicant believes he was the successful tenderer and was never aware that the 1st tender was re-advertised. He pressed on that the Act requires that where a tender is cancelled, such cancellation has to be communicated to all tenderers and as such, the lack of communication on the cancellation of the 1st tender denied the Applicant an opportunity to participate in the re-advertised tender.

48. Mr. Irungu further submitted that upon being served with the re-advertisement notice pertaining to the 2nd tender, the Applicant proceeded to the Procuring Entity's website and noted that despite the allegation that the 2nd tender was floated on 23rd October 2023, the same appears to have been updated on 24th January 2024 which was a day before the instant Request for Review came up for hearing for the first time and there was a single download of the 2nd Tender Document and upon subsequent downloads by the Applicant, there are now four downloads as at the hearing of the instant Request for Review on 30th January 2024. Counsel sought to know who the parties who applied for the 2nd tender were following the re-advertisement and asked the Board to examine all documents pertaining the 1st and 2nd tender.

49. Counsel submitted that the breach of law on the Respondents' part and withholding of information is an offence under Section 176 of the Act and the same attracts consequences. He pointed to the mischief by the Respondents of failing to communicate the cancellation of the 1st tender, change of mode of advertising of the 2nd tender from how the 1st tender had been advertised and the activeness of the 1st tender on the IFMIS portal which has not been cancelled prior to proceeding with re-advertisement of the 2nd tender and indicated that all this goes to show that the intention of the 1st Respondent was to favour the 3rd Respondent while locking out other bidders.

50. Mr. Irungu submitted that the inactions of the 1st Respondent lead to an action that goes against the spirit of the constitution as to a fair process, a competitive process and the 1st Respondent is estopped from proceeding to re-advertise without cancellation of the 1st tender.
51. Counsel urged the Board to set aside the award issued to the 3rd Respondent on 7th December 2023 and to order the 1st Respondent to re-advertise for all bidders that were not informed of the cancellation to participate. In support of his arguments, counsel referred the Board to the holding in *PPARB Application No. 142 of 2019* and provisions of Article 227 (1) of the Constitution on the principle of transparency.
52. Mr. Irungu submitted that a litigant who comes before the Board must have a recourse in law in instances that a Procuring Entity has gone out of its way to infringe on the rights of a tenderer so as to favour another tenderer. He urged the Board to allow the Request for Review as prayed.

Respondents' Submissions

53. In his submissions, Mr. Adipo submitted that the Procuring Entity's website was open to the public for viewing on all information posted therein and that the Applicant was free to look up the advertisement concerning the 2nd tender and respond to the same. He further submitted that the prayer sought by the Applicant in the instant Request for Review had changed from a direct award to re-advertisement which the Procuring Entity was not in a position to

undertake due to the time sensitivity of the contract emanating from the 2nd tender which was to lapse on 31st December 2023.

54. On the issue of non-communication to tenderers on the outcome of evaluation of the 1st tender, Mr. Adipo was of the view that the Board ought to determine what happens where the tender validity period lapses with no extension by an accounting officer and whether the tender automatically terminates. He pointed out that the 120 days' tender validity period for the 1st tender lapsed on 12th August 2023 and the 30 days' extension period if allowed would have lapsed on 12th September 2023 hence the justification for re-advertisement of the 1st tender to save the county from forfeiting resources provided by a conditional grant.

55. Mr. Adipo reiterated that the re-advertisement was lawful and was done in line with Section 96(2) of the Act on the Procuring Entity's website. He asked the Board to uphold the actions of the 1st Respondent in awarding the 2nd tender as per the letter of award dated 7th December 2023 and to find that the tendering process was open, free, fair, competitive, transparent, equitable and cost effective pursuant to Article 227(1) of the Constitution.

56. He also urged the Board to dismiss the Request for Review with costs.

57. When asked by the Board to clarify on why the 1st tender failed, Mr. Adipo submitted that it failed due to the change of scope and a letter

to this effect had been submitted to the Board. He indicated that he did not communicate on the cancellation of the 1st tender to tenderers therein and that tenderers were supposed to check on the website on the same. When asked by the Board whether the cancellation of the 1st tender was published on the portal, he confirmed that no publication of the cancellation of the 1st tender was done.

58. Mr. Adipo informed the Board that he is the Chief Officer at the Procuring Entity and is well conversant with the provisions of the Act. With regard to notifying tenderers on the outcome of an evaluation of a tender, Mr. Adipo submitted that section 87 of the Act requires tenderers to be notified but the Board ought to understand that the 1st and 2nd tender had two different chief officers involved and he only came into the picture later in the process having taken over from the previous chief officer in September, 2023.

59. When asked to further clarify on whether the issue of change of scope could have been cured through a modification and tenderers informed of the same pursuant to section 75 of the Act, he indicated that having been briefed on the status of the 1st tender, he noted that the tender validity period of the 1st tender had lapsed and opined that if a tender validity period had lapsed, it meant that the said tender ought to be re-advertised and proceeded to re-advertise the 1st tender for it to be done again. Mr. Adipo submitted that both the issue of lapse of the tender validity period and the change of scope informed his decision to re-advertise the 1st tender to allow tenderers apply for the same.

60. When asked by the Board on why he held the view that the Request for Review was time barred having confirmed that the Applicant was not notified, Mr. Adipo indicated that he had posed a question for the Board's determination on what the law provides when a tender is issued and the procurement process concluded but no communication is issued by an accounting officer.
61. When asked to clarify by the Board on how many bidders applied for the 2nd tender, Mr. Adipo indicate that 7 bidders submitted bids upon the re-advertisement and that all documents concerning evaluation of the 2nd tender had been submitted to the Board and all the contents was a true reflection of the procurement process in the tender. He further clarified that in the 2nd tender, only 3 tenderers from the 1st tender participated and submitted their bid documents and that the successful tenderer participated in both tenders.
62. When asked to clarify by the Board on why the Professional Opinion in the 2nd tender indicates that the Evaluation Report in the 2nd tender was submitted on 14th June 2023 yet the procurement process in the 2nd tender had not begun, Mr. Adipo submitted that this was a typographical error.
63. When asked by the Board on why the Procuring Entity opted for a different mode of advertisement in the 2nd tender as compared to the 1st tender, Mr. Adipo submitted that according to the Act, a procuring

entity can use any channel to advertise and is not limited to use a specific channel while advertising a tender.

Applicant's Rejoinder

64. Mr. Irungu indicated to the Board that he had no rejoinder.

65. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 12th January 2024 was due to expire on or before 2nd February 2024 and that the Board would communicate its decision on 2nd February 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

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

A. Whether the Board has jurisdiction to hear and determine the instant Request for Review;

In determining this issue, the Board will make a determination on whether the instant Request for Review was filed outside the statutory period of 14 days contrary to Section 167(1) of the Act

read with Regulation 203(2)(c)(iii) of Regulations 2020 thus ousting the jurisdiction of the Board;

Depending on the determination of the first issue;

B. Whether the 1st tender procurement proceeding was lawfully terminated in accordance with Section 63 of the Act read with Article 227(1) of the Constitution;

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

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

67. The Respondents in opposition of the instant Request for Review contend that the Applicant is time barred in challenging the decision of the 1st Respondent to award the 2nd tender by filing the instant Request for Review outside the statutory period of fourteen (14) days contrary to section 167(1) of the Act read with Regulation 203 (2)(c) of Regulations 2020 since a letter of notification of award dated 7th December 2023 had been issued to the 3rd Respondent. During the hearing, Mr. Adipo submitted that the 1st tender was never awarded to any tenderer since an omission affecting the change of scope had been identified leading him to make a decision to advertise the 2nd tender

where the said omission was incorporated. He however confirmed to the Board that tenderers in the 1st tender were not notified of its cancellation and neither was a report filed with the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") detailing reasons for cancellation as prescribed under Section 63 of the Act.

68. On its part, the Applicant submitted that it was never notified by the 1st Respondent as required under Section 87 of the Act of the outcome of evaluation of its bid submitted in the 1st tender and the only information it had regarding the evaluation process of the same was from the IFMIS portal where it was identified as the most responsive and lowest evaluated tenderer. Counsel for the Applicant, Mr. Irungu submitted that the Applicant was also not aware of the advertisement of the 2nd tender following cancellation of the 1st tender and that the Applicant only came to learn of the award of the 2nd tender to the 3rd Respondent herein through a friend.

69. Having considered parties' pleadings, submissions, and the confidential documents in the confidential file submitted by the Respondents to the Board pursuant to section 67(3)(e) of the Act, we understand the Respondents contention to be that the Applicant ought to have filed the instant Request for Review within 14 days from 7th December 2023 being the date the 3rd Respondent was notified of award of the 2nd tender and the Applicant having filed the Request for Review on 12th January 2024 is time barred for having filed the same

outside the stipulated statutory period of 14 days contrary to Section 167(1) of the Act read with Regulation 203(2)(c) so as to divest the Board of its jurisdiction to hear and determine the matter.

70. It is trite law that courts and decision-making bodies can only act in 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.

71. 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."

72. Jurisdiction is defined in Halsbury's Laws of England (4 th Ed.) Vol. 9 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."

73. The *locus classicus* case on the question of jurisdiction is the celebrated case of **The Owners of the Motor Vessel "Lillians" -v- Caltex Oil Kenya Ltd (1989) KLR 1** where Nyarangi J.A. held:

"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."

74. In the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, the Court of Appeal emphasized on 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 is 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...."

75. Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, that:

"whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter."

76. The Supreme Court in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others [2012] eKLR** pronounced itself regarding the source of jurisdiction of a court or any other decision making body as follows:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

77. 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.”

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

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.”

79. 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.

80. Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before the Board.

81. It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, requires any person invoking the jurisdiction of the board to satisfy the following (i) must either be a candidate or a tenderer (within the meaning of Section 2 of the Act) (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020 (iii) must seek administrative review by the Board within fourteen (14) days of notification of award or date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

82. Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 provides as follows:

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

203. Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

(b) be accompanied by such statements as the applicant considers necessary in support of its request;

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

(d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

(4) The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.

83. Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act to be by way of (i) a request for review which is to be (ii) accompanied by such statements as the applicant considers necessary in support of its request. The request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

84. Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

85. It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 requires for one to invoke the jurisdiction of the Board, they must either be (i) a candidate or tenderer (within the meaning of Section 2 of the Act); (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020; (iii) must seek administrative review by the Board within fourteen (14) days of (a) occurrence of breach complained of, having taken place before an award is made, (b) notification of intention to enter into a contract having been issued; or (c) occurrence of breach complained of, having

taken place after making of an award to the successful tenderer (iv) by way of a request for review which is accompanied by (v) such statements as the applicant considers necessary in support of its request.

86. This Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches.

87. We are guided by the holding in **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR** where the High Court at paragraphs 65, 66 and 67 noted that to determine when time starts to run, such determination can only be made upon an examination of the alleged breach and when the aggrieved tenderer had knowledge of the said breach and held:

66. The answer then to the question when time started to run in the present application can only be reached upon an examination of the breach that was alleged by the 2nd Interested Party in its Request for Review, and when the 2nd Interested Party had knowledge of the said breach. The said Request for Review was annexed as

"Annexure CO4" to the 2nd Interested Party's replying affidavit. Paragraphs 2 to 4 of the said Request address the first breach that the 2nd Interested Party 's representative, one Charles Obon'go noted and notified the Chairman of the tender opening committee about at the tender opening, namely that the Applicant had not supplied the sample of 3m of the sleeve and mill certificate and had not been issue with a delivery note, and that the said Applicant sought to introduce the sample after the commencement of the tender opening.

67. It is not in dispute that the tender opening was on 10th November 2017 at 10.00am, which all the parties attest to in their various affidavits. It is therefore evident that for this particular breach the 2nd Interested Party had knowledge of the same and admits to notifying the 1st Interested Party's tender opening committee of the same on 10th November 2017. Therefore, time for filing a review against this particular alleged breach started to run on 10th November 2017, and the Respondent had no jurisdiction to consider the alleged breach when it was included in the Request for Review filed on 21st February 2017, as the statutory period of filing for review of 14 days had long lapsed. Any decisions by the Respondent on the alleged breach were therefore ultra vires and null and void.

88. Turning to the circumstances in the instant Request for Review, it is not in contest that the Applicant was not notified by the 1st Respondent of (a) the outcome of evaluation of its bid submitted in response to the 1st tender, (b) cancellation of the 1st tender and reasons thereof, (c) the decision to re-advertise the 1st tender, (d) re-advertisement of the 1st tender on the 2nd Respondent's website under the 2nd tender, and (d) the notification of award dated 7th December 2023 of the 2nd tender to the 3rd Respondent herein. The Applicant took issue with the conduct of the 1st Respondent in the procurement proceedings of the 1st and 2nd tender and argued that the Respondents conduct was in breach of Section 87 of the Act.

89. The Board notes that section 64(1) of the Act dictates that all communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing.

90. In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity **must notify, in writing,** the tenderer who submitted the successful tender, that its tender was successful **before the expiry of the tender validity period.** Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer

awarded the tender. **These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted simultaneously and in a transparent manner.**

91. In meeting the threshold required in Section 87(2) of the Act read with Regulations 82(3) of Regulations 2020, the 1st Respondent was required to ensure that all tenderers in the 1st tender were notified in writing of the outcome of evaluation of the said tender and any emerging issues, such as the alleged change of scope, that may have led to a decision to cancel the said tender or which may have prompted the need to re-advertise the same under the 2nd tender.
92. The 1st Respondent was therefore under an obligation to ensure that all tenderers in the 1st tender received a written notification of the decision to cancel the 1st tender due to the identified omission in change of scope and the decision to arrest the said omission by re-advertising the said tender under the 2nd tender so that the said tenderers could make an informed decision on how to proceed in the circumstances. This would have at least shown that the 1st Respondent met the principles of transparency and fairness in the procurement proceedings in the two tenders as tenderers would have been kept in the loop on emerging issues and the events following evaluation of

their tenders which were not captured nor updated in the IFMIS portal that was used in the tendering process of the 1st tender.

93. It is imperative to note that the duty to notify tenders in writing of the outcome of evaluation of tenders goes to the root of the responsibilities of an accounting officer stipulated under Section 44(1) of the Act which stipulates that ***an accounting officer of a public entity shall be primarily responsible for ensuring that the public entity complies with the Act.*** It is therefore the primary responsibility of an accounting officer to ensure that a public entity complies with the provisions of the Act.

94. In view of the foregoing, the Applicant having pleaded at paragraph 3 of its Further Affidavit sworn on 26th January 2023 by Mohamed Rashid Ali Haji that it learnt of issuance of an award to the 3rd Respondent on 8th January 2024 after a friend disclosed the said information and there being no evidence adduced before the Board to the contrary or proving that the Applicant had been sufficiently notified, it ought to have moved the Board by way of an administrative review by virtue of Regulation 203(2)(c)(iii) of Regulations 2020.

95. In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

"57. Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***
- (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time."***

96. In computing time when the Applicant should have sought administrative review before the Board the 8th January 2024 is excluded

pursuant to Section 57(a) of IGPA being the day when the Applicant learnt of occurrence of a breach after award. This means, 14 days started running from 9th January 2024 and lapsed on 22nd January 2024. In essence, the Applicant had between 9th January 2024 and 22nd January 2024 to seek administrative review before the Board. Having filed the instant Request for Review on 12th January 2024, the Applicant was within the statutory period prescribed under Section 167(1) of the Act read with Regulation 203(2)(c)(iii) of Regulations 2020.

97. Accordingly, this ground of the Respondents' Notice of Preliminary fails. The Board finds that it has jurisdiction to hear and determine the instant Request for Review and now proceeds to address the substantive issues framed for determination.

Whether the 1st tender procurement proceeding was lawfully terminated in accordance with Section 63 of the Act read with Article 227(1) of the Constitution;

98. Termination of procurement proceedings is governed by Section 63 of the Act and where the procurement proceedings have been terminated in accordance with Section 63 of the Act, the Board is divested of its jurisdiction by dint of Section 167(4)(b) of the Act. The provisions of Section 167(4)(b) of the Act are conditional on such termination being in accordance with Section 63 of the Act and provides as follows:

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

(a);

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

(c)....."

99. In the case of **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR**, the High Court while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 that dealt with termination of procurement proceedings held as follows:

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

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

In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of

our jurisprudence. In the case of Smith v. East Elloe Rural District Council [1965] AC 736 Lord Viscount Simonds stated as follows:

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

It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures. To illustrate the point, the failure by the 2nd Respondent to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether the termination met the threshold under the Act, before finding that it lacks jurisdiction to entertain the case before it, on the basis of a mere letter of termination furnished before it."

100. The court in the *Selex Sistemi Integrati* case cited above, held that the Board has the duty to question whether a decision by a procuring entity terminating a tender meets the threshold of section 63 of the Act, and that this Board's jurisdiction is not ousted by the mere fact of the existence of a letter of notification terminating procurement proceedings.

101. Further, in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR** the High Court held as follows:

"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement..."

A plain reading of section 167 (4) (b) 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 precondition that first needs to be satisfied in the said subsection 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.

As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A- Light Ltd [2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body which is the primary decision maker, [in this instance the Applicant as the procuring entity] to determine if the statutory pre-conditions and circumstances in section 63 exists before a procurement is to be terminated...

However, the Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard...

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v. Public Procurement Administrative Review Board & 2 Others Ex parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining

the propriety of a termination of a procurement process under the provisions of section 63 of the Act”

102. The High Court in the Kenya Veterinary Vaccines Production Institute Case affirmed the decision of the Court in the *Selex Sistemi Intergrati* Case that this Board has the obligation to first determine whether the statutory and procedural pre-conditions of section 63 of the Act have been satisfied to warrant termination of a procurement process, in order to make a determination whether the Board’s jurisdiction is ousted by section 167(4)(b) of the Act.

103. It is therefore important for this Board to determine whether the 1st Respondent terminated the 1st tender in accordance with provisions of section 63 of the Act, which determination can only be made by interrogating the reason cited by the Respondents and whether or not the 1st Respondent satisfied the statutory and procedural pre-conditions for termination outlined in section 63 of the Act.

104. Section 63 of the Act provides as follows:

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

(a) the subject procurement has been overtaken by—

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

105. **Section 63 (1) of the Act stipulates that termination of procurement proceedings is done by an accounting officer 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) of the Act 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.**

106. 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 (hereinafter referred to as 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.

107. In **Judicial Review Miscellaneous Application No. 496 of 2017 Republic –vs- The Public Procurement Administrative Review Board, Intertek Testing Services (E.A) Limited Exparte SGS Kenya Ltd**, Justice John M. Mativo set out the test and the nature of the information and evidence that the Board would be required to consider while determining the propriety of a termination of a procurement process under the provisions of Section 63 of the Act. The Learned Judge *inter alia* held as follows at pages 13 and 14 of the said decision.

"It is my view that section 63 of the Act imposed a statutory obligation upon the first interested party to terminate the tender award only on any of the grounds stated therein and that those grounds are not stated therein for cosmetic purposes.

.....the evidence tendered before the Review Board must provide sufficient information to bring the grounds within the provisions of the law. This recognizes that the tender process and in particular the termination must be done in a transparent and accountable and legal manner as the law demands.

Ultimately, the question whether the information put forward is sufficient to place the termination within the ambit of the law as claimed will be determined by the nature of the reasons given. The question is not whether the best evidence to justify termination has been provided, but whether the evidence

provided is sufficient for a reasonable tribunal or body to conclude, on a balance of 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. If it does not, then the body in question has only itself to blame”.

108. In a nutshell therefore and based on the above decided cases where the decision of a procuring entity to terminate a procurement process is challenged before the Board, the procuring entity is under a duty to place sufficient reasons and evidence before the Board to justify and support the 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 the procedural requirements set out under the provisions of Section 63 of the Act.

109. 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 1st tender which then will inform the legality or lack thereof of the Respondents' decision to advertise and proceed with the 2nd tender to the point of awarding the same to the 3rd Respondent.

110. We note that the reason cited by the 1st Respondent for failure to proceed and award the 1st tender to the successful tenderer, being the Applicant herein, was that an omission was noted and communicated by the Municipal Manager, Mr. Boniface Kamende pertaining exclusion of integrated solar street lights in the scope of works which was required to be included in the 1st Tender Document floated by the Procuring Entity. This was pleaded at paragraphs 12 to 14 of the 1st and 2nd Respondents Memorandum of Response to the Applicant's Request for Review as follows:

"12. There was a change in scope of the tender no. GMC/KUSP/MKS/MUN/01/2022-2023 negotiation No. 1300044/2022-2023 for upgrading of wholesale and retail market loop roads St. Marys Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2022-2023. The Municipal Manager- Machakos Municipality in a letter dated 15th June 2023, informed the 1st respondent that the Bill of Quantities for the advertised works did not involve integrated street solar lights. The letter dated 15th June 2023, by Machakos Municipal Manager to the 1st respondent is hereto attached – marked, MKS-MOR-1).

13. The change in scope of works necessitated review and revision of the Bill of Quantities. Thus, meant that the outcome of tender no. GMC/KUSP/MKS/MUN/01/2022-2023 negotiation No.

1300044/2022-2023 for upgrading of wholesale and retail market loop roads St. Marys Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2022-2023, could not be meet the project objective, thus leading to termination of the procurement proceedings as envisaged on the PPADA Section 63 of 2015.

14. The 1st respondent, informed by the change in scope of the contract, initiated a fresh procurement tender no. GMC/KUSP/MKS/MUN/01/2023-2024 which culminated in the award of contract to the 3rd respondent, in a notification of award dated 7th December 2023. The procurement process complied with the principles of economy objectiveness, efficiency, equal opportunity, transparency, integrity, fairness and value for money as contemplated under the Public Procurement and Asset Disposal Act."

111. Notably, despite pleading that the procurement proceedings in the 1st tender were terminated in accordance with the provisions of Section 63 of the Act, the Respondents have not pointed to which pre-condition under Section 63 (1)(a) to (i) of the Act presented itself leading to the cancellation of the 1st tender and necessitating advertisement of the 2nd tender. Having established that the provisions under section 63 of the Act categorizes reasons for termination of procurement proceedings before award, it would have been prudent for the 1st

Respondent to give tenderers in writing cogent and specific reasons based on any of the pre-conditions enumerated in Section 63(1) (a) to (i) of the Act justifying termination of the procurement proceedings in the 1st tender for cancellation of the 1st tender to be deemed lawful.

112. The Respondents therefore failed to meet the statutory pre-conditions that must be satisfied before termination of procurement proceedings in the 1st tender can be deemed lawful. We say so because for the Respondents to effect a lawful termination of the procurement proceedings of the 1st tender, the 1st Respondent must have (a) terminated in writing procurement proceedings in the 1st tender prior to issuance of a notification of tender award to the successful tenderer and (b) issued real, cogent and tangible reasons for termination.

113. With regard to the procedural pre-conditions that must be satisfied before termination of procurement proceedings in the 1st tender, we have established that Section 63 (2), (3), and (4) of the Act dictates that the 1st Respondent must give the Authority a written report detailing reasons for termination, within fourteen (14) days and must also notify all tenderers who submitted tenders of the termination within fourteen (14) days of termination and such notification must contain the reason for termination. We note that it is not in contest that the 1st Respondent did not submit a written report to the Director General of the Authority on the termination of the procurement proceedings in the 1st tender within fourteen (14) days of its decision to cancel the procurement proceedings in the 1st tender to demonstrate

that the Respondents satisfied the procedural statutory pre-conditions under section 63 (2) and (3) of the Act before termination of procurement proceedings of the 1st tender for such termination to be deemed lawful. Additionally, there are no letters addressed or received by the other tenderers notifying them of termination of procurement proceedings in the 1st tender contrary to section 63(4) of the Act.

114. This 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 –

a)

b)

c) and

d) "

115. 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].

116. 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.

117. In the instant Request for Review, we have found that the 1st Respondent terminated the subject tender's procurement process in the 1st tender without considering the implication of provisions of section 63 of the Act read with Article 10 and 227(1) of the Constitution. Termination of procurement proceedings affects all tenderers as it eliminates the entire tender and denies a tenderer who could have been the next successful tenderer award of the tender. It is the Board's considered view that tenderers in the 1st tender ought to have been issued with proper reasons for termination of procurement proceedings in the said tender as outlined under section 63 of the Act.

118. 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 provides 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"

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

"(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"

120. On its part, section 6 of the Fair Administrative Actions Act, 2015 states that:-

"(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”

121. 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.

122. It is not lost to us that during the hearing, Mr. Adipo submitted that the 1st and 2nd tender involved two different chief officers being himself and his predecessor and that he only took over from the previous chief officer on 2nd September 2023 when the tender validity period of 120 days had already lapsed on 12th August 2023. As such, he submitted that he was of the considered view that the validity period having lapsed on 12th August 2023 meant that the 1st tender died a natural death and the only recourse was re-advertisement of the tender to incorporate the omitted scope of work and save the Procuring Entity from forfeiting resources provided by a conditional grant.

123. The Board is cognizant of the provisions of section 88 of the Act which provides for extension of tender validity period as follows:

"88. Extension of tender validity period

(1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.

- (2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.***
- (3) An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.***
- (4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1).***

124. In essence, the accounting officer of a procuring entity (a) may extend the tender validity period before expiry of such period; (b) give a written notice to tenderers of the extension of the tender validity period; (c) is restricted to extending the tender validity period for not more than thirty (30) days; and (d) is restricted to only extending the tender validity period once.

125. Having carefully studied the 1st Tender Document issued with regard to the 1st tender and we note that ITT 18.2 of Section II- Tender Data Sheet (TDS) at page 26 of the Tender Document provided for the tender validity period as follows:

"The Tender validity period shall be 120 days from the date of tender opening."

126. We also note from the 1st Tender Document that the tender opening of the 1st tender was slated on 12th June 2023. As such, we have tabulated the stipulated timelines and established that the tender validity period of 120 days in the 1st tender was due to lapse on 9th October 2023 and a thirty-days extension by the 1st Respondent would lead it to lapse on 9th November 2023.

127. It is therefore misleading for Mr. Adipo to inform this Board that as at the time he took up office in September 2023, the tender validity period in the 1st tender had lapsed and died a natural death prompting his decision to advertise on 23rd October 2023 the 2nd tender on the Procuring Entity's website.

128. It is quite clear from the confidential documents pertaining to the 1st tender that the Evaluation Committee carried out evaluation of tenders including due diligence on the Applicant and prepared its Evaluation Report on 14th June 2023. It is also clear that the Head of Procurement of the Procuring Entity proceeded to prepare his Professional Opinion with regard to the 1st tender on 16th June 2023 within the tender validity period. We have noted that the letter from the Municipal Manager, Mr. Boniface Kamende dated 15th June 2023 and cited in the Professional Opinion with regard to the 1st tender was also received by the Respondents on 16th June 2023 which was well within the tender validity period.

129. As such, the 1st Respondent being bestowed with the responsibility of ensuring that the Procuring Entity complies with the provisions of the Act ought to have recognized the peculiar situation it was faced with and taken appropriate action within the tender validity period, such as seeking a Professional Opinion from the Head of Procurement on the way forward in the procurement proceedings of the 1st tender or an advisory opinion from the Authority on how to proceed with the 1st tender in ensuring that the 1st tender was handled in accordance with the law while taking it upon himself to extend the tender validity period pending resolution of the issues at hand.

130. Having established that the Respondents did not satisfy both the substantive and procedural statutory pre-conditions of termination of procurement proceedings outlined in section 63 of the Act, the Board finds and holds that the purported cancellation of procurement proceedings of the 1st tender was unlawful and illegal.

131. This therefore raises the question of whether the Procuring Entity's advertisement of the 2nd tender on 23rd October 2023 by the 1st Respondent and subsequent evaluation of the same and notification of award was lawful given the Procuring Entity's failure to complete the procurement proceedings in the 1st tender, which we have established is similar to the 2nd tender.

132. It is our considered view that since the procurement proceedings in the 1st tender were not concluded by the Procuring Entity, it could not

float the 2nd tender and this action cannot be condoned by this Board. It was never the intention of the framers of the Constitution and the Act that a procuring entity would circumvent the manner in which a procurement process is initiated and concluded.

133. An accounting officer is under an obligation to ensure that the manner in which a procurement process is initiated and concluded complies with the provisions of the Act. In our considered opinion, a procuring entity cannot float the same tender twice before completing the procurement proceedings initiated in the first tender. This was the holding in **PPARB Application No. 2 of 2015 Victoria Cleaning Services v Kenya Medical Training College** where the Board held as follows:

"The Procuring Entity could not proceed to invite new quotations for the same services since the first tender process had not been extinguished.

The Board having determined that the first tender process was not terminated (even as the Procuring Entity embarked on the second process), holds that the second process cannot stand. To allow it to stand will amount to having two processes running concurrently with both desiring a common outcome."

134. Accordingly, the Board finds that the termination of the 1st tender's procurement proceedings by the 1st Respondent was not effected 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 and that the termination of the procurement proceedings of the 1st tender by the 1st Respondent was unlawful having been effected contrary to Section 63 of the Act read with Article 227(1) of the Constitution.

What orders should the Board grant in the circumstances?

135. The Board has found that it has jurisdiction to hear and determine the instant Request for Review having established that the Request for Review was filed within the statutory period provided in section 167(1) of the Act read with Regulation 203(2)(c)(iii) of Regulations 2020 and the termination of the 1st tender's procurement proceedings by the 1st Respondent was not effected 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

136. Section 173 of the Act donates wide discretionary powers to the Board. This Board is cognizant of holding by Justice A.K. Ndungu in **Republic v Public Procurement Administrative Review Board & another Exparte Rentco Africa Limited Judicial Review Misc. Application No. E100 of 2022** (hereinafter referred to as "the Rentco Case") where he referred to the holding of by Court of Appeal

in **Civil Appeal No. 510 of 2022 Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others [2022] KECA 982 eKLR** (hereinafter referred to as "Civil Appeal No.510 of 2022") where the Court of Appeal stated:

"36. The overriding argument by the appellant is that upon the lapse of the tender period on 11th January, 2022, the subject tender was dead and could not be resuscitated, hence the justification for the 2nd respondent's finding in its decision dated 6th June 2022 that 'the Applicant, the 1st Respondent and the 2nd Respondent could not extend the tender validity period after 11th January 2022.' On the other hand, the germane argument by the 1st respondent is that the appellant, who was acting on behalf of the procuring entity, was hell-bent on frustrating the award of the tender to it. The High Court made a finding that "the procuring entity had deliberately ran (sic) down the clock with a view to achieving expiry of the tender validity period." The learned judge held, and rightly so in our view, that "a rogue procuring entity cannot be allowed to hide behind the law to sanitize its injurious conduct, conduct that is inimical to the constitutional principles on accountable procurement processes in public procurement." The 1st respondent's contention was that in appropriate cases the 2nd respondent is bestowed with powers under the

PPAD Act to rein in rogue procuring entities, such as the appellant, and bring finality to the procurement process.

37. This leads us to consider the powers of the 2nd respondent in such instances. Section 173 of the PPAD Act states as follows:

'173. 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."

137. Justice Ndungu made further reference to Civil Appeal No. 510 of 2022 in addressing the question of the powers of the Board in directing a Procuring Entity to extend the tender validity period and noted that the Court of Appeal stated as follows:

"Did the 2nd Respondent have power to direct the appellant to extend the validity period of the tender in question? The answer to this question was, in our view, aptly provided by Onyiego, J in Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex parte Kenya Ports Authority & another [2021] eKLR. The learned judge found as follows:

39. The crux of the issue in controversy is whether the Respondent (Review Board) has powers in law to order or direct the accounting officer of the Ex-parte Applicant as a procuring entity to extend the validity period of the subject tender more than once. Section 88 of the Act (PPDA) provides for the extension of the tender validity period...

40. What was the intention of the drafters of this legislation and in particular the inclusion of Section 88? In my view, this provision was intended to guard against any possible mischief or abuse of office or power by accounting officers especially where uncontrolled timelines will give them a free hand to

temper with the tendering process to favour their friends or closely related persons. In other words, once the already extended validity period for a period of 30 days lapses, the tendering process in respect of that tender becomes moot or rather it extinguishes (sic). Upon lapsing, the Procurement entity is at liberty to re-advertise for fresh tendering and the process then follows the full circle like it was never tendered for before.

41. Therefore, the foregoing provision permits extension of a tender validity period by an accounting officer only once and that extension must be made before the expiry of the already stipulated tender validity period. It is common knowledge that one cannot extend time that has already lapsed...

48. From the plain reading of that Section, it is only applicable and binding on the accounting officer and nobody else. Nothing would have been easier than [for] the legislators to include or provide the Review Board's mandate under that section. To that extent, I do agree with counsel for the I/Party that Section 88(3) of the Act does not bar the Review board from making decisions that are deemed to be necessary for the wider attainment of substantive justice...

49. Under section 173(a)(b) & (c) of the Act, the Board has wide discretionary powers for the better management of tendering

system to direct the doing or not doing or redoing certain acts done or omitted from being done or wrongly done by the accounting officer. Although the Act does not expressly limit the powers of the Board from extending tender validity period more than once, one can imply that the powers conferred upon the Review board includes powers to extend validity period to avert situations where the accounting officer can misuse powers under Section 88 to frustrate tenderers or bidders not considered favourable."[Emphasis ours]

138. Justice Ndungu then proceeded to hold as follows in the Rento case:

"56. From the material presented before the Board, it is quite clear that the 2nd Respondent herein acted mala fides in the subject procurement process. Such conduct must be deprecated and must not be left unchecked. The Public Procurement Regulatory Authority must in such circumstances flex its legal muscle to monitor and enforce standards in public procurement and to weed out malfeasance in the processes. It must be borne in mind that any conduct that tends to defeat a fair, equitable, transparent, competitive and cost effective public procurement process is an attempt to overthrow the constitutional order espoused in Article 227 (1) of the Constitution. Any officer responsible for such conduct risks

sanctions including but not limited to a declaration that they are unfit to hold public office.

57. A review of the decision by the Board shows that the same is laced with illegality arising from a glaring misapprehension of the law on extension of the tender validity period by the Board. From the disclosed facts the decision was also unreasonable as it tended to reward the 2nd Respondent for their fraudulent act of commission and omission."

139. In the above Rentco case, the High Court compelled the Board to exercise its powers under section 173(b) of the Act to extend the tender validity period of the subject tender for a period of 60 days or such period that it deemed necessary for the procuring entity to conclude the subject tender process.

140. We note that one of the functions of the Authority outlined in section 9 of the Act is to monitor, assess and review the public procurement and asset disposal system to ensure that they respect the national values and other provisions of the Constitution, including Article 227 of the Constitution.

141. We find the instant case to be a classic example of a procuring entity that requires the intervention of the Authority in exercising its mandate under Section 9 (a) of the Act to ensure that the procurement of Upgrading of Wholesale and Retail Market Loop Roads, St. Mary's Girls

Primary School to KWFT Link Road in Machakos Municipality KUSP by the Procuring Entity herein respects the national values and other provisions of the Constitution, including Article 227 thereof and provisions of the Act and Regulations 2020.

142. In totality to the foregoing, the Board finds that the Procuring Entity's 2nd tender as published in its website and subsequent procurement processes such as opening of submitted tenders, evaluation of submitted tenders, issuance of the Professional Opinion in the 2nd tender and notification of award dated 7th December 2023 is unlawful thus null and void.

143. The upshot of our findings therefore is that the instant Request for Review succeeds in terms of the following orders:

FINAL ORDERS

144. 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 10th January 2024 and filed on 11th January 2024:

A. The Letter of Notification of Intention to Award dated 7th December 2023 issued by the 1st Respondent with respect to Tender No. GMC/KUSP/MKS MUN/01/2023-2024 for

Upgrading of Wholesale and Retail Market Loop Roads, St. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2023-2024 and addressed to the 3rd Respondent, be and is hereby nullified and set aside.

B. The decision by the 1st Respondent to advertise and publish Tender No. GMC/KUSP/MKS MUN/01/2023-2024 for Upgrading of Wholesale and Retail Market Loop Roads, St. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2023-2024 including the subsequent procurement processes undertaken with respect to the said tender such as opening of submitted tenders, evaluation of submitted tenders, issuance of the Professional Opinion dated 22nd November 2023 and issuance of letters of notification of intention to award dated 7th December 2023 be and is hereby annulled and set aside.

C. The tender validity period of Tender No. GMC/KUSP/MKS MUN/01/2022-2023 Negotiation No. 1300044-2022-2023 for Upgrading of Wholesale and Retail Market Loop Roads, St. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2022-2023 be and is hereby extended for a period of 148 days from 9th October 2023 to 4th March 2024.

D. Further to Order No. C above, the 1st Respondent is hereby directed to issue written notifications to tenderers in Tender No. GMC/KUSP/MKS MUN/01/2022-2023 Negotiation No. 1300044-2022-2023 for Upgrading of Wholesale and Retail Market Loop Roads, St. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2022-2023 notifying them of extension of the tender validity period from 9th October 2023 to 4th March 2024.

E. The 1st Respondent is hereby ordered to ensure that the procurement proceedings of Tender No. GMC/KUSP/MKS MUN/01/2022-2023 Negotiation No. 1300044-2022-2023 for Upgrading of Wholesale and Retail Market Loop Roads, St. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2022-2023 proceeds to its lawful and logical conclusion taking into consideration the Board's findings herein, the provisions of the Tender Document, the Act and the Constitution.

F. Further to Order E above, the 1st Respondent is hereby ordered to submit a report to the Public Procurement Regulatory Authority on compliance of the orders issued herein within twenty one (21)days from the date of this decision.

G. That the acting Board Secretary do immediately serve this decision upon the Director General, Public Procurement Regulatory Authority to exercise its mandate under Section 9(1) of the Act with respect to procurement proceedings in Tender No. GMC/KUSP/MKS MUN/01/2022-2023 Negotiation No. 1300044-2022-2023 for Upgrading of Wholesale and Retail Market Loop Roads, St. Mary's Girls Primary School to KWFT Link Road in Machakos Municipality KUSP FY 2022-2023 as ordered herein.

H. 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 2nd Day of February 2024.


.....
CHAIRPERSON

PPARB


.....
SECRETARY

PPARB