REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 11/2024 OF 21ST FEBRUARY 2024

BETWEEN

WILCOM SYSTEMSLIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,
MINISTRY OF TOURISM AND WILDLIFE
(STATE DEPARTMENT FOR TOURISM).....1ST RESPONDENT
MINISTRY OF TOURISM AND WILDLIFE
(STATE DEPARTMENT FOR TOURISM).....2ND RESPONDENT

Review against the decision of the Accounting Officer, Ministry of Tourism and Wildlife (State Department for Tourism) in relation to Tender No.SDT/03/2023-2024 for Provision of Design, Development and Implementation of National Tourism Service Portal.

BOARD MEMBERS PRESENT

1. Ms. Alice Oeri - Chairperson
2. QS. Hussein Were - Member
3. Mr. Alexander Musau - Member

IN ATTENDANCE

Mr. James Kilaka - Secretariat

Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT	**WILCOM SYSTEMS LIMITED**
Ms. Akinyi	-Advocate, Chepkuto Advocates
RESPONDENT	**ACCOUNTING OFFICER, MINISTRY OF TOURISM AND WILDLIFE (STATE DEPARTMENT FOR TOURISM)**
	MINISTRY OF TOURISM AND WILDLIFE (STATE DEPARTMENT FOR TOURISM)
Ms. Grace Kamau	-Advocate, Ministry of Tourism and Wildlife

BACKGROUND OF THE DECISION

The Tendering Process

1. The Ministry of Tourism and Wildlife (State Department for Tourism), the Procuring Entity together with the1st Respondent herein, invited electronic submission oftendersin response toTender No. SDT/03/2023-2024 for Provision of Design, Development and Implementation of National Tourism Service Portal using an open competitive tender method. The subject tender's submission deadline was Friday, 5th January, 2024 at 11.00 a.m.

Submission of Tenders and Tender Opening

2. According to the signed Tender Opening Minutes dated 5th January 2024, submitted under the Confidential File submitted by the Procuring Entity, the following 5 tenderers were recorded as having submitted

their respective tenders in response to the subject tenderby the tender submission deadline:

No.	Name of Tenderer
1.	**Digital Tailor Agency**
2.	**Powerbase Interactive Holding Limited**
3.	**Agile Business Solutions Limited**
4.	**Bharathbrands Limited**
5.	**Wilcom Systems Limited**

Evaluation of Tenders

3. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") which was to undertake an evaluation of the received tenders in the following 3stages as captured in the Tender Document

   i. PreliminaryEvaluation

   ii. Technical Evaluation

   iii. Financial Evaluation

Preliminary Evaluation Stage

4. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Clause 3. Preliminary examination for Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 35 to 36 of the Tender Document.

5. The evaluation was to be on a Yes/No basis and tenderers who failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.

6. At the end of the evaluation at this stage, 3 tenders were found unresponsive with only 2 tenders including that of the Applicant qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation Stage

7. The Evaluation Committee was required at this stage to examine tenderers successful at the Preliminary Stage using the criteria set out as Technical Evaluation under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 36 to 37 of the Tender Document.

8. At this stage, tenderers were to be examined on in 3 sub-stages. i.e. Mandatory Technical Requirement, Technical Evaluation and Detailed Technical Evaluation.

9. At the end of the evaluation at this stage, only the Applicant's tender was found responsive at all the sub-stages under this Stage and thus qualifying for further evaluation at the Financial Evaluation Stage.

Financial Evaluation Stage

10. At this stage of evaluation, the Evaluation Committee was required to examine the tenders per line item using the Criteria set out as Financial Evaluation under Section III– EVALUATION AND QUALIFICATION CRITERIA on pages 37 to 39 of the Tender Document.

11. Tenders were to be examined by price comparison from among the qualified tenderers and the successful tender would be one with the lowest tender price.

12. At the end of the evaluation at this stage, it was established that the Applicant's tender which was the only tender examined at this stage was the lowest evaluated tender in the subject tender.

Due Diligence

13. According to a Due Diligence Report dated 30th January 2024, the Evaluation Committee conducted due diligence on the Applicant's office premises, statutory documents and litigation history. The report records that the Applicant passed the due diligence test.

Evaluation Committee's Recommendation

14. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Applicant at its tendered price of **Kenya Shillings Seventeen Million and One Hundred Thousand (Kshs. 17,100,000.00.)** inclusive of taxes.

Professional Opinion

15. In a signed Professional Opinion dated 5th February 2024 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Head of Supply Chain Management Services, Ms. Jane Wanyika, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation for the award of the subject tender to the Applicant.

16. On 6th February 2024, the Accounting Officer, Mr. John Ololtuaa, rejected the Professional Opinion, directed the termination of the subject tender under Section 63(1)(g) of the Act and further for the tender to be re-advertised.

Notification to Tenderers

17. Accordingly, tenderers were notified of the termination of the subject tender vide letters dated 13th February 2024.

REQUEST FOR REVIEW

18. On 21st February2024, the Applicant through the firm of Chepkuto Advocates, filed a Request for Review dated21stFebruary 2024 supported by an Affidavit sworn on 21stFebruary2024 by Wilson Kerebei, the Business Development Director of the Applicant, seeking the following orders from the Board in verbatim:

    1. ***A declaration that the Respondents breached the provisions of Article 227(1) of the Constitution and Section 63 of the Public Procurement and Asset Disposal Act;***
    2. ***The decision of the Respondents to terminate the procurement proceedings with respect to the tender herein be annulled and set aside;***
    3. ***The procurement process to be completed and the Applicant to be evaluated as per the provisions of Section 80 of the Act;***
    4. ***After the evaluation process is completed, the Respondents be compelled to award the tender to the***

Applicant who was the lowest evaluated bidder pursuant to Section 86 of the Act;

5. ***The Respondents be compelled to pay costs to the Applicant arising from/and incidental to this Application;***
6. ***The Board to make such other and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review;***

19. In a Notification of Appeal and a letter dated21st February 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 21st February, 2024.

20. On 26th February 2024, the 1st Respondent herein, sent a letter of even date forwarding to the Board the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act. No response was filed.

21. Vide letters dated26th February 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 3 days from 26th February 2024.

22. None of the tenderers filed any document in response to the Board's request for information in respect of the subject tender.

23. On 4th March 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 6th March 2024notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 6th March 2024 at 11.00a.m. through the link availed in the said Hearing Notice.

24. On 6th March 2024 at 11:00 a.m., the Applicant and the Respondents through their Advocates joined the scheduled online hearing session. None of the other tenderers who had participated in the tenderwere represented on the scheduled hearing date despite service of the Hearing Notice upon them.

25. The Board read out to the parties that the only document filed in the matter was the Request for Review and the Respondent's letter forwarding the confidential documents. Parties' Advocates confirmed having filed and been served with the Request for Review.

26. Counsel for the Respondents, Ms. Kamau sought the Board's indulgence for having not filed the Respondents' response to the Request for Review and sought for a week to regularize this.

27. The Board considered the Respondents' request and while noting the time-sensitivity of matters filed before it, directed:

    i. The Respondents to file their response by close of business on 6th March 2024

    ii. The Applicant was at liberty to file a rejoinder to the Respondents' response by 9.00 a.m. on 7thMarch 2024

    iii. The hearing was adjourned to Friday, 8th March 2024 at 9:00 a.m.

28. On 7th March 2024, the Respondents filed a Replying Affidavit sworn on even date by John Ololtuaa, the 1st Respondent herein. However, the Applicant did not file any rejoinder.

29. On 8th March 2024 at 9:00 a.m. the Parties herein through their respective Advocates joined the online hearing session. The Board confirmed the filing of the Respondents Replying Affidavit and inquired from the Applicant whether the same had been served upon them. Counsel for the Applicant, Ms. Akinyi, confirmed that service of the Replying Affidavit had been made upon them and pointed out thatthe Applicant was unable to file any rejoinder in light of late service upon them. Accordingly, she sought to be allowed to make her rejoinder in her address during the session, a request that Counsel for the Respondents, Ms. Kamau did not object to.

30. The Board also gave hearing directions and set the order of address as follows:

    i. The Applicant would have 10 minutes to argue its case;

    ii. The Respondents would have 10 minutes to respond;and

    iii. The Applicant wouldthen close with a rejoinder in 5 minutes.

PARTIES SUBMISSIONS

Applicant's Submissions

31. Counsel for the Applicant, Ms. Akinyi, argued that the Respondents in terminating the subject tender failed to provide sufficient notice and evidence to all participants in the tender in accordance with Section 63 of the Act.

32. Relying on ***PPARB Application No. 5 of 2021; Daniel Outlet Limited v Accounting Officer Numeric Machines Complex Limited***, Ms. Akinyi argued that the Board has jurisdiction to interrogate whether the reasons cited for termination satisfy statutory conditions before it can make a finding that it lacks jurisdiction in respect of a matter filed before it.

33. Counsel submitted that the Respondents failed to adhere to Section 63(4) of the Act which requires the Accounting Officer to notify all tenderers of any such termination within 14 days giving specific reasons for the termination. She argued that the Respondents' letter dated 13th February 2024 terminating the subject tender cited force majeure as the reason for termination but no particulars of the force majeure event were furnished.

34. Ms. Akinyi submitted that Section 63(2) of the Act requires a Procuring Entity to give a written report to the Public Procurement Regulatory Authority (herein referred to as **"the Authority"**) on the reasons for termination but the Applicant had not sighted any such report on the termination of the subject tender.

35. Counsel contended that the Procuring Entity went against the Applicant's legitimate expectation of being awarded the subject tender having been subjected to due diligence as per Section 83 of the Act, which requires the lowest evaluated tender to be subjected to due diligence. The Applicant believed that it was the lowest evaluated tenderer in the subject tender.

36. It was argued that the Procuring Entity in terminating the subject tender, failed to comply with the procedural and substantive requirements under Section 63 of the Act and therefore failed to adhere to the principle of transparency, openness, fairness and cost-effectiveness.

Respondents' Submissions

37. Counsel for the Respondents, Ms. Kamau, indicated that the Respondents would be placing reliance on their filed documents i.e. the Replying Affidavit sworn on 7th March 2024 by John Ololtuaa.

38. Ms. Kamau argued that the Respondents in carrying out the subject tender complied with Article 227(1) of the Constitution, the Act and the principles of transparency, fairness, and cost-effectiveness. She maintained that the Procuring Entity considered the Applicant's tender document and even invited the Applicant to participate in the tender opening and demonstration.

39. Counsel argued that the Procuring Entity had filed a Replying Affidavit with annexures showing that the notice of termination of the subject tender were issued and that the said notices contained the reasons for

termination. Further, that there was also annexed, a report sent to the Board on the termination of the subject tender and that it equally contained the reasons for termination of the subject tender.

40. Ms. Kamau submitted that there was no obligation on the part of the Procuring Entity to award the subject tender merely on the basis of having subjected the Applicant to due diligence. She contended that the spirit of Section 83 of the Act was for the Procuring Entity to conduct verification on the tenderers and that due diligence does not automatically mean that a tenderer should be awarded a contract.

41. Counsel argued that the onus of proof lay with the Applicant to demonstrate that it had suffered loss and damages as a consequence of a breach on the part of the Procuring Entity but the Applicant had failed to demonstrate this in the instant Request for Review. She therefore sought the dismissal of the Request for Review.

Applicant's Rejoinder

42. In a brief rejoinder, Counsel for the Applicant, Ms. Akinyi, relying on ***PPARB Application No. 19 of 2020; Trident Insurance Company Limited v Accounting Officer Water Resources Authority & Anor***, argued that the Procuring Entity ought to providedetailed and specific reasons on the termination of a tender.

43. She argued that the letter by the Procuring Entity stated the reason as force majeure without specifying the force majeure events in question.

44. Further relying on the High Court Case in***R v PPARB Ex parte Magic Contractors Limited & 2 Ors***, Counsel argued that the Procuring

Entity was under an obligation to adhere to statutory dictates on both the substantive and procedural requirements under Section 63 of the Act. She submitted that the Procuring Entity failed to adhere to this and thus the termination was improper and that the same should be set aside as sought in the Request for Review.

45. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 21st February 2024had to be determined by 13th March 2024. Therefore, the Board would communicate its decision on or before13th March 2024 to all parties via email.

BOARD'S DECISION

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

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

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

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

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

47. During the parties' address to the Board, Counsel for the Applicant, Ms. Akinyi, argued that the Board has jurisdiction to interrogate whether the reasons cited for termination of a tender satisfy statutory conditions before it can make a finding that it lacks jurisdiction in respect of a matter filed before it.

48. She submitted that in the instant Request for Review, the Procuring Entity failed to specify the reasons for the termination as the termination notice simply mentioned force majeure without specifying the actual force majeure events. It was equally argued that the Procuring Entity failed to provide a Written Report to the Authority on the termination.

49. It was the Applicant's case that the Procuring Entity having subjected it to due diligence, the Applicant had a legitimate expectation that its tender was the lowest evaluated tender and thus warranting to be awarded the subject tender. Accordingly, the termination of the subject tender failed to adhere to the principle of transparency, openness, fairness and cost-effectiveness.

50. On the flip side, Counsel for the Respondents, Ms. Kamau, argued that the Respondents in carrying out the subject tender complied with Article 227(1) of the Constitution, the Act and the principles of transparency, fairness, and cost-effectiveness. She maintained that the Procuring Entity considered the Applicant's tender document and even invited the

Applicant to participate in the tender opening and demonstration of its proposed solution.

51. Counsel argued that the Procuring Entity had exhibited the notice of termination of the subject tender as well a report sent to the Board, both of which outlined the reasons for termination of the subject tender.

52. Ms. Kamau submitted that the conduct of due diligence on the Applicant did not automatically mean that the Applicant would be awarded the tender since due diligence serves as the Procuring Entity's verification of a tenderer's qualification.

53. From the foregoing, the Board is invited to interrogate the circumstances under which the subject tender was terminated, a subject that raises a jurisdictional question on the appropriateness of the instant Request for Review being heard and determined by this Board.

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

55. 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."

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

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

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

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

58. In the case of ***KakutaMaimaiHamisi v PerisPesiTobiko& 2 Others [2013] eKLR,*** the Court of Appeal emphasized the centrality of the issue of jurisdiction and held that:

"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings 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...."

59. 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."

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

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

61. 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.

62. Section 167 of the Act above, extends an opportunity to candidates and tenderers disgruntled with a public tender process to approach the Board for redress. However, subsection (4) of the Section divests the

Board jurisdiction on a myriad of subject matters including the termination of a procurement process.

63. Termination of public procurement proceedings is governed by Section 63 of the Act.

64. Superior Courts of this country have on numerous occasions offered guidance on the interpretation of Section 167(4) of the Act and the ousting of the Board's jurisdiction on account of the subject matter relating to termination of tenders:

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

> ***"33. A plain reading of Section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section***

63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted...

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

66. The above judicial pronouncements mirror the position of this Board in its previous decisions in ***PPARB Application No. 29 of 2023; Craft Silicon Limited v Accounting Officer Kilifi County Government &anor; PPARB Application No. 50 of 2020; Danka Africa (K) Limited v Accounting Officer, Kenya Ports Authority*** and ***PPARB Application No. 9 of 2022; Intertek Testing Services (EA) PTY Limited & Anor v The Director General, Energy and Petroleum Regulatory Authority & Anor; and PPARB Application No. 5 of 2021; Daniel Outlet Limited v Accounting Officer Numeric Machines Complex Limited***

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

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

"63. Termination or cancellation of procurement and asset disposalProceedings

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

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) force majeure

(h) ...

(i) ...

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.

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

70. Effectively, an Accounting Officer is under a duty to provide sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Accounting Officer must also demonstrate that they have complied with the substantive and procedural requirements set out under the provisions of section 63 of the Act.

71. On the one hand, the substantive requirements relate to a Procuring Entity outlining the specific ground under section 63(1) of the Act as to why a tender has been terminated and the facts that support such termination.

72. On the other hand, the procedural requirements include the requirements under Section 63(2), (3), and (4) of the Act i.e. (i) the submission of a Written Report to the Authority on the termination of a tender within 14 days of such termination and (ii) the issuance of notices of termination of tender to tenderers who participated in the

said tender outlining the reasons for termination within 14 days of such termination.

73. The Board shall now interrogate the circumstances under which the subject tender was terminated:

74. The Respondents annexed to the Replying Affidavit**Annexure JO1**, a letter dated 13th February 2024 terminating the subject tender that was sent to the Applicant. The Board has also seen a copy of the said letter as part of the documents submitted by the Respondents under the Confidential File in line with Section 67 of the Act. For completeness of the record, the contents of the said letter are herein reproduced:

"Ref: MOT/PROC/GEB (161) ***Date: 13th February 2024***

Wilcom Systems Limited

P.O. Box Details withheld

Nairobi

Phone: Details withheld

Email: Details withheld

RE: TERMINATION OF PROCUREMENT PROCEEDINGS

This is to notify you of the termination of procurement proceedings of Tender No. SDT/03/2023-2024 for Provision of Design, Development and Implementation of National Tourism Service Portal pursuant to Section 63 of the Public Procurement and Asset Disposal Act, 2015.

The following reason for termination applies:-

Section 63(1)(g) Force Majeure

Thank you for participating.

Signed

JOHN OLOLTUAA

PRINCIPAL SECRETARY

75. From the above letter, the 1st Respondent communicated to the Applicant that the Respondents had terminated the subject tender on account of force majeure which is the ground of termination of a tender available to an Accounting Officer under Section 63(1)(g) of the Act. However, the letter does not go further to offer any details specifying the actual force majeure event(s) that prompted the termination of the subject tender.

76. The Respondents equally exhibited **annexure JO-1**, a report in the form of a letter dated 13th February 2024 and addressed to the Director General of the Authority. It bears reproducing the contents of the said letter:

Ref: MOT/PROC/GEN(160) ***Date: 13th February 2024***

Mr. Patrick K. Wanjuki

Director General

Public Procurement Regulatory Authority (PPRA)

P.O. Box 58535-00200

NAIROBI

RE: TERMINATION OF PROCUREMENT AND ASSET DISPOSAL PROCEEDINGS: SECTION 63(2)

Quarter: THREE

FY: 2023/2024

Procuring Entity Name: STATE DEPARTMENT FOR TORISM	
Tender No.	***SDT/03/2023-2024***
Description of Tender	***Design, Development and Implementation of the National Tourism Portal***
Procurement Method	***Open Tender***
Nature of Procurement (Goods, Works, Consultancy Services, Non-Consultancy Services)	***Non-consultancy Services***
Budgeted Amount/ Value of the Tender (KES)	***Kshs. 25 Million***
Stage of Tender Processing at the time of termination	***Professional Opinion***
Date of termination	***6th February 2024***
Reason for Termination as prescribed under section 63(1) to (i) of the Act	***63(1)(g) Force Majeure***

This report should be submitted to the Authority within 14 days of termination accompanied by the following mandatory documents:

1. ***An extract of the approved procurement plan demonstrating that the subject procurement was planned for.***
2. ***Signed Professional Opinion with the identified reason for termination under Section 63(1) of the Act.***
3. ***Tender Evaluation Report***
4. ***Official termination notification to the bidders***

77. The Report above equally, simply identifies the reason for termination as force majeure under Section 63(1)(g) without any further information. No details of the force majeure events are provided.

78. The Black Law Dictionary (9th Edition) defines force majeure as:

"an event or effect that can be neither anticipated nor controlled"

79. It would therefore follow that to fully satisfy the substantial requirement under Section 63 of the Act, the Accounting Officer had the onus of demonstrating that there were events that could neither be anticipated nor controlled that occurred and thus the termination of the tender. However, the Respondents did not produce any evidence of what could be termed a force majeure event to support the said reason for termination.

80. The Board has scrutinized both the Evaluation Report dated 30th January 2024 and the Professional Opinion dated 5th February 2024 and noted that members of the Evaluation Committee and the Head of Procurement were in concurrence that the subject tender should be awarded to the Applicant. It therefore comes as a surprise that the Accounting Officer went ahead to disregard the Professional Opinion by the Head of Procurement and directed the termination of the subject tender on account of unspecified force majeure events.

81. Superior courts in this country have previously warned against the growing trend of Procuring Entity's reproducing the grounds of termination under Section 63 of the Act without any further information:

82. In ***Republic v Public Procurement Administrative Review Board Exparte Nairobi City & Sewerage Company;Webtribe Limited t/a Jambopay Limited (Interested Party) [2019] eKLR; Nairobi High Court Judicial Review Application 437 of 2018*** the High Court considered a judicial review application challenging the decision of this Board that had found that the Procuring Entity irregularly terminated the tender under consideration. In dismissing the judicial review application, the Court sounded a warning to Procuring Entities that mere recitation of grounds of termination of a tender under Section 63 of the Act without information establishing the alleged ground of termination is insufficient to justify such termination:

> ***45. The mere recitation of the statutory language, as has happened in this case is not sufficient to establish the grounds or sufficient reasons. The reasons for the termination must provide sufficient information to bring the grounds within the provisions of the law. This is because the tender process and in particular, the termination, must be done in a transparent and accountable and legal manner as the law demands. This is because the question whether the information put forward is sufficient to place the termination within the ambit of the law will be determined by the nature of the reasons given. The question is not whether the best reasons to justify termination has been provided, but whether the reasons provided are sufficient for a reasonable***

tribunal or body to conclude, on the probabilities, that the grounds relied upon fall within any of the grounds under section 63 of the Act. If it does, then the party so claiming has discharged its burden under section63

83. From the above case, which is binding on this Board, public procurement processes, including termination or cancellation of a public tender, should be done in an open and transparent manner and that mere recitation of the statutory language under Section 63 of the Act does not suffice.

84. Guided by the above case, the Board finds that the Procuring Entity has failed to establish the substantive requirement of showing that the subject tender was terminated in accordance with any of the grounds under Section 63(1) of the Act.

85. Turning to the procedural requirement i.e. on sending notifications on termination to the tenderers and preparation of a Written Report to the Authority, the Respondents produced in evidence 2 letters.:

86. First, the letter dated 13th February 2024 and addressed to the Applicant. The said letter which terminated the subject tender has been reproduced at paragraph 74 of this Decision. The Applicant admitted receiving the said letter on 15th February 2024 and there was no contest on its service upon the tenderers who participated in the subject tender. It would therefore follow that the letter was served within the 14 days of termination contemplated under Section 63(4) of the Act. However, the letter does not muster the threshold of the termination notice

contemplated under Section 63(4) of the Act for failing to sufficiently disclose the force majeure events that led to the termination of the subject tender.

87. The Respondents equally exhibited its Report dated 13th February 2023 and addressed to the Director General of the Authority. The Report has been reproduced at paragraph 75 of this Decision. The said report does not outline with specificity the actual force majeure event(s) that prompted the termination of the subject tender and is thus equally defective as it fails to meet the requirements of Section 64(3) of the Act.

88. In view of the foregoing, the Respondents have failed to meet both the substantive and procedural requirements for termination of a tender as contemplated under Section 63 of the Act.

89. Accordingly, the Procuring Entity did not terminate the subject procurement process in accordance with Section 63 of the Act and thus the jurisdiction of the Board over the instant Request for Review is not ousted.

90. As the Board concludes on this issue, it wishes to point out that that it was wrong on the part of the 1st Respondent as the Accounting Officer to purport to substitute his decision to terminate the subject tender for that of the Evaluation Committee despite the Evaluation Committee's and the Head of Procurement's recommendation for the Applicant to be awarded the subject tender. The proper cause of action for the 1st Respondent in the event he held any reservation on the tender process would have been to refer the matter back to the Evaluation Committee with directions that they look in to the matters he held reservations on.

91. The Board is satisfied that the Evaluation Committee and the recommendations for award observed and complied with the guiding principles set out in Sections 3, 46, 79 ,80,86(1) and 84 of the Public Procurement and Asset Disposal Act and the provisions of Sections 32.1, 32.2 ,39 and 40 and Section III - Evaluation and Qualification Criteria of the Tender Document

92. The Board holds in the absence of cogent reservation/and or reasons for termination, which the Board held as much the 1st Respondent as the Accounting Officer should consider Evaluation Committee's recommendations and the Head of Procurement's Professional opinion and make an award in the subject tender.

What orders the Board should grant in the circumstances?

93. The Board has found that the subject tender was irregularly terminated and that the Board has jurisdiction to hear and determine the instant Request for Review.

94. The upshot of our finding is that the Request for Review dated 21st February 2024 in respect of Tender NoSDT/03/2023-2024 for Provision of Design, Development and Implementation of the National Tourism Service Portalsucceeds in the following specific terms:

FINAL ORDERS

95. 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 theRequest for Review dated 21stFebruary 2024:

1. TheRequest for Review dated 21st February 2024 be and is hereby allowed.

2. The Respondents'Letters dated 13th February 2024 and addressed to tenderers and terminating Tender No. SDT/03/2023-2024 for Provision of Design, Development and Implementation of National Tourism Service Portal be and are hereby cancelled and set aside.

3. The 1st Respondent be and is hereby directed to award Tender No. SDT/03/2023-2024 for Provision of Design, Development and Implementation of National Tourism Service Portal to the lowest evaluated responsive tender within seven days(7) from the date of this decision while taking into consideration the Board's finding in this Request for Review.

4. Given the subject procurement proceedings are not complete, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 12thDay of March 2024.

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PANEL CHAIRPERSON

PPARB

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SECRETARY

PPARB