

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 14/2024 OF 23RD FEBRUARY 2024

BETWEEN

EMKAY CONSTRUCTION LIMITED _____ APPLICANT

AND

MANAGING DIRECTOR,

KENYA REINSURANCE CORPORATION LTD _____ 1ST RESPONDENT

KENYA REINSURANCE CORPORATION LTD _____ 2ND RESPONDENT

Review against the decision of the Managing Director, Kenya Reinsurance Corporation Limited in relation to Tender No. KRC/2023/2201/363 for Proposed Common Area Refurbishments at Anniversary Towers.

BOARD MEMBERS PRESENT

- | | | |
|----------------------------|---|-------------|
| 1. Mr. Joshua Kiptoo | - | Chairperson |
| 2. Ms. Alice Oeri | - | Member |
| 3. Mr. Alexander Musau CPA | - | Member |

IN ATTENDANCE

- | | | |
|---------------------|---|-------------|
| Mr. Philemon Kiprop | - | Secretariat |
| Mr. Anthony Simiyu | - | Secretariat |

PRESENT BY INVITATION

APPLICANT

EMKAY CONSTRUCTION LIMITED

Ms. Desma Nungo

-Advocate, NOW Advocates LLP

RESPONDENT

**MANAGING DIRECTOR, KENYA
REINSURANCE CORPORATION LIMITED
KENYA REINSURANCE CORPORATIION
LIMITED**

Mr. Alex Thangei

-Advocate, Waruhiu K'Owade & Ng'ang'a
Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Reinsurance Corporation Limited, the Procuring Entity together with the 1st Respondent herein, invited electronic submission of tenders in response to Tender No KRC/2023/2201/363 for Proposed Common Area Refurbishments at Anniversary Towers using an open competitive tender method. The subject tender's submission deadline was Monday, 8th January 2024 at 10.00 a.m.

Submission of Tenders and Tender Opening

2. According to the signed Tender Opening Minutes dated 8th January 2024, submitted under the Confidential File submitted by the Procuring Entity, the following 9 tenderers were recorded as having submitted

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

No.	Name of Tenderer
1.	GWG International Construction
2.	Emkay Construction Limited
3.	Interlink Industries
4.	Karura Engineering Works
5.	Wante Contractors
6.	Floli 22 Contractors Limited
7.	Solitaire Constructions Limited
8.	Sajury Company Limited
9.	Nanchang Foreign Engineering

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 4 stages as captured in the Tender Document
- i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Financial Evaluation
 - iv. Due Diligence and Recommendation for Award

Preliminary Evaluation Stage

4. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as A. Preliminary Evaluation, Table

B: Mandatory Criteria and Table C: Mandatory Criteria 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, 8 tenders were found nonresponsive with only 1 tender, i.e. the Applicant's tender 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 B) Technical Evaluation of the Tender Document.
8. At this stage, tenders required to fully meet all the requirements to proceed to Financial Evaluation.
9. At the end of the evaluation at this stage, the Applicant's tender was found nonresponsive and thus disqualified from further evaluation at the Financial Evaluation Stage.

Financial Evaluation Stage

10. No tender was evaluated at this stage since the Applicant's tender which was the only one responsive at the Preliminary Evaluation Stage was

found nonresponsive at the Technical Evaluation Stage and thus disqualified from further evaluation.

Evaluation Committee's Recommendation

11. Accordingly, the Evaluation Committee recommended the termination of the subject tender.

Professional Opinion

12. In a signed Professional Opinion dated 25th January 2024 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Manager Supply Chain, Ms. Gladyce Musyoki, 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 termination of the subject tender.
13. On 30th January 2024, the Accounting Officer, Dr. Hillary M. Wachinga expressed his concurrence with the Professional Opinion, directed the termination of the subject tender under Section 63 and further for the tender to be re-advertised.

Notification to Tenderers

14. Accordingly, tenderers were notified of the termination of the subject tender vide letters dated 31st January 2024.

REQUEST FOR REVIEW

15. On 23rd February 2024, the Applicant through the firm of NOW Advocates LLP, filed a Request for Review dated 23rd February 2024

supported by a Statement dated 23rd February 2024 signed by Margaret Magiri Mwangi, a Director of the Applicant, seeking the following orders from the Board in verbatim:

- 1. The decision of the 1st Respondent terminating the procurement proceedings for Tender (ITT) No: KRC/2023/2201/363 for Proposed Common Area Refurbishments at Anniversary Towers for Kenya Reinsurance Corporation Limited and intention to advertise the same as contained in the 2nd Respondent's letter signed by the 1st Respondent and received by the Applicant on 9th February 2024 be nullified and set aside in its entirety;***
- 2. The 1st Respondent be directed to proceed with the procurement proceedings of Tender No (ITT) No: KRC/2023/2201/363 for Proposed Common Area Refurbishments at Anniversary Towers for Kenya Reinsurance Corporation Limited to its logical conclusion including the making of an award to the successful bidder in line with the provisions of the Constitution, Act, Regulations 2020 and the Tender Document within fourteen 14 days from the date of this Decision;***
- 3. The Respondents be compelled to pay to the Applicant the costs arising from, incidental to, this Request for Review; and***
- 4. The Public Procurement Administrative Review Board to make such 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.

16. In a Notification of Appeal and a letter dated 23rd 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 23rd February 2024.

On 29th February 2024, the Respondents through the law firm of Waruhiu K'Owade & Ng'ang'a Advocates filed a Notice of Appointment of Advocates and a Memorandum of Response, both dated 29th February 2014. The Respondents also forwarded to the Board the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act').

17. Vide letters dated 29th 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 29th February 2024.

18. None of the tenderers, other than the Applicant, filed any document in response to the Board's request for information in respect of the subject tender.
19. On 1st March 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 1st March 2024 notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 7th March 2024 at 2:30 p.m. through the link availed in the said Hearing Notice.
20. On 5th March 2024 the Applicant filed a Further Statement of even date signed by Margaret Magiri Mwangi.
21. On 6th March 2024 the Applicant filed Written Submissions and a Bundle of Authorities, both dated 6th March 2024.
22. On 7th March 2024, the Respondents filed a Supplementary Memorandum of Response dated 7th March 2024 and a List and Bundle of Authorities, all dated 6th March 2024.
23. On 7th March 2024 at 2:30 p.m., the Applicant and the Respondents through their Advocates joined the scheduled online hearing session.
24. The Board read out to the parties the documents that had been filed in the Request for Review and sought for each party to confirm that each

of the said documents had been served upon them. Parties' Advocates confirmed having filed and having been served with each of the documents in the Request for Review.

25. The Board also gave hearing directions on the order of address being that the Applicant would go first, thereafter the Respondents would offer submissions in response with the Applicant closing with a rejoinder on the Respondents submissions.

PARTIES SUBMISSIONS

Applicant's Submissions

26. Counsel for the Applicant, Ms.Nungo, submitted that the Memorandum of Response and Supplementary Memorandum of Response breached Regulation 205 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020'). She argued that though Regulation 205 required the Accounting Officer and not any other person to submit the Memorandum of Response, the Memorandum of Response and Supplementary Memorandum of Response had neither been done nor signed by the Accounting Officer. She contended that on their face they were prepared by the Respondents but signed by the Respondents' Advocates. It was therefore Counsel's submission that there was a danger in relying on the said documents since they contained disputed facts that were within the domain of the Accounting Officer and not their Counsel.
27. Ms. Nungo placed reliance on ***Civil Case 233 of 2018; Magnolia Pvt Limited v Synermed Pharmaceuticals (K) Limited [2018]eKLR***

and *East African Foundry Works (K) Limited v Kenya Commercial Bank Limited [2002]eKLR.*

28. She argued that the Respondents had produced as part of its Authorities ***PPARB Application No. 7 of 2024; Emcure Pharmaceutical Limited v Kenya Medical Supplies Authority & Another***, which case did not relate to Regulation 205(3) of the Regulations 2020 as it concerned a challenge on the form of a Request for Review and not Memorandum of Response. Counsel therefore argued that the decision was distinguishable from the present circumstances.
29. Ms. Nungo further pushed that the Supplementary Memorandum of Response was filed outside time, after close of pleadings and without the Board's leave. She therefore sought for the Supplementary Memorandum of Response to be expunged from the record.
30. Counsel argued that the Respondents' letter terminating the subject tender was not clear on whose tender in particular was nonresponsive as to warrant the termination. She contended that no specific and tangible reasons had been advanced for the said termination backed with evidence on the same.
31. Relying on ***Judicial Review Misc. Application 496 of 2017; Public Procurement Administrative Review Board & Anor [2017]eKLR*** Counsel argued that the Respondents' regurgitating the statutory language under Section 63 of the Act on termination of a tender of itself does not pass a sufficient ground for terminating the tender.

32. Further that the Board has severally held that for an Accounting Officer to legally terminate a tender they must give real and tangible reasons backed by sufficient evidence for the termination. For this proposition reliance was placed on ***PPARB Application No. 152 of 2020; Top Choice Surveillance Limited & Vaghjiyani Enterprises Limited v The Accounting Officer, Ministry of Transport, Infrastructure, Housing Urban Development and Public Works, State Department for Housing & Urban Development & Anor and PPARB Application No. 123 of 2019; The Gardens and Weddings Centre Limited v Nakuru County Government-The Provincial General Hospital and Another and PPARB Application No. 28 of 2018, Chogis Garage Limited & 22 others vs. Ministry of Water & Irrigation .***
33. Counsel invited the Board to consider the import of giving reasons in accordance with Article 227(1) of the Constitution and Sections 3 and 10 of the Act.
34. Ms. Nungo argued that even if the Board was inclined to consider the Memorandum of Response, at paragraphs 4 to 6 , the Respondents attempt to be ingenious by outlining 2 levels of giving reasons i.e. first reason at paragraph 4 and further specific reasons at paragraph 5. She contended that what the Procuring Entity gave reasons for the termination way late by way of a letter dated 22nd February 2024 after the institution of the instant Request for Review on 23rd February 2024 at 5:00 p.m. According to Counsel, the letter dated 22nd February 2024 was done in breach of section 168 of the Act which suspended the procurement proceedings in respect of the subject tender.

35. Counsel further argued that the letter was issued by someone other than the Accounting Officer and was also issued outside the 14 days timeline contemplated under Section 63(4) of the Act. Counsel cited that the introduction of the letter dated 22nd February 2024 brought about issues of challenge in terms of the right to a fair hearing for the Applicant.
36. It was further argued that the Respondents did not tender any evidence to show that a written report had been made to the Authority with reasons on the termination within the prescribed timelines. Counsel argued on a without prejudice basis that neither the Memorandum of Response nor Supplementary Memorandum of Response exhibited the alleged report to the Authority.
37. She argued that the jurisdiction of the Board can only be ousted if termination is in accordance with Section 63 of the Act. According to the Applicant, the termination was in breach of Section 63 of the Act and thus the instant Request for Review was merited.

Respondents' Submissions

38. Counsel for the Respondents, Mr. Thangei, argued that Regulation 208 of the Regulations 2020 allows parties before the Board to seek legal representation. Further, that Order 9 Rule 7 of the Civil Procedure Rules, 2010 recognizes Advocates as agents of parties in litigation.
39. While referring to ***PPARB Application No. 7 of 2024, Emcure Pharmaceutical Limited vs. Kenya Medical Supplies Authority &***

Another, Mr. Thangei submitted that the failure of an Applicant to sign a Request for Review does not render it defective. Accordingly, he urged the Board to disallow the Applicant's invitation for the striking out of the Respondents' Memorandum of Response and Supplementary Memorandum of Response.

40. Counsel argued that the authorities relied upon by the Applicant relate to affidavits signed by Advocates in conventional litigation but are inapplicable in the instant case there were no affidavits had been filed herein.
41. It was further contended that the Applicant's Further Statement was filed on 25th March 2024 without leave and that no leave was required to file a Supplementary Memorandum of Response.
42. Mr. Thangei submitted that Article 159 of the Constitution of Kenya, 2010 enjoined the Board to disregard procedural technicalities and that Regulation 218 of the Regulations 2020 equally requires that the Board is not bogged down by strict rules of evidence.
43. Counsel argued that in any event the documents in the Supplementary Memorandum of Response had already been submitted to the Board as part of the Confidential Documents under Section 67 of the Act. Accordingly, Counsel sought for the Board to find that the documents were properly on record.

44. Mr. Thangei submitted that the right of the Procuring Entity to terminate the procurement proceedings were vested under Section 63 of the Act as well as Clause 40 of the Tender Document in the subject tender.
45. It was contended that it was not in contention that the Respondents issued a letter to the Applicant stating that the tender had been terminated because none of the submitted tenders was responsive. According to Counsel the letter spelt out that the termination was under Section 63(1)(f) of the Act and thus it met the statutory requirement.
46. He further urged that the Respondents had at paragraphs 2 (b), (c), 5 and 7 of the Memorandum of Response demonstrated the criterion that was applied to determine the Applicant's tender as nonunresponsive.
47. Additionally, that at page 3 of the Supplementary Memorandum of Response, the Respondents had attached a letter to the Authority as required attaching all letters to tenderers and Professional Opinion coming to the conclusion that all the tenderers were unresponsive.
48. Counsel submitted that the law is that when a challenge is fronted on a termination, the burden lies with the Procuring Entity to show that it was regular and that is what the Procuring Entity had done in the instant proceedings.
49. Relying on ***Judicial Review Misc. Application 496 of 2017; Public Procurement Administrative Review Board & Anor [2017]eKLR***, Counsel urged that it is only when termination is challenged that a

Procuring Entity is required too give evidence to support the reason for termination.

50. Mr. Thangei submitted that it is not the letter and spirit of the Act that the Applicant must give reasons to tenderers on the first instance and rather it is only after a termination has been challenged that the Procuring Entity's burden to show sufficient evidence crystallizes.
51. Further reliance was placed on ***JR MISC Application No. 407 of 2018, Republic vs. The Public Procurement Administrative Review Board & Another*** indicating that courts have recognized that where all received tenders are established to be nonresponsive then termination is inevitable.
52. Counsel argued that the Applicant had spent much time on other things than showing that its tender was responsive despite the Respondents having pointed out that the termination of the subject tender was informed by the nonresponsiveness of all the submitted tenders.
53. He argued that the Respondents had satisfied all the requirements under Section 63 of the Act and thus sought for the Request for Review to be dismissed.

Applicant's Rejoinder

54. In a brief rejoinder, Counsel for the Applicant, Ms. Nungo urged that Regulation 208 of Regulations 2020 gives the right of representation at the point of hearing and does not take away the express provisions of Regulation 205(3) of the Regulations 2020.

55. Counsel made reference to ***PPARB Application No. 7 of 2024, Emcure Pharmaceutical Limited vs. Kenya Medical Supplies Authority & Another*** and maintained that it related to a challenge to form and authority of Counsel in a Request for Review where Counsel had gone to the extent of deponing affidavits. She urged that in the present case, statements had been made but no evidence of such authority had been availed.
56. Counsel referred to ***PPARB Application No. 8 of 2023; Toddy Civil Engineering Company Limited v Lake Victoria North Water Works Development Agency*** where the Board found that where a Request for Review made in the name of an Applicant but is signed by the Applicant's Advocate, the same is defective, which case was the one at hand.
57. Ms. Nungo submitted that Regulation 218 of the Regulations 2020 was irrelevant in the present proceedings.
58. She argued that Counsel for the Respondents had confirmed that termination letter only reiterated the statutory language under Section 63 of the Act and only attempted to give reasons for termination in the course of the present proceedings.
59. She refuted the argument made on behalf of the Respondents that substantive reasons are given when a challenge is fronted since for one

to challenge a termination, they must know the reasons why the termination was directed.

60. Accordingly, Counsel sought that the Request for Review be allowed.

CLARIFICATIONS

61. The Board inquired from the Applicant whether they attended any debriefing session in respect of the subject tender to which Ms. Nungo responded in the negative. Counsel indicated that the Applicant had written a letter dated 14th February 2024 inquiring on the reasons for termination and that this was only responded to after the instant Request for Review had been filed.
62. The Board also wished the Applicant to confirm if its tender was responsive to all the requirements in the subject tender to which Ms. Nungo responded in the affirmative.
63. The Board sought that the Respondent clarifies if it was its position that it could selectively give reasons on termination of a tender. Mr. Thangie clarified that the Respondents took the position that in the first instance they gave a reason under Section 63(1)(f) and that it was after the challenge on the termination was brought that it became incumbent on it to adduce evidence to support the reason.
64. The Board inquired from the Respondents on whether they gave reasons on the nonresponsiveness of the Applicant's tender after the

filing of the instant Request for Review to which Mr. Thangie answered in the affirmative.

65. The Board equally sought to know whether a written report on the termination of the subject tender was made to the Authority to which Mr. Thangie responded in the affirmative. He added that the report was uploaded in the Authority's portal and a copy of the same was also attached to the Supplementary Memorandum of Response. Ms. Nungo on her part urged that the attached letter to the Director General of the Authority referred to a Report but no such report was attached.
66. The Board sought for the Respondents to confirm if all the tenderers failed at the Preliminary Evaluation Stage to which Mr. Thangie confirmed that all save for the Applicant failed at this stage but the Applicant went ahead to fail at the Technical Evaluation Stage. On her part, Ms. Nungo urged that the dispute before the Board was on termination of the tender and sought for the Board to restrict itself to that.
67. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 23rd February 2024 had to be determined by 15th March 2024. Therefore, the Board would communicate its decision on or before 15th March 2024 to all parties via email.

BOARD'S DECISION

68. 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. ***Whether the Respondents filed before the Board a competent Memorandum of Response and a Supplementary Memorandum of Response?***

III. ***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?

69. Counsel for the Applicant, Ms. Nungo, argued that the Respondents in terminating the subject tender failed to specify the reason for termination and failed to submit a Written Report to the Authority on the termination. Further that the reason for termination was not backed up by evidence. She argued that the Respondents in their letter of termination simply regurgitated the statutory language under Section 63 of the Act.

70. Ms. Nungo argued that the Respondents made an attempt at ingenuity by suggesting that reasons are given at 2 levels i.e. first during termination where tenderers are notified in general terms of the reasons for termination and thereafter with more details and evidence of the reasons when the termination is challenged before the Board.
71. Counsel further argued that the Respondents letter dated 22nd February 2024 was issued by someone other than the Accounting Officer and was also issued outside the 14 days' timeline contemplated under Section 63 of the Act.
72. She argued that the jurisdiction of the Board can only be ousted if termination is in accordance with Section 63 of the Act. According to the Applicant, the termination was in breach of Section 63 of the Act and thus the instant Request for Review was merited.
73. On the flip side, Counsel for the Respondents, Mr. Thangei, argued that the Respondents issued a letter to the Applicant stating that the tender had been terminated because none of the submitted tenders was responsive. According to Counsel the letter spelt out that the termination was under Section 63(1)(f) of the Act and thus it met the statutory requirement. He further urged that the Respondents had in the Memorandum of Response demonstrated the criterion that was applied to determine the Applicant's tender as nonresponsive.
74. Additionally, that in the Supplementary Memorandum of Response, the Respondents had attached a letter to the Authority as required attaching

all letters to tenderers and Professional Opinion coming to the conclusion that all the tenderers were nonresponsive.

75. Counsel submitted that the law is that when a challenge is fronted on a termination, the burden lies with the Procuring Entity to show that it was regular and that is what the Procuring Entity had done in the instant proceedings.
76. Mr. Thangei submitted that it is not the letter and spirit of the Act that the Applicant must give reasons to tenderers on the first instance and rather it is only after a termination has been challenged that the Procuring Entity's burden to show sufficient evidence crystallizes.
77. Counsel argued that the Applicant had spent much time on other things than showing that its tender was responsive despite the Respondents having pointed out that the termination of the subject tender was informed by the unresponsiveness of all the submitted tenders.
78. 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.
79. 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.

80. 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."

81. 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."

82. 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."

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

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

84. 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."

85. 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.”

86. 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.

87. 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 said Section divests the Board jurisdiction on a myriad of subject matters including the termination of a procurement process.
88. Termination of public procurement proceedings is governed by Section 63 of the Act.
89. 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:
90. 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

91. 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; and PPARB Application No. 5 of***

***2021; Daniel Outlet Limited v Accounting Officer Numeric
Machines Complex Limited***

92. 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.

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

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

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

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) all evaluated tenders are non-responsive;

(g) ...

(h) ...

(i) ...

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

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

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

94. 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.
95. 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.

96. 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.
97. 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.
98. The Board shall now interrogate the circumstances under which the subject tender was terminated:
99. The Board has from the documents submitted under the Confidential File sighted a letter dated 31st January 2024 terminating the subject tender that was sent to the Applicant. For completeness of the record, the contents of the said letter are herein reproduced:

"31st January 2024

Managing Directors

Emkay Construction Limited

P.O. Box 1063-00618

Nairobi

Office of the

Managing Director

Dear Sir,

**RE: TERMINATION OF TENDER- PROPOSED COMMON AREA
REFURBISHMENT AT ANNIVERSARY TOWERS-
KRC/2023/2201/363**

This is to notify you that Kenya Reinsurance Corporation Limited has concluded the evaluation of the above tender.

We regret to inform you that the tender was nonresponsive.

Section 63(1) PPADA an accounting officer of a procuring entity, may at any time prior to notification of tender award, terminate or cancel procurement of asset disposal proceedings without entering a contract where (f) all evaluated tenders are non-responsive.

We therefore terminate the tender with immediate effect the same will be advertised soon.

Yours faithfully,

Signed

DR. HILLARY M. WACHINGA

MANAGING DIRECTOR

CC: Supply Chain Manager

100. From the above letter, the 1st Respondent communicated to the Applicant that the Procuring Entity had concluded the evaluation process in the subject tender and that an **unspecified** tender had been found nonresponsive. Further that Section 63(1)(f) of the Act allowed for termination of a tender where all received tenders had been found nonresponsive. However, the letter is not clear on which tenderer's

tender had been found nonresponsive and on what account and whether all tenders were nonresponsive.

101. Superior courts in this country have previously offered guidance that termination notices under Section 63 of the Act should provide further information and go beyond the mere restatement of the grounds under the Section 63(1) of the Act.
102. 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 section 63

103. The Procuring Entity's letter dated 31st January 2024 terminating the subject tender was not clear on the reason(s) as to why the subject tender was terminated. The said letter mentions that a tender was found nonresponsive without giving details on the tender being described as nonresponsive and without expressly stating whether all tenders were nonresponsive. Plausibly, this confusion informed the Applicant's letter dated 14th February 2024 being Annexure MMM-8 annexed to the Statement of Margaret Magiri Mwangi in support of the Request for Review, which is hereinafter reproduced:

"To:

The Managing Director,

Kenya Reinsurance Corporation Limited

P.O. Box 30271-00100 Nairobi

Reinsurance Plaza, Aga Khan Walk

Nairobi, Kenya

Dear Sir/Madam,

***RE: TERMINATION OF TENDER- PROPOSED COMMON AREA
REFURBISHMENTS AT ANNIVERSARY TOWERS***

TENDER (ITT) NO: KRC/2023/2201/363

***We write to you with regards to your letter dated 31st
January 2024, for the above-names tender for which we
submitted our bid. Your aforementioned letter notified us of
termination of the tender citing that it was "nonresponsive".***

***We hereby request for the reasons why the tender was
"nonresponsive" as well as the reasons why our bid was
found to be "nonresponsive" in accordance with Section 63
of the Public Procurement and Disposal Act of 2015.***

We look forward to your prompt response. Thank you.

Yours faithfully,

Signed

Magiri M. Mwangi

Operations Director.

104. The Board has equally sighted the Respondents letter dated 22nd
February 2024 in response to the above letter:

"22nd February 2024

Emkay Construction Limited
P.O. Box (Details Withheld)
Nairobi

Dear Madam,

**RE: TENDER NO. KRC/2023/2201/363-TENDER FOR
PROPOSED COMMON AREA REFURBISHMENT AT
ANNIVERSARY TOWERS**

**Reference is made to the above subject matter and your
letter dated 14th February 2024.**

**Please note that your firm did not meet the following under
technical evaluation criteria:-**

- 1. Under general experience, you provided four (4) valid
projects instead of five as required in the criteria.**
- 2. Under specific experience, you provided four (4)
projects which were not relevant to the proposed
project.**
- 3. You provided a work methodology that was generic and
not specific to the proposed project.**
- 4. Under key personnel:- The project manager did not
provide proof of engagement with the bidding firm as
per the CV provided.**
- 5. Under key personnel:- the bidder provided three site
agents who lacked specific experience in building
works.**

6. Under key personnel:- the bidder provided only one foreman instead of two as required in the criteria

7. Under key personnel: the bidder provided documents for four (4) artisans none of them had proof of work engagement with the bidding firm

Yours faithfully,

Signed

GLADYCE MUSYOKI

MANAGER SUPPLY CHAIN

CC: DR. HILLARY WACHINGE

MANAGING DIRECTOR

105. From the letter dated 22nd February 2024 above, the Procuring Entity's Manager Supply Chain, Ms. Gladyce Musyoki, details to the Applicant the reasons why the Applicant's tender was nonresponsive to the tender requirements. The letter details 7 reasons that informed the Procuring Entity's decision to determine the Applicant's tender nonresponsive. The Applicant indicated that this letter was served upon it via email on 23rd February 2024 at 5:00 pm after filing the instant Request for Review and this position was not disputed by the Respondents but was confirmed by Mr. Thangei, the Respondents' Advocate on record. We agree with the submissions of the Applicant at paragraph 50(iv)&(v) of the Applicant's Written Submissions that it will be a breach of the Applicant's Constitutional right to a fair hearing under Article 47 and 50 of the Constitution if we are to pronounce ourselves on the reasons alleged by the Respondents on determining the nonresponsiveness of

the Applicant's tender because the Applicant was constrained for time to address such allegations having already filed the instant Request for Review. Accordingly, we shall refrain from addressing and or considering the said allegations.

106. Guided by the ***Nairobi City & Sewerage Company Case*** above, the Board finds that the termination notice contained in the letter dated 31st January 2024 was not made in accordance with the provisions of Section 63 of the Act as it was not clear on the reasons for termination of the subject tender. Further the letter was also wanting in terms of the details of the reasons for terminating the tender and the reasons for determining the Applicant's tender nonresponsive.
107. Whereas, the Procuring Entity's letter dated 22nd February 2024 gave reasons for determining the Applicant's tender nonresponsive that would lead to termination of the subject tender, the same was issued 23 days after its earlier letter of 31st January 2024, which is clearly outside the 14 days contemplated under Section 63(4) of the Act for notification of tenderers of the termination of a tender and the reasons thereof.
108. The Board finds great difficulty following Mr. Thangie's submission that the Procuring Entity has levels of disclosure of information on termination i.e. in general terms at the point of termination and thereafter in more specific terms only when the termination has been a subject of challenge before the Board. We say so because, participants in any tender that has been terminated have a legitimate interest to know the circumstances under which the tender has been terminated

for them to make an informed decision on whether to challenge any such termination.

109. Further, Article 227(1) of the Constitution of Kenya, 2020 underpins the principles of transparency and fairness in the conduct of public tenders. It would therefore stand to logic that a Procuring Entity at the point of terminating a tender to communicate to all the tenderers who participated in the tender, the details on why the tender is being terminated. Accordingly, we agree with Ms. Nungo's submission that the Procuring Entity's letter dated 31st January 2024 ought to have outlined the detailed reasons for the termination of the subject tender and more specifically the reasons that led to the determination of the Applicant's tender as nonresponsive.

To fully satisfy the substantive requirement under Section 63 of the Act, the 1st Respondent as the Accounting Officer had the onus of leading evidence to prove evidence on reason for termination. However, in view of the Board's observation that the letter of termination dated 31st January 2024 lacked clarity on the circumstances surrounding the termination of the subject tender, the Respondent effectively failed to meet the substantive requirement under the subject tender.

110. 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 the letters dated 31st January 2024, and 22nd February 2024 respectively.

111. First, on notifications to the tenderers, the Respondents exhibited notification letters dated 31st January 2024 addressed to each of the tenderers, notifying them of the termination of the subject tender. Copies of the said letters are also part of the Confidential Documents submitted to the Board. The Applicant did not contest having been served with its copy of the said letter within the statutory 14 days' timeline. The Board therefore presumes that the same was served within the statutory timelines.
112. Turning to the Report to the Authority, the Respondent's exhibited a letter dated 31st January 2024 addressed to the Director General of the Authority notifying him of the termination of the tender. Attached to the letter are the notifications to the tenderers, the Evaluation Report and Professional Opinion prepared in the subject tender. The said documents are also in the documents submitted to the Board under the Confidential File and that the Respondents indicated that they were equally uploaded on the Authority's portal. The Board therefore finds that the Report to the Authority was duly submitted within the prescribed timelines.
113. In view of the foregoing, the Respondents satisfied the procedural requirement but failed to meet the substantive requirement for termination of a tender as contemplated under Section 63 of the Act. It therefore follows that the procedural requirement is tainted if the substantive requirement is lacking.
114. 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.

Whether the Respondents filed before the Board a competent Memorandum of Response and a Supplementary Memorandum of Response?

115. Counsel for the Applicant, Ms. Nungo, submitted that the Memorandum of Response and Supplementary Memorandum of Response breached Regulation 205 of Regulations 2020. She argued that though Regulation 205 required the Accounting Officer and not any other person to submit the Memorandum of Response, the Memorandum of Response and Supplementary Memorandum of Response had neither been done nor signed by the Accounting Officer. She contended that on their face they were prepared by the Respondents but signed by the Respondents' Advocates. It was therefore Counsel's submission that there was a danger in relying on the said documents since they contained disputed facts that were within the domain of the Accounting Officer and not their Counsel.
116. Ms. Nungo further argued that the Supplementary Memorandum of Response was filed outside time, after close of pleadings and without the Board's leave. She therefore sought for the Supplementary Memorandum of Response to be expunged from the record.
117. Counsel for the Respondents, Mr. Thangei, argued that Regulation 208 of the Regulations 2020 allows parties before the Board to seek legal

representation. Further, that Order 9 Rule 7 of the Civil Procedure Rules, 2010 recognizes Advocates as agents of parties in litigation.

118. Mr. Thangei submitted that the failure of an Applicant to sign a Request for Review does not render it defective. Accordingly, he urged the Board to disallow the Applicant's invitation for the striking out of the Respondents' Memorandum of Response and Supplementary Memorandum of Response.
119. It was further contended that the Applicant's Further Statement was filed on 25th March 2024 without leave and that no leave was required to file a Supplementary Memorandum of Response.
120. Mr. Thangei submitted that Article 159 of the Constitution of Kenya, 2010 enjoins the Board to disregard procedural technicalities and that Regulation 218 of the Regulations 2020 equally requires that the Board is not bogged down by strict rules of evidence.
121. The Board is therefore called upon to make a determination on competency of the Respondents' Memorandum of Response and Supplementary Memorandum of Response dated 29th February 2024 and 7th March 2024 respectively.
122. Counsel for the Applicant, Ms. Nungo equally took issue with the format of the responses having been made in the name of the Respondents but signed by the Respondents' Counsel citing this Board's Decision in ***PPARB Application No. 8 of 2023; Toddy Civil Engineering Company Limited v Lake Victoria North Water Works***

Development Agency which involved the format of a Request for Review.

123. Regulation 203(1) of the Regulations 2020 prescribes the format that a Request for Review before the Board should take. The said provision requires that a Request for Review should be in the Form set out in the Fourteenth Schedule of the Regulations.
124. However, when it comes to a Memorandum of Response in response to a filed Request for Review, both the Act and the Regulations 2020 are silent on the format it should take. Accordingly, absent a prescribed format, the Respondents cannot be faulted for the format they adopted where the Respondents Counsel signed the Memorandum of Response.
125. Further, the Board is alive to Regulation 208 of the Regulations 2020 that allows litigants to be represented in proceedings before the Board by an Advocate or other representative. For the foregoing reasons we are unable to find fault in the format of the Respondents' responses.
126. The Board therefore finds that the Respondents filed before the Board a competent Memorandum of Response and a Supplementary Memorandum of Response.

What orders the Board should grant in the circumstances?

127. The Board has found that the subject tender was irregularly and unlawfully terminated to the to the extent of the letter of termination

dated 31st January 2024 and that the Board has jurisdiction to hear and determine the instant Request for Review.

128. The Board has equally found that the Respondents filed before the Board a competent Memorandum of Response and a Supplementary Memorandum of Response.
129. The upshot of our finding is that the Request for Review dated 23rd February 2024 in respect of Tender No KRC/2023/2201/363 for Proposed Common Area Refurbishments at Anniversary Towers succeeds in the following specific terms:

FINAL ORDERS

130. 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 23rd February 2024:

- 1. The Request for Review dated 23rd February 2024 be and is hereby allowed .**
- 2. The Respondents' Letters dated 31st January 2024 and addressed to tenderers terminating Tender No. KRC/2023/2201/363 for Proposed Common Area Refurbishments at Anniversary Towers be and are hereby cancelled and set aside.**
- 3. The 1st Respondent be and is hereby directed to issue fresh letters of termination in respect of the Tender No.**

KRC/2023/2201/363 for Proposed Common Area Refurbishments at Anniversary Towers setting out the reasons for termination of the tender within the next 7 days while giving consideration to the Board's finding in this Decision.

- 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 15th Day of March 2024.



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PANEL CHAIRPERSON

PPARB



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SECRETARY

PPARB