

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 19/2024 OF 7TH MARCH 2024

BETWEEN

ENWEALTH FINANCIAL SERVICES LIMITED APPLICANT

AND

BOARD OF TRUSTEES,

KENYA NATIONAL EXAMINATION COUNCIL

STAFF RETIREMENT BENEFITS SCHEME, 2011 ... 1ST RESPONDENT

ACCOUNTING OFFICER, BOARD OF TRUSTEES

KENYA NATIONAL EXAMINATION COUNCIL

STAFF RETIREMENT BENEFITS SCHEME, 2011 ... 2ND RESPONDENT

OCTAGON PENSION SERVICES LIMITED1ST INTERESTED PARTY

ZAMARA ACTUARIES, ADMINISTRATORS &

CONSULTANTS2ND INTERESTED PARTY

Review against the decision of the Accounting Officer Board of Trustees Kenya National Examination Council Staff Retirement Benefits Scheme, 2011 in relation to Tender No. KNECSRBS/EOI/2023-2024/01 for Provision of Scheme Administration Consultancy Services.

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb - Member
2. Mr. Jackson Awele - Member
3. Dr. Susan Mambo - Member

IN ATTENDANCE

1. Mr. James Kilaka - Acting Board Secretary
2. Mr. Philemon Kiprop - Secretariat
3. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT ENWEALTH FINANCIAL SERVICES LIMITED

1. Mr. John Tito - Advocate, Tito & Associates Advocates
2. Mr. Sam Ogendo - Advocate, Tito & Associates Advocates
3. Ms. Irene Akinyi - Pupil, Tito & Associates Advocates

RESPONDENTS BOARD OF TRUSTEES, KENYA NATIONAL EXAMINATION COUNCIL STAFF RETIREMENT BENEFITS SCHEME, 2011 & ACCOUNTING OFFICER, BOARD OF TRUSTEES KENYA NATIONAL EXAMINATION COUNCIL STAFF RETIREMENT BENEFITS SCHEME, 2011

Mr. Jomo Nyaribo - Advocate, Muthaura, Mugambi, Ayugi & Njonjo
Advocates

INTERESTED PARTY OCTAGON PENSION SERVICES LIMITED

1. Ms. Nabayi h/b for Mr. Simiyu - Advocate, Musyoka Murambi &
Associates Advocates
2. Ms. Cynthia Omuya - Advocate, Musyoka Murambi & Associates
Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. The Kenya National Examination Council Staff Retirement Benefit Scheme 2011 (hereinafter referred to as "the Scheme") is a Pension Fund established under an irrevocable trust in 1989 as a Defined Benefit Scheme. On 1st July 2011 it was converted into a Defined Contribution Pension Scheme and is managed by Trustees under a Trust Deed and Rules and the Retirement Benefit Authority Act, 1997 and Regulations.
2. In a Memo dated 16th October 2023, the Trust Secretary, Board of Trustees Kenya National Examination Council Staff Retirement Benefit Scheme 2011 (a) informed the Chief Executive Officer, Kenya National Examinations Council that during the Board of Trustees meeting held on 26th September 2023, it was resolved that retendering for a pension scheme administration service should commence immediately and that the procurement process ought to be completed by 31st December

2023, and (b) requested for approval (i) for the procurement process to be undertaken in liaison with the Supply Chain Management Department of the Kenya National Examinations Council, (ii) for co-optation of one member of staff from the Supply Chain Department to be included in the Tender Evaluation Committee to guide on the evaluation process, (iii) to place an advertisement in two papers as an open tender on Tuesday, 24th October 2023 and (iv) for authority to upload the tender documents on the Kenya National Examinations Council website.

3. Thereafter, Dr. David Njengere, MBS, the Chief Executive Officer, Kenya National Examinations Council proceeded to issue his approval on 17th October 2023.

4. Kenya National Examinations Council on behalf of Kenya National Examination Council Staff Retirement Benefit Scheme 2011 invited sealed Expression of Interest in response to Tender No. KNECSRBS/EOI/2023-2024/01 for Provision of Scheme Administration Consultancy Services (hereinafter referred to as the "subject tender"). The subject tender was advertised on 24th October 2023 in the Daily Nation, on www.knec.ac.ke and in the Public Procurement Information Portal www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the Tender Document') was available for download. The subject tender's submission deadline was scheduled on 7th November 2023 at 10.00 a.m.

Submission of Tenders and Tender Opening

5. According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 7th November 2023 and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of five (5) tenders were submitted in response to the subject tender and were recorded as follows:

Bidder No.	Name
1.	Zamara Actuaries, Administrators & Consultants
2.	CPF
3.	Enwealth Financial Services Limited
4.	Minet Kenya Financial Services
5.	Octagon Africa

Evaluation of Tenders

6. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") constituted by Dr. Ibrahim Otieno, Chairman Board of Trustees, KNEC Staff Retirement Benefit Scheme (2011) undertook evaluation of the five (5) tenders as captured an Evaluation

Report signed by members of the Evaluation Committee on 6th December 2023 and in the following stages:

- i Preliminary Evaluation
- ii Technical Evaluation

Preliminary Evaluation

7. The Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under Clause a) Mandatory Requirements at page 7 to 8 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.
8. At the end of evaluation at this stage, all the five (5) tenderers were determined responsive and proceeded to Technical Evaluation.

Technical Evaluation

9. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause B Technical Evaluation at pages 8 to 10 of the Tender Document. Tenders were required to score a minimum of 80 marks and above at this stage of evaluation to progress for financial evaluation.
10. At the end of evaluation at this stage, all the five (5) tenderers were determined responsive and were recommended to progress to the next stage being request for proposals.

First Professional Opinion

11. In a Professional Opinion dated 6th December 2023 (hereinafter referred to as "the First Professional Opinion"), the Deputy Director Supply Chain Management, Mr. Nicholas O. Mang'ata, reviewed the manner in which the subject procurement process in the subject tender was undertaken including method of procurement and evaluation of tenders and confirmed that the Evaluation Committee evaluated the subject tender using the procedures and criteria as set out in the Tender Document pursuant to the provisions of the Act. He confirmed that the Scheme had sufficient budget to carry out the procurement and concurred with the recommendations of the Evaluation Committee with respect to inviting the five (5) responsive tenderers to the next stage of evaluation being request for proposals having been responsive to the technical evaluation.

12. The First Professional Opinion was approved by Dr. Ibrahim Otieno, Chairman Board of Trustees, KNEC Staff Retirement Benefit Scheme on 6th December 2023.

Submission and Evaluation of Financial Proposals

13. According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 24th January 2024, the following tenderers submitted their bids and were recorded as follows:

Bidder No.	Name
1.	Zamara Actuaries, Administrators & Consultants
2.	Enwealth Financial Services Limited
3.	Minet Kenya Financial Services
4.	Octagon Africa

14. According to the Evaluation Report for the subject tender signed by members of the Evaluation Committee on 6th February 2024, tenders were evaluated in three stages being:

- i Preliminary Evaluation
- ii Technical Evaluation

Preliminary Evaluation

15. The Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under Clause a) Mandatory Requirements at page 7 to 8 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.

16. At the end of evaluation at this stage, one (1) tender was rendered non-responsive while three (3) tenders were determined responsive, including the Applicant's tender and proceeded to Technical Evaluation.

Technical Evaluation

17. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause B Technical Evaluation at pages 8 to 10 of the Tender Document. Tenders were required to score a minimum of 80 marks and above at this stage of evaluation to progress for financial evaluation.

18. At the end of evaluation at this stage, all the three (3) tenderers were determined responsive having attained the minimum score and were recommended to progress to Financial Evaluation.

Second Professional Opinion

19. In a Professional Opinion dated 6th February 2024 (hereinafter referred to as "the Second Professional Opinion"), the Deputy Director Supply Chain Management, Mr. Nicholas O. Mang'ata, reviewed the manner in which the subject procurement process in the subject tender was undertaken including method of procurement and evaluation of tenders and confirmed that the Evaluation Committee evaluated the subject tender using the procedures and criteria as set out in the Tender Document pursuant to the provisions of the Act. He confirmed that the Scheme had sufficient budget to carry out the procurement and concurred with the recommendations of the Evaluation Committee with respect to inviting the three (3) responsive tenderers to the next stage of evaluation being Financial Evaluation having been responsive to the technical evaluation.

20. The Second Professional Opinion was approved by Dr. Ibrahim Otieno, Chairman Board of Trustees, KNEC Staff Retirement Benefit Scheme on 6th February 2024.

Invitation for Opening of Financial Proposals.

21. Tenderers were invited for opening of the financial proposals submitted in the subject tender on 15th February 2024 vide letters dated 6th February 2024

Opening of Financial Proposals

22. According to the Attendance Register Form and the Tender Opening Minutes signed by members of the Tender Opening Committee on 15th February 2024, opening of financial bids of the three (3) responsive tenderers took place on 15th February 2024 and the Tender Opening Committee noted that Octagon Africa submitted two (2) prices in its financial proposals wherein one proposal, the price was stated as 0.25 of the fund value exclusive of VAT while in the second proposal contained in the same document, the price was stated as 0.25 of the fund value inclusive of all applicable taxes.

Financial Evaluation

23. According to the Evaluation Report signed by members of the Evaluation Committee on 19th February 2024, the Financial evaluation would have a weighting of 20% and the formula for determining the financial score (SF) was provided as: $SF = FM \div F \times 100$. The lowest bid would be given a maximum score of 20 marks and the successful bidder



would be the one with the highest combined technical and financial score.

24. At the end of evaluation at this stage, bids were ranked as follows:

Table 1 – Combined financial and Technical score

<i>Bidder No.</i>	<i>Bidder's Name</i>	<i>Technical Score</i>	<i>Financial Score</i>	<i>Total Score</i>	<i>Ranking</i>
<i>1</i>	<i>Zamara Actuaries, Administrators & Consultants</i>	<i>94/100 *80 =75.2</i>	<i>0.25/Funds Value Tax exclusive *20=20.0</i>	<i>95.2</i>	<i>2</i>
<i>2</i>	<i>Enwealth Financial Services</i>	<i>97/100 *80 =77.6</i>	<i>0.25/Funds Value Tax exclusive *20=20.0</i>	<i>97.6</i>	<i>1</i>
<i>3</i>	<i>Octagon Africa</i>	<i>82/100 *80 =85.6</i>	<i>0.25/Funds Value Tax exclusive *20=20.0</i>	<i>85.6</i>	<i>3</i>

Evaluation Committee's Recommendation

25. The Evaluation Committee recommended:

- a) the award of the subject tender to M/s Enwealth Financial Services, the Applicant herein, being the bidder with the highest combined technical and financial score of 97.6 Points;



- b) that negotiations take place before awarding the contract to the successful bidder;
- c) that an ad hoc committee of the Board of Trustees of the Scheme be appointed to carry out negotiations; and
- d) indicated that the successful bidder had earlier worked with the Scheme prior to the current Service Provider.

Third Professional Opinion

26. In a Professional Opinion dated 6th February 2024 (hereinafter referred to as "the Third Professional Opinion"), the Deputy Director Supply Chain Management, Mr. Nicholas O. Mang'ata, reviewed the manner in which the subject procurement process in the subject tender was undertaken including method of procurement and evaluation of tenders and confirmed that the Evaluation Committee evaluated the subject tender using the procedures and criteria as set out in the Tender Document pursuant to the provisions of the Act.

27. He confirmed that the Scheme had sufficient budget to carry out the procurement and indicated that during the Special Board of Trustees meeting held on 21st February 2024, it was noted that in its previous engagement with the Scheme, the Applicant had applied erroneous calculations contrary to the provisions of the Trust Deed and Rules which led the sponsor to issue a demand letter to the Applicant on 22nd February 2022 and intends to sue it for recovery of Kshs. 118,027,437.93 on grounds of negligence and incompetence.

28. Mr. Nicholas O. Mang'ata further indicated that he had reviewed the minutes of the Special Board of Trustees meeting alongside the Evaluation Report and given the unresolved issues with the recommended bidder, recommended for termination of the procurement process in line with Section 63(1)(e) of the Act on account of Material Governance issues having been detected.

29. The Third Professional Opinion was approved by Dr. Ibrahim Otieno, Chairman Board of Trustees, KNEC Staff Retirement Benefit Scheme on 23rd February 2024.

Notification to tenderers

30. Tenderers were notified of termination of the subject tender vide letters dated 23rd February 2024 and informed that the subject tender would be re-advertised on 27th February 2024.

REQUEST FOR REVIEW NO. 19 OF 2024

31. On 7th March 2024, Enwealth Financial Services Limited, the Applicant herein, filed a Request for Review dated 6th March 2024 together with a Supporting Affidavit sworn on 6th March 2024 by Simon Wafubwa, its Managing Director (hereinafter referred to as the 'instant Request for Review') through Tito & Associates Advocates seeking the following orders from the Board in verbatim:

a.) The Termination notice dated 23rd February 2024 be invalidated, struck out and/or set aside.



b.) The Respondent to furnish the Applicant with a comprehensive report detailing reasons for the said termination.

c.) The re-advertisement be stopped, cancelled and/or set aside.

d.) The initial procurement process be continued to finality.

32. In a Notification of Appeal and a letter dated 7th March 2024, Mr. James Kilaka, the Acting Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender and forwarded to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 7th March 2024.

33. Vide letters dated 8th March 2024, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited

to submit to the Board any information and arguments concerning the subject tender within three (3) days.

34. On 12th March 2024, the 1st and 2nd Respondent filed through Muthaura Mugambi Ayugi & Njonjo Advocates a Notice of Appointment of Advocates dated 12th March 2024, a Notice of Preliminary Objection dated 12th March 2024, a Memorandum of Response in Opposition to the Request for Review dated 12th March 2024 together with a physical file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
35. On 19th March 2024, Zamara Actuaries, Administrators & Consultants Limited filed a letter with the Acting Board Secretary dated 15th March 2024 in response to the instant Request for Review.
36. Vide a Hearing Notice dated 18th March 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 22nd March 2024 at 11.00 a.m., through the link availed in the said Hearing Notice.
37. On 21st March 2024, the Applicant filed through its advocates a Further Affidavit sworn by Simon Wafubwa on 21st March 2024, Written Submissions dated 21st March 2024 together with a List of Authorities.
38. On the morning of 22nd March 2024, Octagon Pension Services Limited filed through Musyoka Murambi & Associates a Notice of Appointment of Advocates dated 22nd March 2024, a Notice of Motion application



dated 21st March 2024 together with a Supporting Affidavit sworn by Davis Ongiro on 21st March 2024.

39. When the matter first came up for hearing on 22nd March 2024 at 11.00 a.m., the Board sought to know whether there was any objection by parties to Octagon Pension Services Limited being admitted as an interested party in the instant Request for Review having established that order 2 as prayed in the Notice of Motion application dated 21st March 2024 was spent by virtue of Section 168 of the Act. Both counsels for the Applicant and Respondents indicated that they were not opposed to Octagon Pension Services Limited being joined as an Interested Party in the instant Request for Review. The Board then proceeded to issue orders allowing the Notice of Motion application dated 21st March 2024 in terms of prayer 1 only. Having been admitted, counsel for the Interested Party, Ms. Nabayi sought leave to file its response to the Request for Review. Counsel for the Respondents, Mr. Jomo Nyaribo sought leave to file rebuttal affidavit and submissions in response to the Applicant's Further Affidavit sworn by Simon Wafubwa on 21st March 2024 and Written Submissions dated 21st March 2024.

40. Having considered parties' submissions, the Board directed (a) the Interested Party to file and serve its response to the Request for Review by 4.00 p.m. on 22nd March 2024, (b) the Applicant and Respondents to file and serve any rebuttals to the Applicant's Further Affidavit, Written Submissions and the Interested Party's response together with any additional submissions by 11.00 a.m. on Monday, 25th March 2024, and (c) that hearing of the instant Request for Review would proceed

on Monday, 25th March 2024 at 2.30 p.m. Parties were cautioned to adhere to the strict timelines as specified in the Board's directions since the Board would rely strictly on the documentation filed before it in rendering its decision.

41. Vide a Hearing Notice dated 22nd March 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 25th March 2024 at 2.30 p.m., through the link availed in the said Hearing Notice.

42. On 25th March 2024, the Respondents filed through their advocates an Affidavit sworn by Dr. Ibrahim Otieno on 25th March 2024 and Written Submissions dated 25th March 2024.

43. At the hearing, the Board read out the pleadings filed by parties in the matter and allocated time for each party to proceed and highlight its case. The Board also directed that the hearing of the preliminary objection by the Respondents would be heard as part of the substantive Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of a substantive request for review and deliver one decision.

44. Thus, the matter proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Case

45. In his submissions, counsel for the Applicant, Mr. Tito, relied on the Request for Review dated 6th March 2024 together with a Supporting Affidavit sworn on 6th March 2024 by Simon Wafubwa, its Managing Director, Further Affidavit sworn by Simon Wafubwa on 21st March 2024, Written Submissions dated 21st March 2024 together with a List of Authorities that were filed before the Board.
46. Mr. Tito indicated that the Procuring Entity and Respondents in the instant Request for Review was the Scheme and its Accounting Officer and that Kenya National Examination Council is not a party to the proceedings before the Board. He pointed out that the scheme in issue is a contributory scheme and not the defined benefit scheme that predated the contributory scheme.
47. Counsel submitted that the jurisdiction of the Board is not ousted merely by termination of procurement proceedings and that there are pre-conditions to the ousting of the jurisdiction of the Board. He further submitted that the Board has to adjudicate whether the termination of the procurement process was done in accordance with the law.
48. Mr. Tito submitted that the termination process in the subject tender was fatally flawed and as such, the Board has jurisdiction to hear the instant Request for Review and pointed to the authorities relied upon by the Applicant in its filed submissions.

49. On the termination notice, Counsel pointed out that the Act has expressly provided the manner in which a termination notice ought to be issued. He submitted that the termination notice in the subject tender was issued by a stranger and hence cannot stand.
50. On the reasons advanced by the Procuring Entity regarding termination of the subject tender on account of material governance, Mr. Tito submitted that the reasons have nothing to do with material governance as they have nothing to do with values of governance, ethics, corruption and fraud and are but mechanical reasons of a technical nature rendering the termination notice unlawful and as such, the procurement proceedings in the subject tender ought to proceed to its logical conclusion.
51. Counsel submitted that the notification ought not to only give reasons but also sufficient evidence in support of the reasons for termination. He pointed out that the notification letter merely cited governance issues with no evidence of what they were leaving the Applicant in the dark of what material governance issues it was accused of.
52. Mr. Tito pressed on that the issues complained about by the Respondents are in regard to actuarial computations which is not the province of an administrator but a specific actuarial science which applies in setting up computation factors used to determine a member's benefits and the trustees having come to a decision engage an administrator to employ those computation factors. Counsel argued that it is not the function of an administrator to come up with

computation factors as seen in the instant case where the Applicant is accused of applying the wrong computation factors yet it was the Procuring Entity which relied upon the actuarial report which pointed out that the Scheme had historically applied those factors and were applied prior to the Applicant's engagement. He further argued that the Respondent's complaint was in respect to a closed and wound up scheme, which applied the computation factors complained of and not the Scheme in the instant proceedings.

53. Counsel submitted that the subject tender had gone through various evaluation stages where the Applicant was found to be responsive and scored the highest and was the best ranked. He further submitted that the members of the Evaluation Committee were trustees of the scheme who overturned their own evaluation report at a technical committee level amounting to an impropriety.

54. Mr. Tito submitted that the proceedings before the Retirement Benefits Tribunal had nothing to do with the Applicant who was not a party to the same and the Retirement Benefits Tribunal in its holding blamed the Scheme for being negligent and not the Applicant. Counsel further submitted that the decision to disqualify the Applicant was made in bad faith.

55. On the submissions made by the Respondents, counsel submitted that the instant Request for Review was not an afterthought as it was filed within prescribed timelines and all material disclosures have been made

by the Applicant. He further pointed out that the Applicant is not seeking an equitable relief but a statutory relief from the Board.

56. Counsel submitted that a professional opinion is meant to be independent and objective and that Mr. Nicholas Mang'ata who prepared the Professional Opinion is not an officer of the Scheme and is a Deputy Director of a third party and couldn't therefore issue a report on behalf of the Procuring entity.

57. Mr. Tito further submitted that there are no legal proceedings against the Applicant instituted by the Respondent and the compliant being by a closed scheme which arose in the year 2016, the Respondents lacked capacity and were limited in time to lodge the same.

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

Respondents' case

59. In his submissions, Mr. Nyaribo relied on the Notice of Preliminary Objection dated 12th March 2024, Memorandum of Response in Opposition to the Request for Review dated 12th March 2024 together with confidential documents concerning the subject tender submitted to the Board pursuant to Section 67(3)(e) of the Act, Affidavit sworn by Dr. Ibrahim Otieno on 25th March 2024 and Written Submissions dated 25th March 2024.

60. Mr. Nyaribo submitted that jurisdiction is everything and ought to be considered in priority before the Board can proceed to hear the matter

on its merits. He pointed out that by virtue of Section 167(4)(b) of the Act, the Board has no jurisdiction to entertain the instant Request for Review since termination of the procurement proceedings was done in accordance with the provisions of Section 63(1) of the Act.

61. Counsel further submitted that in compliance with the provisions of Section 63 of the Act, the Respondents notified all tenderers of the termination within the statutory period of 14 days and none of the parties before the Board had alleged otherwise. He urged the Board to review the letter of termination dated 23rd February 2024 which gives the reasons of termination of the termination proceedings.

62. Mr. Nyaribo pointed out that once the letter of termination was served upon the Applicant, it made a written request for clarification vide email and the Respondents duly responded vide email of 5th March 2024 wherein additional reasons for termination were disclosed to the Applicant and this fact was not disclosed by the Applicant to the Board on filing the instant Request for Review.

63. Counsel submitted that the Respondents submitted a report as required under Section 63(2) of the Act to the Authority and the Respondents met the requirements under Section 63 of the Act and it follows that the jurisdictional challenge ought to succeed.

64. Mr. Nyaribo urged the Board to look at grounds 4, 5, and 6 of the Request for Review where the Applicant complains that the reasons issued for termination were vague and ambiguous and submitted that

all other grounds submitted by the Applicant are an afterthought. He further submitted that on the material governance issues, he urged the Board to look at a more holistic and purposeful view of the term governance as opposed to the restrictive view that the Applicant would want the Board to take.

65. Counsel submitted that the Scheme has a unique position under Section 40 of the Retirements Benefit Act and the benefits that attach to it and urged the Board to consider the provisions of Article 10 of the Constitution, the United Nations Commission for Global Governance definition of Governance, the Organization for Economic Development definition of good governance, the European Union Commission principles of good governance and the Retirement Benefits (Good Governance Practices) Guidelines promulgated through Legal Notice No. 193 of 2018.

66. Counsel pressed on that governance issues as captured under Section 63 of the Act must be considered more holistic and encompass the need for professionalism, integrity, due diligence, compliance with the law and compliance with contractual obligations.

67. Mr. Nyaribo submitted that the Applicant failed to meet the governance threshold and urged the Board to review the Minutes of the Special Board of Trustees meeting which took place on the 21st February 2024 which discussed in details the reasons for terminating the procurement proceedings.

68. He pointed out that several third parties had taken independent positions regarding the Applicant before the Respondents elected to terminate the procurement proceedings being the Scheme Actuary, the Retirement Benefits Authority, a peer review report prepared by Alexander Forbes Financial Services, two judgments issued by the Retirement Benefits Tribunal and on the basis of these, the Respondents took the position to terminate the procurement proceedings. Counsel urged the Board to review the Demand letter issued by the Respondents and the response by the Applicant.

69. Mr. Nyaribo further pointed out that the role of an administrator in a scheme is governed by the law and referred the Board to Regulation 7 of the Retirement Benefits Administrators Regulations and Guideline No. 35 of the Retirement Benefits Guidelines. He submitted that as a result of the acts complained of, the Respondents were exposed to a loss of approximately Kshs. 114,000,000.00 which is yet to be recovered to date.

70. On the issue of an accounting officer, counsel submitted that the definition of an accounting officer under the Act and the Public Finance Management Act does not per se capture the Scheme particularly in light of its unique constitution as a trust and the fact that it is a separate legal entity from its sponsor being the Kenya National Examinations Council which is a government entity.

71. He further submitted that by implication, the role of an accounting officer as set out in section 67,68, 72, 81, 83 of the Public Finance



Management Act would identify the Board of Trustees as the accounting officer of the Scheme. Mr. Nyaribo indicated that the chairman of the Board by virtue of his role as setout under the Retirement Benefits Act and Regulations thereunder, the Board Charter and his instrument of appointment and by virtue of long standing and practice, represents the Board of Trustees and is considered the accounting officer for purposes of the Act.

72. With regard to the allegation by the Applicant that the Respondent's claim relates to a closed scheme, Mr. Nyaribo submitted that assets of a closed scheme are transferrable to the Scheme and the Scheme has a mandate to pursue all assets that accrues to it.

73. On the allegation by the Applicant that the Professional Opinion issued to the Authority on termination of the procurement proceedings was issued by a stranger, Mr. Nyaribo referred the Board to the Affidavit of Dr. Ibrahim Otieno at paragraph 6(iii). Counsel further submitted that nothing prevents the Procuring Entity prior to issuing an award to interrogate the process to ensure compliance with the law and if necessary to terminate the procurement proceedings.

74. Counsel indicated that no suit has been filed by the Respondents as of date but the issue is live and the Scheme intends to pursue recovery from the Applicant and the law provides for extension of time and nothing bars the Respondents from filing the claim at a later stage.

75. He urged the Board to dismiss the Request for Review and allow the re-advertised tender to proceed to its logical conclusion.

1st Interested Party's case

76. In her submissions, Ms. Omuya indicated to the Board that the Interested Party did not manage to file its response as directed on 22nd March 2024 and would be aligning itself to the submissions made by the Respondents in the instant Request for Review.

2nd Interested Party's case

77. In a letter dated 15th March 2024 filed on 19th March 2024, the 2nd Interested Party acknowledged receipt of the notification of appeal issued by the Acting Board Secretary and indicated that it had no comment or useful information to provide to the Board pertaining the instant Request for Review and as such, it did not participate in the instant proceedings before the Board.

Applicant's Rejoinder

78. In a rejoinder, Mr. Tito urged the Board to award it costs based in the 1st Interested Party's response. He further submitted that the Applicant has not been blacklisted and the allegations of what the Respondents may do in future do not hold any ground.

79. On the interpretation of governance, counsel submitted that the Board has occasionally in the past indicated what governance means which



sets the law clearly on what governance is and is a definition that is specific and applicable to procurement.

80. On the issue of who is the accounting officer, counsel submitted that there was no reason why the other trustees could not have appended their signatures on the report.

81. He re-iterated that there was no valid reason for termination of the subject tender and it ought to proceed to its logical conclusion and costs awarded to the Applicant.

Clarifications

82. When asked by the Board to clarify on who was the Respondent's accounting officer, whether the termination report was submitted to the Authority via PPIP, and if the material governance issues emanated from the dealings between the Applicant and the Procuring entity, Mr. Nyaribo submitted that the Chairman of the Board of Trustees was the Accounting Officer, that the termination report was submitted to the Authority on 8th March 2024 as deponed at paragraph 6(iii) of the Affidavit sworn by Dr. Ibrahim Otieno on 25th March 2024 and that the material governance issues were historical dealings. He indicated that the decisions by the Retirement Benefits Tribunal were delivered on 23rd July 2020 following which the Respondents issued a demand letter to the Applicant seeking payment for amounts lost due to the actions of the Applicant. He further indicated that the tribunal did not make any findings as to any corrupt dealings by the Applicant.



83. When asked to confirm if the Applicant's tender was responsive save for the due diligence conducted by the Respondents which occasioned the termination, and if the said due diligence was part of the evaluation criteria, Mr. Nyaribo confirmed that the Applicant's tender was responsive and submitted that he did not see the due diligence as part of the evaluation criteria.
84. When asked to qualify who issued the Professional Opinion, Mr. Nyaribo submitted that it was issued by Mr. Nicholas Mang'ata, who is an employee of the sponsor, Kenya National Examination Council and holds the position of Deputy Director, Supply Chain Management.
85. When asked to clarify to the Board whether there were any preconditions in the Tender Document precluding such bidders as the Applicant who had historical dealings with the Respondents as alluded to from participating in the subject tender, Mr. Nyaribo submitted that none was in place and that there have been no debarment proceedings instituted against the Applicant.
86. Upon enquiry by the Board on whether the provisions of Section 63 with regard to material governance apply retrospectively to procurement proceedings that predate previous proceedings and if the Board has jurisdiction to determine issues that are not directly material to the procurement proceedings in the subject tender, Mr. Nyaribo submitted that because of the unique constitution of the Scheme and the obligation of trustees of the Scheme which is joint and several, and

the provisions of Article 10(2) of the Constitution, the Board ought to move away from the narrow interpretation of Section 63(1)(e) of the Act noting the wider definition of governance issues and as soon as a Procuring Entity discovers governance issues, it ought to be allowed to terminate the procurement proceedings as the Respondents did in the subject tender.

87. When asked by the Board to expound on what was vague and ambiguous from the letter of termination issued by the Respondents, Mr. Tito submitted that the allegation of material governance was not illustrated and that the Act requires that the explanation given is tantamount to reasons issued.

88. When asked to clarify the relationship that existed between the Applicant and Kenya National Examination Council, Mr. Tito submitted that there was no relationship in existence between his client and the Kenya National Examination Council and that the Applicant only had a relationship with the Scheme but did not have any outstanding legal issues with the Respondents as alluded to.

89. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 7th March 2024 was due to expire on 28th March 2024 and that the Board would communicate its decision on or before 28th March 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

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

a. Who is the Accounting Officer in the subject tender?

b. Whether the subject tender was terminated or cancelled in accordance with Section 63 of the Act so as to oust the jurisdiction of the Board;

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

Who is the Accounting Officer in the subject tender?

91. The Applicant submitted that Section 63(1) of the Act expressly states that only an accounting officer of a procuring entity has the authority to terminate or cancel procurement proceedings prior to notification of an award and took issue with the fact that the letter of termination of the procurement proceedings in the subject tender dated 23rd February 2024 was issued by Dr. Ibrahim Otieno, the chairman of the Board of

Trustees Kenya National Examination Council Staff Retirement Benefits Scheme 2011 ("the Scheme").

92. On the other hand, the Respondents deponed at paragraph 14 of the Affidavit sworn by Dr. Ibrahim Otieno on 25th March 2024 *inter alia* that (a) the meaning of an accounting officer as set out under section 2 of the Act and section 2 of the Public Finance Management Act as read with sections 67 and 148 do not capture the Scheme, (b) the Scheme is a Trust and is a creature of its Trust Deed and Rules and is governed by those constitutive documents, rules and regulations promulgated for retirement benefits and from these instruments, there is no office known as an accounting officer, (c) by law, the board of trustees shall be jointly and severally accountable for the management of the scheme and all trustees shall be equally responsible for the decision of the board, (d) all the trustees of the Scheme are responsible for managing the finances of the Scheme, (e) by virtue of the provisions of the Retirement Benefits Act, and the regulations made thereunder, the Scheme outsources the distinct roles of Scheme Administrator, Scheme Managers and Custodians and Scheme Asset Managers, and (f) the Board of Trustees can be considered as the Accounting Officer (as represented by the Chairman of the Board of Trustees) for purposes of the Act.

93. Article 227(1) of the Constitution provides the overarching principles of public procurement to be observed by any public entity when contracting for goods and services as follows:

"227. Procurement of public goods and services



- (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.**
- (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –**
- a) Categories of preference in the allocation of contracts;**
 - b) The protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;**
 - c) Sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislations; and**
 - d) Sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.”**

94. The legislation contemplated in Article 227 of the Constitution is the Act which applies to all state organs and public entities with respect to (a) procurement planning, (b) procurement processing, (c) inventory

and asset management, (d) disposal of assets, and (e) contract management.

95. Article 226 of the Constitution provides for accounts and audit of public entities as follows:

(1) An Act of Parliament shall provide for—

(a) the keeping of financial records and the auditing of accounts of all governments and other public entities, and prescribe other measures for securing efficient and transparent fiscal management; and

(b) the designation of an accounting officer in every public entity at the national and county level of government.

96. In essence, every public entity must have an accounting officer as a measure of securing efficient and transparent fiscal management.

97. Section 2 of the Act defines a public entity to include:

xiv a pension fund for a public entity;

98. Section 2 of the Act also incorporates the definition of an accounting officer as assigned under the Public Finance Management Act as follows:



Accounting Officer as: having the meaning assigned to it under section 2 of the Public Finance Management Act, 2012 (No. 18 of 2012).

99. Section 2 of the Public Finance Management Act defines an accounting officer as:

(a) an accounting officer of a national government entity referred to in section 67;

(b) an accounting officer of a county government entity referred to in section 148;

(c) in the case of the Judiciary, the Chief Registrar of the Judiciary; or

(d) in the case of the Parliamentary Service Commission —

(i) the Clerk of the Senate in respect of the Senate;

(ii) the Clerk of the National Assembly in respect of the National Assembly; and

(iii) such other officer in the parliamentary service in respect of any other office in the parliamentary service as the Cabinet Secretary shall, upon resolution by the Commission, designate, within fourteen days of the resolution;

100. Section 67 (2) of the Public Finance Management Act provides that:

"(2) Except as otherwise stated in other legislation, the person responsible for the administration of a Constitutional Commission or institution or Independent



Office shall be the accounting officer responsible for managing the finances of that Commission, institution or Independent Office.”

101. From the above provisions, it is clear that a pension fund constitutes a public entity which ought to have a designated accounting officer. Turning to the circumstances in the instant Request for Review, the Scheme is a Trust as evidenced by the Trust Deed and Rules dated 26th July 2023 between the Kenya National Examinations Council (“the founder”) and the Trustees of the said Scheme whose main purpose as provided under Clause 5 at page 19 of 88 of the Trust Deed is:

“to provide retirement benefits for members upon their retirement from the founder’s service at a specified age and relief for the dependent’s of deceased members and for that purpose, the Trustees shall hold the Contributions paid to them by the Founder and the Members and any other sums, investments and income and all lump sums representing the same upon trust for the respective persons for whose benefit such sums and other benefits are expressed to be payable in accordance with the provisions of this Deed and the Rules thereof.”

102. Section 40 of Retirement Benefits Act provides for the general obligations of trustees and managers as follows:

40. General obligations of trustees and managers

The trustee, manager, custodian or administrator of a scheme shall—

(a) ensure that the scheme fund is at all times managed in accordance with this Act, any regulations made thereunder, the scheme rules and any directions given by the Chief Executive Officer;

(b) take reasonable care to ensure that the management of the scheme is carried out in the best interests of the members and sponsors of the scheme;

(c) report to the Chief Executive Officer, as soon as reasonably practicable, any unusual occurrence which in his view could jeopardise the rights of the members or sponsors of the scheme; and

(d) report to the Chief Executive Officer, as soon as reasonably practicable, if any contributions into a scheme fund remain due for a period of more than thirty days.

103. We note from the confidential documents submitted to the Board pursuant to Section 67(3)(e) of the Act that the Respondents availed for our perusal a Board Charter approved by the Board of Trustees of the Scheme and which came into effect on 22nd September 2023 which defines the Board of Trustees roles, responsibilities as well as functions and structures in a way that supports the trustees in carrying out their strategic oversight function. Clause 4.1.1 of the Board Charter provides

that the Scheme has a unitary Board and the trustees act jointly and appreciate that they are in law, jointly and severally liable for the actions of the Board and they derive their powers from the rules of the Scheme.

104. In view of the above role and responsibilities, it is our considered opinion that the Board of Trustees is the designated Accounting Officer of the Scheme and the functions of an accounting officer lie on the entire Board of Trustees hence there was no objectionable issue for the Board of Trustees to convene for the Special Board of Trustees meeting held on 21st February 2024 to discuss the Evaluation Report and recommendations made upon evaluation of the subject tender by the Evaluation Committee.

105. The Retirement Benefits (Good Governance Practices) Guidelines provides under Guideline 26 for the role of the chairperson of the board of trustees and states that the chairperson of the board of trustees shall provide overall leadership to the board, ensure the efficient and timely conduct of the board's business and act as the spokesperson of the scheme in respect of the scheme's policies.

106. We note that Clause 5 of the Board Charter of the Scheme provides for the Chairperson whose responsibilities include *inter alia* acting as the spokesperson for the Scheme where agreed by the Board and ensuring that the performance of the Board and Sub-Committees is reviewed and evaluated on a regular basis.

107. Vide a letter dated 28th June 2018, Dr. Ibrahim Otieno was appointed to the Board of Trustees of the Scheme with effect from 1st July 2019 and his appointment was renewed for a further three (3) years with effect from 1st July 2022 as communicated vide letter dated 5th August 2022. The Minutes of the Special Board of Trustees meeting held on 21st February 2024 identified Dr. Ibrahim Otieno as a Founder Appointed Trustee and the Chairperson of the Board of Trustees.

108. In the circumstances, we find and hold that Dr. Ibrahim Otieno, the Chairman of the Board of Trustees represents the Board of Trustees which is the Accounting Officer of the Scheme for purposes of the procurement proceedings in the subject tender has the requisite authority to act in the subject tender as a representative and on behalf of the Board of Trustees. As such, we find no objectionable issue on the ground that the communication to tenderers with regard to the outcome of evaluation of the subject tender was signed off by Dr. Ibrahim Otieno, the Chairman of the Board of Trustees of the Scheme.

Whether the subject tender was terminated or cancelled in accordance with Section 63 of the Act so as to oust the jurisdiction of the Board;

109. The Respondents in a Notice of Preliminary Objection dated 12th March 2024 sought for dismissal of the instant Request for Review *in limine* on the ground that the Board has no jurisdiction to hear and determine the instant Request for Review since the procurement proceedings in the subject tender were terminated in line with Section



63 of the Act and that Section 167(4)(b) of the Act expressly precludes termination of procurement proceedings in accordance with Section 63 of the Act from being subject to the review of the Board and as such, the instant Request for Review ought to be dismissed with costs to the 1st and 2nd Respondents.

110. On its part, the Applicant submitted that for the jurisdiction of the Board to be ousted, the termination of procurement proceedings must meet the statutory preconditions set out under Section 63 of the Act and the Board must make a determination of whether or not the termination of procurement proceedings met the requirements of Section 63 of the Act so as to divest it of its jurisdiction.

111. Central to the instant Request for Review is the manner in which the Respondents terminated the procurement proceedings in the subject tender. We note that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution.

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

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

(a) applies or interprets this Constitution;

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

(c) makes or implements public policy decisions.

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

(a)

(b)

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

113. Efficient good governance in public procurement proceedings provides tenderers with an assurance that public procurement and asset disposal processes are operating effectively and efficiently. Such processes are also underpinned by broader principles such as the rule of law, integrity, transparency and accountability amongst others.

114. Termination of procurement proceedings is governed by Section 63 of the Act, which stipulates that when a termination of procurement and asset disposal proceedings meets the threshold of the said provision, the jurisdiction of this Board is ousted by virtue of section 167 (4) (b) of the Act which provides as follows: -

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

(a)



(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act [Emphasis by the Board]

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

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

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

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

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

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

It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures.

To illustrate the point, the failure by the 2nd Respondent to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether the termination met the threshold under the Act, before finding that it lacks

jurisdiction to entertain the case before it, on the basis of a mere letter of termination furnished before it.

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

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

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

A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory 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.

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

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

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's



conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act

118. 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 dismissed a preliminary objection on grounds 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 procurement 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...

119. It is therefore important for the Board to determine the legality, or lack thereof, of the Procuring Entity's decision terminating the procurement proceedings in the subject tender, which determination can only be made by interrogating the reason cited for the impugned termination. It is only then, that a determination whether or not the Board has jurisdiction can be made.

120. Vide a letter dated 10th February 2024, the Applicant was notified that the procurement process in the subject tender had been terminated since material governance issues had been detected. The said letter reads in part as follows:

".....
2.0 Please note that the tender mentioned above has been terminated. This is as per section 63(1) of the Public Procurement and Asset Disposal Act, 2015 which states that "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 (e) material governance issues have been detected.

3.0 Accordingly, the subject tender will be re-advertised on 27th February, 2024. You may contact the undersigned for any other further clarification on the subject matter of this letter.

(signed)

Dr. Ibrahim Otieno,

Chairman, Board of Trustees,

KNEC Staff Retirement Benefits Scheme 2011

121. We note from the confidential documents that vide an email dated 4th March 2024, the Applicant sought clarification regarding the material governance issues identified in the subject tender necessitating its re-advertisement as follows:

"....."

Good afternoon Deborah,

I trust that this email finds you well.

Following our previous correspondence, I would like to request clarification regarding the Material governance issues identified in Tender No. KNEC/KNECSRBS/RFP/2023-2024/01, necessitating its readvertisement.

....."



122. In response, the Respondents issued the clarification vide email dated 5th March 2024 as follows:

***"Good Afternoon Gloria,
This is in reference to your request for clarification regarding termination of tender number KNEC/KNECSRBS/RFP/2023-2024/01 and its subsequent re-advertisement.***

At the award stage, it was noted that there were outstanding legal matters that could compromise contract implementation if awarded.

This necessitated termination of the procurement process to allow for a fresh tendering process where bidders are now required to declare any governance issues, outstanding contractual or legal matters arising from past contracts.

....."

123. We understand the Applicant's contention as seen at grounds 4, 5, and 6 of the Request for Review to be that the reason given for termination is vague and ambiguous with no tangible evidence to support the reason for termination of the procurement proceedings in the subject tender contrary to the provisions of Section 63 of the Act. At paragraph 10 of its Supporting Affidavit sworn by Simon Wafubwa on 6th March 2024, the Applicant sought to have the termination notice

set aside and for the Respondents to furnish it with a comprehensive report detailing reasons of the said termination and for the re-advertisement to be stopped so that the initial process could proceed to finality.

124. On the other hand, the Respondents at paragraphs 9, 10, and 11 of the Memorandum of Response contend that on receipt of the Evaluation Report recommending award of the subject tender to the Applicant, the Board of Trustees of the Scheme convened a Special Board of Trustees meeting on 21st February 2024 whose agenda as seen from the Minutes of the Special Board of Trustees meeting was to consider and deliberate the Evaluation Report and in attendance of the meeting was the Deputy Director, Legal Services, Deputy Director Supply Chain Management and former Board of Trustee Chairman who had been invited to attend the said meeting. That following the meeting, it emerged that there were outstanding governance issues between the Applicant and the Scheme and in particular, as pleaded that at paragraph 10 of the Respondents' Memorandum of Response, that:

"

(a) During the transition from Enwealth Financial Services to Zamara Administrators, obtaining the transfer of member data from the Applicant was a challenge to an extent that the new scheme administrators had to reconstruct some of the member bio data themselves. Indeed, the regulator, the Retirement Benefits Authority, had to be involved for the matter to be addressed.



(b) Wrongful calculation of member benefits resulting in an overpayment of benefits to members in the sum of Kshs. 114,000,000.00. The cumulative sum including the legal and actuarial costs claimed amounts to Kshs. 118,027,437.93.

(c) A demand had been issued to the Applicant by KNEC SRBS but the Applicant's response was defiant and they refused to admit liability. Indeed, the Applicant has not made any efforts to resolve this issue despite adverse finding made against it by the Retirement Benefits Tribunal.

(d) In the premises, KNEC SRBS has initiated legal action as against the Applicant to recover these amounts."

125. Having carefully studied the Minutes of the Special Board of Trustees meeting held on 21st February 2024, we note as follows:

(a) Clause 5.1.9 at page 8 of the said Minutes indicate:

"It was reported to the Committee that there were outstanding legal and governance matters that had emerged and had been brought to the attention of the Chair by the Legal Services Directorate. It emerged that there was an existing legal dispute with the firm of Enwealth Financial Services Ltd arising from their previous engagement as Scheme Administrators. The

Chair requested the Deputy Director, Legal Services to present a Report to members."

(b) Clause 5.2 at pages 8 to 10 of the said Minutes indicate the Report from the Deputy Director, Legal Services which stated *inter alia* that:

"(h) During Enwealth's tenure as administrators of the scheme, they prepared benefit calculations that have subsequently been determined by the Retirement Benefit Authority and by the Retirement Benefits Appeals Tribunal to have been erroneous and incorrect and to have resulted in overpayment of benefits to members who exited from the scheme amounting to a sum of Kshs 114,000,000.

(i) It was established from the foregoing that Enwealth bears the responsibility for the loss of the funds as a result of the erroneous computations"

(c) Clause 5.3 at page 10 to 11 of the said Minutes indicate the Remarks by the Former Board of Trustees Chairman who stated that:

"(i) During the transition from Enwealth Financial Services to Zamara Administrators (Alexander Forbes then), obtaining the transfer of member data was a challenge and even the new Scheme administrators, Zamara had to reconstruct some of the member bio-data themselves. The Retirement Benefit Authority had to be

involved for the matter to be addressed and there was clear correspondence of the Retirement Benefits Authority raising issues on the delay from Enwealth.

(ii) Wrong calculation of member benefits as had been presented by the Deputy Director, Legal Services."

(d) Clause 5.4 at page 11 of the said Minutes indicate the Report from the Deputy Director, Supply Chain Management who informed members present that:

"5.4.1under Section 63 of the Public Procurement and Assets Disposal Act, the procuring entity can terminate the process before awarding of the tender and re-tender. The current matter would fall under Material Governance Issue in the Act.

5.4.2 Members' were informed that the law allows for termination of the procurement process. The procuring entity would be required to communicate to the Public Procurement Regulatory Authority notifying them of the termination and giving reasons.

5.4.3 He responded that the previous procurement Act of 2005 gave the procuring entity the right to blacklist a bidder. However, the current Act of 2015 states that in the event of an issue with a bidder, the matter should be reported to PPRA for blacklisting. He added that Enwealth Financial Services did not appear on the list of blacklisted firms on PPRA's website. He informed



members that they had the option of making the request for blacklisting to the PPRA on the grounds of material governance issues and breach of fiduciary responsibility.”

126. Subsequently, the Board of Trustees of the Scheme took the view that it would not be prudent to contract with the Applicant due to these legal and governance outstanding issues and resolved *inter alia* to terminate the procurement proceedings in the subject tender and for the process to start afresh.

127. It is therefore the Respondents' submission that its termination of the subject procurement process met the threshold for termination as prescribed under Section 63 of the Act.

128. Having considered parties' pleadings and submissions in the instant Request for Review and the confidential file submitted to the Board pursuant to Section 67(3)(e) of the Act, the question that comes up for this Board's determination is whether the Respondents decision to terminate the subject tender on the basis of '*material governance issues have been detected*' was in line with section 63(1)(e) of the Act.

129. Section 63 of the Act is instructive in the manner in which a procuring entity may terminate procurement or asset disposal proceedings and provides as follows:

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

(a) the subject procurement has been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

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

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.



- (2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.**
- (3) A report under subsection (2) shall include the reasons for the termination.**
- (4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination."**

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

131. In essence, Section 63 of the Act is instructive on termination of procurement proceedings being undertaken by an accounting officer of a procuring entity at any time before notification of award is made and such termination must only be effected if any of the pre-conditions enumerated in Section 63(1) (a) to (i) of the Act are present. This is

the substantive statutory pre-condition that must be satisfied before a termination of procurement proceedings is deemed lawful. Further, following such termination, an accounting officer is required to give the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") a written report on the termination with reasons and notify all tenderers, in writing, of the termination with reasons within fourteen (14) days of termination. These are the procedural statutory pre-conditions that must be satisfied before a termination of procurement proceedings is deemed lawful.

132. In **Republic v Public Procurement Administrative Review Board; Leeds Equipment & Systems Limited (interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR** the High Court held that:

"In a nutshell therefore and based on the above-cited cases where the decision of a procuring entity to terminate procurement process is challenged before the Board the procuring entity is to place sufficient reasons and evidence before the Board to justify and support the ground of termination of the procurement process under challenge. The procuring entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of Section 63 of the Act". [Emphasis by the Board]



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

133. Section 63(1)(e) of the Act as cited hereinbefore stipulates that one of the grounds that a procuring entity may rely on to justify its termination of a tender is as a result of detection of material governance issues. The question that arises is what is material governance issues?

134. Governance and how it relates to public procurement is explained in the book "**Public Procurement: International Cases and Commentary, (2012)** edited by Louise Knight, as follows:

"Effective procurement practices provide governments with a means of bringing about social, economic and environmental reform. Conversely, malpractice within public procurement demonstrated a failure of governance and typically arises from corruption and fraud."

135. In essence, the principles of governance require procuring entities and tenderers to avoid any form of malpractice that compromise the integrity of a procurement process of a tender. This Board has on numerous occasions addressed the question of what amounts to material governance issues in public procurement proceedings. In **PPARB Application No. 50 of 2020 Danka Africa (K) Ltd v The Accounting Officer, Kenya Ports Authority & Another** (hereinafter referred to as "the Danka Africa Case") the Board deduced the meaning of material governance in public procurement to mean:



"Therefore, the Board observes that one may deduce the meaning of material governance in public procurement to mean: significant or important governance issues detected in a procurement process that negatively affect the capability of a procuring entity to guarantee compliance with principles of governance, leadership, and integrity when procuring for goods and services. Such material governance issues may emanate from malpractice during the procurement process by bidders, or by the bidder while colluding with a procuring entity, or operational challenges attributed from policy decisions influencing a procuring entity's procurement process."

136. We note that a procuring entity which seeks to terminate a procurement process on account of detection of material governance issues bears the burden of establishing with specificity what the said material governance issues are in the procurement process of the tender and how they affect its capability to guarantee compliance with principles of Article 227 of the Constitution of Kenya.

137. The onus therefore lies squarely at the Respondents' doorstep to demonstrate to tenderers what these material governance issues were as to leave no room for conjecture in the minds of tenderers why the subject tender was terminated. This reasoning accords with the principle of transparency and accountability which are envisaged as essential cogs in any public procurement process in Kenya.



138. Turning to the circumstances in the instant Request for Review, and having in mind the above explanation of detection of material governance issues in public procurement, it is the Board's considered view that it took the instant proceedings for the Applicant to specifically know why the subject tender was terminated on account of material governance issues. We say so because, even if the Respondents purported to issue the Applicant with a clarification on why the subject tender was terminated vide email dated 5th March 2024, they did not expressly state that the material governance issues that had been detected emanated from a previous relationship between the Applicant and the Scheme and entailed outstanding legal issues which the Scheme held against the Applicant. Moreover, this clarification was only issued to the Applicant and not to the other tenderers in the subject tender.

139. The Applicant only came to extensively learn of the material governance issues that were detected leading to termination of the procurement proceedings from the response by the Respondents in the instant Request for Review. Additionally, the Respondents were not clear in their letter of termination dated 23rd February 2024 and email dated 5th March 2024 on why they had to terminate the procurement proceedings in the subject tender if the material governance issues detected were specific to only the Applicant.

140. Section 80(2) of the Act dictates that tenders ought to be evaluated using the procedures and criteria set out in the tender document. The Evaluation Criteria in the Tender document as floated did not restrict bidders that may have had outstanding contractual or legal issues arising from past contracts or previous dealings with the Scheme from participating in the subject tender and any conduct relating to previous contracts that may have come to the attention of the Scheme cannot now be interpreted to mean detection of material governance issues in the current procurement proceedings of the subject tender that justifies termination of the entire procurement proceedings or disqualification from the bid to the detriment of any bidder on the basis of a criteria outside the tender document as this is patently illegal. To further buttress this point, reference is had to the Respondents email dated 5th of March, 2024 sent to the Applicant highlighting the introduction of the new criteria (outstanding governance, contractual or legal matters arising from past contracts) as an evaluation criteria in the proposed re-advertised tender, which was not an evaluation criteria in the present tender.

141. We note that 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. 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 High 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"



142. From the above holding, 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 mere recitation of the statutory language under Section 63 of the Act does not suffice. It is our considered opinion that fairness and transparency during termination of procurement proceedings require as of necessity that an accounting officer of a procuring entity should not only recite the statutory language as reasons for termination but also provide real and tangible reasons backed with sufficient evidence for such termination to all tenderers in the letter of notification of termination of procurement proceedings. With this information and evidence, aggrieved tenderers will critically weigh their options on whether to challenge or not to challenge such a termination in light of being in possession of sufficient evidence of the reasons for such termination

143. Guided by the above holdings, the Board finds and holds that the Respondents have failed to fulfill the substantive requirements for the termination of procurement proceedings in the subject tender as required by Section 63(1)(e) of the Act and the aforecited case laws since they did not provide sufficient evidence of detection of material governance issues in the procurement proceedings as communicated to tenderers in the letter dated 23rd February 2024 to justify termination of procurement proceedings in the subject tender.

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

144. From the confidential file, we note that the four (4) bidders in the subject tender were notified of termination of the procurement proceedings in the subject tender vide letters dated 23rd February 2024. However, the said letters do not muster the threshold of termination notice contemplated under Section 63(4) of the Act for failing to sufficiently give reasons to all tenderers pertaining to the alleged ground of termination due to detection of material governance issues.

145. The Respondents depone at paragraph 6(iii) of the Affidavit sworn by Dr. Ibrahim Otieno that the statutory form under Section 63(2) of the Act was duly filled and submitted to the Authority on its online portal being PPIP on 8th March 2024. The Respondents referred the Board to Exhibit marked IO-2 annexed to the Affidavit sworn by Dr. Ibrahim Otieno being a copy of the comparative sample statutory form and copy of the PPRA Circular No. 4/2022 dated 1st July 2022 on Mandatory Reporting Requirements by Procuring Entities.

146. However, a close scrutiny of the confidential documents submitted by the Respondents to the Board reveals that there is no print out of the duly submitted written report on termination of the subject tender addressed to the Director General of the Authority as contemplated under Section 63 (2) of the Act as read with PPRA Circular No. 4/2022 dated 1st July 2022 on Mandatory Reporting in the PPIP Portal addressing the reasons for termination of the subject tender. At the

very least, the Respondents would have adduced a copy of the PPIP print out as proof of having submitted the report on termination of the subject tender as uploaded on the PPIP website on the alleged 8th March 2024. As such, the procedural statutory pre-conditions that must be satisfied before a termination is deemed lawful as required by Section 63(2) & (3) of the Act have not been met by the Respondents.

147. Having established that the Respondents failed to satisfy both the substantive and procedural statutory pre-conditions of termination of procurement proceedings in line with Section 63 (1)(e) of the Act the Board finds and holds that the Respondents failed to terminate the procurement proceedings of the subject tender in accordance with Section 63 of the Act. As such, the Board's jurisdiction to hear and determine the instant Request for Review has not been ousted by dint of Section 167(4)(b) of the Act.

What orders should the Board grant in the circumstances?

148. We have found that the termination of the procurement proceedings of the subject tender was illegal, irregular and in breach of Section 63 and 80(2) of the Act. We find it just to nullify and set aside, which we hereby do, the decision of the Respondents to terminate the procurement proceedings of the subject tender together with the decision to re-advertised the subject tender on 27th February 2024.

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

FINAL ORDERS

150. 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 6th March 2024 and filed on 7th March 2024:

- A. The Respondents Notice of Preliminary Objection dated 12th March 2024 be and is hereby dismissed.**

- B. The decision by the 1st Respondent to terminate the procurement proceedings of Tender No. KNECSRBS/EOI/2023-2024/01 for Provision of Scheme Administration Consultancy Services be and is hereby annulled and set aside.**

- C. The Procuring Entity's letter dated 23rd February 2024 issued to the Applicant and other tenderers in the subject tender communicating the decision to terminate the procurement proceedings with respect to Tender No. KNECSRBS/EOI/2023-2024/01 for Provision of Scheme Administration Consultancy Services be and is hereby nullified and set aside.**

- D. The decision by the Respondents to re-advertise the subject tender on 27th February 2024 be and is hereby cancelled and**


set aside and any consequent procurement process thereafter is equally null and void.

E. The Applicant's tender and all other tenders that were responsive at the Financial Evaluation stage be and are hereby re-admitted for evaluation at the Financial Evaluation stage and the Respondents are hereby ordered to ensure that the procurement process with respect to Tender No. KNECSRBS/EOI/2023-2024/01 for Provision of Scheme Administration Consultancy Services proceeds to its lawful and logical conclusion within 14 days of this decision taking into consideration the Board's findings herein, the Tender Document, the Constitution, the Act and Regulations 2020.

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

Dated at NAIROBI this 28th Day of March 2024.


.....
CHAIRPERSON
PPARB


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SECRETARY
PPARB