

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 27/2024 OF 27<sup>TH</sup> MARCH 2024**

**BETWEEN**

**SAJUCY COMPANY LIMITED..... APPLICANT**

**AND**

**KENYA REINSURANCE CORPORATION LTD ..... 1<sup>ST</sup> RESPONDENT**

**THE ACCOUNTING OFFICER,**

**KENYA REINSURANCE CORPORATION LTD ..... 2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer, 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. Ms. Alice Oeri - Panel Chairperson
2. Mr. Joshua Kiptoo - Member
3. Mr. Alexander Musau CPA - Member

**IN ATTENDANCE**

1. Mr. Philemon Kiproo - Holding brief for Board Secretary
2. Ms. Evelyn Weru - Secretariat

PPARB No. 27/2024

17<sup>th</sup> April, 2024

## **PRESENT BY INVITATION**

### **APPLICANT**

**SAJUCY COMPANY LIMITED**

Mr. Sang

-Advocate, Chege & Sang Advocates

### **RESPONDENT**

**KENYA REINSURANCE CORPORATION  
LIMITED & THE ACCOUNTING OFFICER,  
KENYA REINSURANCE CORPORATION  
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 and the 1<sup>st</sup> Respondent herein, invited sealed tenders from qualified and interested tenderers in response to Tender No. KRC/2023/2201/363 for Proposed Common Area Refurbishments at Anniversary Towers (hereinafter referred to as "the subject tender") using a national open competitive tendering method. The advertisement for the subject tender was made on 12<sup>th</sup> December 2023 in the Daily Nation newspaper and on the Procuring Entity's website [www.kenyare.co.ke](http://www.kenyare.co.ke) where the blank tender document for the subject tender (hereinafter referred to as the 'Tender Document') was available for download. The subject tender's submission deadline was Monday, 8<sup>th</sup> January 2024 at 10.00 a.m.

### **Submission of Tenders and Tender Opening**

2. According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 8<sup>th</sup> January 2024 and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of nine (9) tenders were submitted in response to the subject tender and were recorded as follows:

<b>No.</b>	<b>Name of Tenderer</b>
<b>1.</b>	<b>DWG International Construction</b>
<b>2.</b>	<b>Emkay Construction Limited</b>
<b>3.</b>	<b>Interlink Industries</b>
<b>4.</b>	<b>Karura Engineering Works</b>
<b>5.</b>	<b>Wante Contractors Ltd</b>
<b>6.</b>	<b>Floli 22 Contractors Limited</b>
<b>7.</b>	<b>Solitaire Constructions Limited</b>
<b>8.</b>	<b>Sajucy Company Limited</b>
<b>9.</b>	<b>Nanchang Foreign Engineering</b>

### **Evaluation of Tenders**

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 2<sup>nd</sup> Respondent undertook evaluation of the nine (9) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 22<sup>nd</sup> January

2024 (hereinafter referred to as the "Evaluation Report") in the following stages:

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

### **Preliminary Evaluation**

4. At this stage of evaluation, the Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under Stage 1: Preliminary Examination - Determination of Responsiveness of the Bidder of Section III- Evaluation and Qualification Criteria at pages 28 to 30 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the Technical Evaluation stage.
5. At the end of the evaluation at this stage, eight (8) tenders were determined non-responsive, including the Applicant's tender while one (1) tender was determined responsive and proceeded to Technical Evaluation.

### **Technical Evaluation Stage**

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria provided under Stage 2 - Technical Evaluation of Section III- Evaluation and Qualification Criteria at pages 30 to 37 of the Tender Document. Tenders were to be examined in 3 sub-stages. i.e. Mandatory Technical Requirement, Technical Evaluation and

Detailed Technical Evaluation and any bid found to be non-responsive at this stage would be disqualified from proceeding to Financial Evaluation.

7. At the end of evaluation at this stage, the one (1) tender under evaluation was determined non-responsive and did not progress for further evaluation at the Financial Evaluation Stage.

### **Financial Evaluation**

8. At this stage of evaluation, the Evaluation Committee was required to apply the criteria provided under Stage 3: Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 38 of the Tender Document. Tenders were to be examined by determination of arithmetic errors, comparison of rates by tenderers; consistency of rate and application of a margin of preference.

9. No tender made it to this stage of evaluation

### **Evaluation Committee's Recommendation**

10. The Evaluation Committee recommended the termination of the subject tender.

### **Professional Opinion**

11. In a Professional Opinion signed on 25<sup>th</sup> January 2024 (hereinafter referred to as the "Professional Opinion"), Ms. Gladyce Musyoki, Manager Supply Chain, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and concurred with the findings of the Evaluation Committee and

recommended that the subject tender be terminated in line with Section 63(1)(f) of the Act.

12. Thereafter, the Accounting Officer, Dr. Hillary M. Wachinga approved the Professional Opinion on 30<sup>th</sup> January 2024 and proceeded to terminate the subject tender.

### **Notification to Tenderers**

13. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of termination of procurement proceedings in the subject tender dated 31<sup>st</sup> January 2024 signed by the 2<sup>nd</sup> Respondent.

### **REQUEST FOR REVIEW NO. 14 OF 2024**

14. On 23<sup>rd</sup> February 2024, Emkay Construction Limited filed a Request for Review No. 14 of 2024 (hereinafter referred to as "Request for Review No. 14 of 2024") supported by a Statement dated 23<sup>st</sup> February 2024 by Margaret Magiri Mwangi, its director against the decision of the 2<sup>nd</sup> Respondent in relation to the subject tender and sought the following orders from the Board:

***a) The decision of the 1<sup>st</sup> 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 2<sup>nd</sup> Respondent's letter signed by the 1<sup>st</sup> Respondent and received by the Applicant on 9<sup>th</sup> February 2024 be nullified and set aside in its entirety;***

***b) The 1<sup>st</sup> 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;***

***c) The Respondents be compelled to pay to the Applicant the costs arising from, incidental to, this Request for Review; and***

***d) 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.***

15. The Board considered the parties' pleadings, documents, written and oral submissions, list and bundle of authorities together with the confidential documents submitted by the 2<sup>nd</sup> Respondent to the Board pursuant to Section 67(3)(e) of the Act and found the following issues called for determination in the Request for Review No. 14 of 2024:

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

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

***c) What orders should the Board issue in the circumstance?***

16. On the first issue framed for determination, the Board found that the Respondents failed to terminate the subject procurement process in accordance with Section 63 of the Act to the extent that the Procuring Entity's letter of termination dated 31<sup>st</sup> 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 Emkay Construction Limited's tender as non-responsive. The Board found that the Respondents effectively failed to meet the substantive requirement for termination of the subject tender contemplated under Section 63 of the Act and as such, the jurisdiction of the Board to hear the matter was not ousted.

17. On the second issue framed for determination, the Board found that the Respondents filed before it a competent Memorandum of Response and Supplementary Memorandum of Response.

18. On 15<sup>th</sup> March 2024, and in exercise of the powers conferred upon it under the Act, the Board made the following final orders with respect to Request for Review No. 14 of 2024:

***a) The Request for Review dated 23<sup>rd</sup> February 2024 be and is hereby allowed.***

***b) The Respondents' Letters dated 31<sup>st</sup> January 2024 and addressed to tenderers and terminating Tender No. KRC/2023/2201/363 for Proposed Common Area Refurbishments at Anniversary Towers be and are hereby cancelled and set aside.***

***c) The 1<sup>st</sup> 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.***

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

### **Notification of Termination of Tenders**

19. *Vide* letters dated 18<sup>th</sup> March 2024, the Procuring Entity notified tenderers of reasons for non-responsiveness of their respective tenders and the decision to terminate the procurement process in the subject tender in line with Section 63(1)(f) of the Act.

## **REQUEST FOR REVIEW NO. 27 OF 2024**

20. On 27<sup>th</sup> March 2024, being dissatisfied with the decision of the Procuring Entity, Sajucy Company Limited, the Applicant herein, filed a Request for Review No. 27 of 2024 dated 26<sup>th</sup> March 2024 together with a Statement in Support of the Request for Review signed on 26<sup>th</sup> March 2023 by Cyrus M. Kibagendi, its Director (hereinafter referred to as "the instant Request for Review") through Chege & Sang Company Advocates seeking the following orders:

- a) Annul and/or quash the decision of the Procuring entity terminating the Tender Proceedings.***
- b) Award the tender to the Applicant being responsive to the tender and the lowest evaluated bid.***
- c) In the alternative to prayer (b), compel the Procuring entity to conclude the procurement process within the next 14 days.***
- d) The Respondent be compelled readmit the applicant Tender document and a new evaluation team proceed with the evaluation of its bid.***
- e) The Procuring entity be condemned to pay costs of KSH.750,000 of this request for Review to the Applicant.***

***f) Such other, additional, further, incidental and/or alternative orders as the Honorable Board may deem just and expedient.***

21. In a Notification of Appeal and a letter dated 27<sup>th</sup> March 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 27<sup>th</sup> March 2024.

22. Vide letters dated 27<sup>st</sup> 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 24<sup>th</sup> 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.

23. On 28<sup>th</sup> March 2024, the Respondents filed through Waruhiu K'Owade & Ng'ang'a Advocates a Notice of Appointment of Advocates dated 28<sup>th</sup> March 2024.

24. On 29<sup>th</sup> March 2024, the Respondents filed with the Board the confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.

25. On 4<sup>th</sup> April 2024, the Respondents filed through their advocate a 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response dated 4<sup>th</sup> April 2024.

26. On 9<sup>th</sup> April 2024, the Respondents filed Written Submissions dated 9<sup>th</sup> April 2024 together with a List and Bundle of Authorities dated 9<sup>th</sup> April 2024.

27. Vide a Hearing Notice dated 9<sup>th</sup> April 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 11<sup>th</sup> April 2024 at 11.00 a.m., through the link availed in the said Hearing Notice.

28. On 11<sup>th</sup> April 2024, the Applicant filed through its advocates an Applicant's Supplementary Affidavit sworn on 11<sup>th</sup> April 2024 by Cyrus Kibagendi together with the Applicant's Written Submissions dated 11<sup>th</sup> April 2024.

29. At the hearing on 11<sup>th</sup> April 2024, the Board confirmed pleadings filed in the matter and allocated parties time to highlight their respective cases. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submission**

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30. In his submissions, counsel for the Applicant, Mr. Sang relied on the Request for Review dated 26<sup>th</sup> March 2024 together with a Statement in Support of the Request for Review signed on 26<sup>th</sup> March 2023 by Cyrus M. Kibagendi, its Director, the Applicant's Supplementary Affidavit sworn on 11<sup>th</sup> April 2024 by Cyrus Kibagendi and Written Submissions dated 11<sup>th</sup> April 2024 that were filed before the Board.
31. Counsel submitted that the regret letter dated 18<sup>th</sup> March 2024 provided reasons for termination of the tender proceedings in two aspects being that the Applicant had not provided a valid NHIF Compliance Certificate and that all evaluated tenders were non-responsive.
32. Counsel submitted that the allegation that the Applicant had not provided a valid NHIF compliance certificate was highly disputed in that in its Supplementary Affidavit, it had issued a confirmation from NHIF, the issuing body that the certificate that had been issued was valid and as such, this basis of disqualifying the Applicant's bid ought to be disregarded.
33. Mr. Sang further submitted that if the Applicant's NHIF Compliance Certificate was found to be valid, there was adequate reason that the Applicant had provided all required documents and its bid was substantially responsive.
34. Counsel indicated that they had received a response to the instant Request for Review from the Procuring Entity and noted that the Respondents conducted a due diligence exercise as per the Tender Document and it is presumed conduct of due diligence on a bidder is done

at a stage where award is about to be made and as such, it is conducted to confirm conformity and by implication of the conduct of the Procuring Entity, it is evident that the Applicant had complied with all mandatory requirements of the Tender Document and the Respondents were trying to look for reasons to lock it out.

35. With regards to the termination of procurement proceedings, counsel submitted that Section 63 of the Act lays out a statutory condition which must be met by the Procuring Entity being to submit a report to the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") and no evidence has been adduced to prove that this requirement was met and as such the termination of the subject tender was a nullity. He pressed on that the Procuring Entity ought to supply cogent and sufficient reasons for termination and referred the Board to the holding in *Leeds Equipment & Systems Limited v Kenya Veterinary Vaccines Production Institute* in support of his argument.

36. Mr. Sang submitted that the requirement for documents to be certified by a commissioner for oaths was not a mandatory requirement, was not stated in the notification letter and had been introduced by the Respondents. He further submitted that the issue of certification by a commissioner of oaths was indicated using a parenthesis and according to the Black Law dictionary, anything appearing under a parenthesis can be ignored and is not mandatory and as such, only a certified copy of the NHIF compliance certificate was required and bidders had the option of having a commissioner of oaths certifying the document.

## **Respondent's Submissions**

37. In his submissions, counsel for the Respondents, Mr. Thangei relied on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response dated 4<sup>th</sup> April 2014, Written Submissions dated 9<sup>th</sup> April 2024, List and Bundle of Authorities dated 9<sup>th</sup> April 2024 together with the confidential documents concerning the subject tender filed with the Board pursuant to section 67(3)(e) of the Act.
38. Mr. Thangei submitted that Item No. 6 of the Preliminary Evaluation Criteria required all bidders to submit a National Hospital Insurance Fund (NHIF) Compliance Certificate certified by a commissioner for oaths and that at the end of the said section of the Tender Documents, bidders were cautioned to note that *only tenderers who fully meet the preliminary evaluation stage requirements shall proceed to technical evaluation and the rest shall stand disqualified.*
39. Counsel further submitted that the validity of the Applicant's NHIF Compliance Certificate was to be measured against the set out requirement and the certificate submitted by the Applicant had not been certified and the same was admitted. He pressed on that the Applicant cannot introduce a evaluation criteria on how it wished to be evaluated outside what had been provided for in the Tender Document.
40. Mr. Thangei submitted that the Respondents wrote to NHIF *vide* letter dated 17<sup>th</sup> January 2024 seeking to ascertain that the certificates submitted by all bidders in the subject tender were valid and that this due diligence was conducted for evaluation purposes and not with an intention

to award any bidder. He pressed on that the procurement process was lawfully terminated there being no responsive evaluated bid and as such the provisions under Section 63 of the Act were met by the Respondents.

41. Counsel asked the Board to take judicial notice of its holding in the Decision issued on 15<sup>th</sup> March 2024 in Request for Review No. 14 of 2024 which was on the same subject tender where the Board was satisfied that a report had been submitted to the Authority pursuant to Section 63(2) and (3) of the Act.

42. When asked by the Board on how the Respondents determined whether the NHIF compliance certificate was valid or not, Mr. Thangei submitted that the validity was to be confirmed through certification by a commissioner for oaths and also from NHIF where they enquired in the letter dated 17<sup>th</sup> January 2024 for confirmation on validity and authenticity of the compliance certificates submitted by all the bidders. He also confirmed that the same could be confirmed online but the certificate ought to comply with the requirements provided for in the Tender Document in that it needed to be certified by a commissioner for oaths.

43. When asked to confirm whether the Procuring Entity sought clarification on validity of the NHIF Compliance Certificate from NHIF, counsel submitted that vide a letter dated 17<sup>th</sup> January 2024, the Respondents sought clarification from NHIF and a response was issued as seen from the letter from NHIF listing bidders who had a valid compliance certificate and those who were not compliant. He pressed on that the Applicant also failed on the requirement for certification by a Commissioner for oaths.

## **Applicant's Rejoinder**

44. In a rejoinder, counsel for the Applicant, Mr. Sang referred the Board to the Applicant's NHIF Compliance Certificate dated 20<sup>th</sup> December 2023 and argued that the said certificate was self-explanatory and was duly certified. He pointed out that NHIF confirmed that its certificate was valid as seen in the letter dated 2<sup>nd</sup> April 2024 attached to its Supplementary Affidavit and argued that the Procuring Entity may have received erroneous information with regard to the Applicant's compliance certificate.

45. Mr. Sang reiterated that what was used in the Tender Document was a parenthesis which meant that one could read the provision with the omission of what was between the parenthesis and pressed on that there was no mandatory requirement for the compliance certificate to be certified and that there was no admission on the Applicant's part that its compliance certificate was not certified by a commissioner for oaths. He urged the Board to note that the issue of certification was not addressed in the notification letter dated 18<sup>th</sup> March 2024 and only came up in the Respondents' response to the instant Request for Review.

46. Counsel pointed out that from the response to the instant Request for Review filed by the Procuring Entity, it was determined to lock out the Applicant from the procurement proceedings in the subject tender.

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

48. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 27<sup>th</sup> March 2024 was

due to expire on 17<sup>th</sup> April 2024 and that the Board would communicate its decision on or before 17<sup>th</sup> April 2024 to all parties to the Request for Review via email.

### **BOARD'S DECISION**

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

**A. Whether the Procuring Entity terminated the subject tender in accordance with Section 63 of the Act;**

**B. What orders should the Board grant in the circumstances?**

### **As to whether the Procuring Entity terminated the subject tender in accordance with Section 63 of the Act;**

50. We understand the Applicant's case on this issue to be that the 2<sup>nd</sup> Respondent terminated the procurement proceedings in the subject tender without any legal justification whereas its bid had satisfied all the requirements of the Tender Document and was substantially responsive. The Applicant contends that its NHIF Compliance Certificate was valid at all material times and the notification letter dated 18<sup>th</sup> March 2024 did not indicate that the said certificate was not certified by a Commissioner for

Oaths and that this reason was an afterthought advanced in the Respondents' response to the Request for Review.

51. On the other hand, the Respondents contend that termination of the subject tender was done in line with the provisions of Section 63 of the Act there being no responsive tenderer in the subject tender and that tenderers were duly notified of the outcome of evaluation of the subject tender with reasons for disqualification of their bids and a report filed with the Authority as prescribed under the Act. It is the Respondents' case that they sought to confirm the validity of the tenderers' submitted NHIF Compliance Certificates, including the Applicant's, and were informed by NHIF that the Applicant's NHIF Compliance Certificate was invalid and not compliant and as such, failure by the Applicant to comply with an express and mandatory requirement in the Tender Document rendered its bid non-responsive in addition to the fact that the same was not certified by a commissioner for oaths.

52. The Board notes that 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]

53. 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 2<sup>nd</sup> 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.***

54. 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.

55. 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 precondition that first needs to be satisfied in the said subsection namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.*

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

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

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

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

56. 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...***

***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***

57. 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.

58. It is not lost to us that the Board in its Decision dated 15<sup>th</sup> March 2024 in Request for Review No. 14 of 2024 addressed a similar issue pertaining to termination of the procurement proceedings in the subject tender and found that the Procuring Entity ought to have outlined detailed reasons for the termination of the subject tender and lead evidence to prove the reasons for termination. The Board held as follows:

***"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 openness 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 31<sup>st</sup> 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 substantial requirement under Section 63 of the Act, the 1<sup>st</sup> Respondent as the Accounting Officer had the onus of leading evidence to prove evidence on reason for the termination. However, in view of the Board's observation that the letter of termination dated 31<sup>st</sup> January 2024 lacked clarity on the circumstances surrounding the termination of the subject tender, the Respondent effectively failed to meet the substantial 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 31<sup>st</sup> January 2024, and 22<sup>nd</sup> February 2024 respectively.**

**111. First, on notifications to the tenderers, the Respondents exhibited notification letters dated 31<sup>st</sup> 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 31<sup>st</sup> 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 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 for termination of a tender as contemplated under Section 63 of the Act. It therefore follows that the procedural requirement is tainted of 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.”[emphasis ours]*

59. In essence, the Board in Request for Review No. 14 of 2024 was satisfied that the procedural requirements for termination of procurement proceedings in the subject tender had been met to the extent of reporting the termination to the Authority but the substantive requirements had not been met by the Respondents which led it to order the Respondents to issue fresh letters of termination of the procurement proceedings in the subject tender setting out reasons for termination to all bidders.

Having carefully studied the confidential documents submitted by the 2<sup>nd</sup> Respondent, we note that in compliance with the Board's orders issued in its Decision dated 15<sup>th</sup> March 2024 in Request for Review No. 14 of 2024, the Applicant was notified of termination of the subject tender as follows:

**15<sup>th</sup> March 2024**  
**Managing Director**  
**Sajacy Company Limited**  
**P.O. Box 17266-00100**

**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.**

PPARB No. 27/2024  
17<sup>th</sup> April, 2024

***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.***

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

***1. Attached Invalid copy of NHIF Compliance Certificate.***

***We therefore terminate the tender with immediate effect.***

***Yours faithfully,***

***Signed***

***DR. HILLARY M. WACHINGA***

***MANAGING DIRECTOR***

***CC: Supply Chain Manager***

61. There is no doubt that the above letter of Notification in the subject tender dated 18<sup>th</sup> March 2024 is the trigger that set off the instant Request for Review.

62. The Board is cognizant of Article 227 of the Constitution which provides as follows:

***"227. Procurement of public goods and services***

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

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

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

53. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

**"80. Evaluation of tender**

**(1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected.**

**(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the**

*provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.*

**(3) *The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-***

**(a) *the criteria shall, to the extent possible, be objective and quantifiable;***

**(b) *each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and***

**(4) *.....***"

64. Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as

objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.

65. Section 79(1) of the Act provides for responsiveness of tenders as follows:

***"(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."***

66. Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** the High Court stated that:

***"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate***

***expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."***

67. The Board notes that Regulation 74(1) of Regulations 2020 provides that:

***"74. Preliminary evaluation of open tender***

***(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—***

***(a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;***

***(b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;***

***(c) any tender security submitted is in the required form, amount and validity period, where applicable;***

***(d) the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;***

***(e) the required number of copies of the tender have been submitted;***

***(f) the tender is valid for the period required;***

- (g) any required samples have been submitted; and**
- (h) all required documents and information have been submitted. [emphasis ours]**

68. Considering the above provisions of the Act, the Regulations 2020 and case law it is clear that evaluation of tenders is only carried out in accordance with the criteria and procedures set out in the Tender Document and that mandatory requirements cannot be waived. In this instance, the Evaluation Committee was under an obligation to evaluate the Applicant's tender using the procedures and criteria set out in the Tender Document having regard to provisions of the Act and the Constitution. A laid out evaluation criteria must, to the extent possible, be objective and quantifiable.

69. Turning to the circumstances of the instant Request for Review, we note that the Tender Document provided a Pre-Qualification Form under Preliminary Evaluation as follows:

“ .....

<b>Item No.</b>	<b>Qualification Subject</b>	<b>Qualification Requirement</b>	<b>Documents To be Completed/provided by Tenderer</b>	<b>For Procuring Entity's Use (Qualification met or Not Met)</b>
.....	.....	.....	.....	.....

<b>6.</b>	<b>NHIF</b>	<b>Provide documentary evidence of having a valid NHIF compliance certificate</b>	<b>Certified copy of NHIF Compliance Certificate (Certified by Commissioner of Oaths)</b>	
****	*****	*****	*****	*****

70. Our understanding of the above requirement is that a bidder was required to provide in its tender, a certified copy of NHIF Compliance Certificate which was duly certified by a Commissioner of Oaths.

71. According to the Evaluation Report, the Evaluation Committee conducted due diligence to ascertain whether tenderers had submitted amongst other requirements, a valid copy of NHIF Compliance Certificate (Certified by Commissioner of Oaths) and proceeded to seek information from various issuing institutions amongst them, the National Hospital Insurance Fund as to the authenticity of submitted documents seen in the Procuring Entity's letter dated 17<sup>th</sup> January 2024 which reads:

"  
**RE: DUE DILIGENCE ON TENDERS FOR PROPOSED COMMON AREA REFURBISHMENT AT ANNIVERSARY TOWERS – KRC/2023/2201/363**  
**Reference is made to the above subject matter.**  
**Kenya Reinsurance Corporation Limited in in the process of evaluating the above tender and one of the mandatory requirements is NHIF compliance certificate.**

*Tenderers have provided Compliance Certificates from your company to support the tender. Pursuant to the provision of part VII, Section 83 of the Public Procurement and Asset Disposal Act (2015), we are carrying out due diligence to confirm the authenticity of the submitted documents. Copies of the certificate are attached herein.*

*We are looking forward to a prompt response to this request.*

....."

72. We note that in response to the request by the Procuring Entity, National Health Insurance Fund through Mr. George Kadede, for the Branch Manager, Upper Hill responded vide letter dated 17<sup>th</sup> January 2024 as follows:

"  
....."  
**RE: CONFIRMATION OF NHIF COMPLIANCE CERTIFICATES PROVIDED BY TENDERERS**

*With respect to your request dated 17<sup>th</sup> January 2024 requesting confirmation of a Compliance Certificates presented to you. Indicated is the validity of the Certificates per your request.*

- 1. SOLITAIRE CONSTRUCTION LTD – VALID COMPLIANCE CERTIFICATE**
- 2. NANCHANG FOREIGN ENGINEERING CO (K) LIMITED – VALID COMPLIANCE CERTIFICATE**

- 3. INTERLINK INDUSTRIES – NOT COMPLIANT**
- 4. SAJUCY COMPANY LIMITED – NOT COMPLIANT**
- 5. FLOLIZZ CONTRACTORS LIMITED – VALID COMPLIANCE CERTIFICATE**
- 6. WANTE CONTRACTORS LIMITED – NOT COMPLIANT**
- 7. EMKAY CONSTRUCTION LTD – VALID COMPLIANCE CERTIFICATE**
- 8. KARURA ENGINEERING WORKS LIMITED – VALID COMPLIANCE CERTIFICATE.**

*Yours Faithfully,*

*(signed) (stamped)*

**GEORGE KADEDE**

**FOR: BRANCH MANAGER, UPPERHILL**

73. Subsequently, the Evaluation Committee noted as follows in its Evaluation Report:

".....

**g) Bidder No. 8**

**M/s SAJUCY COMPANY LTD**

- **Attached Invalid copy of NHIF Compliance Certificate**

74. Turning to the circumstances in the instant Request for Review, during the hearing Mr. Thangei, counsel for the Respondents argued that the Applicant's bid was rendered non-responsive since it failed to submit a valid Compliance Certificate and that its NHIF Compliance Certificate as submitted in its bid document was not certified by a commissioner for Oaths.

75. Having carefully perused the Applicant's original tender submitted to the Board by the 2<sup>nd</sup> Respondent pursuant to Section 67(3)(e) of the Act, we note that the Applicant submitted a Certificate of Compliance No: X1857149 dated 20<sup>th</sup> December 2023 at page 582 of its bid document and the same was certified and stamped as a true copy of the Original by Lilian W Manegene Advocate, Commissioner for Oaths and Notary Public of P.O. Box 7183 00200 Nairobi. As such, the Respondents' argument that the said compliance certificate was not certified by a commissioner for oaths as required in the Tender Document fails.

76. We are now left with the question of whether or not the Applicant's NHIF Certificate of Compliance as submitted in the subject tender was valid.

77. We note that the Applicant at paragraph 3 of its Supplementary Affidavit sworn on 11<sup>th</sup> April 2024 deponed as follows:

***"3. THAT, contrary to what was stated in the regret letter dated 18<sup>th</sup> March 2024, my NHIF compliance certificate was at all material times valid (Annexed and marked CK1 is a confirmation letter dated 2<sup>nd</sup> April 2024 from NHIF Branch Manager)"***

78. We further note that the Applicant's exhibit marked CK1 reads as follows:

***2<sup>nd</sup> April, 2024***

***The Director,  
Sajucy Company Limited,  
P.O. Box 75792-00200***

**NAIROBI**

**Dear Sir,**

**RE: ACKNOWLEDGEMENT OF COMPLIANCE CERTIFICATE**

**We hereby confirm that we issued compliance certificate no. X1857149 on 20<sup>th</sup> December, 2023 as the regulations of NHIF ACT No. 9 of 1998.**

**Yours,**

**(Signed)**

**NICK TSUMA**

**BRANCH MANAGER**

79. In considering the contents of the above letter dated 2<sup>nd</sup> April, 2024 relied upon by the Applicant in support of its arguments that it submitted a valid NHIF Certificate of Compliance, the Board notes that unlike the letter dated 17<sup>th</sup> January 2024 relied upon by the Respondents, the letter dated 2<sup>nd</sup> April 2024 produced by the Applicant does not bear any stamp authenticating and verifying that it was issued by NHIF on 2<sup>nd</sup> April 2024 nor does it state the branch from which Mr. Nick Tsuma, the Branch Manager is situated. We can therefore not say with certainty that the said letter emanated from NHIF when set against the Procuring Entity's letter dated 17<sup>th</sup> January 2024 which is not only signed, stamped and dated by NHIF on the said 17<sup>th</sup> January 2024 but also indicates the issuing branch as Upper Hill.

80. We have further considered the use of the word **valid** under Item No. 6 of the Qualification Requirement of the Preliminary Evaluation of the

Tender Document and note that Oxford Learners Dictionary defines the word "valid" as "that is legally or officially acceptable".

81. In view of the foregoing, the question that we are now called upon to answer is whether the Applicant's NHIF Compliance Certificate was legally or officially acceptable by the Respondents in view of the due diligence exercise conducted by the Evaluation Committee to authenticate the validity of NHIF Compliance Certificates submitted by all bidders in the subject tender.

82. In the Board's considered view and in light of the confirmation on the status of the bidders' compliance certificates as issued in the letter dated 17<sup>th</sup> January 2024 by National Hospital Insurance Fund, the Applicant's NHIF Compliance Certificate was not valid or officially acceptable as required under the Tender Document. As such, it is the Board's finding that the Applicant failed to satisfy the requirement under Item 6 under the Preliminary Evaluation criteria of the Pre-Qualification Form of the Tender Document and could therefore not proceed for further evaluation having been rendered non-responsive at the Preliminary Evaluation stage in the subject tender.

83. We have established from the Evaluation Report submitted in the confidential documents that no bidder qualified to be recommended for award in the subject tender and as such, a recommendation for termination of the subject tender was made in line with Section 63(1)(f) of the Act.

84. The question that now comes up for this Board's determination at this juncture is whether the Procuring Entity's decision to terminate the subject tender on the basis of Section 63(1)(f) of the Act is justified.

85. 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."***

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

87. In essence, Section 63 of the Act is instructive on termination of procurement proceedings being undertaken by an accounting officer of a procuring entity at any time before notification of award is made and such

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

88. 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 ours]

❖ **With regard to the substantive requirements for termination of procurement proceedings in the subject tender;**

89. Section 63(1)(f) 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 if all the evaluated tenders in the subject tender are non-responsive.

90. 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"**

91. 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. In our considered view, 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. 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.

92. In the case of **Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others (2012) eKLR**, the High Court held:

***"Section 112 of the Evidence Act Chapter 80 of the Laws of Kenya provides:***

***'In civil proceedings, when any fact especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.'***

***Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs-KCB (2003) 1EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."***

93. Having carefully studied the confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act, we have established that none of the tenderers were responsive in the subject tender.

94. In the circumstances, we find and hold that the Respondents fulfilled the substantive requirements for the termination of the procurement proceedings in the subject tender as required under Section 63(1)(f) of

the Act and aforesaid authorities having provided sufficient evidence of non-responsiveness of all evaluated tenders in the subject tender.

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

95. We have hereinbefore established that the Board in its Decision dated 15<sup>th</sup> March 2024 in Request for Review No. 14 of 2024 was satisfied that the procedural requirements for termination of procurement proceedings in the subject tender had been met in so far as a written report to the Authority had been issued by the Respondents.

96. We note from the confidential documents that all tenderers in the subject tender were notified of termination of the procurement proceedings in the subject tender vide letters dated 18<sup>th</sup> March 2024 in compliance with the Board's orders of 15<sup>th</sup> March 2024 in Request for Review No. 14 of 2024 and that the said letters mustered the threshold of the termination notice contemplated under Section 63(4) of the Act since tenderers were issued with sufficient reasons pertaining termination of the procurement proceedings in the subject tender due to non-responsiveness of all evaluated tenders in the subject tender.

97. Consequently, having established that the Respondents met both the substantive statutory pre-conditions of termination of procurement proceedings in line with Section 63(1)(f) of the Act and the procedural statutory pre-conditions of termination of procurement proceedings in line with Section 63(2), (3), & (4) of the Act, the Board finds and holds that

the Respondents terminated 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 is ousted by dint of Section 167(4)(b) of the Act.

### **What orders should the Board grant in the circumstances?**

98. We have found that termination of the procurement proceedings in the subject tender met the substantive statutory and procedural statutory pre-conditions of termination of procurement proceedings in line with Section 63 of the Act.

99. The upshot of our finding is that the instant Request for Review fails.

### **FINAL ORDERS**

100. 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 26<sup>th</sup> March 2024 and filed on 27<sup>th</sup> March 2024:

**A. The Request for Review dated 26<sup>th</sup> March 2024 and filed on 27<sup>th</sup> March 2024 be and is hereby dismissed.**

**B. Each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI this 17<sup>th</sup> Day of April 2024.



.....  
**PANEL CHAIRPERSON**



.....  
**SECRETARY**

