

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 60/2024 OF 5TH JULY 2024

BETWEEN

ENWEALTH FINANCIAL SERVICES LIMITED APPLICANT

AND

ACCOUNTING OFFICER, BOARD OF TRUSTEES

KENYA NATIONAL EXAMINATION COUNCIL

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

BOARD OF TRUSTEES,

KENYA NATIONAL EXAMINATION COUNCIL

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

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. Stanslaus Kimani - Member
3. Eng. Lilian Ogombo - Member



IN ATTENDANCE

1. Ms. Sarah Ayoo -Holding brief for Acting Board Secretary
2. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT ENWEALTH FINANCIAL SERVICES LIMITED

Mr. John Tito - Advocate, 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. Justus Omollo - Advocate, Sigano & Omollo LLP 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
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
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>Bidder 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>Bidder 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>Bidder 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 23rd 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 'Request for Review No.



19 of 2024') 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. The Board 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 found the following issues arose for determination

A. Who is the Accounting Officer in the subject matter?

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.

33. On the first issue framed for determination, the Board found and held that Dr. Ibrahim Otieno, the Chairman of the Board of Trustees represented the Board of Trustees which is the Accounting Officer of the Scheme for Purposes of the proceedings in the subject tender and had the requisite authority to act in the subject tender as a representative and on behalf of the Board of Trustees.
34. On the second issue framed for determination, the Board found and held 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 and as such, the Board's jurisdiction had not been ousted by dint of Section 167(4)(b) of the Act.
35. 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 issued the following orders in its Decision dated 28th March 2024 in Request for Review No. 19 of 2024 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 quashed 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.

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 logical conclusion within 14 days of this decision taking into consideration the Board's findings herein, the Tender Document and the provisions of the Act, the Constitution 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

NAIROBI HIGH COURT JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. E075 OF 2024 (hereinafter referred to as "the Judicial Review")

36. Dissatisfied with the Decision of the Board dated 28th March 2024 in Request for Review No. 19 of 2024, the Respondents sought judicial review by the High Court of the said decision in Nairobi High Court Judicial Review Misc. Civil Application No. E075 of 2024 where they sought the following orders:

a) CERTIORARI to remove into the High Court and quash the decision of the Public Procurement Administrative Review Board delivered on the 28th of March 2024 in PPARB Application No. 19 of 2024.

b) DECLARATION that:

i The Public Procurement Administrative Review Board lacked jurisdiction to entertain the Request for Review in PPARB Application No. 19 of 2024 by virtue of the provisions of section 167(4)(b) of the Public Procurement and Asset Disposal Act.

ii The Ex-parte Applicants lawfully terminated the procurement proceedings (with respect to tender number KNECSRBS/EOI/2023-2024/01 for the provision of scheme administration services) under the provisions of section 63(1)(e) of the Public Procurement and Asset Disposal Act.

iii Material governance issues as set out under section 63(1) of the Public Procurement and Asset Disposal Act are not



limited to governance issues arising out of the procurement process.

- iv The letter dated the 24th February 2024 terminating the procurement proceedings disclosed with sufficient clarity the reasons for the termination of the procurement proceedings.*
- v The Ex-Parte Applicants were at liberty, at any stage of the procurement proceedings in question, to conduct a due diligence exercise.*
- vi The Ex-Parte Applicants are at liberty to proceed with the re-advertised tender (tender KNECSRBS/RFP/2023-2024) to its logical conclusion.*

c) The costs be borne by the Respondents.

37. The High Court considered the Judicial Review and found that there was no basis of engaging in a merit review of the Board's decision and found at paragraphs 63 and 64 as follows:

"63. The only stain on the 1st respondent's decision is with respect to the order that the bidders be subjected to a fresh financial evaluation. In their submissions, the applicants urged that this was unreasonable because the evaluation of the tenderers in this respect had already been done and, logically, if the termination was null and void, the procurement proceedings ought to have proceeded from where they had reached before the purported termination...

.....



64. I am in total agreement with the applicants on this score except to add that the order directing the procuring entity to admit all tenders for fresh financial evaluation is severable and can be quashed without affecting the rest of the decision. Accordingly, I will allow the applicants' application only to the extent of quashing this particular order by the 1st respondent. For the avoidance of doubt this is order E in the 1st respondent final orders which is couched as follows:

"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 logical conclusion within 14 days of this decision taking into consideration the Board's findings herein, the Tender Document and the provisions of the Act, the Constitution and Regulations 2020."

65. This order is hereby quashed. For reasons I have given, the rest of the applicant's application is dismissed and considering that the applicant's application is partly successful, parties will bear their respective costs. It is so ordered."



RE-EVALUATION OF THE SUBJECT TENDER

38. Vide a Professional Opinion dated 14th June 2024 (hereinafter referred to as the "Fourth 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 recommended for the Applicant to be awarded the subject tender having been evaluated as having the highest combined technical and financial score of 97.6 points at its quoted price of 0.25% of the fund equivalent to Kshs. 8,671,000.00

39. Thereafter, on the same day of 14th June 2024, the Fourth Professional Opinion was not approved by Dr. Ibrahim Otieno, Chairman Board of Trustees, KNEC Staff Retirement Benefit Scheme due to budgetary constraints. Vide Memo addressed to the Deputy Director Supply Chain Management, Dr. Ibrahim Otieno pointed out that the resultant contract price of Kshs. 8,671,000.00 was beyond the Kshs. 2,050,185.00 and recommended for the matter to be referred back to the Evaluation Committee for reconsideration.

40. According to an Evaluation Report dated 18th June 2024 and signed by members of the Evaluation Committee, the Evaluation Committee reconvened to review its recommendation in view of the inadequate budgetary allocation and observed that the Scheme had provided Kshs.




2,050,185.00 budget allocation for the subject procurement in the year under review. Subsequently, the Committee recommended that the subject tender be terminated in line with Section 63(1)(b) of the Act on account of inadequate budgetary provision.

41. Vide a Professional Opinion dated 18th June 2024 (hereinafter referred to as the "Fifth 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 indicated that the Pension Scheme having provided Kshs. 2,050,185.00 budget allocation in the subject tender had insufficient budget to carry out the procurement activity based on the quoted price for the bidder that had previously recommended for award. He recommended for termination of the subject tender in line with Section 63(1)(b) of the Act since the recommended price was in excess of the available budget and since the Evaluation Committee could not proceed with competitive negotiations since this could be contrary to Section 132(2)(b) of the Act which limits invitation for competitive negotiations to tenderers whose evaluated prices are not more than 25% of the available budget.

42. Thereafter, on the same day of 18th June 2024, the Fifth Professional Opinion was approved by Dr. Ibrahim Otieno, Chairman Board of Trustees, KNEC Staff Retirement Benefit Scheme.

Notification to Tenderers

43. Tenderers were notified of termination of the subject tender vide letters dated 27th June 2024.

REQUEST FOR REVIEW NO. 60 OF 2024

44. On 5th July 2024, Enwealth Financial Services Limited, the Applicant herein, filed a Request for Review dated 5th July 2024 together with a Supporting Affidavit sworn on 5th July 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:

a.) The Applicant's impugned termination notice dated 27th June 2024 to declared to be null and void, of no legal effect and be struck out.

b.) The Board awards the subject tender, for the provision of Pension scheme Administration Consultancy Services (Tender No. KNECSRBS/EOI/2023-2024/01) to the Applicant as adjudicated and evaluated by the Procuring Entity.

c.) The Respondent, the Procuring entity, be directed to award the subject tender, for the provision of Pension scheme Administration Consultancy Services (Tender No. KNECSRBS/EOI/2023-2024/01) to the Applicant.

d.) The Respondent, the Procuring entity, be directed to issue the Applicant contracts in respect of, Tender No.



KNECSRBS/EOI/2023-2024/01 for the provision of Pension scheme Administration Consultancy Services within 3 days of the Boards Decision.

e.) The Retirement Benefits Authority, the relevant sector Regulator, to superintend the issuance of the contract for the provision of Pension Scheme Administration Services to the Applicant.

f.) The Respondent be found and declared to be in contempt for illegally, arbitrarily and consistently being in contempt of the orders of this Honourable Board and the High Court.

g.) That in the peculiar circumstances of this reference and taking into account the egregious and unlawful conduct of the Board of Trustees the costs of this application be awarded to the Applicant.

h.) Any other order that the Honourable Board may deem just and fit.

45. In a Notification of Appeal and a letter dated 5th July 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 5th July 2024.

46. On 12th July 2024, the 1st and 2nd Respondent filed through Sigano & Omollo LLP Advocates a Notice of Appointment of Advocates dated 11th July 2024, and a 1st and 2nd Respondents' Memorandum of Response dated 12th March 2024 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

47. Vide letters dated 15th July 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.

48. Vide a Hearing Notice dated 18th July 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 23rd July 2024 at 11.00 a.m., through the link availed in the said Hearing Notice.

49. On 2nd July 2024, the Applicant filed through its advocates a Further Affidavit sworn by Simon Wafubwa on 19th July 2024 together with

Applicant's Written Submissions and Applicant's List of Authorities dated 19th July 2024.

50. On the morning of 23rd July 2024, the 1st and 2nd Respondents filed through their advocate 1st and 2nd Respondents' Skeletal Submissions dated 23rd July 2024.

51. 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 1st and 2nd 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. Thus, the matter proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

1st and 2nd Respondents' submissions on their preliminary objection

52. In his submissions, counsel for the 1st and 2nd Respondents, Mr. Omollo relied on the 1st and 2nd Respondents' documents filed before the Board including confidential documents concerning the subject tender submitted to the Board pursuant to Section 67(3)(e) of the Act.

53. Mr. Omollo submitted that the Board's jurisdiction has been ousted by Section 167(4)(b) of the Act and that the Applicant lacks *locus standi*



to lodge the instant Request for Review pursuant to Section 167(1) of the Act.

54. On the issue of *locus standi*, counsel referred the Board to the Court of Appeal's holding in *James Oyondi t/a Betoyo Contractors & Anotehr v Elroba Enterprises Limited & 8 others (2019) eKLR* where it was held that for a party to institute a request for review, it ought to at the very least claim to have suffered or to be at the risk of suffering loss or damage as a result of a breach of duty by a procuring entity. He argued that from the instant Request for Review, the Applicant did not plead or attempt to show that it had suffered or risked suffering loss or damage despite this being a threshold requirement under Section 167(1) of the Act. In view of the foregoing, Mr. Omollo urged the Board to find that the Applicant had no *locus standi* before the Board.

55. On the issue of whether the Board has jurisdiction to hear the instant Request for Review in view of Section 167(4)(b) of the Act, Mr. Omollo submitted that the Board in determining if its jurisdiction had been ousted ought to establish if there has been compliance with Section 63 of the Act in terminating the procurement proceedings.

Applicant's submissions and response to the Respondents preliminary objection

56. In his submissions, counsel for the Applicant, Mr. Tito relied on the 1st and 2nd Respondents' documents filed before the Board and indicated

that the instant Request for Review was a continuation of Request for Review No. 19 of 2024.

57. Mr. Tito submitted that there has been an egregious misconduct by the Respondents noting that the matter had been determined by the Board in Request for Review No. 19 of 2024 following which the Respondents appealed at the High Court which did not stay the proceedings and rendered its judgment and directed that an award be made. He indicated that there was an inordinate delay of any action by the Respondents and a letter by the Chairman of the Trustee was issued indicating that the Scheme was doing all it could to award the subject tender.

58. Counsel submitted that the Applicant was notified that the procurement process in the subject tender was terminated due to insufficient budget.

59. He referred the Board to its Decision of 28th March 2024 in Request for Review No. 19 of 2024 and indicated that the question of jurisdiction had been exhaustively covered and reiterated the correct position in law. On the issue pertaining locus standi, Mr. Tito submitted that the Applicant submitted a bid and was the best evaluated bidder and ought to have been awarded the subject tender hence it had locus standi before the Board.

60. Counsel submitted that the actions of the Respondents was a determination not to adhere to the law and comply with orders of the



Board and the High Court and ought to be held as being in contempt of both the High Court and the Board.

61. On the issue of the budgetary provisions, Mr. Tito submitted that in the earlier phase of the evaluation, in more than three occasions, it was confirmed that there was adequate budget for the subject tender and it cannot be that in the eleventh hour an issue of inadequacy of budgetary provisions was the reason adduced for termination of the subject tender. Counsel invited the Board to take note that this was a 3 Billion fund as evidenced by the tender documents and submitted bids which were deemed to be compliant also cited a fee of 0.25% as annual fees for rendering administrative services. Counsel submitted that the Procuring Entity is a pension scheme which is invested into monthly and its value grows.
62. Counsel stated that in the circumstances of the instant Request for Review, the Applicant had prayed for the subject tender to not only be awarded but a contract signed and if for some reason it is found difficult to do so, the Retirement Benefits Authority being a regulatory body vested with the power to assign an interim administrator could be asked to supervise the award of contract in the subject tender to ensure that the Scheme is well managed and services provided adequately.
63. Mr. Tito asked the Board to take note of costs incurred by the Applicant in proceedings before the Board and the High Court with respect to Request for Review No. 19 of 2024 and in lodging the instant Request

for Review and in view of the misconduct by the Respondents and urged the Board to allow the Request for Review with costs as prayed.

1st and 2nd Respondents' submissions

64. Mr. Omollo submitted that the instant Request for Review was a contempt application of the orders of the High Court and Board clothed as an incompetent Request for Review. Counsel made reference to Section 173 of the Act and argued that it does not clothe the Board with powers to punish for contempt of court. He submitted that the question before the Board was whether it can punish for alleged contempt of orders of a superior court.

65. Counsel submitted that the current legal framework for contempt of court proceedings in the Kenya is the Judicature Act which refers to the procedure for the time being in place before the courts of England and that the procedural requirements of the courts of England as of now requires that the parties to the proceedings are named as plaintiffs and defendants, the application to be presented before the court is known as an application notice, there is a requirement for personal notice, a requirement for the applicant to demonstrate the contempt and substance of orders made by the court in question.

66. He indicated that no affidavit had been presented showing there was personal service of that particular order upon those sought to be held in contempt and even if there were, the application before the Board fails since it is not the text of the application expected of a contempt application being a request for review and an applicant seeking a

review before the Board ought to comply with Section 167 read with Regulation 203 of Regulations 2020.

67. Counsel submitted that the issue for consideration in Request for Review No. 19 of 2024 was that procurement proceedings in the subject tender had been terminated on account of material governance issues and the Board found that the procedure for termination did not comply with Section 63 of the Act ordering for nullification of the termination letter and directed that the Applicant's bid be admitted for evaluation at the Financial Evaluation stage within 14 days. He further submitted that this was the only order requiring a positive action by the Respondents who lodged a judicial review before the High Court being dissatisfied with the Board's orders.

68. Mr. Omollo submitted that pursuant to Section 175 of the Act, a decision of the Board becomes final and binding if it is not challenged by way of judicial review within 14 days and as such, the Board's Decision in Request for Review No. 19 of 2024 did not become final and binding as of the time the judicial review proceedings were lodged at the High Court and the timelines for compliance were suspended and there was no obligation for the Respondents to comply within the stipulated timelines. He further pointed out that the order directing re-evaluation of bids be conducted at the Financial Evaluation stage was quashed by the High Court in its Decision delivered on 23rd May 2024 and the High Court was of the view that the procurement proceedings were to proceed from the point they were at before the termination.



69. Counsel submitted that there are a number of steps which follow after an Evaluation Committee makes a recommendation for award of tender and disputed the Applicant's notion that the process in the subject tender was at award stage there being no award stage in procurement proceedings. He further submitted that after a recommendation for award has been made by the Evaluation Committee, the said recommendation is submitted to the head of procurement function under Section 80 of the Act and pursuant to Section 84 of the Act, the head of procurement function is required to prepare a professional opinion and submit it to the accounting officer. Counsel pressed on that once the professional opinion is prepared and accompanying documentation per Regulation 78 of Regulations 2020, it is submitted to the accounting officer who has three options of either approving the award to the successful bidder, seek clarification prior to approving or rejecting the recommendation, or reject the recommendation.

70. Mr. Omollo submitted that in the subject tender, the Evaluation Committee had made a recommendation which was submitted to the Head of Procurement Function who in turn prepared a Professional Opinion dated 14th June 2024 and submitted it to the Accounting Officer who exercised his powers under Regulation 79(1)(c) of Regulations 2020 and rejected the recommendation therein. Counsel pressed on that Regulation 79(1)(c) of Regulations 2020 dictates that when an accounting officer rejects a recommendation, he has to give reasons and provide directions to the Head of Procurement Function and in the instant case, the 1st Respondent rejected the recommendation and wrote to the Head of Procurement Function informing him that the



budget for the procurement process in the subject tender was Kshs. 2,051,185 as evidence by the Kenya National Examinations Council Retirement Benefit Scheme 2011 Budget for the Year Ending June 2024 labelled KNECSRBS Budget 2023.

71. Counsel submitted that according to the Kenya National Examinations Council Retirement Benefit Scheme 2011 Budget for the Year Ending June 2024, Kshs. 1,988,000 was paid in the financial year 2021/2022 toward Administration Fees whereas Kshs. 2,050,185 was the indicated budget for the financial year 2023/2024 for Administration Fees.
72. He indicated that procurement for the subject tender had to be within the approved budget and the 1st Respondent in rejecting the recommendation to award the subject tender gave directions to the Head of Procurement Function and in exercise of that direction, the matter resubmitted back to the Evaluation Committee to reconsider the issue of the budget having regard also to the Financial Proposal made by the successful bidder.
73. Counsel submitted that at this particular stage in the procurement process, it would have been possible to aver termination of the procurement process by engaging in competitive negotiations in view of Section 132(2)(b) of the Act which allows for competitive negotiations where the bid price is not more than 25% above the available budget.

74. Mr. Omollo indicated that the key issue was not what amount of money was available in the Scheme but what budget was available and in considering competitive negotiations, it was found that the Applicant's quoted price of Kshs. 8,671,000 exceeded 25% of the available budget. He submitted that the 1st Respondent took note of the recommendation made by both the Evaluation Committee and Head of Procurement after reconsideration in line with Regulation 48 of Regulations 2020 and approved the recommendation to terminate the procurement proceedings in the subject tender on account of inadequate budgetary provision in line with Section 63(1)(b) of the Act.

75. Counsel submitted that all bidders in the subject tender were notified of termination and reasons for termination thereof and the Public Procurement Regulatory Authority was also notified of the termination vide letter dated 2nd July 2024. He pressed on that the procurement proceedings in the subject tender had been terminated in accordance with Section 63 of the Act divesting the Board of its jurisdiction to hear and determine the matter and in view of the orders of the Board in Request for Review No. 19 of 2024 directing the procurement proceedings to proceed to their logical conclusion, logical conclusion of a procurement process can be an order to terminate or death of the procurement process by effluxion of the tender validity period.

76. With regard to the orders sought by the Applicant, counsel submitted that order no. 1 cannot be issued since the termination notice from the Applicant was not produced before the Board. Counsel further submitted that the order sought for award of the subject tender fell



outside the power stipulated under Section 173 of the Act and that the Board is hamstrung from granting the same. He argued that in the circumstances of inadequate budgetary provisions in the subject tender, should the Applicant be awarded the subject tender, the Respondents would fall afoul the law and engage in a criminal activity of awarding a tender without an adequate budget which has seen accounting officers prosecuted. He further argued that the order sought for signing of a contract within 3 days was contrary to the requirement that any contract signed emanating from procurement proceedings ought to be signed after 14 days of notification of award and as such, granting this order would be illegal. Counsel indicated that the Retirement Benefits Authority has no role in procurement proceedings of independent procuring entities such as the 2nd Respondent and in any case the Regulator would be the Public Procurement Regulatory Authority. He further indicated that the Applicant had failed to satisfy the threshold for a competent contempt of court application and had also not demonstrated how the conduct of the Board of Trustees was illegal.

77. Mr. Omollo submitted that the Applicant took a commercial risk and that the Applicant is not entitled to costs sought. He urged the Board to strike out the Request for Review.

Applicant's Rejoinder

78. In a rejoinder, Mr. Tito submitted that the crux of the matter was whether the termination of the subject tender as communicated on 27th June 2024 was lawful.



79. Counsel indicated that the termination was unlawful and such should be the declaration of the Board. He referred to Section 175 of the Act and submitted that a party who disobeys an order of the Review Board or the High Court or the Court of Appeal shall be in breach of the Act and any action taken by such a party is considered null and void.

80. Counsel submitted that the High Court in the Judicial Review held that the procurement proceedings in the subject tender ought to proceed to the award stage and not the Financial Evaluation stage being a clear indication that the Respondents did not comply with the same. He further submitted that both the Board and the High Court directed the Respondents to conclude the procurement proceedings lawfully and logically.

81. On the issue of budgetary provisions, he argued that there were at least 4 professional opinions by procurement experts indicating that there was sufficient budget and it is questionable how in the middle of June, the Head of Procurement purported that claim that there wasn't a sufficient budget.

82. Counsel further submitted that the documents referred to by the Applicant were not the budget but financial statements and audited accounts which the Applicant did not have sight of and it was clear that the Applicant had taken the Board through financial statements for the years 2021/2022 and 2023/2024 noting that budgets are separate documents and separate concepts.



83. Counsel noted that Mr. Omollo had taken the Board through financial statements ending 30th June 2024, a period that had passed and noting that the subject tender was for three years which was futuristic and a clear indication that the reasons for termination had been fabricated noting that in the earlier termination, the reasons issued had nothing to do with the budget. Counsel pressed on that there was now an invention of budget inadequacy that clearly shows the determination of the Respondents to unlawfully terminate the subject tender.

84. With regard to the powers of the Board, counsel submitted that the Board has power to substitute a decision of a procuring entity with its own decision and in view of what had taken place in the two reviews, it would be lawful for the Board to make a determination that the contract in the subject tender be signed within hours of conclusion of the proceedings herein.

Clarifications

85. When asked by the Board to clarify on whether the Applicant pleaded to having suffered loss or damage, Mr. Tito submitted that the instant Request for review was a continuation of Request for Review No. 19 of 2024 and that per the Applicant's affidavits and submissions, it had indeed indicated loss suffered and in view of the provisions of the Act, any act that is done contrary to the orders of the Board and the High Court is null and void.



86. When asked to confirm if the Respondent complied with the orders of the High Court in the Judicial Review, Mr. Omollo submitted that the Respondents complied noting that the procurement process was to be continued from where it left before the termination and the reasons advanced for termination was that there was inadequate budgetary provision noting that the tender was for one year and from the budget for the year ending 30th June 2024 which was not audited accounts, there was information that had been lifted from previous audited accounts showing previous expenditure.

87. Counsel submitted that the professional opinions referred to were made at stages before the opening of the financial proposals and in view of the template provided in the Act on what a professional opinion should contain, some of the information therein was predetermined in the schedule and so at each stage, the Head of Procurement was required to make a comment on availability of funds and it is also clear that any particular procurement process cannot be commenced without funds having been set aside.

88. In a rejoinder, Mr. Tito submitted that it was factually incorrect for Mr. Omollo to indicate that the professional opinions were rendered prior to the financial evaluation noting that two opinions were rendered past the Financial Evaluation stage.

89. When asked by the Board to expound on where the Board in request for Review No. 19 of 2024 or the High Court in the Judicial Review ordered the Respondents to make an award of the subject tender to

the Applicant, Mr. Tito submitted that the decision of the Board was that the Respondents proceed with the tender to lawful and logical conclusion of the procurement process and the Applicant being the best evaluated bidder ought to be awarded the subject tender.

90. On his part, Mr. Omollo submitted that there was no specific order that was issued either by the High Court or the Board to the extent that the subject tender was to be awarded to the Applicant noting that conclusion of a tender can take three options which is either by award, termination, or effluxion of the tender validity period.

91. When asked to clarify whether the document referred to labelled as KNECSRBS Budget 2023 for the year ending 30th June 2024 was the Procuring Entity's budget addressing the question of administration fees and how long the subject tender was to run, Mr. Omollo answered in the affirmative indicating that this was not financial statements and indicated that it was a one-year contract. He further indicated that from the pattern of expenditure of each financial year, it was not near Kshs. 8,000,000. He confirmed that the same was approved by the Board of Trustees on that particular issue of administration fees.

92. At this juncture, the Board directed that it would be in the interest of justice that the document labelled as KNECSRBS Budget 2023 for the year ending 30th June 2024 be shared with Mr. Tito for his review and submission on the same in view of its significance and submissions made by counsel for the Respondents, Mr. Omollo. Mr. Omollo was directed to share the aforementioned document with Mr. Tito who was

also directed to file further written submissions restricted to 2 pages by 3.00 p.m. on 23rd July 2024 and Mr. Omollo to file his further written submissions by 6.00 p.m. on 23rd July 2024.

93. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 5th July 2024 was due to expire on 21st July 2024 and that the Board would communicate its decision on or before 21st July 2024 to all parties to the Request for Review via email.

94. On 23rd July 2024, the Applicant through its advocates filed Further Submissions dated 23rd July 2024.

95. On 23rd July 2024, the 1st and 2nd Respondents through their advocates filed 1st and 2nd Respondents' Supplementary Submissions dated 23rd July 2024.

Applicant's Further Submissions

96. The Applicant made reference to Section 63(4) of the Act and submitted that the Respondents failed to furnish evidence of the decision taken, furnish the budget not only to all bidders but also to the Authority and the Board. In support of its argument the Applicant referred to the holding in *PPARB Application No. 19 of 2024* and *PPARB Application No. 8 of 2021*.

97. With regard to the Financial Evaluation, the Applicant submitted that vide the Professional Opinion dated 23rd February 2024, Mr. Nicholas



Mang'ata at item 6 confirmed that the pension scheme has sufficient budget to carry out the procurement activity and as such, on the basis of their own evidence and documentation, the Respondents confirmed adequacy of budget and cannot therefore turn to disown their statement and averments as to sufficiency of budget making them estopped from arguing that there isn't adequate budget.

98. The Applicant submitted that the High Court in its judgement dated 23rd May 2024 was expressly categorical that the procurement process proceeds forward to award as financial evaluation was complete and at the time the judgment was delivered, the professional opinion as to adequacy of budget was already rendered on 23rd February 2024 and the financial evaluation concluded.

99. The Applicant submitted that the Respondents had failed to furnish the Board with its budget and what had been submitted were copies of financial statements. It further submitted that the financial statements furnished as budget were a write up by an entity called Zamara who are bidders and the Procuring Entity would know and be capable of preparing, presenting and concluding its own budget.

100. The Applicant argued that the financial statements provided by the Respondents in lieu of the Budget are for a period in the past ending 30th June 2024 while the tender was for the period 2024/2025 renewable for 3 years. The Applicant further argued that a scrutiny of the information availed shows that the financial statements were for the year ending 30th June 2024 fabricated as the scheme budget for

the subject tender and from the Tender Document, the subject tender was for a period of 1 year renewable for two years hence the budget ought to be for that period.

101. The Applicant submitted that the Respondents in reinventing ways to meet their illegal intent acted contrary to the orders of the High Court, proffered a professional opinion dated 14th June 2024 and were now claiming lack of budgetary provision in contradiction of the earlier professional opinion dated 23rd February 2024 thus compromising the procurement process.

1st and 2nd Respondents Further Submissions

102. The Respondents submitted that they had availed documentary proof that the budgetary provision for the subject tender was Kshs. 2,050,185.00 being (a) Duly signed Minutes of the Board of Trustees Meeting held on Wednesday 26th September 2023 at the Kenya National Examinations Council Offices, New Mitihani House, South C, and (b) Excerpt of the Scheme Proposed Budget for the year 2023/2024.

103. The Respondents pointed to table 9 at pages 9 to 13 of the Minutes of Board of Trustees Meeting of 26th September 2023 containing the proposed budget for the scheme for the year 2023/2024 whereby Page 12 of the said minutes recorded the proposed budget for administration fees at Kshs. 2,050,185.00 and Page 13 recorded that the budget was approved by the Board of Trustees through a resolution.

104. The Respondents also pointed to a document titled 'Budget for the year ending June 2024' which indicated that the approved budget for administration fees for the year 2023/2024 is Kshs. 2,050,185.00
105. While making reference to the holding in *PPARB Application No. 8 of 2021*, the Respondents submitted that they had provided tangible evidence of the approved budget for the administration fees in the sum of Kshs. 2,050,185.00 as can be gleaned from the duly signed minutes of the meeting of the Board of Trustees held on 26th September 2023.
106. It is the Respondents case that procurement proceedings under the subject tender was commenced by the Respondents based on the approved budget of Kshs. 2,050,185.00 within the financial year 2023/2024 and it is important to note that the Respondents did not state in the professional opinions or in any other document that the Applicant's tender price of 0.25% of the fund value (which is equivalent to Kshs. 8,671,000.00) was within the approved budget of the Procuring Entity of Kshs. 2,050,185.00.
107. The Respondents submitted that pursuant to Regulation 79 of Regulations 2020, where the accounting officer rejects the recommendation of the head of procurement function, he is obligated to give reasons for doing so and in the instant Request for Review, the procedure undertaken by the 1st Respondent in rejecting the recommendation for award of the subject tender on grounds of

insufficient budgetary provision and issuing written reasons for doing so was within his statutory mandate.

108. The Respondents further submitted that the Applicant had labored under gross misapprehension of the facts regarding budgetary provision for a procurement exercise since according to it, the fund value of Kshs. 2.99 Billion represented adequate budget for the subject tender which is patently false and misleading.

109. The Respondents reiterated that the subject procurement proceedings in the subject tender were terminated in accordance with Section 63 of the Act.

BOARD'S DECISION

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

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

In determining the first issue, the Board shall make a determination on the following sub-issues:

i Whether the Applicant has locus standi before the Board;



ii *Whether the procurement proceedings in the subject tender were terminated in accordance with Section 63 of the Act thereby ousting the jurisdiction of the Board pursuant to Section 167(4)(b) of the Act?*

Depending on the determination of the first issue

B. Whether the Board has statutory powers to punish for contempt of court orders issued by a superior court?

C. Whether evaluation of the Applicant's tenders submitted in the subject tender was carried out in accordance with the provisions of the Tender Document as read with Section 80(2) of the Act and Article 227(1) of the Constitution.

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

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

111. It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a

matter of prudence enquire into it before doing anything concerning such a matter.

112. Black's Law Dictionary, *8th Edition*, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

113. The celebrated Court of Appeal decision in **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989]eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

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

114. The Supreme Court added its voice on the source of jurisdiction of a court or other decision making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;

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

115. In the persuasive authority from the Supreme Court of Nigeria in the case of **State v Onagoruwa [1992] 2 NWLR 221 – 33 at 57 – 59** the Court held:

"Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common place, indeed a well beaten legal track, that jurisdiction

is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based."

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

"...So central and determinative is the issue of jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

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

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



u

118. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

119. This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides:

"(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

120. Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

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

121. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

122. The jurisdiction of the Board is provided for and also limited under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

(2)

(3)

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

(1)—

(a) the choice of a procurement method;



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

(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

123. Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Section 172 and 173 of the Act which donates powers to



the Board with respect to an administrative review of procurement proceedings before the Board. It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

i Whether the Applicant has locus standi before the Board;

124. The 1st and 2nd Respondents contends at paragraphs 24 and 25 (a) of their Memorandum of Response dated 12th July 2024 that the Applicant failed to meet the threshold requirement for filing a competent request for review under Section 167(1) of the Act hence lacks the requisite locus standi to institute the proceedings herein on account of failure by the Applicant to disclose having suffered loss or damage due to the alleged breach of duty imposed on the Procuring Entity. In support of their argument, they made reference to the holding by the Court of Appeal in *James Oyondi t/a Betoyo Contractors & Anotehr v Elroba Enterprises Limited & 8 others (2019) eKLR (Mombasa Civil Appeal No. 131 of 2018)* (hereinafter referred to as "the James Oyondi case").



125. In response, the Applicant submitted that it had filed a competent Request for Review in line with Section 167(1) of the Act and that loss and damage suffered had been disclosed.

126. This Board is cognizant of the holding in the James Oyondi case where the Court of Appeal was called upon to render itself in an appeal challenging the decision of the High Court which held that the Board ought to have ruled that the Appellants had no locus standi before it as they had not demonstrated that they had suffered loss or were likely to suffer loss. The Court of Appeal held as follows:

"That ought to dispose of this appeal but on the second issue as well, the learned Judge cannot be faulted. It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;

"(1) subject to the provisions of this part, a candidate or a tender, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the

alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.”

It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. Were that the case, the Board would be inundated by an avalanche of frivolous review applications. There is sound reason why only candidates or tenderers who have legitimate grievances may approach the Board. In the present case, it is common ground that the appellants were eliminated at the very preliminary stages of the procurement process, having failed to make it even to the evaluation stage. They therefore were, with respect, the kind of busy bodies that section 167(1) was designed of keep out. The Board ought to have ruled them to have no locus, and the learned Judge was right to reverse it for failing to do so. We have no difficulty upholding the learned Judge.

[Emphasis]

127. In essence, the Court of Appeal held that in seeking an administrative review before the Board, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage

due to the breach of a duty imposed on a procuring entity by the Act or Regulations 2020.

128. Having carefully perused the instant Request for Review, we note that the Applicant pleaded at paragraphs 22 as follows:

"22. The Respondent's decision purporting for a second time to terminate the tender is unlawful, arbitrary, made in bad faith and unreasonable."

129. The Applicant further pleaded at paragraph 28 and 30 of its Supporting Affidavit sworn on 5th July 2024 by Simon Wafubwa as follows:

"28. THAT it is in the interest of justice and principles of equity that the Respondents second termination notice dated 27th June 2024 be struck out as the same is brought in bad faith, and with the sole purpose of depriving the Applicant the right to enjoy the fruits of a regularly entered judgement against the Respondents.

.....

30. THAT the Applicant stands to suffer irreparable loss if this application is not heard."

130. We note that the Applicant filed a Further Affidavit sworn on 19th July 2024 by Simon Wafubwa and pleaded at paragraphs 11,14, and 16 as follows:

"11. THAT in response to Paragraph 24 to 25 of the Memorandum of Response, the Applicant has suffered



loss and/or damage, which continues due to the Respondents arbitrary non-compliance of the High Court orders and orders issued by this Honourable Board regarding the subject tender. The Respondents have in disobedience of the said orders proceeded to illegally and unlawfully terminate the subject tender.

.....

14. THAT the Applicant has as a result suffered loss and damage and continues to suffer loss from the Respondents' conduct of failure to comply with the Court orders and its blatant and unlawful refusal to proceed and award the tender to the Applicant, as the successful bidder in the subject tender.

.....

16. THAT the Applicant has demonstrated the loss it has suffered and continues to suffer as the highest evaluated bidder in the subject tender, as a result of breach of duty by the Respondents. This Honourable Board has jurisdiction to hear and determine the review application herein under section 167(1) of the Act."

131. From the foregoing, it is clear that the Applicant at the very least claimed that it has suffered and stands to suffer monumental loss and damage due to the decision of the Procuring Entity. This is in itself an express claim and demonstration by the Applicant that it has suffered or risks suffering loss or damage as a result of breach of duty by the Procuring Entity and therefore meets the threshold requirement for a



tenderer intending to file a review before the Board in terms of Section 167(1) of the Act.

132. In the circumstances, we find and hold that the Applicant has the *locus standi* to seek an administrative review by the Board in the subject tender. Accordingly, this ground of opposition by the 1st and 2nd Respondent fails.

ii Whether the procurement proceedings in the subject tender were terminated in accordance with Section 63 of the Act thereby ousting the jurisdiction of the Board pursuant to Section 167(4)(b) of the Act?

133. The 1st and 2nd Respondent contends at paragraphs 23 and 25 (b) of their Memorandum of Response dated 12th July 2024 the Board's jurisdiction is ousted by Section 167(4)(b) of the Act. It is the Respondents case that since the procurement proceedings in the subject tender were terminated in line with Section 63 of the Act, 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 review by the Board and as such, the instant Request for Review ought to be struck out and/or dismissed with costs to the Respondents.

134. In response, the Applicant submitted that Respondents conduct in the procurement proceedings of the subject tender paints a picture of willfully, knowingly and deliberately failing to award the subject tender

to it being the best evaluated bidder. It is the Applicant's case that the Respondents decision to terminate the subject tender was unlawful and did not meet the threshold stipulated under Section 63 of the Act there being no demonstration that the procedural and substantive requirements were met so as to divest the Board of its jurisdiction.

135. This Board notes that termination of procurement proceedings is governed by Section 63 of the Act. When a termination of procurement and asset disposal proceedings meets the threshold of Section 63 of the Act, 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]

136. Superior Courts of this country have on numerous occasions offered guidance on the interpretation of Section 167(4) of the Act and the ousting of the Board's jurisdiction on account of the subject matter relating to termination of tenders. The High Court in **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR**, 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.

137. The High 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.



138. 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"

139. The above judicial pronouncements mirror the position of this Board in its previous decisions in **PPARB Application No. 5 of 2021; Daniel Outlet Limited v Accounting Officer Numeric Machines Complex Limited; PPARB Application No. 29 of 2023 Craft Silicon Limited v Accounting Officer Kilifi County Government & another; and PPARB Application No. 5 of 2024 Seluk Investments Limited v The Accounting Officer/Chief Officer Department of Urban Development County Government of Machakos & Another.**

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

141. 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."**

142. 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.

143. 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.

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

144. Vide a letter dated 27th June 2024, the Applicant was notified that the procurement process in the subject tender had been terminated on account of inadequate budgetary provision. The said letter reads in part as follows:

".....

2.0 This is to advise that after subjecting the bidders to the financial evaluation as ordered by the Public Procurement Administrative Review Board in its Ruling dated 28th March 2024, the financial proposal of the responsive bid at 0.25% of the fund was equivalent to Kes. 8,671,000/- which is beyond the Kes. 2,050,185 budget allocation for the subject procurement.

3.0 Further, please note that the KNEC SRBS 2011 could not proceed with the Competitive negotiations as this would be in contravention of Section 132(2)(b) of the Public Procurement and Assets Disposal Act, 2015 which limits invitation for competitive negotiations to



tenderers whose evaluated prices are not more than twenty five percent (25%) above the available budget.

4.0 Accordingly, and in view of the foregoing, the subject tender has been terminated as per Section 63(1)(b) 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 on account of inadequate budgetary provision.

5.0 KNEC SRBS 2011 is committed to ensure that its procurement processes are as per Article 227 of the Constitution of Kenya 2010 which states that, when a state organ or 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.

.....

(signed)

Dr. Ibrahim Otieno,

Chairman, Board of Trustees,

KNEC Staff Retirement Benefits Scheme 2011



145. According to the above notification letter, the procurement proceedings in the subject tender were terminated due to inadequate budgetary provision pursuant to Section 63(1)(b) of the Act. We note that this is the second time that the procurement proceedings in the subject tender are being terminated albeit for a different reason.

146. The Board in its Decision dated 28th February 2024 in **PPARB Application No. 99 of 2023 Astronea Construction Limited v The Accounting Officer, County Government of Bomet & Another** considered a similar issue of termination of procurement proceedings due to inadequate budgetary provision and held as follows at paragraphs 177 to 179:

"177. Section 63(1)(b) 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 inadequate budgetary provision.

178. Cambridge Dictionary defines the word 'inadequate' to mean 'too low in quality or too small in amount; not enough' and 'budget' to mean 'the amount of money you have available to spend'. We can therefore deduce that the meaning of inadequate budgetary provision in public procurement to be that the amount of money a procuring entity has to spend is too low or not enough to meet the needs of its user department.



179. Budgetary concerns are a key issue in public procurement. Section 44(1) of the Act provides that an accounting officer of a public entity is primarily responsible for ensuring that the public entity complies with the Act. Further 44 (2)(a) of the Act requires the accounting officer in performance of his/her responsibilities to ensure that procurement of goods, works and services of the public entity are within the approved budget of that entity.

147. In view of the above holding, the Board must now determine whether the reasons advanced by the Respondents in the instant Request for Review to justify termination of procurement proceedings in the subject tender were as a result of inadequate budgetary provisions in line with Section 63(1)(b) of the Act.

148. From the confidential documents submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act, we note that the Respondents submitted a budget labelled KNECSRBS Budget 2023 being the Kenya National Examinations Council Retirement Benefit Scheme 2011 Budget for the Year Ending June 2024. Contrary to submissions made by Mr. Tito, counsel for the Applicant during the hearing, the Board being in receipt of the confidential documents in the subject tender confirms that the same is the Procuring Entity's Approved Budget and not financial statements as alleged. We say so because the Respondents also submitted to this Board Minutes of the Board of Trustees Meeting held on Wednesday 26th September 2023 at



the Kenya National Examination Council Offices, New Mitihani House, South C from 3.00 p.m labelled 'BOT Minutes 26.9.2023' which provided under Clause 5.4 Presentation of the Scheme Budget for the Year 2023/24 which reads in part as follows:

"5.4.2 The Scheme's main expenses were budgeted as follows: Administration Fees KShs. 2,050,185; Fund Manager Fees KShs. 6,586,401 and custodial fees of KShs. 3,202,103.00"

149. Table 9: Scheme Proposed Budget for year 2023/2024 in the said Minutes also indicated that under year 2023/2024 Budget, Administration Fees was provided for at Kshs. 2,050,185. Additionally, we note under Clause 8.1.3 that the Committee requested the Board of Trustees to adopt the administration committee report and the same was approved as presented as follows:

"8.1.4 Board of Trustees Resolution

8.1.4.1 The board approved the request in the committee as presented.

8.1.4.2 The report was proposed by Mr. L Adhiambo and seconded by Mr. P. Nderitu for adoption by the board."

150. Having carefully studied the Procuring Entity's Budget, we note that the same provided for Administration Fees under Expenses as follows:

<i>.....</i>	<i>2021/20 22 Actual</i>	<i>2022/20 23 Projected</i>	<i>2022/20 23 Actual</i>	<i>2023/20 24 Budget</i>	<i>Note s</i>

.....
Expenses	1,988,00	2,038,00	2,000,18	2,050,18	6
Administrati	0	0	5	5	
on Fees					
.....

151. According to the above Scheme Budget for the Year Ending June 2024, it is clear to the Board that the budget for Administration Fees was provided at Kshs. 2,050,185.00 which was above the Applicant's quoted tender price of Kshs. 8,671,000.

152. An argument was advanced by counsel for the Applicant Mr. Tito that both the Board in its Decision of 28th March 2024 and the High Court in its Judgment in the Judicial Review directed the Respondents to proceed with the procurement proceedings in the subject tender to its logical conclusion which meant awarding the subject tender to the Applicant, being the best evaluated bidder. In **PPARB Application No. 62 of 2023 Shemax Consult Limited v The Accounting Officer, National Health Insurance Fund**, the Board held as follows:

"Further, in directing the Procuring Entity to proceed with the procurement process in strict compliance with the applicable law, the Procuring Entity was required to take into consideration the findings made by the Board

on termination proceedings in the event that in proceeding with the procurement proceedings, it resulted to terminate the six tenders. Had the Board expressly intended for the Procuring Entity to proceed with the six tenders by issuing a new tender submission date for the said tenders as alleged by the Applicant in the instant Request for Review, it would have stated as much in its findings and orders issued in its decision dated 7th July 2023 in Request for Review No. 43 of 2023. Proceeding with the procurement process in strict compliance with the applicable law is not limited to opening of tenders, evaluation of tenders, and award to the successful tenderer but also includes inter alia termination of procurement proceedings as stipulated under Section 63 of the Act.”

153. In view of the above, we note that compliance with the Order directing the Respondents to ensure that the procurement proceedings in the subject tender proceeds to its lawful and logical conclusion required the 1st Respondent to ensure that the procurement proceedings in the subject tender proceeded as per the provisions of the Act, the Constitution and Regulations 2020 while taking into consideration what the Board had found in the said decision and included *inter alia* termination of procurement proceedings as stipulated under Section 63 of the Act.



154. We note from the confidential documents that once the High Court rendered its decision in the Judicial Review, the Deputy Director, SCM issued a Fourth Professional Opinion dated 14th June 2024 indicating that the Pension Scheme has sufficient budget to carry out the procurement activity while recommending that the Applicant be awarded the subject tender having emerged as the bidder with the highest combined technical and financial score of 97.6 Points at its quoted price of 0.25% of the fund equivalent to Kshs. 8,671,000. However, the 1st Respondent did not approve the recommendation due to budgetary constraints and issued a Memo dated 14th June 2024 to the Deputy Director, SCM which reads in part:

"2.0 Based on the above observations, I wish to point out that the resultant contract price of Kes. 8,671,000 is beyond the Kes. 2,050,185 budgetary allocation for the subject procurement."

155. We note that the matter was subsequently referred back to the Evaluation Committee which having reconsidered its recommendation in view of the issue of the budgetary allocation for the subject tender, issued an Evaluation Report dated 18th June 2024 recommending for termination of the subject tender in view of the fact that the tender price quoted by the Applicant was over and beyond the available budgetary allocation provided of Kshs. 2,050,185 and as such, the procurement proceedings ought to be terminated on account of inadequate budgetary provision in line with Section 63(1)(b) of the Act. Upon receipt of the Evaluation Report, the Deputy Director, SCM issued a fifth Professional Opinion dated 18th June 2024 recommending

termination of the subject tender on account of inadequate budgetary provision and the said termination was approved by the 1st Respondent.

156. In view of the foregoing, we find that the Respondents have fulfilled the substantive requirements for termination of procurement proceedings in the subject tender as required by Section 63(1)(b) of the Act.

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

157. 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 27th June 2024 and the Board is of the considered view that sufficient reasons pertaining to the reason of termination on account of inadequate budgetary provision pursuant to Section 63(1)(b) of the Act was issued to all tenderers thus mustering the threshold of termination notice contemplated under Section 63(4) of the Act.

158. We also note that the 1st Respondent vide letter dated 2nd July 2024 submitted a written report on termination of the subject tender addressed to the Director General of the Public Procurement Regulatory 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 addressing the reasons for termination of the subject tender. 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 been met by the Respondents.

What orders should the Board grant in the circumstances?

159. We have established that the Respondents satisfied both the substantive and procedural statutory pre-conditions of termination of procurement proceedings in line with Section 63(1)(b) of the Act and as such, termination of the procurement proceedings of the subject tender was done in accordance with Section 63 of the Act.

160. 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. It therefore follows that the instant Request for Review is struck out for want of jurisdiction.

FINAL ORDERS

161. 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 5th July 2024 and filed on even date:


A. The Applicant's Request for Review dated 5th July 2024 and filed on even date with respect to Tender No. KNECSRBS/EOI/2023-2024/01 for Provision of Scheme



Administration Consultancy Services be and is hereby struck out for want of jurisdiction.


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

Dated at NAIROBI this 26th Day of July 2024.


.....

CHAIRPERSON

PPARB


.....

SECRETARY

PPARB