

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 61/2024 OF 8TH JULY 2024

BETWEEN

SPENOMATIC KENYA LIMITED APPLICANT

AND

THE GENERAL MANAGER/CEO,

EAST AFRICAN PORTLAND

CEMENT PLC RESPONDENT

CENTRAL ELECTRICALS INTERNATIONAL

LIMITED..... INTERESTED PARTY

Review against the decision of the General Manager/CEO, East African Portland Cement PLC in relation to RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant.

BOARD MEMBERS PRESENT

- | | | |
|------------------------|---|-------------------|
| 1. Mr. Joshua Kiptoo | - | Panel Chairperson |
| 2. Mr. Alexander Musau | - | Member |
| 3. Ms. Alice Oeri | - | Member |
| 4. Dr. Susan Mambo | - | Member |

IN ATTENDANCE

- | | |
|------------------------|---------------|
| 1. Mr. Philemon Kiprop | - Secretariat |
| 3. Ms. Evelyn Weru | - Secretariat |

PRESENT BY INVITATION

APPLICANT **SPENOMATIC KENYA LIMITED**

Mr. Manyara h/b for

Mr. Mwaura - Advocate, Karuru Mwaura & Company
Advocates

RESPONDENTS **THE GENERAL MANAGER/CEO,
EAST AFRICAN PORTLAND CEMENT PLC**

Mr. Moses Muchiri - Advocate, Mwaniki Gachoka & Co. Advocates

INTERESTED PARTY **CENTRAL ELECTRICALS INTERNATIONAL
LTD**

N/A

BACKGROUND OF THE DECISION

The Tendering Process

1. Vide an Expression of Interest (hereinafter referred to as "EOI") for listing of firms for the Development of Captive Solar Generation advertised on 18th November 2022 on the Daily Nation Newspaper, East African Portland Cement PLC, the Procuring Entity and 2nd Respondent herein, invited interested and eligible bidders to make applications for the development of the Captive Solar Generation. The

EOI submission deadline was on 25th November 2022.

2. Following the EOI, the following firms were shortlisted (hereinafter referred to as "the shortlisted firms") by the 1st Respondent:

No.	Name
1.	Central Electrical International
2.	Spenomatic Kenya Limited
3.	Voltalia Kenya Services Limited
4.	Imexolutions Limited
5.	Ofgen Energy Solutions Simplified
6.	Ric Energy

3. On 17th April 2023, the Procuring Entity invited sealed requests for proposals from the shortlisted firms being the pre-qualified bidders in response to RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant (hereinafter referred to as "the subject tender"). The blank tender document for the subject tender was addressed to the shortlisted firms and had an initial closing date of Thursday, 4th May 2023 but this date was extended twice vide Addendum No. 1 dated 28th April 2023 and Addendum No. 2 dated 15th May 2023 upon request by some of the bidders. The new closing date was pushed to Tuesday, 23rd May 2023.

Submission of Tenders and Tender Opening

4. According to the Minutes of the subject tender’s opening held on 23rd May 2023 signed by members of the Tender Opening Committee on 23rd May 2023 (hereinafter referred to as the ‘Tender Opening Minutes’) and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the ‘Board’) by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the ‘Act’), a total of five (5) tenders were submitted in response to the subject tender. The said five (5) tenders were opened in the presence of tenderers’ representatives present at the tender opening session, and were recorded as follows:

No.	Name of Tenderer
1.	Central Electricals International Ltd
2.	Ric Energy Kenya Limited
3.	Spenomatic Kenya Limited
4.	Imexolutions Ltd
5.	Ofgen- Hdec Consortium

Evaluation of Tenders

5. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the five (5) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 4th August 2023 (hereinafter referred to as the "Evaluation Report") (which Evaluation Report was furnished to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act), in the following stages:

- a) Preliminary Examination for Determination of Responsiveness;
- b) Evaluation of the Technical Proposal; and
- c) Evaluation of the Financial Proposal.

Preliminary Examination for Determination of Responsiveness

6. The Evaluation Committee was required to carry out a preliminary evaluation of tenders in the subject tender using the criteria provided under Clause 2.1 Preliminary Evaluation Criteria Mandatory Requirements for Preliminary Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 23 to 24 of the Tender. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the Evaluation of the Technical Proposal stage.

7. According to the Minutes of the subject tender's held on 25th and 31st May 2023 and signed by members of the Evaluation Committee on 31st May 2023, at the end of evaluation at this stage, two (2) tenders were determined non-responsive while three (3) tenders including the

Applicant's and Interested Party's tenders were determined responsive. The three (3) tenders that were determined responsive proceeded for evaluation at the Evaluation of the Technical Proposal stage.

Evaluation of the Technical Proposal

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 3 Evaluation of the Technical Proposal of Section III – Evaluation and Qualification Criteria at page 25 to 27 of the Tender Document. Tenders were required to attain 80% pass mark to proceed for Evaluation of the Financial Proposal.
9. According to the Minutes of the subject tender's held on 13th and 17th June 2023 and signed by members of the Evaluation Committee on 17th June 2023 (hereinafter referred to as the "Technical Evaluation Report"), at the end of evaluation at this stage, only the Interested Party's tender had met the pass mark score of 80% in the Evaluation of the Technical Proposal and was determined responsive and thus proceeded for evaluation at the Evaluation of the Financial Proposal stage.

Financial Evaluation

10. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 3.2 Price Schedule and Financial Evaluation Requirements BOQ of Section III –

Evaluation and Qualification Criteria at page 27 to 34 of the Tender Document.

11. At the end of evaluation at this stage, the Evaluation Committee independently undertook a cost analysis per unit of energy produced for the photovoltaic systems in current solar energy space and compared with the Interested Party's submission in its tender in order to appreciate the competitiveness of the pricing as can be discerned in the Minutes of the subject tender's held on 18th July 2023 and signed by members of the Evaluation Committee on 18th July 2023.

Evaluation Committee's Recommendation

12. The Evaluation Committee recommended the award of the subject tender to the Interested Parties at its quoted total bid price of Kshs. 572,790,267/= inclusive of all taxes having (i) met the qualification criteria, (ii) been determined to be substantially responsive to the Tender Document, and (iii) been determined to have the lowest tender price.

First Professional Opinion

13. In a Professional Opinion dated 18th July 2023 (hereinafter referred to as the "First Professional Opinion"), the Head of Supply Chain, Mr. Moses Sudi, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect

to award of the subject tender to the Interested Party. He thus requested the 1st Respondent to approve the award of the subject tender as per the recommendation of the Evaluation Committee.

14. The Professional Opinion was furnished to the Board by the 1st Respondent as part of confidential documents pursuant to Section 67(3)(e) of the Act.

Notification to Tenderers

15. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Award dated 11th September 2023.

REQUEST FOR REVIEW NO. 65 OF 2023

16. On 25th September 2023, the Applicant herein, filed a Request for Review No. 652 of 2023 dated 25th September 2023 together with an Affidavit in Support of the Request for Review sworn on 25th September 2023 by Mohamed Taki Rashid, the Applicant's Head of Marketing and Tendering (hereinafter referred to as "Request for Review No. 65 of 2023) through the firm of Nyamu & Nyamu Advocates LLP seeking the following orders:

a) THAT the Notice of the decision by the Procurement Entity for Tender No. EAPCPLC/RFP/009/2023 dated 11th September 2023 be set aside.

b) THAT the Public Procurement Administrative Review Board reviews the scores entered by the Procurement Entity, the tender documents and awards the tender to the applicant. In the alternative this Honorable review Board directs the Procuring entity to evaluate the Applicant's bid at Technical Stage and to award the appropriate marks to the Applicant.

c) This Honourable Review Board substitutes the decision by the Procurement Entity made on 11th September 2023, with a decision awarding the tender herein to the Applicant.

d) The Public Procurement Administrative Review Board directs the procurement Entity to pay exemplary costs to the Applicant.

e) Any other relief that this honourable Review Board may deem fit to grant.

17. The Board considered the parties' pleadings, documents, written and oral submissions, the list and bundle of authorities together with the confidential documents submitted by the Respondent to the Board pursuant to Section 67(3) (e) of the Act and found the following issues called for determination in the Request for Review No. 65 of 2023:

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

In determining the first issue, the Board will make a determination on whether the Request for Review is fatally defective as a result of the Applicant's failure to join the successful bidder as a party to the Request for Review, thus divesting the Board of jurisdiction;

Depending on the determination of the first issue;

ii. Whether the Applicant's tender in response to the subject tender was evaluated in accordance with the criteria set out at Clause 3 Evaluation of the Technical Proposal of Section III- Evaluation and Qualification Criteria of the Tender Document read with Section 80(2) of the Act and Article 227(1) of the Constitution;

iii. Whether the Letter of Notification dated 11th September 2023 met the threshold required in Section 87(3) of the Act read with Regulations 2020;

iv. What orders should the Board grant in the circumstances.

18. On the first issue framed for determination, the Board found that the Applicant's failure to join the successful bidder to the proceedings in

the instant Request for Review did not make the application fatally incompetent as the Interested Party actively participated in the proceedings and as such, the Board found it had jurisdiction to hear and determine the issues raised in the instant Request for Review.

19. On the second issue framed for determination, the Board found that the Evaluation Committee failed to evaluate the Applicant's tender submitted in response to the subject tender in accordance with the criteria set out as Clause 3 Evaluation of the Technical Proposal of Section III- Evaluation and Qualification Criteria of the Tender Document read with Section 80(2) of the Act and Article 227(1) of the Constitution.
20. On the third issue framed for determination, the Board found that the letters of notification of the outcome of the subject tender did not meet the threshold required in Section 126(4) and 87(3) of the Act read with Regulation 82(3) of Regulations 2020 and were therefore null and void.
21. On 16th October 2023, and in exercise of the powers conferred upon it under the Act, the Board made the following final orders with respect to Request for Review No. 65 of 2023:

a) The Letter of Notification of Award issued to the Interested Party dated 11th September 2023 with respect to RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant, be and is

hereby nullified and set aside.

b) The Letters of Regret Notification dated 11th September 2023 issued to the Applicant and other unsuccessful tenderers with respect to RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation, commissioning of a Grid tied Solar PV Plant, be and are hereby nullified and set aside.

c) The 1st respondent is ordered to direct the Procuring Entity's Evaluation Committee to admit the Applicant's tender, together with all other tenders that were determined responsive at the Preliminary Examination stage for re-evaluation at the Technical Proposal stage taking into consideration the Board's findings in this Request for Review.

d) Further to Order No. (c), the 1st Respondent is hereby ordered to proceed with the procurement process of RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant to its logical conclusion within fourteen (14) days of this decision in accordance with the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution.

e) Given that the procurement process/proceedings of the

subject tender is not complete, each party shall bear its own costs in the Request for Review.

22. No evidence was tendered by any party in Request for Review No. 65 of 2023 demonstrating that a party to the Request for Review No.65 of 2023 sought judicial review by the High Court of the Board's Decision dated 16th October 2023 in Request for Review No. 65 of 2023. In the absence of such evidence, it is just to hold that the Board's Decision dated 16th October 2023 in Request for Review No. 65 of 2023 became final and binding to all parties to Request for Review No. 65 of 2023 after the lapse of 14 days from 16th October 2023 in accordance with Section 175(1) of the Act.

RE-EVALUATION OF THE SUBJECT TENDER

Evaluation of the Technical Proposal

23. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 3 Evaluation of the Technical Proposal of Section III – Evaluation and Qualification Criteria at page 25 to 27 of the Tender Document. Tenders were required to attain 80% pass mark to proceed for Evaluation of the Financial Proposal.

24. According to the Minutes for Tender Re-Evaluation of the subject tender's held on 25th and 26th October 2023 and signed by members of

the Evaluation Committee on 26th October 2023 (hereinafter referred to as the "Technical Re-Evaluation Report"), at the end of evaluation at this stage, only the Interested Party's tender had met the pass mark score of 80% in the Evaluation by scoring 88.76% and was determined responsive and thus proceeded for evaluation at the Evaluation of the Financial Proposal stage.

Financial Evaluation

25. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 3.2 Price Schedule and Financial Evaluation Requirements BOQ of Section III – Evaluation and Qualification Criteria at page 27 to 34 of the Tender Document.

26. At the end of evaluation at this stage, the Evaluation Committee independently undertook a cost analysis per unit of energy produced for the photovoltaic systems in current solar energy space and compared with the Interested Party's submission in its tender in order to appreciate the competitiveness of the pricing as can be discerned in the Minutes of the subject tender's held on 26th October 2023 and signed by members of the Evaluation Committee on 26th October 2023. The Evaluation Committee concluded that the bid sum submitted by the Interested Party was within the average market prices as evidenced by the Market Survey Report.

Evaluation Committee's Recommendation

27. The Evaluation Committee recommended the award of the subject tender to the Interested Parties at its quoted total bid price of Kshs. 572,790,267/= inclusive of all taxes having (i) met the qualification criteria, (ii) been determined to be substantially responsive to the Tender Document, and (iii) been determined to have the lowest evaluated tender price.

Second Professional Opinion

28. In a Professional Opinion dated 27th October 2023 (hereinafter referred to as "the Second Professional Opinion"), the Head of Supply Chain, Mr. Moses Sudi, reviewed the manner in which the subject procurement process was undertaken including re-evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to the Interested Party. He thus requested the 1st Respondent to approve the award of the subject tender as per the recommendation of the Evaluation Committee.

29. The Professional Opinion was furnished to the Board by the 1st Respondent as part of confidential documents pursuant to Section 67(3)(e) of the Act.

Notification to Tenderers

30. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award dated 30th October 2023.

REQUEST FOR REVIEW NO. 94 OF 2023

31. On 10th November 2023, being dissatisfied with the decision of the Procuring Entity, the Applicant herein filed Request for Review No. 94 of 2023 together with an Affidavit in Support of the Request for Review sworn on 10th November 2023 by Mohamed Taki Rashid, its Head of Marketing and Tendering (hereinafter referred to as "Request for Review No. 94 of 2023") through Nyamu & Nyamu Co. Advocates LLP seeking for the following orders:

a) THAT the Notice of the decision by the Procuring Entity for Tender No. EAPCPLC/RFP/009/2023 dated 30th October, 2023 be set aside.

b) THAT the Public Procurement Administrative Review Board orders appropriate evaluation of the tender No. EAPCPLC/RFP/009/2023 and in adherence of the Public Procurement and Asset Disposal Act 2015 and Article 227 of the Constitution of Kenya 2010 and Paragraph 107(d)&(e) and 108 of the Decision PPARB Case No. 65 of 2023.

c) This Honourable Review Board sets aside the decision by the Procurement Entity made on 30th October 2023,

declare the same illegal and unconstitutional.

d) The Public Procurement Administrative Review Board directs the procurement Entity to pay exemplary costs to the Applicant.

e) Any other relief that this honourable Review Board may deem fit to grant.

32. The Board considered the parties' pleadings, documents, written submissions, the list and bundle of authorities together with the confidential documents submitted by the Respondents to the Board pursuant to Section 67(3) (e) of the Act and found the following issues called for determination in the Request for Review No. 94 of 2023:

a) Whether the Respondents complied with the orders of the Board issued on 16th October 2023 in Request for Review No. 65 of 2023.

b) What orders should the Board grant in the circumstances.

33. On the first issue for determination, the Board found that in view of the orders issued by the Board on 16th October 2023 in Request for Review No. 65 of 2023, the Respondents failed to score the Applicant accordingly as provided for in the Tender Document where the Applicant had met the stipulated requirements and that the Evaluation

Committee failed to evaluate the Applicant's tender in accordance with the criteria provided for Evaluation of the Technical Proposal of Section III- Evaluation and Qualification Criteria of the Tender Document read with Section 80(2) of the Act and Article 227(1) of the Constitution and in doing so, failed to comply with the orders of the Board issued on 16th October 2023 in Request for Review No. 65 of 2023.

34. The Board deemed it fit to nullify the letter of notification of intention to award and letters of regret dated 30th October 2023 and order the 1st Respondent to direct the Evaluation Committee to re-admit the Applicant's tender together with all other tenders that were determined responsive at the Technical Proposal stage taking into consideration its findings in Request for Review No. 94 of 2023.

35. On 1st December 2023 and in exercise of the powers conferred upon it by the Act, the Board made the following final orders with respect to Request for Review No. 94 of 2023:

a) The Letter of Notification of Award issued to the Interested Party dated 30th October 2023 with respect to RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant, be and is hereby nullified and set aside.

b) The Letters of Regret Notification dated 30th October 2023 issued to the Applicant and other unsuccessful tenderers with respect to RFP No.

EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant, be and are hereby nullified and set aside.

c) The 1st respondent is hereby ordered to direct the Procuring Entity's Evaluation Committee to re-admit the Applicant's tender, together with all other tenders that were determined responsive at the Preliminary Examination stage for re-evaluation at the Technical Proposal stage taking into consideration the Board's findings in this Request for Review.

d) Further to Order No. (c), the 1st Respondent is hereby ordered to proceed with the procurement process of RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant to its logical conclusion within fourteen (14) days of this decision in accordance with the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution.

e) Given that the procurement process/proceedings of the subject tender is not complete, each party shall bear its own costs in the Request for Review.

NAIROBI HIGH COURT JUDICIAL REVIEW CIVIL APPLICATION NO. E140 OF 2023 (hereinafter referred to as "the Judicial Review")

36. Dissatisfied with the Decision of the Board dated 1st December 2023 in Request for Review No. 94 of 2023, the Applicant sought judicial review by the High Court against the said decision in Nairobi High Court Judicial Review Civil Application No. E140 of 2023 where it sought for:

"An Order of certiorari to remove into this Honourable Court for purposes of being quashed the entire decision and orders of the Public Procurement Administrative Review Board, the respondent herein, made on 1st December, 2023 under the Request for Review Application No. 94/2023 in regards to Request for Proposal No. EAPCPLC/RFP/009/202 for Design, Supply, Installation and Commissioning of a Grid-Tied solar PV Plant."

37. The High Court considered the Judicial Review and held as follows:

"In the ultimate, I am not satisfied that the applicants have made out a case for this Honourable Court to interfere with the respondent's decision dated 1st December 2023. The applicant's motion dated 18th December 2023 is dismissed. Parties will bear their respective costs. Orders accordingly."

**NOTICE OF MOTION IN REQUEST FOR REVIEW NO. 94 OF 2023 FILED
ON 5TH MARCH 2024**

38. On 5th March 2024, Central Electricals International Ltd filed under Certificate of Urgency dated 5th March 2024 a Notice of Motion application dated 5th March 2024 together with a Supporting Affidavit sworn by Mohamed Taki Rashid, its Head of Marketing and Tendering, on 5th March 2024 through the firm of Nyamu & Nyamu Company Advocates (hereinafter referred to as "Notice of Motion Application dated 5th March 2024"), seeking the following orders:

a) THAT the matter herein be certified as urgent and the same be heard ex-part in the first instance.

b) THAT the honorable Board be pleased to issue an order extending the tender validity period in respect to the Respondent's RFP NO. EAPCLC/RFP/009/2023 for DESIGN, SUPPLY, INSTALLATION AND COMMISSIONING OF A GRID TIED SOLAR PV PLANT.

c) Any other relief this Board may deem fit to grant.

d) THAT the cost of this application be in the cause.

39. The Board considered the parties' pleadings, documents, written submissions, the list and bundle of authorities together with the confidential documents submitted by the Respondents to the Board pursuant to Section 67(3) (e) of the Act and found the following issues called for determination in the Notice of Motion Application dated 5th March 2024:

a) Whether the Board should extend the subject tender's validity period as prayed in the instant Notice of Motion application?

b) What orders should the Board grant in the circumstances?

40. On the first issue for determination, the Board found that the Respondent failed to comply with the orders of the Board dated 1st December 2023 in Request for Review No. 94 of 2023 and deemed it fit and just to extend the subject tender's validity period with a further 244 days from 20th September 2023 and to directed the 1st Respondent to issue written notifications to tenderers in the subject tender notifying them of extension of the subject tender's validity period for a further 244 days from 20th September 2023.

41. On 26th March 2024 and in exercise of the powers conferred upon it by the Act, the Board made the following final orders with respect to the Notice of Motion Application dated 5th March 2024:

- a) The tender validity period of RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant be and is hereby extended for a further 244 days from 20th September 2023.***
- b) Further to Order No. A above, the 1st Respondent is hereby directed to issue written notifications to tenderers in the subject tender notifying them of extension of the tender validity period of RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant for a further 244 days from 20th September 2023.***
- c) The 1st and 2nd Respondents are hereby ordered to comply with the orders of the Board issued on 1st December 2023 in Request for Review No. 94 of 2023 within fourteen (14) days from the date of this decision.***
- d) The Acting Board Secretary is hereby directed to furnish the Director General of the Public Procurement Regulatory Authority with this decision for purposes of following up on the Respondents' compliance with the Orders of the Board as contained the Decision of the Board dated 1st December 2023 in Request for Review No. 94 of 2023.***

e) Given that the procurement process for the subject tender is not complete, each party shall bear its own cost in the Notice of Motion.

NOTICE OF MOTION IN REQUEST FOR REVIEW NO. 94 OF 2023 FILED ON 8TH APRIL 2024

42. On 8th April 2024, The General Manager/CEO East Africa Portland Cement PLC and the Procuring Entity, (the 1st and 2nd Applicants herein), filed under Certificate of Urgency dated 5th April 2024 a Notice of Motion application dated 5th April 2024 together with a Supporting Affidavit sworn by Mohamed Osman Adan, its Ag. Managing Director, on 5th April 2024 through the firm of Mwaniki Gachoka & Co. Advocates (hereinafter referred to as "the Notice of Motion application filed on 8th April 2024"), seeking the following orders:

a) THAT this Honourable Board be pleased to extend the timeline by another 30 days upon which the Procuring Entity is supposed to comply with the orders issued by the Board on 1st December 2024.

b) THAT costs of the application be in the cause.

43. The Board considered the parties' pleadings, documents, written submissions, the list and bundle of authorities together with the confidential documents submitted by the Respondents to the Board pursuant to Section 67(3) (e) of the Act and found the following issues called for determination in the Notice of Motion Application dated 5th April 2024 and filed on 8th April 2024:

a) Whether the Board should extend the timelines to complete the procurement process in the subject tender as prayed for in the instant Notice of Motion application?

b) What orders should the Board grant in the circumstances?

44. On the first issue framed for determination, the Board found the Notice of Motion application merited and deemed it fit and just to grant a 30 days' extension of time within which the 1st and 2nd Applicants were required to comply with the orders of the Board dated 1st December 2023 in Request for Review No. 94 of 2023 and orders of the Board dated 26th March 2024 in the Notice of Motion Application dated 5th March 2024. The Board also deemed it necessary to supervise the procurement process in the subject tender and ordered the 1st and 2nd Respondents to report to the Board on the progress of evaluation of the subject tender including issuance of an award to the successful tenderer.

45. On 24th April 2024 and in exercise of the powers conferred upon it by

the Act, the Board made the following final orders with respect to the Notice of Motion Application dated 5th April 2024 and filed on 8th April 2024:

- a) *The Notice of Motion dated 5th April 2024 and filed on 8th April 2024 be and is hereby allowed.*
- b) *The Procuring Entity be and is hereby granted an extension of Thirty (30) days from the date of this decision to enable it complete the procurement process in the subject tender including issuing an award to the successful tenderer.*
- c) *The tender validity period of RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant be and is hereby extended for a further 30 days from 20th May 2024.*
- d) *Further to Order No. c) above, the Accounting Officer of the Procuring Entity is hereby directed to issue written notifications to tenderers in the subject tender notifying them of extension of the tender validity period of RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant for a further 30 days from 20th May 2024.*
- e) *The Accounting Officer of the Procuring Entity is hereby directed to report to the Board on the progress of evaluation of the subject*

tender including issuance of an award to the successful tenderer within the next 14 days from the date of this decision.

f) Given that the procurement process for the subject tender is not complete, each party shall bear its own cost in the Notice of Motion application.

SECOND RE-EVALUATION OF THE SUBJECT TENDER

46. Vide letter dated 8th May 2024, the 1st Respondent wrote to the Board Secretary updating the Board on the progress of re-evaluation of the subject tender as directed on 24th April 2024.

Evaluation of the Technical Proposal

47. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 3 Evaluation of the Technical Proposal of Section III – Evaluation and Qualification Criteria at page 25 to 27 of the Tender Document. Tenders were required to attain 80% pass mark to proceed for Evaluation of the Financial Proposal.

48. According to the Minutes for Tender Re-Evaluation of the subject tender's held on 9th May 2024 and signed by members of the Evaluation Committee on 9th May 2024 (hereinafter referred to as the "Technical Re-Evaluation Report"), at the end of evaluation at this stage, only the Applicant's tender had met the pass mark score of 80% in the Evaluation by scoring 88.76% and was determined responsive and

thus proceeded for evaluation at the Evaluation of the Financial Proposal stage.

Financial Evaluation

49. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 3.2 Price Schedule and Financial Evaluation Requirements BOQ of Section III – Evaluation and Qualification Criteria at page 27 to 34 of the Tender Document.

50. At the end of evaluation at this stage, the Evaluation Committee independently undertook a cost analysis per unit of energy produced for the photovoltaic systems in current solar energy space and compared with the Applicant's submission in its tender in order to appreciate the competitiveness of the pricing as can be discerned in the Minutes of the subject tender's held on 14th May 2024 and signed by members of the Evaluation Committee on 14th May 2024. The Evaluation Committee concluded that the bid sum submitted by the Applicant was within the average market prices as evidenced by the Market Survey Report.

Evaluation Committee's Recommendation

51. The Evaluation Committee recommended the award of the subject tender to the Applicant at its quoted total bid price of Kshs. 572,790,267/= inclusive of all taxes having (i) met the qualification

criteria, (ii) been determined to be substantially responsive to the Tender Document, and (iii) been determined to have the lowest evaluated tender price.

Third Professional Opinion

52. In a Professional Opinion dated 24th June 2024 (hereinafter referred to as "the Third Professional Opinion"), the Ag. Head of Supply Chain, Ms. Camilla Sielei reviewed the manner in which the subject procurement process was undertaken including re-evaluation of tenders noted the recommendation of the Evaluation Committee with respect to awarding the subject tender to the Applicant. She however recommended for termination of the subject tender due to inadequate budgetary provision.

53. This Professional Opinion was furnished to the Board by the 1st Respondent as part of confidential documents pursuant to Section 67(3)(e) of the Act.

Notification to Tenderers

54. Tenderers were notified of termination of the subject tender vide letters dated 24th June 2024.

REQUEST FOR REVIEW NO. 61 OF 2024

55. On 8th July 2024, being dissatisfied with the decision of the Procuring

Entity, Spenomatic Kenya Limited, the Applicant herein filed Request for Review No. 61 of 2024 together with a Statement in Support of Request for Review dated 8th July 2024 by Berjeesh Dady Surty, its Managing Director (hereinafter referred to as “the instant Request for Review”) through Karuru Mwaura & Company Advocates seeking for the following orders:

- a) The Board suspends, quashes and declares null and void the decision of the Procuring Entity contained in the letter dated 24th June 2024 terminating/ cancelling the entire Tender No. EAPCPLC/RFP/009/2023 FOR Design, Supply, Installation and Commissioning of a Grid Tied Solar PV Plant.***

- b) The Procurement Entity be compelled to produce the summary of the evaluation committee report and the results of the said evaluation generated pursuant to the orders of the Board of 1st December 2023.***

- c) The Procurement Entity be compelled and directed to complete the procurement process of Tender No. EAPCPLC/RFP/009/2023 FOR Design, Supply, Installation and Commissioning of a Grid Tied Solar PV Plant by awarding the subject tender to the successful tenderer as per the evaluation report conducted as directed by the Board on 1st December 2023.***

- d) The Respondent do pay the costs of the Review.***

56. In a Notification of Appeal and a letter dated 8th July 2024, Mr. James Kilaka, the Acting Secretary of the Board notified Central Electricals International Limited (hereinafter referred to as "the Respondent") and Spenomatic Kenya Limited (hereinafter referred to as "the Interested Party") of the filing of the instant Notice of Motion application, while forwarding to them a copy of the Notice of Motion application together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent and Interested Party were requested to submit a response to the instant Notice of Motion application together with confidential documents concerning the subject tender within five (5) days from the date of the Notification of Appeal and letter dated 8th July 2024.
57. 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.
58. On 17th July 2024, the Respondent filed through Mwaniki Gachoka & Co. Advocates a Notice of Appointment dated 15th July 2024, Respondent's Replying Affidavit sworn on 15th July 2024 by Mohamed Osman Adan together with confidential documents concerning the subject

tender pursuant to Section 67(3)(e) of the Act.

59. 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 2.00 p.m., through the link availed in the said Hearing Notice.

60. On 19th July 2024, the Applicant filed through its advocates a Further Statement in Support of Request for Review dated 19th July 2024 by Berjeesh Dady Surty, its Managing Director together with Written Submissions dated 19th July 2024.

61. When the matter came up for hearing on 23rd July 2024, the Board informed parties that one of the panel members was indisposed and as such, the matter was adjourned to 24th July 2024 at 2.00p.m.

62. At the hearing on 24th July 2024, parties were allocated time to proceed and highlight their respective cases. Thus the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicants' submissions

63. In his submissions, counsel for the Applicant, Mr. Manyara relied on the Applicant's documents filed before the Board.

64. Mr. Manyara submitted that the Applicant seeks the Board to quash

the decision of the Procuring Entity contained in the letter dated 24th June 2024 terminating the subject tender.

65. Counsel submitted that the Procuring Entity is in contempt and disregard of the Board's orders of 24th April 2024 as captured at paragraph 17 of the Statement in Support of the Request for Review. He indicated that the Board while considering Request for Review No. 94 of 2024 heard a request by the Respondent seeking for extension of time to comply with the Board's orders of 1st December 2023. He pointed out that the Board's decision of 1st December 2023 was with regard to re-evaluation of tenders submitted in the subject tender.

66. Counsel referred the Board to Order No. E issued on 24th April 2024 where the Respondent was ordered to inform and report to the Board on the progress of the re-evaluation of the subject tender including issuance of a notification of award to the successful tenderer within 14 days from the date of issuance of the said decision. He indicated that this was not complied with as no report was made to the Board nor an award issued to the successful tenderer and instead what the Respondent resulted to was to terminated the subject tender per Section 63(1)(b) of the Act.

67. Counsel referred the Board to annexure No. 2 annexed to the Respondent's Replying Affidavit being a letter dated 24th June 2024 where the Procuring Entity at paragraph 5 indicates that the Evaluation Committee recommended the subject tender be awarded to the

Applicant and instead the communication received by the Applicant from the Procuring Entity was the letter dated 24th June 2024 marked as Annexure 14 whereby it was informed that the subject tender was terminated on the ground of inadequate budgetary provision.

68. Mr. Manyara submitted that the Board has jurisdiction contrary to the Respondent's averments in its Replying Affidavit that the Board lacks jurisdiction to hear the instant Request for Review on account of termination of the subject tender having been carried out pursuant to Section 63 of the Act thus ousting the jurisdiction of the Board pursuant to Section 167(4)(b) of the Act. In support of his argument, counsel referred to the holding in *PPARB Application No. 119 of 2020*.

69. Counsel pointed out that the decision by the Procuring Entity to terminate the subject tender did not meet either the substantive or procedural requirements stipulated in Section 63 of the Act.

70. With regard to the substantive aspects, counsel submitted that from the contents of the letter dated 24th June 2024, the reason for termination was a hoax in view of the fact that pursuant to Section 44 and 53 of the Act, an accounting officer is required to ensure that there is an approved budget prior to any procurement being commenced so as to meet the obligations of any resulting contract.

71. Counsel further submitted that from the averments made by the Respondent at paragraph 7 of its Replying Affidavit on alleged financial

constraints faced by the Procuring Entity, it is not clear how the same affect the procurement process of the subject tender that was ongoing and neither does it state the period when the financial constraints began despite claiming at paragraph 9 that the Procuring Entity had been facing difficulties for an extended period of time.

72. Counsel argued that if indeed the Procuring Entity had been facing financial challenges as alleged, it was a mockery of the Board for it to seek for enlargement of time, in its Notice of Motion application filed on 8th April 2024, for it to complete the procurement process in the subject tender. He further argued that the Procuring Entity ought to have actually raised these allegations instead of pursuing the Judicial Review at the High Court challenging the Board's Decision.

73. Mr. Manyara submitted that the Procuring entity had taken bidders through a tedious process from the year 2022 to date only to terminate the subject tender without even showing where the budget for the same was reallocated to despite there being an approval of the said budget.

74. With regard to the procedural aspects, counsel submitted that the Procuring Entity is required to issue a written report to the Director General of the Public Procurement Regulatory Authority once termination of the subject tender was done but there is no evidence or demonstration that this was adhered to. Mr. Manyara further submitted that from paragraph 11 of the Respondent's Replying Affidavit, it

appears that the Procuring Entity allegedly notified the Board Secretary in line with Section 63 of the Act yet there is no such provision under the Act and to this end, the Respondent did not comply with Section 63 of the Act as it failed to meet the procedural aspects of termination. In support of his argument, counsel referred the Board to the holding in *PPARB Application No. 77 of 2018*.

75. He reiterated that the Respondent was in contempt of the Board's orders of 1st December 2023 and 24th April 2024 and urged the Board to allow the instant Request for Review and grant the orders as prayed.

Respondent's Submissions

76. In his submissions, counsel for the Respondent, Mr. Muchiri relied on the Respondent's 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.

77. Mr. Muchiri submitted that the Board does not have jurisdiction to hear the instant Request for Review in light of Section 167(4)(b) of the Act read with Section 63 of the Act. Counsel further submitted that the subject tender was terminated on 24th June 2024 and the respective bidders and secretariat to the Board informed of the same.

78. Counsel pointed out that the subject tender has been before the Board on various occasions and the Board in its Decision in Request for Review No. 94 of 2023 obligated the Procuring Entity to keep the Board

informed of any progress in evaluation of the subject tender which was the reason for issuance of the letter of 24th June 2024 in response to an enquiry by the Board Secretary vide letter of 8th May 2024.

79. On the issue of lack of an adequate budgetary provision, Counsel invited the Board to consider the Professional Opinion by the Head of Procurement, Ms. Camilla Sielei, where it actually identified that indeed the Applicant was required to be awarded the subject tender but its respective budget had been utilized for purposes of the plant upgrade shutdown of March/April 2024 and as such, there was no sufficient budget for the Procuring Entity to enter into a contract with the Applicant thus the recommendation for termination as there were no funds.
80. Counsel submitted that the issue of funds is a delicate issue since if at all the Procuring Entity is supposed to issue a notification letter and enter into a contract, it would be doing so in a prejudicial basis since it knows that it does not have funds to honor such contract and the bidder would incur loss for meeting its obligations when the Procuring Entity will not manage to pay it for its services.
81. He urged the Board to dismiss the instant Request for Review with costs.
82. When asked by the Board to expound on when the Respondent realized that the budget was not sufficient to sustain further contract,

Mr. Muchiri submitted that according to the Respondent, the plant upgrade shutdown was around April and the same consumed a lot of funds and without a budget for the subject tender, a notification of award letter cannot be issued. He submitted that he was not sure whether the Procuring Entity communicated this information to bidders.

83. When asked to clarify whether the Applicant filed a written report with the Director General, Public Procurement Regulatory Authority as required under Section 63 of the Act, counsel submitted that the Procuring Entity was working with the orders issued by the Board in Request for Review No. 94 of 2023 where it was required to keep the Board updated on progress made which was why it was relating with the Secretariat on the issue of termination and it did inform bidders of the same hence complied with Section 63 of the Act.

Applicant's Rejoinder

84. In a rejoinder, Mr. Manyara invited the Board to look at the letter of 24th June 2024 addressed to the Board Secretary and note that the same was not in response to the letter of 8th May 2024 as alleged and is indicated at paragraph 11 of the Respondent's Replying Affidavit to be in line with Section 63(2) of the Act.

85. Counsel pointed out that it was questionable that the money allocated for the subject tender was applied elsewhere yet this was not communicated as to save parties time and was a clear indication of

malice on the part of the Respondent. He reiterated that if the money was spent elsewhere, the Board ought to be well informed of the same.

86. He urged the Board to allow the instant Request for Review as prayed and that the subject tender be awarded to the Applicant.

87. When asked to clarify whether the Applicant was informed about the developments concerning the budget being utilized elsewhere, Mr. Manyara submitted that the only communication received by the Applicant was letter of termination of 24th June 2024.

88. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 8th July 2024 was due to expire on or before 29th July 2024 and that the Board would communicate its decision on or before 29th July 2024 to all parties to the instant Request for Review via email.

BOARD'S DECISION

89. The Board has considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of documents, authorities together with confidential documents submitted to the Board by the 1st and 2nd Applicants herein pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

a) 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;

b) Whether the Respondent complied with the orders of the Board issued on 24th April 2024 in the Notice of Motion application in Request for Review No. 94 of 2023 filed on 8th April 2024;

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

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;

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

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

(a);

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

" [Emphasis by the Board]

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

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

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

*In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of *Smith v. East Elloe Rural District Council [1965] AC 736* Lord Viscount Simonds stated as follows:*

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

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

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

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

93. 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"

94. 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.

95. 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.

96. 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."**

97. 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.

98. 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;

99. Vide a letter dated 24th 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:

"....."

The above subject refers:

Pursuant to section 63(1)(b) of the Public Procurement and Asset Disposal Act, 2015, The East African Portland Cement Plc, would like to notify you that the above tender has since been terminated.

The tender has been terminated because of inadequate budgetary provision.

....."

100. 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.

101. This Board differently consituted 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.

102. In view of the above holding, we must now determine whether the reasons advanced by the Respondent 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.

103. During the hearing, counsel for the Respondent, Mr. Muchiri submitted that according to a Professional Opinion dated 24th June 2024 prepared by the Ag. Head of Supply Chain, Ms. Camilla Sielei, the budget for procurement of the subject tender had been utilized in the plant upgrade shutdown of March/April 2024 and consequently, funds were depleted necessitating termination of the procurement proceedings in the subject tender.

104. From the confidential file, the Board has had sight of the Professional Opinion dated 24th June 2024 prepared by Ms. Camilla Sielei, Ag. Head of Supply Chain of the Procuring Entity and the same reads in part at page 5 as follows:

"....."

20. That initially this procurement was placed under plant upgrade budget in the FY 2023-24 Procurement plan. The plant upgrade budget was utilized in the plant upgrade shutdown of March/April 2024. Consequently, the secretariat recommends termination of the procurement proceedings in

line with section 63(1) of the PP&ADA, 2015 due to inadequate budgetary provision.

.....

22. You may therefore terminate procurement proceedings in line with section 63(1)(b) of the PP&ADA, 2015 due to inadequate budgetary provision.”

105. Having carefully scrutinized the confidential file submitted by the Respondent pursuant to Section 67(3)(e) of the Act, we note that there is no evidence as to the Plant Upgrade Budget in the FY 2023-24 Procurement Plan referred to by Ms. Camilla Sielei. Neither is there any evidence showing that an approval was issued to divert funds approved for the procurement of the subject tender to be utilized for the Plant Upgrade Shutdown of March/April 2024 referred to by the Respondent in these proceedings.

106. We note that Section 44 of the Act speaks to approved budgetary allocations as follows:

(1) An Accounting officer of a public entity shall be primarily responsible for ensuring that the public entity complies with the Act.

(2) In the performance of the responsibility under subsection (1), an accounting officer shall –

(a) ensure that procurement of goods, works and services

of the public entity are within approved budget of that entity;

(b) constitute all procurement and asset disposal committees within a procuring entity in accordance with the Act;

(c) ensure procurement plans are prepared in conformity with the medium term fiscal framework and fiscal policy objectives and, subject to subsection (3), submit them to the National Treasury;

(d)

(e) ensure compliance with sections 68,147,148, and 149 of the Public Finance Management Act, 2012 (No. 18 of 2012)

....."

107. Further, Section 53 of the Act provides as follows:

"(1) All procurement by State organs and public entities are subject to the rules and principles of this Act.

(2) An accounting officer shall prepare an annual procurement plan which is realistic in a format set out in the Regulations within the approved budget prior to commencement of each financial year as part of the annual budget preparation process.

(3) Any public officer who knowingly recommends to the accounting officer excessive procurement of items beyond a reasonable consumption of the procuring entity commits an offence under this Act. (4) All asset disposals

shall be planned by the accounting officer concerned through annual asset disposal plan in a format set out in the Regulations.

(5) A procurement and asset disposal planning shall be based on indicative or approved budgets which shall be integrated with applicable budget processes and in the case of a State Department or County Department, such plans shall be approved by the Cabinet Secretary or the County Executive Committee member responsible for that entity.

(6) All procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups.

(7) Multi-year procurement plans may be prepared in a format set out in the Regulations and shall be consistent with the medium term budgetary expenditure framework for projects or contracts that go beyond one year.

(8) Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.

(9) An accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offence under this Act.

- (10) For greater certainty, the procurement and disposal plans approved under subsection (5) shall include choice of procurement and disposal methods and certain percentages referred to under subsection (6).***
- (11) Any state or public officer who fails to prepare procurement and disposal plans shall be subject to internal disciplinary action.***
- (12) Upon submission of the procurement plans to the National Treasury pursuant to section 44(2)(c) of this Act, the accounting officer of a procuring entity shall publish and publicize its approved procurement plan as invitation to treat on its website.***
- (13) On receipt of the procurement plans submitted by the procuring entities, the National Treasury shall publish and publicize the procurement plans as invitation to treat on the state tender portal.”***

108. The import of the above provisions is that it is the primary responsibility of an accounting officer to ensure that a procuring entity complies with the provisions of the Act. The accounting officer is also responsible for preparation of an annual procurement plan which ought to be within the approved budget and should not commence any procurement proceedings until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in the approved budget estimates. An accounting officer who knowingly commences any

procurement process without ascertaining whether the good, work or service is budgeted for commits an offence under the Act.

109. Turning to the circumstances in the instant Request for Review, it is not lost to the Board that the Respondent in the Notice of Motion application filed on 8th April 2024 submitted that it required an extension of time by a further 30 days to enable it complete the procurement process in the subject tender as ordered in the Board's Decision dated 26th March 2024 in the Notice of Motion Application dated 5th March 2024. The Respondent informed the Board that it was at an advanced stage in the procurement process and what was remaining was for the Evaluation Committee to conduct financial evaluation coupled with due diligence so as to proceed and issue an award in the subject tender to the successful bidder. The Board did grant the Respondent the extension sought and we are therefore perplexed by the turn of events taken by the Respondent in the subject tender.

110. In our considered view, if a plant upgrade shutdown was carried out in March/April 2024 as alleged by the Respondent herein, then the Respondent ought to have brought this to the Board's attention as at March/April and sought for different orders in its Notice of Motion Application of 8th April 2024.

111. In determining if the Respondent has provided sufficient reasons to

demonstrate that the subject tender has inadequate budgetary allocation, we are of the considered opinion that the best evidence that a procuring entity ought to provide to demonstrate availability or otherwise of adequate budgetary allocation for a procurement process are the approved procurement plan and budget estimates approved by national treasury contemplated by law under Section 44(2)(b) and 53(5) of the Act.

112. Having established that none of the aforementioned approved procurement plan and budget estimates or approval for diversion of funds has been availed so as to support the reason advanced by the Respondent for termination of the subject tender due to inadequate budgetary provision, an inference may be drawn that the said evidence if tendered would be adverse to the Respondent. In **Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others (2012) eKLR**, the High Court found as follows:

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

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

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such

evidence was produced, it would be adverse to such a party. In the case of Kamotho-vs-KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

113. In the circumstances, the Board finds and holds that the Respondent has failed to fulfill the substantive requirements for the termination of procurement proceedings in the subject tender as required by Section 63(1)(b) of the Act and the aforecited decisional laws since they have not provided sufficient evidence of inadequate budgetary allocation justifying termination of the subject tender. ***(See the Kenya Veterinary Vaccines Production Institute and the Selex Sistemi Integrati Cases (Supra).***

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

114. From the confidential file, we note that all tenderers in the subject tender were notified of termination of the procurement proceedings in the subject tender vide letters dated 24th June 2024. However, the Board has not had sight of any written report addressed to or submitted to the Director General, Public Procurement Regulatory Authority (“the Authority”) notifying it of termination of the subject tender and the reasons thereof in accordance with Section 63(2) & (3) of the Act. The letter of 24th June 2024 addressed to the Board Secretary, Public Procurement Administrative Review Board does not suffice as proof that

the Authority was notified since it was addressed to the Board Secretary and not the Director General of the Authority as prescribed in law.

115. In the circumstances, the Respondent failed to satisfy the procedural statutory pre-conditions that must be satisfied before termination of procurement proceedings is deemed lawful pursuant to Section 63(2) & (3) of the Act.

116. In totality, the Respondent failed to satisfy both the substantive statutory pre-conditions of termination of procurement proceedings in accordance with Section 63 of the Act. As such the Board's jurisdiction has not been ousted by dint of Section 167(4)(b) of the Act.

Whether the Respondent complied with the orders of the Board issued on 24th April 2024 in the Notice of Motion application in Request for Review No. 94 of 2023 filed on 8th April 2024

117. This Board in its Decision issued on 24th April 2024 in the Notice of Motion application in Request for Review No. 94 of 2023 filed on 8th April 2024 found the said application merited and granted the Respondent a 30 days' extension of time within which the Procuring Entity was required to comply with the orders of the Board dated 1st December 2023 in Request for Review No. 94 of 2023 and orders of the Board dated 26th March 2024 in the Notice of Motion Application dated 5th March 2024.

118. The Board took note of the fact that this subject tender had come before it severally and deemed it necessary to supervise the procurement process in the subject tender and ordered the Respondent to report to it on the progress of evaluation of the subject tender including issuance of an award to the successful tenderer.

119. In compliance with the above orders, we note that vide letter dated 8th May 2024, the Respondent did update the Board on progress made in evaluation of the subject tender and in fact indicated that it aimed to issue notification of award letters on or before 20th May 2024. The next update that the Respondent made to the Board was through the letter dated 24th June 2024 where it indicated that following re-evaluation of the subject tender, the procurement proceedings had been terminated.

120. We note that the decision to terminate the subject tender was contrary to the explicit orders of the Board under Order (K) which required the Procuring Entity to issue an award to the successful bidder. Order (K) reads as follows:

"The Accounting Officer of the Procuring Entity is hereby directed to report to the Board on the progress of evaluation of the subject tender including issuance of an award to the successful tenderer within the next 14 days from the date of this decision."

121. It is our considered view that there was non-compliance of the orders of the Board as contained in the Board's Decision dated 24th April 2024

in the Notice of Motion application in Request for Review No. 94 of 2023 filed on 8th April 2024. Section 175(6) of the Act renders any action by a party to a request for review that is made contrary to the decision of Board to be null and void as it provides as follows:

"A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void."

122. Section 176(1)(m) read with Section 176(2) of the Act prohibits a person from contravening a lawful order of the Board and if a person contravenes a lawful order of the Board, such a person commits an offence and is liable upon conviction to a- (a) fine not exceeding Kshs. 4,000,000.00 or to imprisonment for a term not exceeding 10 years or to both, if the person is a natural person or (b) fine not exceeding Kshs.10,000,000.00, if the person is a body corporate.

123. What this means is that an accounting officer or a Procuring Entity that contravenes a lawful order of the Board would be in breach of Section 176(1)(m) of the Act.

124. Once such an allegation of disobedience of the orders of the Board which is essentially an allegation of breach of Section 176(1)(m) of the Act is brought before the Board with respect to procurement

proceedings under Section 167(1) of the Act read with Regulation 203 of Regulations 2020, the Board may consider the same and may, *inter alia*, (a) annul anything the accounting officer of a procuring entity has done; (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone; (c) substitute the decision of the Board for any decision of the accounting officer of a procuring entity; (d) order the payment of costs as between parties to the review; and order termination of the procurement process and commencement of a new procurement process in exercise of the Board's powers under Section 173 of the Act.

125. In the circumstances, we find that the Respondent failed to comply with the orders of the Board issued on 24th April 2024 in the Notice of Motion application in Request for Review No. 94 of 2023 filed on 8th April 2024 and deem it fair and just to annul any action undertaken by the Respondent in contravention of the Board's orders with respect to the subject tender.

What orders should the Board grant in the circumstances?

126. We have established that the Respondent failed to satisfy 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 not done in accordance with Section 63 of the Act. The

Board therefore does have jurisdiction to hear and determine the instant Request for Review.

127. We have also established that the Respondent failed to comply with the orders of the Board issued on 24th April 2024 in the Notice of Motion application in Request for Review No. 94 of 2023 filed on 8th April 2024.

128. Section 173 of the Act donates wide discretionary powers to the Board. This Board is cognizant of holding by Justice A.K. Ndungu in **Republic v Public Procurement Administrative Review Board & another Exparte Rentco Africa Limited Judicial Review Misc. Application No. E100 of 2022** (hereinafter referred to as "the Rentco Case") where he referred to the holding of by Court of Appeal in **Civil Appeal No. 510 of 2022 Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others [2022] KECA 982 eKLR** (hereinafter referred to as "Civil Appeal No.510 of 2022") where the Court of Appeal stated:

"36. The overriding argument by the appellant is that upon the lapse of the tender period on 11th January, 2022, the subject tender was dead and could not be resuscitated, hence the justification for the 2nd respondent's finding in its decision dated 6th June 2022 that 'the Applicant, the 1st Respondent and the 2nd Respondent could not extend the tender validity period after 11th January 2022.' On the other hand, the germane argument by the 1st respondent

is that the appellant, who was acting on behalf of the procuring entity, was hell-bent on frustrating the award of the tender to it. The High Court made a finding that "the procuring entity had deliberately ran (sic) down the clock with a view to achieving expiry of the tender validity period." The learned judge held, and rightly so in our view, that "a rogue procuring entity cannot be allowed to hide behind the law to sanitize its injurious conduct, conduct that is inimical to the constitutional principles on accountable procurement processes in public procurement." The 1st respondent's contention was that in appropriate cases the 2nd respondent is bestowed with powers under the PPAD Act to rein in rogue procuring entities, such as the appellant, and bring finality to the procurement process.

37. This leads us to consider the powers of the 2nd respondent in such instances. Section 173 of the PPAD Act states as follows:

'173. 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.'***

.....

45. We are in agreement with the views expressed by the learned judge that if such a trend of ignoring court orders/directions is allowed to continue it would render the court's supervisory powers enshrined in the Constitution impotent and render the judicial review jurisdiction useless and ineffective as a remedy.

46. In the upshot, we are not satisfied that this appeal has any merit, and it is hereby dismissed in its entirety. It is evident that the 1st respondent was the successful bidder, but the appellant employed dilatory tactics to deny it the tender. This was also confirmed by the 3rd respondent in

its replying affidavit filed before the High Court, Taking into account the history of litigation before the High Court and the Board, and the provisions of Article 227 of the Constitution and section 3 of the PPAD Act, and to bring finality in this matter, we are of the considered view that the interests of justice would be best served if we order, as we hereby do, that the appellant do issue the 1st respondent with the appropriate notification letter within 30 days from the date hereof; and further direct the appellant to complete the tender process in favour of the 1st respondent within 30 days from the date of issuance of the notification letter. The appellant shall also bear the 1st respondent's costs of this appeal."

129. In the Rentco case, Justice Ndungu then proceeded to hold as follows

"56. From the material presented before the Board, it is quite clear that the 2nd Respondent herein acted mala fides in the subject procurement process. Such conduct must be deprecated and must not be left unchecked. The Public Procurement Regulatory Authority must in such circumstances flex its legal muscle to monitor and enforce standards in public procurement and to weed out malfeasance in the processes. It must be borne in mind that any conduct that tends to defeat a fair, equitable, transparent, competitive and cost effective public procurement process is an attempt to overthrow the constitutional order espoused in Article 227 (1) of the Constitution. Any officer

responsible for such conduct risks sanctions including but not limited to a declaration that they are unfit to hold public office.”

130. In both Civil Appeal No.510 of 2022 and the Rentco case, the Court of Appeal and the High Court frowned upon non-compliance and ignorance of court orders and held that such conduct would render the court’s powers enshrined in the Constitution impotent.

131. Turning to the circumstances in the instant Request for Review, it is evident from the Minutes for Tender Re-Evaluation for the Subject tender dated 14th May 2024 and the Professional Opinion dated 24th June 2024 that the Applicant was the successful bidder in the subject tender. Taking into account the history of litigation before this Board and the High Court with regard to this subject tender and being guided by the holding by the Court of Appeal in Civil Appeal No. 510 of 2022, so as to bring finality in this matter, we hereby deem it just and fair to order the Respondent to issue the Applicant with an appropriate letter of notification of award of the subject tender within 7 days from the date hereof and to complete the procurement process in favour of the Applicant taking into consideration the Board’s findings herein and the provisions of the Act, the Constitution and Regulations 2020.

132. Additionally, in view of Section 173(d) of the Act which grants power to the Board to order the payment of costs as between parties to the review, we deem it appropriate in these exceptional circumstances to award reasonable costs to the Applicant due to the Respondent’s actions

in the procurement proceedings in the subject tender which costs shall be assessed by the Board against the provisions of Regulation 2(c) of the Fifteenth Schedule of the Act.

133. The upshot of our findings herein is that the instant Request for Review succeeds in terms of the following specific orders:

FINAL ORDERS

134. 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 8th July 2024 and filed on even date:

a) The Tender Termination Notice dated 24th June 2024 issued by the Respondent with respect to RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant to tenderers including the Applicant herein be and is hereby cancelled and set aside.

b) The Respondent is hereby ordered to issue the Applicant with a letter of Notification of Intention to Award RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant within 7 days from the date hereof.

c) Further to Order (b) above, the Respondent be and is hereby ordered to complete the procurement process in favour of the Applicant taking into consideration the Board's findings herein and the provisions of the Act, the Constitution and Regulations 2020

d) The tender validity period of RFP No. EAPCPLC/RFP/009/2023 for Design, Supply, Installation and Commissioning of a Grid tied Solar PV Plant be and is hereby extended for a further 30 days from 29th July 2024 to enable the Procuring Entity complete the procurement process as directed herein.

e) In view of the Board's findings and orders above, we order that the Procuring Entity shall pay to the Applicant costs of this Request for Review assessed by the Board at Kshs. 250,000/- (Kenya Shillings Two Hundred and Fifty Thousand) only within 21 days of the date of this decision.

Dated at NAIROBI, this 29th Day of July, 2024.



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PANEL CHAIRPERSON
PPARB



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SECRETARY
PPARB