REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 99/2024 OF 8TH OCTOBER 2024

BETWEEN

COLNET LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

Review against the decision of the Accounting Officer, Kenya Revenue Authority in respect of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years.

BOARD MEMBERS PRESENT

1. QS. Hussein Were - Panel Chairperson
2. Mr. Jackson Awele - Member
3. Mr. Daniel Langat - Member

IN ATTENDANCE

Ms. Sarah Ayoo - Secretariat

Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT	**PEESAM LIMITED**
Mr. Mbugua	Advocate, Karugu Mbugua & Co. Advocates
RESPONDENTS	**THE ACCOUNTING OFFICER, KENYA REVENUE AUTHORITY**
	KENYA REVENUE AUTHORITY
Mr. Elisha Nyapara	Advocate, Kenya Revenue Authority
Ms. Almadi	Advocate, Kenya Revenue Authority

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Revenue Authority, the Procuring Entity, *vide* an advert in the MyGov Publication, PPIP Portal (www.tenders.go.ke) and Kenya Revenue Authority website (www.kra.go.ke), invited interested suppliers to submit their bids in response to Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years (herein "the subject tender"). The tender was reserved for Women, Youth and Persons with Disabilities (all AGPO Categories) and had a tender closing date of Friday, 16th February 2024 at 11:00 a.m. The tender equally had 8 Lots under which bidders were at liberty to submit their bids.

Addendum

2. The Procuring Entity issued two addenda offering clarifications to various inquiries that were made by interested suppliers.

Submission of Bids and Tender Opening

3. According to the signed Tender Opening Minutes dated 16th February 2024, fourty six (46) bidders submitted bids in response to the invitation to tender and were listed as follows:

Bidder No.	Name of Bidder
1.	Zuzumz Limited
2.	Kamtix Cleaners Limited
3.	Cleanmark Limited
4.	Kotaa East Africa Limited
5.	Hannaneli Suppliers Limited
6.	Shineways Cleaning Services Limited
7.	Village Mastas Limited
8.	Outlander Express Service Limited
9.	Haver The Company Limited
10.	Biceven East Africa Limited
11.	Kleansley Hygiene Plus Limited
12.	Dechrip East Africa Limited
13.	Sifteagleam Enterprises
14.	Joymax Enterprises
15.	Petals Hygiene & Sanitation Services
16.	Liga Holdings Limited
17.	Rosey International Limited
18.	Ice Clean Care Group Limited
19.	All and Sundry Services

20.	Peesam Limited
21.	Binsmart Enterprises Limited
22.	Nadiah Investments Limited
23.	Neru (K) Limited
24.	Colnet Limited
25.	Aimat Company Limited
26.	Saham Cleaning Services Limited
27.	Paramax Cleaning Services Limited
28.	Ximtak Investment Limited
29.	Maice Enterprises
30.	Oneway Facilities Management Limited
31.	Allreggy Investments Limited
32.	Helicon Kenya Limited
33.	Cleanco Investments Limited
34.	Cityscape Trends Services Limited
35.	Smart Outsource Limited
36.	The Brick Chick Limited
37.	The Waste Company Limited
38.	Trueland Construction Limited
39.	Stepover Services
40.	Easa Enterprises Limited
41.	Sixonet Construction
42.	Zenla Merchants
43.	Remarc Cleaning Services
44.	Brooklyn Cleaning Services
45.	Zendai Express Limited
46.	Saafi Cleaning Company Limited

Evaluation of Tenders

4. The Tender Evaluation Committee undertake evaluation of the received bids in the following 4 stages:

   i. Preliminary Evaluation

   ii. Vendor Evaluation

   iii. Financial Evaluation

   iv. Due Diligence

Evaluation Committee Recommendation

5. At the conclusion of the evaluation exercise, the Evaluation Committee through a report dated 15th March 2024 recommended the award of the 8 Lots of the tender as follows:

Lot	Lowest Evaluated Bidder	Tender Price (Kshs)
Lot 1	Kamtix Cleaners Limited	72,978,000.72
Lot 2	Saafi Cleaning Company Limited	169,518,792.00
Lot 3	Colnet Limited	99,372,312.00
Lot 4	Kamtix Cleaners Limited	26,693,684.95
Lot 5	Colnet Limited	55,289,696.64
Lot 6	Kamtix Cleaners Limited	24,389,831.70
Lot 7	Peesam Limited	74,744,485.59
Lot 8	Peesam Limited	115,445,055.44

6. The Procuring Entity's Acting Deputy Commissioner-Supply Chain Management, Mr. Benson Kiruja, when presented with the Evaluation Report directed the Evaluation Committee to re-evaluate the bids at the Preliminary Evaluation Stage on Requirements No. 10 and 22 of the Tender Document pertaining to (a) NSSF Returns for the last three consecutive months with remittance payrolls (August, September & October2023 or October, November & December 2023) certified by NSSF, and (b) Certified letter from the bidders banker indicating that the firm is currently operating an account and can access line of credit of at least Kshs. 2,000,000.00 at any given time (not older than six months from the tender closing date).

7. The Evaluation Committee re-evaluated the tenders with the result that the Applicant's tender was found non-responsive with respect to mandatory Requirements No. 10 and 22 as neither its payrolls nor NSSF remittance receipts were certified and hence was disqualified from the tender. The Evaluation Committee also recommended award to Kamtix Cleaners Limited for Lots 1, 4 and 6 having found them to be the lowest evaluated tenderers in those lots.

8. Page 9 of 11 of the Professional Opinion records that the Evaluation Committee carried out a cost analysis of the lowest evaluated tenderers and noted (a) a significant discrepancy between the budgeted sum of Kshs. 231,289,563.36 for Lots 2,3, 5 and 7 and the total tender price of Kshs. 619,895,770.32, (b) all bidders who bided for Lot 8 were found to be non-responsive as none made it to the financial evaluation stage,

and (c) bidder No. 2 was found to be the lowest evaluated bidder for Lot 1, 4 & 6.

9. With regard to adequacy of funds, the Professional Opinion proceeds to indicate that the procurement was planned for in the Annual Procurement Plan for the FY 2023/2024 under line item 538 and that the approximate value of the procurement per year was Kshs. 200,000.00.

10. The Professional Opinion also indicates that the Evaluation Committee recommended after the re-evaluation, (a) award of Lots 1, 4, and 6 to M/s Kamtix Cleaners Limited, (b) termination of procurement proceedings for Lots 2, 3, 5, 7 and 8 pursuant to Section 63(1)(b) & (f) and re-advertisement of the five lots.

11. The Procuring Entity therefore awarded Lots 1, 4 and 6 to Kamtix Cleaners Limited and terminated the procurement process for all the other Lots.

12. Subsequently on 14th June 2024, Dr. Lillian Nyawada, on behalf of the 1st Respondent, concurred with the Professional Opinion.

13. Tenderers were notified of the termination of Lots 2,3,5,7 and 8 of the tender *vide* letters dated 2nd July 2024.

REQUEST FOR REVIEW NO. 68 OF 2024

14. On 19th July 2024, the Applicant filed Request for Review No. 68 of 2024 challenging the decision to disqualify its bids in the subject tender. The Board heard the request and on 9th August 2024 delivered a decision with the following final orders:

    1. **The Letters of Notification issued to the Applicant and all the unsuccessful tenderers in respect of Lots 1 to 8 of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years be and are hereby cancelled and set aside.**
    2. **The Letters of Notification issued to the successful tenderers in Lots 1, 4 and 6 under Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years be and are hereby cancelled and set aside.**
    3. **The Evaluation Report dated 11th June 2024 in respect of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years be and are hereby cancelled and set aside.**
    4. **The Professional Opinion dated 13th June 2024 in respect of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years be and are hereby cancelled and set aside**

5. **The 1st Respondent be and is hereby directed to reconvene the Evaluation Committee for purposes of forwarding the Evaluation Report dated 15th March 2024 in respect of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years to the Head of the Procurement Function for preparation of a Professional Opinion having regard to the Board's findings in this Decision.**
6. **Further to order 5 above, Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years be allowed to proceed to its logical conclusion having regard to the Board's finding in this Decision.**
7. **Each party shall bear its own costs in the Request for Review.**

Reconvening of the Evaluation Committee

15. The Board has sighted a letter dated 16th August 2024, forming part of the Confidential File, wherein the 1st Respondent reconvened the Evaluation Committee for purposes of forwarding the Evaluation Report dated 15th March 2024 to the Ag. Deputy Commissioner, Supply Chain Management.

16. The Board has equally seen an Internal Memo dated 21st August 2024 from Evaluation Committee to the Ag. Deputy Commissioner, Supply Chain Management forwarding the Evaluation Report dated 15th March 2024.

Professional Opinion

17. In a Professional Opinion dated 26th August 2024 the Procuring Entity's Ag. Deputy Commissioner- Supply Chain Management, Mr. Benson Kiruja, reviewed the manner in which the subject procurement process was undertaken, including the evaluation of bids, and recommended the Evaluation Committee re-evaluates all the bids in strict compliance with the mandatory evaluation criteria.

18. The Commissioner General, Mr. Humphrey Wattanga, concurred with the Professional Opinion on the same day, on 26th August 2024.

RE-EVALUATION OF BIDS

Preliminary Evaluation

19. At this stage of the evaluation, the submitted bids were to be examined using the criteria set out at Clause 2. Preliminary/Mandatory Evaluation Criteria under Section III-Evaluation and Qualification Criteria at the pages 33 to 35 of the Tender Document .

20. The evaluation was to be on a Pass/Fail basis and bids that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.

21. At the end of the evaluation at this stage, 32 bids, including that of the Applicant, were disqualified. 14 bids qualified for evaluation at the Technical Evaluation Stage.

Vendor Evaluation

22. The Evaluation Committee was required at this stage to examine bids using the criteria set out at Clause 2 Vendor Evaluation Criteria under Section III-Evaluation and Qualification Criteria at pages 36 to 37 of the Tender Document.

23. The evaluation was to be on the basis of a weighted score. In order for one to qualify for further evaluation, they had to garner at least 60 out of 75 marks at this Stage.

24. At the end of the evaluation at this stage, all the 14 bids met the 60 marks threshold and thus qualified for evaluation at the financial stage.

Financial Evaluation

25. The Evaluation Committee was required at this stage to examine bids successful at the Vendor Evaluation Stage using the criteria set out as Price Evaluation under Section III-Evaluation and Qualification Criteria at page 30 of the Tender Document.

26. The Evaluation Committee was to compare the tender prices indicated in the bids according to the specific Lots that a bidder bid for under the subject tender. The successful bid would be that established as bearing the lowest evaluated price under each Lot.

27. At the end of financial evaluation, the following bidders were found to have submitted the lowest tender prices under their respective Lots:

Lot No.	Lowest Evaluated Bidder	Tender Price (Kshs.)
Lot 1	Kamtix Cleaners Limited	72,978,000.72
Lot 2	Village Masters Limited	249,870,609.36
Lot 3	Saham Cleaning Services Limited	156,663,361.92
Lot 4	Kamtix Cleaners Limited	26,693,684.95
Lot 5	Saham Cleaning Services Limited	80,096,192.64
Lot 6	Kamtix Cleaners Limited	24,389,831.70
Lot 7	Hanaleli Supplies Limited	133,265,606.40
Lot 8	All bidders who bid for this Lot were non-responsive	N/A

28. Page 61 to 64 of 54 of the Evaluation Report indicates that the Evaluation Committee compared the Bidders' tender sums against the Annual Procurement Plans with the following results:

Lot	Lowest Evaluated Bidder	Tender Sum for 2 years (Kshs)	Annual Tender Sums (Kshs)	Annual Procurement Plan Allocation	% variance
Lot 1	Kamtix Cleaners Ltd	72,978,000.72	36,489,000.36	26,728,192.76	26.6%
Lot 2	Village Masters Limited	249,870,609.36	124,935,304.70	62,086,257.57	101%
Lot 3	Saham Cleaning Services Ltd	156,663,361.92	78,331,680.96	36,607,465.27	113%
Lot 4	Kamtix Cleaners Ltd	26,693,684.95	13,346,842.48	9,776,562.11	36.5%
Lot 5	Kotaa East Africa	64,852,560.00	80,096,192.64	40,048,096.32	97.7%

Lot 6	Kamtix Cleaners Ltd	24,389,831.70	12,194,915.85	8,932,775.86	36.52%
Lot 7	Hanaleli Supplies Ltd	133,265,606.40	66,632,803.20	27,375,167.85	143.4%
Lot 8	All bidders who bid for this Lot were non responsive	N/A	N/A	N/A	N/A

29. Pages 65 of 65 of the Evaluation Report made an observation that all the lowest evaluated bids under each Lot bore tender sums that were above 25% of the allocated budget for the specific Lots.

Evaluation Committee's Recommendation

30. Accordingly, the Evaluation Committee recommended the termination of the tender on account of inadequate budgetary allocation.

Professional Opinion

31. In a Professional Opinion dated 23rd September 2024 the Procuring Entity's Ag. Deputy Commissioner - Supply Chain Management, Mr. Benson Kiruja, reviewed the procurement process and recommended the termination of the tender as proposed by the Evaluation Committee.

32. The Commissioner General, Mr. Humphrey Wattanga, concurred with the Professional Opinion on the same day, 23rd September 2024.

Notification to Tenderers

33. Tenderers were notified of the termination of the tender *vide* letters dated 23rd September 2024.

REQUEST FOR REVIEW NO. 99 OF 2024

34. On 8th October 2024, Colnet Limited, the Applicant herein, filed a Request for Review dated 7th October 2024, through the firm of Karugu Mbugua & Company Advocates supported by an affidavit sworn on even date by Hariet Wahome, a Director at the Applicant, seeking the following orders from the Board in verbatim:

    a) ***The Letter of Termination of the Procurement proceedings addressed to the Applicant and all other bidders with respect to the tender for Provision of Cleaning and Garbage Collection Services for KRA Offices and Residential Houses for a period of Two (2) years Tender No. KRA/HQS/NCB-034/2023-2024 (hereinafter the "tender") by the First respondents be annulled in its entirety;***

    b) ***The Procuring Entity be directed to award the tender to the lowest evaluated tenderer, in lieu, this Honourable Board be pleased to substitute its decision with that of the Procuring Entity on the issue of award of the subject tender;***

    c) ***That the Respondents do bear the costs of this Request for Review; and***

    d) ***Any other orders that the Honourable Board may deem just and fit in the circumstances.***

35. In a Notification of Appeal and letter dated 8th October 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the

procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said 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 8th October 2024.

36. On 15th October 2024, the Respondents through Elisha Nyapara-Advocate filed a Notice of Preliminary Objection and a Memorandum of Response, both dated 14th October 2024.The Respondents equally forwarded the Confidential Documents under Section 67(3) of the Act.

37. On 16th October 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying them that the hearing of the instant Request for Review would be by online hearing on 23rd October 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.

38. On 23rd October 2024 at 11:00 a.m. when the Board convened for the online hearing, parties were represented by their respective Advocates. The Board read through the documents filed in the proceedings and sought confirmation from the parties on being receipt of the said documents to which parties confirmed in the affirmative.

39. The Board directed that pursuant to Regulation 215 of the Regulations 2020, the present Request for Review would be heard alongside a

related case, Request for Review No. 98 of 2024, which had similar parties, raised similar issues and was also in respect of the subject tender. Additionally, the Board directed that separate Decisions would be rendered in respect of the two Requests.

40. The Board also observed that since there was on record identical Notices of Preliminary Objection by the Respondents, these would be heard as part of the Request for Review in line with Regulation 209 of the Regulations 2020. Additionally, the Board directed that the order of address would be as follows:
    i. The Applicant would start by arguing the Request for Review and addressing the Preliminary Objection in 15 minutes.
    ii. Thereafter, the Respondents would offer a response to the Request for review and argue their Preliminary Objection in 15 minutes.
    iii. The Applicant would then close with a rejoinder on the Request for Review in 5 minutes.

PARTIES SUBMISSIONS

Applicant's Submissions

41. The Applicant submitted that the Board has powers under Section 173 of the Act to review decisions relating to termination of procurement proceedings and was therefore clothed with the jurisdiction to hear and determine the present Request for Review.

42. It submitted further that the genesis of the present Request for Review was traceable to the execution of this Board's orders in Request for Review No. 68 and 69 of 2024 wherein the Board directed the

Respondents to conclude the procurement proceedings. It also submitted that the Respondents, subsequent to the Board's directions, terminated the subject tender on account of what was described as inadequate budget as communicated through Notification Letters dated 23rd September 2024.

43. The Applicant faulted the Respondents' reason for termination of the tender positing that budgetary allocation precedes any tender invitation. Further, that procurement plans inform what a Procuring Entity intends to purchase for any given financial year. It therefore contended that there was a budgetary allocation for the subject tender.

44. The Applicant argued that the Tender Document provided a scope of work which had been reproduced at paragraph 11 of the Supporting Affidavit of Samuel Mburu Nganga which captured the labour cost, costs of material and the contractors' margins. Further, that the Procuring Entity even captured the expected number of employees under each of the Lots under the tender. It was therefore the Applicant's submission that from a computation of the above elements it could not be true that the Procuring Entity's budget for the tender was Kshs 200 million and thereafter Kshs 233 million.

45. According to the Applicant, a Procuring Entity is expected to know its budget before floating a tender and that, in the present case, the Respondents were being ingenious in suggesting that there was an inadequate budgetary allocation. It averred that the procurement documents in the subject tender ought to be made available for the

Board to verify the Respondent's allegations on inadequate budgetary allocation.

46. The Applicant noted that the Respondents appeared to have revisited the issues addressed in Requests for Review Application Nos 68 and 69 of 2024 on the Applicant's submitted NSSF and bank documents. It reiterated that the it submitted documents that were responsive to the evaluation criteria at the Preliminary Evaluation Stage under the tender.

47. Consequently, the Applicant urged the Board to allow the Request for Review.

The Respondents' Submissions

48. Counsel for the Respondents, Mr. Nyapara, indicated that the Respondents would be placing reliance on their filed documents as well as Confidential File.

49. The 1st and 2nd Respondents argued that under Section 167(4)(b) of the Act, the Board is excluded from considering matters that touch on tenders terminated in accordance with Section 63 of the Act. According to the Respondents, in the present case there was compliance with both the procedural and substantive elements of Section 63 of the Act.

50. They argued that a Notification Letter was sent to bidders within 14 days of the termination of the tender and that a Report on the termination was equally sent to the Public Procurement Regulatory Authority.

51. Additionally, that in determining the sufficiency of the allocated budget one looks at the approved procurement plan vis-à-vis the total of the tender prices of the bidders submitting the lowest evaluated bids under each of the lots. They submitted that, in the present case, the Procuring Entity did not have an adequate budgetary allocation to satisfy the tender prices as indicated in the bids of the lowest evaluated bidders under each lot. According to the Respondents, they had led evidence showing that the budget as indicated in the approved Procurement Plan could not meet the cost offered by the lowest bidders under the various lots.

52. The Respondents also pointed out that the allegation by the Applicant that there was non-compliance with Circular No. 7 of 2023 was not true. It was the Respondents' argument that there were bidders who were disqualified at the Technical Evaluation Stage for failing to meet the evaluation criteria at that stage notwithstanding the fact that they had submitted tenders that were within the Procuring Entity's budget. The Respondents therefore urged the Board to down its tools and strike out the Request for Review.

53. It was also the Respondents' contention that the Applicant's bid was also not the lowest evaluated bid under its respective Lots as could be verified from the Evaluation Report and Professional Opinion forming part of the Confidential File.

54. Equally appearing for the Respondents, Ms. Almadi chimed in that the subject tender was unique as it straddled 2 procurement cycles of 2023 - 2024 (1st July 2023 to 30th June 2024) and 2024 - 2025 (1st July 2024 to 30th June 2025). She stated that the 1st cycle had a budget of Kshs 200 million while the 2nd cycle had one of Kshs. 233 million. Further that the 1st cycle was under scrutiny that resulted in this Board's Decision of 9th August 2024 where it was noted with concern that the Respondent allocated a ballpark figure of Kshs.200 Million for 8 Lots without specifying the individual allocation for each of the Lots.

55. According to the Respondents, the 2nd cycle of Kshs. 233 Million was distributed across the Lots with each Lot being allocated a specific amount. Further, that the Respondents complied with the Board's Decision of 9th August 2024 in that upon receipt of the Professional opinion, the Accounting Officer directed re-evaluation of all the bids and it emerged that each of the lowest bid in the various Lots had a tender price that exceeded the Procuring Entity's allocation by more than 25%.

56. The Respondents refuted the Applicant's suggestion that the Procuring Entity had no idea of its budget for the tender. They equally refuted the allegation that the procurement process was conducted in an obscure fashion. Consequently, they urged the Board to strike out the Request for Review.

Applicant's Rejoinder

57. In a brief rejoinder, Counsel for the Applicant, Mr. Mbugua, argued that the scope of work under the subject tender exceeded the Kshs. 200 Million.

58. He urged the Board to interrogate the Evaluation Report to establish the reasons that informed the Professional Opinion.

59. Counsel questioned whether the Accounting Officer acted within his powers when he directed re-evaluation of the bids and also whether the re-evaluation was limited to certain bids or all the bids.

CLARIFICATIONS

60. The Board inquired from the Respondents whether each of the Lots had a cost estimate to guide the bidders. Counsel for the Respondents, Mr. Nyapara stated that each Lot had an estimate in compliance with Circular No. 7 of 2023. He indicated that there were bidders who placed bids bearing tender prices that were within the limits of the approved budget for the individual lots, only that their bids were disqualified at the Technical Evaluation Stage.

61. In response to an inquiry from the Board, Mr. Mbugua for the Applicant, indicated that the reason given on the Notification Letter it received was that the tender was terminated on account of inadequate budgetary allocation.

62. As to whether from their understanding, the Board's Decision of 9th August 2024 contemplated re-evaluation of bids, Counsel for the Respondents Mr. Nyapara answered in the affirmative and pointed out that one of the issues was the conduct of the Head of Procurement function in directing the Evaluation Committee to conduct a re-evaluation of the bids instead of making the recommendation to the Accounting Officer. Mr. Nyapara argued that this was corrected after the Accounting Officer directed for re-evaluation following the recommendation by the Head of Procurement.

63. The Board asked the Respondents to confirm if the Evaluation Committee had knowledge of the approved budget in the first instance and why they did not pay regard to it in the first evaluation of March 2024. The Respondents indicated that the Evaluation Committee had knowledge of the budget but admittedly made a mistake in the first instance but this was subsequently corrected after the Board's Decision.

64. On what measures it had put in place towards the services forming the subject of the tender in view of the termination of the tender, Counsel for the Respondents, Ms. Almadi stated that the Respondents had opted to extend the contracts of the current service providers.

65. At the conclusion of the hearing, the Board notified the parties that the Request for Review having been filed on 8th October 2024 the same had to be determined by 29th October 2024. Therefore, the Board would communicate its decision on or before 29th October 2024 to all parties via email.

BOARD'S DECISION

66. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

    i. *Whether the Board has jurisdiction over the present Request for Review in view of the termination of the subject tender.*
    ii. *Whether the Procuring Entity failed to terminate the subject tender in accordance with the provisions of Section 63 of the Act*
    iii. *What orders the Board should issue in the circumstance*

As to whether the Board has jurisdiction over the present Request for Review in view of the termination of the subject tender

67. Following the filing of the present Request for Review, the Respondents filed a Notice of Preliminary Objection dated 14th October 2024 arguing that the proceedings offend Section 167(4)(b) of the Act as read with Section 63 of the Act.

68. This Board acknowledges the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence inquire into it before doing anything concerning such a matter in respect of which it is raised. It is only upon satisfying itself to have the requisite jurisdiction

will the Board proceed to pronounce itself on the merits of the Request for Review as filed.

69. For starters, the 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."***

70. The locus classicus case on the question of jurisdiction is the celebrated case of ***The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1*** where Nyarangi J.A. made the oft-cited dictum:

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

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

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

72. The jurisdiction of the Board is provided for at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board, as follows:

Section 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.

73. Section 167 of the Act extends an opportunity to candidates and bidders disgruntled with a public tender process to approach the Board for redress. However, subsection (4) of the Section divests the Board of jurisdiction on a myriad of subject matters including the termination of a procurement process. Termination of public procurement proceedings is governed by Section 63 of the Act.

74. Superior Courts of this country have on numerous occasions offered guidance on the interpretation of Section 167(4)(b) of the Act and the ousting of the Board's jurisdiction on account of the subject matter relating to termination of tenders:

75. In ***Nairobi High Court Judicial Review Misc. Application No. 390 of 2018; R v Public Procurement Administrative Review Board & Ors Ex-parte Kenya Revenue Authority***, the High Court

considered a judicial review application challenging the decision of this Board. The Board had dismissed a preliminary objection that had cited that it lacked jurisdiction to hear a Request for Review before it on account of the fact that it related to the termination of a procurement process under section 63 of the Act. In quashing the Board's Decision, the Court affirmed that the Board has jurisdiction to first establish whether the preconditions for termination under section 63 of the Act have been met before downing its tools:

> ***"33. A plain reading of Section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted...***
>
> *See also* ***Nairobi High Court Judicial Review Misc. Application No. 117 of 2020; Parliamentary Service Commission v Public Procurement Administrative Review Board & Ors v Aprim Consultants.***

76. The above judicial pronouncements mirror the position of this Board in its previous decisions in ***PPARB Application No. 14 of 2024; Emkay Construction Limited v Managing Director, Kenya reinsurance Corporation Limited; PPARB Application No. 29 of 2023; Craft***

Silicon Limited v Accounting Officer Kilifi County Government & anor; and ***PPARB Application No. 9 of 2022; and PPARB Application No. 5 of 2021; Daniel Outlet Limited v Accounting Officer Numeric Machines Complex Limited; PPARB Application No. 18 of 2024; Infinity Pool Limited v The Accounting Officer, Kenya Wildlife Services; PPARB Application No. 40 of 2024 Marl Mart Enterprises Limited v The Accounting Officer Independent Electoral and Boundaries Commission & Ors.***

77. Drawing from the above judicial pronouncements, this Board is clothed with jurisdiction to first interrogate whether the preconditions for termination of a tender under Section 63 have been satisfied. It is only upon satisfying itself that the said preconditions have been met that the Board can down its tools in the matter. However, where any precondition has not been met, the Board will exercise its jurisdiction, hear, and determine the Request for Review.

78. The Board has heard arguments by the Respondents that under Section 167(4)(b) of the Act this Board is excluded from considering matters that touch on tenders terminated in accordance with Section 63 of the Act. It is their position that the subject tender was terminated in compliance with both the procedural and substantive requirements prescribed under Section 63 of the Act. They contended that the Respondents sent Notification Letters to bidders and a Report to the Public Procurement Regulatory Authority within the 14 the days' timeline prescribed under Section 63 of the Act. Further that there was evidence on record justifying the Respondents' position that it had inadequate

budgetary allocation to meet the tender prices of the lowest evaluated bidders under the various lots.

79. On its part, the Applicant contented that the Board has powers under Section 173 of the Act to review decisions relating to termination of procurement proceedings and is therefore clothed with the jurisdiction to hear and determine the present Request for Review.

80. The Applicant went on to fault the Respondents' reason for termination of the subject tender arguing that a Procuring Entity ought to satisfy itself that it had a sufficient budget before floating the tender. It was the Applicant's position that the Procuring Entity had presented a scope of works that provided estimates in respect of labour cost, costs of material and the contractor's margins whose computation exceeded Kshs 200 million and thereafter Kshs 233 million.

81. From the foregoing rival positions, this Board is invited to inquire whether it is clothed with jurisdiction to hear and determine the present Request for Review. Section 63 of the Act speaks to termination of public procurement and asset disposal proceedings in the following terms:

Section 63 - Termination or cancellation of procurement and asset disposal Proceedings,

"(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or

cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) ...

(b) inadequate budgetary provision;

(c) ...

(d) ...

(e) ... (f) ... (g) ... (h) ...

(i) ...

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

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

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

82. From the foregoing, for an Accounting Officer of a Procuring Entity to validly terminate a procurement or asset disposal proceedings (i) the termination must be based on any of the grounds under section 63(1) (a) to (f) of the Act; (ii) the Accounting Officer should give a Written Report to the Public Procurement Regulatory Authority within 14 days of termination giving reasons for the termination; and (iii) the Accounting Officer should within 14 days of termination give a Written notice to the

tenderers in the subject tender communicating the reasons for the termination.

83. Effectively, an Accounting Officer is under a duty to provide sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Accounting Officer must also demonstrate that they have complied with the substantive and procedural requirements set out under Section 63 of the Act.

84. Substantive requirements relate to a Procuring Entity outlining the specific ground under section 63(1) of the Act as to why a tender has been terminated and the evidence that support such termination.

85. On the other hand, the procedural requirements include those under Section 63(2), (3) and (4) of the Act, which provide for, (i) the submission of a Written Report to the Authority on the termination of a tender within 14 days of such termination and (ii) the issuance of notices of the termination to tenderers who participated in the said tender outlining the reasons for termination within 14 days of such termination. The Board now turns to interrogate the circumstances under which the subject tender was terminated.

86. The Board has sighted the Procuring Entity's Notification letter dated 23rd September 2024 addressed to the Applicant and the same is reproduced here, in part:

"Reference is made to your submitted bid in regard to the above procurement.

The Authority has terminated the Procurement Proceeding for the above tender due to <u>inadequate budgetary provisions.</u>

This termination is pursuant to Section 63(1)(b) of the Public Procurement and Asset Disposal Act 2015, ...

...

Yours faithfully,

Signed

HUMPHREY WATTANGA

<u>COMMISSIONER GENERAL"</u>

87. From the letter dated 23rd September 2024, the Procuring Entity communicated to the Applicant that the subject tender was terminated on account of inadequate budgetary provision.

88. Section 63(1)(b) of the Act recognizes inadequate budgetary provision as a ground an Accounting Officer can invoke for the termination of procurement and asset disposal proceedings. However, this Board has always held that for one to satisfy the substantive requirement under Section 63, they must go beyond a mere restating of the statutory language on the ground for termination they must demonstrate by way of evidence that the circumstances embodying the ground relied upon actually exist. In the present case, the Respondents shoulder the burden of leading evidence to demonstrate the inadequate budgetary provision.

89. The Respondents produced as part of the Confidential Documents the Annual Procurement Plan for the Financial Year 2024-2025. Below is an excerpt of the relevant part of the Procurement Plan outlining the allocated budget for the various Lots under the subject tender.

206	***Cleaning and garbage collection and Fumigation Countrywide -Lot 1***	***62,086,257.557***
	Cleaning and garbage collection and Fumigation Countrywide -Lot 2	***26,728,192.76***
	Cleaning and garbage collection and Fumigation Countrywide -Lot 3	***36,395,109.27***
	Cleaning and garbage collection and Fumigation Countrywide -Lot 4	***9,776,562.11***
	Cleaning and garbage collection and Fumigation Countrywide -Lot 5	***20,249,851.39***
	Cleaning and garbage collection and Fumigation Countrywide -Lot 6	***8,932,775.86***
	Cleaning and garbage collection and Fumigation Countrywide -Lot 7	***27,375,16.85***
	Cleaning and garbage collection and Fumigation Countrywide -Lot 8	***42,281,751.55***

90. The Respondents equally forwarded to the Board the Tender Evaluation Report dated 6th September 2024. The details of the lowest evaluated bids in the various lots as captured in the Evaluation Report, though already captured in the foregoing paragraphs, bears reproducing at this stage:

Lot	Lowest Evaluated Bidder	Tender Sum for 2 years (Kshs)	Annual Tender Sums (Kshs)	Annual Procurement Plan Allocation	% variance
Lot 1	Kamtix Cleaners Ltd	72,978,000.72	36,489,000.36	26,728,192.76	26.6%
Lot 2	Village Masters Limited	249,870,609.36	124,935,304.70	62,086,257.57	101%
Lot 3	Saham Cleaning Services Ltd	156,663,361.92	78,331,680.96	36,607,465.27	113%
Lot 4	Kamtix Cleaners Ltd	26,693,684.95	13,346,842.48	9,776,562.11	36.5%
Lot 5	Kotaa East Africa	64,852,560.00	80,096,192.64	40,048,096.32	97.7%
Lot 6	Kamtix Cleaners Ltd	24,389,831.70	12,194,915.85	8,932,775.86	36.52%
Lot 7	Hanaleli Supplies Ltd	133,265,606.40	66,632,803.20	27,375,167.85	143.4%
Lot 8	All bidders who bid for this Lot were non responsive	N/A	N/A	N/A	N/A

91. From the foregoing it is apparent that there was budgetary allocation for the services save that all the bidders whose bids were found to be the lowest evaluated bids under their respective Lots, apart from Lot 8, quoted tender prices that exceeded the budgetary allocation for the Lots. In respect of Lot 8, none of the bidders who participated in Lot 8 of the tender qualified for evaluation at the financial Stage.

92. From the tendered evidence, the Board is convinced that the Procuring Entity set out with an honest belief that the available budget was

sufficient for purpose which turned out not to be the case. It follows therefore that the Procuring Entity did not have adequate funds to meet the quotes presented by the lowest evaluated bidders under Lots 1 to 7 of the tender.

93. The Board is also alive to the provisions under Sections 131 to 133 of the Act which permit competitive negotiations in among others instances where the lowest bidder's tender price exceeds the available budget:

131. Competitive Negotiations

An accounting officer of a procuring entity may conduct competitive negotiations as prescribed where—

(a) there is a tie in the lowest evaluated price by two or more tenderers;

(b) there is a tie in highest combined score points;

(c) the lowest evaluated price is in excess of available budget; or

(d) there is an urgent need that can be met by several known suppliers.

132. Procedure for Competitive Negotiations

(1) In the procedure for competitive negotiations, an accounting officer of a procuring entity shall—

(a) identify the tenderers affected by tie;

(b) identify the tenderers that quoted prices above available budget; or

(c) identify the known suppliers as prescribed.

(2) In the case of tenderers that quoted above the available budget, an accounting officer of a procuring entity shall—

(a) reveal its available budget to tenderers; and

(b) limit its invitation to tenderers whose evaluated prices are not more than twenty five percent above the available budget.

3) An accounting officer of a procuring entity shall request the identified tenderers to revise their tenders by submitting their best and final offer within a period not exceeding seven days.

(4) The revised prices shall not compromise the quality specifications of the original tender.

(5) Tenders shall be evaluated by the evaluation committee appointed in the initial process.

133. Successful best and final offer

(1) The successful best and final offer shall be the best rated tender using evaluation criteria set forth in the tender documents.

(2) Cabinet Secretary may develop further guidelines on the powers and thresholds for tender awards.

94. As outlined in the above provisions, in the instances where the lowest evaluated bid bears a tender price that exceeds the budget:

    i. i. The Accounting Officer should reveal the budget to the bidders.
    ii. Ii. The Accounting Officer should then invite bidders whose bids bear tender prices that do not exceed the budget by more than 25% to submit their best and final offers.

iii. iii. The successful bid would be that whose best and final offer shall be established as the successful bid under the evaluation criteria in the Tender Document.

95. The above sections of the Act however do not find application in the present case noting that all the lowest evaluated bids under Lots 1 to 7 of the subject tender quoted prices that exceeded the available budget for the various lots by a margin of over 25%. Accordingly, none of the bidders under the various lots were eligible for invitation to negotiations.

96. Flowing from the above, it is clear that the Respondents satisfied the substantive requirements under Section 63 of the Act, being lack of adequate budgetary allocation to satisfy the tender prices as quoted by the lowest evaluated bidders.

97. The Board now turns to interrogate whether the procedural requirements under Section 63 of the Act were met with respect to the sending of notifications on termination to the bidders and the submission of a Written Report to the Authority.

98. The Board has sighted the Notification Letters dated 23rd September 2024 and addressed to the bidders in the Confidential File. The Applicant annexed to the affidavit of Samuel Mburu Nganga the copy of the Letter addressed to it communicating the termination of the subject tender as ***Annexure SMN-2*** . The Respondents contended that the Notification Letters were sent to all the bidders within 14 days of the termination of the tender and the Applicant did not dispute receipt of its

letter within the said time. It is therefore reasonable to assume that the Notification Letter was sent within the statutory timeline under Section 63 of the Act and therefore reasonably conclude that the Respondents satisfied this part of the procedural requirements under the Act.

99. The other procedural requirement contemplated under Section 63 of the Act is the forwarding of a report on the termination to the Director General of the Public Procurement Regulatory Authority within 14 days of the termination. The Board has keenly studied the Respondents' Memorandum of Response alongside the documents submitted under the Confidential File but has not spotted any Report or communication to the Director General of the Public Procurement Regulatory Authority on the termination of the subject tender. The Board has equally accessed the Public Procurement Information Portal and confirmed that there is no upload from the Respondents on the termination of the subject tender.

100. In the absence of any evidence of the existence of the Report and its dispatch to the Director General of the Public Procurement Regulatory Authority, the Board is not persuaded that the Respondents complied with the requirement to report the termination of the subject tender. The Board, in the circumstances is left to make the inevitable conclusion that the Respondents failed to meet this procedural requirement as stipulated under Section 63 (2) of the Act.

101. In sum, the Respondents failed to satisfy all the procedural requirements under Section 63 of the Act with regard to termination of

procurement proceedings of the subject tender. The said provision contemplates that both the substantive and procedural requirements must be met before the termination of a public procurement or asset disposal process can be deemed lawful. In the present circumstances non-compliance with a procedural requirement renders the termination irregular.

102. In view of the foregoing, the Board finds that the tender subject of these proceedings was not terminated in accordance with Section 63 of the Act. The import of this finding is that the tender is still alive with the attendant consequence that the Board is not divested of jurisdiction to entertain the Request for Review dated 7th October 2024. Accordingly, the Preliminary Objection raised by the Respondents fails and is disallowed. The Board therefore proceeds to interrogate the merits of the Request for Review in the ensuing part of this Decision.

As to whether the Procuring Entity failed to terminate the subject tender in accordance with the provisions of Section 63 of the Act

103. Central to the instant Request for Review is whether the Respondents terminated the subject tender in accordance with the provisions of Section 63 of the Act. Whereas the Applicant contended that the termination of the tender did not comply with the said provisions, the Respondents maintained that there was compliance.

104. The Applicant disagreed with the Respondent's reason that the subject tender was terminated on account of inadequate budgetary

allocation. According to the Applicant the annual procurement plans inform the available budget which then informs the decision to float a tender.

105. On the flip side the Respondents maintained that there was compliance with both the procedural and substantive requirements under Section 63 of the Act.

106. The Board has observed previously in this decision that the lowest evaluated bids in all the Lots, except for Lot 8, under the subject tender, quoted tender prices that exceeded the available budget for the lots by more than 25%. The Board has further observed that none of the bidders who submitted bids under Lot 8 qualified for evaluation at the Financial Stage. It is the Board's view therefore that the Respondents satisfied the substantive requirement on the reason for their intended termination of the subject tender.

107. The Board has also observed in this decision that, in carrying out the intended termination, the Respondents sent out Notification Letters on termination within 14 days but failed to submit the Report on the termination of the tender to the Director General of the Public Procurement Regulatory Authority within 14 days as required under Section 63 of the Act. Consequently, the Board has determined that the Respondents failed to satisfy the procedural requirement on submission of the report to the Public Procurement Regulatory Authority.

108. Section 63 of the Act is mandatory on the requirement for a Procuring Entity to comply with both the substantive and procedural requirements when it comes to termination of a tender. In the present case, the Respondents faltered when it came to the procedural requirements.

109. In view of all of the foregoing, the Board finds that the Procuring Entity did not terminate the subject tender in accordance with the provisions of Section 63 of the Act. The Board therefore holds that the tender subject of this Request for Review is not terminated and hence deemed to be alive. Accordingly, this ground of review succeeds and is allowed.

What orders the Board should grant in the circumstances

110. The Board has found that it has jurisdiction to hear and determine this Request for Review.

111. The Board has further found that the Procuring Entity did not terminate the tender subject of this Request for Review in accordance with the provisions of Section 63 of the Act.

112. The upshot of the Board's finding is that the Request for Review dated 7th October 2024 and filed on 8th October 2024 in respect of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years succeeds in the following specific terms:

FINAL ORDERS

113. 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 this Request for Review:

1. **The Respondents' Notice of Preliminary Objection dated 14th October 2024 be and is hereby dismissed.**
2. **The Letters of Notification dated 23rd September 2024 and issued to the Applicant and all the other bidders in respect of Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years be and are hereby cancelled and set aside.**
3. **The 1st Respondent be and is hereby directed to conclude the procurement proceedings for Tender No. KRA/HQS/NCB-034/2023 for Provision of Cleaning and Garbage Collection for KRA Offices and Residential Houses Countrywide for a period of Two (2) Years in accordance with the law taking into consideration the Board's findings in this Request for Review.**

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

.....	.....
PANEL CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**