

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 120/2024 OF 5TH DECEMBER 2024

BETWEEN

PEESAM LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA ELECTRICITY GENERATING

COMPANY PLC 1ST RESPONDENT

KENYA ELECTRICITY GENERATING

COMPANY PLC 2ND RESPONDENT

Review against the decision of the Accounting Officer Kenya Electricity Generating Company PLC in relation to Tender No. KGN-ADM-008-2024 for Provision of Fumigation and Pest Control Services at Kengen Premises and Power Stations for Two Years (2024-2026) - Re-Advert.

BOARD MEMBERS PRESENT

- | | |
|-------------------------|---------------------|
| 1. Ms. Alice Oeri | - Panel Chairperson |
| 2. Mr. Stanslaus Kimani | - Member |
| 3. QS Hussein Were | - Member |

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT

PEESAM LIMITED

Mr. Karugu

- Advocate, Karugu Mbugua Advocates

1ST & 2ND RESPONDENT

THE ACCOUNTING OFFICER, KENYA ELECTRICITY GENERATING COMPANY PLC & KENYA ELECTRICITY GENERATING COMPANY PLC

Mr. Dennis Njoroge h/b

for Dr. Muthomi Thiankolu - Advocate, Muthomi & Karanja Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Electricity Generating Company PLC, the Procuring Entity and 2nd Respondent herein invited sealed tenders in response to Tender No. KGN-ADM-008-2024 for Provision of Fumigation and Pest Control Services at Kengen Premises and Power Stations for Two Years (2024-2026) - Re-Advert (hereinafter referred to as "the subject tender"). The invitation was by way of an advertisement on 18th June 2024 published on My Gov Newspaper, the Procuring Entity's website www.kengen.co.ke and the

Public Procurement Information Portal www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers by the Procuring Entity (hereinafter referred to as the Tender Document') was available for download. The initial subject tender's submission deadline was scheduled on 23rd July 2024 East Africa Time. The Procuring Entity issued several clarifications and addendums while extending the tender submission deadline to 13th August 2024.

Submission of Tenders and Tender Opening

2. According to the Tender Opening Minutes signed by members of the Tender Opening Committee 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') nine (9) bidders submitted bids in the subject tender as follows:

Bidder No.	Bidder Name
1.	Kamtix Cleaners Co. NLTD
2.	Peesam Limited
3.	Paramax Cleaning Services Limited
4.	Davimore Limited
5.	Barnized Investment Company
6.	Digital Sanitation Services Limited
7.	Dilywalah Orient Limited

8.	Vaneco Enterprises
9.	Sixcon Limited

Evaluation of Tenders

3. A Tender Evaluation Committee appointed by the Respondent undertook evaluation of the submitted bids as captured in a Tender Evaluation Report for the subject tender in the following stages:
- i Preliminary Evaluation
 - ii Technical Evaluation
 - iii Financial Evaluation

Preliminary Evaluation

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Mandatory Requirements of Section III- Evaluation and Qualification Criteria at page 34 of 157 to 35 of 157 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.
5. At the end of evaluation at this stage, three (3) tenders were determined non-responsive, while six (6) tenders were determined responsive and proceeded to Technical Evaluation.

Technical Evaluation

6. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 2: Technical Evaluation on Capacity to Deliver the Contract of Section III- Evaluation and Qualification Criteria at page 35 of 157 to 37 of 157 of the Tender Document. Tenderers were required to meet all the requirements at this stage to proceed for Financial Evaluation.
7. At the end of evaluation at this stage one (1) tender was determined non-responsive, while five (5) tenders were determined responsive and proceeded to Financial Evaluation.

Financial Evaluation

8. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 3. Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 38 of 157 of the Tender Document. Following evaluation of tenders against the set out criteria, a comparative financial analysis was carried out and at the end of evaluation at this stage, four (4) tenders were found to have arithmetic errors for Schedule 1 and were disqualified from further analysis.
9. The Evaluation Committee found Peesam Limited to be the lowest evaluated bidder for provision of fumigation services at total cost in schedule 1 for 1 year at Kenya Shillings One Million Nine Hundred and Fourteen Thousand (Kshs. 1,914,000/-) only and for 2 years at Kenya Shillings Three Million Eight Hundred and Twenty Eight Thousand (Kshs.

3,828,000/-) and in schedule 2 Kenya Shillings Two Hundred and Thirty-Five (Kshs. 235,000/-) as and when required.

Due Diligence

10. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 4. Due Diligence of Section III- Evaluation and Qualification Criteria at page 38 of 157 of the Tender Document. Prior to award of the subject tender, the Procuring Entity was required to carry out due diligence and determine to its satisfaction that the selected bids would qualify to perform the contract in the subject tender satisfactorily.

11. Following the due diligence exercise conducted on 30th September 2024 at the premises of Peesam Ltd at Thika, the Evaluation Committee found that the information provided by the said bidder was true and that it had capacity to perform the contract in the subject tender.

Evaluation Committee's Recommendation

12. The Evaluation Committee recommended that the subject tender be terminated due to inadequate funds occasioned by budget cuts and austerity measures decreed by H.E President William Ruto on 5th July 2024 following the June 2024 Gen Z riots, the rejection of the 2024 Finance Act and previous directives by the National Treasury.

Professional Opinion

13. In a Professional Opinion dated 18th November 2024, the Asst. Supply Chain Manager, Mr. Jeffer Gesaka reviewed the manner in which the procurement process in the subject tender was undertaken including evaluation of tenders and concurred with the Evaluation Committee's recommendation of terminating the subject tender due to an inadequate budgetary provision.

14. The Professional Opinion was approved as recommended by the 1st Respondent, Eng. Peter Njenga, on 18th November 2024.

Notification to Tenderers

15. Tenderers were notified of termination of the subject tender vide letters dated 20th November 2024.

REQUEST FOR REVIEW NO. 120 OF 2024

16. On 5th December 2024, Peesam Limited, the Applicant herein, filed a Request for Review dated 4th December 2024 together with a Supporting Affidavit sworn by Samuel Mburu on 4th December 2024 (hereinafter referred to as "the instant Request for Review") through Karugu Mbugua & Co. Advocates seeking the following orders from the Board:

a) The Letter of Termination of the Procurement proceedings addressed to the Applicant and all other bidders with respect to the tender for fumigation and pest control services at KENGEN Premises and Power Stations for Two

Years (2024-2026) (KGN-ADM-008-2024) (hereinafter the "tender") by the First respondent be annulled in its entirety;

b) The Procurement be directed to bring the procurement process to its logical conclusion by awarding the tender to the lowest evaluated bidder;

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

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

17. In a Notification of Appeal and a letter dated 5th December 2024, Mr. James Kilaka, the Acting Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to the said Procuring Entity 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 Procuring Entity was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 5th December 2024.

18. On 9th December 2024, the 1st and 2nd Respondents filed through Muthomi & Karanja Advocates a Notice of Appointment of Advocates dated 9th December 2024 and the Procuring Entity's Notice of Preliminary Objection dated 9th December 2024.
19. On 11th December 2024, the 1st and 2nd Respondents filed through their advocates the Procuring Entity's Memorandum of Response dated 9th December 2024, the Procuring Entity's Affidavit sworn on 9th December 2024 by Vincent Nyamweya Mamboleo, the Procuring Entity's Exhibits to the Supporting Affidavit dated 9th December 2024 together with confidential documents submitted pursuant to Section 67(3)(e) of the Act.
20. *Vide* letters dated 11th December 2024, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the 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 tender within three (3) days.
21. *Vide* a Hearing Notice dated 11th December 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 17th December 2024 at 2:00 p.m. through the link availed in the said Hearing Notice.

22. On 16th December 2024, the Applicant filed through its advocates a Supplementary Affidavit sworn by Samuel Mburu Nganga on 16th December 2024 and an Applicant's Bundle of Authorities dated 16th December 2024.

23. On 16th December 2024, the 1st and 2nd Respondents filed through their advocates Written Submissions dated 16th December 2024 and the Procuring Entity's List and Bundle of Authorities dated 16th December 2024.

24. At the hearing on 17th December 2024, the Board read out the pleadings filed by parties in the matter allocated time for each party to proceed and highlight its case and directed that the hearing of the preliminary objections by the Respondents would be heard as part of the substantive Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of a substantive request for review and deliver one decision.

25. Thus the Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Respondents' Submissions on their preliminary objection

26. In his submissions, Mr. Njoroge referred the Board to the Procurement Entity's Notice of Preliminary Objection dated 9th December 2024 and submitted that the Board lacks jurisdiction to hear and determine the instant Request for Review.
27. Counsel submitted that though the Request for Review was dated 4th December 2024, it was filed on 5th December 2024 which was outside the 14 days' statutory period stipulated under Section 167(1) of the Act. He referred to paragraph 6 of the Applicant's Supporting Affidavit and argued that it was not in dispute that the Applicant was notified via email on 21st November 2024 at 7:51 a.m. of termination of the subject tender and as such, the filing window lapsed on 4th December 2024 rendering the filing of the instant Request for Review on 5th December 2024 untimely and inadmissible. In support of his argument, he referred the Board to the holding in *Civil Appeal No. E461 of 2024 Pinro Empire Limited v Public Procurement Administrative Review Board and 3 others*.
28. Mr. Njoroge submitted that pursuant to Section 167(4)(b) of the Act, the Board lacks jurisdiction to hear and determine the instant Request for Review since the procurement proceedings in the subject tender were terminated in line with Section 63 of the Act.
29. He further submitted that the Request for Review lacks specificity in disclosing the alleged breaches as it fails to articulate with a reasonable degree of precision how the Procuring Entity allegedly breached Section

63, 83 and 86 of the Act and as such, the instant Request for Review ought to be struck out with costs.

Applicant's Submissions

30. In his submissions, Mr. Karugu opposed the Procuring Entity's Notice of Preliminary Objection and argued that the instant Request for Review having been filed on 5th December 2024 was filed within the statutory timelines of 14 days as provided under Section 167(1) of the Act. He further argued that the notification letter having been sent out on 21st November 2024 meant that the 14 days started running on 22nd November 2024 and lapsed on 5th December 2024.

31. Counsel submitted that the Applicant was notified that the subject tender was cancelled in line with Section 63 of the Act due to inadequate budgetary provision and since there was an admission by the Procuring Entity that the Applicant's bid progressed up to due diligence, the Applicant has the right to question the decision of the Procuring Entity and seek for review of the same by the Board.

32. He referred the Board to the holding in *Nairobi High Court Judicial Review Miscellaneous Application No. 390 of 2018 Republic v Public Procurement Administrative Review Board; Pelican Insurance Brokers (K) Limited ex parte Kenya Revenue Authority* and argued that the Board can review the decision of a procuring entity with regard to termination of procurement proceedings where the conditions under Section 63 of the Act have not been met.

33. Mr. Karugu submitted that the Applicant was not privy to the confidential documents relating to the subject tender and to whether the grounds under Section 63 of the Act had been met and as such, the Board ought to exercise its powers and establish if the preconditions under Section 63 of the Act had been met including submission of a report to the Public Procurement Regulatory Authority on termination of the subject tender.

34. On the issue of inadequate budgetary allocation, counsel questioned when the Respondents learnt of the directive by the President relied on in terminating the subject tender in view of the fact that it was issued in June 2024 while termination was in late November 2024. He submitted that it was unfair for the Applicant and other bidders to be subjected to the entire procurement process including post qualification only for it to be cancelled at the tail end.

35. He further submitted that the Applicant having gone through the post qualification exercise pursuant to Section 83 of the Act had a legitimate expectation that it was the lowest evaluated bidder and would subsequently be awarded the subject tender.

36. He reiterated that the reason to terminate the subject tender was unfair unreasonable and contrary to Article 227 of the Constitution and urged the Board to allow the instant Request for Review as prayed.

Respondents' Submissions

37. In a rejoinder to the Procuring Entity's Notice of Preliminary Objection, Mr. Njoroge reiterated that the alleged breach occurred on 21st November 2024 when time started running and the Request for Review having been filed on 5th December 2024 was time barred.
38. Counsel submitted that the orders sought in the instant Request for Review were unmerited and ought to be declined. He argued that the termination letters issued to the Applicant and other bidders in the subject tender explicitly outlined the reasons for termination, adhered to Section 63(4) of the Act and the holding in *Republic v National Social Security Fund Board of Trustees* [2015] eKLR as quoted in *Migori County Government v INB Management and Consulting Limited* [2021] eKLR. He further argued that this compliance insulated the termination letters from annulment as sought under prayer 1 of the Request for Review.
39. Mr. Njoroge submitted that the Procuring Entity acted within the bounds of Sections 63 (1)(b) and 83 of the Act and the subject tender was terminated due to budget cuts and austerity measures decreed by H.E. President William Ruto Samoei on 5th July 2024 following the June 2024 Gen Z riots, the rejection of the 2024 Finance Act and previous directives by the National Treasury.
40. He submitted that there is a clear demonstration of the Government's commitment to efficient resource monitoring and reduced wastage of public funds and as such, granting prayer 2 of the Request for Review would result in a contract devoid of allocated funds for its execution,

rendering the outcome futile and without practical benefit. In support of his argument, counsel referred to the holding in *Republic v Public Procurement Administrative Review Board & another Ex parte Intertek Testing Services (EA) Pty Limited & Authentix Inc; Accounting Officer, Energy and Petroleum Regulatory Authority & another* [2022] eKLR and *Republic v Public Procurement Administrative Review Board; Accounting Officer County Government of Tana River & another (Exparte); Minet Kenya Insurance Brokers Limited & another (Interested Parties)* [2022] KEHC 14278 (KLR).

41. Counsel further submitted that the Procuring Entity did not breach Section 86 of the Act as alleged and that it is trite law that due diligence is among the many stages of the tendering process and reaching this stage does not guarantee a bidder award of a tender and in any event, a breach under Section 86 of the Act would only arise when a non-compliant tenderer is declared the successful tenderer which is not the case in the instant matter.

42. He urged the Board to dismiss the instant Request for Review with costs.

Applicant's Rejoinder

43. In a rejoinder, Mr. Karugu pointed the Board to Section 57 of the Interpretation and General Provisions Act and submitted that the period when time starts running is exclusive of the day on which the event happened and in the instant matter, time started running on the 22nd

November 2024 and not on 21st November 2024 as alleged by the Respondents.

44. He further submitted that the Board is clothed with power to terminate the termination notices once it is established that termination of procurement proceedings was not conducted pursuant to Section 63 of the Act.

45. He indicated that the directive by the President was public information and ought to have reached the Procuring Entity and informed it with regard to advertisement and floating of the subject tender and conducting the procurement proceedings therein. He pointed out that the Applicant and Respondents were before the Board in *PPARB Application No. 116 of 2024* where similar issues on budget were addressed.

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

CLARIFICATIONS

47. When asked to confirm when the subject tender was advertised and when the presidential directive was issued, Mr. Njoroge clarified that advertisement of the subject tender was done on 18th June 2024 while the Presidential Directive was issued on 5th July 2024.

48. As to whether the instant Request for Review is time barred, he argued that filing of a request for review can only be done within 14 days of the

breach complained of and not 14 days after the alleged breach has occurred.

49. When asked to confirm when the due diligence exercise was carried out and which members of the Evaluation Committee visited the Applicant's premises, Mr. Karugu submitted that though the Applicant's director could not recall the names of the members of the Evaluation Committee who visited the Applicant's premises to carry out the due diligence, it is not in dispute that a due diligence exercise was carried out as confirmed in the Respondent's Memorandum of Response and exhibits.

50. When asked to expound on the specifics of the budgetary cuts relating to the subject tender and if an original budget as planned by the Procuring Entity and a current budget was availed to the Board for it to be able to adduce if the subject tender was a victim of the rationalization process and if any pest control and fumigation services would be procured in the foreseeable future, Mr. Njoroge pointed the Board to the National Treasury Circular No. 2/2024 at page 220 of the Procuring Entity's exhibits and submitted that every state corporation was required to resubmit its FY 2024/2025 recurrent expenditures budget which was required to be rationalized to a level that is not more than 70% of the approved FY 2023/2024 budget and resubmission was to be through GIMIS by 2nd April 2024. He further submitted that state corporations were not to implement new projects without fresh approval from the National Treasury and that all money generated or received which was over and above the approved revenue budget ought not to be spent. Counsel indicated that the

Procuring Entity was in talks with the National Treasury with the aim of having its budget rationalized for it to have finances allocated to various aspects of its operations and this information could be accessed on the PPIP portal.

51. As to whether the Procuring Entity filed a report with the Director General Public Procurement Regulatory Authority with regard to termination of the subject tender and if similar letters of notification of termination were issued to other bidders in the subject tender, Mr. Njoroge submitted that a report was sent to the Authority as evidenced by the screenshots submitted as part of the confidential documents submitted to the Board. He confirmed that notification letters on termination of the subject tender were issued to all bidders.

52. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 5th December 2024 was due to expire on 26th December 2024 and that the Board would communicate its decision on or before 26th December 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

53. The Board has considered each of the parties' submissions and documents placed before it and find the following issues call for determination.

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

In determining the first issue, the Board shall make a determination on whether the instant Request for Review was filed within the statutory period of 14 days of notification of award or occurrence of alleged breach by the Respondents in accordance with section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.

Depending on the determination of the first sub-issue;

B. Whether the procurement proceedings in the subject tender was lawfully terminated in accordance with Section 63 of the Act read with Article 227(1) of the Constitution.

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

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

54. It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction

arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter.

55. 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."

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

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

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

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

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

"Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly

exercise any judicial power thereon. It is now common place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based.”

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

“...So central and determinative is the issue of jurisdiction that it is at once fundamental and 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....”

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

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

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

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

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

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

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.”

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

65. The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

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

(2)

(3)

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

(a) the choice of a procurement method;

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

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

168.

169.

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171.

172.

172. Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

173. Powers of Review Board

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

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings,

including annulling the procurement or disposal proceedings in their entirety;

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

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

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

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

66. Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before the Board.

67. It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, requires any person invoking the jurisdiction of the board to satisfy the following (i) must either be a candidate or a tenderer (within the meaning of Section 2 of the Act) (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020 (iii) must

seek administrative review by the Board within fourteen (14) days of notification of award or date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

68. The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

203. Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

(b) be accompanied by such statements as the applicant considers necessary in support of its request;

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

(d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

(4) The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.

69. Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act to be by way of (i) a request for review which is to be (ii) accompanied by such statements as the applicant considers necessary in support of its request. The request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

70. A reading of Section 167(1) of the Act read with Regulation 203(1), (2) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 requires for one to invoke the jurisdiction of the Board, they must either be (i) a candidate or tenderer (within the meaning of Section 2 of the Act); (ii) must claim to have suffered or to risk suffering, loss or

damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020; (iii) must seek administrative review by the Board within fourteen (14) days of (a) occurrence of breach complained of, having taken place before an award is made, (b) notification under Section 87 of the Act; or (c) occurrence of breach complained of, having taken place after making of an award to the successful tenderer (iv) by way of a request for review which is accompanied by (v) such statements as the applicant considers necessary in support of its request.

71. Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not

successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

72. It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 requires for one to invoke the jurisdiction of the Board, they must either be (i) a candidate or tenderer (within the meaning of Section 2 of the Act); (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020; (iii) must seek administrative review by the Board within fourteen (14) days of (a) occurrence of breach complained of, having taken place before an award is made, (b) notification of intention to enter into a contract having been issued; or (c) occurrence of breach complained of, having taken place after making of an award to the successful tenderer (iv) by way of a request for review which is accompanied by (v) such statements as the applicant considers necessary in support of its request.

73. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract

is issued, the same is only complained of after notification to enter into a contract has been issued. We say so because there would be no need to provide the three instances within which a Request for Review may be filed.

Whether the instant Request for Review was filed within the statutory period of 14 days of notification of award or occurrence of alleged breach by the Respondents in accordance with section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.

74. The 1st and 2nd Respondents in their Notice of Preliminary Objection sought for the instant Request for Review to be struck out on the ground that the Board lacks jurisdiction to entertain the same since it is time barred having been filed outside the statutory period of 14 days stipulated under Section 167(1) of the Act.

75. On its part, the Applicant submitted that the instant Request for Review was filed within the 14 days' statutory period provided Section 167(1) of the Act as read with Regulation 203(2)(c) of Regulations 2020 and the Board is seized with jurisdiction to hear and determine the same.

76. Having considered parties' pleadings, submissions, and the confidential documents contained in the confidential file submitted by the 2nd Respondent to the Board pursuant to section 67(3)(e) of the Act, the

issue that calls for determination by this Board is what were the circumstances in the instant Request for Review that determine the period when the Applicant ought to have approached the Board?

77. It is not in contest that the Applicant received via email a notification letter on 21st November 2024 informing it that the procurement proceedings in the subject tender had been terminated and this prompted it to file the instant Request for Review. This Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches.

78. We are guided by the holding in **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR** where the High Court at paragraphs 65, 66 and 67 noted that to determine when time starts to run, such determination can only be made upon an examination of the alleged breach and when the aggrieved tenderer had knowledge of the said breach and held:

66. The answer then to the question when time started to run in the present application can only be reached upon an examination of the breach that was alleged by the 2nd Interested Party in its Request for Review, and when the 2nd Interested Party had knowledge of the said

breach. The said Request for Review was annexed as "Annexure CO4" to the 2nd Interested Party's replying affidavit. Paragraphs 2 to 4 of the said Request address the first breach that the 2nd Interested Party 's representative, one Charles Obon'go noted and notified the Chairman of the tender opening committee about at the tender opening, namely that the Applicant had not supplied the sample of 3m of the sleeve and mill certificate and had not been issue with a delivery note, and that the said Applicant sought to introduce the sample after the commencement of the tender opening.

67. It is not in dispute that the tender opening was on 10th November 2017 at 10.00am, which all the parties attest to in their various affidavits. It is therefore evident that for this particular breach the 2nd Interested Party had knowledge of the same and admits to notifying the 1st Interested Party's tender opening committee of the same on 10th November 2017. Therefore, time for filing a review against this particular alleged breach started to run on 10th November 2017, and the Respondent had no jurisdiction to consider the alleged breach when it was included in the Request for Review filed on 21st February 2017, as the statutory period of filing for review of 14 days had long lapsed. Any decisions by the Respondent

on the alleged breach were therefore ultra vires and null and void.

79. In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

57. Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

80. Section 57(a) of the IGPA provides that in computing time, the period of days from the happening of an event ought to be deemed to be exclusive of the day on which the event happens. This therefore means that in computing time when the Applicant ought to have filed a request for review, the date of occurrence of the breach complained of by the Applicant was on 21st November 2024. It is our considered view that the statutory period of 14 days stipulated under Section 167(1) of the Act started running from 22nd November 2024 and lapsed on 5th December 2024. The Applicant having filed the instant Request for Review on 5th December 2024 was within the statutory period of 14 days provided under Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020.

81. Accordingly, this ground of the Procuring Entity's Notice of Preliminary fails.

Whether the procurement proceedings in the subject tender was lawfully terminated in accordance with Section 63 of the Act read with Article 227(1) of the Constitution.

82. 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]

83. 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.

84. 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.

85. 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 subsection namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.

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

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

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

86. In ***Nairobi High Court Judicial Review Misc. Application No. 390 of 2018; R v Public Procurement Administrative Review Board & Ors Ex parte Kenya Revenue Authority***, the High Court considered a judicial review application challenging the decision of this Board. The Board dismissed a preliminary objection on grounds that it lacked jurisdiction to hear a Request for Review before it on account of the fact

that it related to the termination of a procurement process under section 63 of the Act. In dismissing the judicial review application, the Court affirmed that the Board has jurisdiction to first establish whether the preconditions for termination under section 63 of the Act have been met before downing its tools:

"33. A plain reading of Section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted...

See also Nairobi High Court Judicial Review Misc. Application No. 117 of 2020; Parliamentary Service Commission v Public Procurement Administrative Review Board &Ors v Aprim Consultants

87. It is therefore important for the Board to determine the legality, or lack thereof, of the Procuring Entity's decision terminating the procurement proceedings in the subject tender, which determination can only be made by interrogating the reason cited for the impugned termination and

whether or not the 1st Respondent satisfied the statutory and procedural pre-conditions for termination outlined in section 63 of the Act.

88. Section 63 of the Act provides for termination of procurement proceedings 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."

89. Section 63 (1) of the Act stipulates that termination of procurement proceedings is done by an accounting officer prior to award of a tender and when any of the pre-conditions listed in sub-section (a) to (i) exist. Additionally, Section 63 (2), (3), and (4) of the Act 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.

90. In essence, Section 63 of the Act is instructive on termination of procurement proceedings being undertaken by an Accounting Officer of

a procuring entity at any time before notification of award is made and such termination must only be effected if any of the pre-conditions enumerated in Section 63(1) (a) to (i) of the Act are present. This is the substantive statutory pre-condition that must be satisfied before a termination of procurement proceedings is deemed lawful. Further, following such termination, an accounting officer is required to give the Authority (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.

91. In **Judicial Review Miscellaneous Application No. 496 of 2017 Republic –vs- The Public Procurement Administrative Review Board, Intertek Testing Services (E.A) Limited Exparte SGS Kenya Ltd**, Justice John M. Mativo set out the test and the nature of the information and evidence that the Board 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. The Learned Judge *inter alia* held as follows at pages 13 and 14 of the said decision.

"It is my view that section 63 of the Act imposed a statutory obligation upon the first interested party to terminate the tender award only on any of the grounds stated therein and that those grounds are not stated therein for cosmetic purposes.

.....the evidence tendered before the Review Board must provide sufficient information to bring the grounds within the provisions of the law. This recognizes that the tender process and in particular the termination must be done in a transparent and accountable and legal manner as the law demands.

Ultimately, the question whether the information put forward is sufficient to place the termination within the ambit of the law as claimed will be determined by the nature of the reasons given. The question is not whether the best evidence to justify termination has been provided, but whether the evidence provided is sufficient for a reasonable tribunal or body to conclude, on a balance of probabilities that the grounds relied upon fall within any of the grounds under Section 63 of the Act. If it does, then the party so claiming has discharged its burden under Section 63. If it does not, then the body in question has only itself to blame”.

92. In a nutshell therefore and based on the above decided cases where the decision of a procuring entity to terminate a procurement process is challenged before the Board, the procuring entity is under a duty to place sufficient reasons and evidence before the Board to justify and support the termination of the procurement process under challenge. The Procuring Entity must in addition to providing sufficient evidence also

demonstrate that it has complied with the substantive and the procedural requirements set out under the provisions of Section 63 of the Act.

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

93. The Respondents submitted that the Evaluation Committee's recommendation following evaluation of the subject tender was to terminate the subject tender as per Section 63(1)(b) of the Act due to inadequate budgetary provision and that all bidders were notified vide Notice of Termination dated 20th November 2024 sent via email on 21st November 2024.

94. Section 63(1)(b) of the Act as cited hereinabove stipulates that one of the grounds that a procuring entity may rely on to justify its termination of a tender is inadequate budgetary provision.

95. 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.

96. Budgetary provision is a key factor 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 section 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.

97. Section 53 of the Act further 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.”

98. 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.

99. Turning to the circumstances in the instant Request for Review, we note that during the hearing, Mr. Njoroge while arguing the Respondents' case

submitted that the above reason cited for termination of the subject tender was as a result of budget cuts and austerity measures decreed by H.E. President William Ruto on 5th July 2024 following the June 2024 Gen Z riots, the rejection of the 2024 Finance Act and the previous directives by the National Treasury.

100. In support of his argument, he referred the Board to the Procuring Entity's Exhibit marked "VM-12" being a Statement by His Excellency William Ruto dated 5th July 2024 announcing further austerity measures, a National Treasury Circular No. 2/2024 dated 27th March 2024 on Policy Measures to Enhance State Corporations' Revenue Generation and Expenditure Rationalization in line with the Government's Fiscal Consolidation Efforts and the Procuring Entity's Internal Memo dated 17th May 2024 on Implementation of Austerity Measures for FY2023/24.

101. We have carefully studied the confidential file submitted by the 1st Respondent pursuant to Section 67(3)(e) of the Act in an effort to establish whether the Respondents provided sufficient reasons to demonstrate that the subject procurement had inadequate budgetary allocation. In our considered view, the best evidence that a procuring entity ought to provide to demonstrate availability or lack of an adequate budgetary allocation for the procurement process would be the Procuring Entity's Approved Procurement Plan, Approved Budget Estimates that were in place at the time of commencement of the procurement process in the subject tender as contemplated under Section 44(2)(b) and 53(d) of the Act and the re-submitted budget for the current financial year that

was rationalized and resubmitted through GIMIS by 2nd April 2024 as indicated in the National Treasury Circular No. 2/2024 dated 27th March 2024.

102. In saying so, we note that the subject tender was advertised on 18th June 2024 and closed on 13th August 2024 which was after issuance of the National Treasury Circular No. 2/2024 dated 27th March 2024, the Internal Memo dated 17th May 2024 and the President's announcement of 5th July 2024. As such, the Procuring Entity in floating the subject tender and proceeding with commencement of the procurement proceeding in the subject tender with regard to sourcing for fumigation and pest control services was well aware of the austerity measures and budget cuts designed to streamline operations and mitigate unnecessary expenditure by state entities including re-submission of its rationalized recurrent expenditure budget.

103. The Board has neither had sight of the Procuring Entity's Approved Procurement Plan, Approved Budget Estimates nor the re-submitted rationalized recurrent expenditure budget that were in place at the time of commencement of the procurement process in the subject tender from the Respondents' confidential file in support of the allegation that there was inadequate budgetary provision in the subject tender. There is therefore no adequate evidence pertaining to budgetary insufficiency and allocation supplied to the Board in support of termination of the procurement proceedings in the subject tender.

104. This Board when faced with a similar issue as the one in the instant Request for Review in **PPARB Application No. 75 of 2023 Astronea Construction Limited v The Accounting Officer, County Government of Bomet & Others** held at paragraph 92 of its Decision as follows:

'... If indeed the Respondent lacks adequate funding for the subject tender, nothing would be easier than for it to demonstrate the same by exhibiting the complete procurement plan and approved budget (including supplementary budgets if any) of both the Respondent and the State department of trade, with whom the subject tender was to be executed, to enable all parties and the board verify its assertions. Absent these documents, an inference may drawn that the said evidence if tendered would be adverse to the Respondent...'

105. Superior courts in this country have previously warned against the growing trend of procuring entity's reproducing the grounds of termination under Section 63 of the Act without any further information. In **Republic v Public Procurement Administrative Review Board Exparte Nairobi City & Sewerage Company; Webtribe Limited t/a Jambopay Limited (Interested Party) [2019] eKLR; Nairobi High Court Judicial Review Application 437 of 2018** the High Court considered a judicial review application challenging the decision of this

Board that had found that the Procuring Entity irregularly terminated the tender under consideration. In dismissing the judicial review application, the High Court sounded a warning to Procuring Entities that mere recitation of grounds of termination of a tender under Section 63 of the Act without information establishing the alleged ground of termination is insufficient to justify such termination:

"45. The mere recitation of the statutory language, as has happened in this case is not sufficient to establish the grounds or sufficient reasons. The reasons for the termination must provide sufficient information to bring the grounds within the provisions of the law. This is because the tender process and in particular, the termination, must be done in a transparent and accountable and legal manner as the law demands. This is because the question whether the information put forward is sufficient to place the termination within the ambit of the law will be determined by the nature of the reasons given. The question is not whether the best reasons to justify termination has been provided, but whether the reasons provided are sufficient for a reasonable tribunal or body to conclude, on the probabilities, that the grounds relied upon fall within any of the grounds under section 63 of the Act. If it does, then the party so claiming has discharged its burden under section 63"

106. From the above holding, which is binding on this Board, public procurement processes, including termination or cancellation of a public tender, should be done in an open and transparent manner and mere recitation of the statutory language under Section 63 of the Act does not suffice. In our considered view, fairness and transparency during termination of procurement proceedings require as of necessity that an accounting officer of a procuring entity should not only recite the statutory language as reasons for termination but also provide real and tangible reasons backed with sufficient evidence for such termination. With this information and evidence, aggrieved tenderers will critically weigh their options on whether to challenge or not to challenge such a termination in light of being in possession of sufficient evidence of the reasons for such termination

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

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

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

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

108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

108. Guided by the above holdings, the Board finds and holds that the Respondents have failed to fulfill the substantive requirements for the termination of procurement proceedings in the subject tender as required by Section 63(1)(b) of the Act and the aforementioned case laws since they have not provided sufficient evidence of inadequate budgetary allocation justifying termination of the subject tender.

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

109. We note that Mr. Njoroge sent to the Board via email dated 16th December 2024 a screenshot of the PPIP Portal addressing termination of the subject tender as contemplated under Section 63 (2) of the Act as read with PPRA Circular No. 4/2022 dated 1st July 2022 on Mandatory Reporting in the PPIP Portal addressing termination of the subject tender.

110. From the confidential file, we also note that bidders in the subject tender were notified of termination of the procurement proceedings in the subject tender vide letters dated 20th November 2024 sent via email on 21st November 2024. However, the said letters do not muster the threshold of termination notice contemplated under Section 63(4) of the

Act for failing to sufficiently give reasons pertaining to the alleged ground of termination due to inadequate budgetary provision.

111. In view of the foregoing, the Board finds that the procedural statutory pre-conditions that must be satisfied before a termination is deemed lawful as required by Section 63(2) & (3) of the Act have not been met by the Respondents.

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

What orders the Board should grant in the circumstances?

113. We have established that the termination of the procurement proceedings of the subject tender was irregular and in breach of Section 63 of the Act. We fault the 1st Respondent for commencing the procurement process of the subject tender without ascertainment of whether there were sufficient funds to meet the obligations of the resulting contract as such actions were contrary to the provisions of the Act and the Constitution noting that such issues of budgetary allocation

ought to have been arrested before commencement of procurement proceedings in the subject tender.

114. The Board notes that the Respondents at ground No. 2 of their Notice of Preliminary contend that the instant Request for Review does not disclose with a reasonable degree of precision the (specific) reasons for the complaint i.e. how the Procuring Entity allegedly breached Sections 63, 83, and 86 of the Act. However, given our findings hereinabove, the Board has established that the Applicant was aggrieved by the decision of the Procuring Entity to terminate the subject tender due to an inadequate budgetary provision as notified vide letter dated 20th November 2024 and as such, it had a sufficient reason to seek review of this decision before this Board. Accordingly, this ground of objection also fails.

115. The upshot of our finding is that the instant Request for Review succeeds with respect to the following specific orders:

FINAL ORDERS

116. 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:

A. The Procuring Entity's Notice of Preliminary Objection dated 9th December 2024 be and is hereby dismissed.

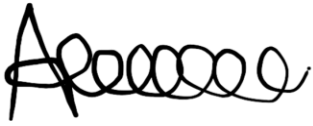
B. The decision by the 1st Respondent to terminate the procurement proceedings of Tender No. KGN-ADM-008-2024 for Provision of Fumigation and Pest Control Services at Kengen Premises and Power Stations for Two Years (2024-2026) - Re-Advert be and is hereby quashed.

C. The Procuring Entity's letter dated 20th November 2024 issued to the Applicant and other tenderers in the subject tender communicating the decision to terminate the procurement proceedings be and is hereby nullified and set aside.

D. The 1st Respondent is hereby directed to act on the findings of the Evaluation committee at the financial evaluation and due-diligence stage and proceed with the procurement process to its logical conclusion within 21 days of this decision taking into consideration the Board's findings herein. Provided that the proceedings shall not be concluded earlier than 14 days window period.

E. Given that the procurement process is incomplete, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 23rd Day of December 2024.



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PANEL CHAIRPERSON

PPARB



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SECRETARY

PPARB