

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 3/2025 OF 6TH JANUARY 2025

BETWEEN

MATENGO ASSOCIATES.....APPLICANT

AND

**THE TRUST SECRETARY, MOI TEACHING AND
REFERRAL HOSPITAL STAFF PENSION SCHEME.....RESPONDENT**

Review against the decision of the Accounting Officer, Moi Teaching and Referral Hospital Staff Pension Scheme in respect of Tender No. MTRHSPS/RFP/IA2/2024-2026 Request for Proposal for Provision of Internal Audit Services to MTRH Staff Pension Scheme.

BOARD MEMBERS PRESENT

Mr. George Murugu FCI Arb & IP	Chairperson & Panel Chair
Mr. Joshua Kiptoo	Member
Mr. Stanslaus Kimani	Member
Mr. Robert Chelagat	Member

IN ATTENDANCE

Mr. Philemon Kiprop	Secretariat
Mr. Anthony Simiyu	Secretariat

PRESENT BY INVITATION

APPLICANT

MATENGO ASSOCIATES

Mr. Kiprono

Advocate, A.E. Kiprono & Associates

RESPONDENTS

THE TRUST SECRETARY, MOI TEACHING AND REFERRAL HOSPITAL STAFF PENSION SCHEME

Mr. Yego

Advocate, Z.K. Yego Law Offices

Mr. Albert Kigen

The Trust Secretary, Moi Teaching and Referral
Hospital Staff Pension Scheme

BACKGROUND OF THE DECISION

The Tendering Process

1. Moi Teaching and Referral Hospital Staff Pension Scheme, together with the Respondent herein, invited interested suppliers to submit their bids in response to Tender No. MTRHSPS/RFP/IA2/2024-2026 Request for Proposal for Provision of Internal Audit Services to MTRH Staff Pension Scheme. It was an open (national) tender and the tender submission deadline was set as 31st October 2024 at 10:00 a.m.

Submission of Bids and Tender Opening

2. According to the Tender Opening Minutes dated 31st October 2024 under the Confidential File submitted by the Procuring Entity, the following ten



(10) bidders were recorded as having submitted their bids in response to the subject tender by the tender submission deadline.

#	Bidder
1.	MGI Alekim LLP
2.	Kingori Kimani & Co
3.	Ernest & Young LLP
4.	Ronalds LLP
5.	Matengo & Associates
6.	Grant Thornton Advisory East Africa Ltd
7.	Bace Partners LLP
8.	PFK Consulting (K) Ltd
9.	Bon & Drew Associates
10.	RK & Associates

Evaluation of Bids

3. The Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the submitted bids in the following 3 stages in the subject tender as captured in the Evaluation Report
 - i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Financial Evaluation



1st Preliminary Evaluation

4. At this stage of the evaluation, the submitted bids were to be examined using the criteria set out as Clause 2. Preliminary examination for Determination of Responsiveness under Section III- Evaluation and Qualification Criteria at pages 27 to 28 of the blank Tender Document.
5. The evaluation was to be on a Yes/No basis and any bid that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
6. The Evaluation Report dated 9th December 2024 (herein "**1st Evaluation Report**") shows that at the end of the evaluation at this stage, 5 of the submitted bids were found unresponsive to the mandatory requirements and thus disqualified from further evaluation. Only 5 bids, which included that of the Applicant were responsive to the mandatory requirements and thus qualified for further evaluation.

1st Technical Evaluation

7. At this stage of the evaluation, the bids successful at the Preliminary Evaluation Stage were to be examined using the criteria set out as Technical Requirements under Section III- Evaluation and Qualification Criteria at pages 29 to 30 of the blank Tender Document.
8. Bids were to be evaluated against 9 requirements that carried a cumulative score of 100 marks. In order for a bid to qualify for further evaluation, they had to garner at least 80 marks. Any bid that failed to



garner the 80 marks threshold would be disqualified from further evaluation.

9. Whereas the Tender Document set 80 marks as the threshold for a bid to qualify for further evaluation at the Financial Evaluation Stage, the 1st Evaluation Report departs from this and treats 70 marks as the threshold to qualify for further evaluation at the Financial Evaluation Stage. This results in 2 bids being disqualified for not meeting the minimum 70 marks threshold. Only 3 bids including that of the Applicant (72 marks) met the 70 marks threshold and were thus qualified for further evaluation.

1st Financial Evaluation

10. At this stage of the evaluation, the bids successful at the Technical Evaluation Stage were to be examined using the criteria set out as Part C. Financial Evaluation at page 30 of the blank Tender Document.
11. Bids were to be evaluated through a comparison of their tender prices and the successful bid would be that offering the lowest tender price among the bids that qualified for evaluation at the Financial Evaluation Stage.
12. The 1st Evaluation Report records that at the end of the evaluation at this stage, the Applicant's bid was established as the bid offering the lowest tender price at **Kshs. 550,000 p.a. inclusive of all taxes.**



1st Evaluation Committee's Recommendation

13. The Evaluation Committee vide its 1st Evaluation Report recommended the award of the subject tender to the Applicant at its tendered price of **Kenya Shillings Five Hundred and Fifty Thousand (Kshs. 550,00) p.a. inclusive** of all taxes.

1st Professional Opinion

14. In a Professional Opinion dated 16th December 2024 (hereinafter referred to as the "the 1st Professional Opinion") the Procuring Entity's Senior Supply Chain Officer, Mr. Michael K Yegoh, reviewed the manner in which the subject procurement process was undertaken and recommended the termination of the subject tender as per the Evaluation Committee's Report.
15. The Professional Opinion was subsequently approved by the Respondent, Mr. Albert Kigen on the same day, 16th December 2024.

Notification to the bidders

16. All the bidders in the subject tender were notified of the outcome of the evaluation exercise vide letters dated 16th December 2024. The letters indicate that the subject tender had been awarded to the Applicant.
17. Subsequently, on 18th December 2024, the Respondent sent a letter to all the bidders recalling the notification letters of 16th December 2024 with a promise to offer further communication.



18. It would appear that subsequent to the recall of the letters of 16th December 2024, the Evaluation Committee reconvened to re-evaluate the bids received in the subject tender right from the Preliminary Evaluation Stage.

2nd Preliminary Evaluation

19. At this stage of the evaluation, the submitted bids were to be examined using the criteria set out as Clause 2. Preliminary examination for Determination of Responsiveness under Section III- Evaluation and Qualification Criteria at pages 27 to 28 of the blank Tender Document.
20. The evaluation was to be on a Yes/No basis and any bid that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
21. According to the Evaluation Report dated 18th December 2024 (hereinafter "the 2nd Evaluation Report"), at the end of the evaluation at this stage, 5 of the submitted bids were found unresponsive to the mandatory requirements and thus disqualified from further evaluation. Only 5 bids, which included that of the Applicant were responsive to the mandatory requirements and thus qualified for further evaluation.

2nd Technical Evaluation

22. At this stage of the evaluation, the bids successful at the Preliminary Evaluation Stage were to be examined using the criteria set out as



Technical Requirements under Section III- Evaluation and Qualification Criteria at pages 29 to 30 of the blank Tender Document.

23. Bids were to be evaluated against 9 requirements that carried a cumulative score of 100 marks. In order for a bid to qualify for further evaluation, they had to garner at least 80 marks. Any bid that failed to garner the 80 marks threshold would be disqualified from further evaluation.
24. According to the 2nd Evaluation Report, at the end of the evaluation at this stage, 3 bids which included that of the Applicant (72 marks) were disqualified as unresponsive as they did not meet the minimum 80 marks threshold. Only 2 bids met the 80 marks threshold and thus qualified for further evaluation.

2nd Financial Evaluation

25. At this stage of the evaluation, the bids successful at the Technical Evaluation Stage were to be examined using the criteria set out as Part C. Financial Evaluation at page 30 of the blank Tender Document.
26. Bids were to be evaluated through a comparison of their tender prices and the successful bid would be that offering the lowest tender price among the bids that qualified for evaluation at the Financial Evaluation Stage.



27. At the end of the evaluation at this stage, the MGI Alekim LLP's bid was established as the bid offering the lowest tender price at **Kshs. 1,624,000 p.a. inclusive of all taxes.**

2nd Evaluation Committee's Recommendation

28. The Evaluation Committee vide its Evaluation Report dated 18th December 2024 recommended the termination of the subject tender while noting that MGI Alekim LLP's tender price of **Kenya Shillings One Million, Six Hundred Twenty-Four Thousand (Kshs. 1,624,000) p.a. inclusive** of all taxes exceeded the budget by over 100%.

2nd Professional Opinion

29. In a Professional Opinion dated 20th December 2024 (hereinafter referred to as the "the Professional Opinion") the Procuring Entity's Senior Supply Chain Officer, Mr. Michael K Yegoh, reviewed the manner in which the subject procurement process was undertaken and recommended the termination of the subject tender as per the Evaluation Committee's Report.
30. The Professional Opinion was subsequently approved by the Respondent, Mr. Albert Kigen on the same day, 20th December 2024.

Notification to the bidders

31. Accordingly, the bidders were notified of the termination of the subject tender vide letters dated 23rd December 2024.



REQUEST FOR REVIEW

32. On 6th January 2025, the Applicant herein through the firm A.E. Kiprono & Associates filed a Request for Review dated 6th January 2025 supported by an affidavit sworn on 6th January 2025 by Meshak Matengo Nyagweth, the Applicant's Managing Director, seeking the following orders:

- a) An order annulling and setting aside the Respondent's letter to the Applicant dated 18th December 2024;***
- b) An order annulling and setting aside the Respondent's decision to terminate Tender No. MTRHSPS/RFP/IA2/2024-2026 for the provision of internal audit services to MTRH Staff Pension Scheme as contained in the letter dated 23rd December 2024;***
- c) An order directing the Respondent to proceed and execute the contract with the Applicant pursuant to the notification of intention to award dated 16th December 2024;***
- d) Costs of the request for review be granted to the Applicant;***
- e) Any other relief that the Review Board deems fit to grant under the circumstances.***

33. In a Notification of Appeal and a letter dated 6th January 2025, Mr. James Kilaka, the Ag. Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent 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 Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 6th January 2025.

34. On 13th January 2025, the Respondent through the firm of Z.K. Yego Law Offices filed a Notice of Appointment of Advocates alongside a Preliminary Objection dated 9th January 2025 and a Replying Affidavit sworn on 9th January 2025 by Albert Kigen, the Respondent herein. The Respondent equally forwarded to the Board the Confidential Documents under Section 67(3) the Act.
35. On 17th January 2025, the Applicant filed Written Submissions of even date.
36. On the same day, 17th January 2025, the Ag. Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 22nd January 2025 at 2:00 p.m. through the link availed in the said Hearing Notice.
37. On 20th January 2025, the Respondent filed Written Submissions of even date.
38. When the Board convened for hearing on 21st January 2025 at 2:00 p.m. parties were represented by their various Advocates. The Board read



through the documents filed in the matter and sought parties' confirmation that the documents had been served upon them to which they confirmed in the affirmative.

39. The Board noted that since the Respondent had filed Preliminary Objection, this would be considered as part of the Request for Review pursuant to Regulation 209(4) of the Regulations 2020. Accordingly, the Board gave the following directions on the order of address:
- i. The Respondent would start by urging their Preliminary Objection within 3 minutes.
 - ii. Thereafter Applicant would then respond to the Preliminary Objection and urge the Request for Review within 13 minutes;
 - iii. The Respondent would then offer a response to the Request for Review in 10 minutes
 - iv. Lastly, the Applicant would close by way of rejoinder in a minute.
40. Below is a summary of parties submissions before the Board

PARTIES SUBMISSIONS

Respondent's Submission on the Preliminary Objection

41. Counsel for the Respondent, Mr. Yego submitted that the present Request for Review was incompetent for failing to name the Procuring Entity as a Respondent. He relied on ***R v Public Procurement Administrative Review Board v Kenya Ports Authority & anor Ex parte Jeleram***



Industrial Suppliers Limited [2019]eKLR for the proposition that the failure to join a mandatory party renders a Request for Review defective.

42. He argued that the Fourteenth Schedule under the Regulations 2020 set out the format of a Request for Review which indicates that the Procuring Entity should be the Respondent, which was not the case in the present proceedings.
43. Counsel further argued that the present Request for Review was time-barred under Section 167(1) of the Act as read with Regulation 203(2)(c). He submitted that the breach complained of was the cancellation made on 18th December 2024 in respect of a tender awarded on 16th December 2024. Reliance was made on ***PPARB Application No. 111 of 2020 Zephania K. Yego & Harris A Aginga t/a Z.K. Yego Law Offices v Independent Electoral and Boundaries Commission; PPARB 120 of 2020*** and ***David M. Mereka t/a Merela & Company Advocates v Independent Electoral and Boundaries Commission*** for the argument that jurisdiction of the Board is time-bound.

Applicant's Submissions on both the Request for Review and the Preliminary Objection

44. Counsel for the Applicant, Mr. Kiprono, indicated that under Section 170 of the Act, it is the Accounting Officer of a Procuring Entity and not the Procuring Entity that is stipulated as a mandatory party. Further, that it would be erroneous for the Fourteenth Schedule of the Regulations 2020



to be elevated as to override the express provisions of Section 170 of the Act on the parties to a Request for Review.

45. Counsel further relied on ***James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** for the proposition that failure to join the Procuring Entity as a party does not render a Request for Review as defective. Further reliance was put on ***R v Public Procurement Administrative Review Board v Kenya Ports Authority & anor Ex parte Jeleram Industrial Suppliers Limited [2019]eKLR*** for the proposition that the Procuring Entity is not among the parties to a Request for Review.
46. Mr. Kiprono contended that the Request for Review was timeously filed as it was filed within 14 days from 23rd December 2024, which was the date when the Respondent terminated the procurement proceedings in the subject tender. He argued that computing the 14 days timeline would show that 6th January 2025 was the deadline date and which also happens to be the date when the Applicant filed the present Request for Review.
47. Counsel made reliance was made on ***Republic v Public Procurement Administrative Review Board & 2 Others Ex parte Kemotrade Investment Limited [2018]eKLR*** and ***Public Procurement Administrative Review Board v Four M Insurance Brokers Limited & 3 Others (Civil Appeal E1009 of 20230 [2024] KECA79(KLR) (9February 2024)(Judgment)*** for the argument that



the 14 days timeline begins to run from the point one discovers the breach complained of.

48. On the merits of the Request for Review, Counsel faulted the propriety of the termination of the subject tender highlighting that the termination was done after award. He pointed out that this was contrary to Section 63 of the Act which contemplates that termination under Section 63 of the Act is only available prior to the issuance of an award and not after. He decried that in the present case, the Applicant was awarded the subject tender through a letter dated 16th December 2024 and therefore the Respondent could not purport to terminate the subject tender through the subsequent letter dated 18th December 2024.
49. Counsel invited the Board to interrogate the Confidential Documents to ascertain whether the Respondent complied with the procedural requirements for terminating a tender under Section 63 of the Act.
50. He argued that whereas the letter of 23rd December 2024 terminated the subject tender on account of inadequate budgetary provision, the Respondent had indicated in its response to the Request for Review indicated that the Applicant's bid failed to meet the 80 marks threshold at the Technical Evaluation Stage. The Respondent considers this an absurdity noting that it was previously awarded the subject tender and that at no time during the tender process was it ever informed that its bid was unresponsive at the Technical Evaluation Stage.



51. Reliance was made on ***Republic v Public Procurement Administrative Review Board & anor Ex parte SGS Kenya Limited [2017]eKLR; PPARB Application No. 84 of 2017; Baraki International Limited v Kenya Urban Roads Authority and PPARB Application No. 88 of 2017; Spring Engineering Group Limited v Sports Kenya and PPARB No1 of 2018; Transpower Energy Solutions Limited v Kenya Pipeline Company Limited*** for the proposition that the ground relied upon for termination of a procurement process has to be justified.
52. He argued that the Applicant's bid was within the Procuring Entity's budget as it was previously awarded the subject tender at its tender price. According to the Applicant the decision to terminate the subject tender which was initially awarded to the Applicant was lacking in fairness, equitability, transparency and competitiveness and in breach of Article 227 of the Constitution. He maintained that the ground for terminating the subject tender was not supported in evidence and therefore urged the Board to allow the Request for Review.

Respondent's Submissions on the Request for Review

53. Counsel for the Respondent, Mr. Yego reiterated that under Regulation 203 of the Regulations 2020 and the Fourteenth Schedule of the Regulations 2020, a Procuring Entity must be made a party to a Request for Review.



54. He equally contended that the cause of action for the present Request for Review arose on 18th December 2024 when the Respondent sent a letter to the bidders recalling the award of the subject tender to the Applicant. According to the Respondent, the further communication made on 23rd December 2024 only explained the reasons as to why the cancellation was done. Therefore, the Respondent was of the view that the Applicant ought to have moved this Board within 14 days from 18th December 2024 and not 23rd December 2024. From the Respondent's computation the Request for Review was filed 5 days outside time.
55. On the substance of the Request for Review, Counsel argued that the cancellation of the award was informed by the fact that the Applicant's bid was unresponsive at the Technical Evaluation Stage having failed to meet the 80 marks threshold to qualify for evaluation at the Financial Stage. He argued that the Applicant's bid scored 72 marks and thus was erroneously qualified for evaluation at the Financial Evaluation Stage and that it is this error that previously led to their award of the subject tender as the lowest evaluated bidder. He argued that the Respondent was right to recall and cancel the notification that had been issued in error.
56. Mr. Yego argued that the letter of 23rd December 2024 disclosed the reason of inadequate budgetary provision as the reason for terminating the subject tender because all the bidders who qualified for evaluation at the Financial Evaluation Stage quoted tender prices that were above the



Procuring Entity's budget for the subject tender. He therefore urged the Board to dismiss the Request for Review.

Applicant's Rejoinder

57. In a brief rejoinder, Counsel for the Applicant, Mr. Kiprono reiterated that at no point in the tender process did the Respondent inform the Applicant that its bid was unresponsive at the Technical Evaluation Stage.
58. Additionally, he argued that the letter dated 18th December 2024 was not a cancellation but a recall. Accordingly, there was no indication in the letter that the subject tender had been cancelled.

CLARIFICATIONS

59. The Board called on the Respondent to clarify the error that was apparent in the 1st evaluation process. Counsel for the Respondent, Mr. Yego confirmed that an error was apparent at the Technical Evaluation Stage as the Applicant's bid was erroneously qualified for evaluation at the Financial Evaluation Stage when it had not garnered the minimum 80 marks threshold at the Technical Evaluation Stage. Counsel contended that the Applicant's bid mustered 72 marks which was below the minimum 80 marks required for a bid to qualify for further evaluation at the Financial Evaluation Stage.
60. The Board sought the Applicant's confirmation on whether they were aware that their bid was erroneously qualified for evaluation to the Financial



Evaluation Stage. Counsel for the Applicant, Mr. Kiprono maintained that throughout the tender process, the Applicant was never informed of the alleged error and that the fact that the Applicant was initially awarded the subject tender suggests that there was no such error.

61. The Board sought the Respondent's confirmation that the letter dated 16th December 2024 did not list the Applicant among the unsuccessful bidders in the subject tender and Counsel for the Respondent, Mr. Yego responded in the affirmative.
62. The Board also sought the Respondent's confirmation that the letter dated 18th December 2024, recalling the award to the Applicant did not give any reason for the recall and Counsel for the Respondent, Mr. Yego responded in the affirmative.
63. The Board asked the Respondent to confirm that the cancellation of a procurement process should be accompanied by reasons for such cancellation and Counsel for the Respondent, Mr. Yego confirmed in the affirmative.
64. The Board inquired from the Respondent on why the letter dated 23rd December 2024 did not outline that the Applicant's bid was unresponsive at the Technical Evaluation Stage. The Trust Secretary, Mr. Kigen, indicated the letter dated 23rd December 2024 adopted a format proposed



by the Head of Procurement as being the standard format prescribed by the Public Procurement Regulatory Authority.

65. The Board invited parties to offer their comments on what was to be made of the letter of recall's indication that further communication was to be made available to the bidders. Counsel for the Respondent, Mr. Yego, argued that the letter was unequivocal that the tender had been recalled and this was because of an error. He therefore argued that the Applicant ought to have approached the Board on the basis of this recall. On the flip side, Counsel for the Applicant, Mr. Kiprono highlighted that the Respondent appeared to have likened the recall with a termination notwithstanding the fact that the two are not synonymous. Further that Section 63 of the Act cannot form the basis of recalling an award.
66. The Board asked the Respondent to cite the legal basis for the recall letter of 18th December 2024. Counsel for the Respondent, Mr. Yego referred to the Professional Opinion under Section 47 and 84 of the Act as read with Section 78(2) of the Act
67. The Board asked parties to comment on whether the letter of 18th December 2024 created a cause of action. Counsel for the Respondent, Mr. Yego answered in the affirmative citing that the letter had the effect of cancelling the award made to the Applicant. On the other hand, Counsel for the Applicant had a different view. Mr. Kiprono argued no cause of action accrued since recall does not mean termination.



68. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 6th January 2025 had to be determined by 27th January 2025. Therefore, the Board would communicate its decision on or before 27th January 2025 to all parties via email.

BOARD'S DECISION

69. 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 determining this issue, the Board will consider:

- i. Whether the Request for Review is defective for not listing the Procuring Entity as a Respondent?
- ii. Whether the present Request for review is time-barred under Section 167(1) of the Act?
- iii. Whether the Board has jurisdiction over the matter under Section 167(4)(b) of the Act?

Depending on the finding on the first issue:

II. ***Whether the Respondent in terminating the subject tender complied with the provisions of Section 63 of the Act?***



III. ***What orders should the Board issue in the circumstance?***

Whether the Board has jurisdiction over the present Request for Review?

70. Following the service of the Request for Review upon the Respondent, the latter filed a Preliminary Objection dated 9th January 2024 premised on 2 grounds. First, that the present Request for Review was fatally defective for not naming the Procuring Entity as a party. Second, that the present Request for Review was time-barred under Section 167(1) of the Act and Regulation 203 of the Regulations 2020.
71. The Respondent's Preliminary Objection raises jurisdictional question which this Board is invited to determine as a preliminary issue in line with the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on 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 in respect of which it is raised.
72. 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."***



73. On its part, Halsbury's Laws of England (4th Ed.) Vol. 9 defines jurisdiction as:

"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

74. 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 draws tools in respect of the matter before it the moment it holds that it is without jurisdiction."

75. 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...."

76. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

"(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."

77. Further, Section 28 of the Act provides for the functions of the Board as:

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



78. The Board shall now separately interrogate the grounds featuring in the Respondent's Preliminary Objection dated 9th January 2025:

i. Whether the Request for Review is defective for not listing the Procuring Entity as a Respondent?

79. The Respondent took the view that the present Request for Review had omitted a mandatory party and was thus defective. Counsel for the Respondent, Mr. Yego argued that the failure to join a mandatory party to a Request for Review rendered it fatally defective. He contended that in the present case the Applicant had failed to join the Procuring Entity i.e. Moi Teaching and Referral Hospital Staff Pension Scheme as a party in breach of the format prescribed under Regulation 203 and the Fourteenth Schedule of the Regulations 2020. It was therefore argued on behalf of the Respondent that the present Request for Review was fatally defective and thus ought to be struck out.

80. The Applicant took a different view, highlighting that the law did not contemplate that a Procuring Entity was a mandatory party to a Request for Review. Counsel for the Applicant, Mr. Kiprono, indicated that under Section 170 of the Act, it is the Accounting Officer of a Procuring Entity and not the Procuring Entity that is stipulated as a mandatory party. Further, that it would be erroneous for the Fourteenth Schedule of the Regulations 2020 to be elevated as to override the express provisions of Section 170 of the Act on the parties to a Request for Review. He



therefore argued that failure to join the Procuring Entity as a party does not render a Request for Review as defective.

81. Drawing from the above rival positions on the competency of the Request for Review as filed, the Board is invited to determine whether the Applicant's failure to name Moi Teaching and Referral Hospital Staff Pension Scheme as a party to the Request for Review renders it fatally defective.

82. For starters, Section 170(b) of the Act sets out the parties to a Request for Review in the following terms:

"170. Parties to review

The parties to a review shall be—

(a) the person who requested the review;

(b) the accounting officer of a procuring entity;

(c) the tenderer notified as successful by the procuring entity;

and

(d) such other persons as the Review Board may determine."

83. From Section 170 above, the necessary parties to a Request for Review are (i) the Applicant; (ii) the Accounting Officer of the concerned Procuring Entity; (iii) the successful tenderer under the subject tender; and (iv) any other party that the Board may determine.



84. Notable from the above, Section 170 of the Act lists the Accounting Officer of a Procuring Entity and **not** the Procuring Entity as a party to the Request for Review.
85. Superior Courts in this country have on multiple occasions pronounced themselves on the applicability of Section 170 of the Act above.
86. Specific to the statutory history on the departure from having the Procuring Entity as a party to the Accounting Officer, the decision of the Court of Appeal in ***Mombasa Court of Appeal Civil Appeal No. 131 of 2018; James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR*** is instructive.
87. In the said appeal, the Court of Appeal rendered itself on an appeal which was predicated on various grounds of appeal including the failure to include an Accounting Officer as a party to Request for Review. In giving the history of Kenya's public procurement statute on necessary parties to a Request for Review under Section 170 of the Act, the appellate court affirmed that the failure to include an Accounting Officer of a Procuring Entity and the successful tenderer renders a Request for Review as incompetent:

"It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings, the current statute which replace it, the PPADA, requires that the accounting officer of the procuring entity, be the party.



Like the learned Judge we are convinced that the amendment was for a purpose. Parliament in its wisdom elected to locate responsibility and capacity as far as review proceedings are concerned, on the accounting officer specifically. This, we think, is where the Board's importation of the law of agency floundered. When the procuring entity was the required party, it would be represented in the proceedings by its officers or agents since, being incorporeal, it would only appear through its agents, though it had to be named as a party. Under the PPADA however, there is no such leeway and the requirement is explicit and the language compulsive that it is the accounting officer who is to be a party to the review proceedings. We think that the arguments advanced in an attempt to wish away a rather elementary omission with jurisdictional and competency consequences, are wholly unpersuasive. When a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or to belittle a failure to comply. We think, with respect, that the learned Judge was fully entitled to, and did address his mind correctly to the law when he followed the binding decision of the Supreme Court in NICHOLAS ARAP KORIR SALAT vs. IEBC [2014] eKLR when it stated, adopting with approval the judgment of Kiage, JA; "I am not in the least persuaded that Article 159 and Oxygen principles which both commands courts to seek substantial



justice in an efficient and proportionate and cost effective manner to eschew defeatist technicalities were ever meant to aid in overthrow of rules of procedure and cerate anarchical tree for all in administration of justice. This Court, indeed all Courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines are to serve the process of judicial adjudication and determine fair, just certain and even handed courts cannot aid in bending or circumventing of rules and a shifting of goal posts for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.” We have no difficulty holding, on that score, that the proceedings before the Board were incompetent and a nullity, which the learned Judge properly quashed by way of certiorari.”

88. From the above decision by the Court of appeal, it is apparent that:
- i. Under the repealed procurement statute, the Procuring Entity was a necessary party.
 - ii. Under the succeeding statute (the Act), the Accounting Officer was made a necessary party in place of the Procuring Entity.
 - iii. The amendment of statute to have an Accounting Officer in place of the Procuring Entity serves to locate responsibility and capacity in respect of public procurement proceedings.



- iv. Under the Act, failure to join the Accounting Officer as a party to a Request for Review renders the Request for Review as fatally defective.

- 89. Turning to the present Request for Review, it only bears ***"Trust Secretary, Moi Teaching and Referral Hospital Staff Pension Scheme"*** as the only Respondent.
- 90. Under Section 2 of the Public Finance Management Act, the Trust Secretary, Moi Teaching and Referral Hospital Staff Pension Scheme is the Accounting Officer for Moi Teaching and Referral Hospital Staff Pension Scheme. Therefore, the Applicant named the Accounting Officer, Moi Teaching and Referral Hospital Staff Pension Scheme as a Respondent in its Request for Review. Essentially the Applicant complied with Section 170 of the Act.
- 91. The Board is mindful of the fact that the Respondent premised its Preliminary Objection on Regulation 203 of the Regulation 2020 and the Fourteenth Schedule of the Regulations 2020.
- 92. For completeness of the record the Board will outline the statutory basis of the said provisions:
- 93. Section 167(1) of the Act provides for the right of a candidate or bidder to file a Request for Review before this Board in the following terms:



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.

94. On its part Regulation 203(1) of the Regulations 2020 prescribes the Form that a Request for Review should take in the following terms:

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.

95. For completeness of the record and for ease of reference the Form referred to under Regulation 203(1) as being under the Fourteenth Schedule is hereinafter reproduced:

FORM OF REVIEW

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.....OF..... 20.....

BETWEEN

.....APPLICANT (Review Board)



AND

.....RESPONDENT (Procuring Entity)

Request for Review of the decision ...

96. From the Form above it would appear that the Applicant in a Request for Review would be this Board. It would equally appear that the Respondent would be the Procuring Entity. These representations are set out in the Form under the Fourteenth Schedule are at variance with Section 170 of the Act in at least 3 material regards:
- i. Whereas Section 170 of the Act contemplates the Applicant to a Request for Review to be the person filing the Request for Review, the Form under the Fourteenth Schedule of the Regulations 2020 designates the Board as the Applicant to a Request for Review.
 - ii. Whereas Section 170 of the Act contemplates that an Accounting Officer of a Procuring Entity should be a party to a Request for Review, the Form the Fourteenth Schedule of the Regulations 2020 designates the Procuring Entity itself as the Respondent to a Request for Review.
 - iii. Whereas Section 170 of the Act contemplates that a successful bidder should be a party to a Request for Review, the Form the Fourteenth Schedule of the Regulations 2020 does not make provision for a successful bidder as a party a Request for Review.



97. Confronted with the above conflict, the Board draws guidance from Section 31(b) of the Interpretation and General Provisions Act:

31. General provisions with respect to power to make subsidiary legislation

Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation—

(a) ...

(b) no subsidiary legislation shall be inconsistent with the provisions of an Act;

98. Superior courts in this country have equally held that subsidiary legislation cannot override statute. In ***Republic v Kenya School of Law & another Ex Parte Kithinji Maseka Semo & another [2019] eKLR*** the High Court stated:

78. By subjecting the ex parte applicant to the requirements under the Regulations as opposed to the category expressly provided under section 1(a) of the second schedule under which their qualifications fall, the Respondents not only ignored the express provisions of section 16, but also elevated the Regulations above the provisions of the act. As was held in Republic vs Kenya School of Law & Council of Legal Education ex parte Daniel Mwaura Marai,[63]the provisions of a subsidiary legislation can under no circumstances override



or be inconsistent with any act of Parliament be it the one under which they are made or otherwise. A similar position was held in Republic v Council of Legal Education & another Ex parte Sabiha Kassamia & another[64] and Republic v Council of Legal Education & another Ex-Parte Mount Kenya University.[65] Also relevant is Section 31 (b) of the Interpretation and General Provisions Act,[66]which provides that no subsidiary legislation shall be inconsistent with the provisions of an Act of Parliament.

79. Borrowing from the jurisprudence discussed above, I find no difficulty concluding that the provisions of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 cannot override the express provisions of section 16 of the KSL Act, which prescribe the admissions requirements to the ATP as those stipulated in the Second Schedule to the Act. Specifically, the Regulations cannot override the provisions of section 1(a) of the second Schedule. Had Parliament desired any other qualifications to apply over and above the qualifications held by the ex parte applicants, it would have expressly provided so.

See also ***Republic V Kenya School Of Law & Another Ex Parte Otene Richard Akomo & 41 Others; Council Of Legal Education***



***(Interested Party) [2020] eKLR Judicial Review Application
No. 20 of 2020 Consolidate with Misc Civil App No. 26 Of 2020***

99. Drawing from the above pronouncements, which are binding on this Board, we cannot purport to elevate the Form under the Fourteenth Schedule of the Regulations 2020 above the express provisions of Section 170 of the Act on parties to a Request for Review. Accordingly, the provisions of the Section 170 of the Act takes precedence over the Regulations 2020.
100. This Board draws further guidance from the dictum of the Court of Appeal in the **Betoyo Case** above, which is explicit that the present Act departed from its predecessor which mandated an Applicant to make the Procuring Entity a party. Under the current Act, the Accounting Officer took up the place of the Procuring Entity. Therefore, under the Act, an Applicant cannot be faulted for failing to join the Procuring Entity as a party. Differently put, the Applicant cannot be faulted for not making Moi Teaching and Referral Hospital Staff Pension Scheme a party to the present proceedings. Accordingly, this ground of the Preliminary Objection fails.

ii. Whether the present Request for review is time-barred under Section 167(1) of the Act?

101. The Respondent, while arguing that this Board's jurisdiction is time-bound, contended that the present Request for Review was time-barred



under Section 167(1) of the Act as read with Regulation 203(2)(c). Counsel for the Respondent, Mr. Yego submitted that the breach complained of in the subject tender was the cancellation made on 18th December 2024 in respect of a tender awarded on 16th December 2024. According to the Respondent, the present Request for Review was filed outside the statutory time under Section 167 of the Act since the Applicant's award was recalled on 18th December 2024.

102. In contrast, the Applicant argued that the present Request for Review was timeously filed. Counsel for the Applicant, Mr. Kiprono submitted that the Request for Review was filed on 6th January 2024 which was the 14th day from the from 23rd December 2024, the day when the Respondent terminated the procurement proceedings in the subject tender. It was argued that the Applicant knew of the termination on 23rd December 2024 and thus this constituted the benchmark date for the computation of the 14 days' timeline.

103. The Board is therefore invited to ascertain at this stage whether the present Request for Review is time-barred.

104. For starters, a reading of Section 167 of the Act denotes that the jurisdiction of the Board should be invoked within a specified timeline of 14 days:

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.

105. Regulation 203(2) (c) of the Regulations 2020 equally affirms the 14-days timeline in the following terms:

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***

106. Our interpretation of the above provisions is that an Applicant seeking the intervention of this Board in any procurement proceedings must file their request within the 14-day statutory timeline. Accordingly, Requests for Review made outside the 14 days would be time-barred and this Board would be divested of the jurisdiction to hear the same.

107. It is therefore clear from a reading of section 167(1) of the Act, Regulation 203(1)(2)(c) & 3 of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a Request for Review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made (ii) notification of intention to enter in to a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three (3) instances namely (i) before notification of intention to enter in to a contract is made (ii) when notification of intention to enter into a contract has been made and (iii) after notification to enter into a contract has been made. The option available to an aggrieved candidate or tenderer in the aforementioned



instances is determinant on when occurrence of breach complained took place and should be within 14 days of such breach.

108. It was not the intention of the legislature that where an alleged breach occurs before notification to enter in to contract is issued, the same is only complained after the notification to enter into a contract has been issued. We say so because there would be no need to provide 3 instances within which such Request for Review may be filed.
109. Section 167 of the Act and Regulation 203 of the Regulations 2020 identify the benchmark events for the running of time to be the date of notification of the award or the date of occurrence of the breach complained of.
110. In ***Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR*** the High Court offered guidance on when time begins to run in the following terms:

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.



111. From the foregoing, in computing time under Section 167 of the Act, consideration should be made to the breach complained of in the Request for Review and the time when an Applicant learnt of the said breach.
112. Turning to the case at hand, the gravamen of the Applicant's Request for Review, as can be discerned from the grounds in support thereof, is that it challenges the Respondent's termination of the subject tender. The Respondent's communication to the bidders was made through letters dated 23rd December 2024. Further, it is not disputed that the Respondent dispatched the said letter on 23rd December 2024 and the Applicant received its copy on the same day, 23rd December 2024.
113. From the above, it is clear that 23rd December 2024, being the date when the Applicant first learnt or is expected to have learnt of the Respondent's decision to terminate the subject tender, is the benchmark date from which the 14-day statutory window should run. This position is based on this Board's long strand of Decisions to the effect that though Section 167 of the Act and Regulation 203 of the Regulations 2020 outline multiple instances that could form the benchmark date from when the 14-days statutory window opens, the actual benchmark date for any given candidate or bidder is the date they first learnt of the breach being complained about. Accordingly, the question of knowledge of the breach being complained of is central towards identifying the benchmark date.



114. The Board will now proceed to compute the timeline within which the present Request for Review ought to have been filed before it. In computing the 14 days contemplated under the Act, we take guidance from section 57 of the Interpretation and General Provisions Act:

"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”

115. When computing time when the Applicant ought to have sought administrative review before the Board, 23rd December 2024 is excluded as per section 57(a) of the IGPA being the day that the Applicant learnt of the occurrence of the alleged breach. This means time started to run on 24th December 2024 and lapsed on 6th January 2025. In essence, the Applicant had between 23rd December 2024 and 6th January 2025 to seek administrative review before the Board. The present Request for Review was filed on 6th January 2025 which was the 14th day from the date of learning of the breach in question and therefore within the statutory timelines.
116. Counsel for the Respondent, Mr. Yego suggested that the 14 days statutory begun to run on 18th December 2024, being the date when the Applicant received a notification of the recall of its award. The Board finds great difficulty in adopting this suggestion for at least 2 reasons:
- i. The Request for Review as framed challenges the termination of the subject tender. The Applicant received the letter dated 23rd December 2024 terminating the subject tender on the same day, 23rd December 2024.
 - ii. The letter dated 18th December 2024 recalling the Applicant's award did not of itself crystalize any cause of action as it was neither a notification as contemplated under Section 87 of the Act nor a termination of Tender process under Section 63 of the



Act. Counsel for the Respondent, Mr. Yego made an admission during clarification session that the letter of 18th December 2024 recalling the Applicant's award did not constitute a notification. Further, the said letter did not give any reasons for the recall but only asked bidders to anticipate a further communication in due course thereby, not crystallising an actionable cause at that point capable of attracting the Board's jurisdiction. The contents of the letter dated 18th of December 2024 indeed created legitimate expectation on further communication with respect to notifications dated 16th of December, 2024 and did not, curiously though, State that a new evaluation was being sanctioned and undertaken following notifications sent out on the 16th of December, 2024, which for us, would have explicitly created an actionable cause for which time would have legally ran.

117. Consequently, the Board finds that the present Request for Review was timeously filed. Therefore, this ground of Preliminary Objection contending that the Request of Review was time-barred must of necessity fail. Effectively, both grounds of the Respondent's Notice of Preliminary Objection fail.

iii. Whether the Board has jurisdiction over the matter under Section 167(4)(b) of the Act?

118. Though not pleaded by any party, the Board finds it appropriate to interrogate whether it has jurisdiction over the present Request for



Review in view of the fact that it touches on termination of a procurement process, which subject the Board is divested the jurisdiction to entertain under Section 167(4)(b):

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.

119. Section 167 of the Act above, 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



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.

120. 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:

121. 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 proposal 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

122. 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 and Electoral Boundaries Commission & Ors***

123. 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.

124. Section 63 of the Act speaks to termination of public procurement and asset disposal proceedings in the following terms:

"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.

125. 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 PPRA 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.

126. 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 the provisions of Section 63 of the Act.



127. On the one hand, the 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 facts that support such termination.
128. On the other hand, the procedural requirements include the requirements under Section 63(2), (3), and (4) of the Act i.e. (i) the submission of a Written Report to the PPRA on the termination of a tender within 14 days of such termination and (ii) the issuance of notices of termination of tender to tenderers who participated in the said tender outlining the reasons for termination within 14 days of such termination.
129. The Board shall now interrogate whether the Respondents satisfied the substantive and procedural requirements under Section 63 of the Act when terminating the procurement proceedings in the subject tender:
130. Turning to the present Request for Review, the Board has sighted the Procuring Entity's letter dated 23rd December 2024, terminating the subject tender and the same bears reproducing for ease of reference:

NOTIFICATION OF TERMINATION OF TENDER

23rd December

2024 Dear Bidder

1)NOTIFICATION OF TERMINATION OF TENDER



***DATE OF TRANSMISSION: This notification is sent by email
on 23rd December, 2024***

***Procuring Entity: Moi Teaching and Referral Hospital Staff
Pension Scheme***

***Contract Title: TENDER FOR PROVISION OF INTERNAL
AUDIT SERVICES TO MTRH STAFF PENSION SCHEME***

ITT No: MTRHSPS/RFP/IA2/2024-2026

***This is to notify you that we have decided to terminate the
above tender before award. This tender has been
terminated pursuant to section 63(1)(b) of the Public
Procurement and Asset Disposal Act 2025, due to
inadequate budgetary provision...***

...

***If you have any questions regarding this Notification,
please do not hesitate to contact us.***

On behalf of the Procuring Entity. Signed

Mr. Albert Kigen

Trust Secretary

131. 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.



132. Section 63(1)(b) of the Act recognizes inadequate budgetary provision as one of the grounds under which an Accounting Officer can invoke for the termination of procurement and asset disposal proceedings. However, as this Board has always held, for one to satisfy the substantive requirement under Section 63, they must go beyond a mere restating of the statutory language on the grounds 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 shouldered the burden of leading evidence demonstrating the inadequate budgetary provision.
133. The Board has keenly studied the Respondent's Replying Affidavit as well as the documents constituting the Confidential File but has not come across anything pointing towards the actual budget the Procuring Entity had set aside for the subject tender. The Respondent did not supply the approved annual procurement plan embodying the subject tender with the result that the Board cannot ascertain the amount set aside for the subject tender. Absent any such crucial information on the approved budget, the Respondent cannot argue that the Procuring Entity had an inadequate budgetary provision for the subject tender. In this regard, the Respondent has failed to discharge the substantive requirement for termination of a procurement process under Section 63 of the Act.
134. Turning to the procedural requirement under section 63 of the Act, the Board has sighted the termination letter dated 23rd December 2024 and



which letter the Applicant acknowledges having received on the same day, 23rd December 2024. The Board is therefore convinced that the Respondent notified bidders of the termination of the bid within 14 days of such termination. However, the Respondent did not lead any evidence to show that it prepared and submitted the Written Report to the Public Procurement Regulatory Authority on the termination of the subject tender.

135. From the above the Respondent has not satisfied the substantive requirement under Section 63 as it has not demonstrated in evidence that the Procuring Entity had an inadequate budgetary provision for the subject tender. The Respondent has equally failed to satisfy the limb of the procedural requirement on submission of a Written Report to the Public Procurement Regulatory Authority. Consequently, we find that the Respondent in terminating the subject tender failed to comply with Section 63(2) and (3) of the Act. Additionally, the subject tender was terminated after the issuance of an award whereas the termination under Section 63 of the Act can only be done prior to an award.

136. In view of the foregoing, the Board finds that it is clothed with jurisdiction to hear and determine the present Request for Review.

Whether the Respondent in terminating the subject tender complied with the provisions of Section 63 of the Act?

137. The Board has already found under the preceding issue that the Respondent failed to establish the substantive requirement for failing to



lead evidence on the Procuring Entity having an inadequate budgetary provision for the subject tender. The Board has equally found that Respondent has failed to meet the limb of the procedural requirement requiring the Procuring Entity to submit a Written Report to the Public Procurement Regulatory Authority on termination of the subject tender. Effectively, we have found that the Respondent in terminating the subject tender did not comply with the provisions of Section 63 of the Act.

138. Before penning off this Decision, the Board wishes to point out that it has observed a number of irregularities in the manner in which the subject tender was carried out:

- i. Whereas Regulation 79 of the Regulations 2020 contemplates that an Accounting Officer can either reject or approve the recommendation given to them under a Professional Opinion, the said provision does not contemplate that an Accounting Officer can approve more than one Professional Opinion in the same tender, especially where the Professional Opinions are contradictory. In the present case the Accounting Officer approved the 1st Professional Opinion for the award of the subject tender to the Applicant and subsequently approved the 2nd Professional Opinion for the termination of the same tender. It would stand to logic that upon the approval of the 1st Professional Opinion and the subsequent issuance of an Award to the Applicant, the Accounting Officer could not once again approve a subsequent Professional Opinion for the termination of the same tender. Technically, all subsequent



documents including the recall letter dated 18th December 2024, 2nd Evaluation Report and 2nd Professional Opinion amount to a nullity.

- ii. Equally, the Board observed from the Confidential Documents that the Evaluation Committee in its 1st Evaluation Report adopted a pass mark threshold at the Technical Evaluation Stage, different from the one prescribed under the Tender Document. Whereas the Tender Document at page 30 set 80 % marks as the minimum a bid had to garner at the Technical Evaluation in order to qualify for further evaluation at the Financial Evaluation Stage, it would appear that the Evaluation Committee instead used 70% marks as the threshold with the result that certain bidders not satisfying the 80 marks threshold were evaluated at the Financial Evaluation Stage. In this regard, the 1st Evaluation Report is riddled with errors as it contains recommendations that are based on an erroneous evaluation criteria.

139. In view of the above shortcomings, the Board finds that there is need to steer the procurement process in the subject tender back on track and for the same to be concluded in a manner that is both lawful and in strict adherence to the evaluation criteria as set out in the Tender Document. In this regard, a re-evaluation of all the bids received in the subject tender would be appropriate.



What orders the Board should grant in the circumstances?

140. The Board has found it has jurisdiction over the present Request for Review.
141. The Board equally found that the Respondent in terminating the subject tender did not comply with the provisions of Section 63 of the Act.
142. The upshot of our finding is that the Request for Review dated 6th January 2025 in respect of Tender No. MTRHSPS/RFP/IA2/2024-2026 Request for Proposal for Provision of Internal Audit Services to MTRH Staff Pension Scheme succeeds in the following specific terms:

FINAL ORDERS

143. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2025, the Board makes the following orders in the Request for Review dated 6th January 2025:

- 1. The Respondent's Preliminary Objection dated 9th January 2025 be and is hereby dismissed.**
- 2. The Letters of Notification of Termination of Tender dated 23rd December 2024 and addressed to bidders in respect of Tender No. MTRHSPS/RFP/IA2/2024-2026 Request for Proposal for Provision of Internal Audit Services to MTRH Staff Pension Scheme be and are hereby cancelled and set aside;**



- 3. The Letters dated 18th December 2024 and addressed to the bidders in respect of Tender No. MTRHSPS/RFP/IA2/2024-2026 Request for Proposal for Provision of Internal Audit Services to MTRH Staff Pension Scheme be and are hereby cancelled and set aside;**
- 4. The Letters of Notification dated 16th December 2024 and addressed to the Applicant and the unsuccessful bidders in respect of Tender No. MTRHSPS/RFP/IA2/2024-2026 Request for Proposal for Provision of Internal Audit Services to MTRH Staff Pension Scheme be and are hereby cancelled and set aside;**
- 5. The Evaluation Report dated 18th December 2024 and Professional Opinion dated 20th December 2024 in respect of Tender No. MTRHSPS/RFP/IA2/2024-2026 Request for Proposal for Provision of Internal Audit Services to MTRH Staff Pension Scheme be and are hereby cancelled and set aside;**
- 6. The Evaluation Report dated 9th December 2024 and the Professional Opinion dated 16th December 2024 in respect of Tender No. MTRHSPS/RFP/IA2/2024-2026 Request for Proposal for Provision of Internal Audit Services to MTRH Staff Pension Scheme be and are hereby set aside;**





7. The Respondent be and is hereby directed to reconvene the Evaluation Committee for purposes of conducting a fresh evaluation process of all the bids received in respect of Tender No. MTRHSPS/RFP/IA2/2024-2026 Request for Proposal for Provision of Internal Audit Services to MTRH Staff Pension Scheme, while having regard to the Board's findings in this Decision.

8. The Respondent be and is hereby directed to oversee the procurement proceedings in respect of Tender No. MTRHSPS/RFP/IA2/2024-2026 Request for Proposal for Provision of Internal Audit Services to MTRH Staff Pension Scheme, to their logical and lawful conclusion within 21 days from the date of this Decision.

9. Each party shall bear its own costs.

Dated at NAIROBI, this 27th day of January 2025.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB