

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 15/2025 OF 19<sup>TH</sup> FEBRUARY 2025**

**BETWEEN**

**THE CONSORTIUM OF ALPHA BETA ED PTE LTD &  
RYCE EAST AFRICA LIMITED..... APPLICANT**

**AND**

**THE ACCOUNTING OFFICER, GEOTHERMAL  
DEVELOPMENT COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT**

**GEOTHERMAL DEVELOPMENT COMPANY  
LIMITED.....2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer, Geothermal Development Company Limited in respect of Tender No. GDC/GRD/OT/001/2024-2025 for the Supply and Installation of 5 to 10MW Geothermal Wellhead Power Plant at Menengai Geothermal Project

**BOARD MEMBERS PRESENT**

- |    |                    |                   |
|----|--------------------|-------------------|
| 1. | QS Hussein Were    | Panel Chairperson |
| 2. | Eng. Lilian Ogombo | Member            |
| 3. | Ms. Alice Oeri     | Member            |



**IN ATTENDANCE**

- 1. Ms Sarah Ayoo Holding brief for Ag Board Secretary
- 2. Mr. Erickson Nani Secretariat
- 3. Ms. Christabel Kaunda Secretariat

**PRESENT BY INVITATION**

**APPLICANT THE CONSORTIUM OF ALPHA BETA ED  
PTE LTD & RYCE EAST AFRICA LTD**

- 1. Mr. Obed Torotwa Advocate, CNK Advocates LLP

**RESPONDENTS THE ACCOUNTING OFFICER,  
GEOTHERMAL DEVELOPMENT  
COMPANY LIMITED  
GEOTHERMAL DEVELOPMENT  
COMPANY LIMITED**

- 1. Ms. Charity Zeron Advocate, Geothermal Development Company Limited

**OTHER BIDDERS SOSIAN ENERGY LIMITED**

- 1. Mr. Alvin Kosgei Advocate

**BACKGROUND OF THE DECISION**

**The Tendering Process**



1. Geothermal Development Company Limited (the Procuring Entity) invited interested tenderers to submit bids for Tender No. GDC/GRD/OT/001/2024-2025 for the Supply and Installation of a 5 to 10MW Geothermal Wellhead Power Plant at the Menengai Geothermal Project. It was an open tender, with a submission deadline set for 16th August 2024 at 11:00 a.m.
2. The Procuring Entity initially extended the submission deadline to 18th September 2024 through Addendum 2, before further extending it to 18th October 2024 through Addendum 8.

**Submission of Bids and Tender Opening**

3. As per the Tender Opening Minutes dated 18th October 2024 the following six (6) bidders submitted their bids:

<b>Bid No.</b>	<b>Bidder</b>
1.	Rentco Africa Limited
2.	Kruman Finance Oasis Consortium
3.	Kaishan Group Co. Ltd
4.	Alpha Beta Ed PTE Ltd Ryce East Africa Ltd
5.	GL Africa Energy Ltd Barwasim Africa Consulting Weldcon Limited
6.	Sosian Energy Ltd

**Evaluation of Bids**

4. The 1st Respondent appointed a Tender Evaluation Committee to assess the submitted bids in the following three (3) stages.
  - i. Preliminary Evaluation
  - ii. Technical Evaluation
  - iii. Financial Evaluation

### **1st Preliminary Evaluation**

5. At this evaluation stage, all submitted bids were assessed based on the criteria outlined in Section III – Evaluation and Qualification Criteria, as set out on pages 23 and 24 of the Tender Document.
6. One (1) bid was found unresponsive to the mandatory requirements and was disqualified from further evaluation. The remaining five (5) bids, including that of the Applicant, met the mandatory requirements and proceeded to the next evaluation stage.

### **1st Technical Evaluation**

7. At this evaluation stage, bids that passed the Preliminary Evaluation were assessed based on the criteria outlined in Section III – Evaluation and Qualification Criteria on page 25 of the Tender Document.
8. All five (5) bids were found responsive, achieving scores above the threshold of seventy percent (70%). Consequently, the Evaluation Committee recommended them for further evaluation.
9. On 18th November 2024, the Acting Manager, Supply Chain for the Procuring Entity, issued secretarial comments via a memo, requesting the Evaluation Committee to review its Evaluation Report in accordance with Clause 27 of the Tender Document, which required bidders to submit sealed separate technical and financial proposals.



## **2nd Preliminary Evaluation**

10. The Evaluation Committee considered the secretarial comments and reviewed its Evaluation Report leading to the disqualification of two (2) bidders, including the Applicant. As a result, the two (2) bidders did not proceed to the next stage of evaluation.

## **2nd Technical Evaluation**

11. All four (4) bidders were found to be responsive, achieving scores above the required threshold of seventy percent (70%). Therefore, the Evaluation Committee recommended that the four (4) firms proceed to the financial opening.

## **Professional Opinion**

12. On 3rd December 2024, the Accounting Officer rejected the Professional Opinion of the same date and the Evaluation Committee's recommendation to proceed with the financial opening of the tenders. The rejection was based on an MW-12 Discharge Collapse Report dated 2nd December 2024, which indicated that a key well intended for use in the tender had developed technological challenges. Consequently, the Accounting Officer recommended initiating tender termination proceedings.
13. On 30th January 2025, the Evaluation Committee reviewed the MW-12 Discharge Collapse Report and recommended the termination of the tender evaluation process.

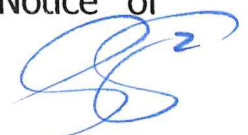
## **Notification to the Bidders**

14. Bidders were notified of the tender termination through letters dated 5th February 2025.



## **REQUEST FOR REVIEW**

15. On 19th February 2025, the Applicant, through the firm of CNK Advocates LLP, filed a Request for Review dated 17th February 2025, accompanied by a Statement in Support of the Request for Review sworn on the same date by Raymond Kaptich, Director of Alpha Beta Ed PTE Limited, seeking the following orders:
- a) A declaration that the Procuring Entity violated the principles of public procurement, the national values and the Public Procurement and Asset Disposal Act, 2015 by purporting to terminate the procurement proceedings without regard to the provisions of section 63 of the Act.*
  - b) A declaration that the decision of 5th February 2025 by the Procuring Entity is unlawful, unconstitutional and devoid of merit.*
  - c) An order compelling the Procuring Entity to proceed with the subject procurement to conclusion without further delays.*
  - d) Costs.*
16. In a Notification of Appeal and letter dated 19th February 2025, Mr. James Kilaka, the Acting Board Secretary, informed the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender. He also forwarded a copy of the Request for Review to the Respondents and requested them to submit a response along with confidential documents related to the tender within five (5) days.
17. On 26th February 2025, the Respondents filed a Notice of



Appointment dated 24th February 2025. Curiously, however, the Notice did not appoint anyone. As self-represented parties, they proceeded to file a Memorandum of Response of the same date, accompanied by an Affidavit in Support sworn by Patrick Kapto, the Acting Manager, Supply Chain of the 2nd Respondent.

18. The Respondents equally forwarded to the Board the Confidential Documents under section 67 (3) of the Public Procurement and Asset Disposal Act ("the Act").
19. On 28th February 2025, the Acting Board Secretary notified all bidders in the subject tender via email, of the existence of the instant 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 bidders in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days.
20. On the same day, 28th February 2025, the Acting Board Secretary issued a Hearing Notice to the parties, informing them that the hearing of the Request for Review would be conducted virtually on 5th March 2025 at 11:00 a.m. via the provided link.
21. On 4th March 2025, the Respondents filed their Written Submissions dated 3rd March 2025.
22. On 5th March 2025, the Applicant filed an Affidavit in Rejoinder to the Respondent's Memorandum of Response sworn on 4th March 2025 by Raymond Kaptich. On the same day, the Applicant also



filed its Written Submissions dated 4th March 2025.

23. When the Board convened for the hearing on 5th March 2025 at 11:00 a.m. the parties were represented by their respective Advocates. Sosian Energy Limited who was a bidder in the subject tender, was present through its Counsel, Mr. Alvin Kosgei, and indicated that he would align himself with the submissions of the Applicant.
24. Considering the nature of the matter at hand and the line of argument taken by the Respondents in their Written Submissions regarding the issue of jurisdiction, the Board inquired from the Counsel for the Respondents whether she had filed any Notice of Preliminary Objection. She confirmed that no such notice had been filed.
25. The Board proceeded to allocate time to the parties for their respective submissions.

## **PARTIES SUBMISSIONS**

### **Applicant's Submissions**

26. Counsel for the Applicant, Mr. Obed Torotwa, argued that the Respondents had violated Section 80 of the Act by failing to adhere to the statutory timeline of thirty (30) days as prescribed therein. He emphasized that statutory timelines are integral to procedural compliance, forming the foundation of due process and constitutional principles, and must be strictly observed by all parties.
27. Counsel relied on the decision in ***Aprim Consultants v. Parliamentary Service Commission & Another*** (Civil Appeal



**No. E039 of 2021**), asserting that the court held that judicial review proceedings challenging the decisions of the Public Procurement Administrative Review Board must be strictly concluded within forty-five (45) days from the date of filing. He emphasized that any decision rendered outside the prescribed timeline would be a nullity, devoid of any legal effect.

28. On the issue of the Procuring Entity's termination of the procurement process being *ultra vires*, Counsel argued that the Respondents failed to justify their actions, which appeared to be an afterthought. He contended that the Respondents did not provide any documentation to substantiate their claims regarding the Applicant's alleged non-compliance with Clause 27 of the Tender Document in its entirety.
29. Counsel submitted that the Respondents relied on a non-existent provision of the law, Section 63(1)(ii) of the Act, in terminating the tender. He argued that even if the Respondents were to be given the benefit of the doubt and deemed to have relied on Section 63(1)(a)(ii) of the Act, they were still obligated to substantiate the alleged change in technology that occurred between the time of tender advertisement and the decision to terminate the tender.
30. Counsel argued that the collapse of a well is a resource depletion issue rather than a technological change. He relied on the case of ***Okiya Omtatah Okiiti & 3 others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 6 others [2021] eKLR***, where the Court held that an act of *ultra vires*



occurs when a decision-making authority commits an error of law in the process of making the decision or taking the action that is the subject of the complaint.

### **Respondents' Submissions**

31. Counsel for the Respondents, Ms. Charity Zeron, submitted that the termination of the tender was lawfully executed in accordance with Section 63 of the Act. She argued that the termination was necessitated by substantial technological changes, as outlined in the MW-12 Discharge Collapse Report.
32. She emphasized that the tender opening was conducted in the presence of the bidders through their respective representatives. She stated that the tender attracted six (6) bidders, and at the Preliminary Evaluation Stage, five (5) bidders, including the Applicant, were found responsive. During the Technical Evaluation Stage, all five (5) bidders remained responsive. However, on 18th November 2024, the Evaluation Committee received secretarial comments directing them to review their report in accordance with Clause 27 of the Tender Document.
33. She submitted that the Evaluation Committee re-evaluated its report in accordance with Clause 27 of the Tender Document, resulting in the disqualification of two (2) bidders, leaving four (4) bidders to proceed to the Technical Evaluation Stage. At this stage, all four (4) bidders were found responsive, and the committee recommended that they advance to the financial opening. However,



on 3rd December 2024, the 1st Respondent (Accounting Officer) rejected this recommendation, citing the MW-12 Discharge Collapse Report, which indicated that one of the key wells had developed technological challenges.

34. Counsel acknowledged that the termination letter mistakenly cited a non-existent provision of the law but clarified that the intended reference was to Section 63(1)(a)(ii) of the Act. She further submitted that the delay in the tendering process was due to the complexity of the tender. On the issue of jurisdiction, she argued that the Board lacked jurisdiction to entertain the matter, as the termination was carried out in accordance with Section 63 of the Act.

### **Rejoinder**

35. Counsel submitted that the Board has jurisdiction because the termination was not done in line with section 63 of the Act. Counsel argued that the collapse or depletion of a well was already foreseeable and that is why a remedy had already been crafted therefore it cannot be said that the same constituted a change in technology. Counsel contended that the Respondents did not show the part under clause 27 of the Tender Document that the Applicant did not satisfy. Counsel further submitted that the Respondents violated section 80 of the Act as anything that they did after the lapse of thirty (30) days became null.

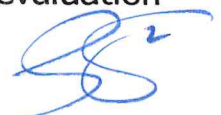
### **CLARIFICATIONS**

36. The Board inquired whether the Applicant was aware of the



addenda that had been issued, to which Counsel responded in the affirmative.

37. The Board sought clarification from the Respondents on whether the evaluation and pre-evaluation processes occurred simultaneously. Additionally, the Board requested the Respondents to specify the grounds on which the Applicant was disqualified and at what stage this disqualification took place. The Respondents were also asked to clarify what letter was sent to the Applicant, its contents, and whether the same letter was sent to the other bidders. Furthermore, the Board inquired about the effect of the Respondents' admission regarding the error in citing the legal provision for terminating the tender, questioning whether this admission confirmed their failure to meet the criteria under section 63 of the Act. Further, the Respondents were asked to confirm whether, after the termination, they posted the relevant information on the Public Procurement Information Portal (PPIP).
38. In response to the question regarding pre-evaluation and evaluation, the Respondents clarified that after the evaluation process, the Evaluation Committee received secretarial comments advising them to reconsider their report in line with clause 27 of the Tender Document. Consequently, Counsel asserted that this was not a case of evaluation and re-evaluation but rather a consideration of the secretarial comments by the Evaluation Committee.
39. In response to the question regarding the stage at which the disqualification occurred, Counsel stated that the evaluation



process did not reach its conclusion but was instead terminated. As a result, the Applicant did not receive a specific letter detailing the reasons for their disqualification or for being unsuccessful. Counsel explained that the specific reasons for disqualification would have been provided had the tender process proceeded to the award stage. However, since the process was terminated before reaching that stage, all participating bidders were instead provided with general reasons for the termination.

40. Regarding whether the Respondents uploaded the documents to the Public Procurement Information Portal (PPIP), Counsel stated that they had indeed submitted the documents and provided a screenshot as evidence to confirm the same. On the issue of their admission regarding the legal provision relied upon, Counsel clarified that they acknowledged only a clerical error in citing the provision but maintained that their grounds for termination—technological changes—remained unchanged.
41. The Board further sought clarification from the Applicant on whether the termination of the Applicant and other bidders was indeed based on technological changes. In response, Counsel for the Applicant pointed out inconsistencies in the Respondents' position. Firstly, he noted that the Applicant did not proceed past the tender opening stage. Secondly, he highlighted that the Applicant's termination occurred after the tender opening had already been concluded.
42. The Board further sought clarification from the Applicant regarding their claim that the Procuring Entity conducted the evaluation of



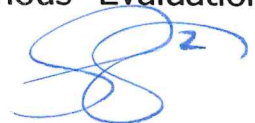
tenders beyond the statutory 30-day period. The Board asked what action, if any, the Applicant took upon realizing that the 30-day period had lapsed without any communication from the Procuring Entity.

43. In response, Counsel for the Applicant stated that the Applicant had indulged the Respondents. However, he acknowledged that there is no official record to confirm this.
44. The Board sought clarification from the Respondents on several issues. First, it inquired about the existence of two Evaluation Reports and asked which one should be considered the valid report for the purposes of the Procuring Entity's actions. Further, the Board requested clarification regarding the submission that the second Evaluation Report merely incorporated secretariat comments. If that was the case, what was the substantial difference between the first and second Evaluation Reports?
45. The Board also sought the actual dates on which both the first and second Evaluation Reports were issued, along with their respective recommendations. Additionally, it requested clarification on the claim that mandatory criteria 1 to 4 had been waived.
46. Regarding the timeline of the evaluation process, the Board sought confirmation on whether the evaluation was conducted within the statutory 30-day period as required under section 80(6) of the Act. If the evaluation exceeded this timeframe, the Board asked what actions the Procuring Entity took to ensure compliance.
47. Another key issue raised was the number of addenda issued by the



Procuring Entity. Specifically, the Board sought confirmation on when the last addendum—Addendum No. 10—was issued, given that information from the Applicant’s documentation indicated it was released on 16th October 2024. Since the tender opening took place just two days later, on 18th October 2024, the Board questioned the impact of issuing an addendum so close to the tender opening date.

48. Furthermore, the Board asked for clarification on section 84 of the Act, which mandates the issuance of a professional opinion by the head of the procurement function. It specifically referred to regulation 78(2) of the Public Procurement and Asset Disposal Regulations (Regulations), which imposes strict timelines for issuing the professional opinion. The Board requested a detailed timeline showing when the Evaluation Reports were issued, when the professional opinion was provided, and when the Accounting Officer took action regarding each of the Evaluation Reports.
49. Further, concerning the collapse of the well, the Board sought clarification on the exact timing of the collapse, how the Procuring Entity became aware of it, and whether the Procuring Entity had any recourse beyond terminating the tender.
50. In response to the question regarding the effect of Addendum No. 10, the Respondents stated that it had no impact on the tender process, as it did not alter any material information related to the tender.
51. In response to the question regarding the various Evaluation



Reports, Counsel for the Respondents stated that two Evaluation Reports exist. The first report is dated 15th November 2024, while the second is dated 21st November 2024. She explained that secretarial comments on the first Evaluation Report were received on 18th November 2024. The Evaluation Committee then considered these comments from 18th November and finalized the second Evaluation Report on 21st November 2024.

52. Regarding which of the two reports takes precedence, the Respondents confirmed that they rely on the Evaluation Report dated 21st November 2024, as it was the one recommending the accounting officer to approve the financial opening of the bids.
53. On the issue of whether there was a substantial deviation between the first and second Evaluation Reports, Counsel responded in the affirmative.
54. Regarding the action taken by the Procuring Entity to ensure compliance with Section 80(6) of the Act, Counsel stated that bidders were not notified of the delay. However, she maintained that the delay was due to the technical nature of the tender. Additionally, the Respondents confirmed that they did not extend the evaluation period.
55. The Board sought clarification from the Respondent on whether the Evaluation Committee interrogated the MW-12 Discharge Collapse Report. Counsel affirmed that it did and stated that the Evaluation Committee submitted its report on 30th January 2025, recommending the termination of the tender.



56. The Board further sought clarification on why the Tender Document provided for a recourse in the event of a well breakdown after the tender had been awarded, yet no such recourse was available before the award of the tender.
57. In response to the question on recourse, the Respondents explained that the Procuring Entity had indicated that they would provide make-up wells. The make-up wells are typically introduced after the project has been successfully commissioned, or when a drop in pressure or megawatt production is observed. At that point, the Procuring Entity would introduce a make-up well. However, the Procuring Entity did not anticipate a scenario where the main wells would collapse before the project commenced.

### **BOARD'S DECISION**

58. 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 pursuant to section 167(4)(b) of the Act on account of the termination of the subject tender;*

Depending on the finding of the first issue:

- ii. Whether the Procuring Entity violated section 80 (6) of the Act by failing to evaluate the tender within 30 days;*
- iii. Whether the Procuring Entity, in terminating the subject tender, failed to comply with the provisions of section 63 of the Act;*
- iv. What orders the Board should issue in the circumstance.*



**As to whether the Board has jurisdiction over the present Request for Review pursuant to section 167 (4)(b) of the Act on account of the termination of the subject tender**

59. In response to the Request for Review, the Respondents submitted that the Board lacks jurisdiction under Section 167(4) of the Act. Counsel argued that the termination of the tender was conducted in accordance with Section 63 of the Act, thereby divesting the Board of the authority to determine the matter.
60. On the other hand, the Applicant argued that the Board has jurisdiction to determine the Request for Review, as the termination was not carried out in accordance with Section 63 of the Act. Counsel submitted that while Section 167(4)(b) of the Act bars the Board from reviewing a termination decision made under Section 63, the Board retains the authority to assess whether the termination indeed complied with the said provision. If the Board finds that the termination was inconsistent with Section 63, it has the jurisdiction to invalidate the decision.
61. As a general rule, when the issue of jurisdiction is raised in any court of law or decision-making body, it must be determined first before addressing any other matters. This is because jurisdiction is fundamental—without it, a court or tribunal lacks the authority to proceed any further.
62. The Supreme Court in the case of **Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020)**

[2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment) stated that:

*On our part, and this is trite law, jurisdiction is everything as it denotes the authority or power to hear and determine judicial disputes. It was this court's finding in In R v Karisa Chengo [2017] eKLR, that jurisdiction is that which grants a court authority to decide matters by holding;*

*By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."*

63. This Board is a creature of statute, established under Section 27(1) of the Act, which states:



***"(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."***

64. Section 28 of the Act outlines the functions of the Board as follows:

***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.***

65. The jurisdiction of the Board is provided for under section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board as follows:

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.*

66. Section 167 of the Act provides an avenue for candidates and bidders aggrieved by a public tender process to seek redress before the Board. However, subsection (4) limits the Board's jurisdiction on certain matters, including the termination of procurement proceedings. The termination of public procurement proceedings is specifically governed by Section 63 of the Act, which outlines the grounds and procedures for lawful termination.
67. Superior courts in Kenya have consistently provided guidance on the interpretation of Section 167(4)(b) of the Act, particularly regarding the limitation of the Board's jurisdiction in matters involving the termination of tenders. Judicial precedents have clarified the extent to which the Board's authority is ousted when a procurement process is terminated under Section 63 of the Act.
68. In **Nairobi High Court Judicial Review Misc. Application No. 390 of 2018; R v Public Procurement Administrative Review Board & Others Ex parte Kenya Revenue Authority**, the High Court examined a judicial review application challenging the Board's decision. The Board had dismissed a preliminary objection asserting that it lacked jurisdiction to hear a Request for



Review concerning the termination of a procurement process under Section 63 of the Act. In quashing the Board's decision, the Court affirmed that the Board has jurisdiction to first determine whether the preconditions for termination under Section 63 of the Act have been met before declining to hear the matter.

***"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 precondition 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..."***

69. 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***
70. Drawing from the above judicial pronouncements, this Board has the jurisdiction to first assess whether the preconditions for terminating a tender under Section 63 of the Act have been met. Only after confirming compliance with these preconditions can the Board decline to hear the matter. If any precondition is not satisfied, the Board retains the authority to hear and determine the Request for Review.
71. Section 63 of the Act speaks to termination of public procurement and asset disposal proceedings in the following terms:



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

***"(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—***

***(a) the subject procurement have been taken by-***

***(i) operation of law; or***

***(ii) substantial technological change;***

***(b) - (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.***

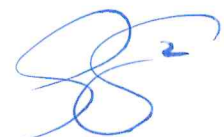
***(3) A report under subsection (2) shall include the reasons for the termination.***

***(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.***

72. 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 one of the grounds outlined under Section 63(1)(a) to (f) of the Act.



- ii. The Accounting Officer must submit a written report to the Public Procurement Regulatory Authority (PPRA) within 14 days of the termination, detailing the reasons for the decision.
  - iii. The Accounting Officer must also issue a written notice to all tenderers within the same 14-day period, clearly communicating the reasons for the termination.
73. Effectively, an Accounting Officer has a duty to provide sufficient reasons and supporting evidence to justify the termination of a procurement process under challenge. Additionally, the Accounting Officer must demonstrate compliance with both the substantive and procedural requirements set out under Section 63 of the Act.
74. On the one hand, the substantive requirements require a Procuring Entity to specify the particular ground under Section 63(1) of the Act for terminating a tender and to present the supporting facts justifying such termination.
75. On the other hand, the procedural requirements encompass the obligations set out under Section 63(2), (3), and (4) of the Act. These include: (i) submitting a Written Report to the PPRA within 14 days of the termination and (ii) issuing termination notices to all participating tenderers within the same period, clearly stating the reasons for termination.
76. The Board shall now examine whether the Respondents adhered to both the substantive and procedural requirements outlined in Section 63 of the Act when terminating the procurement proceedings for the subject tender.



77. The Board has reviewed the letter dated 5th February 2025, addressed to the Applicant, which is reproduced below, in part:

**"RE: NOTIFICATION LETTER: TERMINATION OF THE TENDER FOR THE SUPPLY AND INSTALLATION OF 5 TO 10 MW GEOTHERMAL WELLHEAD POWER PLANT AT MENENGAI GEOTHERMAL PROJECT – TENDER NO. GDC/GRD/OT/001/2024-2025**

***The above-mentioned tender in which you participated refers;***

***GDC wishes to inform you that the above tender has been terminated in line with the Public Procurement and Asset Disposal Act 2015 section 63 (1)(ii) read with the Public Procurement & Asset Disposal Regulations 2020.***


***However, we thank you for showing interest in doing business with Geothermal Development Company and look forward to a continued business relationship.***

***Yours faithfully,***

***Signed***

***PAUL K. NGUGI***

***Managing Director & CEO"***

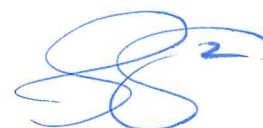


78. From the above letter dated 5th February 2025, the Procuring Entity communicated to the Applicant that the subject tender was terminated in line with Section 63(1)(ii) of the Act. However, upon a quick perusal of the aforesaid statutory provision, it becomes apparent that no such subsection exists.
79. During the hearing, Counsel for the Respondent acknowledged that the referenced letter cited a non-existent provision of the law. She clarified that the Respondent intended to rely on Section 63(1)(a)(ii) of the Act.
80. Section 63(1)(a)(ii) of the Act recognizes substantial technological changes as a valid ground for an Accounting Officer to terminate procurement proceedings. However, as this Board has consistently held, merely restating the statutory language is insufficient to satisfy the substantive requirements under Section 63. Instead, there must be demonstrable evidence proving that the circumstances justifying the termination actually exist. In this case, the burden was on the Respondents to present evidence establishing the occurrence of a substantial technological change.
81. The Board has carefully examined the Respondents' Affidavit in Support of the Memorandum of Response, along with the documents contained in the Confidential File. The primary document relied upon by the Respondents to justify the termination of the tender proceedings is the MW-12 Discharge Collapse Report.
82. The Board observes that at no point did the Respondents, through their Memorandum of Response, Affidavit in Support of the



Memorandum of Response, or Written Submissions, explicitly specify the substantial technological change that led to the termination of the tender proceedings. Instead, the Respondents' Counsel appears to direct the Board to scrutinize the MW-12 Discharge Collapse Report to identify the alleged technological change.

83. The Board has reviewed the MW-12 Discharge Collapse Report, which states that the well collapsed on the 16th or 17th of November 2024. The report's author attributes the possible cause of the collapse to scale deposition.
84. As highlighted above, the burden was on the Respondents to substantiate how a substantial technological change occurred. Accordingly, the Respondents were required to establish a clear connection between scale deposition and technological change. Merely asserting that the tender proceedings were terminated due to substantial technological change, without specifying the exact nature of the change, is insufficient.
85. The Board emphasizes that a mere reference to an event, such as the collapse of MW-12 due to scale deposition, does not automatically equate to a substantial technological change as envisioned under Section 63(1)(a)(ii) of the Act. A Procuring Entity must provide clear, credible, and compelling evidence demonstrating the said substantial change in technology, rendering the initial procurement unfeasible. Without such evidence, the justification for termination remains unsubstantiated and cannot be upheld.



86. With respect to the procedural requirements under Section 63 of the Act, the Board has reviewed the termination letter dated 5th February 2025, which the Applicant acknowledges receiving on 7th February 2025. Based on this, the Board is satisfied that the Respondent adhered to the requirement of notifying bidders of the termination within the prescribed 14-day period.
87. Regarding the procedural requirement under Section 63(2) of the Act, which mandates the Procuring Entity to submit a Written Report to the Public Procurement Regulatory Authority (PPRA) within 14 days of termination, the Board has verified compliance through the Public Procurement Information Portal (PPIP) accessible at [www.tenders.go.ke](http://www.tenders.go.ke). The Board notes that the Respondent's tender is listed on the PPIP, a platform managed by the PPRA, thereby fulfilling the requirement to report the termination. Furthermore, in the absence of evidence to the contrary that the tender was reported on 19th February 2025, the Board is satisfied that this requirement was met within the statutory 14-day period.
88. Based on the foregoing analysis, the Board finds that it has the requisite jurisdiction to hear and determine the present Request for Review. Accordingly, this ground of preliminary objection fails and is disallowed.
89. The Board having determined that it has jurisdiction in the instant Request for Review now turns to interrogate the Request for Review on its merits.



**As to whether the Procuring Entity violated the provisions of Section 80 (6) of the Act by failing to evaluate the tender within 30 days**

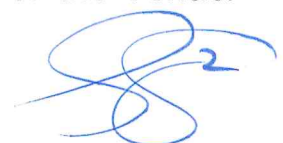
90. The Applicant argued that the Respondents were legally obligated to complete the tender evaluation within thirty (30) days from the date of tender opening. Counsel contended that since the tenders were opened on 18th October 2024, the evaluation period had already lapsed by 17th November 2024. As such, the decision to terminate the proceedings on 5th February 2025 was unlawful.

91. In response, Counsel for the Respondents argued that the delay was due to the complexity of the tender. The Respondents further submitted that the first Evaluation Report was issued within the stipulated thirty (30) days, as it was completed on 15th November 2024.

92. Section 80(6) of the Act provides that:

***(6) The evaluation shall be carried out within a maximum period of thirty days.***

93. A literal interpretation of the above provision suggests that the initial evaluation, which resulted in the first Evaluation Report dated 15th November 2024, was conducted within the statutory timeframe. However, following this report, the Evaluation Committee received secretarial comments instructing them to reconsider the report in accordance with Clause 27 of the Tender Document.



94. The above secretarial comments prompted the Evaluation Committee to reconsider its report, resulting in the second Evaluation Report dated 21st November 2024. The key question that arises is whether this second report contravenes the provisions of Section 80(6) of the Act, given that it was issued after the thirty (30) days statutory limit had elapsed.

95. Regulation 79 (2) and (5) of the Regulations provide that:

***2)The evaluation report under paragraph (1), shall be reviewed by the head of the procurement function and forwarded to the accounting officer together with the professional opinion referred to in section 84 of the Act within a day upon receipt of the evaluation report.***

***3) .....***

***4) ...***

96. ***Where the accounting officer has approved the recommendation of the head of procurement function under paragraph (4)(f), the head of procurement function shall—***

***(a) inform the user department for concurrence;***


***(b) refer the matter back to the evaluation committee for review and recommendation to the accounting officer;***

***(c) inform the successful bidder for concurrence; and***

***(d) make appropriate recommendation to the accounting officer, taking into account the views of the user department, the evaluation committee and the successful bidder.***



97. The Board has perused the Confidential File alongside the pleadings filed by the Respondents and observed that the Evaluation Committee received the secretarial comments on 18th November 2024. These comments prompted an extension of the evaluation process, ultimately leading to the issuance of the second Evaluation Report.
98. The Board observes that the tender proceedings remained in motion, with no apparent violation of Section 80(6) of the Act. This is because if all actions expected of an Evaluation Committee—including evaluation, review, and subsequent evaluations as provided under Regulation 79(5)(b) of the Regulations—were required to be completed strictly within thirty (30) days, the law would have explicitly stated so.
99. In the Board’s view the thirty (30) days timelines provided under Section 80(6) of the Act does not extend to subsequent reviews, if necessary, as contemplated under Regulation 79(5)(d) of the Regulations.
100. The Board finds that the Procuring Entity did not violate the provisions of Section 80(6) of the Act, as the first Evaluation Report was completed within the statutory timeline prescribed under the said provision. Accordingly, this ground of review fails and is disallowed.



**As to whether the Procuring Entity, in terminating the subject tender, failed to comply with the provisions of Section 63 of the Act**

101. The Board's understanding of the matter at hand is that the subject tender entails the institution of a Geothermal Well Head Power Plant in Menengai under a 25 year Build Own Operate (**BOO**) Contract procured under open international tender. Geothermal Development Corporation (GDC) is procuring an Investor/ Independent power producer (**IPP**) to finance, design, manufacture/ procure, supply, install/construct, test and commission the Geothermal Wellhead Power Plant (GWPP). GDC shall **supply steam and brine** of equivalent to 5 to 10MW for conversion by the GWPP to be installed pursuant to the tender. The IPP/Investor shall utilize the GWPP for **captive power generation** with an option of, off taking the net electricity output to Kenya Power for power supply.
102. It is the Board's further understanding that due to low wellhead pressure of low enthalpy wells GDC has drilled in Menengai, they cannot be connected to the current high-pressure system supplying the 105MW project. For those wells to be utilized economically **alternative technology** for low enthalpy wells need to be applied.
103. GDC therefore went through the process of inviting tenders on 16<sup>th</sup> July 2024 for the supply and installation of a 5 to 10 MW Geothermal Wellhead Power Plant. Six bidders submitted bids and were opened on 18<sup>th</sup> October 2024. Two evaluation reports, dated 15<sup>th</sup> November 2024 and 21<sup>st</sup> November 2024, yielded four (4)

successful tenders at preliminary and technical evaluation stages and were recommended for financial evaluation. Two bidders, including the Applicant were disqualified at the preliminary evaluation stage.

104. Opening of financial bids of the four bidders did not happen as recommended by the evaluation committee in their report of 21<sup>st</sup> November 2024. The Accounting officer, through a communication dated 3<sup>rd</sup> December 2024 rejected the evaluation committee's recommendation for the four bidders to proceed to the financial opening based on a **MW-12 discharge collapse** report. The Accounting Officer recommended termination of the procurement due to technological challenges. The Acting Manager, Supply Chain Management prepared secretarial comments dated 09<sup>th</sup> January 2025 on the termination of the tender and the same was interrogated and passed by the Evaluation Committee on 30<sup>th</sup> January 2025 opening the way for termination notices to bidders dated 5<sup>th</sup> February 2025.

105. What followed the termination is this Request for Review filed by the Applicant. The Board has already determined in the preceding issue that the Respondent failed to satisfy the substantive requirement, as they did not provide evidence demonstrating the existence of a substantial technological change to justify the termination of the tender. Consequently, the Board finds that the Respondent did not comply with the provisions of Section 63 of the Act in terminating the subject tender.

106. It is instructive that the termination of the subject tender was



hinged on the collapse of Well MW-12. An Internal Memo dated 2<sup>nd</sup> December, 2024 signed by Janet Suwai, Acting General Manager (GRM) and addressed to the General Manager, (GRD) stated as follows:

***"MW-12 Discharge collapse report***

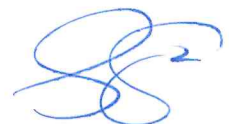
*MW-12 was spud on 14<sup>th</sup> October 2012 and completed on 16<sup>th</sup> January 2013 to 2044 m total vertical depth. It is one of the production wells at Menengai geothermal field. The well was supplying hot fluid to Menengai Direct-Use demonstration project since August 2019 until it collapsed on 16/17 November 2024.*

***Possible causes***

*The obstruction encountered at around 1580 m while the well was flowing in 2013, is believed to have been caused by scale deposition. The decline in enthalpy recorded in 2019, with the increased mass flow may therefore be attributed to scaling that could have led to blockage of high enthalpy fluids from hotter deep zones. There is also a possibility of inflow of cooler fluids from shallower zones, pointing to the likelihood of damaged casings.*

***Remedy***

*The proposed possible cause however, require investigations to ascertain the reason for the well discharge decline and collapse. This will involve performing downhole profiles and caliper logs to check the downhole conditions.*



<b>Cause</b>	<b>Remedy /Intervention</b>
<i>Scaling associated causes</i>	<i>Scale removal by well work over</i>
<i>Parted casings</i>	<i>Replace/ repair damaged section(s)</i>

*Regards*

*Janet Suwai"*

107. A follow up report from the Department of Geothermal Resource Management (GRM) on justification for terminating of the procurement was issued on 7<sup>th</sup> December 2024. The report prepared by Edwin Odum, Senior Engineer, GRM was reviewed by Janet Suwai, Ag. HOD, GRM and approved by Eng. Cornel Ofwona, General Manager, GRD (signed for), stated as follows:

***"Introduction***

*GDC plans to utilize available extra steam from Menengai phase I project to generate 5 to 10 MW of geothermal power by installing a wellhead power plant. This is to be achieved by using low enthalpy wells that cannot be connected to the high pressure system currently supplying steam to the 105 MW project. A preliminary steam field design to supply steam and brine for a wellhead power plant was done using wells MW-04, MW-9A, MW-10ST and MW-12 as production wells with MW-05 and MW-28A as reinjection wells. This design was submitted as part of the tender document...*

***"Justification for terminating the procurement***

*During the tender evaluation process, well MW-12 which was discharging and was one of the wells planned to be used for the well head plant collapsed and stopped producing steam. A downhole profile conducted encountered an obstruction at around 600 meters. This development substantially compromises the initial plan of steam supply for the 5 to 10 MW well power plant. The power plant designs submitted by the tenderers are also no longer valid.*

***"Departmental Recommendation***

*Geothermal Resource Management department recommends the termination of the tender for supply and installation of 5 to 10 MW Geothermal Wellhead Power Plant at Menengai Geothermal Project due to the collapse of MW-12 which has compromised the original steam field design for the project..."*

108. The Board has carefully considered the flow of events leading up to the termination of the subject and makes the following observations:

- a) The MW-12 Discharge collapse report dated 2<sup>nd</sup> December 2024 highlights possible causes for the collapse of the well as scale deposition and the likelihood of damaged casings. The report recommends investigations to ascertain the reason for the well discharge decline and collapse and advises on the remedial measures to be taken. This is to involve performing downhole profiles and caliper logs to check the downhole conditions. The

Board has not seen evidence to show that the remedy proposed in the Discharge Collapse report dated 2<sup>nd</sup> December 2024 was followed through.

- b) The department of Geothermal Resource Management Report dated 07<sup>th</sup> December 2024 which requested the GDC's Accounting Officer to consider and approve the request to terminate the tender process indicated that, ***a down hole profile conducted encountered an obstruction at around 600 meters.*** The Board notes that the departmental report does not disclose when the downhole profile investigation was conducted and by whom. The details of the investigation are not provided rendering it doubtful if the investigation ever happened. In any case, the departmental request to terminate was coming too late on 7<sup>th</sup> December 2024 the Accounting Officer having already issued instructions for the termination of the tender on 3<sup>rd</sup> December 2024.
- c) It would appear the Accounting Officer issued instructions for the termination before the recommendation had been obtained from the Geothermal Resource Management Department. The GRM department's recommendation for the termination was issued on 07<sup>th</sup> December 2024 which begs the question, what was the basis upon which the Accounting Officer instructed the Manager, Supply Chain Management to commence termination proceedings of the tender on 3<sup>rd</sup> December 2024?
- d) Well MW-12 is only one of four production wells for steam and



brine in the tender document. The others are MW-04, MW-09A and MW-10ST which were not affected by the collapse. Well MW-28 and MW-05 are designated reinjection wells and were equally not affected by the collapse of the MW-12. These can carry on with the tender considering that the anticipated plant output is between 5 and 10MW.

- e) Out of the GDC design of steam and brine supply of equivalent of 5 to 10 MW from the six wells, it has not been pointed out the amount of lose in steam and brine output occasioned by the collapse of well MW-12 and the effect that it would have on the overall plant output. An impact on the overall output would have assisted greatly in determining this issue.
- f) The tender anticipated a deterioration in the capacity of the well dedicated to the project to produce steam at the required specifications. According to Addendum No. 4 dated 20<sup>th</sup> August 2024 at Item No. 12, GDC was responsible for providing makeup wells in case of steam decline. The said addendum stated as follows:

***Question:*** *what is the fall-back plan if the geothermal well dedicated for the project deviates in its capacity to produce steam at the required specifications?*

***Answer:*** *GDC will be responsible for providing **makeup wells** in case of steam decline*

The Board notes that this fall-back plan was not activated by the Procuring Entity following the reported collapse of well MW-12.



- g) The Board has seen Discharge History of well MW-12 from its initial testing done in February to May 2013; March to May 2014 and August 2019 to January 2024. As at January 2024 the well produced enthalpy of around 680 Kj/kg. No data is available for the period up to November 2024 when the alleged collapse occurred.
- h) An incident report of 16/17 November 2024 for the operation of well MW-12 has not been provided to the Board to back up statements on the collapse of well MW-12. The Board is being invited to rely on mere statements that there was well collapse on 16/17 November 2024 and further that a downhole profile investigation was carried out, on an undisclosed date. It is important to point out that this Board is not moved on mere conjecture but rather on submissions backed by evidence.
- i) The Evaluation Committee issued second evaluation report on 21<sup>st</sup> November 2024 to which the Ag. Manager Supply Chain Management issued a Professional opinion on 22<sup>nd</sup> November 2024. No action was forthcoming from the Accounting Officer until 3<sup>rd</sup> December 2024 when the Accounting Officer rejected the professional opinion and recommended termination of procurement proceedings on account of one of the wells having developed, what he termed, technical challenges. Regulation 79 (1) provides for the Accounting Officer to approve or reject the Professional Opinion within a day. In the subject tender the Accounting Officer took 11 days to act on the Professional Opinion. Further, the Accounting Officer did not seek any clarification from Head of Procurement or the Evaluation Committee.



j) The reason cited for the termination is technological change. Section 63 (1), (a) (ii) of the Act provides for the termination or cancellation of procurement proceedings when the subject procurement is overtaken by substantial technological change. The respondent under section 63(i) (a) (ii) of the Act, albeit wrongly cited, gave the reason for the cancellation of the tender as substantial technological change. The Board is not convinced that the collapse of a well amounts to substantial technological change.

109. The preceding Board observations point to statutory and procedural missteps on the part of the Procuring Entity in the handling of the subject tender. The Board has already determined in the preceding issue that the Procuring Entity failed to satisfy the substantive requirement, as they did not provide evidence demonstrating the existence of a substantial technological change to justify the termination of the tender.

110. In the Board's considered view, GDC went to great lengths to initiate and justify the cancellation of the subject tender, and in the process, overlooked key statutory and procedural imperatives. The Board has not found any justification to set aside the Evaluation Committee's report dated 21<sup>st</sup> November, 2024. The procuring entity failed to meet the threshold set under section 63 of the Act in the termination of the subject tender.

111. Consequently, the Board finds that the Respondent failed to comply with the provisions of Section 63 of the Act in terminating the subject tender. This ground of the request for the review therefore succeeds and is allowed.



**As to what orders the Board should issue in the circumstance**

112. The Board finds that it has jurisdiction over the present Request for Review.
113. It is the Board's further finding that the Respondents did not offend the provisions of Section 80 (6) when carrying out evaluation of the subject tender.
114. The Board has also determined that the Respondents failed to comply with the provisions of Section 63 of the Act in terminating the subject tender.
115. Consequently, the Request for Review dated 17th February 2025, concerning Tender No. GDC/GRD/OT/001/2024-2025 for the Supply and Installation of a 5 to 10MW Geothermal Wellhead Power Plant at the Menengai Geothermal Project for Geothermal Development Corporation succeeds in the following specific terms:

**FINAL ORDERS**

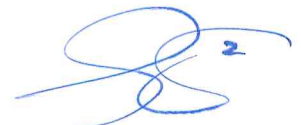
116. In the exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in this Request for Review:

- 1. The Letters of Notification of Termination of Tender dated 5th February 2025, issued to the Applicant and all the other bidders with respect to Tender No. GDC/GRD/OT/001/2024-2025 for the Supply and**



**Installation of a 5 to 10MW Geothermal Wellhead Power Plant at the Menengai Geothermal Project, be and are hereby canceled and set aside.**

- 2. The 1<sup>st</sup> Respondent is hereby directed to instruct the Head of Procurement function of the Procuring Entity to resubmit the Professional Opinion dated 22<sup>nd</sup> November 2024 in respect of Tender No. GDC/GRD/OT/001/2024-2025 for the Supply and Installation of a 5 to 10MW Geothermal Wellhead Power Plant at the Menengai Geothermal Project for the approval of the Accounting Officer in accordance with the law, taking into consideration the findings of the Board herein.**
- 3. Further to Order 2 above, the Respondent is directed to proceed with the procurement process to its logical and lawful conclusion, within 21 days from the date of this decision.**
- 4. In order to ensure compliance with the Orders herein the 1<sup>st</sup> Respondent is directed to extend the tender validity period of the subject tender in accordance with Section 88 of the Act before the expiry of the tender validity of the subject tender.**
- 5. Given that the procurement process is not complete each party shall bear its own costs of the review.**



Dated at NAIROBI, this 11<sup>th</sup> day of March 2025



.....  
**CHAIRPERSON**  
**PPARB**



-----  
**SECRETARY**  
**PPARB**

