

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 53/2025 OF 29TH APRIL 2025

BETWEEN

BLITS PROOF GROUP LIMITEDAPPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA AIRPORTS AUTHORITY 1ST RESPONDENT

KENYA AIRPORTS AUTHORITY 2ND RESPONDENT

Review against the decision of the Accounting Officer, Kenya Airports Authority in relation to Tender No. KAA/RT/SEC/0099/2023-2024 for Supply, Delivery, Installation & Commissioning of Security Screening Equipment -2D Cabin Size X-Ray Machine, Walk Through Metal Detector & Ups for Kenya Airports Authority

BOARD MEMBERS PRESENT

- | | | |
|-------------------------------------|---|-------------|
| 1. Mr. George Murugu, FCI Arb, I. P | - | Chairperson |
| 2. Mrs. Njeri Onyango, FCI Arb | - | Member |
| 3. Mr. Joshua Kiptoo | - | Member |

IN ATTENDANCE

- | | |
|--------------------|---|
| 1. Ms. Sarah Ayoo | - Holding Brief for the Board Secretary |
| 2. Ms. Evelyn Weru | - Secretariat |



PRESENT BY INVITATION

APPLICANT

BLITS PROOF GROUP LIMITED

1. Mr. Karanja Kamotho - Advocate, Chimera, Kamotho & Co.
Advocates
2. Capt. Benedicts Bodo - Managing Director

RESPONDENTS

THE ACCOUNTING OFFICER, KENYA AIRPORTS AUTHORITY & KENYA AIRPORTS AUTHORITY

Mr. Chris Mulili - Advocate, Legal Department

BACKGROUND OF THE DECISION

The Tendering Process

1. The Kenya Airports Authority, the Procuring Entity and the 2nd Respondent herein invited qualified and interested tenderers to submit sealed tenders in response to Tender No. KAA/RT/SEC/0099/2023-2024 for Supply, Delivery, Installation & Commissioning of Security Screening Equipment -2D Cabin Size X-Ray Machine, Walk Through Metal Detector & Ups for Kenya Airports Authority (hereinafter referred to as the "1st Tender") through restricted tendering process pursuant to Section 102 (1) (c) and (d) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'). Tenders would



be submitted online and the initial tender submission deadline was scheduled on 1st December 2023 at 11.00 a.m.

Addenda

2. The Procuring Entity subsequently issued, on various dates, eight (8) Addenda which offered clarifications on various provisions of the Tender Document while extending the tender submission deadline to 25th January 2024 at 11.00 a.m.

Submission of Tenders and Tender Opening

3. According to the Tender/ Quotation Register and the Tender Opening Minutes which were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Act, a total of six (6) tenders were submitted in response to the 1st Tender. The six (6) tenders were opened in the presence of tenderers' representatives present at the online tender opening session, and were recorded as follows:

Bidder No.	Name
1.	Circuit Business Systems Kenya Ltd
2.	Blits Proof Group Limited
3.	Brinker Solutions Ltd



4.	Biometrics Technology Ltd
5.	House of Procurement Limited & Unival Group GmbH
6.	Securex Agencies (K) Limited & KGT Kenya Limited

Evaluation of Tenders

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the six (6) tenders as captured in an Evaluation Report for the 1st Tender in the following stages:
- i Preliminary Evaluation;
 - ii Technical Evaluation; and
 - iii Financial Evaluation.

Preliminary Evaluation

5. The Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under Stage I – Preliminary / Mandatory Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.
6. At the end of evaluation at this stage, two (2) tenders were determined non-responsive, while four (4) tenders, including the Applicant's tender, were determined responsive and proceeded to Technical Evaluation.



Technical Evaluation

7. The Evaluation Committee was required to carry out a Technical Evaluation using the criteria provided under Stage 2 - Technical Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document. Tenderers were required meet all the technical evaluation requirements so as to progress for Financial Evaluation.
8. At the end of evaluation at this stage, the two (2) tenders were determined non-responsive while two (2) tenders, including the Applicant's tenders, were determined responsive, and proceeded to Financial Evaluation.

Financial Evaluation

9. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria provided under Stage 3 - Financial Evaluation of Section III – Evaluation and Qualification Criteria of the Tender Document.
10. At the end of evaluation at this stage, the Evaluation Committee ranked the responsive bids as follows:

<i>No.</i>	<i>Firm</i>	<i>Total Quoted bid price</i>
<i>1.</i>	<i>MS Blits Proof Group Limited</i>	<i>USD 905,406.68</i>
<i>2.</i>	<i>Securex Agencies (K) Limited & KGT Kenya Limited</i>	<i>USD 1,013,994.20</i>



Evaluation Committee's Recommendation

11. Three (3) Evaluation Committee members recommended award of the 1st Tender to M/s Blits Proof Group Limited being the lowest evaluated bidder, at its total quoted price of United States Dollar Nine Hundred and Five Thousand Four Hundred and six and Sixty-Eight Cents (USD 905,406.68) Only subject to due diligence. One member of the Evaluation Committee however gave a dissenting opinion as captured in the Evaluation Report.

Due Diligence

12. According to the Due Diligence Report submitted as part of the Confidential Documents to the Board, the Evaluation Committee carried out due diligence in accordance with Section 83 of the Act on the lowest responsive bidder with the objective of confirming and verifying its qualifications as submitted in the 1st Tender.
13. Being satisfied with the results of the due diligence exercise, the Evaluation Committee recommended award of the 1st Tender to M/s Blits Proof Group Limited being the lowest evaluated bidder, at its total quoted price of United States Dollar Nine Hundred and Five Thousand Four Hundred and six and Sixty-Eight Cents (USD 905,406.68) Only. It also recommended for further verification to be undertaken by it during the factory visit before shipping the equipment.



Professional Opinion

14. In a Professional Opinion dated 11th March 2024 (hereinafter referred to as "the Professional Opinion"), the General Manager (Procurement & Logistics), Mr. Vincent Korir reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders.
15. He confirmed that the available budget allocated for the procurement was Kshs. 166 Million under GL 699005 and noted that one member of the Evaluation Committee offered a dissenting opinion.
16. He nonetheless concurred with the recommendations of the Evaluation Committee with respect to award of the 1st Tender to M/s Blits Proof Group Limited, at its total quoted price of United States Dollar Nine Hundred and Five Thousand Four Hundred and six and Sixty-Eight Cents (USD 905,406.68) Only.
17. The Professional Opinion was thereafter approved by Mr. Henry Ogoye on the same day of 11th March 2025.

Notification to Tenderers

18. Tenderers were notified of the outcome of evaluation of the 1st Tender vide letters dated 11th March 2025 as seen from copies of letters submitted among the Confidential Documents to the Board.



Tenders Budget Confirmation

19. Vide Memo dated 21st January 2025, the General Manager (Procurement & Logistics), Mr. Vincent Korir requested the General Manager, Finance to confirm if the listed tenders therein had the budget in the revised budget to enable conclusion of contracts.
20. Vide Memo dated 20th February 2025, the General Memo – Finance responded on the budgetary issue concerns.

Termination of Procurement Proceedings & Retendering

21. Vide Memo dated 4th April 2025, the General Manager (Procurement & Logistics) sought from the Ag. Managing Director/ CEO approval for termination of the procurement proceedings in the listed tenders, including the 1st Tender herein on account of lack of funds. The Ag. Managing Director/ CEO approved the termination on the same day of 4th April 2025.
22. Vide Memo dated 17th April 2025, the General Manager (Procurement & Logistics) notified the General Manager (Security Services) that the 1st Tender had been terminated due to inadequate budgetary provision and asked him to facilitate re-tendering.
23. Vide letters dated 15th April 2025, bidders were notified that the procurement proceedings in the 1st Tender had been terminated due to inadequate budgetary provision.



24. The Applicant was invited by the Respondents to submit a sealed bid in response to Tender No. KAA/RT/SEC/0131/2024-2025 for Supply, Delivery, Installation & Commissioning of Security Screening Equipment -2D Cabin Size X-Ray Machines and Walk Through Metal Detectors for Kenya Airports Authority (hereinafter referred to as "the 2nd Tender") vide letter dated 18th March 2025.

REQUEST FOR REVIEW NO. 53 OF 2025

25. On 29th April 2025, Blits Proof Group Limited, the Applicant herein, filed a Request for Review dated 29th April 2025 together with a Statement in Support of the Request for Review signed by Capt. (RTD) B. N. Bodo, its Managing Director and dated 29th April 2025 and a Verifying Affidavit sworn on 29th April 2025 by Capt. (RTD) B. N. Bodo (hereinafter referred to as the 'instant Request for Review') through Chimera, Kamotho & Co. Advocates seeking the following orders from the Board:

a) The Board be pleased to set aside the letter of the Procuring Entity dated 15th April 2025 which terminated the award issued to the Applicant.

b) The Board be pleased to terminate the procurement process in Tender No. KAA/RT/SEC/0131/2024-2025 for the Supply, Delivery, Installment and Commissioning of Security Screening Equipment-2D Cabin Size X-Rays, Walk Through Metal Detectors and UPS for Kenya



Airports Authority in compliance with the Constitution of Kenya, the Public Procurement and Asset Disposal Act, 2015, the Regulations thereof, and all other enabling provisions of the law.

- c) Any Contract entered into by and between the Procuring Entity and any other party in respect of tender for the Supply, Delivery, Installment and Commissioning of Security Screening Equipment-2D Cabin Size X-Rays, Walk Through Metal Detectors and UPS for Kenya Airports Authority as it may relate to the same works earlier awarded to the Applicant be cancelled and set aside.***
- d) The Board be pleased to compel the Respondents to issue to the Applicant the Contract ensuing from Tender No. KAA/RT/SEC/0099/2023-2024 Supply, Delivery, Installment and Commissioning of Security Screening Equipment-2D Cabin Size X-Rays, Walk Through Metal Detectors and UPS for Kenya Airports Authority in compliance with the Constitution of Kenya, the Public Procurement and Asset Disposal Act, 2015, the Regulations thereof, and all other enabling provisions of the law.***



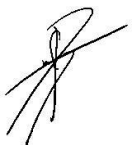
e) The 1st and 2nd Respondents pay the costs of the Review herein.

f) Any other reliefs that the Board may deem fit and just to grant in the circumstances.

26. In a Notification of Appeal and a letter dated 29th April 2025, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the 1st Tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the 1st Tender within five (5) days from 29th April 2025.

27. On 7th May 2025, the Respondents jointly filed through Vincent Korir, General Manager (Procurement and Logistics), an undated Reply by the Procuring Entity dated together with a file containing confidential documents concerning the 1st Tender pursuant to Section 67(3)(e) of the Act.

28. Vide letter dated 9th May 2025, the Acting Board Secretary notified all tenderers in the 1st Tenders via email, of the existence of the Request



for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the 1st Tender were invited to submit to the Board any information and arguments concerning the tender within three (3) days.

29. Vide a Hearing Notice dated 9th May 2025, the Acting Board Secretary, notified parties and all tenderers in the 1st Tender of an online hearing of the Request for Review slated for 14th May 2025 at 11.00 a.m., through the link availed in the said Hearing Notice.
30. On the same day of 9th May 2025, the Applicant filed through its advocates a Response to the Procuring Entity's Reply dated 9th April 2025.
31. On 13th May 2025, the Applicant filed Written Submissions and a List of Authorities both dated 13th May 2025.
32. At the hearing of the matter on 14th May 2025 at 11.00 a.m., the Applicant was represented by Mr. Karanja Kamotho Advocate, while the 1st and 2nd Respondents were represented by Mr. Chris Mulili Advocate.
33. The Board proceeded to read out respective pleading filed by parties in the matter. Mr. Mulili made an application for the hearing to be adjourned to enable him file his written submissions. He indicated that



he had just received the Applicant's submissions and there were issues that he needed to address.

34. In response, Ms. Kamotho indicated that he was ready to proceed with the hearing and was opposed to the application for adjournment. He pointed out that all parties had been served with the Hearing Notice in the matter and though no notice to file written submissions had been issued, it was out of the Applicant's industry to file the same and it would be greatly prejudiced if the matter was adjourned noting that procurement of the new tender was still in process.

35. In a rejoinder, Mr. Mulili submitted that the Hearing Notice was only served upon the Procuring Entity on 9th May 2025 and he did not personally receive it until a few minutes to the hearing when it was internally shared with him together with the Applicant's Written Submissions. He argued that it would only be in the interest of justice and fairness that he is allowed to file his written submissions.

36. Having considered parties' submissions, the Board confirmed that parties were amenable to canvass the matter by way of written submissions and proceeded to issue the following directions:

- i The Application for adjournment be and is hereby allowed.
- ii The Respondents be granted leave to file and serve their comprehensive and exhaustive written submissions and list of authorities by 9.00 a.m. on 15th May 2025.



- iii The Applicant be granted commensurate leave to file and serve its further written submissions and list of authorities by 2.00 p.m. on 15th May 2025.
- iv Parties were cautioned to adhere to the strict timelines as directed since the Board would rely strictly on the documentation filed before it in rendering its decision.
- v Parties were also informed that the instant Request for Review having been filed on 29th April 2025 was due to expire on 20th May 2025 and that the Board would communicate its decision on 20th May 2025 to all parties to the Request for Review via email

37. On 15th May 2025, the Respondent filed Written Submissions dated 15th May 2025.

38. On the same day of 15th May 2025, the Applicant filed Supplementary Written Submissions dated 15th May 2025.

PARTIES' SUBMISSIONS

Applicant's case

39. In its submissions, the Applicant placed reliance on its pleadings filed before the Board.

40. The Applicant submitted that Section 63 of the Act applies to termination prior to notification of tender award and that in the instant matter, it was notified of award of the 1st Tender on 6th March 2024 whereas the Procuring Entity purported to terminate the said award on



15th April 2025 which was about 13 months from the date of notification of award.

41. The Applicant contends that the reason given by the Procuring Entity for termination of the 1st Tender being due to withdrawal of its performance guarantee is not one of the reasons envisioned for termination of procurement proceedings under Section 63 of the Act.

42. As to the allegation of inadequate budgetary funds being the reason for termination of the 1st Tender, the Applicant submitted that this was inaccurate and contrary to the provisions of the Act. It pointed out that no documentation has been availed to enable the Board verify the assertion for inadequate budget provision. It further pointed out that by issuing it with the award letter, the Procuring Entity created a legitimate expectation on the Applicant that the process would proceed to contract signing and at no point did the Procuring Entity communicate to it that it was having budgetary constraints or any other issue that would make the process not to proceed to the contract stage.

43. In support of its argument, it made reference to the holding in *PPARB Application No. 75 of 2023 Astronea Construction Limited v The Accounting Officer, County Government of Bomet & Others*, *PPARB Application No. 64 of 2020 Erdemann Property Limited v The Accounting Officer, export Processing Zones Authority; Civil Appeal E510 of 2022 Chief Executive Officer the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 Others* ;



and *Judicial Review Misc. Application No. E100 of 2022 Republic v Public Procurement Administrative Review Board & another; Rentco Africa Limited (Ex parte)* and submitted that neither the facts of the instant matter nor the application of the law to the facts support the actions of the Procuring Entity to terminate the 1st Tender.

44. The Applicant submitted that the Procuring Entity deliberately avoided entering into a contract with it despite awarding it the 1st Tender and that this was orchestrated through (a) failure to respond to the request to enter into a contract after the Applicant wrote to it on 29th April 2024 and declining to issue a contract during the validity period, (b) initiation of another procurement process in the 2nd Tender without bringing the procurement process in the 1st Tender to a logical conclusion, and (c) giving legally untenable reasons for termination of the 1st Tender.

45. As to whether the 2nd Tender is similar to the 1st Tender, it is the Applicant's case that both tenders are similar and that the technical specifications of the items listed in both tenders show that the Procuring Entity is looking to procure the Supply, Delivery, Installation & Commissioning of Security Screening Equipment -2D Cabin Size X-Ray Machine, Walk Through Metal Detector & Ups and the only difference between the two is that the 2nd Tender has been broken down into Lot A and B where Lot A is essentially the 1st Tender and the Procuring Entity has increased the quantity of 2D Security Screening Equipment from 5 to 6 while Walk Through Metal Detectors remain 10.



46. The Applicant pointed out that the 2nd Tender had 6 2D cabin size x-ray machines instead of 5 and had an additional scope of 3 check in x-ray machines. It argued that a difference in quantities of items between the two tenders cannot be considered a difference in technical specifications and instead, this was a difference in volume and not in the nature of quality, features, functionality, design or performance of the items themselves.

47. The Applicant queried how the Procuring Entity purported not to have a sufficient budget for the 1st Tender but has an even higher budgetary requirement for the 2nd Tender noting the increase in budget from Kshs. 166 Million to Kshs. 284.5 Million.

48. The Applicant urged the Board to allow the instant Request for Review as prayed.

Respondents' case

49. In their submissions, the Respondents placed reliance on the pleadings and confidential documents submitted to the Board.

50. As to whether the 1st Tender was properly terminated, the Respondents submitted that the termination of the procurement proceedings in the 1st Tender was in compliance with Section 63 of the Act and while referring to Section 63 (1)(b) of the Act and the holding by the Supreme Court in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No. 26 of 2014 [2014] eKLR*,



submitted that a purposive approach in the interpretation of any provision of the Act would demand that the Act is read in a holistic manner with due regard to (a) the guiding principles of public procurement as set out under section 3 of the Act, (b) other relevant provisions of the Act, and (c) Article 227 of the Constitution on public procurement, in order to breathe life to the Act and ensure its objects are achieved.

51. The Respondents indicated that the Applicant was requested vide the notification of intention to enter into a contract to submit a performance guarantee to enable preparation of the contract in the 1st Tender. They pointed out that the guarantee was submitted but later on 19th September 2024 withdrawn by the Applicant. They further pointed out that vide letter dated 8th May 2024 responding to the Applicant's request for issuance of a contract, the Procuring Entity confirmed to the Applicant that the procurement process had not been concluded and sought to extend tender validity period by an additional 30 days until 28th June 2024.

52. It is the Respondent's case that despite having issued the Applicant with a notification of intention to enter into a contract, they were unable to conclude the procurement process on the basis of an insufficient budget.

53. They pointed the Board to an internal memo by the Procuring Entity's General Manager Finance indicating that the budget available was Kshs.



51.002 Million against the Applicant's bid price of USD 905,406.68 (about Kshs. 117,106,818.36) making it impossible to issue a contract in the circumstances. They further pointed out that the procurement process was frustrated by the fact that the Applicant withdrew its performance guarantee vide its letter dated 19th September 2024, which was a requirement before issuance of the contract as noted by the Respondent in the notification letter dated 6th March 2024.

54. The Respondents submitted that upon termination of the 1st Tender in line with Section 63 of the Act, all bidders in the 1st Tender were notified on 15th April 2025 and the Public Procurement Regulatory Authority (hereinafter referred to as "PPRA") was similarly notified and the status updated on the Public Procurement Information Portal (hereinafter referred to as "PPIP")

55. As to whether the 2nd Tender is similar to the 1st Tender, the Respondents submitted that the tender referenced as KAA/RT/SEC/0131/2024-2025 was initiated as a new procurement process for the 2024-2025 financial year and was based on user requirements and the availability of funds for that fiscal year.

56. They argued that while the 2nd Tender may appear similar to the 1st Tender, the 1st Tender's validity period had expired and the scope in both was different as follows:

<i>S/NO.</i>	<i>KAA/RT/SEC/0099/2023-2024</i>	<i>KAA/RT/SEC/0131/2024-2025</i>
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1.	<i>Supply, delivery, installation and commissioning of security screening equipment – 2D Cabin size x-rays, Walk through metal detectors and UPS for JKIA, MIA, WAP, EIA and KIA airports.</i>	<i>Supply, delivery, installation and commissioning of security screening equipment – 2D x-ray machines and Walk through metal detectors for Kenya Airports Authority.</i> <ul style="list-style-type: none"> • <i>No mention of Re-Tender</i> • <i>No UPS</i> • <i>No specification of airports to be supplied</i>
2.	<i>Tender has only 2D cabin luggage x-ray machines.</i>	<i>Tender has both Cabin and Check-in x-ray machines.</i>
3.	<i>Tender required procurement of 05 No. x-ray machines, 10 No. WTMD and 06 No. UPS – 3KVA</i>	<i>09 x-ray machines (06 Cabin and 03 Check-in)</i> <i>10 WTMD</i> <i>No UPS (excluded)</i>
4.	<i>For Re-tender, the technical specifications do not change. The only items affected are the tender number and the date of opening and closing.</i>	<i>The technical specifications have changed for cabin x-ray machine and introduced specs for the 03 check-in x-ray machines.</i>
5.	<i>The tender did not have Lots</i>	<i>Has two Lots on same tender document</i> <i>LOT 1 – 06 Cabin X-ray and 10 WTMD</i> <i>LOT 2 – 03 Check-in x-ray machines</i>
6.	<i>The tender sum was:</i> <i>05 2D Cabin X-ray machines – 150M</i> <i>10 WTMD – 10M</i> <i>06 UPS -3KVA – 6M</i> <i>Total – Kshs. 166M</i>	<i>Tender sum:</i> <i>06 2D Cabin X-Ray machines – 180 M</i> <i>10 WTMD – 20M</i> <i>03 2D Check-in X-ray machines – 84.5M</i> <i>Total – Kshs. 284.5M</i>

57. They urged the Board to dismiss the instant Request for Review with costs.

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:

A. Whether the 1st Tender's procurement proceedings were lawfully terminated in accordance with Section 63 of the Act.

Depending on the outcome of Issue A

B. Whether the Board should extend the tender validity period of the 1st Tender, and if extended, what is the net effect on the 2nd Tender.

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



Whether the 1st Tender's procurement proceedings were lawfully terminated in accordance with Section 63 of the Act.

59. It is the Respondents case that despite having issued the Applicant with a notification of intention to enter into a contract in the 1st Tender, the procurement proceedings therein were lawfully terminated in line with the provisions of section 63 of the Act due to inadequate budgetary provision. Further, that the procurement proceedings in the 1st Tender were frustrated as a result of withdrawal by the Applicant of its Performance Guarantee and expiry of the tender validity period and as such, the instant Request for Review ought to be dismissed.

60. The Applicant, on its part, submitted that it was issued with a notification of intention to enter into a contract in the 1st Tender on 6th March 2024 and had a legitimate expectation that it would enter into a contract with the Procuring Entity within the tender validity period. It further submitted that Section 63 of the Act is only applicable with regard to termination of procurement proceedings prior to notification of tender award and as such, the purported termination of the 1st Tender and advertisement of the 2nd Tender by the Respondents is illegal. It argued that the Respondents acted in bad faith with the intention of frustrating the procurement process in the 1st Tender and that the reasons given for termination of the same are untenable and contrary to the Act and Constitution.

61. The Board notes that termination of procurement proceedings is governed by Section 63 of the Act. When a termination of procurement



and asset disposal proceedings meets the threshold of Section 63 of the Act, the jurisdiction of this Board is ousted by virtue of Section 167 (4) (b) of the Act which provides as follows: -

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

(a).....;

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

62. Superior Courts of this country have on numerous occasions offered guidance on the interpretation of Section 167(4) of the Act and the ousting of the Board's jurisdiction on account of the subject matter relating to termination of tenders. The High Court in **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR**, while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 that dealt with termination of procurement proceedings held as follows:

"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005, s 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the jurisdiction of the Review Board. That question



can be answered by a close scrutiny of section 36 (6) of the said Act which provides:

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

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

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

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



and fairness as well as to increase transparency and accountability in Public Procurement Procedures.

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

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

64. Further, in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR** (hereinafter referred to as "JR No. 142 of 2018") the High Court held as follows:



"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement..."

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

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



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

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

65. The above judicial pronouncements mirror the position of this Board in its previous decisions in **PPARB Application No. 5 of 2021; Daniel Outlet Limited v Accounting Officer Numeric Machines Complex Limited; PPARB Application No. 29 of 2023 Craft**



Silicon Limited v Accounting Officer Kilifi County Government & another; and PPARB Application No. 5 of 2024 Seluk Investments Limited v The Accounting Officer/Chief Officer Department of Urban Development County Government of Machakos & Another.

66. Drawing from the above judicial pronouncements, this Board will first interrogate the termination of the subject tender to establish whether the termination of the subject tender was in accordance with the requirements under Section 63 of the Act. It is only upon satisfying itself that the said requirements have been met that the Board can down its tools in the matter. However, where any requirement has not been met, the Board will exercise its jurisdiction, hear, and determine the Request for Review.

67. Section 63 of the Act is instructive in the manner in which a procuring entity may terminate procurement or asset disposal proceedings and provides as follows:

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

(a) the subject procurement has been overtaken by—



- (i) operation of law; or*
 - (ii) substantial technological change;*
 - (b) inadequate budgetary provision;*
 - (c) no tender was received;*
 - (d) there is evidence that prices of the bids are above market prices;*
 - (e) material governance issues have been detected;*
 - (f) all evaluated tenders are non-responsive;*
 - (g) force majeure;*
 - (h) civil commotion, hostilities or an act of war; or*
 - (i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.*
- (2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.**
- (3) A report under subsection (2) shall include the reasons for the termination.**
- (4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen**



days of termination and such notice shall contain the reason for termination.”

68. Section 63 (1) of the Act stipulates that termination of procurement proceedings is only done by an accounting officer prior to notification of award of a tender and when any of the pre-conditions listed in subsection (a) to (i) exist. Additionally, Section 63 (2), (3), and (4) outlines the procedure to be followed by a procuring entity when terminating a tender. It is trite law that for the termination of procurement proceedings to pass the legal muster, a procuring entity must demonstrate compliance with both the substantive and procedural requirements under Section 63 of the Act.
69. In essence, Section 63 of the Act is instructive on termination of procurement proceedings being undertaken by an accounting officer of a procuring entity at any time before notification of award is made and such termination must only be effected if any of the pre-conditions enumerated in Section 63(1) (a) to (i) of the Act are present. This is the substantive statutory pre-condition that must be satisfied before a termination of procurement proceedings is deemed lawful.
70. Further, following such termination, an accounting officer is required to give the Public Procurement Regulatory Authority a written report on the termination with reasons and notify all tenderers who participated in the tender, in writing, of the termination with reasons within fourteen (14) days of termination. These are the procedural statutory pre-



conditions that must be satisfied before a termination of procurement proceedings is deemed lawful.

As to the substantive requirements for termination of procurement proceedings in the 1st Tender;

71. Vide letter dated 15th April 2025, the Applicant was notified that the procurement process in the 1st Tender had been terminated. The said letter reads in part as follows:

".....

We refer to your bid submitted on 25th January, 2024, in response to the above tender.

Further to the letter dated 11th March, 2024, this is to notify you that the procurement proceedings for the subject tender have been terminated due inadequate budgetary provision.

We wish to thank you for the interest shown in our organization and look forward to doing business with you in the future.

This letter of notification is issued in accordance with the Public Procurement and Asset Disposal Act 2015.

....."

72. According to the above notification letter, the procurement proceedings in the 1st Tender were terminated due to inadequate budgetary provision pursuant to Section 63(1)(b) of the Act. It is not in



contest that this termination was subsequent to an award of the 1st Tender having been issued to the Applicant herein on 11th March 2025 and the Applicant having accepted the same on 13th March 2024.

73. The Board must now determine whether the reasons advanced by the Respondents to justify termination of procurement proceedings in the 1st Tender after award, due to inadequate budgetary provisions is in line with Section 63 of the Act.

74. We note that the High Court in **Asphalt Works Investment Limited v Kenya Ports Authority (Judicial Review Application E022 of 2023) [2023] KEHC 27253 (KLR)** considered a judicial review application in which the Ex-parte Applicant challenged a Procuring Entity's decision to terminate a public tender that had been awarded to the Ex-parte Applicant, who had even gone to the lengths of executing the procurement contract. In finding for the Ex-parte Applicant, the High Court opined that termination of a public tender could only be done before and not after an award had been issued. It found as follows:

"In the circumstances, there was no justification for the ostensible termination of the initial contracts by the respondent. Moreover, Section 63 of the PPADA recognizes that the respondent could only terminate the procurement proceedings before, and not after notification of tender award."



75. Guided by the above decision of the High Court which is binding on this Board on account of the judicial doctrine of stare decisis, we equally affirm that under the Act, a tender can only be terminated prior to an award being made as stipulated under Section 63 (1) of the Act. In the instant Request for Review, it is not in contest that the procurement proceedings in the 1st Tender were terminated after issuance of an award to the Applicant and on this basis alone, it follows that the termination of the 1st Tender was irregular and in breach of the Act.

76. The above notwithstanding, the Board is cognizant of its Decision dated 28th February 2024 in **PPARB Application No. 99 of 2023 Astronea Construction Limited v The Accounting Officer, County Government of Bomet & Another** where it considered a similar issue of termination of procurement proceedings due to inadequate budgetary provision and held as follows at paragraphs 177 to 179:

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

178. Cambridge Dictionary defines the word 'inadequate' to mean 'too low in quality or too small in amount; not enough' and 'budget' to mean 'the amount of money you have available to spend'. We can therefore deduce that



the meaning of inadequate budgetary provision in public procurement to be that the amount of money a procuring entity has to spend is too low or not enough to meet the needs of its user department.

179. Budgetary concerns are a key issue in public procurement. Section 44(1) of the Act provides that an accounting officer of a public entity is primarily responsible for ensuring that the public entity complies with the Act. Further 44 (2)(a) of the Act requires the accounting officer in performance of his/her responsibilities to ensure that procurement of goods, works and services of the public entity are within the approved budget of that entity.

77. In essence, the Board found that for a Procuring Entity to allege that procurement proceedings were being terminated due to inadequate budgetary provision, it meant that the amount of money that the procuring entity had to spend on the tender was too low or not enough so as to meet the needs of its user department. This is in view of the fact that the accounting officer of the procuring entity is required to ensure that the procurement of goods, works and services of the public entity is within the approved budget of the said entity.

78. Turning to the circumstances in the instant matter, we note from page 2 of 10 of the Professional Opinion submitted as part of the Confidential



Documents that the procurement in the 1st Tender was initiated on 12th September 2023 vide a Purchase Requisition No. 20001809 dated 19th September 2023 by the Head of the User Department in consultation with the Managing Director/CEO vide a memo dated 3rd August 2023. As for the budget, the Professional Opinion indicated at page 2 of 10 that the budget for the requirement was available under GL 699005 and confirmed at page 5 of 10 that the available budget allocated for the procurement was Kshs. 166 Million under GL 699005.

79. We further note that the Respondents at paragraph 2 at page 3 of 5 of their Reply by the Procuring Entity pleaded that the Procuring Entity did not have sufficient budget as follows:

"In response to paragraph 9, 10 and 20 of the Request for Review, the Procuring Entity avers that it did not have sufficient budget to complete the procurement process as the budget allocated for the tender in question was part of a consolidated budget which was depleted before the procurement process could be concluded. Additionally, the Procuring Entity states that the Applicant withdrew its performance guarantee as explained in paragraph 4 below and, in effect, had withdrawn from the procurement process. Consequently, the Procuring Entity was constrained to terminate the procurement process. The Procuring Entity thus notified the bidder of the termination pursuant to section 63 of PPADA, 2015."



80. From the above, the Procuring Entity contends that it did not have a sufficient budget to complete the procurement proceedings in the 1st Tender since the allocated budget was part of a consolidated budget that was depleted before the procurement process was completed.

81. However, the Board has not had sight, from the submitted confidential documents, of any documentation in support of the averment that the Procuring Entity's approved budget or the consolidated budget with respect to the 1st Tender was depleted thus hindering completion of the procurement proceedings in the 1st Tender.

82. It is imperative to note that Section 44 and 53 of the Act provides for funding of tenders as follows:

44 Responsibilities of the accounting officer

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

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

(a) ensure that procurement of goods, works and services of the public entity are within approved budget of that entity;

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



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

.....

.....

53. Procurement and asset disposal planning

(1) ...

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

(3)

(4)

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

(6)



(7)

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

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

.....

83. The import of the above provision is that it is the primary responsibility of an accounting officer to ensure that a procuring entity complies with the provisions of the Act. The accounting officer is also responsible for preparation of an annual procurement plan which ought to be within the approved budget and he/she ought to first satisfy himself or herself that there are sufficient funds to meet the obligations of any resulting contract reflected in the procuring entity's approved budget estimates prior to commencement of any procurement proceedings. Criminal liability is imposed on an accounting officer who knowingly commences any procurement process without first ascertaining if the goods, works or services have been budgeted for.

84. This Board in **PPARB Application No. 75 of 2023, Astronea Construction Limited v The Accounting Officer, County Government of Bomet & Others** held at paragraph 83 of its Decision



that the best evidence that a procuring entity ought to provide to demonstrate availability or otherwise of adequacy of budgetary allocation for a procurement process is the approved procurement plan and the approved budget estimates as contemplated under Section 44 (2)(b) and 53 (5) of the Act.

85. We note that the Respondents in support of the averment that it did not have sufficient funds to complete the procurement proceedings in the 1st Tender instead pointed the Board to an internal Memo dated 20th February 2025 by the Procuring Entity's General Manager Finance indicating that the only available budget in the 2024/2025 Financial Year with regard to the 1st Tender was Kshs. 51.002 Million.

86. Noting that the procurement proceedings in the 1st Tender were initiated on 12th September 2023, the Board is left to wonder why the issue of availability of budget is being made by the Respondents in reference to the 2024/2025 Financial Year budget yet for the procurement proceedings in the 1st Tender to commence, they ought to have been planned for and budgeted for in the 2023/2024 Financial Year.

87. From parties' pleadings and the confidential documents submitted to the Board, we note that following issuance of the notification of intention to enter into a contract award in the 1st Tender:

- a) The Applicant accepted award vide letter dated 13th March 2024 and submitted a Performance Guarantee on 23rd April 2024.



- b) The Applicant vide letter dated 29th April 2024 sought to be issued with the contract in regard to the 1st Tender for its review and further action.
- c) The Procuring Entity vide letter dated 8th May 2024 informed the Applicant that it had not completed the Procurement Process and requested the Applicant to extend its tender validity by an additional 30 days from 30th May 2024 so as to expire on 28th June 2024 to allow finalization of the tendering process.
- d) Vide letter dated 13th May 2024, the Applicant indicated that it had agreed to extend the validity of its tender as requested and its bid remained valid up to 28th June 2024.
- e) Vide Memo dated 3rd June 2024 addressed to the General Manager (P& L), the Procuring Entity's Legal Counsel sought for confirmation memos from Procurement, User Department and Finance that it was in order for them to proceed with preparation of draft contracts.
- f) Vide email dated 15th July 2024, the Legal Counsel indicated that she was yet to receive the confirmation memo on the subject contract with regard to the 1st Tender and returned the file to P & L as the timeline for contract preparation had lapsed.



- g) Vide letter dated 19th September 2024 addressed to the General Manager (Procurement and Logistics) of the Procuring Entity, the Applicant indicated that there had not been any communication on signing of contract with regard to the 1st Tender and requested to recover its performance bond until such a time when the Procuring Entity will be ready to proceed with the contract.
- h) In a Memo dated 21st January 2025, the General Manager Procurement and Logistics requested the General Manager Finance to confirm if several tenders listed therein, including the 1st Tender had a budget within the revised budget to enable them conclude contracts.
- i) In a Memo dated 20th February 2025, the General Manager Finance indicated that the available budget in the 2024/2025 Financial Year with regard to the 1st Tender was Kshs. 51.002 Million.
- j) In a Memo dated 4th April 2025, the General Manager Procurement and Logistics notified the Ag. Managing Director/CEO of the intention to terminate various tenders including the 1st Tender due to inadequate of budget and the same was approved on the same date of 4th April 2025 as seen from the words 'approved' appended in writing and signed by the Ag. Managing Director.



k) Vide letter dated 15th April 2025, bidders were notified of termination of the 1st Tender due to inadequate budgetary provision.

l) In a Memo dated 17th April 2025, the General Manager Procurement and Logistics informed the General Manager Security Services while copying in the Projects & Tendering Section that the 1st Tender had been terminated due to inadequate budgetary provision and asked them to liaise and facilitate re-tendering.

m) Vide letter dated 18th March 2025, the Applicant was invited to submit its bid in the 2nd Tender.

88. From the above sequence of events, the Board observes that there is no documentation/record demonstrating that the allocated budget for the 1st Tender was part of a consolidated budget as pleaded by the Respondents and how the said consolidated budget was depleted before the procurement process in the 1st Tender was completed. There is also no evidence of re-allocation of the approved budget for the 1st Tender within the financial year in which its procurement proceedings were commenced.

89. Absent evidence of inadequate budgetary allocation for the 1st Tender, the Board finds great difficulty in finding that there are no funds to finance a contract in the 1st Tender having awarded the same to the



Applicant. The Board came to a similar holding in its Decision in **PPARB Application No. 119 of 2024 Summa Turizm Yatimciligi Anonim Sirketi v The Principal Secretary/Accounting Officer Ministry of Defence.**

90. In the premise, the Board finds and holds that the Respondents have failed to fulfill the substantive requirements for the termination of procurement proceedings in the subject tender as required by Section 63(1)(b) of the Act and aforecited decisions and holdings since they have not provided sufficient evidence of inadequate budgetary allocation justifying termination of the 1st Tender.

As to procedural requirements for termination of procurement proceedings in the 1st Tender

91. The Board has had sight of letters dated 15th April 2025 from the confidential file, addressed to bidders who participated in the 1st Tender, including the Applicant, notifying them of termination of the procurement proceedings due to inadequate budgetary provision. However, there is no proof of service of the said letters or receipt of the same by the said bidders, save for the Applicant who attached a copy of the said letter marked as Exhibit BN 8 to the Request for Review.

92. Further, despite the Respondents submitting that they notified PPRA of termination of the 1st Tender and provision a screenshot of the status



of the 1st Tender on the PPIP, there is no indication of when the Director General PPRA was notified of termination of the 1st Tender as contemplated under Section 63 (2) of the Act as read with PPRA Circular No. 4/2022 dated 1st July 2022.

93. As such, the procedural statutory pre-conditions that must be satisfied before a termination is deemed lawful as required by Section 63(2), (3) & (4) of the Act have not been met by the Respondents.

94. It is not lost to the Board that the Applicant withdrew its Performance Guarantee vide letter dated 19th September 2024 having not received any communication from the Respondents on signing of a contract in the 1st Tender. This however is not one of the reasons stipulated under Section 63 of the Act for termination of procurement proceedings and the Respondents cannot purport to rely in the same as a justification for termination of the procurement proceedings in the 1st Tender.

95. Having established that the Respondents failed to satisfy both the substantive statutory pre-conditions of termination of procurement proceedings, the Board finds and holds that the purported termination of the procurement proceedings in the 1st Tender was unlawful, illegal, and contrary to Section 63 of the Act. The upshot of our finding is that the Board is clothed with the requisite jurisdiction to hear and determine the instant Request for Review.



Whether the Board should extend the tender validity period of the 1st Tender, and if extended, what is the net effect on the 2nd Tender.

96. Section 88 of the Act provides for extension of tender validity period as follows:

"88. Extension of tender validity period

(1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.

(2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.

(3) An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.

(4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1).

97. In essence, the accounting officer of a procuring entity (a) may extend the tender validity period before expiry of such period;(b) give a written notice to tenderers of the extension of the tender validity



period; (c) is restricted to extending the tender validity period for not more than thirty (30) days; and (d) is restricted to only extending the tender validity period once.

98. ITT 21.1 of Section II- Tender Data Sheet of the Tender Document provided the period of the tender validity in the 1st Tender as 126 days.

99. We have hereinbefore established that vide letter dated 8th May 2024, the Procuring Entity informed the Applicant that it had not completed the procurement process and requested the Applicant to extend its tender validity by an additional 30 days from 30th May 2024 so as to expire on 28th June 2024 to allow finalization of the tendering process.

100. Subsequently, vide letter dated 13th May 2024, the Applicant indicated that it had agreed to extend the validity of its tender as requested and its bid remained valid up to 28th June 2024.

101. Taking into consideration the above communication between the Applicant and the Respondent, we note that the alleged extension of the tender validity period in the 1st Tender was irregular for the reason that the request to extend the tender validity period was sought by the Procuring Entity and supposedly granted by the Applicant. This is contrary to the clear provisions under Section 88 of the Act which places the responsibility of extending the tender validity period by 30 days on the 1st Respondent and informing, in writing, all the bidders who participated in procurement proceedings of the said extension.



102. The Board takes cognizance of its wide discretionary powers as provided under Section 173 of the Act which states:

"173. Powers of Review Board

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

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

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

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

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

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

103. In **Republic v Public Procurement Administrative Review Board & another** **Exparte Rentco Africa Limited** **Judicial Review**



Misc. Application No. E100 of 2022 (hereinafter referred to as “the Rentco Case”), the High Court referred to the holding by the Court of Appeal in **Civil Appeal No. 510 of 2022 Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others [2022] KECA 982 eKLR** (hereinafter referred to as “Civil Appeal No.510 of 2022”) while addressing the question of whether the Board has power to direct a Procuring Entity to extend the tender validity period and noted that the Court of Appeal held as follows:

“Did the 2nd Respondent have power to direct the appellant to extend the validity period of the tender in question? The answer to this question was, in our view, aptly provided by Onyiego, J in Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex parte Kenya Ports Authority & another [2021] eKLR. The learned judge found as follows:

39. The crux of the issue in controversy is whether the Respondent (Review Board) has powers in law to order or direct the accounting officer of the Ex-parte Applicant as a procuring entity to extend the validity period of the subject tender more than once. Section 88 of the Act (PPDA) provides for the extension of the tender validity period...



40. What was the intention of the drafters of this legislation and in particular the inclusion of Section 88? In my view, this provision was intended to guard against any possible mischief or abuse of office or power by accounting officers especially where uncontrolled timelines will give them a free hand to temper with the tendering process to favour their friends or closely related persons. In other words, once the already extended validity period for a period of 30 days lapses, the tendering process in respect of that tender becomes moot or rather it extinguishes (sic). Upon lapsing, the Procurement entity is at liberty to re-advertise for fresh tendering and the process then follows the full circle like it was never tendered for before.

41. Therefore, the foregoing provision permits extension of a tender validity period by an accounting officer only once and that extension must be made before the expiry of the already stipulated tender validity period. It is common knowledge that one cannot extend time that has already lapsed...

48. From the plain reading of that Section, it is only applicable and binding on the accounting officer and nobody else. Nothing would have been easier than [for] the



legislators to include or provide the Review Board's mandate under that section. To that extent, I do agree with counsel for the I/Party that Section 88(3) of the Act does not bar the Review board from making decisions that are deemed to be necessary for the wider attainment of substantive justice...

49. Under section 173(a)(b) & (c) of the Act, the Board has wide discretionary powers for the better management of tendering system to direct the doing or not doing or redoing certain acts done or omitted from being done or wrongly done by the accounting officer. Although the Act does not expressly limit the powers of the Board from extending tender validity period more than once, one can imply that the powers conferred upon the Review board includes powers to extend validity period to avert situations where the accounting officer can misuse powers under Section 88 to frustrate tenderers or bidders not considered favourable."[Emphasis ours]

104. The High Court in the Rentco case proceeded to hold as follows:

56. From the material presented before the Board, it is quite clear that the 2nd Respondent herein acted mala fides in the subject procurement process. Such conduct must be deprecated and must not be left unchecked. The



Public Procurement Regulatory Authority must in such circumstances flex its legal muscle to monitor and enforce standards in public procurement and to weed out malfeasance in the processes. It must be borne in mind that any conduct that tends to defeat a fair, equitable, transparent, competitive and cost effective public procurement process is an attempt to overthrow the constitutional order espoused in Article 227 (1) of the Constitution. Any officer responsible for such conduct risks sanctions including but not limited to a declaration that they are unfit to hold public office.

57. A review of the decision by the Board shows that the same is laced with illegality arising from a glaring misapprehension of the law on extension of the tender validity period by the Board. From the disclosed facts the decision was also unreasonable as it tended to reward the 2nd Respondent for their fraudulent act of commission and omission."

105. In the above Rentco case, the High Court compelled the Board to exercise its powers under section 173(b) of the Act to extend the tender validity period of the subject tender for a period of 60 days or such period that it deemed necessary for the procuring entity to conclude the subject tender process. The learned judge held, and rightly so in our view, that ***"a rogue procuring entity cannot be allowed to hide behind the law to sanitize its injurious conduct, that is***



inimical to the constitutional principles on accountable procurement processes in public procurement."

106. In view of the foregoing, this Board has powers to order for extension of the tender validity period to avert situations where an accounting officer of a procuring entity frustrates tenderers or frustrate the procurement process contrary to the provisions of the Constitution, Act, and Regulations 2020.

107. Having established that the termination of the procurement proceedings in the 1st Tender was illegal and noting the sequence of events leading to a flawed extension of the tender validity period and to termination of the 1st Tender, we deem it just and fit to extend the validity period in the 1st Tender for a period of 60 days from the date of this decision as an intervening measure to enable the Respondents comply with the provisions of the Act and proceed with preparation and signing of a contract with the Applicant as envisioned under Section 134 and 135 of the Act.

108. During the hearing of the instant Request for Review, the Board heard the Applicant submit that the 2nd Tender as advertised by the Respondents was similar to the 1st Tender. In response, the Respondents submitted that the 2nd Tender was initiated as a new procurement process for the FY 2024-2025 and that though the two tenders appear similar, the scope was different.



109. The Board has hereinabove established that *vide* Memo dated 17th April 2025, the General Manager Procurement and Logistics informed the General Manager Security Services while copying in the Projects & Tendering Section that the 1st Tender had been terminated due to inadequate budgetary provision and asked them to liaise and facilitate re-tendering. This subsequently led to the invitations to bidders such as the Applicant to submit bids in the 2nd Tender whose tendering, just like the 1st Tender, was conducted under Restricted (National) tendering method.

110. It is therefore the considered view of the Board that the 2nd Tender was a retendering of the 1st Tender by the Procuring Entity.

111. We do however note a difference under the Scope of Works of the Technical Specifications in the Tender Document as stipulated under the 1st Tender and the 2nd Tender in the sense that under the 1st Tender, the locations provided with regard to the procurement included Jomo Kenyatta International Airport, Moi International Airport, Wilson Airport, Eldoret International Airport, and Kisumu International Airport while in the 2nd Tender, the scope of works is categorized under Lot A and Lot B as follows:

- i Lot A includes Moi International Airport, Ukunda Airport, Malindi & Lamu Airport, Kisumu Airport and Wajir Airport.
- ii Lot B includes Moi International Airport and Wilson Airport.

112. It is therefore the Board's considered view that having extended the tender validity period in the 1st Tender, the same ought to be implemented as is at the point of award and the attendant contract



ought to capture the scope of works as laid out in the 1st Tender's Tender Document.

113. With the above in mind, the 1st Respondent in ensuring compliance with the Board's orders ought to modify the 2nd Tender and ensure that the same does not infringe on the aspects of the scope of work as captured in the 1st Tender or on any other provision.

114. In the circumstances, the Board finds it appropriate to extend the tender validity period in the 1st Tender to enable the procurement proceedings with respect to the 1st Tender come to a logical conclusion in accordance with our findings herein.

What orders should the Board grant in the circumstances?

115. The Board has established that it is clothed with jurisdiction to hear and determine the instant Request for Review noting that the procurement proceedings in the 1st Tender were not terminated in accordance with the provisions of the Act.

116. The Board has found it fit and just to extend the tender validity period in the 1st Tender to enable the procurement proceedings with respect to the 1st Tender come to a logical conclusion in accordance with the findings herein.

117. The upshot of our decision is that the Request for Review dated 29th April 2025 and filed on even date succeeds with respect to the following specific orders:



FINAL ORDERS

118. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the instant Request for Review:

A. The Letters dated 15th April 2025 with respect to termination of the procurement proceedings in Tender No. KAA/RT/SEC/0099/2023-2024 for Supply, Delivery, Installation & Commissioning of Security Screening Equipment -2D Cabin Size X-Ray Machine, Walk Through Metal Detector & Ups for Kenya Airports Authority be and are hereby nullified and set aside.

B. The decision of the 1st Respondent to terminate the procurement proceedings with respect to Tender No. KAA/RT/SEC/0099/2023-2024 for Supply, Delivery, Installation & Commissioning of Security Screening Equipment -2D Cabin Size X-Ray Machine, Walk Through Metal Detector & Ups for Kenya Airports Authority be and is hereby nullified and set aside.

C. The tender validity period of Tender No. KAA/RT/SEC/0099/2023-2024 for Supply, Delivery, Installation & Commissioning of Security Screening Equipment -2D Cabin Size X-Ray Machine, Walk Through Metal Detector & Ups for Kenya Airports Authority be and is




hereby extended for a period of 60 days from the date of this Decision.


D. The Applicant be and is hereby ordered to submit to the Procuring Entity a fresh Performance Guarantee in line with the Notification of Intention to Enter into a Contract dated 11th March 2024.

E. The 1st Respondent is hereby ordered to proceed with the procurement process in respect of Tender No. KAA/RT/SEC/0099/2023-2024 for Supply, Delivery, Installation & Commissioning of Security Screening Equipment -2D Cabin Size X-Ray Machine, Walk Through Metal Detector & Ups for Kenya Airports Authority to its logical and lawful conclusion within 60 days from the date of this Decision, noting this Board's findings in this Decision.

F. Each party shall bear its own costs in this Request for Review.

Dated at NAIROBI this 20th Day of May 2025.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB