

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 58/2025 OF 14TH MAY 2025

BETWEEN

KEDDY ENTERPRISES LIMITED APPLICANT

AND

**THE PRINCIPAL SECRETARY,
STATE DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT 1ST RESPONDENT**

**STATE DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT 2ND RESPONDENT**

Review against the decision of the Accounting Officer, State Department of Housing and Urban Development in relation to Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure).

BOARD MEMBERS PRESENT

- | | | |
|-----------------------------------|---|-------------|
| 1. Mr. George Murugu FCI Arb, I.P | - | Chairperson |
| 2. Mr. Stanslaus Kimani | - | Member |
| 3. Eng. Lilian Ogombo | - | Member |

IN ATTENDANCE

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



PRESENT BY INVITATION

APPLICANT

KEDDY ENTERPRISES LIMITED

1. Mr. Anthony Simiyu - Advocate, ASW Law Advocates LLP
2. Mr. Mic hael Mutea - Advocate, Mutea Muthuri & Company Advocates
3. Mr. Roy Chidi - Advocate

RESPONDENTS

THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT & STATE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Ms. Charity Kagiri

- State Counsel

Mr. John Maina

- Head, Supply Chain Management, State
Department of Housing & Urban Development

BACKGROUND OF THE DECISION

The Tendering Process

1. The State Department of Housing and Urban Development, the Procuring Entity and the 2nd Respondent herein invited qualified and interested tenderers to submit sealed tenders in response to Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) (hereinafter referred to



as the "subject tender") by use of open competitive method (National). The invitation was by way of an advertisement on 27th June 2024 in the Star Newspaper and on the 2nd Respondent's website www.housingandurban.go.ke and the Public Procurement Information Portal www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers by the Procuring Entity (hereinafter referred to as the 'Tender Document') was available for download. The tender submission deadline of the subject tender was initially scheduled on 8th August 2023 at 09.00 a.m.

Addenda

2. The Procuring Entity subsequently issued, on various dates, nine (9) Addenda which sought to vary, to some extent, certain information provided in the blank Tender Document while extending the submission deadline to 24th September 2024.

Submission of Tenders and Tender Opening

3. According to the Minutes of the subject tender's opening held on 24th September 2024 signed by members of the Tender Opening Committee on 20th December 2023 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of fourteen (14) tenders were submitted in response to the subject



tender. The said fourteen (14) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1.	Padaa Enterprises Ltd
2.	Kiu Construction Ltd
3.	Asken Yapi Group Insaat Limited
4.	Highpoint Company Ltd
5.	Blue Swift Contractors and General Supplies Ltd
6.	Sava Builders Ltd
7.	Keddy Enterprises Ltd
8.	Aditi Construction Ltd
9.	Zaky Infra Ltd
10.	Neelcon Construction Services Ltd
11.	Custom General Construction Ltd
12.	Sahjanad Construction Ltd
13.	Devdan Enterprises Ltd and Leeds Entrepreneur
14.	Parklane Construction 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 fourteen (14) tenders as captured in an Evaluation



Report for the subject tender signed by members of the Evaluation Committee on 28th November 2024 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 Clause A Preliminary and Mandatory Requirements Checklist of Section III- Evaluation and Qualification Criteria at page 31 of 157 to 32 of 157 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, twelve (12) tenders were determined non-responsive, while two (2) tenders, being Bidder No. 1's tender and 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 Criteria for the Bidders of Section III- Evaluation and Qualification Criteria at page 33 of 157 to 34 of 157 of the Tender



Document. Tenderers were required to attain the minimum score of 70 points so as to progress for further evaluation.

8. At the end of evaluation at this stage, the two (2) 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 Clause D Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 34 of 157 to 35 of 157 of the Tender Document.
10. The Evaluation Committee upon checking for the completeness of the B.O.Q noted that Bidder No. 1 Bill of Quantities for builder's works was not submitted and proceeded to disqualify the said bidder from further evaluation. Upon checking for arithmetic errors, the evaluation Committee found that the Applicant's tender had an error of 4.13 % (Kshs.76,538,958.62) to their disadvantage. The Applicant was subsequently notified of its arithmetic error vide letter dated 25th November 2024 and it confirmed and accepted the error vide letter dated 28th November 2024.
11. At the end of evaluation at this stage, the Evaluation Committee ranked the responsive bids as follows:

Table 14: Ranking of Bids



Bid No.	Name Of Tenderer	Corrected Bid amount (Kshs)	Bid amount (Kshs)	Rank
7	Keddy Enterprises Ltd	1,928,145,473.62	1,851,606,515.00	1

Evaluation Committee's Recommendation

12. The Evaluation Committee recommended award of the subject tender to M/s Keddy Enterprises Limited of P.O BOX 24470 -00100, Nairobi at its quoted tender sum of Kenya Shillings One Billion, Eight Hundred Fifty-One Million, Six Hundred and Six Thousand, Five Hundred Fifteen and zero cents (Kshs1,851,606,515.00) only being the lowest evaluated bidder.

Due Diligence

13. According to the Due Diligence Report dated 20th January 2025, the Evaluation Committee carried out due diligence in accordance with Section 83 of the Act on the lowest responsive bidder. The scope of the due diligence entailed (a) visiting the offices of the responsive bidder to establish their physical address and assess their capacity, (b) ascertaining the authenticity of the bid security and Line of credit submitted by the tenderers, (c) ascertaining the authenticity of the firm's experience by confirming completion status of at least one sample project among the projects submitted by the bidder. Being satisfied with the results of the due diligence exercise, the Evaluation Committee recommended award of the subject tender to M/s Keddy Enterprises Limited of P.O BOX 24470 -00100, Nairobi at its quoted tender sum of Kenya Shillings One Billion, Eight Hundred Fifty-One



Million, Six Hundred and Six Thousand, Five Hundred Fifteen and zero cents (Kshs1,851,606,515.00) only being the lowest evaluated bidder.

First Professional Opinion

14. In a Professional Opinion dated 28th January 2025 (hereinafter referred to as the "First Professional Opinion"), the Head Supply Chain Manager, Mr. John Maina reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

15. However, the 1st Respondent did not approve the First Professional Opinion and directed for re-evaluation of all bids in the subject tender.

Re-Evaluation of the subject tender

16. The Head of Supply Chain Management returned the Evaluation Report to the Evaluation Committee via memo dated 4th February 2025 with the following instructions from the 1st Respondent: (a) Refer to KRA report on this bidder, (b) Evaluate next qualified bidder, (c) N/B Re-evaluate all bids noting minor deviations especially on not stamping special form, and (d) confirm with NCA on overseas companies.

Extension of Tender Validity Period

17. Vide letters dated 25th February 2025, bidders were notified of extension of the tender validity period for 30 days up to and including 27th March 2025.



Evaluation Review

18. The Evaluation Committee noted in the Evaluation Review Report signed by members of the Evaluation Committee on 10th March 2025, that the 1st Respondent noted from submitted audited financial statements and bank statements that the sales (turnover) far surpassed the cash movements in the bank statements and wrote to Kenya Revenue Authority for verification of the turnover against the VAT records submitted to KRA for purposes of due diligence vide letter dated 18th December 2024. In response, KRA vide letter dated 10th January 2025 indicated that the Applicant had filed its returns as at 2/01/2025 but had outstanding VAT liabilities for the period between February 2018 and January 2022 and that it carried out a tax evasion investigation in 2024 and extra taxes demanded from the Applicant. However, the Applicant appealed against the investigation findings and the matter was ongoing before the Tax Appeals Tribunal.
19. In conclusion, the Evaluation Committee opined that the Applicant was tax compliant as evidenced by the Tax Compliance Certificate issued by KRA and recommended award of the subject tender to the Applicant.

Second Professional Opinion

20. In a Professional Opinion dated 13th March 2025 (hereinafter referred to as the "Second Professional Opinion"), Mr. Benard Oloo for the Head Supply Chain Manager reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders



and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

Notification to Tenderers

21. Tenderers were allegedly notified of termination of the subject tender pursuant to Section 63(1)(f) vide letters dated 26th March 2025 copies of which were submitted to the Board as part of the confidential file.

REQUEST FOR REVIEW NO. 44 OF 2025

22. On 10th April 2025, Keddy Enterprises Limited, the Applicant herein, filed a Request for Review dated 10th April 2025 together with a Statutory Statement sworn on 10th April 2025 by Evangeline Kiende its Director and another Statutory Statement sworn on 10th April 2025 by Emma Wangai Njeru, its employee (hereinafter referred to as 'Request for Review' No. 44 of 2025) seeking the following orders from the Board in verbatim:

a) A declaration does hereby issue that the Respondents' failure to declare the evaluation outcome in respect of Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) within the tender period to the detriment of the Applicant as the lowest evaluated bidder constituted a breach of Sections



80(6) and 86(1)(a) of the Public Procurement and Asset Disposal Act (Cap 412C).

- b) The Respondents be and are hereby directed not to re-advertise Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure).***
- c) The tender validity period in respect of Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) be and is hereby extended for further period of 90 days from 27th March 2025 to allow for the conclusion of the procurement process in the said tender.***
- d) The Respondents be and are hereby directed to issue a letter of award in respect of Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and***



Infrastructure) to the Applicant as the lowest evaluated bidder.

e) The Respondents be and are hereby directed to execute a contract with the Applicant in respect of Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) within 21 days from the date of the Board's Decision.

f) The Applicant be and is hereby awarded costs in respect of this Request for Review.

g) Any other relief that would serve the interests of justice in the circumstance.

23. In exercise of the powers conferred upon it by Section 173 of the Act, the Board made the following orders on 29th April 2025 in Request for Review No. 44 of 2025:

A. The Applicant's Request for Review dated 10th April 2025 and filed on even date be and is hereby marked as settled.



B. The 1st Respondent be and is hereby directed to forthwith issue all bidders who participated in Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) with the termination notice dated 26th March 2025.

C. The tender validity period with respect to Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) be and is hereby extended for a period of 120 days from 28th April 2025.

D. There shall be no orders as to costs.

TERMINATION OF PROCUREMENT PROCEEDINGS

24. Vide letter dated 26th March 2025 dispatched on 30th April 2025 via email, the 1st Respondent notified bidders of termination of the procurement proceedings in the subject tender for being non-responsive pursuant to Section 63(1)(f) of the Act.



REQUEST FOR REVIEW NO. 58 OF 2025

25. On 14th May 2025, the Applicant filed a Request for Review dated 14th May 2025 together with a Statutory Statement sworn on 14th May 2025 by Evangeline Kiende, its director (hereinafter referred to as 'Request for Review' No. 58 of 2025) seeking the following orders from the Board in verbatim:

a. A declaration does hereby issue that the Respondents' termination of Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) to the detriment of the Applicant as the lowest evaluated bidder constituted a breach of Sections 63, 79(1) and 80(2) of the Public Procurement and Asset Disposal Act (Cap 412C);

b. The letters of termination issued by the Respondents to the bidders in respect of Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) be and are hereby cancelled and set aside;



- c. The Respondents be and are hereby directed to issue a letter of award in respect of Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) to the Applicant as the lowest evaluated bidder;***
- d. The Respondents be and are hereby directed to execute a contract with the Applicant in respect of Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) within 21 days from the date of the Board's Decision.***
- e. The Applicant be and is hereby awarded costs in respect of this Request for Review.***
- f. Any other relief that would serve the interests of justice in the circumstances.***



26. In a Notification of Appeal and a letter dated 14th May 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 subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 14th May 2025.
27. On 23rd May 2025, the Respondents jointly filed through PS Charles M. Hinga, CBS, CA (SA), the 1st Respondent herein, a Response on Appeal of the subject tender dated 24th April 2025 together with a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
28. *Vide* a Hearing Notice dated 23rd May 2025, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 27th May 2025 at 11.00 a.m., through the link availed in the said Hearing Notice.
29. *Vide* email dated 26th May 2025, the Acting Board Secretary notified all tenderers in the subject 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 subject tender were invited to submit to the Board any information and arguments concerning the tender within three (3) days.

30. On 26th May 2025, the Applicant filed via email through its advocates Written Submissions dated 25th April 2025 together with its List of Authorities relied upon.
31. At the hearing of the instant Request for Review on 27th May 2025 at 11.00 a.m., the Board read out the documents filed by parties in the matter. Ms. Kagiri sought for an adjournment on the grounds that she had not received the Applicant's written submission and list of authorities and would require time to peruse the same and file her rejoinder. On his part, Mr. Simiyu indicated that he was not opposed to Ms. Kagiri's request for more time but pointed out that the Applicant had only been served with the Respondents' response on Friday, 23rd May 2025 and its submissions only raised matters of law as opposed to facts.
32. Having considered parties' submissions, the Board issued the following directions in the instant Request for Review:
- i The Respondents be granted leave to file their written submissions and authorities by 3.00 p.m. on 28th May 2025.
 - ii The hearing of the matter would proceed at 8.00 a.m. on 29th May 2025.



33. On 28th May 2025, the Respondents filed Written Submissions dated 28th May 2025.

34. Vide email dated 28th May 2025, the Board informed parties that due to unavoidable circumstances, the instant Request for Review would proceed for hearing on 29th May 2025 at 4.30 p.m.

35. At the hearing of the instant Request for Review on 29th May 2025 at 4.30 p.m., the Board confirmed compliance with its previous orders and proceeded to allocate time for parties to highlight their respective cases. Thus, the instant Request for Review proceeded for hearing as scheduled.

PARTIES SUBMISSIONS

APPLICANT'S CASE

36. In its submissions, the Applicant relied on its pleadings and documents filed before the Board in the instant Request for Review.

37. As to whether the subject tender was terminated in accordance with Section 63 of the Act, the Applicant submitted that the Respondents' termination of the subject tender constitutes a breach of Sections 63, 79(1), 80(2) and 86 of the Act.

38. Mr. Simiyu submitted that whereas Section 167(4)(b) of the Act exempts procurement processes terminated in accordance with Section 63 of the Act from the jurisdiction of the Board, the Board has



jurisdiction to hear and determine the instant matter since the impugned tender was not terminated in line with provisions of Section 63 of the Act. In support of his argument, counsel relied on the holding in *Republic v Public Procurement Administrative Review Board; Pelican Insurance Brokers (K) Limited (Interested Party); Ex Parte Kenya Revenue Authority [2019] eKLR ; Nairobi High Court JR Application No. 390 of 2018*.

39. Counsel pressed on that for a procuring entity to validly terminate a procurement process, the termination must be based on any of the grounds under Section 63(1)(a) to (f); the accounting officer ought to issue a written report to the Director General, Public Procurement Regulatory Authority within 14 days of the termination citing reasons for the termination; and the accounting officer ought to give a written notice to bidders within 14 days notifying them of the said termination.
40. While citing the holding in *Summa Turizm Yatimciligi Anonim Sirketu v The Principal Secretary, Ministry of Defence & Anor; PPARB Application No. 114 of 2024*, Mr. Simiyu submitted that section 63(1) (a) to (f) of the Act constitutes the substantive requirement for termination whose fulfilment requires the procuring entity to go beyond a mere restatement of the statutory language of the grounds for termination. He further submitted that the said requirement calls on a procuring entity to furnish information and evidence of the ground relied upon for termination and that in the instant matter, the Respondents were

required to demonstrate that the Applicant's bid was unresponsive but failed to do so.

41. Counsel urged the Board to note that while the Respondents' letter dated 26th March 2025 indicates that the subject tender had been terminated for being non-responsive pursuant to Section 63(1)(f) of the Act, the said letter did not disclose the specific reason as to why the Applicant's bid was established as non-responsive and no evidence has been led to show that the Applicant's bid was unresponsive.
42. Counsel submitted that Section 63 (2), (3), and (4) of the Act constitute the procedural requirements whose fulfilment requires the procuring entity to demonstrate that they furnished a written report to PPRA in addition to notifying all bidder of termination of the tender. He argued that the Respondents had not fulfilled these procedural requirements as no report had been filed with PPRA noting from the print out of the PPIP portal that the subject tender was not amongst the tenders reported as terminated by the Respondents as at 13th May 2025.
43. The Applicant indicated that the Respondents through their submissions had not rebutted the contention that they failed to report the termination of the procurement proceedings in the subject tender and have neither availed any evidence of such reporting.
44. The Applicant urged the Board to find that the subject tender was not terminated in accordance with Section 63 of the Act since the



Respondents failed to satisfy both the substantive and procedural elements under Section 63 of the Act for the termination to be deemed as valid.

45. As to whether the Respondents had a valid ground for disqualifying the Applicant's tender in the subject tender, Mr. Simiyu submitted that there was no basis for disqualification of the Applicant's tender in view of the fact that the Respondents' letter dated 26th March 2025 does not disclose the specific reason for termination of the Applicant's tender.
46. Counsel pointed out that the Respondents' contention at pages 6 and 9 of their response that the Applicant's tender was disqualified on account of suspicion of tax evasion lacks merit since (a) suspicion is not enough to disqualify a bidder, (b) the Respondents acknowledged that there is a pending tax dispute at the Tax Appeals Tribunal between the Applicant and KRA and any allegation of tax evasion is unfounded at this stage, (c) an attempt to litigate the merits of the proceedings before the Tax Appeals Tribunal would offend the doctrine of sub judice, and (d) the authenticity of the Applicant's Tax Compliance Certificate submitted at page 824 of its tender has not been questioned and it is prima facie evidence that it held a valid Tax Compliance Certificate for the period up to 3rd July 2025.
47. Counsel argued that the Respondents' contention at page 10 of their response that they have written to EACC to investigate the submission of bids in the subject tender does not constitute a ground for disqualifying the Applicant's tender since (a) the Applicant is not aware



of any pending investigations with respect to its tender, (b) it would be premature to impute any guilt on the part of the Applicant in view of provisions under Article 50 of the Constitution and (c) both the Ethics and Anti-Corruption Commission Act (Cap 7H) and the Anti-Corruption Economic Crimes Act (Cap 65) do not prescribe a timeline within which the Commission should undertake and conclude its investigations and procurement proceedings being time sensitive cannot be tied to processes without a defined time frame.

48. As to the issue of withdrawal of the letters dated 2nd September 2024 and 10th December 2024 by Equity Bank, Mr. Simiyu submitted that this was not a ground for disqualifying the Applicant's bid since

a) the timing of the purported withdrawal is suspicious and could not inform termination of the subject tender since the Applicant received the termination letter on 30th April 2025 while the Respondents contend that the Bank withdrew its previous letters on 16th May 2025 and as such, this information was not available at the time of termination of the subject tender and declaration of the Applicant's tender as non-responsive on 30th April 2025.

b) the relevant time for consideration of validity of a document in the tender is at the tender closing date and not during evaluation or due diligence as previous held by the Board in *Asal Frontiers Limited v The Accounting Officer, Kenya National Highways Authority & 2 Ors ; PPARB Application No. 9 of 2023 and Asal*



Frontiers Limited v The Accounting Officer, Kenya National Highways Authority & 2 Ors ; PPARB Application No. 18 of 2023
hence none of the documents constituting the Applicant's tender was impeached at the time of the subject tender closing.

- c) under common law, the law of agency dictates that a principal is bound by the actions of its agents even in instances where the agent acted without authority and in the instant matter, the letters of 2nd September 2024 and 10th December 2024 were prepared by officials of the Bank hence binding on the Bank and as such, the purported withdrawal smacks malice.
- d) under common law, the doctrine of vicarious liability dictates that employers are liable for the wrongful acts of their employees in instances where the wrongful acts are committed in the ordinary course of business and in the instant matter, the letters being purported to being withdrawn were made by employees at the Bank and in the ordinary course of banking business and as such, any such action cannot in good conscience be countenanced.
- e) the indoor management rule (Rule in Turquands Case) is to the effect that a Company cannot raise a defence of lack of compliance of internal procedures to defeat a claim with respect to obligations created on its part by an official acting in his official capacity as upheld by the Court of Appeal in *Board of Trustees National Social Security Fund v Micheal Mwalo [2015] KECA 782 (KLR); Nairobi Civil Appeal No. 293 of 2014.*



49. Mr. Simiyu questioned why the 1st Respondent was against the award of the subject tender to the Applicant yet both the evaluation Committee and the Head of Procurement Function had on 2 different occasions recommended award of the subject tender to the Applicant.
50. He pointed out that pursuant to Section 83 of the Act as read with Regulation 80 of Regulations 2020, the function of carrying out due diligence vests in the Evaluation Committee and not the Accounting Officer and that separation of roles of the tender opening, tender evaluation, preparation of a professional opinion and award of tender variously vests in different hands serves to promote transparency and introduce checks in the public procurement process.
51. Counsel referred the Board to the holding by the High Court in *Republic v Public Procurement Administrative Review Board Ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021]eKLR; Mombasa High Court JR No. 32 of 2020* and submitted that allowing the circumvention of the provisions of the Tender Document opens up a procurement process to be abused by both bidders and a procuring entity. He further submitted that in the instant matter, the 1st Respondent had elected to circumvent not just the Tender Document but the Act and Regulations 2020 holding himself as both the accounting officer and the evaluation committee thus driving away a successful bidder from its deserved award in breach of Section 63, 79(1), 80(2) and 86 of the Act.



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

RESPONDENTS' CASE

53. In their submissions, the Respondents relied on their pleadings and documents filed before the Board in the instant Request for Review.

54. Ms. Kagiri submitted that the subject tender was terminated by the Respondents in line with Section 63(1)(f) of the Act given that all evaluated tenders were non-responsive.

55. As to whether the Applicant's tender submitted in the subject tender was responsive, counsel submitted that evaluation of bids was carried out in accordance with the criteria set out in the Tender Document and more particularly pursuant to Clause 29 under part E on the evaluation and comparison of tenders.

56. Counsel submitted that under the detailed technical evaluation criteria, item 6 provided for financial resources and a bidder was required to provide evidence of financial resources by way of cash in hand, lines of credit, overdraft facility, etc. and to attach evidence of the financial resources equating to Kshs.350 million. She indicated that a bidder who met this requirement scored the maximum points of 25 marks but where the financial resources were below kshs.350 million the score was 0 which would also be given in instances where a bidder had not demonstrated /given evidence for the financial resources.



57. Ms. Kagiri indicted that the Applicant was scored 25 marks on this requirement on the basis of a response received from Equity Bank vide letter Ref:EBKI/MRU/014262550224 dated 10th December,2024 that confirmed that the submitted line of credit was authentic.
58. Counsel submitted that in carrying out further due diligence in line with Article 227 of the Constitution, and the time of actioning being immaterial as long as the process was undertaken during the tender validity period, subsequent confirmation by Equity Bank indicated that it had withdrawn the letter previously issued that stated that the Applicant was eligible to Kshs. 3 billion line of credit. She argued that it would go against the principles under Article 227 of the Constitution to hold that the Applicant was in conformance of this requirement and the resultant effect was that the Applicant had not rendered any evidence and could not thus continue holding the score of 25 marks rendering it technically unresponsive in view of this discovery and not the lowest evaluated bidder.
59. As to termination of the procurement proceedings in the subject tender, counsel argued that the 1st Respondent was not bound by the recommendation of the Evaluation Committee and the Professional Opinion by the Head of Procurement in view of the developing facts.
60. Counsel pointed out that pursuant to Section 44 (1) of the Act, the 1st Respondent is primarily responsible for ensuring that the public entity complies with the Act and that this responsibility extends to ensuring compliance with any other responsibility assigned by the Act and



Regulations 2020 noting provisions under Section 68 of the Public Finance and Management Act. She further pointed out that proceeding with award of the subject tender to the Applicant would be in gross violation of the 1st Respondent's statutory obligation.

61. Ms. Kagiri submitted that no tender was found responsive in the subject tender and as such termination under Section 63(1)(f) of the Act was justified.

62. She indicated that assertions by the Applicant remain unfounded and urged the Board to dismiss the instant Request for Review with costs.

APPLICANT'S REJOINDER

63. In a rejoinder, Mr. Simiyu reiterated that no report on termination of the subject tender had been made to PPRA. He submitted that the holding by the Board in *Asal Frontiers Limited v The Accounting Officer, Kenya National Highways Authority & 2 Ors ; PPARB Application No. 9 of 2023* and *Asal Frontiers Limited v The Accounting Officer, Kenya National Highways Authority & 2 Ors ; PPARB Application No. 18 of 2023* was relevant to the circumstances in the instant matter as it spoke to the issue of timing of when a document should be considered valid or invalid.

CLARIFICATIONS

64. Asked to explain what prompted the second inquiry vide letter dated 27th March 2025 to Equity Bank, Mr. John Maina submitted that it was



the decision of the 1st Respondent to get further information from Equity Bank which prompted the response received.

65. As to whether similar tenders were subjected to similar treatment as the subject tender by the 1st Respondent after conclusion of the evaluation process, Mr. Maina answered in the affirmative and confirmed that there has been instances where the 1st Respondent has sought for information after evaluation is concluded and a professional opinion issued.

66. While making reference to the Internal Memo dated 26th March 2025 and received on 27th March 2025 addressed to the 1st Respondent by the Head, Supply Chain Management forwarding letters of notification of termination of the procurement process in the subject tender and seeking concurrence and signature, the Board sought to know what was unresponsive about the Applicant's tender at this point in time.

67. In response, Mr. Maina confirmed to the Board that there were two evaluations that were conducted in the subject tender and two professional opinions issued but the 1st Respondent was not comfortable with the manner in which the results of the evaluation process done. He indicated that the issue of forwarding letters of termination arose out of discussions held with the 1st Respondent and the need to bring the procurement process to a close.



68. On her part, Ms. Kagiri submitted that pursuant to section 44(1) of the Act, the 1st Respondent is responsible for ensuring that procurement proceedings are conducted in line with the provisions of the Act.
69. Asked as to comment on the communications placed on the said Internal Memo dated 26th March 2025 indicating that the tender was to be awarded to Padaa and to inform the Board who Padaa is as indicated thereon in the procurement proceedings, Mr. Maina indicated that Padaa was a bidder in the subject tender who had progressed to the Financial Evaluation but was disqualified. He further indicated that the inquiry was made by the 1st Respondent.
70. Asked if the subject tender was being terminated due to lapse of the tender validity period after extension or due to lack of responsiveness following communication placed on the aforementioned Internal Memo, Mr. Maina reiterated that following discussions with the 1st Respondent, there was need to conclude the evaluation process.
71. He indicated that a tender can only be extended once which the 1st Respondent had already done and as such, at the time of forwarding the termination letters, the validity period was to lapse in two days' time.
72. Asked if as at 4th April 2025, the Professional Opinion and Evaluation Report was recommending award of the subject tender to the Applicant, Mr. Maina confirmed that this was the correct position as reported and seen from communication placed on the Internal Memo



dated 26th March 2025. He indicated that on the basis of responses received, the subject tender could not be awarded.

73. The Board pointed the Respondents to the comments made by the 1st Respondent on the Second Professional Opinion indicating that the Applicant faked documents in Konza and is a discredited bidder that should be blacklisted and sought to know where this information came from, the context in which it was issued and applied in the subject tender.

74. In response, Mr. Maina submitted that he was not in a position to comment on the said remarks by the 1st Respondent but the Professional Opinions rendered were in concurrence with the findings of the Evaluation Committee.

75. The Board further pointed out that the issue of line of credit arose during the due diligence process as seen from the Due Diligence Report and sought to know if the Evaluation Committee carried out a further due diligence pursuant to Section 83 of the Act with regard to the line of credit withdrawn by Equity Bank and if a report on the same was prepared.

76. In response, Mr. Maina submitted that withdrawal of the line of credit by Equity Bank was after the two evaluation reports and professional opinions had been rendered and also after termination of the procurement proceedings in the subject tender.



77. As to whether EACC had responded to the 1st Respondent's letter dated 27th March 2025 requesting for it to initiate an investigation on the Applicant pursuant to Section 66 of the Act, Mr. Maina informed the Board that EACC had responded in the current week and asked for several documentation in the matter. He further confirmed that at the time of termination of the subject tender, they had not responded.
78. With regard to the due diligence carried on the letter of credit, the Board sought to know if the Respondents wrote to the specific branch that issued the same or to the head office. Mr. Maina indicated that they wrote to the office that issued the said letter though following recent meetings it was agreed that these authentication letters must be confirmed by the head office.
79. At the conclusion of the online hearing, the Board informed parties that it would communicate its decision to all parties in the instant Request for Review via email.

BOARD'S DECISION

80. The Board has considered each of the parties' submissions and documents placed before it and finds that the following issues call for determination:

I. Whether the Procuring Entity terminated the subject tender in accordance with Section 63 of the Act thus ousting the jurisdiction of the Board.



II. Whether the 1st Respondent erred in carrying out further due diligence on the Applicant's tender in the subject tender contrary to Section 83 of the Act.

III. Whether the Applicant's tender submitted in the subject tender was unfairly and illegally disqualified.

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

As to whether the Procuring Entity terminated the subject tender in accordance with Section 63 of the Act thus ousting the jurisdiction of the Board.

81. The Board has heard the Applicant submit on this issue that the 1st Respondent terminated the procurement proceedings in the subject tender without any legal justification and contrary to Section 63 of the Act. The Applicant contends that its tender satisfied all the requirements of the Tender Document, was substantially responsive and emerged as the lowest evaluated bid thus recommended for award of the subject tender. It is the Applicant's case that the Respondents deliberately terminated the procurement proceedings in the subject tender so as to frustrate it from being awarded the said tender.

82. The Board heard the counter submissions by the Respondents to be that termination of the procurement proceedings in the subject tender

was in line with Section 63 of the Act there being no responsive tender in the subject tender. The Respondents contend that documents submitted by the Applicant portrayed elements of fraud contrary to the Act and this issue had been raised with EACC to carry out investigations in addition to further due diligence being carried out on the Applicant's tender.

83. From the foregoing, the Board is invited to interrogate into the circumstances under which the procurement proceedings in the subject tender were terminated, a subject that raises a jurisdictional question on the appropriateness of the Board to hear and determine the instant Request for Review.

84. It is an established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

85. 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."

86. 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.

87. 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.

88. 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"

89. The above judicial pronouncements mirror the position of this Board in its previous decisions in **PPARB Application No. 53 of 2025; Blits Proof Group Limited v The Accounting Officer Kenya Airports Authority & Another; PPARB Application No. 29 of 2023 Craft Silicon Limited v Accounting Officer Kilifi County Government & another; PPARB Application No. 5 of 2024 Seluk Investments Limited v The Accounting Officer/Chief Officer Department of Urban Development County Government of**



**Machakos & Another; and PPARB Application No. 27 of 2024
Sajucy Company Limited v Kenya Reinsurance Corporation Ltd
& Another** wherein the Board took the position that its jurisdiction can only be ousted if termination of procurement proceedings was done in accordance with Section 63 of the Act.

90. 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.

91. 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."*

92. Further, Regulation 48 of Regulations 2020 provides:

"(1) Prior to the cancellation or termination of a procurement and asset disposal proceedings under



section 63 of the Act, an accounting officer may take into account the recommendations of the head of procurement function.

(2) The report required under section 63(2) and (3) of the Act shall be made in accordance with the guidelines issued by the Authority.”

93. In essence, whether there are valid substantive reasons for the termination of procurement proceedings prior to award of a tender is **a question of fact** that must be made out by sufficient evidence, the onus whereof is on the procuring entity which must show that any of the pre-conditions listed in sub-section (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 to wit; an accounting officer is required to give PPRA a written report on the termination with reasons and notify all bidders in writing of the termination with reasons within fourteen (14) days of termination.

94. In a nutshell, for 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.

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

95. The Applicant is aggrieved by the decision of the 1st Respondent to terminate the procurement proceedings in the subject tender for being non-responsive pursuant to Section 63(1)(f) of the Act as communicated in the letter dated 26th March 2025, which reads in part:

"....."

This is to inform you that the procurement process has been terminated for being non-responsive pursuant to Section 63(1)(f) of the Public Procurement and Asset Disposal Act, 2015.

In case you wish to request for a debriefing in relation to the evaluation of your Tender, you may contact the undersigned.

....."

96. According to the above notification letter, the procurement proceedings in the subject tender were terminated due to all the evaluated tenders, including the Applicant's tender, being found to be non-responsive.

97. This Board must now determine whether the reason advanced by the Respondents to justify termination of procurement proceedings in the subject tender due to there being no responsive tender is in line with Section 63 of the Act.

98. By way of background, the Procuring Entity invited bidders to submit tenders in the subject tender on 27th June 2024 and the same attracted



fourteen (14) bidders, including the Applicant herein. Bids were opened on 24th September 2024 followed by evaluation that took place in four stages being the preliminary evaluation, technical evaluation, financial evaluation and post qualification.

99. At the conclusion of the Financial Evaluation, the Applicant's bid emerged as the most responsive and lowest evaluated tender and was subsequently referred by the Evaluation Committee for post qualification/due diligence in line with the provisions under Section 83 of the Act. The scope of the post qualification/due diligence entailed (a) visiting the offices of the responsive bidder to establish their physical address and assess their capacity, (b) ascertaining the authenticity of the bid security and Line of credit submitted by the tenderers, (c) ascertaining the authenticity of the firm's experience by confirming completion status of at least one sample project among the projects submitted by the bidder.

100. Being satisfied with the results of the post qualification exercise as seen from the Due Diligence Report dated 20th January 2025, the Evaluation Committee recommended award of the subject tender to the Applicant at its tender sum of Kenya Shillings One Billion, Eight Hundred Fifty-One Million, Six Hundred and Six Thousand, Five Hundred Fifteen and zero cents (Kshs1,851,606,515.00) only being the lowest evaluated bidder.

101. A First Professional Opinion was subsequently prepared by the Head Supply Chain Management, Mr. John Maina who concurred with the



recommendation of the Evaluation Committee with respect to award of the subject tender to the Applicant.

102. When requested to approve the First Professional Opinion, we note that the 1st Respondent declined to approve the same and instructed the Evaluation Committee to re-evaluate the subject tender and while doing so, (i) to refer to the KRA report on the Applicant's tax evasion issues and proceed to evaluate the next qualified bidder, and (ii) to re-evaluate all bids noting minor deviations especially on not stamping special form and confirming with NCA on overseas companies.

103. The Evaluation Committee in line with the instruction of the 1st Respondent resulted to re-evaluate the subject tender and this included taking note of the correspondence between the 1st Respondent and KRA concerning verification of the Applicant's turnover against VAT records and tax evasion concerns. We note that the Evaluation Committee following the re-evaluation exercise opined that the Applicant was tax compliant as evidenced by its Tax Compliance Certificate issued by KRA and that the issue of tax evasion was before the Tax Appeals Tribunal and was yet to be determined.

104. With regard to directions to evaluate the next responsive bidder, we observe that the Evaluation Committee noted that the only other bidder who made it to the Financial Evaluation stage was disqualified for failure to submit bills of quantities for builders works and as such, only the Applicant was responsive at the Financial Evaluation stage. The Evaluation Committee also looked into the other issues of minor



deviations and NCA confirmation on overseas companies and found the same to be inapplicable in addition to finding that none of the bidders submitted foreign registration certificates with NCA.

105. We note that upon conclusion of the re-evaluation exercise and an Evaluation Report dated 10th March 2025 being prepared by the Evaluation Committee and forwarded to the Head of Procurement Function, a Second Professional Opinion was issued to the 1st Respondent concurring with the findings of the Evaluation Committee following re-evaluation and recommending award of the subject tender to the Applicant. However, once again the 1st Respondent on 17th March 2025 declined to approve award of the subject tender to the Applicant indicating that:

"Ms. Keddy faked documents in Konza. This is a discredited bidder that should be blacklisted."

106. Subsequent to the above, we note that vide Internal Memo dated 26th March 2025, the Head Supply Chain Management, Mr. John Maina forwarded to the 1st Respondent letters of notification for termination of the procurement process for the subject tender dated 26th March 2025 for being non-responsive and sought for his concurrence and signature. On the said Memo, the Board notes correspondence between the 1st Respondent and the Head Supply Chain Management where the 1st Respondent questions why the tender was being terminated since he thought it was awarded to Padaa and in response, Mr. Maina indicated that they had discusses and agreed to terminate as the



validity period was over after the initial extension and Padaa was awarded the Mavoko contract. Further, it was indicated on the said Memo on 4th April 2025 that the Professional Opinion was still recommending the Applicant for award.

107. The Board notes that prior to dispatch of the termination letters, the Applicant filed PPARB Application No. 44 of 2025 where the Board in its Decision dated 29th April 2025 by consent of parties extended the tender validity period for 120 days from 28th April 2025 and directed the 1st Respondent to issue all bidders with the termination notice letters dated 26th March 2025. Subsequently, the 1st Respondent issued the Applicant on 30th April 2025 with a letter dated 26th March 2025 notifying it of termination of the subject tender.

108. From the confidential file, the Board also notes (i) a letter addressed to the CEO Ethics and Anti-Corruption Commission (EACC) dated 27th March 2025 and received on 17th April 2025 where the 1st Respondent requested EACC to initiate investigations on the Applicant pursuant to Section 66 of the Act, and (ii) a letter addressed to the Managing Director Equity Bank (Kenya) Limited dated 27th March 2025 and received on 17th April 2025 requesting for confirmation on how the said bank issued a line of credit to the Applicant for Kshs. 3,000,000,000.00

109. From the foregoing, we understand that:

- i. The Evaluation Committee prepared two separate evaluation reports recommending the Applicant for award of the subject



tender following due diligence and re-evaluation while the Head of Supply Chain equally prepared two Professional Opinions in concurrence recommending the Applicant for award of the subject tender.

- ii. The 1st Respondent initially declined to approve award of the subject tender to the Applicant on the basis of a verification exercise that he undertook by writing to KRA for verification of the turnover against the VAT records submitted to KRA for purposes of due diligence vide letter dated 18th December 2024.
- iii. KRA responded vide letter dated 10th January 2025 indicating that the Applicant had filed all returns as at 2nd January 2025 but had outstanding tax liabilities for the period between February 2018 to January 2022 and following investigations leading to demand for extra taxes, the Applicant had appealed against the investigations findings and the matter was ongoing before the Tax Appeals Tribunal.
- iv. From KRA's response, the Evaluation Committee opined that the Applicant was tax compliant as evidenced by its submitted Tax Compliance Certificate
- v. Following re-evaluation, the 1st Respondent for a second time declined to approve award of the subject tender to the



Applicant on the basis that it faked documents in Konza and that it is a discredited bidder that should be blacklisted. The Board has however not had sight of how the 1st Respondent came to this conclusion or documentation informing his decision and reasons for rejecting the Second Professional Opinion.

- vi. There was back and forth communication between the 1st Respondent and the Head of Procurement Function prior to issuance of letters of termination of the subject tender on grounds of non-responsiveness of all bids.
- vii. The 1st Respondent prior to dispatch of the termination letters on 30th April 2025 carried out another verification exercise against the Applicant's line of credit with Equity Bank (Kenya) Limited vide letter dated 27th March 2025 and received on 17th April 2025.
- viii. The 1st Respondent prior to dispatch of the termination letters on 30th April 2025 requested for initiation of an investigation on the Applicant by EACC vide letter dated 27th March 2025 received on 17th April 2025.

110. It therefore appears to the Board that there was a discord between both the Evaluation Committee, Head of Procurement Function, and the 1st Respondent in view of the outcome of evaluation of the subject



tender with both the Evaluation Committee and head of procurement function recommending award of the subject tender to the Applicant on the one hand and 1st Respondent advancing reasons why the Applicant should not be awarded the said tender on the other , thus rendering it non-responsive. The Board notes that the 1st Respondent carried out verification exercises on the Applicant's tender while at the same time recommending for commencement of investigations against it by EACC.

111. The question that then arises is whether by conduct, the 1st Respondent's actions amounted to evaluation of the Applicant's tender thus usurping the role of the Evaluation Committee in the subject tender in finding the Applicant's tender as non-responsive.

112. In view of the aforementioned actions by the 1st Respondent, the Board observed that Section 85 of the Act provides that:

"Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers"

113. Section 46 of the Act provides for the establishment of an ad hoc evaluation Committee whose role is stipulated under Section 46(4) of the Act as:



"(4) An evaluation committee established under subsection (1), shall—

(a) deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it;

(b) consist of between three and five members appointed on a rotational basis comprising heads of user department and two other departments or their representatives and where necessary, procured consultants or professionals, who shall advise on the evaluation of the tender documents and give a recommendation on the same to the committee within a reasonable time;

(c) have as its secretary, the person in charge of the procurement function or an officer from the procurement function appointed, in writing, by the head of procurement function;

(d) complete the procurement process for which it was appointed and no new committee shall be appointed on the same issue unless the one handling the issue has been procedurally disbanded;



(e) adopt a process that shall ensure the evaluation process utilized adheres to Articles 201(d) and 227(1) of the Constitution.

114. Further, Regulation 30 of Regulations 2020 provides for conduct of the members of the Evaluation Committee as follows:

"In discharging the mandate provided for under the Act, members of the evaluation committee shall—

(a) conduct the technical and financial evaluation of the tenders or proposals availed in strict adherence to the compliance and evaluation criteria set out in the tender documents;

(b) perform the evaluation or negotiation with due diligence;

(c) conduct the evaluation within the periods specified in the Act;

(d) not enter into direct communication with any of the tenderers participating in a tender or proposal that such evaluation committee is considering;

(e) seek any clarifications on tenders or proposals under consideration through the head of the procurement function; and

(f) prepare a report on the analysis of the tenders availed, and final ratings assigned to each tender and make recommendations and submit the report to the head of the procurement function."

115. In essence, it is the sole responsibility of the Evaluation Committee to *inter alia* deal with evaluation of bids and complete the procurement process for which it was appointed while ensuring that it adheres to the provisions of Articles 201(d) and 227(1) of the Constitution and the evaluation criteria set out in the tender documents. Additionally, the Evaluation Committee is tasked with (a) conducting due diligence, (b) seeking clarifications on bids under consideration through the head of the procurement function and (c) preparation of a report on the analysis of bids evaluated and final ratings assigned to each bid and making recommendations to be submitted to the Head of Procurement Function.
116. It is therefore the considered view of the Board that evaluation and comparison of tenders is conducted with a view of making recommendations to the accounting officer through the head of procurement to inform the decision of the award to the successful bidder.
117. Notably, adverse information may come to the knowledge of a procuring entity regarding a successful bidder prior to signing of a contract leading to rejection of recommendations to award a tender to the said bidder. In such an instance, the accounting officer of the procuring entity in rejecting recommendations by the Head of Procurement Function is required to comply with provisions under Regulations 79 of Regulations 2020 which provides that:



(1) Upon receipt of the evaluation report and professional opinion, the accounting officer shall take into account the contents of the professional opinion and shall within a day, in writing —

(a) approve award to the successful tenderer;

(b) seek clarification from the head of the procurement function or the evaluation committee prior to approving or rejecting the award; or

(c) reject the recommendations.

(2) Where the accounting officer rejects the recommendations under paragraph (1)(c), the accounting officer shall give reasons and provide further directions to the head of the procurement function, in writing.

(3) Pursuant to section 68(2)(g) of the Act, any further directions, approval or rejection by the accounting officer shall form part of the procurement records.

118. In essence, where the accounting officer rejects in writing the recommendations following receipt of the evaluation report and professional opinion, he/she is required to give reasons for the rejection and provide further directions to the Head of Procurement Function in writing.

119. In the instant matter, it is evident that the Applicant's tender had been rendered responsive and no reason had been found by the Evaluation Committee to warrant its disqualification in the subject tender at the point of rejection by the 1st Respondent of the two evaluation reports by the Evaluation Committee recommending award of the subject tender to the Applicant and the two Professional Opinion concurring with recommendations of award of the subject to the Applicant.
120. The 1st Respondent in rejecting the recommendations upon receipt of the evaluation reports and professional opinions did not provide further directions to the Head of Procurement Function as at 17th March 2025 and instead resulted to disqualify the Applicant's bid in the subject tender as seen from the communications indicated in the Internal memo dated 26th March 2025 and professional opinion thus usurping the role of the Evaluation Committee appointed to evaluate bids submitted in the subject tender.
121. Further, at the time of issuance of the letters notifying bidders of termination of the procurement proceedings in the subject tender on 30th April 2025, the Applicant's tender was responsive as determined by the Evaluation Committee with concurrence by the Head of Procurement Function and there was no reason to justify disqualification of its tender in the subject tender. As such, we find that termination of the procurement proceedings in the subject tender

under Section 63(1)(f) on the ground that all evaluated tenders are non-responsive remains unsubstantiated.

122. We say so because:

- a) The 1st Respondent does not have any power to declare the Applicant's tender non-responsive as this is a role reserved for the Evaluation Committee.
- b) The Evaluation Committee found the Applicant to be tax compliant having satisfied the requirement for a tax compliance certificate and any issues pertaining to its tax status could not be used as a basis for its disqualification since discussion of any matter pending before the Tax Appeal Tribunal would be against the doctrine of *sub judice*.
- c) The request for investigation by EACC by the 1st Respondent is not a ground for disqualifying the Applicant's tender noting the legal principle of presumption of innocence until proven guilty and that the said investigations are yet to be completed as at the time of hearing the instant matter.
- d) The 1st Respondent in rejecting recommendations to award the subject tender to the Applicant did not give further directions to the Head of Procurement if he was of the considered view that there was need for a further verification exercise to be conducted on the Applicant and instead resulted to carry out the said verification himself.



123. The Board notes that Superior courts in this country have previously warned against the growing trend of procuring entity's reproducing the grounds of termination under Section 63 of the Act without any further information to bidders. In **Republic v Public Procurement Administrative Review Board Exparte Nairobi City & Sewerage Company; Webtribe Limited t/a Jambopay Limited (Interested Party) [2019] eKLR; Nairobi High Court Judicial Review Application 437 of 2018** the High Court considered a judicial review application challenging the decision of this Board that had found that the Procuring Entity irregularly terminated the tender under consideration. In dismissing the judicial review application, the High Court sounded a warning to procuring entities that mere recitation of grounds of termination of a tender under Section 63 of the Act without information establishing the alleged ground of termination is insufficient to justify such termination:

"45. The mere recitation of the statutory language, as has happened in this case is not sufficient to establish the grounds or sufficient reasons. The reasons for the termination must provide sufficient information to bring the grounds within the provisions of the law. This is because the tender process and in particular, the termination, must be done in a transparent and accountable and legal manner as the law demands. This is because the question whether the information put forward is sufficient to place the termination within the



ambit of the law will be determined by the nature of the reasons given. The question is not whether the best reasons to justify termination has been provided, but whether the reasons provided are sufficient for a reasonable tribunal or body to conclude, on the probabilities, that the grounds relied upon fall within any of the grounds under section 63 of the Act. If it does, then the party so claiming has discharged its burden under section 63"

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



125. Guided by the above holdings, the Board finds and holds that the Respondents have failed to fulfill the substantive requirements for the termination of procurement proceedings in the subject tender as required by Section 63(1)(f) of the Act since they have not provided sufficient evidence that all evaluated tenders in the subject tender were non-responsive to justify termination of the subject tender.

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

126. From the confidential file submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act, we have established that the 1st Respondent issued bidders who participated in the subject tender with letters dated 26th March 2025 notifying them of termination of the procurement proceedings in the subject tender for being non-responsive pursuant to Section 63(1)(f) of the Act. However, the said letters do not muster the threshold of termination notice contemplated under Section 63(4) of the Act for failing to sufficiently give reasons pertaining to the alleged ground of termination due to all evaluated tenders in the subject tender being non-responsive. None of the bidders was informed as to the reasons why its bid was found to be unresponsive in the subject tender.

127. The 1st Respondent also failed to include in the confidential file the Written Report on termination of the subject tender addressed to the Director General of the Authority as contemplated under Section 63 (2)

of the Act as read with PPRA Circular No. 4/2022 dated 1st July 2022 on Mandatory Reporting in the PPIP Portal addressing the reasons for termination of the subject tender. As such, the procedural statutory pre-conditions that must be satisfied before a termination is deemed lawful as required by Section 63(2) & (3) of the Act have not been met by the Respondents.

128. Having established that the Respondents failed to satisfy both the substantive and procedural statutory pre-conditions of termination of procurement proceedings in the subject tender, the Board finds and holds that the Respondents failed to terminate the procurement proceedings of the subject tender in accordance with Section 63 of the Act.

129. As such, the Board's jurisdiction to hear and determine the instant Request for Review has not been ousted by dint of Section 167(4)(b) of the Act.

As to whether the 1st Respondent erred in carrying out further due diligence on the Applicant's tender in the subject tender contrary to Section 83 of the Act.

130. Section 83 of the Act is instructive on conduct of due diligence and provides as follows:

"83. Post-qualification



(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.”

131. Further Regulation 80 of the 2020 Regulations provides as follows:

"80. Post-qualification

(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.

(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the

tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—

(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or

(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method.”

132. In **PPARB Application No. 158/ 2020 On the Mark Security Limited V The Accounting Officer, Kenya Revenue Authority and Another**, the Board established that a due diligence exercise is a fundamental element of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.

133. As to due diligence being carried out in the subject tender, we have hereinabove established that the Evaluation Committee carried out due diligence on the Applicant, having emerged as the lowest evaluated bidder, as evidenced by the Due Diligence Report dated 20th January 2025. Part of the scope of the due diligence exercise entailed authentication of the Applicant's Line of Credit submitted in its bid document.

134. The Evaluation Committee clearly indicated in its Due Diligence Report that they carried out due diligence with regard to the Applicant's Line of Credit by writing to Equity Bank vide ref:



MLPWHUD/SDHUD/AHP/411/410/1 to confirm the authenticity of the Applicant's submitted line of credit. The Due Diligence Report indicates that in response Equity Bank responded vide letter Ref: EBKI/MRU/014262550224 dated 10th December 2024 confirming the line of credit is authentic. Being satisfied with the results of the due diligence exercise, the Evaluation Committee recommended award of the subject tender to the Applicant.

135. The Board has heard submission by the Respondents' that a further due diligence exercise was conducted by the 1st Respondent on the Applicant's line of credit as seen from the letter dated 27th March 2025 addressed to the Managing Director Equity Bank Kenya Limited and received on 17th April 2025. The said letter reads:

"

The State Department of Housing and Urban Development advertised the above tender and M/s Keddy Enterprises Limited was one of the tenderers who participated.

M/s Equity Limited issued M/s Keddy Enterprises Limited with a letter of credit Ref:EBKL/MRU/0140262558224 dated 2nd September, 2024 (copy attached) of Kshs. 3,000,000,000.00 and was authenticated vide letter Ref: EBKL/MRU/014262550224 dated 10th December, 2024 (copy attached)

It can be noted that the sum of credits submitted by M/s Keddy Enterprises Limited in their 6 months' bank statement plus the confirmed turnover in KRA VAT returns of 180 million cannot support the turnover



disclosed in their bids hence it is not clear how they got a line of credit of Kshs. 3,000,000,000.00 which was authenticated by the Bank.

The purpose of this letter therefore is to request you to confirm how you issued a line of credit for Kshs 3,000,000,000.00 for a company that has credit lines of only 180 million.

....."

136. The Board has also heard submissions by the Respondents that a response to the above letter from Equity Bank Kenya Limited was received on 16th May 2025 informing it that it was withdrawing its previous letters of confirmation of authenticity of the Applicant's line of credit since the aforesaid letters were issued by bank officers without the requisite bank's authorization.

137. It was on this basis that the Respondents alleged that the Applicant's tender as submitted was tainted with fraud and procedurally lacking in material respects thus rendering it non-compliant and unresponsive.

138. It is evident that the information relied upon by the Respondents in alleging that the Applicant's tender is tainted with fraud thus unresponsive was obtained on 16th May 2025 which was after purported termination of tender proceedings and during the pendency of the instant Request for Review, and suspension of procurement proceedings in the subject tender pursuant to Section 168 of the Act.



139. Section 168 of the Act provides for suspension of procurement proceedings as follows:

***"168. Notification of review and suspension of proceedings
Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed."***

140. In **PPARB Application No. 13 of 2021 Five Blocks Enterprises Limited v Managing Director KEBS & Another** the Board pronounced as follows:

"...upon filing of a request for review application, an automatic stay of proceedings takes effect which suspends all procurement proceedings and prevents any further steps from being taken in the tender in question. Further, procurement proceedings shall resume at the point they were, when the stay comes to an end, once the request for review has been heard and determined by the Board."

141. The communication from Equity Bank (Kenya) Limited relied upon by the Respondents in alleging that the Applicant's tender is tainted with fraud and thus rendering it unresponsive was received and relied upon during the suspension of procurement proceedings pursuant to section 168 of the Act. Any action taken by the Respondents in furtherance of



the procurement proceedings before the instant Request for Review has been heard and the Board renders its decision is null and void.

142. The Board further observe that the above further due diligence exercise with Equity Bank (Kenya) Limited on the Applicant's line of credit was made by the 1st Respondent. Section 83 of the Act is clear on due diligence being carried out by the Evaluation Committee. Subsequently, the post qualification exercise carried out by the 1st Respondent vide letter dated 27th March 2025 cannot be said to be due diligence within the meaning of the provisions under section 83 of the Act.

143. The Board has hereinabove established that the 1st Respondent was usurping the role of the Evaluation Committee in the subject tender by purporting to carry out a verification exercise on the Applicant's tender having rejected recommendations to award the Applicant the subject tender. Further, the above letter by the 1st Respondent was sent after the letters of termination of the subject tender dated 26th March 2025 had been submitted to the 1st Respondent for concurrence and signature.

144. In our considered view, if the 1st Respondent was privy to detrimental information that would inhibit award of the subject tender to the Applicant, it would have been prudent of him in rejecting the evaluation reports and professional opinions to give reasons and further directions to the Head of Procurement Function to direct the Evaluation



Committee to carry out a further verification exercise based on this information in line with Section 83 of the Act.

145. In view of the foregoing, the Board finds that the 1st Respondent erred in carrying out further due diligence on the Applicant's tender in the subject tender contrary to Section 83 of the Act.

As to whether the Applicant's tender submitted in the subject tender was unfairly and illegally disqualified.

146. The Board is alive to the objective of public procurement which is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

"227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –

a)

b)



- c) and
- d) ”

147. Further to the above provision, the national values and principles of governance under Article 10 of the Constitution apply to State organs and public entities contracting for goods and services. Article 10 provides as follows:

"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a);

(b);

(c) good governance, integrity, transparency and accountability [Emphasis ours].

148. Efficient good governance in public procurement proceedings provides tenderers with an assurance that public procurement and asset disposal processes are operating effectively and efficiently. Such processes are also underpinned by broader principles such as the rule of law, integrity, transparency and accountability amongst others.



149. Justice Mativo (as he then was) in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** (hereinafter referred to as "Misc. Application No. 60 of 2020") spoke to the principles under Article 227 of the Constitution as follows:

"45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document....."

150. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information and provides as follows:

"(1) An accounting officer of a procuring entity shall use standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings."



(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."

151. Further Section 60(1) provides as follows:

"(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings."

152. In the same vein, section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

"(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders."

153. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

- (1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected.**
- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and,**
- (3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-**
 - (a) The criteria shall, to the extent possible, be objective and quantifiable;**
 - (b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and**
- (4)"**

154. Section 80(2) of the Act is clear on the requirement for the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. The Board's interpretation of a system that is fair is one



that considers equal treatment of all tenders against criteria of evaluation known by all tenderers having been well laid out in the tender document issued by the procuring entity. Section 80 (3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in the tender document.

155. The Board further takes note of Section 86 (1) (a) of the Act that provides for the successful tender as follows:

"(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

(b);

(c);

....."

156. Turning to the circumstances in the instance Request for Review, it has been determined hereinabove that evaluation of the subject tender was completed upon issuance of the two evaluation reports and a Due Diligence Report by the Evaluation Committee to the Head of the Procurement Function of the Procuring Entity who also prepared two Professional Opinions concurring with the findings of the Evaluation Committee on award of the subject tender to the Applicant.



157. We have established that the alleged evaluation of the Applicant's tender by the 1st Respondent and his subsequent actions upon receipt of the Evaluation Committee's evaluation and due diligence reports leading to disqualification of the Applicant's tender in the subject tender on the basis of a further due diligence exercise, carried put post termination of the subject tender on the basis of withdrawal of its line of credit by Equity Bank (Kenya) Limited and allegations of fraud is contrary to the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution.

158. In the circumstances, the Board finds that the Procuring Entity unfairly, unlawfully and illegally disqualified the Applicant's tender submitted in the subject tender and holds the Procuring Entity in breach of the provisions of the Tender Document as read with Section 80(2) of the Act and Article 227(1) of the Constitution. Accordingly, this ground of review succeeds and is allowed.

As to what orders should the Board grant in the circumstances?

159. 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 subject tender were not terminated in accordance with the provisions of the Act.



160. The Board has found that the 1st Respondent erred in carrying out further due diligence on the Applicant's tender in the subject tender contrary to Section 83 of the Act.

161. The Board has also found that the Respondents unfairly, unlawfully and illegally disqualified the Applicant's tender submitted in the subject tender contrary to the provisions of the Tender Document as read with Section 80(2) of the Act and Article 227(1) of the Constitution.

162. The upshot of our findings is that the instant Request for Review succeeds and is allowed in the following specific terms, subject to the right of any person aggrieved with this decision to seek judicial review by the High Court within fourteen days:

FINAL ORDERS

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

A. The decision by the 1st Respondent to terminate the procurement proceedings of Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) be and is hereby nullified and set aside.



- B. The Procuring Entity's letter dated 26th March 2025 issued to the Applicant and other tenderers in the subject tender communicating the decision to terminate the procurement proceedings with respect to Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) be and is hereby nullified and set aside.**
- C. The 1st Respondent's further due diligence on the Applicant's tender vide letter dated 27th March 2025 addressed to Equity Bank (Kenya) Limited post termination of the subject tender and resultant feedback from Equity Bank (Kenya) Limited vide letter dated 16th May 2025 during pendency of the instant Request for Review be and is hereby nullified and set aside.**
- D. The 1st Respondent is hereby ordered to proceed with and ensure that the procurement process with respect to Tender No. MLPWHUD/HUD/AHP/411/2023-2024 for the Proposed Construction of the Machakos New City AHP Project (Phase 1) in Machakos Township Constituency in Machakos County (With Associated Social Amenities and Infrastructure) proceeds to its lawful and logical conclusion within 30 days of this decision taking into consideration the Board's findings**



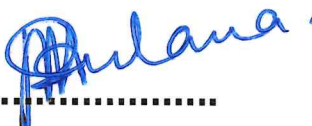
herein including the Board's finding on the evaluation, due diligence, and recommendation of award of the subject tender, the various provisions of the Act, the Constitution and Regulations 2020.

E. The Board Secretary is hereby directed to furnish the Director General of the Public Procurement Regulatory Authority with this decision for his information and for purposes of monitoring the implementation of this decision pursuant to Section 9(1)(a) and 2 of the Act.

F. In view of the Board's findings and orders above, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 3rd Day of June 2025.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB



