

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 30/2014 OF 17<sup>TH</sup> JULY, 2014

BETWEEN

UAP INSURANCE CO. ....APPLICANT

AND

EXPORT PROCESSING ZONE AUTHORITY....PROCURING ENTITY

BOARD MEMBERS PRESENT

Mr. Paul Gicheru - Chairman

Ms Gilda Odera - Member

Mr. Peter Ondieki - Member

Mr. Hussein Were - Member

Mr. Nelson Orgut - Member

IN ATTENDANCE

Mr. Stanley Miheso - Holding Brief for the Secretary

Ms. Shelmith Miano - Secretariat

**PRESENT BY INVITATION:**

**Applicant - UAP INSURANCE**

Kiragu Kimani - Advocate

Mercy Mathai - Advocate

Victor Rapando - Pupil

**Procuring Entity - EPZ AUTHORITY**

Cyprian M. Wekesa - Advocate

Richard Malebe - Advocate

Rose Kariuki - Advocate

Margaret Njenga - Procurement Manager

Tom Sakwa - GM UTS

Samuel Kalu - Legal Assistant

Venessa Lwila - Legal Assistant

**Interested Parties**

Paul Wagonga - Kenbright NBC

Edwin Abungu - Kenbright NBC

## THE DECISION OF THE BOARD

### THE BACKGROUND

The parties to this Request for Review spent a considerable amount of time in arguing on the twin issues of jurisdiction and the merits of the Request for Review. The Board has however considered the Request for Review, the response dated 22<sup>nd</sup> July, 2014 and which was filed by the Procuring Entity on the same day, the written and the oral submissions made by the parties and finds that the basic background facts giving rise to the filing of this Request for Review were largely not in dispute and they are basically that the Procuring Entity advertised the tender for the Provision of staff medical Insurance cover in the local dailies namely the Daily Nation Newspaper Edition of Thursday 29<sup>th</sup> May, 2014 and in the Standard Newspaper Edition of Wednesday 28<sup>th</sup> May, 2014.

The Tender which closed on Friday 13<sup>th</sup> June, 2014 at 11.00 a.m. attracted a total of sixteen firms which bought the tender document but only Ten (10) tenderers submitted their bids and as would be expected in any tender process the tender evaluation committee evaluated the tenders.

The documents placed before the Board and more particularly the minutes of the evaluation committee signed on 19<sup>th</sup> June, 2014 show that a process of examination of the tenders was carried out in accordance with the criteria spelt out in the tender documents which provided for three stages of evaluation namely, the Preliminary technical and the financial evaluation.

Upon the conclusion of the examination process, the tender evaluation committee recommended that M/s UAP Insurance Company Limited, the Applicant herein be awarded the **Tender No. EPZA 17/2013/2014** for the Provision of staff medical insurance cover at their quoted bid sum of Kshs. Nineteen Million, Five Hundred and Eighty Four Thousand, Five Hundred and Seventy Two Only (Kshs. 19,584,572.00) inclusive of taxes.

Pursuant to the tender evaluation committee's recommendation, the Procuring Entity's tender committee met on Thursday 19<sup>th</sup> June, 2014 and approved the award of the subject tender to the Applicant as recommended by the tender evaluation committee subject to **"the Public Procurement Oversight Authority (PPOA) confirming in writing that it is ok to award a tender if only one bidder qualifies for technical evaluation and subsequently qualifies for financial evaluation"**. The tender committee's decision is set out at page 4 of the 12<sup>th</sup> Tender committee meeting held on 19<sup>th</sup> June, 2014 at 11.00 a.m. at the Procuring Entity's executive Board Room on the 3<sup>rd</sup> Floor of the Administration Building and which were supplied to the Board by the Procuring Entity pursuant to the Provisions of Section 44 (2) (c) of the Act.

It was common ground by all the parties to this Request for Review that based on the tender committee's recommendation of the award of the tender to the Applicant, the Procuring Entity notified the Applicant that its tender was successful vide a letter of notification of award dated 19<sup>th</sup> June, 2014. The Procuring Entity also stated at paragraph 3 of its response dated 22<sup>nd</sup> July, 2014 a fact which was confirmed by Counsel for the Procuring

Entity at the hearing of this Request for Review that in addition to notifying the Applicant that its tender was successful, the Procuring Entity also issued letters of notification to the other tenderers who participated in the tender process that their bids were unsuccessful.

The Applicant produced the letter of notification that its tender was successful at page 56 of the Request for Review while the Procuring Entity produced the same letter at page 35 of its response and also produced the letters addressed to all the unsuccessful tenderers all of which were dated 19<sup>th</sup> June, 2014 and which run from pages 26 to 34 of the Procuring Entity's Response to the Request for Review.

It is clear from the material placed before the Board that all was quiet until 10<sup>th</sup> July, 2014 when the Applicant received a letter dated 9<sup>th</sup> July, 2014 from the Procuring Entity informing the Applicant that the tender awarded to it had been cancelled. This letter which the Applicant produced at page 68 of its Request for Review reads as follows:-

Date: 9<sup>th</sup> July, 2014

Mr. Fred Ruoro  
Business Development Manager - Health Division  
UAP Insurance Company Ltd  
Bishop Garden Towers  
Bishops Road  
P. O. Box 43013-00100  
NAIROBI

Dear Mr. Ruoro,

EPZA TENDER NO. 17/2013 -2014: PROVISION OF STAFF MEDICAL INSURANCE COVER

53/21

We refer to our letter of 19<sup>th</sup> June, 2014 and your reply of 24<sup>th</sup> June 2014 regarding the above matter and regret to inform you that the above tender has been cancelled with effect from the date of this letter. The tender for the provision of staff medical cover will be re-advertised in due course by way of an open tender and you are free to participate in the said tender.

The Authority is aware that UAP has so far offered credit facilities based on the list of staff and their dependants forwarded via email on 1<sup>st</sup> July, 2014 and attached herewith and undertakes to pay the medical expenses incurred up to end of day of 10<sup>th</sup> July, 2014 subject to receipt of invoices within a period of thirty days for the medical expenses incurred.

Your sincerely

**CYRILLE NABUTOLA**  
**CHIEF EXECUTIVE OFFICER**

It is apparent from the correspondences that ensued thereafter and more particularly from the Applicant's letter dated 11<sup>th</sup> July, 2014 and the Procuring Entity's letter dated 16<sup>th</sup> July, 2014 appearing at pages 69 and 70 of the Applicant's Request for Review respectively that the Applicant was dissatisfied with the Procuring Entity's decision cancelling the award of the subject tender to the Applicant. The Applicant insisted in its letter dated 11<sup>th</sup> June, 2014 that the tender had been awarded to it procedurally and inter-alia requested the Procuring Entity to reverse the cancellation within the next seven (7) days failing which it would instruct its lawyer to pursue the matter before the relevant authorities.

The letter at page 70 of the Applicant's Request for Review indicates that instead of the Procuring Entity reversing its decision cancelling the award of the tender to the Applicant, the procuring Entity instead appears to have invited the Applicant to a meeting at the Fairview Hotel on 22<sup>nd</sup> July, 2014. There was no further record placed before the Board to show whether the

meeting took place at all or what the outcome of the said meeting was if it took place.

### THE REQUEST FOR REVIEW

It is however apparent from the documents placed before the Board and the written and the oral arguments that ensued upon the filing of this Request for Review that the Applicant was dissatisfied with the Procuring Entity's decision cancelling the award of the subject tender to it. The Applicant set out five grounds challenging the Procuring Entity's said decision and requested for the following orders from the Board:-

- a) That the Respondent's (the Procuring Entity's) decision contained in its letter dated 9<sup>th</sup> July, 2014 purporting to cancel the tender awarded to the Applicant be annulled.
- b) The Respondent (the Procuring Entity) be ordered to execute a written contract with the Applicant in accordance with Section 68 (1) of the Act.
- c) The costs of this Review be awarded to the Applicant.
- d) The Applicant be granted any other order as the Board may deem it fit to make.

As earlier adverted to in this decision, the Procuring Entity opposed the Applicant's Request for Review and filed a response dated 22<sup>nd</sup> July, 2014. The Procuring Entity also filed a notice of Preliminary Objection dated 22<sup>nd</sup> July, 2014 and a set of two submissions in support of its position in opposition to the Applicant's Request for Review.

When the Applicant's Request for Review came up for hearing before the Board, both parties to the application were represented by Counsel namely Mr. Kiragu Kimani and Mr. Cyprian M. Wekesa respectively who made able submissions in support of their respective clients positions.

The Board has heard the oral submissions made by the parties and has considered the Request for Review, the Response thereto, the notice of preliminary objection filed by the Procuring Entity, the written and the supplementary written submissions filed before it by the parties, the affidavit sworn by Mr. James Wambugu on behalf of the Applicant on 5<sup>th</sup> August, 2014 and finds that this Request for Review raises three narrow issues which are as follows:-

1. Whether the Applicant's Request for Review was filed out of time pursuant to the Provisions of Regulation 73 (2) (c) (II) and consequently whether the Board has jurisdiction to hear and determine the Request for Review.
2. Whether the Board has jurisdiction to Review or inquire into any grievance touching on the propriety of the termination of a tender or a tender process in view of the Provisions of Section 36 (6) of the Act.
3. Depending on the Board's determination on issues (a) and (b) above whether the Procuring Entity's action to cancel/terminate the award of the subject tender to the Applicant was valid and in accordance with the Provisions of Section 36 of the Act.



## ISSUE NO. 1

Whether the Applicants Request for Review was filed out of time pursuant to the Provisions of Regulation 73 (2) (c) (II) and consequently whether the Board has jurisdiction to hear and determined the Request for Review.

The Procuring Entity in its notice of Preliminary Objection dated 22<sup>nd</sup> July, 2014 and its written and oral submissions made by Counsel argued that the Applicant had been notified that it's tender was successful by a notice dated 19<sup>th</sup> June, 2014 and that the Applicant therefore ought to have filed its Request for Review before the expiry of a period of Seven (7) days from that date. The Procuring Entity further argued that the jurisdiction of the Board to adjudicate on a Review under the Public Procurement and Disposal Act and the Regulations made thereunder can only be invoked before the award of the tender or within Seven (7) days after the notification of the award and that in the Procuring Entity's view the Board was *fuctus officio* and could not adjudicate on any other issue beyond the two scenarios.

The Procuring Entity therefore urged the Board to find that the Applicant's Request for Review had been filed more than twenty eight (28) days from the date of notification of the award and that the appeal was therefore frivolous pursuant to Provisions of Section 93 (2) (d) of the Public Procurement and Disposal Act.

In answer to the Procuring Entity's Submissions, Counsel for the Applicant submitted that the view taken by the Procuring Entity on this issue was wrong. The Applicant submitted that what the Applicant was challenging in its Request for Review was the Procuring Entity's decision to cancel the award of the tender to it as contained in the Procuring Entity's decision dated 9<sup>th</sup> July, 2014 as communicated to it on 10<sup>th</sup> July, 2014 and not the decision awarding it the tender as notified in the letter of 19<sup>th</sup> June, 2014.

The Applicant asserted that under the Provisions of Section 93 of the Act a bidder who had participated in a tender process could challenge the process upon notification or post notification depending on the stage at which any breach or threatened breach of the Provisions of the Act or the Regulations had occurred. The Applicant argued that in this Request for Review, the purported cancellation of the Applicant's award occurred after the notification dated 19<sup>th</sup> June, 2014 had been given and that it was therefore within the Applicant's right to lodge a Request for Review against the Procuring Entity's decision dated 9<sup>th</sup> July, 2014 and that its Request for Review was within time.

The Board has considered the rival submissions made by the parties on this issue. The Board has also looked at the Request for Review and more particularly the prayers sought by the Applicant which the Board has already set out in this decision.

It is plain from paragraph 2 of the Request for Review and from prayer 1 at page 2 of the Request for Review that what the Applicant is challenging is the decision contained in the letter dated 9<sup>th</sup> July, 2014 by which the

Procuring Entity sought to cancel the award of the tender to the Applicant and not the letter dated 19<sup>th</sup> June, 2014 notifying the Applicant that its tender was successful.

The Board further finds that the decision contained in the letter dated 9<sup>th</sup> July, 2014 was communicated to the Applicant on 10<sup>th</sup> July, 2014 a fact that was not disputed by the Procuring Entity and that the Applicant which filed this Request for Review on 17<sup>th</sup> July, 2014 filed the Request within the period of Seven (7) days stipulated by Regulations and that its Request for Review is therefore properly before the Board.

Before leaving this aspect of the Procuring Entity's Preliminary Objection, the Board is of the considered view that this point of objection ought not to have been taken at all because by its letter dated 19<sup>th</sup> June, 2014, the Procuring Entity was informing the Applicant that its tender was successful. Surely what aspect of that decision could a successful bidder, who the Board presumes would be happy be expected to challenge. Would the Applicant, which was successful, be reasonably expected to come before this Board and challenge a declaration that its tender was successful. The Board would have been rightly surprised if the Applicant's Request for Review was against the letter dated 19<sup>th</sup> June, 2014 and while this Board endeavours to continue entertaining Requests for Review and objections that appear *prima-facie bonafide*, this endeavour will not however extend to entertaining arguments, grounds or objections which are *prima-facie* not well taken and a classic example of such an argument is the Procuring Entity's argument that "a successful tenderer should challenge a

notification of an award of a tender to it". Such an argument is in the Board's view an argument in vain which demeans the status of the Board, the party raising it, it is frivolous and is to say the least a waste of the Board's time and an abuse of due process. The Board will not, out of abundant caution comment any further on this aspect of the matter. The Board has already stated that the Applicant's Request for Review is based on the Procuring Entity's decision dated 9<sup>th</sup> July, 2014 purporting to terminate the Applicant's tender and as such the Applicant's Request for Review was filed within time and is properly before the Board.

Accordingly the Procuring Entity's first ground of objection on jurisdiction as set out in issue No. 1 therefore fails and is hereby dismissed.

## ISSUE NO. 2

Whether the Board has jurisdiction to Review or inquire into any grievance touching on the propriety of the termination of a tender or a tender process in view of the Provisions of Section 36 (6) of the Act.

The second issue on jurisdiction raised by the Procuring Entity was that under the Provisions of Section 36 of the Public Procurement and Disposal Act the Board had no jurisdiction to inquire into the question of termination once the Procuring Entity had decided to exercise such a right under the Provisions of Section 36 of the Act. The Procuring Entity based its argument on this issue on the Provisions of Section 36 (6) of the Act which provides as follows:-

*"A termination under this Section shall not be reviewed by the Review Board or a Court".*

The Procuring Entity placed heavy reliance on the decision of the High Court in the case of **Republic =vs= The Permanent Secretary Ministry of Staff of Defence and 2 Others Exparte Benken Hygiene Services 2013** in support of the proposition that the Board did not have jurisdiction to hear any matter arising from the Procuring Entity's decision to terminate a tender under the Provisions of Section 36(6) of the Act and more particularly argued that neither the court nor the Board could compel a Procuring Entity to enter into a contract under the Provisions of Section 68 (1) and 2 of the Act.

The Applicant on it's part opposed the Procuring Entity's position and argued that the Provisions of Section 36 (6) of the Act did not and could not bar the Board from inquiring into the issue of the Propriety of a termination under the Provisions of Section 36 of the Act and more particularly so where a Procuring Entity had not complied with the Provisions of Section 36 of the Act which set out the procedure for termination.

Counsel for the Procuring Entity relied on the High Court's decision in the case of **Selex Systemi Intergrati =vs= The Public Procurement Administrative Review Board and the Kenya Civil Aviation Authority (HCC 1260 of 2007)** where the Court held that the Board had jurisdiction to hear and determine any grievance arising from the exercise by the

Procuring Entity of the right to terminate Procurement proceedings under the provisions of Section 36 of the Act.

Counsel for the Applicant further relied on the Provisions of Article 159 (2) (a) of the Constitution which enjoins any body exercising judicial authority to ensure that justice is done to all irrespective of status.

It was the Applicant's further argument that if the Board adopted the approach proposed by the Procuring Entity, the Applicant would be left without a remedy and that adopting such an approach would amount to giving the Procuring Entity a "blank Cheque" and that this would promote impunity.

The Board has carefully considered the arguments made by the parties on the issue of the interpretation of the Provisions of Section 36(6) of the Act namely whether the Provisions of that Section can deprive the court or the Board of the Jurisdiction to inquire into any grievance touching on the propriety of the termination of a tender or a tender process. The Board wishes to observe that though the arguments on this jurisdictional aspect were lengthy, both the court and the Board have made several pronouncements on this issue.

The leading decision on this issue and which has withstood the test of time is the High Court decision in the case of **Selex Sistemi Intergrati vs- The Public Procurement Administrative Review Board and the Kenya Civil Aviation Authority (NAI HCC 1260 OF 2007)**. This judicial review matter contains two rulings one made by the Honourable Justice J. G. Nyamu (as

he then was) and the other by the Honourable Justice George Dulu on 2<sup>nd</sup> May, 2008 and 28<sup>th</sup> August, 2008 respectively. While the Honourable Justice J. G. Nyamu dealt with the Preliminary issue of Jurisdiction, the Honourable Justice George Dulu dealt with the substantive application for Judicial Review and also dealt with the issue of jurisdiction.

The Board has considered the decisions by both the Honourable Judges and particularly the decision by the Honourable Justice J. G. Nyamu given on 2<sup>nd</sup> May, 2008. The Jurisdictional issue for determination before the Judge was whether the court or the Public Procurement and administrative Review Board has the jurisdiction to hear and determine a question arising from the decision of a Procuring Entity under the Provisions of Section 36 of the Act or to entertain an application for judicial Review after the period of 14 days set out in Section 100 (4) of the Act has lapsed.

Upon considering the rival arguments made by the parties and the long line of authorities placed before him Justice Nyamu made the following findings on the issue of the ouster clauses under Section 36(6) and Section 100 (4) of the Act.

1. The ouster clause in Section 100(4) of the Procurement Act is not entirely clear and the court must therefore resolve the dispute by upholding its jurisdiction instead of its ouster.
2. The ouster Section was inserted in obvious ignorance of the Judicial Review laws Order 53 and the Section was inserted in obvious ignorance of the Judicial Review laws.

3. An ouster Section is not in tandem with the other laws on judicial review, namely the law Reform Act and Order 53 and the Section was inserted in obvious ignorance of the judicial Review Laws.
4. An ouster Section is void where it violates Provisions of the Constitution.
5. Ouster clauses are usually grounded on public interests consideration and good administration, and there cannot be greater public interest than that expressed in the Constitution. In this regard ouster clauses will be ineffective unless they pass the test of reasonableness and proportionality.
6. Ouster Sections or clauses are ineffective in the face of jurisdictional issues.

In arriving at his decision the Judge relied on several common law decisions on ouster clauses and more particularly the case of *Smith vs East Elloe Rural District Council* [1965] as 736 where Lord Viscount Simonds stated as follows:-

*"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative Provisions 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".*



The court also relied on the landmark decision in the case of **Anisminic =vs= the Foreign Compensation Commission [1969] ALL ER 2008** where Lord Reid made the following famous statement on ouster clause:-

*"It is a well established principle that a Provision ousting the ordinary jurisdiction of the court must be construed strictly meaning, I think that if such a Provision is reasonably capable of having two meanings that meaning shall be taken which preserves the ordinary jurisdiction of the court".*

○ The Judge (J. G. Nyamu J) further stated that the court or any other judicial authority has to look into the ouster clauses as well as the challenged decision to ensure that Justice is not defeated and that in our jurisdiction the principle of proportionality is now part of our jurisdiction.

○ Turning to the Provisions of the Public Procurement and Disposal Act, the Court held that in considering the issue of jurisdiction the court or any body exercising judicial authority must look at the objectives and the intention of Parliament in Section 2 of the said Act which is *inter-alia* to promote integrity and fairness as well as to increase transparency and accountability in the Procurement procedures.

○ On the requirement for the giving of reasons under Section 36 of the Act, the Court stated that the giving of reasons is one of the fundamental tenants of the principle of natural Justice and that the failure to give reasons under the Provisions of Section 36 of the Act would invite intervention by the court.

On the issue of ouster clauses *vis-avi* the Constitution the court while relying on Article 77 (9) of the old Constitution held that upholding the ouster Clauses in Section 36(6) and Section 100(4) of the Act would be in conflict with the Constitutional requirement that a court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial and where the proceedings for such a determination are instituted by a person before such a Court or other adjudicating authority the case shall be given a fair hearing within a reasonable time.

The Court in the decision delivered on 2<sup>nd</sup> May, 2008 in the case of **Selex Systemi Intergrati** therefore concluded it's decision by holding that the ouster clauses under Section 36(6) and Section 100(4) of the Act were not absolute or unfettered and that the Court and the Board could hear appropriate grievances arising from any alleged breach of the said provisions.

In his ruling dated 28<sup>th</sup> August, 2008 on the substantive application, the Honourable Justice George Dulu adopted Justice Nyamu's finding on the issue of jurisdiction and made the following remarks on the requirement that the Procuring Entity should give reasons in finding number 4 of his decision:-

**4: Whether the applicant should have sought for reasons of termination before going to the review board (1<sup>st</sup> respondent)**

*"Counsel for the 2<sup>nd</sup> respondent has argued that the ex-parte applicant should have asked for reasons for the termination of Tender before rushing to the 1<sup>st</sup> respondent with their application. The rationale of this argument seems to be that the applicant went to the 1<sup>st</sup> respondent prematurely. Therefore, the 1<sup>st</sup> respondent was correct in dismissing the application of the ex-parte applicant on a preliminary objection".*

*I do not think that argument can be sustained. First of all, that is not the reason why the 1<sup>st</sup> respondent dismissed the applicant's complaint or appeal. Secondly, and more importantly, section 36 (3) of the Act which appears to be relied upon by the 2<sup>nd</sup> respondent's counsel, does not impose a duty on the applicant to have asked for the reasons for termination of Tender before going to the 1<sup>st</sup> respondent with their complaint. Infact subsection (7) of section 36 imposes a mandatory duty on the procuring entity to give the reasons for termination to the public procurement Oversight Authority to the ex-parte applicant".*

It is noteworthy from the wording of the Provisions of Section 36(6) of the Act that the Section purports to oust the jurisdiction of the Review Board and the Court and the Board therefore finds that the decisions which have been cited above are not only relevant to the interpretation of the ouster clause in the context of the court but also of the Review Board and are therefore relevant to the issue now before the Board.

Now turning to the points of dispute before the Board on the second issue of jurisdiction the Board finds some of the Applicant's grievances in the Request for Review are *inter-alia* that:-

- (i) In purporting to exercise the right to terminate under Section 36 of the Act, the Procuring Entity did not comply with the entire Provisions of Section 36 of the Act in that it did not notify all bidders of the decision to terminate the tender nor did it make a report of that decision to the Director of the Public Procurement Authority.
- (ii) The Procuring Entity did not give the Applicant or the Director of the Authority the reasons for the termination.
- (iii) The Decision was not based on any plausible or reasonable ground.
- (iv) The Procuring Entity's decision breached the Applicant's rights under the Constitution and particularly Article 159 (2) (a) that requires that Justice shall be administered to all in a fair manner.
- (v) The Respondent had breached the objectives set out in Section 2 of the Act among others things.

The Board finds that the Applicant's grievances some of which have been set out above are justiciable grounds which fall within all the parameters set out in the *Selex Systemi* decisions and the Board therefore has the requisite jurisdiction to hear them. What the Applicant is essentially complaining about is that the Procuring Entity did not Act in accordance with the law, that it's action was not fair and transparent and the Procuring

Entity therefore breached the objectives set out in the Act and it's decision was not based on reasonable or valid grounds and finally that the Procuring Entity acted unconstitutionally and in breach of the rules of natural justice.

Before making it's final finding on this issue, the Board wishes to comment on the Procuring Entity's response and more particularly the reference to the decision given by the Honourable Justice G. V. Odunga in the case of **Republic =vs= The Permanent Secretary, Minister of State for General Defence Cleaning Services expert Hygiene Services Limited (Nai HCC Misc. Application No. 705 of 212)**.

It was the Procuring Entity's Position based on the above decision that the Court held that the law did not impose a duty on a Procuring Entity to enter into a contract and that to the Contrary the decision whether or not the Procuring Entity ought to enter into a contract is one left to the Procuring Entity as it has the discretion to terminate the tender at any time before entering into the contract.

The Procuring Entity urged the Board to find that what the Applicant sought, namely, the order that the Respondent be ordered to execute a written contract with the Applicant in accordance with Section 68 (1) of the Act could not be granted in view of the Court's decision in the **Exparte Benken Hygiene services Ltd** case.

In response to this argument, Mr. Kiragu Kimani urged the Board to find that if there was any conflict between the decisions made by both Justice

Nyamu J. A and Justice George Dulu and that made by Justice Odunga then the Board should resolve such a conflict by considering which decision or decisions were persuasive and adopt the same.

The Board has anxiously considered the Applicant's argument that the Board resolves the perceived conflict between decisions of Judges of concurrent jurisdiction and whose decisions are in law binding on the Board. This has compelled the Board to carefully consider all the three decisions on the interpretation of Section 36(2) of the Act and has carefully read the decision of the Honourable Justice G. V. Ondunga in the case of **Hygiene Services Limited** and having read the said decision and the decisions in the **Selex Systemi** cases, the Board finds that no conflict exists between the decisions and the three decisions made by the three eminent Judges of the High Court dealt with separate issues which dealt with particular peculiar circumstances of each of the cases before the Judges.

The question before the Honourable Justice Odunga in the **Hygiene Services Limited** case was whether an Applicant could through an order of mandamus compel a Procuring Entity to execute a contract under the Provisions of Section 68(1) and (2) of the Act. The learned Judge answered that question by stating that the court could not compel a party through an order of mandamus to execute a contract and further held that judicial review was concerned not with the merits of the decision but the decision making process. The Judge did not in any of his findings hold that either the Court or the Board had no jurisdiction to address a grievance under the Provisions of Section 36(6) of the Act.

There is therefore no conflict between the decisions made by the Judges but Owing to the nature of the submissions made regarding the perceived conflict the Board has perused the decisions submitted before it by the parties and particularly the decision made by the Honourable Justice G. V. Odunga on 2<sup>nd</sup> July, 2014 in the case of Republic =vs= The Ministry of Interior and Coordination of The National Government and others Exparte ZTE Corporation and ZTE Corporation (Kenya) Limited (Nai HC Judicial Review No. 441 of 2013).

It is apparent on the face of the said decision that the Judge was alive to the existence of the decision in the Selexi Systemi case. This is clear at holding number 40 where the Judge while commenting on Justice Nyamu's decision in that case stated as follows:-

*"40: in the above case, it was held that ouster clauses are effective as long as they are not unconstitutional, inconsistent with the main objectives of the Act and pass the test of reasonableness and proportionality. The Judge (Justice J. G. Nyamu) recognized that the Court's Jurisdiction may be precluded or restricted by either legislative mandate or certain special texts. However where the ouster clause leaves an aggrieved party with no effective remedy or at all, it is my view that such ouster clause will be struck down as being unreasonable".*

The Board has itself considered and determined the implications of the Provisions of Section 36(6) of the Act in the authorities which the Board

will set out in the holding on issue No. 3. It will therefore bear repetition if the Board were to set them out here.

The upshot of the all the above considerations is that the Board has jurisdiction to entertain grievances under Section 36 of the Act particularly the grievances raised in this matter and the Procuring Entity's objection as contained in issue no. 2 is therefore disallowed.

### **ISSUE NO. 3**

**Whether the Procuring Entity's action to terminate the award of the subject tender to the Applicant was valid and in accordance with the Provisions of Section 36 of the Act.**

Having determined issues no. 1 and 2 on jurisdiction and having established that the Board has the jurisdiction to hear and determine the grievances placed before it by the Applicant the Board will now proceed and consider the arguments on and determine the 3<sup>rd</sup> issue framed for determination.

The Applicant based its argument on this ground on the decision of the Honourable Justice Dulu dated 28<sup>th</sup> August, 2008 in support of the proposition that a Procuring Entity could not terminate a tender once an award had been made. Counsel submitted that the Procuring Entity could not therefore terminate the award of the tender to the Applicant after a notification of the award had been made and that such a decision was contrary to the law and was therefore null and void. The Applicant



therefore contended that the Procuring Entity erred in terminating the award of the subject tender awarded to the Applicant.

The Applicant alternatively argued that even assuming for arguments sake that the Procuring Entity could exercise the rights conferred by the Provisions of Section 36 of the Act at any stage of the Proceedings, then the Procuring Entity was obliged to exercise such a right in strict Compliance with the Provisions of Section 36 of the Act and that the Procuring Entity was at the very least enjoined to inter-alia:-

- (i) Give reasons for cancelation.
- (ii) Notify all the other bidders of its decision to terminate.
- (iii) Notify the Director of the Public Procurement Authority of the decision to terminate together with the reasons for the termination.
- (iv) Act in good faith and base the termination on valid grounds.
- (v) Act within the Provisions of the Constitution.

Counsel for the Applicant argued that the Procuring Entity in this instance had acted contrary to the express Provisions and the spirit of the Act and that by its own admission, the Procuring Entity had failed to demonstrate strict compliance with the Provisions of Section 36 of the Act on termination and more particularly that it admitted that it had not notified all the other tenderers of it's decision to terminate. The Applicant further argued that the Procuring Entity had also admitted in the submissions by it's Counsel Mr. Wekesa that it had not complied with the Provisions of

Section 30 (7) & (8) by giving the Director General of the Public Procurement Oversight Authority a written report on the fact of termination and the reasons for the termination.

Counsel for the Applicant argued that inspite of non compliance with the Provisions of Section 36 of the Act, there were no reasonable grounds upon which the award of the tender to the Applicant had been terminated. The Applicant through its counsel drew the Board's attention to the fact that upon the notification of the award of the tender to the Applicant, the Applicant was requested to provide services to the Procuring Entity which the Procuring Entity enjoyed and had not paid for.

Mr. Wekesa in answer to the Applicant's submissions maintained that under the Provisions of the Act, the Procuring Entity had an unfettered right to terminate procurement proceedings under the Act and that once the Procuring Entity had exercised such a right, the exercise of that right could not be questioned by the Board or the court under the Provisions of Section 36 (6) of the Act.

While responding to the Applicant's argument that the Respondent could not terminate the award of a tender after giving a letter of notification Mr. Wekesa submitted that there was no definition of the word Procurement proceedings under the Act and while relying on the provisions of Section 36(1) of the Act Mr. Wekesa contended that a Procuring Entity could terminate Procurement Proceedings without entering into a contract. Counsel therefore argued based on this Provision that Procurement proceedings could only come to an end upon the execution of a contract

and that the Procuring Entity had therefore acted properly by terminating the Procurement process since no written contract had been entered into by the parties as at the date of the termination.

On the reasons for termination, Counsel for the Procuring Entity while relying on paragraphs 8 and 9 of the Procuring Entity's Response argued that the Procuring Entity had terminated the award of the tender to the Applicant due to material flaws in the evaluation process which had emerged after the award had been made. The Applicant cited some of the alleged flaws in paragraph 9 of the response as *inter-alia* being:-

- a) That the evaluation of the Preliminary and mandatory requirements was replete with unexplainable inconsistencies and gaps.
- b) The letter of notification of award of tender was issued prematurely before the tender committee had completed its due diligence.
- c) The notification of award was not undertaken by the level of authority **specified by the law.**

The Procuring Entity notably stated at paragraphs 8 of its response that the award had been cancelled at the tender committee meeting held on 8<sup>th</sup> July, 2014 due to what the Procuring entity's tender committee termed as material flaws in the evaluation process and added that the minutes of the meeting had not been confirmed as this Review was pending before the Board thereby rendering the matter *sub judice*.

Counsel for the Procuring Entity supplied the Board with copies of the unsigned minutes of the tender Committees 14<sup>th</sup> and 15<sup>th</sup> meetings held on

4<sup>th</sup> and 8<sup>th</sup> July, 2014 respectively in support of the reasons for cancellation. The minutes were supplied to the Board on 6<sup>th</sup> August, 2014. The Procuring Entity urged the Board to look at the minutes and affirm its decision to terminate the tender awarded to the Applicant.

On the issue of the failure to give reasons, the Procuring Entity argued that the Procuring Entity was not obliged to give reasons in the absence of a Request by the Applicant for reasons and that as at the date the Request for Review came up for hearing, the Applicant had not sought for the said reasons.

On the requirement for the Procuring Entity to give a notice of termination of Procurement Proceedings to the Director General of the Authority and the reasons under the Provisions of Section 36 (7) and (8) of the Act, Counsel for the Procuring Entity conceded that no notice and or reasons had been given to the Director General of the Authority as yet because the Applicant had instituted the present Request for Review before the Board and that just like the minutes, the Procuring Entity argued that it did not give the notice or the reasons since such an action would be *sub judice*.

Based on the above arguments, Counsel for the Procuring Entity therefore urged the Board to dismiss the Applicant's Request for Review with costs.

The Board has considered the Request for Review, the Response thereto and the submissions tendered for and against the propriety of the issue of the termination of the award of the subject tender to the Applicant. The

Board has also considered the authorities cited by the parties in support and in opposition to the Request for Review.

Before the Board proceeds to determine this issue, the Board will first address the rival submissions made by the parties on the stage at which a Procuring Entity can terminate Procurement proceedings. The Applicant argued that the Procuring Entity could not do so after the notification of an award had been made to a successful tenderer while the Procuring Entity argued that this right can be exercised at any stage before a contract is signed.

On this aspect of the matter and without deciding whether Justice Dulu was right or wrong in his interpretation of Section 36 in the *Selex Systemi* case, the Board opts to base its decision on the express Provisions of Section 36 (1) of the Act which provides as follows:-

*"36 (1): A Procuring Entity may at any time, terminate procurement Proceedings without entering into a Contract".*

The Board therefore finds that the Procuring Entity's argument that a Procuring Entity can terminate the procurement process or proceedings at any time before a contract is signed as correct. The Board however holds that this can only be done within the parameters of the law as determined in issue number 2 and will therefore address the issue of whether the termination/cancellation in the particular circumstances of this case was done in accordance with the provisions of the Constitution and the Act and the first aspect which the Board will address in the circumstances of this

case are the functions and the limits of the power of a tender committee under the law.

From the minutes submitted to the Board by the Procuring Entity to Board and more particularly the tender committee's minutes of 19<sup>th</sup> June, 2014, the tender committee of the Procuring Entity awarded this tender to the Applicant on 19<sup>th</sup> June, 2014 but subject to a confirmation from the Authority as to whether it would be proper to award the tender if only one tenderer had reached the final evaluation stage. This notwithstanding, the same tender committee purported to cancel the award of the tender to the Applicant on 9<sup>th</sup> July, 2014 two weeks after it had awarded it the tender on 19<sup>th</sup> June, 2014. The issue that therefore naturally arises is whether under the Provisions of the Act and the Regulations the tender committee could revisit the tender process after making an award on 19<sup>th</sup> June, 2014.

The Provisions of Regulation 11 of the Regulations are explicit and they state as follows:-

*Regulations 11 (1) in considering the submissions made by the Procurement Unit or Evaluation Committee, the Tender Committee may reject a submission with reasons.*

*Regulations 11 (2) (b) The tender committee shall not reject any submission without justifiable and objective reason.*

*Regulations 11 (3) where the Tender Committee rejects the recommendation of the Evaluation committee the decision shall be*

*reported to the head of the Procuring Entity or to the Accounting Officer.*

The Board finds that the Regulations require a Tender Committee that has rejected the recommendations of the Evaluation Committee to report the same to the Accounting Officer; the Regulations do not give the Tender Committee powers to re-enter the arena and terminate tenders.

A responsible tender committee must examine the minutes of the tender evaluation committee in minute detail and confirm that the evaluation committee had strictly adhered to the evaluation criteria before making an award of the tender to the successful bidder. The tender committee cannot raise questions which would have rightly been raised before the award of the tender after it has awarded the tender. The Board has no doubt that the minutes of the evaluation committee were before the tender committee when it awarded the tender to the Applicant. If there were any errors, flaws, gaps in the marks awarded by the evaluators or any other such purported discrepancy, the tender committee should have picked these out before awarding the tender. The applicant was not the one evaluating tenders. It was the Procuring entity's evaluation committee. The Board therefore finds no basis upon which the Applicant should be punished for alleged irregularities or any alleged gaps when it was not the one evaluating the tenders. The Applicant was therefore on firm ground when it submitted that these were purely internal issues and the Procuring Entity is at liberty to employ any of its internal disciplinary machinery if it finds

that any of the members of its evaluation committee contributed to the occurrence of any of the irregularities.

Notwithstanding the fact that the Regulations are clear on the mandate of the Tender Committee, it is noteworthy that in this case, the tender committee purported to continue exercising what it considered as its unending mandate leading up to the cancellation of the award of the tender to the Applicant. The Board has examined the provisions of the Act and the Regulations and has not been able to come across a Provision or a Regulation that allows a procuring Entity to carry out evaluation, notification, a cancellation, a re-evaluation, an investigation or a re-investigation after the award of a tender and all these outside the statutory Period set out in the Act and the Regulations.

Under the Provisions of Regulation 46 of the Regulations, an evaluation of tenders must be concluded within fifteen (15) days after the opening of the tenders after which the tender committee must recommend or reject the recommendation to award the tender to any bidder. Once the tender is awarded there is no further room for the tender committee or the evaluation committee to revert back and forth leading to an endless journey. The tender committee cannot evaluate, re-evaluate, cancel or revisit awards of tender ad infinitum.

The Board therefore finds and holds that upon making its decision of 19<sup>th</sup> June, 2014, the tender committee became *functus officio*.



The Board has also examined the unsigned minutes of 4<sup>th</sup> and 8<sup>th</sup> July, 2014 supplied to the Board by the Procuring Entity on 6<sup>th</sup> August, 2014. The Board has examined the substance of the two minutes and the minutes of the 19<sup>th</sup> June, 2014 and has noted that the only issue that was alive in the minutes of 19<sup>th</sup> June, 2014 was whether it would have been right for the Procuring Entity to award the tender where only one tenderer had made it to the last stage of evaluation.

This reason resonates through the minutes of 4<sup>th</sup> and 8<sup>th</sup> July, 2014. The Board has looked at the last two sets of minutes which are not signed and has observed that the minutes are vague and look like a record of arguments between the secretariat and members of the tender committee. While the members of the secretariat stood by and justified the decision to award the tender to the Applicant, some Board members continued raising one issue after another. It is noteworthy that the minutes do not state the name of the member raising any particular inquiry and the use of the word "some members" runs through the minutes of 4<sup>th</sup> and 8<sup>th</sup> July, 2014.

The Board finds that the law on tendering is very clear and it is that the outcome of a tender process does not depend on the number of participants. There is no requirement that they be one, two, three or any other number. A tender is like a race. If only one competitor reaches the final mark so be it. The Procuring Entity ought to and did award the tender to the only remaining bidder who in this case was the Applicant. The Procurement process, just like a race cannot be stopped because only one entrant had made it to the finishing line.

In this particular instance and from all the available evidence it is only the Applicant which upon a consideration of all the relevant stages of evaluation which made it to the end. The tender committee ought to have and did award the tender and the tender committee's decision to subject its decision to a confirmation by the Director of the Public Procurement Authority (PPOA) was not necessary.

The Board has read through the Provisions of the Act and the Regulations and there is nothing in the said provisions of the law that requires a tender committee to seek any clarification from the PPOA or anybody before making an award of tender where there is only one tenderer remaining in the process. This practice if allowed would negate and take away the requirement of the independence of the evaluation and the tender committees and would lead to endless inquiries being directed at the Director General of the Authority, who is in law not a member of an evaluation or tender committee.

As the Board has already stated, Regulation 46 of the Regulations requires that tenders must be evaluated within a period of 15 days. The evidence before the Board shows that this tender closed on 13<sup>th</sup> June, 2014 at 11.00 a.m. The period of 15 days elapsed on 28<sup>th</sup> June, 2014. The minutes of the evaluation committee show that the evaluation committee completed the evaluation on 19<sup>th</sup> June, 2014 well within the period of 15 days and its recommendations were adopted by the tender committee on the same day namely 19<sup>th</sup> June, 2014. By the time the tender committee was purporting to revisit the decision of the evaluation committee on 8<sup>th</sup> July, 2014, the

statutory period of 15 days for the evaluation of tenders had long lapsed. The Procuring Entity did not provide any evidence to the Board to demonstrate that the Procuring Entity complied with the Provisions of Regulation 14 (2) of the Regulations on extension of time for evaluation or re-evaluation of this tender.

Regulation 14(2) allows a Procuring Entity to extend time for the evaluation of tenders beyond the period of 15 days. Such an extension can however only be granted in two instances, namely, where there is a large number of tenders or where the tender is complex and such an extension can only be granted for a further period of Thirty (30) days only. The right of extension can only be exercised during the tender validity period. The Procuring Entity's tender or evaluation committee did not therefore have any power to carry on with what amounted to an evaluation long after the statutory period.

The Board further finds on the basis of the Procuring Entity's own admission that it purported to terminate the award of the tender to the Applicant even before the tender committee's recommendations of 8/7/2014 had been adopted and the minutes confirmed and signed. The Procuring Entity also conceded that it had not notified all the other bidders of its decision to terminate and that no report had been made to the Director General of the Authority containing the reasons for the termination.

The Procuring Entity also expressly admitted that it did not give reasons for the termination to the Applicant in addition to not giving the reasons to

the Director General of the Authority. It was held in the two decisions in the **Selex Systemi** case that the failure to give reasons amounts to a breach of the rules of natural justice. The Board adopts the court's reasoning on this aspect of the Review.

The Procuring Entity sought to explain this away by stating that it did not take the above steps because that Request for Review was pending before the Board and that the matter was therefore **sub judice**. It is true that in ordinary circumstances once a Request for Review was filed before the Board, Procurement proceedings which are still pending would stand suspended pending the determination of the Request for Review pursuant to the Provisions of Section 94 of the Act.

The Board finds the reason given by the Procuring Entity not to be plausible because of the following:-

- (i) The tender committee awarded the subject tender to the Applicant on 19<sup>th</sup> June, 2014 and therefore concluded its mandate under the Act after that. The purported proceedings of 8<sup>th</sup> July, 2014 seeking to cancel the award of tender cannot by any stretch of imagination amount to Procurement Proceedings under the Provisions of Section 94 of the Act capable of being suspended.
- (ii) A notification of termination of tender to the Director General of the Authority containing reasons is not a Procurement proceeding for the purposes of Section 94 of the Act. It could not have been suspended under the Provisions of the said Section.

(iii) It is inconceivable that the Procuring Entity purported to terminate the award even before it had concluded and confirmed the minutes of 8/7/2014. This amounted to placing the cart before the horse since one cannot terminate an award of the tender first and then seek to inquire or look for the reasons to support the purported termination.

It is now established that the power conferred upon a Procuring Entity under the Provisions of Section 36 of the Act is not absolute and should be exercised in strict compliance with the letter and the spirit of the law.

While exercising power under Section 36 of the Act and indeed while exercising any other power conferred on it by the Act or the Regulations the Procuring Entity is bound by the Provisions of Article 227 of the Constitution and Section 2 of The Public Procurement and Disposal Act.

**Article 227 of the Constitution reads as follows:-**

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

**Section 2 of the Public Procurement and Disposal Act set out the following as the objectives of the Act.**

- a) To promote maximum economy and efficiency;**
- b) To promote competition and ensure that the competitors are treated fairly;**
- c) To promote integrity and fairness of those procedures;**

- d) To increase transparency and accountability in those procedures and;
- e) To increase confidence in those procedures.

The net effect of all this Constitutional and Statutory Provisions is that the Procurement process and how it should be conducted is enshrined in the Constitution and statute. A procuring Entity while exercising the powers conferred upon it by the Constitution and the Act exercises such powers for, on behalf and in trust for the Public. Both the Constitution and the Act impose on a Procuring Entity the duty to the Act fairly, equitably, transparently, to promote competition and act in a manner that promotes maximum economy efficiency and saves costs. The Procuring Entity is also obliged to promote integrity in the Procurement process.

The Board has previously had occasion to consider the issue of termination in the following previous decisions:-

In the case of **Tudor Services Ltd =vs= National Oil Corporation (Application No. 21 of 2009)** the Board held that the powers conferred upon the Procuring Entity under Section 36 of the Act must be exercised in good faith and in full compliance with the requirements set out under the Act. The Board proceeded to nullify the termination of an award of tender by the Procurement Entity for failure to comply with the Provisions of Section 36 of the Act.

In the case of **Horse bridge Network Systems (EA) Ltd =vs= The Central Bank of Kenya Limited (PPOARB No. 65 of 2012)** the Board nullified the

termination of an award of a tender inter-alia on the ground that the Procuring Entity had not filed a report of the termination with the Director General of the Public Procurement Oversight Authority (PPOA) as required by the Provisions of Section 36(7) of the Act.

In the case of **Muema Associates =vs= Turkana County Council (Application No. 35 of 2008)** the Board held that while exercising the power to terminate an award of a tender under the Provisions of Section 36 of the Act, the Procuring Entity must inter-alia:-

- (i) Give sufficient notice to all bidders of the decision to terminate the Procurement Proceedings.
- (ii) The Procuring Entity must give reasons for its decision.
- (iii) The Procuring Entity must give a report to the Authority regarding its decision to terminate Procurement proceedings as per Section 36(7) of the Act.

The Board has considered all the facts of this case as set out above and for all the above reasons finds that the Procuring Entity's decision purporting to terminate the award of the tender to the Applicant via its letter dated 9<sup>th</sup> July, 2014 contravened the Provisions of the Constitution and the Act and more particularly the Provisions of Section 36 of the Act. This ground of the Request for Review as set out in issue no. 3 is therefore allowed.

## THE FINAL ORDERS

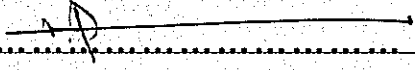
Based on the Board's findings under issue number 3 above and in the exercise of the powers conferred upon the Board by the Provisions of Section 98 of the Act, the Board makes the following Orders:-

1. The Request for Review filed by the Applicant before this Board on 17<sup>th</sup> July, 2014 be and is hereby allowed in the following terms:-
  - a) The Respondent's/the Procuring Entity's decision contained in its letter dated 9<sup>th</sup> July, 2014 purporting to cancel/terminate the award of the subject tender to the Applicant be and is hereby declared null and void and is set aside.
  - b) Accordingly, the Procuring Entity is hereby directed to proceed and complete the procurement process the subject matter of this Request for Review in accordance with the Provisions of the Act including Section 68 and the Regulations within Seven (7) days from today's date.
  - c) In order to ensure that Order 1(b) of the Board's orders is complied with, the Procuring Entity is hereby directed to notify and provide evidence of compliance with order 1(b) above to the Director General of the Public Procurement Oversight Authority and to this Board through its secretary within 8 days from today's date.

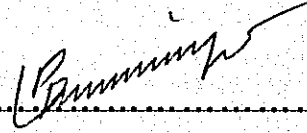


2. Each party shall bear it's own costs of this Request for Review.

Dated at Nairobi this 9<sup>th</sup> day of August 2014.



**CHAIRMAN, PPARB**



**SECRETARY, PPARB**

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