

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO.80/2018 OF 14TH JUNE, 2018

BETWEEN

**CONSORTIUM OF GBM PROJECTS AND
ERG INSAAT TICARET VE SANAYI A.S APPLICANT**

AND

NATIONAL IRRIGATION BOARD PROCURING ENTITY

Review against the decision of the National Irrigation Board in the Matter of Tender No. NIB/T/018/2016-2017 for Funding, Design, Build, Own, Operate and Transfer of the High Grand Falls Dam Project and Associated Irrigation Infrastructure in Kitui, Tana River and Garissa Counties, Republic of Kenya.

BOARD MEMBERS PRESENT

- | | |
|---------------------------|------------|
| 1. Mr. Paul Gicheru | - Chairman |
| 2. Mr. Peter Ondieki, MBS | - Member |
| 3. Eng. Weche Okubo, OGW | - Member |
| 4. Qs Hussein Were | - Member |

IN ATTENDANCE

- | | |
|---------------------|-----------------------|
| 1. Philip Okumu | - Secretariat |
| 2. Maryanne Karanja | - Secretariat |
| 3. Andrew Gitonga | - Intern, Secretariat |

PRESENT BY INVITATION

APPLICANTS-

1. Wilfred Nyamu
2. David Kamotho
3. Nyokabi Kamotho

Consortium of GBM Projects Limited and ERG Insaat Ve Sanayi A.S Limited

- Advocate, Nyamu & Nyamu Advocates
- Representative
- Advocate ,Nyokabi Kamotho Advocates

PROCURING ENTITY-

1. Lilian Kimani
2. Samuel Karanja
3. Denis B. Aroka

National Irrigation Board

- Advocate, L. G. Kimani & Co. Advs
- Pupil, L. G. Kimani & Co. Advocates
- Corporation Secretary, NIB

BACKGROUND OF DECISION

The National Irrigation Board (NIB)'s Accounting Officer approved the request for the prequalification of firms for the works and thereafter the prequalification was undertaken through open international tender. The expression of interest (EOI) advertisement was published in the Kenya Government's e-procurement portal, <http://www.supplier.treasury.go.ke>, NIB's website <http://www.nib.or.ke/tenders> and in three daily newspapers of nationwide circulation - *The Daily Nation, the Standard and The Star*, on 13th January 2017.

Seven (7) applicants submitted their bids on time and the bids were opened on 17th February, 2017, as follows:-

Table 1: List of applicants

Applicant No.	Applicant Name	Number of Copies
1.	GBM - ERG Engineering	1 Original Application and 3 copies
2.	China Huadian Engineering Co. Ltd	1 Original Application and 3 copies
3.	China Machinery and Engineering Corporation (CMEC)	1 Original Application and 3 copies
4.	CMC Di Ravenna	1 Original Application and 3 copies
5.	China International Water and Electric Group	1 Original Application and 3 copies
6.	China National Complete Engineering Cooperation Joint Venture	1 Original Application and 3 copies
7.	El-Noor General Contractors in joint venture with BNA International Company Ltd, Shandong Wuzheng Group and Top International Engineering	1 Original Application

The Procuring Entity's evaluation committee evaluated the bids and recommended, in a report dated 11th April 2017, that six of the seven bidders be shortlisted for having met the set criteria. The Head of Procurement Function reviewed the evaluation report and, together with his professional opinion, submitted it to the General Manager on 25th April 2017. The Procuring Entity's General Manager approved the recommendation for the shortlisting of the six applicants on 26th April 2017 and notifications of the outcome of the tender process were sent to all the applicants on 28th April 2017.

Tender No. NIB/T/018/2016-2017 for Funding, Design, Build, Own, Operate and Transfer of the High Grand Falls Dam Project and Associated Irrigation Infrastructure in Kitui, Tana River and Garissa Counties in the

Republic of Kenya was initiated by the user department, Engineering Services, through a procurement request in an internal memorandum dated 28th September 2017.

The Procuring Entity's General Manager approved the request on 7th October, 2017 for restricted tendering. The six shortlisted tenderers were issued with Request for Proposals (RFP) documents on 19th October, 2017 and invited to submit proposals. A pre-proposal briefing and site visit was conducted on 8th November 2017.

The deadline for submission of the technical and financial proposals was 30th November, 2017 and the following one tenderer submitted its proposals as at the closing date.

Table 2: Summary of the opened proposals

Tender No.	Tenderer Name	Opened proposals
1.	GBM - ERG Consortium (GBM Projects Limited and ERG Insaat Ticaret Ve Sanayi A.S)	1 original and 3 copies of technical proposals and 1 sealed financial proposal

On 17th April 2018, the Engineering Services department recommended, in an internal memorandum to the General Manager, the termination of the procurement proceedings on the basis of the need to undertake validation exercise of the design for optimization and to revise the total area covered in the project and the method of water conveyance. The user department considered this to be a technological change that prompted the need for immediate termination of the procurement proceedings.

Based on the documentation, justification and recommendations provided by the User Department, one Boaz Okello purporting to act on behalf of the

Procuring Officers Accounting Officer terminated the procurement process by a letter dated 18th April, 2018

THE REQUEST FOR REVIEW

This Request for Review was lodged before the Board by the Consortium of GBM Projects and ERG Insaat Ticaret VE Sanayi A.S on 14th June, 2018 in the matter of the Tender No. NIB/T/018/2016-2017 for the Funding, Design, Build, Own, Operate and Transfer of the High Grand Falls Dam Project and Associated Irrigation Infrastructure in Kitui, Tana River and Garissa Counties in the Republic of Kenya.

The Applicant sought for the following orders:-

1. The Procuring Entity's decision made vide the letter dated 14th May, 2018 and received on 4th June 2018 cancelling the Tender No. NIB/T/018/2016-2017 for the Funding, Design, Build, Own, Operate and Transfer of the High Grand Falls Dam Project and Associated Irrigation Infrastructure in Kitui, Tana River and Garissa Counties, Republic of Kenya be set aside and/or nullified.
2. The Applicant be awarded the costs of the review application.

During the hearing of the Request for Review the Applicant was represented by Mr. Wilfred Nyamu, Advocate from the firm of Nyamu & Nyamu Advocates while the Procuring Entity was represented by Ms Lilian Kimani, Advocate from the firm of M/s L.G Kimani & Co. Advocates.

The parties submissions

The Preliminary objection

In her response to the Request for Review, Counsel for the Procuring Entity raised a preliminary objection to the Request for Review on the ground that the Board did not have the jurisdiction to hear and determine the same on the ground that the Request for Review had been filed out of time.

Owing to the need to expeditiously hear and determine this dispute, the parties agreed to have the objection on jurisdiction heard as part of the substantive Request for Review.

The following were the respective parties submissions during the hearing of the Request for Review and the preliminary objection.

The Applicant's Case

Counsel for the Applicant contended in support of the Request for Review that the Applicant submitted a tender to the Procuring on 30th November, 2017 in accordance with the Procuring Entity's requirements and that on the same date, the tender was opened at 12.00 noon. The Applicant further contended that after the opening, it did not hear from the Procuring Entity again despite writing a letter dated 2nd March, 2018 to the Procuring Entity requesting to know the progress or the outcome of the procurement process.

Counsel for the Applicant additionally submitted that the Procuring Entity illegally, unfairly without regard to procedure, and without regard to the letter of 2nd March, 2018, purported to terminate the tender through a letter dated 14th May 2018. He further submitted that the Procuring Entity's inordinate delay and the refusal to communicate or respond to the

correspondence from the Applicant breached the provisions of article 47 (1) of the Constitution of Kenya, 2010.

Counsel for the Applicant also submitted that the letter through which the subject procurement process was terminated was signed by a person other than the Accounting Officer of the Procuring Entity. He stated that the said letter was signed by one Boaz Okello who is not the General Manager of the Procuring Entity and that the purported termination was therefore illegal, null and void **ab initio**.

It was the Applicant's further contention case that under the provisions of Section 63(1) of the Public Procurement and Asset Disposal Act 2015, that it was only the accounting officer of a Procuring Entity who can terminate procurement proceedings and that no other officer of a Procuring Entity can usurp or purport to exercise a power that is exclusively vested in law on the accounting officer of a Procuring Entity.

On the reason for termination, Counsel for the Applicant submitted that the reasons given by the Procuring Entity did not fall within any of the grounds of termination set out under the provisions of Section 63 of the Act which has elaborately set out the grounds of termination of a tender process.

Counsel for the Applicant further stated that the Procuring Entity's decision to terminate the procurement process herein was based on a report dated 28th June, 2018 allegedly authored by the National Government and Public Universities collaboration on food security.

He however submitted that the said report did not relate to the project which was the subject matter of the procurement in issue and that the decision to terminate was therefore based on the wrong premise.

He additionally submitted that the said report was a power point presentation which was not conclusive and that the same ought not to have formed a basis for the termination of the tender process.

On the issue of the procedure to be observed while terminating a procurement process, Counsel for the Applicant submitted that the Procuring Entity had not comply with the procedural requirements set out under the provisions of Section 63 of the Act and that it had not produced any evidence to show that it had notified the Director General of the Public Procurement Authority of the termination of the procurement proceedings as required by the provisions of Section 63(2) of the Act.

Turning to the preliminary objection on jurisdiction, Counsel for the Applicant stated that the said objection did not have any basis in law as the Procuring Entity had not produced any evidence to show when it served the letter of notification of the termination of the procurement process on the Applicant.

Counsel for the Applicant further submitted that the Applicant received the letter of termination of the procurement process on 4th June, 2018 and produced the envelope showing the date of receipt of letter. He therefore submitted that the time for the filling of the Request for Review started running from 4th June, 2018 and ended on 18th June, 2018.

He contended that the Request for Review which was filed by the Applicant on 14th June, 2018 was therefore filed within time.

In conclusion, Counsel for the Applicant urged the Board to dismiss the preliminary objection raised by the Procuring Entity and allow the Request for Review.

The Procuring Entity's Response

In response to the Request for Review, Counsel for the Procuring Entity submitted that the Procuring Entity notified the Applicant of the termination of the Procurement process herein on 14th May 2018.

Counsel for the Procuring Entity further stated that the Procuring Entity communicated the termination of the procurement process to the Applicant on 14th May, 2018 in accordance with the instruction to bidders (ITB) 2.10.4 of the tender document and Section 63 of the Act. She also contended that the Procuring Entity gave reasons for the termination which in the Procuring Entity's view was necessitated by the need to undertake a validation exercise of the design for optimization and revision of the total area covered by the project and the method of water conveyance which in the Procuring Entity's view was informed by recommendations from a team of university experts on hydrology on the project who were tasked to undertake the validation of the project which was also meant to ensure value for money. She additionally submitted that the team recommended that further studies be undertaken and change of technology be made for water conveyancing which was considered a substantial technological change.

Counsel for the Procuring Entity urged the Board to look at the validation report and find that the termination of the procurement process herein was based on valid reasons.

On the issue of who had signed the letter of termination, Counsel for the Procuring Entity conceded that the letter of termination of the procurement process was signed by one Mr. Boaz Okello who was the Head of Procurement of the Procuring Entity and not by the Accounting Officer of the Procuring Entity. She also conceded that it was only the Accounting Officer of a Procuring Entity who can terminate procurement proceedings under the provisions of Section 63(1) of the Act.

She however urged the Board to uphold the termination and dismiss the Applicant's Request for Review.

The Applicant's Reply

In a short response to the submissions made by Counsel for the Procuring Entity, Mr. Nyamu Advocate for the Applicant submitted that it had been admitted that the letter of termination was signed by one Boaz Okello who was not the Accounting Officer of the Procuring Entity. He stated that the power to terminate procurement proceedings could not be delegated. He also emphasised that the report upon which the termination was based referred to a High Grand falls for Galana Kulalu Dam and not the High Grand falls Dam as in the project the subject matter of the tender. With regard to the date of the validation report namely 28th June 2018, he stated that the report was actually prepared and authored after the filling of the Request for Review and that this action contravened the provisions of

Section 168 of the Act relating to stay of procurement proceedings upon the filling of a Request for Review.

THE BOARD'S DETERMINATION

The Board has considered the submissions made by Counsel for both parties and has further examined all the documents placed before it and finds that this Request for Review raises the following two issues for determination:-

- (i) Whether the Board is deprived of the jurisdiction to hear and determine the Request for Review before it on account of the request for review having been filed out of time contrary to the provisions of Section 167 (1) of the Act.
- (ii) Depending on the Board's determination of issue (i) above, whether in terminating the tender process herein, the Procuring Entity acted within the provisions of Section 63 (1) of the Act.

The Board will now proceed to determine the issues framed for determination as follows:

1. As to whether the Board is deprived of the jurisdiction to hear and determine the Request for Review before it matter on account of the request for review having been filed out of time contrary to the provisions of Sections 167 (1) of the Act.

As already stated above, during the hearing of this request for review counsel for the Procuring Entity contended that the Board lacked jurisdiction in this matter on account of the request for review having been filed out of time. She relied on the allegation that the Applicant was served with the notice of termination on 14th May 2018 via an email through its official email

address. She further added that although the hard copy of the letter of notification was sent to the Applicant by way of registered mail, a notification had been sent to the Applicant via email on the 14th of May 2018. She also added that the Applicant had not denied that the email address belonged to it and that it had further not disputed that it received the letter of notification of the termination.

Counsel for the Procuring Entity therefore stated that under the provisions of Section 167(1) of the Act, the Applicant could only seek administrative review within 14 days of becoming aware of the occurrence of an alleged breach or within a period of fourteen (14) days of receiving the letter of notification. She contended that the Applicant knew about the termination on 14th May 2018 and not on 4th of June, 2018.

Counsel for the Procuring Entity relied on among other cases the Court of Appeal decision in the case of the **Owners of the Motor Vessel "Lillan S" v. Caltex Oil (Kenya) Ltd (1989) KLR** where the court of Appeal held that a court or any other judicial body could not hear or determine a matter where it lacks the jurisdiction to do so.

In response to the Preliminary Objection raised by the Procuring Entity, Mr. Nyamu advocate for the Applicant opposed the Preliminary Objection stated that the time for the filing of this Request for Review started running from the date of receipt of notification of decision by the Procuring Entity to terminate the procurement process but not from the date when the letter of notification of the termination is dated. He further stated that the Applicant was notified by a letter sent by post which was received on 4th June 2018 and that time therefore started running from the said date and ended on 18th

June 2018. He produced the original envelope containing the letter of notification and which the Applicant stated it received on 4th June, 2018.

Counsel for the Applicant further argued that the Applicant never received the email stated to have been sent to it by the Procuring Entity on 14th May 2018. He further argued that it was clear on the face of the email document attached to the Procuring Entity's affidavit and which was marked as annexure GMM5, that one could not tell when the email was sent, the web or the homepage from which it was sent. He contended that the document appeared like one that had been typed.

The Board has perused the documents submitted to it and has considered the rival submissions made before it by the parties to this Request for Review and notes that the Procuring Entity produced and relied on an email dated 14th May 2018 allegedly sent to the Applicant as proof of service of the letter of notification. The said email reads as follows:-

“Attached please find our letter on the above referenced subject and tender. The hard copy and the submitted sealed financial and funding proposals that have been returned to you through registered mail at your address.”

There is no doubt that under the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act 2015 a candidate or a tenderer who is aggrieved by the decision of a Procuring Entity to terminate a procurement process must file a Request for Review regarding the said decision within a period of fourteen (14) days from the date of becoming aware of the same. The said Section 167(1) of the Act provides as follows:-

Section 167 (1) "Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."

The Board has considered the opposing positions taken by the two parties on when the letter of notification was served or received by the Applicant and the question which arises is, which, between 14th May 2018 and 4th June 2018 is the date when the Applicant was notified that the tender process herein had been terminated. Upon a consideration of all the evidence placed before it the Board however finds that even though the letter of termination was dated 14th May 2018 that was not the date of service of the letter of notification of the termination of the tender because the existence of the said letter was not brought to the attention of the Applicant on that date.

Although the Procuring Entity contended that it emailed the letter of termination to the Applicant on 14th May 2018, the Board has however looked at the email purportedly addressed to the Applicant and which was attached to the Replying Affidavit sworn by Gitonga Mugambi, the General Manager of the Procuring Entity and notes that the same was purportedly emailed to the following addresses michaels.short@gbmmec.com; chris.von.kienlin@gbmmec.com. The Applicant has however disputed that the said letter was ever sent to its email address. The Board wishes to

observe at the outset that the said email which was attached to Mr. Mugambi's Affidavit does not conclusively show that the email address used was Applicant's email or that the letter of notification was sent to the Applicant. The Board further notes that the Procuring Entity did not provide an authentication to show that the email was sent and was received by the Applicant. In the circumstances therefore the Board is of the considered opinion that the Applicant was not notified of the termination process herein on 14th May, 2018.

In the absence of clear proof of service of the letter of notification, it is Board's view that it is legally untenable for the Procuring Entity to argue that the Request for Review filed by the Applicant herein on 14th June, 2018 was filed outside the statutory period of 14 days. In the case of **Maalin Trading Co. Ltd Vs County Government of Wajir (PPARB 22 of 2017)** the Board held as follows as regards the issue of service and when the time for the filling of a Request for Review starts running:-

"The Board is of the considered view that when it comes to notification, it is not the date on the letter of notification that counts, rather what counts is the date that letter is brought to the attention of the intended recipient."

The Board therefore finds that the Applicant was notified of the termination of the procurement process herein on 4th June 2018 and the period of 14 days started running from 4th June 2018 and lapsed on 18th June, 2018. It is the further finding of the Board that the Applicant having filed this Request for Review on 14th June, 2018 the same was filed within the statutory time set out under the provisions of Section 167(1) of the Act. The Board therefore holds that the Applicant complied with the provisions of Section 167 (1) of

the Act in terms of the time for the filing of the Request for Review. Accordingly, this ground of preliminary objection fails and is disallowed.

The Board consequently holds that it has the jurisdiction to hear and determine the Request for Review on its merits.

2. Whether the Procuring Entity, in terminating the subject tender, acted within the provisions of Section 63 (1) of the Act.

Turning to the substantive issue namely the reason/ground for the termination of the procurement process, the Board has considered the submissions made by the parties and has also read through all the documents which were placed before it and which are relevant to the issue now before it.

It is evident from the undisputed facts in this case that the Procuring Entity herein invited bids for Tender No. NIB/T/018/2016-2017 for Funding, Design, Build, Own, Operate and Transfer of the High Grand Falls Dam Project and Associated Irrigation Infrastructure in Kitui, Tana River and Garissa Counties in the Republic of Kenya on 19th October, 2017. The method of procurement that was used by the Procuring Entity was that of a Request for Proposals (RFP) through restricted tendering. The letter of invitation for the submission of proposals was sent to six tenderers who had been shortlisted through an earlier Expression of Interest process.

It was further not disputed that only one bidder namely M/s Messrs GBM - ERG Consortium (GBM Projects Limited and ERG Insaat Ticaret Ve Sanayi A.S) - the Applicant herein - returned its tender on the date that the tender closed/opened which was on 30th November 2017.

In an internal memorandum dated 17th April 2018, the Engineering Services Department of the Procuring Entity tender however commenced termination proceedings of the tender. It recommended the termination of the procurement proceedings on the basis of the need to undertake a validation exercise of the design for optimization and revise the total area covered in the project and the method of water conveyance. The user department considered this to be a substantial technological change that in its view prompted the need for immediate termination of the procurement proceedings.

Pursuant to the above and in a letter dated 14th May 2018 signed by one Boaz Okello, the Applicant was informed as follows:

“In accordance with Instructions to Bidder (ITB) 2.10.4 of the issued RFP document and Section 63 of the Publication and Asset Disposal Act (2015), the Procuring Entity, National Irrigation Board (NIB) has terminated the procurement proceedings for the above tender. The termination of the procurement proceedings has been necessitated by the need to undertake a validation exercise of the design for optimisation and revise the total area covered in the project and method of water conveyance. This change was considered as a substantial technological change that prompted the need for immediate termination of the procurement proceedings pursuant to Section 63 (1) (a) (ii) of the Act.”

It is the obviously the Procuring Entity's letter dated 14st May 2018 informing the Applicant that the subject tender had been terminated that triggered the filling of this Request for Review. The issue which the Board's therefore needs to determine is whether the Procuring Entity acted within

the law in terminating the procurement proceedings relating to the subject tender the way it did.

Before embarking on the determination of the above issue, the Board wishes to observe that the law on when and how a Procuring Entity can terminate a procurement process is now well settled and is as follows:-

The law on the Board and the court's jurisdiction to determine the validity of a termination process is now well settled and has been the subject matter of several decisions delivered by the Board and the court on the issue.

One of the leading decisions on the issue of termination is the case of **Republic -vs- The Public Administrative Review Board, The Kenya Civil Aviation Authority and Thales Air Systemi Intergrati (Nai HC Misc. Appl. No. 1260 of 20017)** where Justice Nyamu (as he then was) and Justice G. Dulu while considering the provisions of Sections 36 and 100 of the repealed public Procurement and Disposal Act 2005 held that the Board has jurisdiction to hear and determine a question challenging the termination of a procurement process by the Procuring Entity.

The Board has adopted the above decision and reasoning in several of its previous decisions as illustrated by the case of **AON Kenya Insurance Brokers Ltd -vs- The Teachers Service Commission (PPARB Appl. No. 8 of 2015)**".

Based on the above decisions therefore where the decision of a procuring Entity to terminate a procurement process is challenged before the Board, the procuring Entity is under a duty to place sufficient reasons or evidence before the Board to justify and support the termination of the procurement process under challenge. The Procuring Entity must in addition to

providing sufficient evidence also demonstrate that it has complied with the substantive and the procedural requirements set out under the provisions of Section 63 of the Public Procurement and Asset Disposal Act 2015 which states as follows:-

Section 63 (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."

The Board has examined the facts and the circumstances surrounding this case and more particularly the letter of termination and finds, based on the undisputed fact that the letter of termination herein was signed by one Boaz Okello who was admittedly not the Accounting Officer of the Procuring Entity that the purported termination of the procurement process herein was wrongful from the start.

Under the provisions of Section 63(1) of the Public Procurement and Asset Disposal Act, it is only the accounting officer of a Procuring Entity who can terminate procurement proceedings. The Board further finds that the letter of termination is what embodies the decision to terminate and the power to make such a decision cannot be delegated.

The Board reiterated the above position in the case of **Surperserve Ltd -vs- County Government of Lamu & The Ministry of Transport, Infrastructure, Housing & Urban Development (PPRBA No. 77 of 2018)** where the Board held as follows in a case where the Head of Procurement of the Procuring

Entity had also purported to sign a letter of termination of a procurement process.

“Firstly it is evident from the letter of termination of the procurement process that the same was signed by Mr. Jonah M. Zealot who from his own admission is the Assistant Director Supply Chain Management of the Procuring Entity but not by the Accounting Officer of the Procuring Entity. Under the provisions of Section 63(1) of the Act, it is only an Accounting Officer of a Procuring Entity who can sign a letter of termination of a procurement process and cannot delegate that mandate”.

The Board had earlier made the following relevant observation in the case of Shenzhen Star Instrument Co. Ltd -vs- Kenya Power & Lighting Company Ltd (PPRBA NO. 48 of 2018).

“ As far as matters procurement are concerned, the Act and the Regulations have elaborately defined the functions of each officer involved in procurement. The Act and the Regulations have elaborately set out who should commence the process, who should open tenders, who should evaluate the same, who should give a professional opinion, who should finally sanction and sign the letter of award and more importantly in this case who should grant an extension of the tender validity”.

In view of the provisions of Section 63(1) of the Act and the above decisions, the letter of termination dated 14th May, 2018 and which was signed by Mr. Boaz Okello is a nullity and could not terminate the procurement process herein.

The above findings notwithstanding, the Board further holds that the Procuring Entity terminated procurement proceedings herein on the basis of an alleged substantial technological change under the provisions of Section 63 (1) (a) (ii) of the Act. The Board has read through the affidavit sworn by Mr. Gitonga Mugambi, the General Manager of the Procuring Entity herein. The said affidavit states as follow in part;-

Para 7: “In January, 2018, a National Government and Public Universities Collaboration on Food and Nutrition Security Initiative was set up consisting of University of Nairobi, Egerton University, Moi University, Jomo Kenyatta University of Agriculture and Technology, the National Irrigation Board, the Agriculture Development Corporation, the Ministry of Agriculture and Irrigation and Ministry of Water and Sanitation to validate the progress and proposed development of the GKFSP among other food security initiatives under the *Big 4 Agenda*. The task was executed through the work of six (6) Thematic Working Groups reviewing the various aspects of agricultural development including water resources, water storage and conveyance infrastructure, on-farm engineering, crop production and associated socioeconomic and environment risks.”

Para 9: “After conducting the validation exercise, one of the findings of the group concerning the project herein was as follows:

“Reconnaissance study of the proposed water transfer from Tana catchment at High Grand Falls (HGF) to Galana-Kulalu

concluded this option was not feasible, owing to the long distance and difficult terrain current and proposed downstream water demands. However, detailed analysis is required to establish impacts on existing and planned downstream water demand. This includes water demand for the LAPSSET in Lamu, proposed expansion of Bura Irrigation, Lahore canal project, and annual flash floods for maintaining the Lower Tana Delta, and critically to control saline water intrusion around the delta”.

Para 11: “From the findings it was considered necessary to undertake validation exercise of the project design for optimisation and revise the total area covered in the project and method of water conveyance. This change was considered as an issue of substantial technological change that would change the nature of the project substantially and reduce the cost as well. “

The Board has perused the document styled “National Government and Public Universities Initiative on Food and Nutrition Vol. 1: Galana-Kulalu Food Security Project, Executive Validation Report: 2018 Section on the Proposed Galana Dam and Hydrology” and notes the following:

- i) The document is a power-point presentation of the National Government and Public Universities Initiative on Food and Nutrition
- ii) The document was signed by Eng. Wangai Ndirangu on 28th June 2018

- iii) The document is part of the Ministry of Agriculture and Irrigation report on Expanding Irrigated Acreage for Food Security and Nutrition Security dated February, 2018
- iv) The power point presentation appears focussed on the Galana-Kulalu Food Security Project and does not focus on the tender subject of this request for review.
- v) The power point presentation makes recommendation for further studies including validation by the Universities consortium.

The Board notes that the document on the basis of which the termination of procurement proceedings of the subject tender was based is dated 28th June 2018 long after the termination was done on 14th May 2018. Parts of the document are dated February 2018 casting doubt on the authenticity of the document. The Board further notes that the document was signed 14 days after this Request for Review had been filed. The Board however finds that under the provisions of Section 168 of the Act once a Request for Review is filled, the same operates as a stay of procurement proceedings. Section 168 of the Act states as follows:

“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”.

Under the provisions of Section 168 of the Act therefore, once a Request for Review has been filed with the Board there is what is commonly referred to as a **“stand still period”** when all processes relating to a procurement are

suspended until the Request for Review is heard and determined. A procuring Entity cannot therefore for example evaluate tenders or publish addenda or issue letters of notification or take any other steps relating to the procurement process during this time. This was the holding of the Board in the case of **Avante International Technology Inc -vs- Independent Electoral and Boundaries Commission (PPARB Appl. No. 19 of 2017)** where the Board annulled a termination of a tender which was effected under the provisions of Section 63 of the Act during the pendency of a Request for Review filed with the Board.

For whatever it is worth, the “National Government and Public Universities Initiative on Food and Nutrition Vol. 1: Galana-Kulalu Food Security Project, Executive Validation Report: 2018 Section on the Proposed Galana Dam and Hydrology” offends the provisions of Section 168 of the Act since it was signed after the filling of the Request for Review herein and was therefore of no legal effect.

But even assuming that the document was authentic and valid the fact that it is a power point presentation and that the document was not submitted to any authority makes it an inconclusive study of the subject in issue. The document itself recommends further validation studies implying that the decision to terminate the subject tender was based on an inconclusive research, if at all. The Board further notes that the Procuring Entity did not produce the appointment letters and the terms of reference of the members of the National Government and Public Universities Collaboration on Food and Nutrition Security Initiative set up in January, 2018 and neither did it avail the product of the Initiative’s work. It is the Board’s further view that

the power point presentation referred to in Mr. Mugambi's affidavit does not meet the requirements of the product of a study capable of being acted upon.

The authenticity of the validation document aside, the Board notes that the document makes no mention of novel technological innovations that would merit the termination of the tender which is the subject matter of this request for review under the provisions of Section 63 (1) (a) (ii).

Further, the Act allows for termination of procurement proceedings under the circumstances identified in Section 63 sub-section 1 (a) to (i) and for the Director-General of the Public Procurement Regulatory Authority to be given a written report of the termination pursuant to the provisions of sub-section (2). In the tender which is the subject matter of this review, the circumstances permitting termination and which are spelt out under Section 63 (1) (a) to (i) were lacking. Further, no written report was filed with the Director-General of Public Procurement Regulatory Authority on the termination pursuant to sub-section (2) of Section 63 of the Act.

These essential requirements were set out by the Board in the case of **Muema Associates -vs- Turkana County Council (PPARB Appl. No. 35 of 2008)** where the Board held that in order for there to be a lawful termination, a Procuring Entity must among other things do the following.

- i. Give sufficient notice to all bidders of the decision to terminate the procurement proceedings.
- ii. Give sufficient reasons for the decision to terminate.
- iii. Give a report to the Authority regarding the decision to terminate procurement proceedings.

The Board therefore finds that the purported termination of the tender the subject matter of this request for review is null and void since the same was not done in accordance with the law as laid out under the provisions of Section 63 of the Act.

The Board further wishes to state that under the provisions of the Public Procurement and Asset Disposal Act 2015, a Procuring Entity is required to evaluate any tender or tenders submitted to it by a bidder or bidders and the fact that only one bidder has submitted a bid cannot entitle the Procuring Entity to refuse to evaluate the tender in issue.

Under the provisions of Section 176(1) (c) of the Act it is an offence for the Procuring Entity or any of its staff to fail to evaluate and award a tender.

The said Section 176(1) (c) of the Public Procurement and Asset Disposal Act provides as follows:-

Section 176 (1) "A person shall not—

- a)
- b)
- c) **delay without justifiable cause the opening or evaluation of tenders, the awarding of contract beyond the prescribed period or payment of contractors beyond contractual period and contractual performance obligations.**

The Board finally wishes to observe that there has been a considerable increase in the number of procurement proceedings being terminated without legal basis. Such terminations are in the Board's view, unnecessarily

and only serve to delay procurement processes and end up denying the public an opportunity to benefit from the intended procurements. Most cases of termination normally arise where there is a change of personnel at the Procuring Entity or where a favoured bidder is unable to submit a tender to the Procuring Entity for one reason or the other among many other factors. ~~law~~.

In the end therefore this Request for Review succeeds and is allowed in terms of the following orders:

FINAL ORDERS

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, 2015 the Board makes the following orders on this Request for Review.

- a) **The Request for Review filed by the Applicant in respect of Tender No. NIB/T/018/2016-2017 for the Funding, Design, Build, Own, Operate and Transfer of the High Grand Falls Dam Project and Associated Irrigation Infrastructure in Kitui, Tana River and Garissa Counties, Republic of Kenya be and is hereby allowed.**
- b) **The Procuring Entity's termination of the said tender *vide* its letter dated 14th May 2018 be and is hereby annulled and the same is set aside.**
- c) **The Procuring Entity is directed to evaluate the tender or tenders submitted to it and conclude the procurement process herein**

including the making of an award within fourteen (14) days from the date of this decision.

- d) The tender validity and the tender security validity periods are extended for a further period of forty-five (45) days to enable the Procuring Entity complete the process as directed in order number (c) above.
- e) Owing to the fact that the procurement process herein is not completed, each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 4th day of July, 2018.


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CHAIRMAN
PPARB


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SECRETARY
PPARB

