

THE REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 144/2020 OF 25TH NOVEMBER 2020

BETWEEN

COUNTY BUILDERS LIMITED.....APPLICANT

AND

**THE ACCOUNTING OFFICER,
MINISTRY OF TRANSPORT, INFRASTRUCTURE,
HOUSING, URBAN DEVELOPMENT AND PUBLIC WORKS,
STATE DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT.....1ST RESPONDENT**

**MINISTRY OF TRANSPORT, INFRASTRUCTURE,
HOUSING, URBAN DEVELOPMENT AND PUBLIC WORKS,
STATE DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT.....2ND RESPONDENT**

Review against the decision of the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works (State Department of Housing and Urban Development) with respect to Tender No. MTIHU DPW/SDHUD/UDD/006/2020-2021 for the Proposed Construction of Kangari Market in Muranga County.

BOARD MEMBERS

- | | |
|----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Joseph Gitari | -Member |
| 3. Qs. Hussein Were | -Member |

4. Arch. Steven Oundo, OGW -Member
5. Ms. Njeri Onyango -Member

IN ATTENDANCE

1. Mr. Philemon Kiprop -Holding brief for the Secretary

BACKGROUND TO THE DECISION

The Bidding Process

The Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works, State Department of Housing and Urban Development (hereinafter referred to as "the Procuring Entity") invited sealed tenders for Tender No. MTIHUDPW/SDHUD/UDD/006/2020-2021 for the Proposed Construction of Kangari Market in Muranga County (hereinafter referred to as "the subject tender") through an advertisement published on 19th August 2020 on the Procuring Entity's Website.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of twenty-nine (29) bids by the bid submission deadline of 15th September 2020. The same were opened shortly thereafter by a Tender Committee in the presence of tenderers' representatives.

Evaluation of Bids

The Evaluation Committee undertook evaluation of bids in the following stages: -

- i. Preliminary Evaluation;
- ii. Technical Evaluation; and
- iii. Commercial Evaluation.

1. Preliminary Evaluation

At this stage, the Evaluation Committee evaluated tenders against the criterion outlined in Clause 2.1 of the Instructions to Tenderers read together with Stage 1. Preliminary Evaluation of Bids of the Appendix to Instructions to Tenderers of the Tender Document and found fourteen (14) tenderers responsive and thus eligible to proceed to Technical Evaluation.

2. Technical Evaluation

At this stage, the Evaluation Committee evaluated tenders against the technical specifications outlined in Stage 2. Technical Evaluation of Bids of the Appendix to Instructions to Tenderers of the Tender Document based on assessment made on a pass/fail basis. At the end of Technical Evaluation, the Evaluation Committee found 2 tenderers responsive and thus eligible to proceed to Financial Evaluation They included: -

- M/s County Builders Limited; and
- M/s Njuca Consolidated Limited.

3. Financial Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Stage 3. Financial Evaluation of Bids of the Appendix to Instructions to

Tenderers of the Tender Document with a view of determining the lowest evaluated tenderers for award of the subject tender. The Evaluation Committee noted the tender prices of the two tenderers as follows: -

Rank	Bidder Name	Bid Amount (Kshs)
1	County Builders Limited	342,866,956.20
2	Njuca Consolidated Limited	442,690,175.30

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s County Builders Limited at the sum of Kshs. 342,866,956.20 for being the lowest evaluated tenderer.

Professional Opinion

In a professional opinion dated 15th October 2020, the Procuring Entity's Head of Supply Chain Management Services reviewed the Evaluation Report dated 6th October 2020 and noted the need for a due diligence exercise to ensure fairness, transparency and accountability on the evaluation process. On 30th October 2020, the Accounting Officer of the Procuring Entity, through hand written comments on the said professional opinion, terminated the subject procurement proceedings on account of material governance issues and suggested areas of improvement on bid document by referring the Head of Supply Chain Management Services to comments on page 9 and 17 of the said professional opinion.

Notification to Tenderers

In letters dated 5th November 2020, the Procuring Entity notified all tenderers that the subject procurement process has been terminated due to governance issues and in accordance with section 63 (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as “the Act”) and further stated the process would be re-advertised soon.

THE REQUEST FOR REVIEW

M/s County Builders Limited (hereinafter referred to as “the Applicant”) lodged a Request for Review dated 25th November 2020 and filed on even date together with a Statement in Support of the Request for Review sworn on 25th November 2020 and filed on even date and a Statement in Response to Reply by the Respondents, sworn on 4th December 2020 and filed on even date, through the firm of Chepkuto Advocates, seeking the following orders:

-

- a) An order declaring the Respondents breached the provisions of Article 227 (1) of the Constitution and section 63 of the Act;***
- b) An order annulling and setting aside the Respondents decision terminating the procurement proceedings with respect to the tender herein;***
- c) An order quashing and setting aside the Invitation to Tender via the re-advertisement of the tender and the subsequent re-tendering process be quashed and set aside forthwith;***

- d) An order directing the Procuring Entity to complete the subject procurement process and directing the Applicant to be evaluated as per the provisions of section 80 of the Act;***
- e) An order compelling the Respondents to pay costs to the Applicant arising from/and incidental to this Application.***
- f) Such and further orders as the Board may deem fit and appropriate in ensuring the ends of justice are fully met in the circumstances of this Request for Review.***

In response, the Respondents addressed a letter dated 1st December 2020 to the Board Secretary and filed the same with the Board on 2nd December 2020 (hereinafter referred to as “the Respondents’ Response”).

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority’s website (www.ppra.go.ke) in recognition of the challenges posed by Covid-19 pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board’s administrative and contingency management plan to mitigate the Covid-19 pandemic. Through this circular, the Board dispensed with

physical hearings and directed that all request for review applications shall be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged Written Submissions dated 9th December 2020 and filed on even date. The Respondents did not lodge Written Submissions.

BOARD'S DECISION

The Board has considered each of the parties' pleadings together with the confidential documents submitted pursuant to section 67 (3) (e) of the Act and finds that the following issues call for determination: -

- I. Whether the Accounting Officer of the Procuring Entity terminated the subject procurement proceedings in accordance with the substantive and procedural requirements for termination specified in section 63 of the Act.**

Depending on the outcome of the above issue: -

- II. Whether a procuring entity ought to find tenderers non-responsive as a result of arithmetic errors found in their tenders during Financial Evaluation.**

The Applicant's and the Procuring Entity's rival cases on the question of termination of the subject procurement, are as follows: -

At paragraph 1 of its Request for Review, the Applicant avers that the Respondents breached the provisions of the Act and the Constitution for their failure to notify all tenderers of termination of the subject procurement proceedings within 14 days in accordance with section 63 (4) of the Act. The Applicant further avers that the Respondents (i) failed to offer sufficient reasons for termination of the subject procurement proceedings, (ii) failed to take into account the fact that the Applicant prepared its bid in accordance with provisions of the Tender Document and the Act, (iii) failed to follow the procedural and substantive requirements for termination under section 63 of the Act by proceeding to re-advertise the subject tender and thus ignored the principles of fairness, equitability, transparency, competitiveness and cost-effectiveness as required by Article 227 (1) of the Constitution. At paragraph 4 of its Written Submissions, the Applicant states that it learnt of the Procuring Entity's re-advertisement of the subject tender through the local dailies thus filed the Request for Review to challenge the Procuring Entity's action. According to the Applicant, it only received notification of termination on 2nd December 2020, posted by the Respondents on 27th November 2020, after the Applicant lodged its Request for Review. Having had sight of the Respondents' Response, the Applicant in its Statement in Response to the Respondents' Response and paragraph 33 of its Written Submissions opposed the Respondents' averment that the subject procurement process would still be terminated as a result of arithmetic errors in financial bids of tenderers who proceeded to Financial Evaluation. In the

Applicant's view, the Respondents raised financial aspects of the tender while on the other hand terminated the procurement process due to material governance issues. The Applicant further states that the provisions of the Act supersede provisions of the Public Procurement and Asset Disposal Regulations (hereinafter referred to as "Regulations 2020") on the question of arithmetic errors of a tender.

In their Response to the Request for Review, the Respondents state that all tenderers who participated in the subject procurement proceedings were notified of termination vide letters referenced MTIHUD/SDHUD/SCMS/4/11/VOL.1/ (2) dated 5th November 2020 with sufficient reasons given in the said letters. According to the Respondents, tenderers were informed that material governance issues led to the termination of the subject procurement pursuant to section 63 (1) (e) of the Act. To support this position, the Respondents made reference to anonymous letters sent to the 1st Respondent's office and several calls received by the Procuring Entity regarding concerns raised on the evaluation process. As a result, the 1st Respondent issued a circular dated 15th October 2020 and marked as "Annexure 2" of the Respondent's Response to all staff of the Procuring Entity notifying them of the complaints raised and the need for all Heads of Department to sensitize members of their department on sensitivity of the subject procurement process and the level of integrity required. The Respondents further aver that termination of the subject procurement proceedings and the resultant re-advertisement followed the laid down procedure in law. As regards the issue of arithmetic errors in

tenderers' financial bids, the Respondents made reference to Regulation 74 of Regulations 2020 to support their view that all tenders that proceeded to Financial Evaluation had arithmetic errors in their calculations, which errors amount to a major deviation thus requiring such tenders to be disqualified. In conclusion, the Respondents aver that the subject procurement process is part of a presidential directive and that time to conclude the same is of essence, hence the reason why re-advertisement of the tender was made immediately. The Respondents therefore urged the Board not to delay the subject procurement proceedings any further.

Having considered parties' pleadings, the Board notes that, termination of procurement and asset disposal proceedings is governed by section 63 of the Act. Further, if such termination meets the requirements of section 63 of the Act, the jurisdiction of this Board is ousted pursuant to section 167 (4) (b) of the Act which provides as follows: -

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

(a);

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act"

[i.e. section 63 of the Act] Emphasis by the Board

In Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex

parte Selex Sistemi Integrati (2008) eKLR (hereinafter referred to as "the Selex Sistemi Integrati Case"), the court while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Repealed Act") that dealt with termination of procurement proceedings held as follows: -

"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005, section 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the jurisdiction of the Review Board. That question can be answered by a close scrutiny of section 36 (6) of the said Act which provides: -

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

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

"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the

jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal.”

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

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

The court in the Selex Sistemi Integrati Case held that this Board (as was constituted then) had the duty to question whether a decision by a procuring entity terminating a tender met the threshold of section 100 (4) of the Repealed Act, and that the Board's jurisdiction was not ousted by mere existence of a letter of termination furnished before it.

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

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

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

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

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

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v. Public Procurement Administrative Review Board & 2 Others Ex-

parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act”

The Court in JR No. 142 of 2018 affirmed the decision of the Court in the *Selex Sistemi Integrati Case* that this Board has the obligation to first determine whether the statutory pre-conditions of section 63 of the Act have been satisfied to warrant termination of a procurement process, in order to make a determination whether the Board’s jurisdiction is ousted by section 167 (4) (b) of the Act.

It is therefore important for this Board to determine whether the Procuring Entity terminated the subject tender in accordance with provisions of section 63 of the Act, which determination can only be made by interrogating the reason cited by the Procuring Entity and whether or not the Procuring Entity satisfied the statutory pre-conditions for termination outlined in section 63 of the Act. In doing so, the Board finds it necessary to trace the chronology of events in the subject procurement process.

It is not in dispute that the Procuring Entity advertised the subject procurement process through an Invitation Notice published on its Official Website on 19th August 2020. From the Procuring Entity’s Tender Opening Minutes dated 15th September 2020, which forms part of the confidential documents submitted to the Board, a total of 29 tenderers submitted their

tenders in response to the said advertisement. Thereafter, an Evaluation Committee undertook evaluation of bids in the subject tender to determine tenderers' responsiveness to requirements outlined in the Tender Document. Clause 8.3 of the said report further states the Evaluation Committee recommended award of the subject tender to the Applicant. In a professional opinion dated 15th October 2020, the Procuring Entity's Head of Supply Chain Management Services reviewed the Evaluation Report dated 6th October 2020 whilst making the following observations: -

"...Secretariat Comments

The Secretariat noted that the evaluation committee while evaluating the bids never confirmed the authenticity of the bid securities letters issued from the Financial Institutions. This is a fundamental factor and verifying the validity of bid securities is necessary.

The Secretariat also noted that the evaluation committee never conducted due diligence as required in the bidding documents and also under section 83 (1), (2) of the Public Procurement and Asset Disposal Act, 2015. Due Diligence is the verification of Forms submitted in Section IV and if successful bidders fails after conducting due diligence, a report is prepared to the effect and the bid is rejected as non-responsive and second lowest is subjected to due diligence.

The Committee needs to do a due diligence on the documents provided to ensure fairness, transparency and accountability on the evaluation process.

Supply Chain Management Services Opinion

In view of the above Secretariat comments, it's my opinion that the evaluation committee reviews its evaluation report and do due diligence to confirm the authenticity of the submitted documents. It is therefore my professional opinion that the evaluation report for the Proposed Construction of Kangari Market in Murang'a County be returned to the evaluation committee to relook at the issues raised."

Having received the Professional Opinion of the Head of Supply Chain Management Services, the 1st Respondent noted the comments made therein and on 30th October 2020, referred the same back to the Head of Supply Chain Management Services with the following comments written by hand: -

"(1). This tender is hereby terminated and should be repeated on account of material governance issues

(2). Discuss areas of improvement on bid document, refer to page 9 and 17 of my comments"

The Board studied the said professional opinion and notes that the comments on page 9 and 17 referenced by the 1st Respondent relate to

several questions and suggestions made by the 1st Respondent to the Head of Supply Chain Management Services as follows: -

"Page 9. Was the tender reserved for citizens only? Is this for shareholding or it also includes directors? Is this a mandatory criterion?"

What is wrong with the bid-bond issued by insurance companies?"

Page 17. Pass/fail criteria to be restricted to less complex bids especially quotations. Article 227 requires the evaluation process to yield to a fair, transparent process that gives best value for money"

On the face of the said professional opinion, the 1st Respondent made the following additional comments: -

"Refer to my comments & discuss further how to improve bid/tender documents so as to yield better value for money & competitive bids"

Whereas Clause 8.2 of the Evaluation Report dated 6th October 2020 states that a due diligence exercise was conducted on the lowest evaluated tenderer based on the documents submitted by the tenderer, the Secretariat Comments by the Head of Supply Chain Management Services suggest that a due diligence exercise had not been conducted. Apart from the questions raised and suggestions made by the 1st Respondent to the Head of Supply

Chain Management Services on areas of improvement, the 1st Respondent did not approve the recommendation made for the Evaluation Committee to conduct a due diligence exercise. Instead, the 1st Respondent terminated the subject procurement process on account of governance issues and stated the same ought to be "repeated" without particularizing the governance issues referred to as a reason for such termination.

In the Respondents' Response, the 1st Respondent referred the Board to an Anonymous Letter dated 6th October 2020 and marked as "Annexure 1" which contains the following details: -

"Reporting on Corruption Practices in the Proposed Construction of Kangari Market in Muranga County Tender Awarding

Dear PS

Please boss, me I know you to be a people of wisdom and truthfulness and free from corruption. Please now stop the team doing evaluation from continuing with corruption of taking bribes from some contractors. They want to win this project to one contractor who has failed but they are putting good papers in his document and removing the non-compliant. I was told by one of them who is not happy with what the others are doing. The have sworn that the man who has given them 9 million must get the contractor. Before I go to court please try to investigate this scam and tell them to

work uprightly and God will bless them instead of failing the contractors with all papers because of money.

Thank you PS, waiting for you to rescue us from corrupt officers.

Yours faithfully

Contractor (name hidden for security reasons)”

A second anonymous letter dated 23rd September 2020 also marked as Annexure 1 to the Respondents' Response contains the following details: -

"REF: COMPLAIN ABOUT UNETHICAL CONDUCT BY EVALUATION TEAM

Dear Sir/Madam

I am a Kenyan contractor who participated in the above tender for construction of Kangari Market. Whereas I have participated in several tenders in your department previously and I have not been lucky to win any tender, I have always felt that the evaluation has always been conducted in an open and transparent manner. However, I write to register my utmost disappointment with your officers undertaking the evaluation for the above tender.

I have received many calls from some of the evaluation members soliciting for money while convincing me that since I had quoted a higher price than many other contractors I

stand no chance of getting the project unless I "cooperate" with them.

Initially I thought the calls were coming from conmen but the fact they have very precise details about my tender makes me believe that they are officers from your esteemed office.

I have shared the same information with one of my fellow contractors and he has surprisingly told me that he is going through the same ordeal. They have been threatening him that his bid bond would be rejected because it is from insurance company instead of bank. This is despite the fact that the instructions to tenderers did not specify the bid bond must be from a bank.

This is a worrying trend bearing in mind that there are many tenders in your department and this may compromise the integrity of the whole process.

The last caller has given me an ultimatum that they are planning to go to Maanzoni lodge for a retreat and that is where my fate would be sealed if I don't cooperate.

Please consider to rectify this situation before it causes embarrassment to the whole process

Anonymous

Affected Kenyan

CC: Ethics and Anti-Corruption Authority"

Having received anonymous letters on allegations of corrupt practices in the subject procurement process and unethical conduct by the Evaluation Committee, the 1st Respondent addressed an Internal Memo dated 15th October 2020 to all Heads of Department & all AIE Holders and another Internal Memo dated 15th October 2020 to the Head of Supply Chain Management Services, Deputy Director, Supply Chain Management Services. The Internal Memo dated 15th October 2020 addressed to all Heads of Department & all AIE Holders states as follows: -

"Reference is made to my previous memo with respect to the delegation of the Head of Supply Chain Management function between the Directorate of Urban Development and the Directorate of Housing

.....

It has also come to my attention that there are complaints emanating from the public with regards to interference of the procurement processes. This is a grievous offence that has sanctions and penalties defined in the Public Procurement and Disposal Act. Heads of Departments should therefore sensitize their respective departments involved in procurement processes on the sensitivity of the process and the level of integrity required to be involved in the process"

The second Internal Memo dated 15th October 2020 addressed to the Head of Supply Chain Management Services, Deputy Director, Supply Chain Management Services reads as follows: -

"It has come to my attention through the public that the procurement function for this State Department has become less transparent with certain processes receiving undue influences that interferes with our ability to achieve the required standard needed for public procurement This memo serves as a caution that this will not be tolerated as it presents this State Department as an avenue for corrupt practices, impeding the ability of the procurement process to demonstrate the achievement of value for money in all out assets and services acquisition.

I expect that the procurement process going forward will be standardized and implemented as per the law and regulations that govern public procurement. I also expect that members appointed to tender opening, evaluation and contract implementation committees are kept abreast of the high levels of integrity and transparency that is required in the process.

I expect that the procurement process for the State Department be standardized for all forms of procurement and that an operating manual be presented to this office within 21 days. This process and the developed process forms should become part and parcel of any submissions with regards to professional advises presented to this office on any procurement matter"

The 1st Respondent also made reference to several calls he received where concerns on evaluation of tenders in the subject procurement process were raised thus prompted him to issue the two Internal Memos referred to hereinbefore to staff of the Procuring Entity and subsequently, terminating the subject procurement proceedings. As a result, letters dated 5th November 2020 were addressed to tenderers which we note, contain the following details: -

"I refer to the above mentioned tender which you participated in. Kindly note that the tender has been terminated due to governance issues and in accordance with the Public Procurement and Asset Disposal Act, 2015, Section 63 (e). The process will be re-advertised soon. You are requested to collect your bid security from us immediately for cancellation with your Bank"

It is against this background that the Board now turns to address the question whether the Procuring Entity complied with the substantive and procedural requirements for termination of procurement proceedings.

The Organization of Economic, Co-operation and Development (OECD) published the **"OECD Principles for Integrity in Public Procurement (2008)"** (hereinafter referred to as "the OECD Principles") in response to a pressing need identified by countries around the world to reform public procurement systems and reinforce integrity and public trust in how public

funds are managed. At page 9 of the OECD Principles, it is acknowledged that: -

"Governments and state-owned enterprises purchase a wide variety of goods, services and public works from the private sector, from basic computer equipment to the construction of roads. Public procurement is a key economic activity of governments that represents a significant percentage of a Country's Gross Domestic Product. An effective procurement system plays a strategic role in avoiding mismanagement and waste of public funds. Corruption thrives on secrecy. A key challenge across countries is to ensure transparency in the entire public procurement cycle, no matter what the stage of the process is or the procurement method used."

Of all government activities, public procurement is one of the most vulnerable activity susceptible to instances of fraud and corruption. As a result, it is important for a country to have a robust legal framework that would guide public entities in undertaking procurement and asset disposal proceedings.

To understand what material governance is, the Board first interpreted the word **"governance"** and how it relates to public procurement. The Cambridge Dictionary of English, 7th Edition defines **"governance"** as: -

"the way that organizations or countries are managed at the highest level, and the systems for doing this"

According to the United Kingdom Department for International Development (DFID) (2001), governance is: -

"how institutions, rules and systems of the executive, legislature, judiciary and military operate at central and local level and how the state relates to individual citizens, civil society and the private sector"

In the Case decided by the **East African Court of Justice at Arusha, First Instance Division, Reference No. 5 of 2011, Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda (2013)**, the Court addressed the meaning of **"good governance"** at page 7 thereof when it held as follows: -

"Good governance means many things in many contexts..."

Good governance is an indeterminate term used to describe how public institutions conduct public affairs and manage public resources. The concept "good governance" centers around the responsibility of governments and governing bodies to meet the needs of the masses. Because the term good governance can be focused on any one form of governance, organizations and authorities will often focus the meaning of good governance to a set of requirements that conform to the organization's agenda, making good governance imply many different things in many different contexts"

On the other hand, governance and how it relates to public procurement is explained in the book "***Public Procurement: International Cases and Commentary, (2012)*** edited by Louise Knight, as follows: -

"Effective procurement practices provide governments with a means of bringing about social, economic and environmental reform. Conversely, malpractice within public procurement demonstrates a failure of governance and typically arises from corruption and fraud"

From the above definitions, the Board notes that principles of governance dictate the manner in which public entities relates with citizens, and in this instance such principles require procuring entities and tenderers to avoid any form of malpractice that compromise the integrity of a procurement process. Principles of governance that apply in public procurement in Kenya are outlined in the Constitution, some of which include the following: -

"Article 10 (2) (c): The national values and principles of governance include: - good governance, integrity, transparency and accountability

Article 227 (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective."

The answer to the question of what amounts to material governance issues has also been the subject of proceedings before this Board. For instance, in **PPARB Application No. 50 of 2020, Danka Africa (K) Ltd v. The Accounting Officer, Kenya Ports Authority & Another**, (hereinafter referred to as “the Danka Africa Case”) the Board deduced the meaning of material governance in public procurement to mean: -

“significant or important governance issues detected in a procurement process that negatively affect the capability of a procuring entity to guarantee compliance with principles of governance, leadership and integrity when procuring for goods and services. Such material governance issues may emanate from malpractice during the procurement process by the bidders, or by the bidder while colluding with a procuring entity, or operational challenges attributed from policy decisions influencing a procuring entity’s procurement process.”

As was held by the Board in the Danka Africa Case, material governance issues may emanate from malpractice during a procurement process by tenderers, or by a tenderer in collusion with a procuring entity. Material Governance issues may also include operational challenges attributed from policy decisions influencing a procuring entity’s procurement process. Section 63 (1) (e) of the Act suggests the possibility of detecting material governance issues in a given procurement process whilst specifying substantive and procedural requirements for termination of the procurement

process when such a scenario occurs. Section 63 (1) (e), 2, 3 and 4 of the Act states as follows: -

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

(a)

(b)

(c)

(d)

(e) material governance issues have been detected;

(f)

(g)

(h)

(i)

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

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

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.

The Procuring Entity cited section 63 (1) (e) of the Act to support its position that the subject procurement was terminated as a result of material governance issues. From the documents referred to by the Procuring Entity, specifically the anonymous letters dated 6th October 2020 and the one dated 23rd September 2020, allegations of corruption in the subject procurement process were made in the following ways: -

- i. Bribes taken by the Evaluation Committee in the amount of Nine Million Kenya Shillings from some contractors;*
- ii. Attempts made to secure recommendation of award to a particular contractor by removal of documents from a tenderer's tender and insertion of other documents considered to be "compliant documents" into such tenderer's tender;*
- iii. Communications received by tenderers in the form of calls from some evaluation committee members soliciting money from tenderers whilst assuring them that the fate of their tender would be secured in their favour;*
- iv. Threats made by some evaluation committee members to a tenderer of the likelihood of its bid bond being rejected if such tenderer does not "cooperate"; and*
- v. Allegations that the integrity of the subject procurement process has been compromised.*

It is evident that grave allegations of corruption in the subject procurement proceedings were raised in the Anonymous letters addressed to the 1st Respondent which amount to material governance issues. This in the Board's view, presented an opportunity for the Procuring Entity to engage other investigative agencies to address the allegations of corruption. These institutions include the Ethics and Anti-Corruption Commission whose functions are expressed in section 11 of the Ethics and Anti-Corruption Act. No. 22 of 2011 to include the following: -

"The Commission shall: -"

(1) (a)

(b) work with other State and public offices in the development and promotion of standards and best practices in integrity and anti-corruption;

(c) receive complaints on the breach of the code of ethics by public officers;

(d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution"

On the other hand, section 5 (1) (b) (i) of the Office of the Director of Public Prosecutions Act No. 2 of 2013 gives the Director of Public Prosecutions the power to: -

"institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed"

Section 35 (j) of the National Police Service Act, Chapter 84, Laws of Kenya gives the Directorate of Criminal Investigations powers to: -

"investigate any matter that may be referred to it by the Independent Police Oversight Authority" (such as on allegations of corruption) **[Emphasis by the Board]"**

The foregoing provisions support the Board's view that the allegations of corruption in the subject procurement proceedings ought to have been forwarded to the Ethics and Anti-Corruption Commission and/or the Directorate of Criminal Investigations as appropriate for investigation and recommendation to the Office of the Director of Public Prosecutions for any appropriate action. An investigation undertaken on complaints received from the public would then verify the truthfulness or lack thereof, of the allegations raised on corrupt practices.

From the documentation provided by the Procuring Entity, there is no evidence that the Procuring Entity engaged any of the investigative agencies cited hereinbefore so that the truthfulness or lack thereof, of the allegations

of corruption in the subject tender, is verified and other appropriate action taken.

In **Republic v. Public Procurement Administrative Review Board ex parte Nairobi City Water Sewerage Company; Webtribe Limited t/a Jambopay Limited (Interested Party) (2019) eKLR** (hereinafter referred to as “the Nairobi City Water Case”), the Court while addressing the issue of termination of procurement proceedings held as follows: -

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

Having considered the finding in the foregoing case, it is the Board's considered view that the allegations of corruption made through anonymous letters and calls to the 1st Respondent were not only alarming but also raised doubts on the integrity of the subject procurement process. This would have prompted the Procuring Entity to take reasonable steps in (i) engaging investigative agencies to verify the authenticity and truthfulness of the allegations with a view of obtaining real and tangible evidence of the alleged corrupt practices (ii) devising ways of ensuring the integrity of the subject procurement process is protected and (iii) promoting the principle of transparency so as to provide specific reasons to tenderers regarding the

specific material governance issue detected leading to termination of the subject procurement proceedings.

The Procuring Entity attempted an explanation as to why the subject procurement was terminated by providing information to the Board yet it did not provide the same information to tenderers save for citing what the law provides in section 63 (1) (e) of the Act. The filing of a Request for Review should not be the motivation for a procuring entity to explain the allegations received on material governance issues. The Procuring Entity ought to first have the allegations of corruption investigated and verified before relying on such allegations in terminating a procurement processes. Otherwise, it would disenfranchise tenderers if for example, an investigation is undertaken and the outcome of it shows there was no real and tangible evidence to support material governance issues, yet a procuring entity already terminated a procurement process relying on unverified allegations of corruption. This goes to the heart of the rules of natural justice in that tenderers are not deprived of their right to administrative review where a procurement process they have participated in, is terminated solely on allegations of corruption without a verification process undertaken. In essence, an investigation by relevant institutions ought to verify corruption allegations thus providing real and tangible evidence of the material governance issues detected in a given procurement process.

“Material governance issues being detected” is one of the grounds requiring real and tangible evidence to support termination of procurement proceedings under section 63 of the Act. The 1st Respondent did not provide evidence of having taken any action beyond warning its staff of the implications of engaging in corrupt practices in procurement processes generally, after anonymous letters and calls on corruption allegations were received. It is worth noting that the Board was not furnished with any information that phone numbers or names were identified by the Procuring Entity after a follow-up process. If the Board were to take such allegations as the gospel truth, tenderers or any person who wishes to have a procurement process retendered would issue anonymous letters and/or make anonymous calls to procuring entities raising allegations that may lack basis with the hope of a second bite at the cherry. The allegations of corruption made to the 1st Respondent through anonymous letters and calls remain allegations and cannot be taken to be the gospel truth especially since no investigations were undertaken to verify their truthfulness or lack thereof.

In terms of the substantive requirements for termination, the Board finds the Accounting Officer of the Procuring Entity failed to provide real and tangible evidence of the specific material governance issues detected to support termination of the subject procurement process pursuant to section 63 (1) (e) of the Act.

As regards the procedural requirements for termination, section 63 (2), (3) and (4) of the Act are instructive on this aspect. After termination of procurement proceedings, the Accounting Officer must submit a report to the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") within 14 days from the date of termination with reasons for the termination. The Procuring Entity furnished the Board with a letter dated 17th November 2020 addressed to the Director General of the Authority together with a report which we note merely cites the reason for termination of the subject tender due to material governance issues without any particulars of the material governance issues being referred to. Whereas the Professional Opinion of the Head of Procurement function shows termination of the subject tender was approved on 30th October 2020, it is only until 17th November 2020 that the Procuring Entity addressed a letter to the Director General of the Authority. In addition to this, there is no evidence of dispatch of the letter and report to the Office of the Director General of the Authority within fourteen (14) days of termination.

All persons who submitted tenders must be notified within fourteen days from the date of termination and such notice must contain sufficient reasons for termination pursuant to section 63 (4) of the Act. The Board observes that the Procuring Entity attached letters of notification of termination of the subject procurement process, which are all dated 5th November 2020. According to the Dispatch Register by Postal Corporation of Kenya submitted as part of the Procuring Entity's confidential file, notification letters were taken to the Postal Corporation of Kenya on 24th November 2020 while others were taken on 26th November 2020. If the date of 30th October 2020 when

the Accounting Officer approved termination and the date of 5th November 2020 on the letters of termination are considered, then the Procuring Entity sent letters for transmission to tenderers outside the 14-day period specified in section 63 (4) of the Act. On the other hand, at paragraph 1 of its Statement in Response to the Respondents' Response, the Applicant avers that the letter of notification dated 5th November 2020, was posted on 27th November 2020 and received by the Applicant on 2nd December 2020. To support this submission, the Applicant furnished the Board with an envelope of postage wherein a postage stamp dated 27th November 2020 is affixed therein. Furthermore, a receipt stamp of the Applicant shows the letter dated 5th November 2020 was received on 2nd December 2020. This evidence has not been controverted by the Procuring Entity. According to the Board's Dispatch Register, the letter of notification of filing of the instant Request for Review was sent to the Procuring Entity on 26th November 2020 after the Request for Review was filed on 25th November 2020. In essence, the Applicant was notified of termination of the subject procurement outside the 14-day period specified in section 63 (4) of the Act and moreover, termination was made during suspension of procurement proceedings pursuant to section 168 of the Act because the Request for Review had already been filed on 25th November 2020.

The Board was also informed that the Procuring Entity re-advertised the subject tender. To support this, the Applicant attached an extract of MyGov Publication Newspaper which contains a Re-advertisement of **"Tender No. MTIHU DPW/SDHUD/UDD/006/2020-2021 for the Proposed**

Construction of Kangari Market in Muranga County” published by the Procuring Entity. The date of the re-advertisement is not clear save that a date is indicated on the foot of the said extract by hand as “17th Nov”. The Board visited the Official Website of the Procuring Entity’s State Department for Housing and Development (housingandurban.go.ke.) and notes that the Re-advertisement was posted therein on MyGov Issue No. 20 of 17th November 2020 together with a Tender Document in relation to the re-advertisement that can be downloaded. The issuing date of the Tender Document is indicated as 17th November 2020 whereas the tender name is specified as **“Tender No. MTIHUDPW/SDHUD/UDD/006/2020-2021 for the Proposed Construction of Kangari Market in Muranga County”**. This in the Board’s view is sufficient evidence that the re-advertised tender was published on 17th November 2020.

Section 63 (4) of the Act requires notification to tenderers to be made within 14 days of termination while on the other hand, section 167 (1) of the Act gives tenderers 14 days to lodge a Request for Review. This stand-still period precludes the Procuring Entity from re-advertising a tender before the lapse of 14 days after notification of termination is made to tenderers. For instance, the Applicant only received notification of termination on 2nd December 2020 and thus the Procuring Entity was precluded from re-advertising the tender until the lapse of 14 days after 2nd December 2020. The re-advertisement had the potential of interfering with the Applicant’s right to seek administrative review on the Procuring Entity’s termination and was hinged on an unlawful termination process. This therefore makes the

said re-advertisement null and void for contravening the provision of section 63 (4) read together with section 167 (1) of the Act. Evidently, the procedural requirements for termination of a tender were not satisfied in the subject procurement proceedings as we have found.

In the circumstances, the Board finds that the Accounting Officer of the Procuring Entity failed to terminate the subject procurement proceedings in accordance with the substantive and procedural requirements of section 63 of the Act. This therefore means the Accounting Officer's decision terminating the subject procurement proceedings is null and void. The effect of this finding is that the Board has jurisdiction to entertain the Request for Review and shall now address the second issue framed for determination.

On the second issue, the Procuring Entity took the view that the subject procurement process would still be terminated because all tenders that proceeded to Financial Evaluation had arithmetic errors in their calculations and such errors are to be treated as major deviations pursuant to Regulation 74 (2) of Regulations 2020 which provides as follows: -

"Subject to section 79 (2) (b) of the Act any errors in the submitted tender arising from a miscalculation of unit price quantity subtotal and total bid price shall be considered as a major deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive"

The Applicant cited Section 79 (2) (b) of the Act which states that: -

"79. (1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

(2) A responsive tender shall not be affected by—

(a); or

(b) errors or oversights that can be corrected without affecting the substance of the tender"

The Board observes that pursuant to section 79 (2) (b) of the Act, a responsive tender is not affected by errors or oversights that can be corrected without affecting the substance of a tender. However, Regulation 74 (2) of Regulations 2020 views any errors from a miscalculation of unit price quantity subtotal and total bid price to be a major deviation that affects the substance of the tender and would lead to disqualification of the tender as non-responsive.

In considering the provisions cited herein, the Board observes that Regulation 74 (2) of Regulations 2020 is subject to the provision of section 79 (2) (b) of the Act. In the article on "**Solicitors at Risk**" published on November 2013, Andrew Nickels explains the meaning of the phrase "**subject to**" in legal agreements and legislation as follows: -

"Subject to" looks ahead to the exception. It is used in a clause that is secondary to the clause it is expressed to be

"subject to". It tells the reader which clause takes priority where there is an overlap"

In its **"Guide to Legislative Processes in Kenya"** published in 2015, the Kenya Law Reform Commission explains the relationship between subsidiary legislation and a primary legislation (i.e. the parent Act/Statute) as follows:

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"In other words, subsidiary legislation must conform to the primary legislation in all respects"

Thus, the Board deduces the meaning of **"subject to"** as applied in Regulation 74 (2) of Regulations 2020 to mean that Regulation 74 (2) of Regulations 2020 must conform in all respects with section 79 (2) (b) of the Act because the primary legislation being the Act, takes priority over Regulations 2020.

Furthermore, section 31 (b) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya provides that: -

"Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation—

(a)

(b) no subsidiary legislation shall be inconsistent with the provisions of an Act"

Section 24 (2) of the Statutory Instruments Act No. 23 of 2013 further provides that: -

"statutory instrument (i.e. subsidiary legislation) shall not be inconsistent with the provisions of the enabling legislation, or of any Act, and the statutory instrument shall be void to the extent of the inconsistency" [Emphasis by the Board]

The Court in **Petition No. 20 of 2019, Victor Juma v Kenya School of Law & Council of Legal Education (Interested Party) [2020] eKLR** also addressed the legal relationship between a primary/parent legislation and a subsidiary legislation while comparing provisions of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 and the Kenya School of Law Act, 2016 when it held as follows: -

"I see no reason why the provisions of a subsidiary legislation should override the express provisions of an Act of Parliament. It is therefore my finding that the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 are not applicable in this case, and the relevant legislative instrument to be applied is the KSL Act. This means that the Petitioner cannot benefit from the vertical progression recognized in the Legal Education (Accreditation and Quality Assurance) Regulations, 2016."

Given that subsidiary legislation should not be inconsistent with provisions of an Act, when such an inconsistency arises, provisions of the Act supersede. In this instance, Regulation 74 (2) of Regulations 2020 states that any errors should lead to disqualification of a tender yet, the said Regulations should only apply to the extent of section 79 (2) (b) of the Act which allows errors or oversights can be corrected without affecting the substance of a tender to be declared responsive. There is therefore an inconsistency, and thus section 79 (2) (b) of the Act must prevail.

The Board is also mindful of section 82 of the Act which states that: -

"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity"

The Board has established certain errors or oversights can be corrected without affecting the substance of a tender. That notwithstanding, the tender sum remains the same and cannot be corrected even if errors or oversights (which are not necessarily arithmetic errors in a tender) may be identified or corrected pursuant to section 79 (2) (b) of the Act. This explains why a tenderer is bound by its tender sum hence ought to be prepared to implement a tender at its tender sum because award is made based on that tender sum. These provisions support the Board's view that the Procuring Entity did not have leeway to apply Regulation 74 of Regulations 2020 without considering provisions of section 79 (2) (b) and 82 of the Act.

Accordingly, the Board finds that Regulation 74 (2) of Regulations 2020 does not vest an automatic action for the Procuring Entity to find tenderers non-responsive as a result of arithmetic errors found in their bids during Financial Evaluation because the said provision is subject to section 79 (2) (b) of the Act whilst taking into account how a tender sum ought to be treated pursuant to section 82 of the Act.

Having nullified the Procuring Entity's decision on termination, the Board must now identify the step that the Procuring Entity had reached prior to termination so as to determine the next action that the Accounting Officer of the Procuring Entity ought to have taken. The Evaluation Report dated 6th October 2020 and the Professional Opinion dated 15th October 2020 confirm that recommendation for award of the subject tender was made to the Applicant. According to the said evaluation report, the Evaluation Committee states that the Applicant was subjected to due diligence based on the documents submitted in its tender. However, in his professional opinion, the Head of Procurement function expressed the need for a due diligence exercise whilst stating that no due diligence exercise was conducted to confirm the authenticity of the documents provided by the Applicant.

The Board studied all the documents in the Procuring Entity's confidential file but did not find any document clarifying whether a due diligence exercise was undertaken. On its part, Stage 4. Recommendation of Award of Section III. Evaluation and Qualification Criteria of the Tender Document shows that

due diligence was a mandatory exercise. The said provision reads as follows:

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- "(a) Bidders shall be ranked from lowest to the highest evaluated price, and the bidder with the lowest evaluated price identified.***
- (b) The lowest evaluated bidder shall be subjected to due diligence based on the documents submitted under Section IV. Bidding Forms and tender documents on pass/fail basis.***
- (c) if the lowest evaluated bidder fails after conduct of due diligence, a report shall be prepared to that effect and the bid rejected as non-responsive.***
- (d) In that event, the second lowest bidder shall be subjected to the due diligence based on the forms submitted under Section IV. Bidding Forms and tender documents on pass/fail basis.***
- (e) The Bidder whose offer has been determined to be the lowest evaluated bid and is substantially responsive to the tender documents, provided further that the bidder is determined to be eligible and qualified to perform the contract shall be recommended for award of contract"***

The law relating to due diligence as outlined in section 83 of the Act states as follows: -

- "(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.***
- (2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***
- (3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—***
- (a) initial each page of the report; and***
- (b) append his or her signature as well as their full name and designation."***

The Tender Document identified elements of due diligence with similarities to the procedure provided in section 83 of the Act. In his Secretariat Comments in the Professional Opinion outlined hereinbefore, the Head of Procurement function also notes that due diligence should comply with provisions of section 83 of the Act including the preparation of a due diligence report. The Procuring Entity already made due diligence exercise a mandatory exercise under Stage 4. Recommendation of Award of Section III. Evaluation and Qualification Criteria of the Tender Document and the

same ought to be conducted whilst taking into account the provisions of section 83 of the Act as acknowledged by the Head of Procurement function.

In determining the appropriate orders to grant in the circumstances, the Board is mindful of its finding that the Accounting Officer of the Procuring Entity's decision terminating the subject procurement process and the resultant re-advertisement of the tender are null and void. The Board takes cognizance of the comments made by the Accounting Officer of the Procuring Entity of the need to yield better value for money and to award the tender in a system that is competitive. The Procuring Entity also stated that the subject procurement process was undertaken pursuant to a Presidential directive and that time is of essence to conclude the same.

The Board believes that the objectives cited by the Accounting Officer of the Procuring Entity, that is, to yield better value for money and award the subject tender in a competitive manner which are part of the principles outlined in Article 227 (1) of the Constitution, can be achieved. To that end, the Board is of the considered view that a re-advertisement, issuance of new tenders, constituting an evaluation committee that would use additional public resources to undertake another evaluation would amount to unreasonable delay and a burden to tax payer's money whereas time and money has already been spent in undertaking this procurement process. Therefore, the appropriate action to be taken is for the Accounting Officer of the Procuring Entity to ensure the procurement process proceeds to its

logical conclusion including the making of an award subject to a due diligence exercise conducted on the lowest evaluated tenderer in accordance with Stage 4. Recommendation of Award of Section III. Evaluation and Qualification Criteria of the Tender Document read together with section 83 of the Act.

In totality, the Request for Review succeeds in respect of the following orders: -

FINAL ORDERS

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

- 1. The Accounting Officer of the Procuring Entity's Letters of Notification of Termination of Tender No. MTIHUDPW/SDHUD/UDD/006/2020-2021 for the Proposed Construction of Kangari Market in Muranga County dated 5th November 2020 addressed to all tenderers who participated in the subject procurement proceedings, be and are hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Re-advertisement of Tender No. MTIHUDPW/SDHUD/UDD/006/2020-2021 for the Proposed Construction of Kangari Market in Muranga**

County on 17th November 2020, be and is hereby cancelled and set aside.

- 3. The Accounting Officer of the Procuring Entity is hereby directed to conclude the procurement proceedings in Tender No. MTIHU DPW/SDHUD/UDD/006/2020-2021 for the Proposed Construction of Kangari Market in Muranga County including the making of an award to the lowest evaluated tenderer subject to due diligence, within 14 days from the date of this decision.**
- 4. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 15th day of December 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB