

THE REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 50/2020 OF 8TH APRIL 2020

BETWEEN

DANKA AFRICA (K) LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY.....1ST RESPONDENT

AND

KENYA PORTS AUTHORITY.....2ND RESPONDENT

Review against the decision of the Accounting Officer of Kenya Ports Authority with regard to Tender No. KPA/018/2019-20/PSM for the Supply of Fuel.

BOARD MEMBERS

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|-----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Ambrose Ogetto | -Member |
| 3. Ms. Robi Chacha | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Stanley Miheso | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Kenya Ports Authority (hereinafter referred to as “the Procuring Entity”) advertised Tender No. KPA/018/2019-20/PSM for the Supply of Fuel (hereinafter referred to as “the subject tender”) in MyGov Publication Website (www.mygov.go.ke) inviting sealed bids from interested eligible bidders.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of 16 bids by the bid submission deadline of 21st November 2019 and the same were opened shortly thereafter by a Tender Opening Committee at the Procuring Entity’s Procurement Conference Room in the presence of bidders’ representatives.

Evaluation of Bids

An Evaluation Committee appointed by the Managing Director of the Procuring Entity evaluated bids in the following stages:-

- i.** Preliminary Evaluation;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

1. Preliminary Evaluation

At this stage, the Evaluation Committee evaluated the bids received by the Procuring Entity with a view of confirming whether or not bidders submitted the documents listed in Clause 24 of Section III. Tender Data Sheet at pages 42 to 44 of the Tender Document.

At the end of Preliminary Evaluation, thirteen firms were found non-responsive therefore did not proceed to Technical Evaluation. The remaining three firms; M/s Insignia Group Ltd, M/s Danka Africa Ltd and M/s Oxford Oils (K) Ltd proceeded to Technical Evaluation having been found responsive to the requirements at the Preliminary Evaluation Stage.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the evaluation criteria outlined in Clause 30 of Section III. Tender Data Sheet at pages 45 and 46 of the Tender Document, which required bidders to achieve a minimum technical score of 75% to proceed to Financial Evaluation. At the end of Technical Evaluation, the three bidders achieved the following technical scores:-

Bidder	M/s Insignia Group Ltd	M/s Danka Africa Ltd	M/s Oxford Oils (K) Ltd
Score	97%	94.7%	99.7%

At the end of Technical Evaluation, the Evaluation Committee recommended the three bidders to proceed to Financial Evaluation having obtained the minimum technical score required in the Tender Document.

3.1. Financial Opening

On 9th December 2019, the bids of the three firms were opened at the Procuring Entity's Procurement Conference Room and their bid prices recorded.

3.2. Financial Evaluation

At this stage, the Evaluation Committee compared the prices quoted by the three bidders with a view of determining the lowest evaluated tenderers as required under Clause 30.9 (a) of Section II. Instructions to Tenderers read together with Clause 31 of Section III. Tender Data Sheet at page 47 of the Tender Document.

The Evaluation Committee therefore recommended award of the subject tender in the following categories:-

a) Automotive Gas Oil

- M/s Danka Africa (K) Ltd

No	Station	Unit Price VAT Inclusive
1	MAIN STATION	97.37
3	DOCK-YARD	97.37
4	CONT'NER TERMINAL 1 & 2	97.37

5	MOBILE BOWSER	97.37
6	NAIROBI ICD	99.42
7	KISUMU PORT	101.00
8	LAMU PORT	101.06

- M/s Insignia Group Ltd

No	Station	Unit Price VAT Inclusive
2	SOT	97.32

b) Premium Motor Spirit

- **M/s Insignia Group Ltd**

No	Station	Unit Price VAT Inclusive
1	MAIN STATION	103.16
4	CONT'NER TERMINAL 1 & 2	103.16
6	NAIROBI ICD	105.38

- **M/s Oxford Oils (K) Ltd**

No	Station	Unit Price VAT Inclusive
7	KISUMU PORT	106.88

- **M/s Danka Africa (K) Ltd**

No	Station	Unit Price VAT Inclusive
8	LAMU PORT	107.11

Due Diligence

In a letter dated 11th December 2019, the Procuring Entity sought confirmation from M/s Vivo Energy Kenya Ltd in relation to supply of various petroleum products and connectivity to Mombasa SOT Terminal facilities with respect to the three bidders recommended for award of the subject tender. Through a letter dated 19th December 2019, M/s Vivo Energy Kenya Ltd only confirmed the existence of agreements with M/s Insignia Group Limited and M/s Danka Africa (K) Ltd for supply of various petroleum products and that M/s Vivo Energy Kenya Ltd offers Mombasa SOT Terminal facilities.

Professional Opinion

In a professional opinion dated 20th December 2019, the Ag. Head of Procurement and Supplies gave factual background leading to the decision by the Procuring Entity to advertise the subject tender. He then proceeded to review the Evaluation Report noting the recommendation for award made by the Evaluation Committee.

He further noted that in a letter dated 11th December 2019 addressed to M/s Vivo Energy Kenya Ltd, the Procuring Entity sought confirmation whether M/s Vivo Energy Kenya Ltd will be offering SOT connectivity to M/s Insignia Group Ltd, M/s Danka Africa (K) Ltd and M/s Oxford Oils (K) Ltd since the said bidders had provided agreements with M/s Vivo Energy Kenya Ltd for SOT connectivity. In response, M/s Vivo Energy Kenya Ltd through its letter dated 19th December 2019 confirmed having agreements with M/s Insignia

Group Limited and M/s Danka Africa (K) Ltd for supply of various petroleum products and that M/s Vivo Energy Kenya Ltd offers Mombasa SOT Terminal facilities.

He further expressed his satisfaction that the procurement process met the provisions of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and Article 227 (1) of the Constitution. He therefore endorsed the Evaluation Committee's recommendation but that Kisumu Port be awarded to M/s Danka Africa (K) Ltd, owing to the fact that there was no confirmation from M/s Vivo Energy Kenya Ltd of the existence of agreements for supply of petroleum products and SOT connectivity with respect to M/s Oxford Oils (K) Ltd.

Advice on Termination of the Procurement Process

In a letter dated 4th March 2020, the Ag. Head of Procurement and Supplies gave a background leading to the procurement process highlighting challenges faced in the Supply of Fuel to the Procuring Entity. He further advised the Managing Director of the Procuring Entity to approve termination of the subject tender. The said advice was approved by the Managing Director on 5th March 2020.

Notification of Termination

In letters dated 6th April 2020, the Procuring Entity notified bidders who participated in the subject tender that the same was terminated pursuant to section 63 (1) (e) of the Act.

REQUEST FOR REVIEW NO. 37 OF 2020

M/s Danka Africa (K) Limited (hereinafter referred to as "the Applicant") lodged Request for Review No. 37/2020 on 17th March 2020 with respect to the subject tender before this Board seeking the following orders:-

- 1. An order annulling and setting aside the Respondent's decision not to evaluate and/or award Tender No. KPA/018/2019-20/PSM for the Supply of Fuel;**

- 2. The Board be pleased to review all records of the procurement process relating to Tender No. KPA/018/2019-20/PSM for the Supply of Fuel and be pleased to order the Respondent to complete the tendering process, evaluate all bids and award the tender to the lowest bidder as provided for in the tender document;**

- 3. In the alternative to (b) above, an order directing the Respondent to award Tender No. KPA/018/2019-20/PSM for the Supply of Fuel to the Applicant herein in the event the**

Applicant was/is determined and/or found to be the lowest evaluated bidder; and

4. An order directing the Respondent to pay the full costs incidental to these proceedings.

Subsequently, on 27th March 2020, a Consent with respect to Request for Review No. 37/2020 between the Applicant and the Procuring Entity was filed with the Board containing the following details:-

"The parties would be most obliged if the following consent were adopted as the Order of the Board;

By consent;

- a. The Request for Review dated 17th March 2020 be and is hereby marked as settled with no order as to costs.***
- b. The Respondents be and are hereby ordered to complete the procurement process with respect to Tender No. KPA/018/2019-20/PSM for the Supply of Fuel within seven (7) days from the date of this consent.***
- c. In default of (b) above, the Applicant be at liberty to file a Request for Review"***

The Board having considered parties' consent filed before it and in exercise of the powers conferred upon it by Section 173 of the Act, granted the following orders on 7th April 2020:-

- “1. The Consent filed on 27th March 2020 with respect to Request for Review Application No. 37/2020 filed on 17th March 2020, be and is hereby adopted as the orders of the Board.**
- 2. The Board makes no orders as to costs. ”**

REQUEST FOR REVIEW NO. 50 OF 2020

The Applicant on 8th April 2020 lodged a Request for Review which is dated the same day together with a Statement in Support of the Request for Review sworn and filed on even date. Further to this, the Applicant lodged an Amended Request for Review dated and filed on 14th April 2020 through the firm of Muchemi & Co. Advocates, seeking the following orders:-

- 1. An order nullifying and setting aside the Respondent’s decision canceling Tender No. KPA/018/2019-20/PSM for the Supply of Fuel;***
- 2. An order extending the Tender Validity Period for Tender No. KPA/018/2019-20/PSM for the Supply of Fuel to allow the 1st Respondents to complete the tendering process;***
- 3. The Board be pleased to review all the records of the procurement process relating to Tender No. KPA/018/2019-20/PSM for the Supply of Fuel and to direct the Respondents to complete the tendering process, evaluate all bids and***

award the tender to the lowest bidder as provided for in the Tender Document;

4. In the alternative to (3) above, an order directing the Respondent to award Tender No. KPA/018/2019-20/PSM for the Supply of Fuel to the Applicant herein in the event the Applicant was/is determined and/or found to be the lowest evaluated bidder; and

5. An order directing the Respondent to pay the full costs and incidental to these proceedings.

In response, the Respondents lodged a Memorandum of Response dated and filed on 17th April 2020 and a List of Authorities dated and filed on 27th April 2020, through the firm of Muriu, Mungai & Company LLP Advocates.

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 the 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 disease. 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.

In compliance with the directions of the Board, the Applicant lodged its Written Submissions dated and filed on 22nd April 2020 together with a List and Digest of Authorities, while the Respondents lodged their Written Submissions dated 24th April 2020 and filed on 27th April 2020.

BOARD'S DECISION

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

- I. Whether the Procuring Entity terminated the subject procurement process in accordance with section 63 read together with section 3 of the Act, section 4 and 5 of the Fair Administrative Actions Act, 2015, Articles 47, 73, 227 (1) and 232 of the Constitution, thereby ousting the jurisdiction of the Board.**

Depending on the determination of the above issue:-

II. Whether the Board has powers to extend the Tender Validity Period of the subject tender, if so, whether it should extend such period in the circumstances.

Before addressing our minds on the above issues, the Board would like to dispense with two preliminary issues arising from the pleadings filed by parties to this Request for Review.

It is worth noting that the Applicant was notified of termination of the subject procurement proceedings vide a letter dated 6th April 2020. Thereafter, the Applicant lodged a Request for Review on 8th April 2020. However, on 14th April 2020, the Applicant filed an Amended Request for Review that included the following paragraphs:-

"16. THAT Clause 18.1 of the Tender Document under Section III-Tender Data Sheet states that the Tender Validity period for Tender No. KPA/018/2019-20/PSM for the Supply of Fuel is 150 days, which period lapses on or about 21st April 2020.

17. THAT the Tender Validity Period is at risk of lapsing and that if such period is not extended, any resultant contract executed by the Respondents and the

successful bidder will be null and void for failure to comply with Section 135 (3) of the Act

.....

and the following prayer:-

2. THAT, the Board be pleased to extend the Tender Validity Period for Tender No. KPA/018/2019-20/PSM for the Supply of Fuel to allow the 1st Respondent to complete the tendering process."

Section 167 (1) of the Act provides that:-

"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"

Having considered the above provision, it is worth noting that the Applicant's Amended Request for Review filed on 14th April 2020 is within the 14-day statutory period under section 167 (1) of the Act required to approach this Board, if the date of 6th April 2020 when the Applicant was notified of

termination of the subject procurement process is taken into account. Accordingly, the Board admits the Applicant's amended Request for Review as forming part of the proceedings before this Board.

On the second preliminary issue, the Board notes that the Respondents opposed the inclusion of the 2nd Respondent as a party to the Request for Review. In their Memorandum of Response, the Respondents submitted as follows:-

"The 2nd Respondent avers that it is non-suited and the application against it is for striking out in light of section 170 of the Public Procurement and Asset Disposal Act, 2015 (hereafter PPAD 2015)

The Respondents aver that the Request for Review is incurably defective, lacks any evidentiary basis and is for summary rejection"

In their Written Submissions, the Respondents further submit as follows:-

"a. Whether the 2nd Respondent is non-suited

We note that the Applicant has offered no submissions on this point notwithstanding that it was boldly made in paragraph 3 of the Memorandum of Response...

It is unnecessary to spend much time on the point when it can be easily resolved by recalling what the Court of Appeal said

in James Oyondi t/a Betoyo Contractors & Another v. Elroba Enterprises Limited & 8 Others (2019) eKLR;

'It is clear that whereas the repealed statute named the procuring entity as a required party to review proceedings, the current statute which replaced it, the PPADA, requires that the accounting officer of the procuring entity, be the party, the requirement is explicit and the language compulsive that it is the accounting officer who is to be the party to the review proceedings...When a statute directs in express terms who ought to be parties, it is not open to a person bringing review proceedings to pick and choose, or belittle a failure to comply'

It remains for us to remind the Board of its decision of 24th March 2020 in PPARB No. 34 of 2020; Petro Oil Kenya Limited v. Accounting Officer, Kenya Ferry Services & 3 Others. That holding, made only a few weeks ago, and on exactly the same point, completes our submissions on this issue."

The Board considered the Respondents' submissions regarding the Applicant's joinder of the 2nd Respondent as a party to the Request for Review and notes that section 170 of the Act provides as follows:-

"The parties to a review shall be—

(a) the person who requested the review;

(b) the accounting officer of a procuring entity;

- (c) the tenderer notified as successful by the procuring entity; and***
- (d) such other persons as the Review Board may determine”***

The Respondents cited the decision of the Board in **PPARB Application No. 34 of 2020, Petro Oil Kenya Limited v. Accounting Officer, Kenya Ferry Services & 3 Others** (hereinafter referred to as “Review No. 34 of 2020”) where the Board relied on the decision of the Court of Appeal in **Civil Appeal No. 131 of 2018, James Oyondi t/a Betoyo Contractors & Another v. El Roba Enterprises Limited & 8 Others** when addressing the import of section 170 (b) of the Act.

In Review No. 34 of 2020, the Board held as follows:-

“despite the requirement of Section 170 (b) of the Act, an accounting officer be identified as a party to the review and not a procuring entity, Form RB 1, made pursuant to Regulation 73 of the 2006 Regulations still identifies a procuring entity as a party to be joined to the Request for Review, hence the reason why applicants still join the “procuring entity” as a party to the Review to exercise abundance of caution. The Applicant cannot be faulted for joining the “Procuring Entity” as a party to the Request for Review, noting that Form RBI found in the Fourth Schedule to

the 2006 Regulations, which are still applicable, directs the Applicant to join the "Procuring Entity" to its review application.

That notwithstanding the Board notes that Section 170 (b) of the Act is expressed in mandatory terms and this Board would be acting outside the law to hold that applicants should join the procuring entity as a party to the Request for Review. If the legislature intended that a procuring entity be joined as a party to the Request for Review, the legislature would have expressly mentioned that fact as it did in Section 96 (b) of the Repealed Act.

It is also worth noting that the Board already made a finding that when Regulations are inconsistent with the Act, the Act prevails. The Board therefore agrees with the finding of the Court of Appeal that the Accounting Officer must be joined as a party to a review application, noting that any orders issued by the Board are taken up by the Accounting Officer, being the person responsible for overseeing the entire procurement process to its conclusion."

In the above case, the Board found that it is mandatory to join the accounting officer of a procuring entity as a party to the Request for Review

pursuant to section 170 (b) of the Act and not the procuring entity. The Board further noted in the above decision that Form RB 1, made pursuant to Regulation 73 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") still identifies a procuring entity as a party to be joined to the Request for Review, hence the reason why applicants still join a "procuring entity" as a party to the Review to exercise abundance of caution.

Just like the applicant in Review No. 34 of 2020, the Applicant herein cannot be faulted for joining the procuring entity as a party to the Request for Review, when Form RB1 made pursuant to Regulation 73 of the 2006 Regulations still directs it to do so. What the Board is keen to observe is that the Applicant herein joined the necessary party to this Request for Review and that is the Accounting Officer of the Procuring Entity, who has the responsibility to redo anything in the subject procurement process if the Board directs as much pursuant to section 173 (b) of the Act.

Having found that the Procuring Entity is not a party contemplated by Section 170 of the Act, the Board finds that the appropriate remedy is to expunge the 2nd Respondent from being a party to the Request for Review. The Board further notes that such an order does not render the Request for Review defective since the Applicant already joined the necessary party to this Request for Review (i.e. the Accounting Officer of the Procuring Entity) as required by section 170 (b) of the Act.

Accordingly, the Board hereby strikes out the 2nd Respondent from being a party to the Request for Review with no order as to costs.

Having dispensed with the above preliminary issues, the Board shall now address the main issues for determination.

On the first issue for determination, the 1st Respondent through its Memorandum of Response and Written Submissions, took the view that where the procurement process has been terminated in accordance with section 63 of the Act, the Board lacks jurisdiction to entertain the same pursuant to section 167 (4) (b) of the Act. More specifically, the 1st Respondent avers as follows:-

"We however appreciate, as do the decisions referred to by the Applicant, that the jurisdiction will only be ousted if the substantive and procedural steps in section 63 of PPAD 2015 are followed. We show they were, and start with the procedural requirement"

From the foregoing, it is worth noting that, the 1st Respondent appreciates that for the jurisdiction of this Board to be ousted by section 167 (4) (b) of the Act, the Board must first satisfy itself that termination or cancellation of procurement proceedings meets the threshold of section 63 of the Act.

Notably, section 167 (4) (b) of the Act 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]

As noted by the 1st Respondent, the Applicant referred the Board to the finding of the court 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"). In 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 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 has the duty to question whether a decision by a procuring entity terminating a tender meets the threshold of section 63 of the Act, and that this Board's jurisdiction is not ousted by mere existence of a letter of notification terminating procurement proceedings.

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 pre-condition 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 Intergrati* 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 the legality, or lack thereof, of the Procuring Entity's decision terminating the subject tender, which determination can only be made by interrogating the reason cited for terminating the subject procurement process.

A factual background leading to termination of the subject tender is that the Office of the President, through the Chief of Staff and Head of Public Service addressed a letter dated 30th April 2015 to all Principal Secretaries stating as follows:-

"During the meeting of Principal Secretaries held on February 11, 2015, the Chief Executive Office, National Oil Corporation of Kenya (National Oil) presented the mandate and future plans of the Corporation and a proposal for the Corporation to be the supplier of fuel lubricants and Bitumen to Ministries and Government agencies

It was noted and agreed that the initiative will lead to cost-savings, access to guaranteed clean fuel and fraud prevention through use of fuel cards

In order to realize these benefits, all Ministries and Government agencies are, therefore, requested to liaise and

negotiate with the Corporation for supply of fuel oil. Where service contract with other suppliers already exists the contracts should be allowed to run to term after which the Ministry or agency shall revert to the National Oil”

The 1st Respondent submits that its previous contractor, M/s Hashi Energy Limited, handed over the fueling facilities to National Oil Corporation of Kenya (NOCK) on 1st October 2016, following the directive of 30th April 2015 from the Office of the President. As averred by the 1st Respondent in its confidential file, it realized that out of arrangements it was not privy to, NOCK appointed a third party to the contract namely, M/s Great White Investment Limited to carry out actual supplies of fuel to the Procuring Entity on behalf of NOCK, while NOCK provided fuel stocks and logistics support.

Having noted the challenges the Procuring Entity was facing in its engagement with NOCK, on 12th June 2019, the 1st Respondent sought exemption from the directive given through the letter dated 30th April 2015. In the letter of 12th June 2019 addressed to Principal Secretary, State Department of Transport, Ministry of Transport, Infrastructure, Public Works, Housing & Urban Development, the 1st Respondent stated as follows:-

"OPEN TENDER FOR FUEL SUPPLIES AT KENYA PORTS AUTHORITY FOLLOWING UNDER-PERFORMANCE OF NATIONAL OIL CORPORATION OF KENYA (NOCK) IN CONTRACT NO. KPA/135/2016-15/PSM

In line with the directive contained in the letter from the Head of Public Service...copy attached, the Authority negotiated and awarded the contract for fuel supplies to National Oil Corporation of Kenya (NOCK) Ltd. The previous contractor M/s Hashi Energy Limited subsequently handed over the fueling facilities to NOCK on 1st October 2016

Later on, Management realized that out of arrangements the Authority was not privy to, NOCK appointed a third party to the contract. The private firm namely M/s Great White Investment Limited was obligated to carry out the actual supplies on their behalf while NOCK provided fuel stocks and logistics support

Over the contract period, the Authority conducted joint performance review meetings with NOCK's representatives as required in the Conditions of Contract. In summary, the following issues remain of major concern:-

- 1. While introduction of the private firm to run the KPA account contract depicted lack of internal capacity of NOCK to handle the business of such magnitude and complexity, it had the direct effect of lengthened communication chain between the Authority and Contractor***

2. The Authority uses the Shimanzi Oil Terminal (SOT) as the bunkering station for its berthing tugs. However, NOCK does not own shore terminal facilities with pipeline connectivity at SOT; instead relies on hospitality agreements with other private oil marketers

The Contractor's apparent lack of control over their principals' operations at SOT more often than not resulted in inordinately long (up to 24 hours) tug bunkering delays and disruption of shipping schedules- a clear disadvantage to KPA and clients

3. Contrary to expectations, serious cases of adulterated fuel deliveries were reported to NOCK, the following being samples:-

i. Ship berthing Tug Duma II was immobilized after receiving adulterated bunkers on 27th September 2018

ii. Cargo cranes received adulterated fuel on separate occasions. The adulteration was confirmed by SGS who carried out sampling and analysis of the fuel

4.;

5.;

6.;

7.;

Respectfully, in view of KPA business needs and the above highlighted shortcomings of the NOCK contract, I request that the Authority subsequently be excluded from the above stated directive. Instead, kindly approve use of open tender method to procure the services of reputable fuel suppliers with the requisite managerial, technical and financial capacity to deliver on the size and complexity of the growing Port business."

Subsequently, on 24th September 2019, the 1st Respondent advertised an open tender, that is, the subject tender on behalf of the Procuring Entity inviting sealed bids from eligible bidders for the Supply of Fuel to the Procuring Entity. The said advertisement attracted a total of 16 bids, including the Applicant, and the bids were opened on 21st November 2019. The 1st Respondent appointed an evaluation committee that evaluated tenders in the Preliminary, Technical and Financial Evaluation Stages, thereby recommending the Applicant, M/s Insignia Group Ltd and M/s Oxford Oils (K) Ltd for award of the subject tender.

Meanwhile on 16th December 2019, NOCK addressed a letter to the 1st Respondent seeking renewal of its contract whilst stating as follows:-

"This is to notify you that National Oil Corporation of Kenya was awarded the above tender from 1st October 2016 for a period of three years, and extended for another three months effective 1st October 2019.

As the current contract expires on 31st December 2019, we would like to express our interest to have the contract renewed for a further 3 year term based on our mutual beneficial relationship over the past 3 years..."

In a second letter addressed to the 1st Respondent, NOCK stated as follows:-

"Reference is made to the meeting held in your office on 10th January 2020 between yourselves and National Oil Corporation of Kenya

We wish to address Kenya Ports Authority's concerns as follows:-

- 1. National Oil Corporation of Kenya shall directly manage the operations at the fueling stations. No third party contractor shall run the site on behalf of NOC. We have developed the internal capacity to handle business of your magnitude...;***

2. Going forward, NOC has engaged the services of other Oil Marketing Companies who own storage facilities within SOT. This shall ensure efficiency in processing and delivery of product within stipulated and acceptable timelines...;

3.;

4.;

5.;

For a start, NOCK proposes that KPA makes weekly payments based on the average fuel consumption. NOCK on its end shall prepare and submit fuel invoices on a weekly basis accounting for consumption to be netted off from the previous week's prepayment

We gratefully look forward to a positive response on the above proposal and to a mutually beneficial relationship”

However, on 21st January 2020, the 1st Respondent addressed another letter to the Principal Secretary, State Department of Transport, Ministry of Transport, Infrastructure, Public Works, Housing & Urban Development stating as follows:-

"...Based on the experiences under the fuel contract with NOCK, the need to prudently manage fuel deliveries by competent partners cannot be overemphasized

The fuel supply contract was expiring on 19th August 2019, KPA had earlier on vide our letter...dated 12th June 2019 sought for exclusion of the above stated directive by the Head of Public Services through the Principal Secretary, State Department of Transport. The use of open tender was the preferred method of procurement for the supply of fuel contract. It was necessary that the new fuel supply tender be cognizant of lessons learnt from single sourcing as crucial Operational Element as fuel for Port marine craft and equipment

Currently, we have processed the procurement of fuel through the open tender method. NOCK did not show interest in the open tender process and thus never submitted a bid. On the contrary, they have submitted a letter requesting for fresh negotiations on the contract for supply of fuel providing the Authority with a new price list for the products which comparatively is higher than the prices obtained in the open tender process. They have further requested that they be paid in advance prior to making deliveries which exposes the Authority to financial risks in case of non-performance.

Respectfully, in view of KPA business needs and the above highlighted shortcomings of the NOCK contract, I request that the Authority subsequently be excluded/exempted from the above stated directive. The Authority will recommend award to firms that the requisite managerial, technical and financial capacity to deliver on the size and complexity of the growing Port business”

From the documentation before the Board, there is no evidence that the request for exemption from the directive given through the letter dated 30th April 2015 by the Head of Public Service, was granted despite the 1st Respondent having sought exemption from the Principal Secretary, State Department of Transport, Ministry of Transport, Infrastructure, Public Works, Housing & Urban Development vide the two letters dated 12th June 2019 and 21st January 2020.

Subsequently through a letter dated 4th March 2020, the Ag. Head of Procurement and Supplies advised the 1st Respondent as follows:-

“...The Authority through letters of 12th June 2019 and 21st January 2020 sought for exemption of the directive contained in the letter of Head of Public Service dated 30th April 2015. To date we have not received clearance

On the other hand, we have received two letters from NOCK of 16th December 2019 and 14th January 2020 requesting to

have the supply of fuel contract renewed with NOCK commitment towards improved operational and managerial performance

The results of the open tender process under Tender number KPA/019/2019-20/PSM- Supply of Fuel have not been concluded and communicated to bidders as a result of the Authority awaiting response on the request to be exempt from the letter dated 30th April 2015...

It is my considered view that the directive of the Head of Public Service issued vide letter dated 30th April 2015 still stands unless a contrary one is issued. I propose that the open tender process be suspended/terminated and uphold the directive of the Head of Public Service issued vide letter dated 30th April 2015

.....;

The purpose of this letter is to request you to:

- i. Approve termination of Tender number KPA/019/2019-20/PSM- Supply of Fuel..."***

The 1st Respondent proceeded to approve the advice given by the Ag. Head of Procurement and Supplies on 5th March 2020. It is important to note at this point that, on 17th March 2020, the Applicant filed a Request for Review, i.e. Review No. 37 of 2020 with respect to the subject tender seeking among

others, an order *"directing the 1st Respondent to complete the tendering process, evaluate all bids and award the tender to the lowest bidder as provided for in the tender document"*

However, on 27th March 2020, a Consent between the Applicant and the 1st Respondent was filed before the Board, and the Board proceeded to adopt the same on 7th April 2020 with no orders as to costs. On 6th April 2020, the Applicant was notified of termination of the subject procurement process. This prompted the Applicant to file the Request for Review that is now before the Board.

The Board has considered parties' submissions on the first issue for determination and notes that section 63 (1) (e) of the Act provides that:-

"(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”

The letter of notification dated 6th April 2020 addressed to the Applicant by the 1st Respondent herein stated as follows:-

"Reference is made to your participation in the subject tender

You are hereby notified that, pursuant to section 63 (1) (e) of the Public Procurement and Asset Disposal Act, 2015, the tender has been cancelled

Attached herewith please find your original tender security of Kshs. 1,000,000 from M/s Monarch Insurance Co. Ltd for your record.

We however thank you for your participation in the tender and look forward to working with you in future. Should you require any further clarification on the subject tender, please do not hesitate to contact the office of the undersigned for assistance."

The Board observes that the Applicant's case is that the grounds stipulated under section 63 of the Act are not mere pronouncements of the law but are grounds that should be well founded by evidence and fair administrative action that is reasonable and procedurally fair. According to the Applicant, it has no knowledge or information with regards to the material governance

issues allegedly detected by the 1st Respondent nor has the 1st Respondents availed such information before.

To support its submission, the Applicant in its Request for Review referred the Board to Articles 10, 73, 227 and 232 of the Constitution read together with section 3 of the Act to support its view that the foregoing provisions dictate that, procurement processes must be carried out in a manner that promotes fair competition, integrity, transparency, accountability and public confidence. In the Applicant's view, the action by the 1st Respondent cancelling the subject tender without providing real and tangible evidence to support the ground for termination, is in gross violation of the principles under the Act and the Constitution.

On its part, the 1st Respondent in its Memorandum of Response submitted that the reason for termination of the subject tender was stated in the letter dated 6th April 2020 as "material governance issues have been discovered". In the 1st Respondent's view, there is no statutory duty to give any reason and evidence beyond what the statute provides. Such evidence should be treated in confidence pursuant to section 67 (1) of the Act and the same should not be disclosed, except where the statute expressly permits the disclosure. In its Written Submissions, the 1st Respondent further submits that it complied with the procedure for termination of the subject tender as outlined in section 63 of the Act and that a valid and substantive reason for

terminating the subject tender was provided to the Applicant therefore the Board's jurisdiction is ousted by dint of section 167 (4) (b) of the Act.

In its determination of this issue, the Board observes that the dispute before it revolves around the question whether the Procuring Entity did in fact detect material governance issues to terminate the subject tender and the question whether the Applicant was afforded specific and sufficient reasons for termination of the subject tender when it was informed that material governance issues had been detected.

On the first sub-issue, the Applicant attempted an explanation in its Written Submissions of what amounts to material governance issues by stating that these are significant issues detected by a procuring entity, and that they may include; corruption, fraud and collusive tendering during the procurement process that are contrary to the principles of governance and national values under the Constitution.

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 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"

The 1st Respondent cited the decision of 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)** where it was held as follows at page 7 thereof:-

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

Good governance is an indeterminate term used in international development literature to describe how public institutions conduct public affairs and manage public resources. The concept "good governance" centres 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 that a procuring entity and bidders avoid any form of malpractice that compromise a procurement process leading to failure of good governance practices.

Principles of governance that bind public procurement are explained 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 Cambridge Dictionary of English defines “material” as:- *“significant, major, important, of consequence, consequential”*.

Therefore, the Board observes that one may deduce 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.

The 1st Respondent in this instance, having noted that the Principal Secretary, State Department of Transport, Ministry of Transport, Infrastructure, Public Works, Housing & Urban Development failed to provide exemption from the directive of the letter dated 30th April 2015, opted to terminate the subject tender.

This is after the 1st Respondent, through the advice of the Ag. Head of Procurement and Supplies, concluded that the directive given in the letter dated 30th April 2015 is binding to the Procuring Entity and it could not therefore contract the services of other companies, so long as the directive of 30th April 2015 requires the Procuring Entity to procure fuel services from NOCK.

The Board is cognizant that the President issued Executive Order No. 1 of June 2018 specifying the Organization of the Government of the Republic of Kenya whilst directing as follows:-

"IN EXERCISE of the powers conferred by Article 132 (3) (c) of the Constitution as read with Article 13 of the Constitution and all other enabling Laws, I. UHURU KENYATTA, President of the Republic of Kenya and Commander-in-Chief of the Defence Forces, direct:-

THAT the Government shall be organized as set out in this Order:-

- (i) THAT this Order contains portfolios responsibilities and changes made in the structure of Government;***
- (ii) THAT this Order assigns functions and institutions among Ministries and State Department;***
- (iii) THAT this Order supersedes Order No. 1 of 2016 issued in May 2016***

.....;

Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works	State Department of Transport Functions:	Institutions Kenya Ports Authority (Kenya Ports Authority Act, CAP 391)
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Accordingly, the Procuring Entity is an institution under the State Department of Transport, Ministry of Transport, Infrastructure, Public Works, Housing & Urban Development, therefore the directive dated 30th April 2015 issued to all Principal Secretaries (and copied to all Cabinet Secretaries) of various ministries, would be binding to the institutions falling under such ministries.

The inability to procure fuel services from any other supplier but NOCK, is therefore a material governance issue that would prevent the Procuring Entity from concluding a contract with a different supplier when an exemption from the directive issued through the letter dated 30th April 2015 has not been granted.

The 1st Respondent was alive to the fact that it had first sought exemption from the directive of 30th April 2015 on behalf of the Procuring Entity through

a letter dated 12th June 2019, but that no exemption was granted. However, after the lapse of 3 months, the 1st Respondent still proceeded to advertise the subject tender on 24th September 2019 using the open tendering method, despite having received no exemption from the Procuring Entity's parent Ministry.

As earlier noted, the Procuring Entity proceeded with the said procurement process, by opening the 16 tenders received by it, evaluating the same and even recommending 3 bidders for award of the tender in the respective categories.

The Board has already traced some of the challenges cited by the Procuring Entity with respect to its 3-year contract for the supply of fuel with NOCK and the communications made to the Principal Secretary, Ministry of Transport and Infrastructure, Public Works, Housing & Urban Development, which bore no fruits. However, the Applicant contends that the Procuring Entity failed to provide sufficient reasons and evidence of the material governance issues detected thereby influencing the decision to terminate the subject tender.

At this juncture, the Board deems it necessary to consider the authorities cited by parties regarding the question whether the 1st Respondent provided specific and sufficient reasons for terminating the subject tender.

The Applicant and the 1st Respondent referred the Board to the decision of Justice Mativo 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 1st Respondent cited part of paragraph 45 of the said decision, where Justice Mativo 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"

The Applicant on the other hand, cited paragraphs 43 and 45 where the Honourable Judge held as follows:-

"My understanding of section 63 of the Act is that there must be evidence that there is real and substantial technological change. A party invoking the said provision must put forward sufficient evidence for a court to conclude that, on the probabilities, the technological changes cited is of such nature that it renders it imprudent for the contract to proceed on the original terms, and the nature of the change and how it

substantially affects the contract ought to be clearly stated. Differently put, the report to the Director General did not provide reasons to support the existence of substantial technological change

The mere recitation of the statutory language, as has happened in this case is not sufficient to establish the grounds or sufficient reasons. The reasons for the termination must provide sufficient information to bring the grounds within the provisions of the law. This is because the tender process and in particular, termination must be done in a transparent and accountable and legal manner as the law demands. This is because the question whether the information put forward is sufficient to place the termination within the ambit of the law will be determined by the nature of the reasons given. The question is not whether the best reasons to justify termination has been provided, but whether the reasons provided are sufficient for a reasonable tribunal or body to conclude, on the probabilities, that the grounds relied upon fall within any of the grounds under section 63 of the Act. If it does, then the party so claiming has discharged its burden under section 63"

Having considered the finding of Justice Mativo in the Nairobi City Water Case, the Board observes that the court was dealing with termination of

procurement proceedings pursuant to section 63 (1) (a) (ii) of the Act that deals with a procurement having been overtaken by substantial technological change.

In that regard, the Court found that the technological changes cited should be of such nature that it renders it imprudent for the contract to proceed on the original terms, and the nature of the change and how it substantially affects the contract ought to be clearly stated. The court proceeded to conclude that a mere recitation of the statutory language is not sufficient to establish the grounds or sufficient reasons for a termination.

The Board would like to note that the Honourable Judge proceeded to hold that, undue regard should not be given on whether a procuring entity has provided the best reasons, but regard must be given to whether sufficient reasons have been provided. This explains why according to Justice Mativo, a mere recitation of the statutory language, for example, material governance issues have been detected is not sufficient to establish the grounds for termination of a tender or the reasons therefrom.

The Applicant further cited the decision in **Republic v. Public Procurement Administrative Review Board & another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR**, where it was held as follows:-

"In a nutshell therefore, the procuring entity is under duty to place sufficient reasons and evidence to justify and support the ground of 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 procedural requirements set out under the provisions of section 63 of the Public Procurement and Asset Disposal Act, 2015"

The Board notes the emphasis placed by the court in the above case that a procuring entity should provide sufficient reasons and evidence to justify and support the ground for terminating a procurement process. In the Board's view, sufficient reasons, including real and tangible evidence require the 1st Respondent to particularize the material governance issue or issues detected, that prevents it from awarding the subject tender and thereafter executing a procurement contract with a successful bidder. It is therefore not a sufficient ground, as noted in the Nairobi City Water Case, to merely recite or reproduce the provision as expressed in section 63 (1) (e) of the Act.

The Board further notes that the 1st Respondent took the view that it has no statutory duty to give any reason and evidence beyond what the statute provides. In the 1st Respondent's view, such evidence should be treated in confidence pursuant to section 67 (1) of the Act and should not be disclosed,

except where the statute expressly permits the disclosure. Section 67 (1) of the Act, referred to by the 1st Respondent provides as follows:-

"(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—

(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

(b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;

***(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations;
or***

(d) the contents of tenders, proposals or quotations"

On the other hand, section 63 (4) of the Act states that:-

"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 having compared the foregoing provisions observes that, providing a bidder with the specific reasons and evidence why a tender has been terminated does not amount to a breach of section 67 (1) of the Act. The import of section 63 (4) of the Act is to ensure that the right to fair administrative action is achieved in public procurement processes. Article 47 of the Constitution states that:-

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

“(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”

Further, section 5 of the Fair Administrative Actions Act No. 4 of 2015 provides as follows:-

“(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights of interests of a group of persons or the general public, an administrator shall:-

- (a)**;
- (b)**;
- (c)**;
- (d) where the administrator proceeds to take the administrative action proposed**
 - (i) give reasons for the decision of administrative action as taken"**

On its part, section 6 of the Fair Administrative Actions Act, 2015 states as follows:-

- "(1) Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review**
- (2) The information referred to in subsection (1) may include:-**
 - (a) the reasons for which the action was taken**
 - (b) any other relevant documents relating to the matter"**

The constitutional right to fair administrative action including the right to provide a person with sufficient reasons and information following an

administrative action is codified in section 5 and 6 of the Fair Administrative Actions Act. It was never the intention of the legislature for a procuring entity to hide behind section 67 (1) of the Act when it fails to particularize the specific reasons and information for its administrative action.

Section 3 of the Act, which cites the principles that guide public procurement processes provides that:-

"Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

(a) the national values and principles provided for under Article 10;

(b)

(c)

(d)

(e)

(f) the values and principles of public service as provided for under Article 232"

In addition to the above principles, Article 73 (1) of the Constitution that was cited by the Applicant provides that:-

"73. Responsibilities of leadership

(1) Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution;

(ii)

(iii); and

(iv) promotes public confidence in the integrity of the office”

The 1st Respondent ought to have been motivated by the need to promote public confidence in the integrity of the subject procurement process. The Board reiterates that the filing of a Request for Review should not be the only reason that motivates a procuring entity to disclose the specific reasons (in its confidential file) why it has taken an administrative action affecting bidders. The information relating to termination of a procurement process should be availed to bidders beforehand for them to elect whether to challenge such administrative action, especially in this case where section 67 (1) of the Act could not have been breached by disclosure of the specific material governance issue detected.

All bidders, including the Applicant herein had legitimate expectation and commercial interests when submitting their bids in response to the tender advertisement. Therefore, if the conclusion of the procurement process

through the making an award is affected by factors leading to a termination, such bidders ought to be afforded sufficient reasons in the form of real and tangible evidence explaining the material governance issue that was detected by the 1st Respondent. In the very least, bidders ought to have been given an explanation so that they understand why the Procuring Entity is reverting to the directive of 30th April 2015 which it had previously disregarded when it advertised the subject tender.

The Board observes that section 63 of the Act further provides a procedure for termination, which ought to be applied as follows:-

According to section 63 (1) of the Act, termination of a procurement process is done by an accounting officer of a procuring entity prior to notification of tender award, without signing a contract. The Procuring Entity must have real and tangible evidence that supports its grounds for termination of a tender, and not merely stating the grounds provided in the aforementioned section. In the Board's view, "material governance issues having been detected" is one of the grounds requiring real and tangible evidence to support termination based on that ground.

Secondly, the Accounting Officer must submit a report to the Public Procurement Regulatory Authority within 14 days from the date of termination of a tender. Such a report must contain the reasons for termination of the tender.

Fourthly, 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, to afford bidders the right to fair administrative action as stipulated in Article 47 of the Constitution read together with sections 5 and 6 of the Fair Administrative Actions Act, and not merely reciting the statutory language as expressed in section 63 (1) of the Act.

The 1st Respondent submitted that it followed the procedure under section 63 (1) of the Act to the latter upon terminating the subject tender. In the Board's view, following the procedure under that provision is not sufficient, especially in this instance where the Applicant was not informed of the specific material governance issues detected by the Procuring Entity.

In totality of the foregoing, the Board finds that the 1st Respondent failed to terminate the subject procurement process in accordance with section 63 of the Act read together with section 5 and 6 of the Fair Administrative Actions Act, 2015 and Article 10, 47, 73, 227 and 232 of the Constitution, given its failure to provide specific and sufficient information to the Applicant that would have demonstrated real and tangible evidence of the material governance issue detected in the subject procurement process.

The effect of this is that the letter of notification of termination of the subject procurement process dated 6th April 2020 is null and void, hence, the Board

has jurisdiction to entertain the Request for Review, and now proceeds to address the second issue for determination.

On the second issue, the Applicant referred the Board to clause 18.1 of Section III. Tender Data Sheet of the Tender Document to support its view that the Tender Validity Period of 150 days will lapse on 21st April 2020. In the Applicant's view, if the tender validity period is not extended by the Board, any resultant action by the 1st Respondent, such as the signing of a contract would be null and void. The Applicant further cited section 173 (b) of the Act to support its view that the Board has powers to extend the tender validity period, therefore urged the Board to extend such period to allow the 1st Respondent to complete the subject procurement process.

In its Written Submissions, the 1st Respondent refers to section 168 of the Act to support its view that the letter dated 8th April 2020 by the Board Secretary addressed to the Procuring Entity did not suspend the tender validity period and that the Board only suspended the signing of a contract. The 1st Respondent further cited section 88 (1) of the Act to support its view that it is only the Procuring Entity that can extend the tender validity period, and that since the Procuring Entity did not extend such period, the Board cannot extend it.

Having considered parties' submissions, the Board observes that Clause 18 of Section II. Instructions to Tenderers read together with Clause 18.1 of

Section III. Tender Data Sheet of the Tender Document specified the Tender Validity Period to be 150 days after the tender submission deadline.

Whereas Clause 21.2 (a) of Section III. Tender Data Sheet of the Tender Document specified the tender submission deadline to be 24th October 2019. This period was extended to **21st November 2019** vide Addendum No. 2 dated 1st November 2019. Hence, the Tender Validity Period was 150 days after 21st November 2019. By the time the Applicant lodged its Review No. 37 of 2020 on 17th March 2020, 33 days of the Tender Validity Period were remaining.

On the same date of 17th March 2020, the Board Secretary notified the Procuring Entity of the existence of Review No. 37 of 2020. The Board adopted the consent by the Applicant and the 1st Respondent on 7th April 2020. On 8th April 2020, the Applicant lodged the instant the Request for Review.

This now leads the Board to address the 1st Respondent's contention that the Board did not suspend the tender validity period when notifying it of the existence of the request for review. In the letter dated 8th April 2020 addressed to the 1st Respondent, the Board Secretary stated as follows:-

"Tender No. KPA/018/2019-20/PSM

Item: Supply of Fuel

You are hereby notified that on 8th April 2020, a request for review was filed with the Public Procurement Administrative Review Board in respect of the above tender

.....;

Please note that according to the Public Procurement and Asset Disposal Act 2015, the procurement process should be stopped and no contract subject to the Regulations can be signed between the Procuring Entity and the successful tenderers until the appeal has been finalized..."

Section 168 of the Act provides 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"

The Board notes that the import of section 168 of the Act was addressed by **Justice Nyamweya in Judicial Review Application No. 540 of 2017, Republic v. Public Procurement Administrative Review Board & Another, ex parte Transcend Media Group Limited (2018) eKLR** (hereinafter referred to as "the Transcend Media Case") where the Honourable Judge held as follows:-

"The question that needs to be answered by this Court is whether the Respondent correctly interpreted the provisions of the law on the effect of the litigation before it on the tender validity period. The Respondent in this respect held that a notice by the Secretary of the Review Board and any stay order contained therein can only affect the procurement process from proceedings further but cannot act as an extension of the tender validity period, nor can it stop the tender validity period from running.

I find that this position is erroneous for three reasons, Firstly, section 168 of the Act provides that 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. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time-specific and time-bound.

Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point, at least for any deadlines defined by

reference to a period of time, which in this case included the tender validity period. It would also be paradoxical and absurd to find that procurement proceedings cannot proceed, but that time continues to run for the same proceedings.

I am in this respect persuaded by the decision in UK Highways A 55 Ltd vs Hyder Consulting (UK) Ltd (2012) EWHC 3505 (TCC) that proceedings had automatically continued from the point they left once a stay was lifted, and therefore time for service of particulars of a claim had expired in the interim period between when the initial stay expired and a second stay was agreed upon. It was also held in R (H) vs Ashworth Special Hospital Authority (2003) 1 WLR 127 that the purpose of a stay is to preserve the status quo pending the final determination of a claim for review, and to ensure that a party who is eventually successful in his or her challenge will not be denied the full benefit of his or her success. The relevant status quo that will determine a successful party's benefit in the instant case includes the tender validity period."

It is now well established that suspension of procurement proceedings pursuant to section 168 of the Act includes suspension of the tender validity period. The Board finds that this suspension exists by operation of the law

under section 168 of the Act as enunciated by Justice Nyamweya in the Transcend Media Case.

This means that, as at the time the Applicant lodged its Request for Review No. 37 of 2020, 33 days of the tender validity period were remaining and time stopped running with respect to the tender validity on 17th March 2020, to commence running a day after the Board adopted the parties' consent on 7th April 2020. However, on 8th April 2020, when time was to resume running, the instant Request for Review was filed, hence time stopped running. Therefore, 33 days of the tender validity period of the subject tender still remain.

Further, section 88 (1) of the Act provides as follows:-

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

(2)

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

The Act gives the 1st Respondent the discretion to extend the tender validity period and he may do so once for a maximum period of 30 days.

Section 173 of the Act, more specifically subsection (b) thereof provides as follows:-

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

(a);

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

The Board has powers to direct the 1st Respondent to extend the tender validity period for a period of 30 days in accordance with section 88 (1) of the Act. Accordingly, the Board finds that it has powers to direct the 1st Respondent to extend the tender validity period of the subject tender.

In determining whether to extend such period, the Board has established that the decision of the 1st Respondent terminating the subject procurement process as communicated in the letter of notification dated 6th April 2020 is null and void. This therefore means that the 1st Respondent ought to conclude the subject procurement process to its logical conclusion including issuance of notification letters to bidders with specific and sufficient reasons in accordance with the Act and the Constitution.

In giving such direction, the Board notes that the tender validity period of the subject tender still has 33 days before it lapses and this in the Board's view is sufficient time for the 1st Respondent to bring this procurement process to a logical conclusion. However, in the event that the 1st Respondent is unable to conclude the subject procurement process in the 33 days remaining, the Board directs the 1st Respondent to extend the tender validity period in accordance with section 88 of the Act.

In totality, the Request for Review hereby succeeds in terms of the following specific 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 Procuring Entity's Letters of Notification of Termination of Procurement proceedings dated 6th April 2020 with respect to Tender No. KPA/018/2019-20/PSM for the Supply of Fuel addressed to the Applicant herein and all other bidders who participated in the subject tender, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity is hereby directed to complete the procurement process in the subject tender to its logical conclusion including issuance of notification letters to all**

bidders who participated in the subject tender with specific and sufficient reasons in accordance with the Act and the Constitution, within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this case.

3. Each party shall bear its own costs in the Request for Review.

Dated at Nairobi, this 29th day of April 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB