

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO.64 OF 2017 DATED 13TH JULY, 2017**

**BETWEEN**

**SGS KENYA LIMITED.....APPLICANT**

**AND**

**ENERGY REGULATORY COMMISSION .....PROCURING ENTITY**

**AND**

**INTERTEK TESTING SERVICES (EA) LTD.....INTERESTED PARTY**

Review against the Decision of the Energy Regulatory Commission in the matter of Tender No. ERC/PROC/4/3/16 – 17/119 for Provision of Marking and Monitoring of Petroleum Products.

**BOARD MEMBERS PRESENT**

- |                       |          |
|-----------------------|----------|
| 1. Paul Gicheru       | Chairman |
| 2. Neslon Orgut       | Member   |
| 3. Hussein Were       | Member   |
| 4. Rosemary Gituma    | Member   |
| 5. Peter Ondieki, MBS | Member   |

**IN ATTENDANCE**

- |                     |               |
|---------------------|---------------|
| 1. Philemon Kiprop  | - Secretariat |
| 2. Maureen Kinyundo | - Secretariat |

## **PRESENT BY INVITATION**

### **Applicant – SGS Kenya Limited**

- |                     |                     |
|---------------------|---------------------|
| 1. Peter Munge      | Advocate,MMC Africa |
| 2. Muturi Gideon    | Advocate,MMC Africa |
| 3. Albert Stockkell | MD                  |
| 4. Yusuf Jin        | Manager             |
| 5. John P.Onunga    | Senior Analyst      |
| 6. Kimani Muhoro    | Lawyer              |

### **Procuring Entity– Energy Regulatory Commission**

- |                     |                        |
|---------------------|------------------------|
| 1. Wambua Kilonzo   | Advocate               |
| 2. Loise Thuge      | Procurement            |
| 3. Morris Maina     | Lawyer                 |
| 4. Nicholas Malonza | Advocate               |
| 5. Kithure Mutua    | Clerk                  |
| 6. Edward Kinyua    | Ag. Director Petroleum |
| 7. Robert Mahenia   | Advocate               |

### **Interested Parties**

- |                    |                      |
|--------------------|----------------------|
| 1. Anthony Gitonga | Advocate,Intertek    |
| 2. Kimani Muhoro   | Lawyer,Intertek      |
| 3. Lawi Kiplagat   | Nile hauliers, Agent |
| 4. Victor Mbithi   | Manager,Intertek     |
| 5. Jaindi Kisero   | Journalsit           |

## **BOARD'S DECISION**

Upon hearing the representations of the parties and interested candidates before the Board and upon considering the information and all the documents before it, the Board decides as follows:-

### **BACKGROUND OF AWARD**

The Energy Regulatory Commission (ERC) advertised in local dailies the tender bids for Provision of Services for the Marking and Monitoring of Petroleum Products on 12<sup>th</sup> May 2017 for a period of 24 renewed annually at the discretion of ERC.

#### **Bid Opening**

Three (3) bids were received and opened on 31<sup>st</sup> May 2017 in the presence of some of the bidder's representatives.

#### **Firms that responded to RFP**

The firms that responded to the RFP were as follows:

#### **Firms that responded to RFP**

| S/No. | Firms Name                         |
|-------|------------------------------------|
| 1.    | SICPA SA                           |
| 2.    | Intertek Testing Services (EA) Ltd |
| 3.    | SGS                                |

#### **Evaluation**

The evaluation was divided into three main parts namely:

- (i) Preliminary Evaluation
- (ii) Technical evaluation
- (iii) Financial evaluation

The combination of the above was used to come up with the combined evaluation score.

The evaluation criteria applied is set out in the Request for Proposal (RFP).

All bidders provided One (1) original and four (4) copies properly bound.

All the three (3) bidders met all the mandatory requirements and therefore qualified for technical evaluation.

- 1) Sicpa SA.
- 2) Intertek Testing Services (EA) Ltd.
- 3) SGS Limited.

#### Brief Overview of the Submitted Technical Proposals SICPA Security Solutions S.A

- a) Reference letters from clients who have used the technology;
- b) Two distinct markers; one for kerosene and the other one for export products;
- c) Non-launderable marked) Marker contains a forensic layer;
- d) Marker use patented) Ready to use marker thereby eliminating chances of errors during marker preparation;
- e) Proper marker custody process;
- f) Non-plastic sample collection bottles with tamper proof seals;
- g) Good monitoring methodology – requires no chemical extraction during testing
- h) Ability to automatically transmit to the client test results from the field test equipment; and
- i) Easy to use self test kit.
- j) Weaknesses
- k) Non re-usable self test kits; and b) High cost marking and monitoring methodology.

## **INTERTEK TESTING SERVICES (E.A) LTD**

### **Strengths**

- a) Reference letters from clients who have used the technology;
- b) Markers supplied as ready to use blends;
- c) Marker blend contains a forensic layer;
- d) Non-launderable markers; and
- e) Non-plastic sample collection bottles with tamper proof seals.

### **Weaknesses**

- a) Universal layer of marker for both kerosene and export product. Identification of adulteration by kerosene is thus based on elimination after a second test ruling out export dumping. Accordingly if the export layer is left out during marker blending, it would be hard for the field team to identify what constitutes adulteration or dumping;
- b) Testing procedure requires extraction of markers by use of chemicals making the process complicated and doubtful in case of a legal process;
- c) Markers lack specific patents;
- d) No mention of the re-usability of the self test kits; and
- e) Non-detailed self test kit distribution mechanism.

## **SGS KENYA LIMITED**

### **Strengths**

- a) Two distinct markers; one for kerosene and the other one for export products;
- b) Non-launderable markers;
- c) Marker blend contains a forensic layer;

- d) Good monitoring methodology – requires no chemical extraction during testing;
- e) Ability to automatically transmit to the client test results from the field test equipment;
- f) Markers use patented; and
- g) Self test kit re-usable;

#### Weaknesses

- a) Lack of reference letters from clients who have used the technology;
- b) Markers will require preparation which was perceived as the manual mixing or blending process that may be prone to errors; and
- c) Sample retention containers have plastic material making them non-tamper proof.

#### General Observations

- i) The increasing need of detection of adulteration by use of Jet A1 ought to have been captured in the terms of reference for this tender. This is so because Jet A1 is never marked unlike illuminating kerosene and there is reliable information that the perpetrators of adulteration have now shifted to the use of Jet A1 as an adulterant for diesel. Further, the Commission is now aware of an existing technology that can easily detect presence of Jet A1 in motor fuels.
- ii) The team also noted the need for a detailed explanation of how the test results from the monitoring teams are to be transmitted to the client. To this end the advantage of use of a real time and tamper proof mechanism that would provide more authentic results.

## **Professional Opinion & Recommendation**

It was noted that technological change in the field of Marking and Monitoring of Petroleum products where real time data capture and transmission of results was available and it would be prudent for the Commission to adopt the new and efficient technology which will ensure value for money.

In view of the above the Head of Procurement recommended that the procurement process should be terminated in compliance with section 63 (1) of the Public Procurement and Asset Disposal Act 2015 where (a) the procurement has been overtaken by (ii) substantial technological change.

The Director General considered and approved the opinion and recommendation to facilitate re-tendering for the services where new technological change will be incorporated.

## **REVIEW**

The Request for Review was lodged by M/s SGS Kenya Limited on 13<sup>th</sup> July, 2017 in the matter of the Tender No. ERC/PROC/4/3/16-17/119 for Provision of Marking and Monitoring of Petroleum Products.

The Applicant sought for the following orders:-

- a) The termination of the Procurement Proceedings of Tender No. ERC/PROC/4/3/16-17/119 and any process or steps taken pursuant to the said termination be declared null and void.*
- b) The Respondent, Energy Regulatory Commission, be directed to award tender Number ERC/PROC/4/3/16-17/119 for provision of marking and monitoring petroleum products to the Applicant, SGS Kenya Limited.*

- c) In the alternative to (b) above, the Respondent be directed to proceed with the tender process and complete the entire process, including the making of an award.*
- d) The Applicant be awarded costs for the Request for Review herein.*
- e) The Board do grant such further orders as it may deem fit to grant in the interest of justice and under the circumstances of the case herein as provided by Section 173 of the Act.*

During the hearing of this Request for Review, the Applicant was represented by Mr. Peter Munge Advocate from the firm of M/s Muriu Mungai & Company Advocates while the Procuring Entity was represented by Mr. Wambua Kilonzo advocate from the firm of M/s S. M. Kilonzo and Associates. Although all the bidders who participated in this tender were notified of the existence and the hearing date for this Request for Review only the firm of M/s Intertek Testing Services (EA) Ltd appeared during the hearing and was represented by Mr. Anthony Gitonga and Mr. Kimani Muhoro advocates from the firm of M/s Muhoro and Gitonga Advocates.

The Board has considered the Applicant's Request for Review dated 13<sup>th</sup> July, 2017, the supporting affidavit sworn by Mr. Albert Stockell support of the Request for Review together with all the documents annexed to the said affidavit.

The Board has also considered the responses filed by the Procuring Entity and the interested party herein on 21<sup>st</sup> July, 2017 and 25<sup>th</sup> July, 2017 respectively.

The Board has also considered the written and the oral submissions made before it by all the parties to this Request for Review and finds that it was evident from all the documents that were filed before it and the submissions



made by the parties that this Request for Review raised the following two issues that were set out by the Applicant at page 5 of it's written submissions dated 21<sup>st</sup> July, 2017.

- i) Whether the Review Board has the power to hear and determine a dispute touching on termination under the provisions of Section 63 of the Public Procurement and Asset Disposal Act.**
- ii) Whether the termination of the tender the subject matter of this Request for Review was undertaken in compliance with the provisions of the Constitution and the Public Procurement and Asset Disposal Act.**

The Board will now proceed to consider and render a decision on each of the two issues:-

#### **ISSUE NO. I**

**Whether the Review Board has the power to hear and determine a dispute touching on termination under the provisions of Section 63 of the Public Procurement and Asset Disposal Act.**

The first issue which touches on the Board's jurisdiction to hear and determine the Applicant's Request for Review was raised by the Applicant in it's written and oral submissions made before the Board. It however transpired during the hearing of the Request for Review that neither the Procuring Entity nor the interested party was challenging the Board's jurisdiction to investigate the propriety of the Procuring Entity's decision to terminate the subject tender.

It was infact conceded by Mr. Wambua Kilonzo and Mr. Anthony Gitonga Advocates for the Procuring Entity and the interested party respectively that the Board has the jurisdiction to inquire into the propriety of a termination process undertaken by a Procuring Entity.

The above admissions therefore put to rest the question of whether the Board has the jurisdiction to hear and determine the dispute before it but before leaving the issue of jurisdiction, the Board wishes to state that the question of the Board's jurisdiction to inquire into the legality of the exercise of a Procuring Entity's right to terminate is now well settled and the law on this issue has been the subject matter of several decisions by the courts and the Board as illustrated by the following decisions among others.

The leading decision on this issue is the case of **Republic -vs- The Public Procurement Administrative Review Board, The Kenya Civil Aviation Authority Ex-parte Selex Systemi Intergrati (Nai HC Misc. Application No. 1260 of 2007)** where the court affirmed the Board's jurisdiction to hear and determine any issue touching on the propriety of a termination of a procurement process by a Procuring Entity. The court stated as follows in the said decision:-

**"In our present case the purported termination was done after award of tenders was communicated as confirmed by both the Applicants and the interested party and even the 2<sup>nd</sup> Respondent. This cannot be a situation covered by the ouster clause under Section 36(1) of the Act. It is my finding and decision that the ouster clause under Section 36(1) of the Act does not apply to the present case as the tender was already awarded. There is no subsequent event from parties other than the Procuring Entity that actuated the proceedings. I therefore hold that both the 1<sup>st</sup> Respondent and this court has jurisdiction to consider and review the decision of the 2<sup>nd</sup> Respondent, the Procuring Entity to terminate the awarded tender".**

The Board restated the above position in the recent case of **Avante International Technology Inc -vs- The Independent Electoral and Boundaries Commission** [PPARB Review No. 19 of 2017] where it referred to several decided cases in the following words:-

**“.....the High Court expressly held that a bidder who is dissatisfied with a Procuring Entity’s decision to terminate a tender process can actually challenge the decision to terminate the process before the Board which is bound to consider the legality or otherwise of the decision to terminate.**

**The above position has been upheld in several other decisions and one of the most recent decision by the High Court is the case of **Republic -vs- The Central Bank of Kenya Ltd, the Kenya Anti-Corruption Commission and Horse Bridge Network Systems (EA) Ltd** (Nai Constitutional Application 87 of 2014) by the Honourable Justice Weldon Korir. The Court of Appeal now has put the matter to rest in the case of **Nai. CA No. 69 of 2015; Ethics and Anti-Corruption Commission -vs- Horsebridge Network Systems (EA) LTD** where the Court of Appeal has emphatically stated that the Board has the power to question and even annul a termination...”**

It is therefore clear from all the above decisions that the Board has the jurisdiction to hear and determine this Request for Review and will accordingly proceed to examine the legality of the termination of the tender under consideration as set out in issue number II below.

## **ISSUE NO. II**

**Whether the termination of the tender the subject matter of this Request for Review was undertaken in compliance with the provisions of the Constitution and the Public Procurement and Asset Disposal Act.**

On the second issue framed for determination, Counsel for the Applicant started off his submissions by stating that the Procuring Entity advertised an open tender inviting bidders to submit bids for the provision of marketing and monitoring of petroleum products under tender number ERC/PROC/4/3/16-17/119 with a tender closing date of 12<sup>th</sup> May, 2017 which was later extended to 31<sup>st</sup> May, 2017.

Counsel for the Applicant further submitted that pursuant to the said invitation to tender, the Applicant, the interested party and the firm of SCIPA Security Solutions S.A Company Limited submitted their bids which went through the entire evaluation process leading upto a recommendation of award of the tender being made by the Procuring Entity in favour of the Applicant.

Counsel for the Applicant however stated that inspite of the above recommendation the Procuring Entity notified the Applicant vide a letter dated 7<sup>th</sup> July, 2017 that it had terminated the procurement proceedings in question on the ground that the terms of reference of the procurement in issue did not include some emergent technological requirements.

It was the Applicant's case that the Procuring Entity's decision to terminate the procurement proceedings in the manner it did breached the law and was arrived at in bad faith. Mr. Munge advocate stated that it was clear from the Procuring Entity's bundle of response and more particularly from pages 91 to 92 of the said document that the offending action of the Procuring Entity was based on the professional opinion paper dated 7<sup>th</sup> July, 2017 signed by M/s Loise Thuge, the Head of the Procuring Entity's Procurement Department who noted that there had been a technical change in the field of marketing and

monitoring of petroleum products where real time data capture and transmission of results was being used now. She therefore recommended that the tender process in question be terminated so that the Procuring Entity could adopt the new technology so as to ensure efficiency and obtain value for money in the monitoring process.

Counsel for the Applicant however faulted the professional opinion and stated that the termination of a tender process on the ground that the terms of reference did not include some emergent technological requirements required expert evidence or evidence in the form of a technical report to establish the existence of the new technology. Counsel for the Applicant relied on the Board's decision in the case of **Avante International Technology, Inc –vs- Independent Electoral and Boundaries Commission (PPARB Appl. No. 19 of 2017)** in support of his contention that the Procuring Entity ought to have retained the services of a technically qualified expert or a team of experts who should have given an opinion to establish the existence of the new technology.

It was the Applicant's further case that the Procuring Entity's Head of Procurement was not technically qualified to comment on the existence of the alleged new technology since her bio data on professional qualifications showed that she was a procurement professional and was not therefore technically competent to demonstrate that there had indeed been a technical change to justify the termination of the procurement process.

Counsel for the Applicant further stated that the professional opinion prepared by the Head of Procurement of the Procuring Entity did not also indicate that there had been any substantial technological change as contemplated by Section 63(1)(a)(ii) of the Act and that in any event, the

Applicant and SCIPA Security Solutions S.A had proposed in their technical proposals that they were able to provide real time data capture and transmission of results technology if awarded the subject tender. The Applicant stated that it was willing to offer the said service at it's quoted price of USD\$2,619,447.46 and termed the Procuring Entity's decision to terminate the tender based on the above ground as one made in bad faith, was imprudent and unreasonable and was not meant to achieve the objective of ensuring efficiency or that the Procuring Entity would obtain value for money.

Turning to the wording used by the Procuring Entity, Counsel for the Applicant submitted that the Procuring Entity had decided to terminate the procurement process herein on the ground that there had been an emergent technological change. He however submitted that what Section 63(1)(a)(ii) of the Act required the Procuring Entity to demonstrate was that there was substantial technological change. He stated that the legislature had clearly used the word substantial change which according to the Oxford Dictionary meant a change "of considerable size or value". Counsel for the Applicant however argued that the Procuring Entity had not submitted any evidence to show that the Applicant's bid had been overtaken by any other technology or that there was substantial technological change.

He therefore urged the Board to find and hold that the Procuring Entity's decision to terminate the tender in question was improper and that the termination ought to be set aside.

Mr. Wambua Kilonzo advocate for the Procuring Entity opposed the Applicant's Request for Review. Mr. Kilonzo submitted that the Procuring Entity's decision to terminate the procurement proceedings was proper and

was done in compliance with the provisions of Section 63(1) (a) (ii) of the Public Procurement and Asset Disposal Act.

He further submitted that the Procuring Entity's Accounting Officer had complied with all the steps set out in Section 63 of the Act in effecting the termination and had issued letters of notification of the termination to all the bidders who participated in the procurement process and had also notified the Public Procurement Regulatory Authority of the Procuring Entity's decision to terminate the tender as required by the provisions of Section 63(2) of the Act. He referred the Board to the letters of notification appearing at pages 93 to 96 of the Procuring Entity's response in support of his argument.

In addition to the power of termination set out under Section 63 of the Act, Counsel for the Procuring Entity additionally stated that Clause 2.10.4 of the tender document gave the Procuring Entity the power to terminate the procurement proceedings before a contract award and that in doing so, the Procuring entity would not be liable to any person in the event of a termination. It was the Procuring Entity's case that having purchased and submitted its tender to the Procuring Entity; the Applicant was bound by the provisions of clause 2.10.4 of the tender document and could not therefore challenge the Procuring Entity's decision to terminate.

Turning back to the substantive ground cited by the Procuring Entity for the termination of the procurement process, Counsel for the Procuring Entity submitted that there are two types of motor fuels in the market namely the Automotive Gas Oil (AGO) which was in the ordinary parlance referred to as "diesel" and the second one being the premier motor sport which was referred to in the ordinary parlance as "super". He stated that these two

motor fuels are usually adulterated by unscrupulous traders using illuminating kerosene or the Jet A1 fuel. Counsel for the Procuring Entity stated that in order to eliminate the adulteration of the Automotive Gas Oil and super fuel using illuminating kerosene, the Government introduced a requirement that illuminated kerosene be marked via legal notice No. 64 of 2000.

He explained that the use of adulterated fuel in any machine would lead to the machine malfunctioning and thereby occasioning loss to the owner of the machine since knocks are not insured or insurable.

Counsel for the Procuring Entity further submitted that the Procuring Entity floated the tender in question in order to provide a mechanism for detecting adulteration and ensuring the quality of petroleum products which were made available to members of the public.

He further stated that when the Procuring Entity first advertised the tender in question, the tender provided for a self-test mechanism which was reliant on a human being physically undertaking the test and transmitting the test results. He however stated that the said mode of testing had its drawbacks such as the possibility of manipulation by the person doing the test because of the human intervention factor and the delay in the transmission of results among other factors.

Counsel for the Applicant further submitted that there would ordinarily be a considerable period of delay between the time of testing the fuel and the time of relaying the result which often compromised the gathering of evidence and the quality of the test report.



Counsel for the Procuring Entity also stated that upon the submission of bids by the three bidders who had participated in the procurement process for the terminated tender, the Procuring Entity realized from the technical proposals submitted by the Applicant and SICPA Security Solutions S.A that the two companies were capable of automatically transmitting the test results from the field test equipment real time and that this being a better technology it would eliminate the possibility of interference of the test results through human intervention and also expedite the gathering and transmission of evidence.

Counsel for the Procuring Entity stated that it is this realization that led to the termination of the initial procurement process in order for the Procuring Entity to procure the real time monitoring and transmission technology which was far much superior to that being sought to be procured.

On the competence of the professional opinion prepared by M/s Loise Thuge, Counsel for the Procuring Entity submitted that the opinion was based on the findings of the Procuring Entity's technical evaluation committee and the Head of Procurement was therefore entitled to prepare the opinion based on the findings of the tender evaluation committee.

Mr. Wambua further stated that the Procuring Entity's Head of Procurement acted in compliance with the provisions of Section 84 of the Act in giving her opinion and that there was no evidence of bad faith on her part.

He additionally stated that all the bidders who submitted their tenders in the terminated process would not suffer any prejudice since they were entitled to submit their tenders afresh incorporating the new technology which the Applicant had demonstrated that it possessed.

Mr. Kilonzo further stated that the Board could not interfere with the Procuring Entity's decision to terminate the procurement process since it was the Procuring Entity's duty to determine its technological requirements and that the Board could not therefore dictate to the Procuring Entity what technology it would use.

On the language used by the Procuring Entity, Counsel for the Procuring Entity stated that the words "emergent technological requirements" and "substantial technology change" meant one and the same thing and that there was no difference in the meaning of the two words as used in the letter of termination and Section 63(1)(a)(ii) of the Act respectively.

He therefore concluded his submissions by urging the Board to dismiss the Applicant's Request for Review.

Mr. Anthony Gitonga and Mr. Kimani Muhoro advocates for the interested party fully associated themselves with the submissions made by Counsel for the Procuring Entity and supported the Procuring Entity's decision to terminate the procurement proceedings relating to the advertised tender.

Mr. Gitonga stated that the Head of Procurement of the Procuring Entity was entitled by the provisions of Section 46(4) (c) of the Act to be appointed as a member of the Procuring Entity's tender evaluation committee and that there was nothing wrong in her giving a professional opinion in her capacity as both a member of the tender evaluation committee and as the Head of Procurement of the Procuring Entity.

Mr. Gitonga additionally defended the Procuring Entity's decision to terminate the procurement process on the basis of the observations made by

the Procuring Entity's technical evaluation committee and stated that the people who formed part of the said committee were technically competent to consider all the technical aspects of the tender.

On his part Mr. Kimani advocate stated that the Procuring Entity was entitled to terminate the tender and re-advertise the same in order to benefit from the real time data capture and transmission technology which was far more superior than what the Procuring Entity had initially tendered for.

He confirmed that the interested party was prepared to offer this technology but stated that it did not offer it in the terminated tender because the new technology was not set out as one of the technical requirements in the tender documents used in the terminated tender process.

He additionally stated that the omission of the new technology from the tender documents for the terminated tender was prejudicial to the interested party and that the Procuring Entity's decision to terminate and re-advertise the tender afresh would place it on an equal footing with the other two bidders. He concurred that the new technology could detect Jet A1 fuel and to the extent that the new technology was not within the Procuring Entity's knowledge at the time the tenders in the terminated process were submitted then the new discovery amounted to a substantial technological change within the contemplation of the provisions of Section 63(1) (a) (ii) of the Act.

He therefore urged the Board to dismiss the Applicant's Request for Review and allow the Procuring Entity to terminate the procurement process in order to enable it benefit from the new technology.

In a brief response to the submissions made by Counsel for the Procuring Entity and the two advocates who made submissions on behalf of the interested party, Mr. Munge emphasized that the words 'substantial technological change' were not one and the same thing with the words 'emergent technology'. He stated that in his own understanding, the word 'emergent' referred to something coming up while the word 'substantial' meant something of considerable size or value. He denied that the two words meant one and the same thing and stated that this must be the reason why Parliament did not use the words interchangeably in Section 63(1) (a) (ii) of the Act.

On the provisions of clause 2.10.4 of the tender document which allowed the Procuring Entity to terminate the procurement process, Counsel for the Applicant stated that there cannot be estoppel against a statute and further that the Procuring Entity was therefore under an obligation to prepare an expert report and not rely on the opinion of the Head of Procurement who was not technically qualified to give an opinion.

He submitted that the Procuring Entity's technical evaluation committee had determined that the Applicant was technically qualified to perform the tender and further that the Procuring Entity should have awarded the tender to the Applicant based on the evaluation committee's recommendation since the Applicant had proposed to offer the new technology at no extra cost a fact that the Procuring Entity ought to have taken advantage of in order to save costs.

Mr. Munge disputed the interested party's submission that it was capable of offering the new technology to the Procuring Entity and noted that there was no such evidence presented to the Board by the Procuring Entity.

He therefore urged the Board to allow the Applicant's Request for Review.

The Board has considered the arguments made by the parties in support and in opposition to the second issue framed for determination and finds that under the provisions of Section 63 of the Public Procurement and Asset Disposal Act, a Procuring Entity is vested with the powers to terminate procurement proceedings so long as it complied with the procedure and the substantive law set out in the Act.

One of the grounds on the basis of which a Procuring Entity can terminate a procurement process before making an award of a tender is if the subject procurement has been overtaken by substantial technological change.

The Board has looked at the tender document which was prepared by the Procuring Entity for the purposes of this procurement and the minutes of the tender evaluation committee and finds that as at the date when the subject tender was advertised, the Procuring Entity did not intend to procure a fuel testing technology that could capture the test results through a real time data capture transmission system and a detection of adulteration of motor fuels by use of Jet A1 fuel.

It is the Board's view based on the evaluation report dated 30<sup>th</sup> June, 2017 which was produced by the Procuring Entity that the existence of the new technology was brought to the attention of the Procuring Entity's tender evaluation committee by the technical proposals submitted to it by the Applicant and SICPA Security Solutions S. A which offered to supply to the Procuring Entity a marking and monitoring service that had the ability to automatically transmit test results from the field using a real time technology.

It is upon this discovery that the Procuring Entity decided to terminate the procurement proceedings. This was in the Board's considered opinion a discovery that fell within the provisions of Section 63(1) (a) (ii) of the Public Procurement and Asset Disposal Act 2015.

The Board has considered the extent of the new technology and finds that the same will provide several advantages to the Procuring Entity as it would eliminate the possibility of interference with evidence through human intervention and also provide an avenue for a quick transmission of test results to various agencies thereby playing a crucial role in maintaining the quality of the petroleum products made available to the public by completely or substantially reducing cases of adulteration of petroleum products.

Turning to the tender document itself, the Board finds that under clause 2.10.4 of the tender document, the Procuring Entity reserved to itself the right to terminate the tender at its sole discretion. The tender document further stated that the Procuring Entity would not be liable to any of the bidders including the Applicant in the event that the Procuring Entity decided to terminate the procurement process.

The said Clause 2.10.4 of the tender document provides as follows:-

*"2.10.4: The Procuring Entity may at any time terminate procurement proceedings before contract award and shall not be liable to any person for the termination".*

The Applicant having therefore decided to participate in the tender process on the basis of this provision in the tender document was bound by the provisions of the tender documents including those of Clause 2.10.4

The Board has severally held that a bidder who decides to participate in a tender process is bound by the provisions of the tender document and cannot disown some clauses in the tender document merely because the action taken by the Procuring Entity was not favorable to it.

The above position has been stated in several decided cases such as the case of **Republic v Public Procurement Administrative Review Board & Another *ex-parte* Gibb Africa Ltd & Another [2012]eKLR** and by the Board in the case of **Riley Services Limited vs the Judiciary (PPARB Appl. No. 57 of 2014)**.

The Board further notes that during the hearing of this Request for Review, the Applicant sought to fault the Procuring Entity by stating that it ought not to have relied on the professional opinion which was prepared by M/s Loise Thuge the Procuring Entity's Head of procurement on 7<sup>th</sup> July, 2017 as a basis for its decision to terminate the procurement process in question.

It was the Applicant's case that M/s Thuge was not technically qualified to prepare the professional opinion since she was only qualified in the field of procurement.

The Board has considered the contents of the evaluation report prepared on 30<sup>th</sup> June, 2017 and finds that the opinion prepared by M/s Thuge was based on the observations made by the Procuring Entity's tender evaluation committee under the heading "**General Observations**".

The tender evaluation committee observed as follows in its said report.

#### **"GENERAL OBSERVATIONS"**

- i) The increasing need of detection of adulteration by use of Jet A1 ought to have been captured in the terms of reference for this tender.

This is so because Jet A1 is never marked unlike illuminating kerosene and there is reliable information that the perpetrators of adulteration have now shifted to the use of Jet A1 as an adulterant for diesel. Further, the Commission is now aware of an existing technology that can easily detect presence of Jet A1 in motor fuels.

ii) The team also noted the need for a detailed explanation of how the test results from the monitoring teams are to be transmitted to the client. To this end the advantage of use of a real time and tamper proof mechanism that would provide more authentic results”.

As the Board has previously observed, the duty to evaluate tenders and make technical and other recommendations touching on evaluation lies on the Procuring Entity's tender evaluation committee members who are presumed to possess the necessary technical qualifications required in carrying out the technical evaluation process.

The Board further finds that members of an evaluation committee are selected on the basis that they are qualified to consider the technical aspects of the tender in question and the Board will not easily interfere with the findings of an evaluation committee unless there is a glaring irregularity in the process. The Board therefore gives the benefit of doubt to the Procuring Entity's tender evaluation committee in reaching the decision that it did in the circumstances of this case.

The Board further notes that the tender document used in the terminated process did not contain a criteria which required bidders to submit a proposal that incorporated the new technology which would enable bidders to transmit test results real time in their technical proposals.



It is the Board's view that in the absence of this requirement some bidders and particularly the interested party herein M/s Intertek Testing Services (EA) Ltd was prejudiced since it was unable to submit a tender incorporating the new technology as this was not a requirement set out in the tender document.

The Board therefore finds that it would be improper to allow some of the bidders to benefit from a criterion which was not part of the tender documents to the exclusion of others.

On the issue of prejudice, the Board finds that a re-tender by the Procuring Entity would give all the three bidders who participated in the terminated procurement process an equal chance to participate in the re-tender. There was no suggestion by any of the three bidders that they would be handicapped in any way from participating on an equal footing if the tender is re-advertised particularly in view of the Board's finding in the preceding paragraph that the interested party herein was prejudiced by the absence of a criteria requiring bidders to incorporate the new technology in the first tender. It would therefore be in the interest of all the bidders if the tender is conducted afresh to enable the Procuring Entity prepare a comprehensive criteria that would incorporate the requirement for the new technology to enable all the bidders participate fairly.

The upshot of all the above findings is therefore that the Applicant's Request for Review fails and is disallowed in terms of the following final orders:-

### **FINAL ORDERS**


Pursuant to all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset

Disposal Act, the Board makes the following orders on this Request for Review.

- a) The Applicant's Request for Review dated 13<sup>th</sup> July, 2017 challenging the Procuring Entity's decision made on 7<sup>th</sup> July, 2017 seeking to terminate the procurement process of tender number ERC/PROC/4/3/16-17/119 in respect of the tender for the provision of marking and monitoring of petroleum products be and is hereby disallowed.
- b) The Procuring Entity is therefore at liberty to re-advertise the tender for the provision of the said services.
- c) In view of the Board's finding on the first issue framed for determination, the Board orders that each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 1<sup>st</sup> day of August, 2017.

  
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**CHAIRMAN**  
**PPARB**

  
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**SECRETARY**  
**PPARB**