

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO 10/2020 OF 21ST JANUARY 2020

BETWEEN

TESCO INVENT VENTURES.....APPLICANT

AND

NATIONAL YOUTH SERVICE.....1ST RESPONDENT

AND

THE DIRECTOR GENERAL,

NATIONAL YOUTH SERVICE.....2ND RESPONDENT

Review against the decision of National Youth Service in respect of Tender No. NYS/PROC/11/2019-2020 for Supply, Delivery, Installation and Commissioning of Industrial Textile Machines for a period of one year.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Nicholas Mruttu | -Member |
| 3. Mr. Ambrose Ogeto | -Member |
| 4. Ms. Phyllis Chepkemboi | -Member |

IN ATTENDANCE

- | | |
|-----------------------|------------------------------|
| 1. Mr. Stanley Miheso | -Holding brief for Secretary |
|-----------------------|------------------------------|

2. Ms. Judy Maina

-Secretariat

PRESENT BY INVITATION

APPLICANT

-TESCO INVENT VENTURES

1. Ms. Sandra Opiyo

-Advocate, A.E. Kiprono & Associates

PROCURING ENTITY

-NATIONAL YOUTH SERVICE

1. Mr. James Kairu

-Head of supply chain management

2. Mr. Steven Obaga

-Principal Supply Chain Management Officer

3. Ms. Sarah Sidi

-SCMO1

4. Ms. Harriet Mburu

-SP

5. Mr. Veronica Ruto

-INSP

INTERESTED PARTIES

1. Ann Mwathi

-Admin

2. Elizabeth Mubira

-Makers Kenya Ltd

3. Mohamed

-Abyey Ltd

4. Enock Mogana

-Abyey Ltd

5. Daniel Machoka

-Abyey Ltd

6. Raphael Waweru

-Twin Eight K. Ltd

BACKGROUND TO THE DECISION

National Youth Service (hereinafter referred to as "the Procuring Entity") advertised Tender No. NYS/PROC/11/2019-2020 for Supply, Delivery, Installation and Commissioning of Industrial Textile Machines for a period of one year (hereinafter referred to as "the subject tender") on 17th December 2019 on MyGov Publication Website.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of 13 No. bids by the tender submission deadline of 9th January 2020. Having appointed a Tender Opening Committee, the bids were opened at the NYS Headquarters Conference Room in the presence of bidders.

THE REQUEST FOR REVIEW

M/s Tesco Invent Ventures (hereinafter referred to as "the Applicant") lodged a Request for Review on 21st January 2020 together with a Statement in Support of the Request for Review sworn and filed on the same date (hereinafter referred to as "the Applicant's Statement"). In response, the Procuring Entity lodged Submission Against Request for Review dated 27th January 2020 (hereinafter referred to as "the Procuring Entity's Response") together with another document termed Submission Against Request for Review dated 4th February 2020 (hereinafter referred to as "the Procuring Entity's Further Response"). M/s Abbey Limited also

lodged a reply to the Request for Review in form of a letter dated 3rd January 2020.

The Applicant sought for the following orders in the Request for Review:-

- 1. An order declaring the 1st Respondent's Tender Document for Tender No. NYS/PROC/11/2019-2020 for Supply, Delivery, Installation and Commissioning of Industrial Textile Machines for a period of one year and the tender proceedings commenced thereof incurably flawed;***
- 2. An order directing the Respondents to terminate Tender No. NYS/PROC/11/2019-2020 and re-tender the same in compliance with the Constitution, the Act and the Regulations;***
- 3. An order awarding costs of the Request for Review to the Applicant; and***
- 4. Any other relief that the Review Board deems fit to grant under the circumstances.***

During the hearing, the Applicant was represented by Ms. Sandra Opiyo on behalf of the firm of A.E Kiprono & Associates Advocates, while the Procuring Entity was represented by its Head of Supply Chain Management, Mr. James Kairu appearing together with Mr. Steven Obaga, the Procuring Entity's Principal Supply Chain Management Officer. M/s

Abbey Limited who filed a Response to the Request for Review, and all other bidders present at the hearing chose not to address the Board.

The Applicant and the Procuring Entity made oral submissions detailed hereinbelow. However, Counsel for the Applicant did not make any submissions in rejoinder.

PARTIES' SUBMISSIONS

Applicant's Submissions

In her submissions, Counsel for the Applicant, Ms. Opiyo, fully relied on the Request for Review and the Applicant's Statement.

Ms. Opiyo addressed the Board on the import of section 167 of the Act to support her view that the Applicant having obtained the Tender Document from the Procuring Entity was a candidate in the subject procurement proceedings and therefore had the required locus standi to approach the Board by way of a Request for Review. She further submitted that the tender was advertised on 17th December 2019 and that the Applicant only learnt of the same on 2nd January 2020 and obtained the Tender Document on 3rd January 2020 by purchasing a copy of the same from the Procuring Entity.

Ms. Opiyo submitted that upon studying the Tender Document, the Applicant learnt of an anomaly in the manner in which the Procuring Entity would carry out Technical Evaluation in that Technical Evaluation would carry a total of 80% but no explanation was given of how the Procuring Entity would arrive at the score of 80% and this in the Applicant's view, meant the Procuring Entity's Evaluation Committee would come up with a new evaluation criterion later on during evaluation.

On here second issue, Counsel referred the Board to Clause T.E.3 of part (b). Preliminary Technical Evaluation at page 20 of the Tender Document which required bidders to attach latest bank statement for the last 3 Months (May-July 2019). In the Applicant's view, since the tender was advertised on 19th December 2019, then the last 3 months should have been September to November 2019 and not May to July 2019.

On her third issue, Ms. Opiyo referred the Board to Clause T.S.1 of the Detailed Technical Specs at page 20 of the Tender Document which instructed bidders to provide a machine name as "*Racer 8 Head Embroidery Machine*". In the Applicant's view, the said machine is a brand name with a local agent, hence restricting tenderers to the said brand amounted to single sourcing, since obtaining authorization from the said manufacturer is not possible. In addition, Counsel urged the Board to study the technical specifications provided in the Tender Document against the machine name "*Racer 8 Head Embroidery Machine*" are the technical specifications of ZSK Embroider Machine whose extract can be found at

page 73 of the Request for Review. According to Counsel, the Procuring Entity violated the provisions of section 60 (4) and 103 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as “the Act”) in instructing bidders to submit a particular brand.

Upon being prompted by the Board that the Tender Document at page 21 required bidders to, in the alternative submit an equivalent machine, Counsel maintained her submissions that the Procuring Entity restricted the require machine that is owned by a particular manufacturer.

On her fourth issue, Counsel referred the Board to the Technical Evaluation Criteria provided in Clause T.S 14, T.S18 and T.S22 found at pages 24, 24 and 26 of the Tender Document respectively and submitted that the Applicant wondered how the Procuring Entity would measure and compare the specification of the machines that were to be submitted by tenderers.

On her fifth issue, Ms. Opiyo referred the Board to page 27 of the Tender Document and submitted that the Procuring Entity provided two distinct award criteria in that the tender would be award in whole or in part, and further that the award would be to the lowest evaluated bidder. On enquiry by the Board, Counsel confirmed that the subject tender was divided into lots. Counsel further submitted that the Applicant having sought clarification from the Procuring Entity 6th January 2020 it only received the

Procuring Entity's response on 20th January 2020 when tenders were already opened on 9th January 2020.

To support her submissions Counsel relied on the case of **PPARB Application No. 44 of 2017, Rosecate Promotions and Supplies Limited v. Independent Electoral Boundaries Commission** and submitted that the Board held that no award can be made in respect of a defective tender document. She further submitted that this position was reiterated in **Judicial Review Miscellaneous Application No. 137 of 2015, JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co.Ltd/Pride Enterprises v Public Procurement Administrative Review Board & 2 others [2015] eKLR**

In conclusion, she urged the Board to grant the prayers sought in the Request for Review.

Procuring Entity's Submissions

In his submissions, the Procuring Entity's Principal Supply Chain Management Officer, Mr. Steven Obaga, fully relied on the Procuring Entity's Response and Further Response.

Mr. Obaga submitted that the Procuring Entity is not in breach of section 60 (1) and (2); 70 (3) of the Act as alleged by the Applicant since the Tender Document gave clear description of the machines required in the subject tender.

As regards seeking clarification, Mr. Obaga referred the Board to page 5 of the Tender Document which required bidders to request clarification within 7 days before the tender submission deadline which provision was not complied with by the Applicant. According to Mr. Obaga, the Procuring Entity outsourced the services of Postal Corporation of Kenya and have an agreement with the said Corporation to make delivery and collection at least on a daily basis. He further submitted that it was strange that the Applicant's letter was not found from the Procuring Entity's post office on 4th and 17th January 2020 when mail was collected by Postal Corporation of Kenya for the Procuring Entity. He referred the Board to Annex 3 (b) of the Procuring Entity's Response which he submitted is the Procuring Entity's Mail Receipt Register. He then submitted that the Procuring Entity only received the Applicant's letter on 20th January 2020.

Mr. Obaga submitted that the Applicant in a letter dated 13th January 2020 hand delivered the same to the Procuring Entity to follow up its earlier letter of 6th January 2020. According to Mr. Obaga, the tenders received by the Procuring Entity had long been opened by the Procuring Entity on 9th January 2020.

On the second issue of technical score of 80% assigned in the Tender Document, Mr. Obaga submitted that the machines required by the Procuring Entity are many and it was not possible to craft evaluation criteria for each of them. In his view, the rational of specifying a technical score of 80% was to give the evaluation committee a broad guideline on what they needed to emphasize on with the detailed analysis of the tender submitted by a bidder. On further enquiry by the Board, Mr. Obaga confirmed that if the Procuring Entity used the criteria of YES/NO, it would get the same results desired by the use of 80% score during Technical Evaluation. He further submitted that there was no weighting of scores during Technical Evaluation.

On the award criteria applied, Mr. Obaga submitted that the criterion of lowest evaluated bidder was to be used by the Procuring Entity in awarding the subject tender and that the Procuring Entity has leeway to award the tender in whole or in part, so long as a bidder is the lowest evaluated bidder for some of the lots or all lots as the case may be.

On the fourth issue, Mr. Obaga submitted that Racer 8 Head Embroidery machine is not a brand name. On the Board's direction, the Supply Chain Management Officer, Ms. Sarah Sidi explained that what the Procuring Entity desired is a machine with 8 heads that will be fast. According to Ms. Sidi, Racer means faster and that racer 8 is made by different companies.

She further submitted that if one were to walk into a shop, they would talk of Header 8 if they desired the said machine.

Mr. Obaga then submitted that the Tender Document required an equivalent as an alternative. According to Mr. Obaga, ZSK as referred to by the Applicant is not in the Tender Document.

On the fifth issue of latest bank statements, Mr. Obaga submitted that the Procuring Entity required bidders to provide bank statements for May to July 2019 since in his view, firms that supply in large scale, a lot of activities are done in the mentioned months and this would assist in assessing the financial muscle of the bidders.

On the Fabric shredding machine stipulated on TS14, Mr. Obaga submitted that the Procuring Entity is not seeking to procure domestic machines. He further submitted that the circular cutting machine, he submitted that the user department of the Procuring Entity desires a machine that is industrial and heavy duty as opposed to smaller machines for domestic use. For the Steam Iron with table, he also submitted the Procuring Entity desired an industrial machine.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documentation filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and oral submissions of the parties.

The issues for determination areas follows: -

- I. Whether the Applicant complied with Clause 2.5.1 of Section II. Instructions to Tenderers of the Tender Document when seeking clarification of tenders from the Procuring Entity; and***
- II. Whether the Procuring Entity issued a Tender Document with respect to the subject tender in accordance with section 60 (1), (2) and (4), 70 (3) and 80 (3) (a) of the Act.***

The Board now proceeds to address the above issues as follows:-

On the first issue, the Applicant submitted that on 6th January 2020, it wrote to the Procuring Entity seeking clarification on some provisions in the Tender Document. However, the Applicant submitted that it did not receive a response from the Procuring Entity thereby wrote another letter dated

13th January 2020 and hand delivered the same at the Procuring Entity's offices to follow up on its previous letter of 6th January 2020. In the Applicant's view, the Procuring Entity's failure to respond to the issues raised by the Applicant in the letter seeking clarifications on provisions of the Tender Document, precipitated the instant Request for Review application.

In response, the Procuring Entity submitted that it only received the Applicant's letter of 6th January 2020, on 20th January 2020, long after tenders had been opened on 9th January 2020.

The Procuring Entity then referred the Board to Annex III (B) attached to its Response and submitted that the same is a Daily Mail Receipt Register of 4th and 17th January 2020 which did not contain the Applicant's letter of 6th January 2020 and that it is only the Daily Mail Register of 20th January 2020 that shows the Applicant's letter was received on the said date. According to the Procuring Entity, it has an agreement with the Postal Corporation of Kenya to deliver and collect mails on its behalf and that the Applicant's letter of 6th January 2020 was not among the mails received on 4th and 17th January 2020.

The Procuring Entity then referred the Board to provisions of the Tender Document which directed bidders on the timelines they ought to have complied with when seeking clarifications from the Procuring Entity.

The Board having considered parties' submissions, observes that Clause 2.5.1 of Section II. Instructions to Tenderers of the Tender Document provides as follows:-

"A prospective tenderer requiring any clarification of the tender document may notify the Procuring Entity in writing or by post at the entity's address indicated in the Invitation to Tender. The Procuring Entity will respond in writing to any request for clarification of the tender documents which it receives not later than seven (7) days prior to the deadline for the submission of tenders, prescribed by the procuring entity. Written copies of the procuring entity's response (including an explanation of the query but without identifying the source of the inquiry) will be sent to all prospective tenderers that have received the tender document.

From the above provision, the Board notes that the Procuring Entity would only respond to clarifications sought by bidders when the same are received not later than 7 days before the tender closing date. Therefore, a response to clarifications would be made to clarifications received by 3rd January 2020. The Applicant in this instance submitted that it sent its letter

seeking clarification on 6th January 2020. Even assuming the said letter could be received on the same date of 6th January 2020, the Procuring Entity would not be able to respond to the same in good time, noting that by 6th January 2020, the tender closing date was three days away.

The Board having studied the Procuring Entity's Daily Mail Registers dated 4th, 17th and 20th January 2020, attached to its Response as Annex III (B) observes that an entry is made in the Daily Mail Register of 20th January 2020 referring to the title of the subject tender. However, no details are given to ascertain whether that entry is in respect of the Applicant's letter seeking clarification.

It is however clear that if the date of 6th January 2020 is considered, this Board can only arrive at the conclusion that the Applicant did not take Clause 2.5.1 of Section II. Instructions to Tenderers of the Tender Document into account regarding the timelines for seeking clarification from the Procuring Entity.

The main objective of seeking clarifications from a procuring entity is to assist a bidder in the preparation of its tender before the tender closing date. It is therefore the Board's considered view that a procuring entity provides timelines within which bidders ought to seek clarifications, so that responses can be made at the earliest, before the tender closing date approaches. In other circumstances when a procuring entity responds to

clarifications when the tender closing date is too close, it may elect to extend that date when issuing Addendum in Response to Clarifications sought by bidders.

Therefore, if the date of 20th January 2020 is taken into account, one can only conclude that, a response from the Procuring Entity would not assist the Applicant in the preparation of its tender, noting that tenders already opened on 9th January 2020. Such a response would therefore serve no purpose.

Accordingly, the Board finds that the Applicant failed to comply with Clause 2.5.1 of Section II. Instructions to Tenderers of the Tender Document in seeking clarification from the Procuring Entity.

On the second issue framed for determination, the Applicant raised several provisions in the Tender Document which in its view, fail to comply with section 60 (1), (2) and (4), 70 (3) and 80 (3) (a) of the Act. The Board having studied the Tender Document proceeds to make the following findings:-

i. Latest Bank Statements

Criteria T.E.3 of Clause 2.22 (b). Preliminary Technical Evaluation of Section II. Appendix to Instructions to Tenderers at page 20 of the Tender Document provides as follows:-

"T.E.3: Latest Bank statement

Attach last 3 months (May to July 2019)"

The Applicant contended that the Procuring Entity ought to have specified the last three months as September, October and November, which were the months prior to advertisement of the tender on 17th December 2019. The Procuring Entity on the other hand submitted that it specified the months of May, June and July 2019 since during those months, firms that supply the machines required in the subject tender in large scale, undertake a lot of activities, hence this would assist the Procuring Entity to assess their financial strength by examining their bank statements for the months of May, June and July.

The Board observes that section 60 (1) of the Act requires the Accounting Officer to:-

"(1) ...prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those

who may wish to participate in the procurement proceedings"

Further, section 70 of the Act states as follows:-

"70 (1)The Authority shall issue standard procurement and asset disposal documents and formats as prescribed for use by procuring entities.

(2) A procuring entity shall use standard procurement and asset disposal documents prescribed under subsection (1), in all procurement and asset disposal proceedings

(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders"

This therefore means, the discretion of preparing specific requirements relating to goods, works or services being procured rests on the Accounting Officer so long as such requirements allow for fair and open competition among bidders. The Procuring Entity had the discretion to specify the bank statement it requires from bidders if in its view, the months of May, June, July would enable it assess the financial strength of bidders who wish to participate in the subject tender.

Accordingly, the Board finds that the Procuring Entity complied with section 60 (1) and 70 (3) of the Act in so far as criteria T.E.3 of Clause 2.22 (b). Preliminary Technical Evaluation of Section II. Appendix to Instructions to Tenderers at page 20 of the Tender Document, is concerned.

ii. Lot 1- Special Garment Machine

Criteria T.S.1 of the Detailed Technical Specs of Section II. Appendix to Instructions to Tenderers at page 20 of the Tender Document provides as follows:-

S/N o	Machine Name	Specifications	Responsiveness
Lot 1-Special Garment Machine			
T.S. 1	Racer 8 Head Embroider y Machine	Eight garments at a time 1,000 Stiches Per Minute Windows-Based Networking Full Color Screen Adjustable Presser Foot 80 Million Stitch Memory Low Noise & Lightweight Industrial Grade Build Style Twelve Colors/Needles 3 USB Ports & Ethernet Small Tubular Arm Integrated Design Editor Automatic Error Analysis Soft Tension Technology – stitching small, high quality lettering Adjustable presser foot Head to head distance 400 and 495mm	

	Or its equivalent	
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The Applicant contended that the Technical Specifications listed in the Tender Document is associated with a company known as ZSK. The Procuring Entity refuted these submissions and stated that reference to Racer in the Tender Document means that the machine required would work “faster” and the same is not a brand name.

The Board having considered parties’ submissions on this aspect observes that section 60 (4) of the Act provides as follows:-

"60 (1).....

(2).....

(3).....

(4) The technical requirements shall not refer to a particular trademark, name, patent, design, type, producer or service provider or to a specific origin unless—

(a) there is no other sufficiently precise or intelligible way of describing the requirements; and

(b) the requirements allow equivalents to what is referred to."

From the above provision, a procuring entity has leeway to allow equivalents to what has been referred to in instances where the technical

requirements refer to a particular trademark, name, patent, design, type, producer or service provider or to a specific origin.

Even if the Board were to find that Racer 8 Head Embroidery Machine is a particular trademark, name, patent, design, type, producer or service provider, the Tender Document allowed for equivalents. This means, a bidder who proposes to supply an equivalent of Racer 8 Head Embroidery Machine would still meet the requirements of Criteria T.S.1 of the Detailed Technical Specs of Section II. Appendix to Instructions to Tenderers at page 20 of the Tender Document.

Accordingly, the Board finds that Criteria T.S.1 of the Detailed Technical Specs of Section II. Appendix to Instructions to Tenderers at page 20 of the Tender Document meets the threshold of section 60 (4) (b) of the Act.

iii. Criteria under TS 14, TS18 and TS22

Pages 24, 25 and 26 wherein criteria TS 14, TS 18 and TS 22 can be found provide as follows:-

LOT 2-Tailoring Machines			
TS 14	Fabric Shredding Machine	Industrial	
LOT 3-Other Production/Garment Machines			

TS 18	Circular Cutting Machine (Octa)	Industrial	
LOT 4-Industrial Laundry Machines			
TS 22	Steam Iron with Table	Industrial	

The Procuring Entity submitted that the machines listed above are available in the market in two broad categories, that is, for domestic use and for industrial use. According to the Procuring Entity, since its user department requires machines that are heavy duty and can prepare garments in large scale, it would not be procuring machines for domestic use, as they are small, compared to machines for industrial use.

The Board having considered submissions by parties on this aspect, observes that the Procuring Entity explained what it required in so far as the above machines are concerned and the intended use, which is, industrial in nature. This Board observes that it ought not dictate what the Procuring Entity requires so long as the requirements in the Tender Document promote open and fair competition as specified in section 60 (1) and 70 (3) of the Act, which was cited hereinbefore.

Accordingly, the Board finds that the requirements in criteria TS 14, TS 18 and TS 22 meet the threshold of section 60 (1) and 70 (3) of the Act.

iv. Award Criteria

On this issue, the Applicant contended that the Procuring Entity provided two award criteria in the subject tender that would be used to arrive at the successful bidder. In response to this assertion, the Procuring Entity submitted that the subject tender was divided into lots. Therefore, even though award would be made to the lowest evaluated bidder, such award can be made in part or in whole.

Clause 2.27.6 of Section II. Appendix to Instructions to Tenderers of the Tender Document provides the award criteria as follows:-

"Award Criteria

Award shall be to the lowest evaluated bidder

(i) Contract may be awarded in whole OR in part"

Further, pages 20 to 27 of the Tender Document specified the lots in the subject tender as follows:-

- a) LOT 1: Special Garment Machine;
- b) LOT 2: Tailoring Machines;
- c) LOT 3: Other Production/Garment Machines; and
- d) LOT 4: Industrial Laundry Machines.

Evidently, the subject tender was divided into four lots and bidders were at liberty to bid for one or more lots if they wished to do so. Therefore, there is a possibility that all the lots may be awarded to one bidder, if such bidder is found to be the lowest evaluated bidder in all of the four lots. It is also possible for the tender to be awarded in part, to one or several bidders depending on the number of bidders found to have submitted the lowest evaluated bids in the respective lots.

Accordingly, the Board finds that the Applicant's assertion that the Tender Document has two award criteria, lacks merit, since the Procuring Entity specified the award criteria of lowest evaluated bidder depending on the outcome of Financial Evaluation conducted in the respective lots.

v. Technical Evaluation Score

The Technical Evaluation Score is provided at page 20 of the Tender Document as follows:-

"This section (Technical Evaluation) will carry a total of 80% of the whole evaluation"

The Applicant submitted that it was not clear how the Procuring Entity would award the score of 80% since the Technical Evaluation stage

contained several sub-categories whose specific scores were not provided in the Tender Document.

On its part, the Procuring Entity submitted that the rationale of providing a total score of 80% during Technical Evaluation is to give the Evaluation Committee *"a broad guideline when conducting detailed analysis of the bids being evaluated at the Technical Evaluation stage"*. Upon enquiry by the Board, the Procuring Entity submitted that the total technical score of 80% would also serve the same purpose as a YES/NO criteria.

In the Procuring Entity's Response, it is averred as follows:-

"I wish to clarify that the 80% assigned to the Technical score is simply a guide on the weightage the evaluation team was to apportion to the technical whereas the remaining 20% comprised of the financial component

The lowest evaluated bidder will be determined on the basis of which firm meets the following:-

- 1. Mandatory Requirements;***
- 2. Technical compliance;***
- 3. Financial compliance parameters;***
- 4. Due diligence findings.***

The above compliance thresholds are to be applied on the whole tender as a package or in part as lots when it comes to award"

The Board having studied the Tender Document observes that there was no requirement for weighting of scores. It is therefore not clear how the Procuring Entity will arrive at the score of 80% and where the remaining 20% would come from.

In an open tender, where the Request for Proposal method of tendering is not used, award of a tender is made in accordance with section 86 (1) (a) of the Act which states as follows:-

"The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price"

This award criterion was restated in Clause 2.27.6 of Section II of the Appendix to Instructions to Tenderers of the Tender Document as:-

"Award shall be to the lowest evaluated bidder"

Given that the award criterion was that of lowest evaluated bidder, it would therefore serve no purpose to weight scores at 20% at the Financial Evaluation stage as averred by the Procuring Entity in its Response, since at that stage, the Procuring Entity's concern is to check the prices quoted

by bidders and not to weight their scores. This is because, responsiveness to eligibility and mandatory requirements including technical specifications was already done during the Preliminary and Technical Evaluation stages.

Section 80 (3) of the Act further provides that:-

"(1).....

(2).....

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—

(a) the criteria shall, to the extent possible, be objective and quantifiable;"

It is the Board's considered view that not all bidders would be awarded the same score of 80% at the Technical Evaluation stage, since some bidders may exceed the minimum technical requirements while others may only manage to meet some of the requirements at the Technical stage. Hence, a bidder should be able to know the score awarded to it in accordance with the documents it has submitted in response to the technical requirements in the Tender Document, even if that score fails to reach 80%.

It is therefore the Board's considered view that, in the absence of a breakdown of scores at the Technical Evaluation stage, the score of 80% is neither objective nor quantifiable noting that the Technical Evaluation stage had several sub-categories and there ought to be an indication of the scores awarded to a bidder on each sub-category. Furthermore, weighting of scores is of no use at the Financial stage in an open tender where the Request for Proposal method of tendering is not used.

The Board finds that the Procuring Entity's criteria of 80% score at the Technical Evaluation stage fails to meet the threshold of section 80 (3) of the Act as the said criteria is neither objective nor quantifiable.

In totality of the foregoing, the Board finds that the Procuring Entity failed to issue a Tender Document with respect to the subject tender in accordance with section 80 (3) of the Act, in so far as the Technical Evaluation Score of 80% at page 20 of the Tender Document is concerned.

In determining the appropriate orders to issue in the circumstances, the Board has found that the Procuring Entity failed to issue a Tender Document with respect to the subject tender in accordance with section 80 (3) of the Act, in so far as the Technical Evaluation Score of 80% at page 20 of the Tender Document is concerned. The Applicant referred the Board to the decision in **PPARB Application No. 44 of 2017, Rosecate Supplies & Promotions Ltd v. Independent Electoral Boundaries Commission**, where it was held as follows:-

"A Procuring Entity which proceeds to evaluate and award a tender based on a defective tender document therefore stands the risk of the procurement process and the eventual award being annulled if challenged at the end of the process after award has been made"

This position was reiterated by the Court in **Judicial Review Application No. 137 of 2015, JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering C. Ltd/Pride Enterprises v. Public Procurement Administrative Review Board & 2 Others (2015) eKLR**, as follows:-

"If indeed the Review Board had found that there was a problem with the Tender Document, it ought to have asked the Procuring Entity to retender. You cannot use a faulty Tender Document to award a Tender..."

The above authorities support the Board's view that, having found that the Technical Evaluation Score of 80% at page 20 of the Tender Document offends the provisions of section 80 (3) (a) of the Act, the Procuring Entity ought not proceed to evaluate bids and award the subject tender using a faulty Tender Document containing criteria that offends the provisions of the Act.

Section 70 (1) and (2) of the Act, which were cited hereinbefore directs procuring entities to seek guidance from the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") on Standard Tender Documents that they can use and customize to fit their needs in a procurement process. In this instance, the Procuring Entity ought to seek guidance from the Authority on a Standard Tender Document that the Procuring Entity can customize to suit its needs.

Once Procuring Entity seeks guidance from the Authority on the applicable Tender Document and having noted that bids in the subject tender were already opened, the Board finds that the appropriate step that the Procuring Entity ought to take is to re-tender for the Supply, Delivery, Installation and Commissioning of Industrial Textile Machines using the fresh Bidding Document prepared in accordance with the provisions of the Act, taking into consideration, the findings of the Board in this Request for Review application.

As regards, the issue of costs, the court in **Judicial Review Application No. 6 of 2014, Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant & Ihururu Dairy Farmers Co-operative Society Ltd** held as follows:-

"The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event....."

The **Halsbury's Laws of England** 4th Edition (Re-issue), [2010], **Volume 10** at paragraph 16 reads that:-

"The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice" [Emphasis added].

The Board observes that even though costs should follow the event, a decision maker should exercise its discretion on whether or not to award costs by accommodating the special circumstances of the case. In the circumstances of the Request for Review, the Applicant herein will have an opportunity to participate in the re-tender having found that such an order is appropriate in this instance. Hence, the Board shall refrain from awarding costs.

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

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:-

- 1. The Procuring Entity's Tender Document issued in respect of Tender No. NYS/PROC/11/2019-2020 for Supply, Delivery, Installation and Commissioning of Industrial Textile Machines for a period of one year, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity is hereby directed to retender for Supply, Delivery, Installation and Commissioning of Industrial Textile Machines for a period of one year within thirty (30) days from the date of this decision.**
- 3. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 12th day of February 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB

Delivered in the presence of:-

- i. Ms. Sandra Opiyo holding brief for Mr. Kiprono for the Applicant; and**
- ii. Mr. James Kairu for the 1st and 2nd Respondents**