

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 39/2020 OF 18TH MARCH 2020

BETWEEN

SIMBA CORPORATION LIMITED.....APPLICANT

AND

**THE ACCOUNTING OFFICER,
MINISTRY OF INTERIOR AND COORDINATION
OF NATIONAL GOVERNMENT.....PROCURING ENTITY**

AND

ISUZU EAST AFRICA LIMITED.....1ST INTERESTED PARTY

AND

TOYOTA KENYA LIMITED.....2ND INTERESTED PARTY

Review against the decision of the Ministry of Interior and Coordination of National Government rejecting the Applicant's bid with respect to Tender No. MICNG/SDI/005/2019-2020 for Leasing of Locally Assembled Motor Vehicles Phase V.

BOARD MEMBERS

- | | |
|-------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Alfred Keriolale | -Member |
| 3. Ms. Rahab Chacha | -Member |

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT

-SIMBA CORPORATION LIMITED

1. Mr. Innocent Muganda -Advocate, Sagana Biriq & Co. Advocates
2. Mr. Matata Munyeke -Chief Commercial Officer

PROCURING ENTITY

-MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT

1. Mr. Eric Obura -Senior State Counsel
2. Mr. Stephen Wamae -DD/Supply Chain Management Officer

1ST INTERESTED PARTY

-ISUZU EAST AFRICA LIMITED

1. Ms. Mellyine Okina -Advocate, Kemboy Law Advocates
2. Mr. Anthony Musyoki -Legal
3. Ms. Kipkosgei Shollei -Government Sales
4. Mr. Gabriel Kanyiayi -Strategy

OTHER INTERESTED PARTY

A. CMC MOTORS GROUP LIMITED

1. Mr. Ong'anda Junior -Advocate, Migos Ogamba & Associates
Advocates

BACKGROUND TO THE DECISION

The Ministry of Interior and Coordination of National Government, State Department for Interior and Citizen Services (hereinafter referred to as "the Procuring Entity") invited sealed bids for Tender No. MICNG/SDI/005/2019-2020 for Leasing of Locally Assembled Motor Vehicles Phase V (hereinafter referred to as "the subject tender") through an advertisement in MyGov Publication Website and the Procuring Entity's Website on 28th January 2020 pursuant to the High Court ruling of 17th January 2020 in the matter of **Judicial Review Miscellaneous Application No. 284 of 2019, Republic v Public Procurement Administrative Review Board; Principal Secretary, State Department of Interior, Ministry of Interior and Co-ordination of National Government (Interested Party) ; and Ex Parte Applicant CMC Motors Group Limited (2020) eKLR.**

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of 10No of bids by the tender submission deadline of 12th February 2020. The same were opened shortly

thereafter by a Tender Opening Committee, at Harambee House, 7th Floor Boardroom in the presence of bidders' representatives who chose to attend.

Evaluation of Bids

An Evaluation Committee was appointed by the Principal Secretary in the State Department of Interior of the Procuring Entity vide Letter Ref. No. MICNG/PROC/28/1 Vol. VIII (185) dated 7th February 2020. The Evaluation Committee evaluated bids in the following stages:-

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

At the end of Financial Evaluation, the Evaluation Committee recommended award of the subject tender in the respective lots as shown below:-

Lot	Bidder No.	Bidder Name	Make/Model	Price for 4 years
1	B7	Toyota (K) Ltd	Toyota Landcruiser, HZJ79R-TJMRS	4,610,511,137.00
2	B3	DT Dobie & Co. Ltd	Volkswagen Tiguan, AllSpace Trendline	378,346,675.21
3	B8	Urysia Ltd	Peugeot 3008 Active	879,549,044.71
4	B9	Isuzu East Africa Ltd	Isuzu TFS 86 DC	1,406,098,282.00
5	B9	Isuzu East Africa Ltd	Isuzu TFS 86 D/Cab	1,778,681,021.00
6	B9	Isuzu East Africa Ltd	Isuzu TFS 86 S/C	860,673,109.00

Bidder No. 10, M/s Simba Corporation Limited was found non-responsive after a due diligence exercise conducted prior to Technical Evaluation. According to the Due Diligence Report signed on 18th February 2020, the Evaluation Committee conducted a due diligence exercise on 14th February 2020 and 17th February 2020. On Bidder No. 10, M/s Simba Corporation Limited, the Evaluation Committee noted the following:-

- The firm had indicated they have an operational assembling line at Associated Vehicle Assemblers Ltd (AVA) for the type and model of the vehicle they had offered in their bid document;
- However, on visiting AVA, the Evaluation Committee did not see any assembly kits or vehicles in the assembly process. The vehicle offered in their tender document was also not in the list of vehicles currently assembled by AVA. The Evaluation Committee was shown a complete vehicle of the same and it is listed as one of the vehicle to be assembled in future;
- AVA has no production data for the firm on the type and model for motor vehicles offered in the tender document.

In a professional opinion dated 3rd March 2020, the Head of Procurement reviewed the Evaluation Report dated 3rd March 2020 expressing his views that the procurement process met the requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). He urged the Accounting Officer (Principal Secretary, State Department of Interior & Citizen Services) to award the subject tender as

recommended by the Evaluation Committee. The said professional opinion was approved on the same date of 3rd March 2020.

In letters dated 4th March 2020, all the successful and unsuccessful bidders were notified of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Simba Corporation Limited (hereinafter referred to as “the Applicant”) lodged a Request for Review dated 17th March 2020 and filed on 18th March 2020 together with a Supporting Affidavit sworn and filed on even date with a Supplementary Affidavit sworn on 30th March 2020 and filed on 31st March 2020 seeking the following orders:-

- 1. An order allowing the Request for Review;***
- 2. An order annulling the decision of the Procuring Entity through the letter dated 4th March 2020 that the Applicant had not been successful in Tender No. MICNG/SDI/005/2019-2020 for Leasing of Locally Assembled Motor Vehicles Phase V;***
- 3. An order directing the Procuring Entity to award Tender No. MICNG/SDI/005/2019-2020 for Leasing of Locally Assembled Motor Vehicles Phase V to the Applicant in the respective categories in its bid;***

- 4. In the alternative, the Honourable Board do re-evaluate the tender and award the Applicant in the respective categories in its bid;***
- 5. An order directing that the costs of and/or incidental to this Review be borne by the Procuring Entity; and***
- 6. Any other orders that the Board deems just and fit in the circumstances.***

In response, the Procuring Entity filed a Response to the Request for Review dated 23rd March 2020 and Written Submissions on 24th March 2020, while the 1st Interested Party filed an Affidavit sworn and filed on 25th March 2020.

The Request for Review came up for hearing before the Board on 26th March 2020 wherein the Applicant was represented by Mr. Innocent Muganda on behalf of the firm of Sagana, Biriq & Company Advocates, the Procuring Entity was represented by its Senior State Counsel, Mr. Eric Obura, the 1st Interested Party was represented by Ms. Mellyne Okina on behalf of the firm of Kemboy Law Advocates and M/s CMC Motors Group (K) Limited was represented by Mr. Ong'anda Junior on behalf of the firm of Migos Ogamba & Associates Advocates.

The Board drew parties' attention to its Circular No 1/2020 dated 16th March 2020 and further direction issued vide Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan

to mitigate the Covid-19 disease including the manner in which matters shall be handled by the Board. Accordingly, the Board directed as follows:-

- 1. All Interested Parties, including M/s CMC Motors Group (K) Ltd are hereby directed to file and serve their responses and written submissions by 5pm on the 27th day of March 2020.**
- 2. The Applicant is at liberty to file and serve a Further Statement in Support of its Request for Review together with its Written Submissions by 5pm on 30th March 2020.**
- 3. The Procuring Entity is at liberty to file and serve Supplementary Submissions by 5pm on 2nd April 2020.**
- 4. There being no objection from the parties to the Request for Review, the Procuring Entity is hereby allowed to proceed with the procurement process in the subject tender save for Lots 4, 5 & 6 of the subject tender.**
- 5. The Procuring Entity is hereby directed to submit the Financial Bids and Minutes of Opening of the Financial Bids to the Board by 5pm on 27th March 2020.**
- 6. The decision of the Board shall be rendered to all parties by way of email on or before 8th April 2020.**

Consequently, the 1st Interested Party lodged Written Submissions dated and filed on 26th March 2020, while the Applicant filed Written Submissions dated 31st March 2020 and filed on 1st April 2020 together with a List of Authorities.

The Board observes that on 6th April 2020, Mr. Innocent Muganda representing the Applicant addressed an email to the Board Secretariat (pparb@ppra.go.ke.) stating that from the instructions of his client, he was of the view that the Board would be reviewing the entire procurement process in the subject tender and not just reviewing the specific Lots 4, 5 & 6 of the subject tender that were challenged by the Applicant in the Request for Review. He took the view that the Board's decision may affect the entire procurement process (and not just the specific lots in issue). Therefore, the Procuring Entity should await the Board's decision in all the lots and abide by the said decision.

The Board observes that when the matter came up for hearing on 26th March 2020, the Board enquired from all parties whether there was any objection to the Board directing the Procuring Entity to proceed with the procurement process in Lots 1, 2, 3 & 7 which the Applicant was not challenging in the Request for Review. In response, the Procuring Entity, the 1st Interested Party through their respective Advocates and Mr. Ong'anda Junior, Counsel for M/s CMC Motors Group Ltd submitted that they had no objection to the Procuring Entity proceeding with the procurement process in the lots that are not challenged by the Applicant in its Request for Review. On its part, the Applicant, through its Counsel submitted that it will leave the Board to make a decision and shall be guided by the decision of the Board on this issue. Accordingly, the Board directed the Procuring Entity to proceed with the procurement process in the subject tender save for Lots 4, 5 & 6. In essence, the Procuring Entity was at liberty to proceed with the procurement

process with respect to Lots 1, 2, 3 and 7 of the subject tender as from 26th March 2020.

The Applicant raised its concern that the Board may be reviewing the procurement process in the subject tender with respect to all the lots after the Board had dispensed with the hearing of the Request for Review and after the orders of the Board allowing the procurement process in Lots 1, 2, 3 & 7 of the subject tender to continue, had been issued. In the Board's view, the Applicant's request for the Procuring Entity to await the Board's final decision in this matter in order to proceed with lots 1, 2, 3 and 7 is tantamount to reviewing the Board's decision and/or seeking the Board to review its own decision when the Board does not have such review powers.

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 rightfully found the Applicant's bid non-responsive in accordance with the Tender Document and the Act; and***

II. Whether the Applicant suffered prejudice as a result of the Procuring Entity's failure to disclose the successful tenderers in the Applicant's letter of notification of unsuccessful bid dated 4th March 2020.

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

On the first issue, the Board observes that the Applicant received a letter of notification of unsuccessful bid dated 4th March 2020, having participated in the subject tender pursuant to the Procuring Entity's Invitation Notice dated 28th January 2020. The Applicant's letter of notification of unsuccessful bid dated 4th March 2020 contains the following details:-

"Reference is made to the above tender in which you participated

We wish to inform you that the tender has been concluded. However, we regret to inform you that you were not successful for the following reasons:-

<i>Lot</i>	<i>Reason (s)</i>
<i>1</i>	<i>-The vehicle offered was not locally assembled -The vehicle offered had an engine capacity of 2,179cc which was below the specified range of 2900-4200cc</i>
<i>2</i>	<i>The vehicle offered was not locally assembled</i>
<i>3</i>	<i>The vehicle offered was not locally assembled</i>
<i>4</i>	<i>The vehicle offered (both Options A and B) were not locally assembled</i>
<i>5</i>	<i>The vehicle offered (both Options A and B) were not locally assembled</i>

6	<i>The vehicle offered was not locally assembled</i>
7	<i>The vehicle offered was not locally assembled</i>

We thank you for showing interest in working with us”

Through this Request for Review, the Applicant challenged the outcome of its bid with respect to Lots 4, 5 & 6 of the subject tender. The Board having studied the Procuring Entity’s confidential file observes that according to the Procuring Entity, the Applicant’s bid was found non-responsive following a due diligence exercise conducted on 17th February 2020.

In that regard, the Board studied the Procuring Entity’s Due Diligence Report dated 18th February 2020 to ascertain how the due diligence exercise on the Applicant’s bid was conducted. In the said Due Diligence Report, the Evaluation Committee noted the following:-

“The team was met by the Factory Manager, Dave Williamson who was accompanied by the following member of the Management Team and representatives of the firms:-

.....

3. Mahindra

The Committee did not see any assembly kits, assembly line or vehicles in the assembly process. The vehicle was also not in the list of vehicles currently assembled by the AVA Ltd.

However, the Committee was shown a complete vehicle as shown in the photo below:-

.....

Conclusion on Associated Vehicle Assemblers Ltd

The Committee noted that:-

- 1.;***
- 2. Of the other vehicles indicated in the tender documents to be assembled at AVA, Mombasa, no assembly kits or vehicles in the assembling process were seen.***

(i);

(ii);

(iii) Bidder No. 10, M/s Simba Corporation. The firm has indicated that they have an operational assembling line at AVA for the type and model of the vehicle they had offered in their tender document. However, on visiting the AVA, the Committee noted the following:

a) The Committee did not see any assembly kits or vehicles in the assembly process. The vehicle offered in their tender document was also not in the list of vehicles currently assembled by the AVA Ltd. However, the Committee was shown a

complete vehicle of the same and it is listed as one of the vehicles to be assembled in future
b) The AVA has no production data for the firm on the type and model of Motor Vehicles offered in the tender document”

The Procuring Entity, in its Response, averred that it conducted a due diligence aimed at ensuring that the motor vehicles submitted in the various lots were locally assembled.

The purpose of due diligence, according to Stage 4. Due Diligence under Clause 2.22.1 of the Appendix to Instructions to Tenderers of the Tender Document is as follows:-

“The Evaluation Committee shall conduct due diligence on the bidder to ascertain the competence/capability of the firm to supply locally assembled motor vehicles”

Further, paragraphs 86 and 87 at page 50 of the Tender Document provide that:-

“86. The vehicles to be supplied SHALL be Locally Assembled. The same shall be confirmed during due diligence as part of the evaluation process

87. Due Diligence shall also be done during production to confirm local assembly”

From the foregoing, the Board notes that the main objective of the Procuring Entity’s due diligence exercise as stated in the Tender Document was to ascertain the competence/capability of the firm to supply locally assembled motor vehicles as part of the evaluation process. The said due diligence exercise would also be undertaken during production to ascertain local assembly.

In addition to the subject tender sourcing for Leasing Services of Locally Assembled Motor Vehicles, Clause (ii) of the Tender Advertisement Notice of 28th January 2020 specified that:-

“The Ministry of Interior and Coordination of National Government, State Department for Interior and Citizen Services now invites sealed tenders from local assemblers of motor vehicles for provision of vehicles and transport services for the National Government Administration, National Police Service and Presidential Delivery Unit through Leasing”

From the onset, it is clear that the Procuring Entity only required sealed tenders from local assemblers of motor vehicles. This explains why the Procuring Entity maintained its intention to ascertain bidders’

competence/capability as local assemblers who would supply locally assembled vehicles as an eligibility criterion communicated to bidders in the Advertisement Notice dated 28th January 2020.

The Board observes that since the Tender Advertisement Notice of 28th January 2020 required bids from local assemblers as an eligibility criterion, the Procuring Entity found it necessary (as averred in its Response) to confirm whether the bids received by it are from local assemblers of motor vehicles. Page 50 of the Tender Document required the Procuring Entity to confirm whether the vehicles to be supplied are also locally assembled during a due diligence exercise as part of the evaluation process.

Apart from the above clauses demonstrating that the invitation of bids from local assemblers was an eligibility criterion to be considered as part of the evaluation process, Stage 1 under Clause 2.22.1 of the Appendix to Instructions to Tenderers of the Tender Document provides as follows:-

"STAGE 1: PRELIMINARY EVALUATION

The following shall be considered

- (i) Bid Security of Kshs. 1,000,000.00 from a commercial bank licensed by the Central Bank of Kenya valid for 300 days from the tender closing date and time***
- (ii) Submit copies of Certificate of registration/Certificate of incorporation;***

- (iii) Submit copies of Valid Tax Compliance Certificate;***
- (iv) Duly filled, signed and stamped business questionnaire form;***
- (v) Duly filled, signed and stamped non-debarment form;***
- (vi) Duly filled, signed and stamped integrity declaration form;***
- (vii) Attach original brochures and catalogues for evaluation of technical specifications. Photocopies shall not be allowed;***
- (viii) Submit copies of manufacturer authorization letter***
- (ix) Copies of CR 12 for incorporated companies or copies of national identity cards for business registration'***

Regulation 47 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") further specifies the purpose of preliminary evaluation as follows:-

- "47. (1) Upon opening of the tenders under section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether-***
 - (a) the tender has been submitted in the required format;***

- (b) any tender security submitted is in the required form, amount and validity period;***
- (c) the tender has been signed by the person lawfully authorized to do so;***
- (d) the required number of copies of the tender have been submitted;***
- (e) the tender is valid for the period required;***
- (f) all required documents and information have been submitted; and***
- (g) any required samples have been submitted”***

Having compared the documents specified in Stage 1 under Clause 2.22.1 of the Appendix to Instructions to Tenderers of the Tender Document to Regulation 47 (1) (f) of the 2006 Regulations, the Preliminary Evaluation conducted by the Procuring Entity ascertained whether bidders submitted the documents and information required in Stage 1 under Clause 2.22.1 of the Appendix to Instructions to Tenderers of the Tender Document.

According to page 6 of the Evaluation Report dated 3rd March 2020, the Evaluation Committee confirmed whether or not bidders submitted all the documents outlined in Stage 1 under Clause 2.22.1 of the Appendix to Instructions to Tenderers of the Tender Document and whether some of the

documents were dully filled, signed and stamped as required by the Procuring Entity.

The documents and information submitted in response to the above preliminary evaluation criteria could not assist the Procuring Entity to satisfy itself that vehicles offered by bidders are locally assembled and that bidders are local assemblers save for the Original Brochures and Catalogues required for evaluation of technical specifications which would perhaps bring out the statement to the effect that the bidders are local assemblers and the vehicles offered are locally assembled.

Having conducted a Preliminary Evaluation with a view of establishing whether or not bidders submitted the documents and information required in Stage 1 under Clause 2.22.1 of the Appendix to Instructions to Tenderers of the Tender Document, the Procuring Entity found it necessary to confirm whether bidders met the eligibility criterion in the Advertisement Notice dated 28th January 2020, in that it is only local assemblers offering locally assembled vehicles that could participate in the subject tender.

The Board studied the Tender Document with a view of establishing the documents and information required by the Procuring Entity in determining whether or not the vehicles offered by a bidder are locally assembled and noted the following:-

Schedule A: Schedule of Vehicles Specifications and Requirements (Lots/Vehicle Specifications Quantity) at page 52 of the Tender Document provided as follows:-

Lot No	Vehicle Specifications	Description of Specification per CMTE	User	QTY	Totals
1	Heavy Duty Pick Up Single Cab... Locally Assembled	.....	.....	.....
2	Medium Duty Utility Passenger Vehicle... Locally Assembled	.....	.....	.....
3	Light Duty Utility Passenger Vehicle Locally Assembled	.....	.....	.....
4	Pick up Double Cab... Locally Assembled	.....	.....	.....
5	Pick up Double Cab... Locally Assembled	.....	.....	.....
6	Pick up Single Cab... Locally Assembled	.....	.....	.....
7	Heavy Duty Utility Passenger Vehicle... Locally Assembled	.....	.....	.....

On its part, Section VI. Schedule of Vehicles Specifications and Requirements (Lots/Vehicle Specifications Quantity) at pages 53 to 86 of the Tender Document provided one of the specification of the vehicles quoted by bidders in each of the 7 lots as follows:-

Tenderer's Specification Column to be completed by ALL		
GENERAL	Requirement	Tenderer's
(a)		
(b)		
(c)		
(d) <u>Vehicle quoted for is locally assembled</u>	YES MANDATORY	.....(Y/N)

Further to this, Schedule B. Locally Assembled Motor Vehicle Lease Schedule at page 88 of the Tender Document provided a **"Locally Assembled Motor Vehicle Leasing Schedule- Addendum to Master Operating Lease Agreement"** wherein bidders would indicate whether or not they agree to lease locally assembled vehicles to the Procuring Entity in accordance with the terms and conditions specified in the said Agreement.

It is worth noting that Clause (C). Past Experience under Stage 2. Technical Evaluation at page 24 of the Tender Document provides as follows:-

"This takes into account the past experience of the company in leasing programs in the country or even outside. The requirement and award of the points will be the same for all the lots, distributed as below:-"

- a. Proof of satisfactory service for contracts of similar nature executed within the last three (3) years -(10 points)**
- (b) Submit reference letters from 3 clients, providing details of clients and contact persons within the client organization -(3 points)**
- (c) Local experience in leasing**
Indicate lease programs which have been undertaken in the country (3 points)
- (d) Composition of the organization including key managers likely to be assigned to implement these services (1 point)“**

In order to provide guidance to bidders that the information required with respect to the above criterion should relate to leasing of locally assembled motor vehicles, the Procuring Entity further provided Schedule C. Schedule of Lease Payments at page 91 of the Tender Document with the following details:-

Leasing of Locally Assembled Motor Vehicle Official Government Transport				
Leasing Payment Schedule				
Payment No	Payment Date Month/Quarter	Lease Payment Amount	Other Payment	Total Amount
1				
2				
3				
4				
Total Year 1				

5				
6				
7				
8				
Total Year 2				
9				
10				
11				
12				
Total Year 3				
13				
14				
15				
16				
Total Year 4				
Total Lease Payments				

From the foregoing, the Board notes that the above requirements and specifications were evaluated at the Technical Evaluation Stage as can be seen from the Procuring Entity’s Evaluation Report dated 3rd March 2020. This clearly demonstrates that even though bidders were required to demonstrate they were local assemblers as an eligibility criterion, the technical specifications of the vehicles in terms of Leasing of Locally Assembled Motor Vehicles would also be considered during Technical Evaluation.

It is therefore the Board’s considered view that the Tender Document directed the Procuring Entity to establish whether the bids received were from local assemblers as an eligibility criterion forming part of the evaluation

process and that the Procuring Entity would also ascertain whether the vehicles offered are locally assembled during Technical Evaluation.

Having established that there was an eligibility criterion forming part of evaluation process to the effect that the bids received must be from local assemblers and that the vehicles offered by bidders must be locally assembled, the Board shall now establish whether the Procuring Entity rightfully found the Applicant's bid non-responsive.

In its Written Submissions, the Procuring Entity submits that the Applicant's motor vehicles offered in various lots (including Lots 4, 5 & 6 of the subject tender that have been challenged by the Applicant) are not being locally assembled. According to the Procuring Entity, it visited Associated Vehicles Assemblers (AVA) Ltd (i.e. the Assembly Plant identified by the Applicant for the vehicle it was offering) but there was no assembly line for the Mahindra motor vehicles.

The Procuring Entity further contends that there was no evidence of Semi Knocked Down and Completely Knocked Down Kits for the Mahindra vehicles within the AVA plant.

In support of the written submissions by the Procuring Entity, the 1st Interested Party in its Written Submissions submits that the Mahindra

importation documents attached to the Applicant's Request for Review are in the name of Xylon Motors Ltd which is a separate legal entity from the Applicant herein. In the 1st Interested Party's view, Xylon Motors Ltd did not participate in the subject tender hence the Applicant could not use the documents of Xylon Motors Ltd.

The 1st Interested Party also makes reference to 2 letters attached to the Applicant's Request for Review. The first one is dated 30th January 2020 and addressed to the Procuring Entity indicating that Mahindra and Mahindra Ltd entered into a Local Assembly Agreement with the Applicant and that in the said letter, reference is made to Mahindra Pick-ups being assembled at AVA Ltd. Regarding the second letter, the 1st Interested Party avers that the same is dated 1st February 2020 addressed to the Principal Secretary, State Department of Public Works indicating that Mahindra and Mahindra Ltd would directly supply the Mahindra Vehicle to the Procuring Entity and that the letter does not mention the Applicant as the supplier of the said vehicles.

The 1st Interested Party further makes reference to a letter dated 15th October 2019 attached to the Applicant's Request for Review, which is an approval given to Xylon Motors Limited by the National Treasury stating that AVA Ltd would be the designated assembly plant of Xylon Motors Ltd pending the establishment of an assembly plant by Xylon Motors Ltd. The 1st Interested Party further makes reference to an Assembly Agreement between the Applicant and AVA Ltd which in the 1st Interested Party's view,

does not have evidence showing the Applicant had an approval to import and assemble Mahindra motor vehicle CKD kits.

Lastly, the 1st Interested Party referred to supply contracts adduced by the Applicant in its Request for Review evidencing supply of motor vehicles to the Ministry of Transport, Infrastructure, Public Works, Housing and Urban Development. However, the 1st Interested Party contends that the said contracts were with respect to supply of Mitsubishi vehicles by the Applicant, whereas Xylon Motors Limited is the one that was contracted to supply Mahindra Vehicles.

The Applicant on its part explains at paragraphs 26 of its Written Submissions that it provided evidence to show its business arrangement conducted through its subsidiary, AVA Ltd wherein the Applicant owns 100% shares. Secondly, that the Applicant vide letters dated 10th July 2019 and 30th August 2019 applied to the Ministry of Industry, Trade and Cooperatives for an authorization which was obtained on 15th October 2019 to undertake assembly of motor vehicles through its subsidiaries; AVA Ltd and Xylon Motors Ltd.

Subsequently, the Applicant avers that it submitted in its bid, a contract with AVA Ltd for the production and assembly of Mahindra Motor Vehicles. Regarding the visit by the Procuring Entity on 17th February 2020, the Applicant avers that the Evaluation Committee were shown videos and

photos of the motor vehicles assembly process including the Mahindra Pick-up model and that AVA Ltd in a letter dated 12th February 2020 provided evidence that the Mahindra Vehicles model would be flagged off by the President of the Republic of Kenya on 9th March 2020.

Thirdly, that vide an email sent to the Procuring Entity by AVA Ltd, the Applicant contends that the Procuring Entity was informed that the Assembly of the Mahindra Motor Vehicle would commence in November 2019 but that the same finally commenced in January 2020. In the Applicant's view, the Procuring Entity did not see any Completely Knocked Down Kits for the Mahindra vehicle since the kits were already used before the said visit to assemble the Mahindra vehicle, therefore the Procuring Entity was shown a completed Mahindra vehicle.

Having considered parties' written submissions, the Board first studied the Applicant's original bid to establish whether or not there was any documentation in support of the relationship between the Applicant, Xylon Motors Ltd and AVA Ltd.

As regards the Applicant and AVA Ltd, the Board noted the following:-

- At page 000126 of the Applicant's original bid, a CR12 extract of AVA Ltd as at 12th October 2017 is attached with the following details:-

Names	Address	Nationality	Shares
Adil Popat	Kenyan	Nil

Dinesh Kotecha	.....	Kenyan	Nil
Simba Corporation Limited	.....		540,000
Total			540,000

- At pages 000131 to 000138 of the Applicant's original bid, a Certification issued to AVA Ltd No. IATF 16949:2016 detailing the activities undertaken by AVA Ltd as; Contract Review, Purchasing and Supplier Management in Assembly of Commercial Vehicles. The brands being assembled at AVA Ltd are specified as follows;

	Brand	Franchise Holder	OEM Origin
Fuso	Mitsubishi Fuso Trucks	Simba Corporation Ltd	Germany, Japan, India
Mitsubishi	Mitsubishi Motors	Simba Corporation Ltd	Japan
Mahindra		Simba Corporation Ltd	India

- At page 000143 of the Applicant's original bid, a letter dated 30th January 2020 on the letterhead of Mahindra & Mahindra South Africa Pty Ltd (Kenya Branch) addressed to the Procuring Entity with the following details:-

"We Mahindra & Mahindra Ltd

Have entered into agreement with Simba Corporation for Local Assembly of New Generation Mahindra Pickups Single/Double Cabin with 4 Wheel Drive & 2 Wheel Drive Configuration

At present Mahindra Pickups are locally assembled at Associated Vehicle Assemblers Ltd (AVA) Mombasa

All the technical support, manpower training to locally assemble these units has been duly extended while assembling the vehicles at Associated Vehicle Assemblers Kenya (Ltd) (AVA) Mombasa”

- At page 000144 to 000149 of the Applicant’s original bid, an Agreement dated 2nd May 2019 between Simba Corporation Limited identified as the Importer and Associated Vehicles Assemblers Ltd as the Assembler where it is noted as follows:-

“The Importer (i.e. Simba Corporation Limited) has entered or proposes to enter with Mahindra & Mahindra Ltd into an Agreement whereby the Importer will be authorized to import into Kenya in CKD condition certain vehicles assembled by the Assembler (Associated Vehicles Assemblers Ltd) in accordance with the Conditions of Assembly

3. Assembler Service

Subject to continuing fulfilment of the Importer’s duties hereunder, the Assembler shall provide at the Plant all such factory facilities, general production equipment and trained employees as shall be necessary to achieve and maintain such production schedules as are from time to time agreed

between the Importer and the Assembler with the consent of the Manufacturer to the Manufacturer's Specifications and standards of quality at the volume defined in Schedule A

4. Importer Service

The Importer shall supply to the Assembler at the Plant, subject to continuing fulfilment of the Assembler's duties hereunder and to the more detailed provisions hereinafter set out, sufficient CKD parts and components as prescribed in the Conditions of Assembly as well as parts and components of local supply in order to achieve and maintain such production schedules as aforesaid"

- At page 000264, A Local Assembler Statement of Qualification on the letterhead of AVA Ltd and Simba Corporation Limited stating as follows:-

"Simba Corporation Ltd (Simba), a 100% Kenyan Owned Company is a local assembler and fully owns Associated Vehicle Assemblers Ltd (AVA), a leading motor assembly plant in East African Region. Simba is the only 100% locally owned company that owns an assembly plant in Kenya

AVA assembles over 60% of all vehicles assembled in Kenya

Simba has been in operation in Kenya for over 52 years and assemble over 90% of vehicles it sells in the Republic of Kenya

Simba Corporation Ltd sells the following brands in Kenya

-Mitsubishi

-Fuso

-Renault

-Mahindra

-SAME Tractors"

From the foregoing documentation, the Board notes that Section 3 of the Companies Act, No. 17 of 2015 states that:-

"wholly-owned subsidiary company" (of another company) means a company that has no members other than that other company and that other company's wholly owned subsidiaries (or persons acting on behalf of that other company or its wholly-owned subsidiaries)"

Applying the foregoing definition, the Board notes that according to the CR12 extract of AVA Ltd, AVA Ltd has two other members but the said members do not own shares in it. The Applicant wholly owns AVA Ltd noting that the Applicant holds all the shares in AVA Ltd evidenced by the CR 12 cited hereinabove.

AVA Ltd also entered into an agreement with the Applicant, whereby AVA Ltd is the Assembler who shall provide factory facilities, general production equipment and trained employees necessary to achieve and maintain production schedules. On the other hand, the Applicant is the Importer who would supply to the AVA Ltd, sufficient CKD parts and components as prescribed in the Conditions of Assembly as well as parts and components of local supply in order to achieve and maintain their production schedules.

The Board further makes an observation that in the agreement dated 2nd May 2019, the Applicant expresses the intention to enter into an agreement with Mahindra & Mahindra Ltd whereby the Applicant will be authorized to import into Kenya in CKD condition, certain vehicles assembled by AVA Ltd.

However, no agreement between the Applicant and Mahindra & Mahindra Ltd was attached to the Applicant's bid. It is only the letter dated 30th January 2020 addressed to the Procuring Entity that states that an Agreement exists between the Applicant and Mahindra & Mahindra Ltd for Local Assembly of New Generation Mahindra Pickups Single/Double Cabin with 4 Wheel Drive

& 2 Wheel Drive Configuration which are locally assembled at Associated Vehicle Assemblers Ltd (AVA) Mombasa.

From the foregoing, it is the Board's considered view that the Applicant provided documentation demonstrating its relationship with AVA Ltd, being its wholly-owned subsidiary and that Assembly of the Mahindra Pick Up model is undertaken at AVA Ltd, Mombasa (i.e. the Applicant's wholly-owned subsidiary) with the understanding that Mahindra & Mahindra Ltd agreed for its vehicles to be locally assembled by the Applicant at the assembly plant in Mombasa (i.e. AVA Ltd).

As regards the Applicant and Xylon Motors Ltd, the Board notes the following:-

- At page 000169 of the Applicant's original bid, a letter dated 15th October 2019 from the National Treasury and Planning addressed to the Commissioner General, Kenya Revenue Authority, stating as follows:

"RE: APPROVAL OF M/S XYLON MOTORS LIMITED AS AN IMPORTER OF COMPLETELY KNOCKED DOWN (CKD) KITS AND ASSEMBLER OF MOTOR VEHICLES AND PICK=UPS

We refer to a letter Ref No. MOI/CORP/5/1 dated 24th September 2019 from M/s Xylon Motors Limited

addressed to the National Treasury and Planning on the above subject tender

After due consideration, the Cabinet Secretary for the National Treasury and Planning on 11th October 2019 approved M/s Xylon Motors Ltd as an importer of CKD kits and Assembler of Mahindra motor vehicles and pick-ups in Kenya

By a copy of this letter, the management of M/s Xylon Motors Limited is advised to liaise with the Commissioner of Customs and Border Control, Kenya Revenue Authority for licensing of a bonded warehouse facility for the assembled motor vehicles and pick-ups. The Complete Knocked Down Kits shall be assembled by Associated Vehicles Assemblers in Mombasa until such time M/s Xylon Motors Limited puts up an assembly plant..”

- At page 000171, A permit to use Standardization Mark issued on 11th September 2019 by the Kenya Bureau of Standards to Xylon Motors Ltd with respect to Pick-Up Trucks, specifically Mahindra brand

The Board studied the Applicant’s bid but did not find any documentation supporting the relationship between Xylon Motors Ltd and the Applicant. The letter dated 15th October 2019 indicates an approval given by the National Treasury and Planning for Xylon Motors Ltd to import CKD kits and that until

such time when Xylon Motors Ltd sets up an Assembly Plant, the Mahindra motor vehicles and pick-ups will be assembled at AVA Ltd.

From the foregoing, the Board notes that the Applicant provided evidence that it was authorized by Mahindra and Mahindra Ltd to import CKD kits for the Mahindra vehicle models and that Assembly of the said Mahindra vehicle model is undertaken at AVA Ltd. There is however no relation in the Applicant's bid that it would import CKD Kits whose approval were given to Xylon Motors Ltd.

Despite the Applicant having been named as the importer of CKD kits for the Mahindra vehicle models, the Applicant attached at page 000173 to 000174, an Exemption issued by Kenya Bureau of Standards to Xylon Motors Ltd, for **"Manufacturers Importing Raw Materials Machinery and Spare parts for own use: List of Raw Materials Exempted from PVOC"**. The said exemption is granted with respect to **Mahindra Scorpio D/c Truck Model: DVR4JMCABRJ and Mahindra Scorpio S/c Truck Model: CVR2JMCABRJ** issued to Xylon Motors Ltd and not the Applicant.

Having noted that the Applicant's bid does not contain documentation explaining its relationship with Xylon Motors Ltd, the Board observes that the documentation attached to the Applicant's bid belong to Xylon Motors Ltd and not the Applicant. There is also no agreement between the Applicant and Xylon Motors Ltd permitting the Applicant to use the Raw Materials

Machinery and Spare Parts for which exemption from PVOC was granted by the Kenya Bureau of Standards to Xylon Motors Ltd.

The Board further notes that the Procuring Entity in its Response to the Request for Review avers that during its visit to the Applicant, the Evaluation Committee was taken on a tour of the entire AVA local assembly plant and there was no evidence of a local assembly line for the Applicant’s motor vehicle (i.e. the Mahindra model) as alleged by the Applicant and that not a single CKD component was shown. The Procuring Entity further avers that its Evaluation Committee was shown a parked completely built Mahindra pick-up and it was not certain whether it was locally assembled or imported fully built.

The Board having considered this submission, studied page 000200 of the Applicant’s original bid to establish the specifications of the Mahindra vehicle being offered by the Applicant. On that page, a document referred to as **“Build Status of Vehicle model proposed”** is attached. For Lots 4, 5 & 6, the Applicant provided the following details:-

Tender Lot No. & Description	Vehicle Brand/Model Proposed and Build Status
Lot 4 Pick Up Double Cab, 4x4, LWB, 1900-300cc Diesel with Superstructure & Canvas Locally Assembled	<u>Mahindra Scorpio Double Cab Pick up</u> Vehicles assembled from completely knocked down kits
Lot 5 Pick Up Double Cab, 4x4, LWB, 1900-300cc Diesel	<u>Mahindra Scorpio Double Cab Pick up</u> Vehicles assembled from completely knocked down kits

Locally Assembled	
Lot 6 Pick Up Single Cab, 4x4, 1-1.5 TON, Diesel, 1900-300cc, Diesel, with Superstructure & Canvas	
Locally Assembled	

The Applicant further provides details of the Mahindra vehicles offered in the respective lots as follows:-

- At page 000283 of the Applicant's bid, MTD-2387-045-20 Pick Up Double Cab, 4x4, LWB. 1900.3000cc Diesel with Superstructure and Canvas (Mahindra Scorpio S6 Pick-up Double with Canvas for Lot 4-Option 2;
- At page 000324 of the Applicant's bid, MTD-2384-045-20 Pick Up, Double Cab, 4x4, LWB. 1900-3000cc, Diesel (Mahindra Scorpio S6 Double Pick Up 4x4) for Lot 5-Option 2;
- At page 000349 of the Applicant's bid, MTD-2382-045-20 Pick Up Single Cab, 4x4, 1-1.5 Ton, Diesel, 1900-3000cc, Diesel with Superstructure & Canvas (Mahindra Scorpio S6 Single Cab 4x4) for Lot 6-Option 2.

It is important to note that the vehicle, brand and models of the Mahindra vehicles proposed by the Applicant in lots 4, 5 & 6 differ from the vehicle, brand and models of the Mahindra vehicles for which KEBS Exemption (i.e.

Manufacturers Importing Raw Materials Machinery and Spare parts for own use: List of Raw Materials Exempted from PVOC) was given to Xylon Motors Ltd (i.e. **Mahindra Scorpio D/c Truck Model: DVR4JMCABRJ and Mahindra Scorpio S/c Truck Model: CVR2JMCABRJ**).

Further, having studied the Due Diligence Report of 18th February 2020 the Board observes that the Procuring Entity's contention is that it was shown a parked, completely built Mahindra pick-up and could not therefore ascertain whether it was locally assembled or imported fully built.

Further to this, the Board was referred to a Power Point presentation forwarded by AVA Ltd's representative, Mr. Dave Williamson to the Procuring Entity via email on 17th February 2020 regarding the commercial activities undertaken and to be undertaken in future by AVA Ltd. Having studied the said Power Point presentation, the Board observes the following:-

- At page 11 of the said power point presentation, AVA indicates its next steps with regards to Mahindra Pick Ups as follows:-
 - ✓;
 - ✓ ***The following month we will introduce Mahindra pick ups;***
 - ✓;
 - ✓;

The Board is only left with the Procuring Entity's assertion that it was shown a parked completely built Mahindra pick-up and could not therefore ascertain whether it was locally assembled or imported fully built.

The Board already established that the Procuring Entity invited bids from local assemblers. This therefore means that as at the tender submission deadline of 12th February 2020, all bidders ought to have been local assemblers and that the vehicles being offered in a bidder's respective bid is locally assembled. The Applicant provided evidence that it owns an assembly plant (i.e. AVA Ltd) thereby making it a local assembler. There is however no evidence placed before the Board to demonstrate that one of the vehicles offered in the Applicant's bid (i.e. the Mahindra vehicle model for Lots 4, 5 & 6) is the one that was parked at AVA Ltd, completely built as alleged by the Procuring Entity.

Having noted that the Tender Document and the Advertisement Notice made it mandatory that all bids must be submitted from local assemblers and the same being an eligibility criterion to be verified during the evaluation process, the Board deems it necessary to address its mind on the manner in which a due diligence exercise should be conducted as outlined in the Act.

Section 83 of the Act states that:-

- "Section 83 (1)** *An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.*
- (2)** *The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.*
- (3)** *To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—*
- (a)** *initial each page of the report; and*
- (b)** *append his or her signature as well as their full name and designation."*

Section 83 (1) of the Act provides that the purpose of due diligence is to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender. In conducting a due diligence exercise, the following procedure must be adhered to:-

Due diligence should be conducted by the Evaluation Committee after tender evaluation but prior to award of the tender to confirm and verify the qualifications of the bidder determined by the Procuring Entity to have submitted the lowest evaluated responsive tender. Section 83 (1) of the Act stipulates that a due diligence exercise is conducted on the lowest evaluated responsive tender to confirm and verify qualifications of such tenderer.

Further, an Evaluation Committee is the one that conducts a due diligence exercise. Section 46 (4) (b) of the Act provides that:-

Section 46 (1) An Accounting officer shall ensure that an ad hoc evaluation committee is established in accordance with this Act and Regulations made thereunder and from within the members of staff, with the relevant expertise

(2)

(3)

(4) An Evaluation Committee established under subsection (1) shall:-

(a);

(b) consist of between three and five members appointed on a rotational basis comprising heads of user department and two other departments or their representatives and where necessary, procured consultants or professionals, who shall advise on the evaluation of the tender documents and give a recommendation on the same to the committee within a reasonable time

From the above provision, the minimum number required to constitute an Evaluation Committee is 3. On the other hand, section 83 (3) of the Act directs that it is only the Evaluation Committee members who took part in the due diligence that sign and initial the due diligence report. Even though it is not mandatory that all Evaluation Committee members participate in a due diligence exercise, the minimum number of three stipulated under section 46 (4) (b) of the Act must be maintained noting that it is an Evaluation Committee that conducts a due diligence exercise.

Prior to commencing the due diligence exercise, the Evaluation Committee must first conclude evaluation of tenders at the Preliminary, Technical and Financial Evaluation Stages and recommend the lowest evaluated responsive

tenderer for award of the tender. At this stage, due diligence has not been conducted yet, hence the date appearing at the end of the Evaluation Report should be a true reflection of when evaluation at the Preliminary, Technical and Financial stages were concluded.

Due diligence is conducted on the lowest evaluated responsive tenderer. This is used to verify and confirm the qualification of the lowest evaluated tenderer after preliminary, technical and financial evaluation with respect to what such tenderer provided in its bid, in response to the minimum eligibility and mandatory requirements in the Tender Document and which documents ought to have been considered during evaluation.

Having noted that it was a mandatory eligibility criterion for bidders to demonstrate that they are local assemblers and that the vehicles offered are locally assembled together with evidence of having leased locally assembled vehicles within the last 3 years, this information would then be verified in a due diligence exercise conducted on the lowest evaluated responsive tenderer after tender evaluation but prior to award of the subject tender.

Further, section 83 (2) of the Act suggests one of the parameters of due diligence that an evaluation committee may adopt when undertaking a due diligence exercise, that is, obtaining confidential references from persons with whom the tenderer has had prior engagement. However, this does not

limit site visits for purposes of a due diligence exercise in terms of the needs of the Procuring Entity.

The Evaluation Committee would opt to conduct a visit of the assembly plant of the lowest evaluated responsive tenderer as indicated in the bid of that lowest evaluated responsive tenderer to confirm and verify whether or not the vehicles offered in the respective lots are locally assembled.

After concluding the exercise, a due diligence report must be prepared outlining how due diligence was conducted together with the findings of the process. The said report is signed only by members of the Evaluation Committee who took part in the due diligence exercise, and they must include their designation. Further, the report must be initialed on each page.

If the qualifications of the lowest evaluated tenderer are satisfactory, the report is submitted to the Head of Procurement function for his professional opinion and onward transmission to the Accounting Officer who will consider whether or not to award the tender to that lowest evaluated tenderer.

Assuming the lowest evaluated tenderer is disqualified after the first due diligence, this fact must be noted in the Due Diligence Report with reasons. In view of the findings of this report that the lowest evaluated tenderer be disqualified after due diligence, the Evaluation Committee then recommends

award to the next lowest evaluated tenderer. Thereafter, a similar due diligence process is conducted on such tenderer.

This procedure is applied until the successful tenderer for award of the tender is determined.

The Board observe that section 80 (2) of the Act provides as follows:-

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents..."

Section 83 (1) of the Act gives guidance to the Procuring Entity that upon conclusion of financial evaluation (being the last stage of tender evaluation), such a due diligence exercise (which is a post-qualification exercise) is conducted on the lowest evaluated responsive tenderer prior to award of the tender.

Having found that the Procuring Entity conducted a due diligence prior to Technical Evaluation, the Board is cognizant that the Tender Document at page 50 thereof had indicated that due diligence shall be part of the evaluation process and that a due diligence would also be done during production to confirm local assembly. Further to this, the Tender Advertisement Notice made the requirement for bidders to be local assemblers an eligibility criterion.

However, Section 83 of the Act recognizes due diligence as a post-qualification exercise conducted only on the lowest evaluated responsive tenderer. This Board notes that where provisions of a Tender Document are not in tandem with the Act, the Act prevails.

In order to ascertain whether or not bidders are local assemblers and whether the vehicles offered by such bidders are locally assembled, the Board finds that the Procuring Entity ought to conduct a due diligence exercise on the bidder it will determine to be the lowest evaluated responsive tenderer, only after it has conducted an evaluation process at the Preliminary, Technical and Financial Stages.

In totality of the first issue, the Board finds that the Procuring Entity, though entitled to conduct due diligence on the Applicant, it conducted such exercise prematurely, hence did not rightfully find the Applicant's bid non-responsive based on the due diligence exercise conducted prior to Technical Evaluation.

On the second issue for determination, the Applicant contended the Procuring Entity failed to disclose the successful bidders in the subject tender contrary to Section 87 of the Act which states as follows:-

"(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person

submitting the successful tender that his tender has been accepted.

(2)

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof

According to section 87 (3) of the Act, the Procuring Entity has the obligation to notify the unsuccessful tenderers of the outcome of their bids with specific reasons, and in doing so, to disclose the successful tenderer. The letter of notification of unsuccessful bid dated 4th March 2020 that was addressed to the Applicant contained the specific reasons why the Applicant's bid was found unsuccessful but did not specify the successful tenderers in the subject tender.

Despite this omission, the Applicant exercised its right to administrative review pursuant to section 167 (1) of the Act since it was informed of the specific reasons why its bid was found unsuccessful enabling it to challenge the said decision through this Request for Review. Furthermore, the Applicant joined M/s Isuzu East Africa Limited (the 1st Interested Party who was awarded lots 4,5 & 6 of the subject tender) and M/s Toyota Kenya

Limited (the 2nd Interested Party who was awarded lot 1 of the subject tender) as parties to the Request for Review.

It is worth noting that the Applicant joined the 2nd Interested Party as a party to the Request for Review even though it was not challenging Lot 1, but was only aggrieved by the Procuring Entity's decision on its bid with respect to Lots 4, 5 & 6 of the subject tender.

Evidently, the Applicant knew of the identity of the successful bidders in the respective lots of the subject tender, despite the Procuring Entity's omission to disclose the said successful bidders in the letter of notification issued to the Applicant.

It is not lost to the Board that disclosure of the successful bidder in the said notification satisfies one of the principles of public procurement processes enshrined in Article 227 (1) of the Constitution which states that procurement of goods and services must be undertaken in a system that is transparent.

This Board observes that after a procuring entity enters into a contract with a successful bidder, such a contract is to be published for the public's

consumption. The details of the contract would therefore be open to all including the identity of the successful tenderers and the amounts at which award of the subject tender was made to them in the respective lots. In this instance, the Applicant already knew the identity of the successful tenderers thereby joining two of them as parties to the Request for Review.

It is evident from the foregoing that the Applicant suffered no prejudice having been informed of the specific reasons why its bid was found non-responsive in its letter of notification.

Accordingly, the Board finds that the Applicant suffered no prejudice as a result of the Procuring Entity's omission to disclose the successful tenderers in the subject tender having informed the Applicant of the specific reasons why its bid was found non-responsive.

In determining the appropriate orders to grant in the circumstances, the Board has established that the requirement that all bidders participating in the subject tender must be local assemblers and that the vehicles offered must be locally assembled, was an eligibility criterion already established as such in the Procuring Entity's Advertisement Notice. Further, the Tender Document contained evaluation at the Technical Evaluation Stage of the technical specifications of the vehicles offered by bidders and that confirmation and verification of the same is to be done through a due diligence exercise on the lowest evaluated bidder.

Accordingly, the Board finds that the appropriate order to issue in the circumstances is to direct the Procuring Entity to conduct a re-evaluation of the Applicant's bid together with all other bids at the Preliminary Evaluation Stage, taking into consideration the Board's finding that being a local assembler and that the vehicles offered must be locally assembled was an eligibility criterion to be evaluated as much as possible at the Preliminary Evaluation Stage and/or verified in a due diligence exercise conducted on the lowest evaluated responsive tenderer.

In totality, the Request for Review is hereby allowed 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 Letter of Notification of Unsuccessful bid dated 4th March 2020 issued to the Applicant in so far as Lots 4, 5 & 6 of Tender No. MICNG/SDI/005/2019-2020 for Leasing of Locally Assembled Motor Vehicles Phase V are concerned, be and is hereby cancelled and set aside.**

For the avoidance of doubt, the decision of the Procuring Entity in the Applicant's Letter of Notification of Unsuccessful bid dated 4th March 2020 in so far as Lots 1, 2, 3 & 7 of the subject tender are concerned, remain valid.

- 2. The Letter of Notification of Award dated 4th March 2020 addressed to M/s Isuzu East Africa Ltd with respect to Lots 4, 5 & 6 of the subject tender, be and is hereby cancelled and set aside.**

- 3. The Procuring Entity is hereby directed to re-instate the Applicant's bid together with all other bidders at the Preliminary Evaluation Stage and conduct a re-evaluation of the Applicant's bid and all other bidders at the Preliminary Evaluation Stage with respect to Lots 4, 5 & 6 of the subject tender.**

- 4. Further to Order No. 3 above, the Procuring Entity is hereby directed to conclude the procurement process to its logical conclusion including the making of an award within fourteen (14) days from the date of this decision.**

5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 8th day of April 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB