

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 116/2020 OF 14TH AUGUST 2020

BETWEEN

KENNEDY ODHIAMBO OWITI,

DAVID OTIENO NJER, AND JUDE

THADEUS RAGOT T/A

OWITI OTIENO & RAGOT ADVOCATES.....APPLICANT

AND

THE ACCOUNTING OFFICER,

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....RESPONDENT

Review against the decision of the Independent Electoral and Boundaries Commission with respect to Tender No. IEBC/PRQ/01/2019-2020 for Pre-Qualification for Provision of Legal Services.

BOARD MEMBERS

- | | |
|----------------------------|------------------|
| 1. Arch. Steven Oundo, OGW | -Member Chairing |
| 2. Ms. Phyllis Chepkemboi | -Member |
| 3. Dr. Joseph Gitari | -Member |

IN ATTENDANCE

1. Mr. Phillip Okumu

-Holding brief for Secretary

BACKGROUND TO THE DECISION

The Bidding Process

The Independent Electoral Commission (hereinafter referred to as “the Procuring Entity”) advertised Tender No. IEBC/PRQ/01/2019-2020 for Pre-Qualification for Provision of Legal Services (hereinafter referred to as “the subject tender”), in the Daily Nation Newspaper, Public Procurement Information Portal (PPIP) and the Procuring Entity’s website.

Bid Submission Deadline and Opening of bids

A total of one hundred and seventy-five (175) firms/bidders submitted pre-qualification bid documents and the same were opened on 12th May 2020 in the presence of bidders and their representatives who chose to attend.

Evaluation of Bids

The Evaluation Committee was appointed vide a memo dated 6th May 2020 and conducted evaluation of bids in the following two stages: -

- Preliminary Evaluation Stage;
- Technical Evaluation Stage.

1. Preliminary Evaluation Stage

At this stage of evaluation, bids were checked for responsiveness and completeness to determine whether they conform to all the eligibility and mandatory requirements as stipulated in the prequalification document as shown in the table below:

No	Requirements
1.	Submission of one original and one copy of the Pre-Qualification application duly paginated and signed/initialed on every page.
2.	Duly completed and signed pre-qualification submission form.
3.	Duly completed and signed confidential pre-qualification business questionnaire.
4.	Firm profile, providing the following information: <ul style="list-style-type: none">• Period during which the law firm has been in operation (Waived from Mandatory Requirement}• Number of partners and their standing in the bar in respect of disciplinary issues• Number of associates and their disciplinary standing in the bar in respect of disciplinary issues• Number of paralegal staff• Number of support staff• Type of cases handled by the firm.
5.	A Copy of Certificate of Registration of Practice.
6.	Copies of admission certificates and current practicing certificates of the proprietor, partners and associates
7.	Reference letters on client letterheads from five (5) major clients that the bidders are currently representing, and details of contact persons.
8.	Valid Tax Compliance Certificate.
9.	Submission of audited accounts for the last three (3) years
10.	Letter of good standing of the firm detailing all the Advocates in the firm from the Law Society of Kenya.

No	Requirements
11.	Must Show Proof of Valid Indemnity Cover which shall be: <ul style="list-style-type: none"> a) Denomination in Kenya Shillings or in other freely convertible Currency. b) Issued by an insurance Company located in Kenya and registered by Insurance Regulatory Authority c) Valid at closing date of Tender d) Be updated and valid at all times for period of engagement and rendering of services to the Commission
12.	A Duly Signed Declaration not to engage in corruption made pursuant to section 62 of the Public Procurement and Asset Disposal Act, 2015 indicating that the firm or any of its partners, associates and/or employees will not engage in any corrupt or fraudulent practice and declaration that the firm or any of its partners, associates and/or employees are not debarred from participating in Procurement Proceedings.

Upon completion of preliminary evaluation, one hundred and eight (108) bids were found to be non-responsive to the preliminary requirements hence did not qualify for Technical Evaluation.

Sixty-seven (67) bidders were found to be responsive and were recommended to proceed for Technical Evaluation.

2. Technical Evaluation

At this stage of evaluation, bid documents were assessed in order to determine whether the firms were technically qualified by applying the technical evaluation criteria as indicated in the Pre-qualification document as follows: -

- a) Value of professional indemnity cover
- b) Capacity of the firm (Attach CVs of key personnel proposed for administration and execution of legal briefs).

c) Briefs handled (indicate nature of briefs handled)

- i. Employment and Labour Laws Act;
- ii. Complex Constitutional Litigation;
- iii. Administrative Law/Judicial Review
- iv. Civil Litigation
- v. Procurement and Disposal Law related briefs

d) Provide Reference Letters from six (6) clients for whom similar services are offered

Upon conclusion of Technical Evaluation, Bidder No. 36, 108, 119 and 153 failed to meet the minimum required score of 75%. However, sixty-three (63) bidders were found to be technically responsive by attaining the required minimum scores of 75% and were recommended for pre-qualification.

Summary of the Evaluation Results: -

Total No. of responded bidders	Bids that failed at the Preliminary Evaluation stage	Bids that failed at the technical Evaluation stage	Technically qualified bids after technical evaluation
175	108	4	63

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended that the sixty-three (63) bidders found to be technically

responsive to be considered for pre-qualification in line with the criteria outlined in the pre-qualification document.

Professional Opinion

The Deputy Director, Supply Chain Management concurred with the recommendation made by the Evaluation Committee which was duly approved by the Accounting Officer on 8th June 2020.

REQUEST FOR REVIEW NO. 116 OF 2020

M/s Kennedy Odhiambo Owiti, David Otieno Njer and Jude Thadeus Ragot t/a Owiti Otieno & Ragot Advocates (hereinafter referred to as "the Applicant"), acting in person, lodged a Request for Review dated 13th August 2020 and filed on 14th August 2020 (hereinafter referred to as "the Request for Review") together with a Statement dated 13th August 2020 and filed on 14th August 2020 (hereinafter referred to as "the Applicant's Statement").

In response, the Procuring Entity, acting in person, lodged a Letter of Response to the Request for Review dated 17th August 2020 and filed on 18th August 2020 (hereinafter referred to as "the Procuring Entity's Response").

M/s Prof. Tom Ojienda & Associates (hereinafter referred to as "the 1st Interested Party"), acting in person, lodged an Interested Party's

Response to the Request for Review dated and filed on 21st August 2020.

M/s Magee Law LLP (hereinafter referred to as "the 2nd Interested Party"), acting in person, lodged a Response to the Request for Review in form of a letter dated and filed on 20th August 2020

M/s Muchai Lumatete Walubengo (hereinafter referred to as "the 3rd Interested Party"), acting in person, lodged a Statement in Support of the Request for Review dated and filed on 21st August 2020.

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

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- i. An order that the decision of the Respondent dated 25th June 2020 declaring the Applicant's bid as unsuccessful be set aside and substituted with an order declaring the said bid as successful;*
- ii. An order that the Applicant be pre-qualified for provision of legal services to the Respondent for the period ending June 2023;*
- iii. An order for costs of the review;*
- iv. Such other orders the Review Board may deem fit to issue.*

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

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions.

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act").

The Request for Review was filed on 14th August 2020. The Procuring Entity was served with the Request for Review Application on 17th August 2020.

The Board observes that the one hundred and seventy-five (175) bidders who participated in the subject tender, including the sixty-three (63) successful bidders who qualified for pre-qualification under the subject tender were duly notified via email of the Request for Review Application on 19th August 2020.

The Applicant filed written submissions dated 21st August 2020 and filed on even date. The Procuring Entity, the 1st, 2nd and 3rd Interested Parties did not file any written submissions.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") including the Applicant's written submissions.

The issues that arise for determination are as follows: -

- I. Whether the Procuring Entity evaluated the Applicant's bid at Preliminary Evaluation Stage in accordance with section 80 (2) of the Act read together with Article 227 (1) of the Constitution with respect to the following mandatory criteria: -**

- a) MR 1: Submission of one original and one copy of the pre-qualification application duly paginated and signed/initialed on every page

II. Whether the Procuring Entity discriminated against bidders practicing outside Nairobi in the award of the subject tender contrary to Article 27 of the Constitution read together with Article 227 (1) of the Constitution;

Before the Board puts its mind to the issues framed for determination, the Board would like to make the following observation: -

The 1st Interested Party filed an Interested Party's Response to the Request for Review dated and filed on 21st August 2020 in support of the Request for Review with the following prayer as captured in paragraph 29 therein: -

"It is on the premise of these observations that the Interested Party prays in support of the Applicant that the procurement process be quashed for being fundamentally flawed. In the alternative, the Interested Party prays to be deemed pre-qualified since nothing cogent prevents it from enjoying such status." [Emphasis by the Board]

Further, the 2nd Interested Party lodged a Response to the Request for Review in form of a letter dated and filed on 20th August 2020 which stated as follows: -

"...On our part we do strongly believe that the tender process was transparent, free and fair.

IEBC adhered to the Public Procurement and Asset Disposal Act No. 33 of 2015 and the regulations thereunder and all other enabling provisions of the law.

It is therefore our view that if any party was not selected then the said party must have failed or not adhered to a particular regulation or requirement."

Finally, the 3rd Interested Party filed a Statement in Support of the Request for Review dated and filed on 21st August 2020 seeking the following orders as captured in paragraph 13 and 14 therein: -

"13. THAT in the premises and without prejudice to the foregoing, we join issue with the Applicant herein and beseech the Board to review the decision of the Respondent dated 25th June 2020 and the same be set aside.

14. THAT in the alternative, we implore on the Board to find that our bid was successful and be pre-qualified for provision of legal services to the Respondent and be listed in the panel of external advocates. [Emphasis by the Board]

From the foregoing excerpts, the Board observes that the 1st and 3rd Interested Parties were not only seeking orders that touch on the present Request for Review Application but were also seeking orders specific to their respective bid documents with respect to the subject tender.

Moreover, the Board observes that the 2nd Interested Party lodged a Response to the Request for Review in form of a letter dated and filed on 20th August 2020.

The Board has considered who an Interested Party is in a Request for Review application.

The Black's Law Dictionary (Ninth Edition) defines an 'interested party' as follows: -

"A party who has a recognizable stake (and therefore standing) in the matter"

Further, Order 10 Rule 2 of the Civil Procedure Rules (2010) further states that an Interested Party is one: -

"... whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit...."

Accordingly, an interested party is a party who has a recognizable stake or interest in a matter, whose presence may be necessary to enable a court or any adjudicating body to effectually and completely settle all questions raised therein.

The role of an Interested Party in legal proceedings was explained by the Honourable Justice Munyao in the case of **Civil Case 172 of 2012 Marigat Group Ranch & 3 others v Wesley Chepkoimet & 19 others [2014] eKLR** where he stated as follows: -

"An interested party would be a person who has a close connection to the subject matter of the suit yet not claiming any rights over it."

An Interested Party is therefore a person who is closely connected to the subject matter of a suit but who's role in the proceedings is limited in that they cannot claim any rights with respect to the matter under review or determination.

In this regard therefore, an interested party in administrative review and disposal proceedings is a tenderer who participated in a procurement process that is the subject of administrative review and disposal proceedings before the Board.

It is important to note that once the Applicant filed the Request for Review, all tenderers who participated in the subject tender were notified of the existence of the request for review application by the Board Secretary and were invited to submit any information with respect to the request for review application within three (3) days from the date of notification, failure to which the review proceedings will proceed in their absence.

Such information may be presented before the Board in the form of pleadings which will be served to all parties who choose to participate in the request for review proceedings.

The Board notes, the 2nd Interested Party filed a letter and not pleadings before the Board in support of the Procuring Entity's position in the Request for Review application.

Further, from an examination of the pleadings filed by the 1st and 3rd Interested Parties, the Board notes, the prayers sought therein are separate and distinct from the Applicant's Request for Review application as they touch on an interest specific to the abovementioned Interested Parties.

In this regard therefore, it is the Board's considered view that the orders sought by the 1st and 3rd Interested Parties are ordinarily sought through a request for review application but in this instance have been sought through the 'back door' as an Interested Party.

In doing so, the 1st and 3rd Interested Parties, have advanced their respective cases without filing a request for review application and intentionally or not, avoided the responsibility of filing a request for review application and paying the relevant filing costs which would be incurred in this respect.

The Board notes, the 1st and 3rd Interested Parties were at liberty to file a request for review application and approach this Board as applicants pursuant to section 167 (1) of the Act. If the 1st and 3rd Interested Parties had moved the Board as applicants, the Board would have exercised its discretion to consolidate their request for review applications with that of the Applicant in this case as provided under Regulation 215 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "the 2020 Regulations") which provides as follows: -

"Where two or more requests for review are instituted arising from the same tender or procurement proceeding, the Review Board may consolidate the requests and hear them as if they were one request for review."

Accordingly, the Board finds that the orders sought by the 1st and 3rd Interested Parties are not properly filed before this Board.

The Board will now address the first issue framed for determination as follows: -

Vide a letter dated 25th June 2020 which the Applicant received on 7th August 2020 as pleaded in paragraph 5 of its Request for Review, the Applicant was notified by the Procuring Entity of the outcome of its bid submitted in response to the subject tender which letter read as follows:

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"Reference is made to the above prequalification process which you participated in. The Commission regrets to notify you that your application for pre-qualification was unsuccessful due to the following reason (s):

i. Did not initialize/sign the bid document as required

The Commission takes this opportunity to thank you most sincerely for having participated in the above pre-qualification process and hope that you will be able to participate in any other procurement opportunity that may arise in future."

Aggrieved by the decision of the Procuring Entity, the Applicant moved the Board through the Request for Review.

The Applicant submitted that it duly signed its tender document on every part indicated 'Tenderer's signature'. The Applicant contended that if at all there was any omission in signing any part of its tender document, the omission was minor, inadvertent and regrettable and did not affect the validity of its tender document, which position was supported by the 3rd Interested Party. Further, that the Applicant scored well over 75% of the total score and therefore its bid was substantially responsive and should not have been disqualified from further evaluation by the Procuring Entity.

On its part, the Procuring Entity contended that the Applicant did not initialize/sign its bid document as required and thus its bid was disqualified from further evaluation for failure to meet a mandatory requirement as set out in the Pre-Qualification Document. The Procuring Entity contended that the Applicant did not score more than 75% during evaluation as the Applicant's bid was disqualified at the Preliminary/Mandatory Stage of Evaluation. It was therefore the Procuring Entity's contention that it complied with the provisions of the Pre-Qualification Document and the Act in its evaluation of bids under the subject tender.

The 1st Interested Party was of the view that the requirement to initialize a bid document was superficial and did not speak to the substance of selecting applicants for pre-qualification for offering legal services. Moreover, the said requirement was an undue technicality which should not hamper the dispensation of justice.

In its determination of the first issue framed for determination, the Board studied Mandatory Requirement No. 1 of the Mandatory Requirements for Pre-qualification on page 9 of the Pre-Qualification Document which provides as follows: -

"Submission of one original and one copy of the pre-qualification application duly paginated and signed/initialled on every page....

...The mandatory requirements must be met in order to qualify for the Technical Evaluation."

Accordingly, all tenderers were required to submit one original and one copy of their pre-qualification application (tender/bid document), which was required to be duly paginated and signed/initialled on every page. Further, the Pre-Qualification Document indicated that in order to qualify for Technical Evaluation, a tenderer must meet every mandatory requirement.

The question that arises is what does it mean to sign/initial every page?

The Cambridge English Dictionary defines the word 'initial' as follows: -

"to write the first letters of each of your names on an official document to show that you have read it and agree with it"

Using the foregoing interpretation, the Board observes that tenderers were required to write the first letters of their names and sign on each page of their tender document to demonstrate that they agree with each submission therein.

With this in mind, the Board examined the Applicant's original tender which forms part of the Procuring Entity's confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act and observes that the Applicant submitted an original and copy of its tender document. Further the Board observes that the Applicant's original and copy of its tender document were duly paginated from page 1 to page 225. However, although the Applicant signed its tender document on the

pages indicated 'Tenderer's Signature', the Applicant did not sign/initial each and every page of its tender document as required under the Pre-Qualification Document.

The Board examined the Procuring Entity's Evaluation Report signed on 9th June 2020 and observes therein the Evaluation Committee's remarks following preliminary evaluation of the Applicant's tender where it stated as follows: -

"Firm No. B 126 (Owiti Otieno & Ragot Advocates)

Reason for Non-Responsiveness – Did not initialize/sign the bid document as required."

From the above excerpt, the Board observes that the Applicant's bid was disqualified at the Preliminary Evaluation Stage since the Applicant did not initialize/sign its bid document as required in the Prequalification Document and that the Applicant's bid was disqualified at Preliminary Evaluation Stage and thus did not qualify to proceed to the Technical Evaluation Stage.

In this regard therefore, the Board notes, the Applicant's bid did not score more than 75% as alleged by the Applicant as scoring was only applied at the Technical Evaluation Stage and not the Preliminary Evaluation Stage where responsiveness was determined based on whether or not a bidder complied with a mandatory requirement as provided in the Pre-Qualification Document.

The Board considered the Applicant's submissions that any omission in signing any part of its tender document was minor, inadvertent and regrettable and did not affect the validity of its tender.

The question that arises in this regard is what is a mandatory requirement and what is its purpose?

The Board notes that section 79 of the Act is instructive on this aspect as it states as follows: -

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

Accordingly, a responsive tender is one that conforms to all the eligibility and mandatory requirements in the tender document.

These eligibility and mandatory requirements were considered by the Honourable Justice Mativo in **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR**

"Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets all requirements as set out in the bid document. Bid requirements usually relate to compliance

with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril. Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing, empowerment or post qualification. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.....

.....Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected. It is on the basis of the mandatory criteria that "competent" tenders are established....."

Accordingly, a responsive bid is one that meets all the mandatory requirements as set out in the bid document which are in essence the first hurdle that bidders must overcome for further consideration in an evaluation process. A mandatory requirement is therefore a condition or

formality that is listed in a tender document that must be met for a bid to qualify for further evaluation. These mandatory requirements or what are often referred to as eligibility requirements are considered at the Preliminary and sometimes at Technical Evaluation stages after which Financial Evaluation is conducted. Further, bidders found to be non-responsive on mandatory requirements are excluded from the bid process regardless of the merits of their bids.

The next question that arises is what is a minor deviation?

Following the definition of a responsive tender as provided hereinabove, section 79 (2) and (3) of the Act provides as follows with respect to minor deviations: -

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

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

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

(3) A deviation described in subsection (2) (a) shall—

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders. [Emphasis by the Board]

This provision stipulates that the responsiveness of a tender shall not be affected by any minor deviations that do not materially depart from the

requirements set out in the Tender Document. It further defines a minor deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

The Honourable Justice Mativo in **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** (hereinafter referred to as Miscellaneous Civil Application No. 85 of 2018) considered what amounts to a minor deviation and determined as follows: -

The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable.

In this regard therefore, a minor deviation:

- a) Does not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents;
- b) Does not touch on the substance of the tender.
- c) Can be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

The Honourable Justice Mativo in Miscellaneous Civil Application No. 85 of 2018 continued as follows: -

"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in

that all bidders are required to tender on the same work and to the same terms and conditions.”

From the foregoing, it is evident that a mandatory requirement cannot be waived by a procuring entity or termed as a ‘minor deviation’ as a mandatory requirement is instrumental in determining the responsiveness of a bid and is the first hurdle a bid must overcome in order to be considered for further evaluation.

As explained by the Honourable Justice Mativo in the aforementioned decision, it is important for bidders to compete on an equal footing and therefore where a procuring entity waives a mandatory requirement in favour of only one bidder, the same runs contrary to the public procurement principles of fairness and equity as espoused under Article 227 (1) of the Constitution which states as follows: -

“When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.” [Emphasis by the Board]

To buttress this point, the High Court in **Miscellaneous Civil Application 140 of 2019 Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR** stated as follows: -

"It is evident that compliance with the requirements for a valid tender process including terms and conditions set out in the bid documents, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that a bidder or the Respondent may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Mandatory requirements in bid document must be complied with. Deviations from mandatory bid requirements should not be permissible.

In the instant case, the Board has established that the Applicant submitted one copy and one original of its tender document and duly paginated the same. However, although the Applicant signed its tender document on the pages indicated 'Tenderer's Signature', the Applicant did not sign/initial each and every page of its tender document as required by Mandatory Requirement No. 1 of the Mandatory Requirements for Pre-qualification on page 9 of the Pre-Qualification Document.

It is therefore the finding of this Board that the Procuring Entity in finding the Applicant's bid non-responsive at the Preliminary Evaluation Stage rightfully and fairly evaluated the Applicant's bid at the Preliminary Evaluation stage in accordance with section 80 (2) of the Act, as read together with Article 227 (1) of the Constitution with respect to

Mandatory Requirement No. 1 of the Mandatory Requirements for Pre-qualification on page 9 of the Pre-Qualification Document.

With respect to the second issue framed for determination, the Applicant contends that the Procuring Entity discriminated against tenderers practicing outside Nairobi in the award of the subject tender. The Applicant submitted that out of the sixty (63) pre-qualified firms, over eighty-five percent (85%) were based in Nairobi while only fifteen percent (15%) were based up-country. It was the Applicant's contention that such discrimination offends Article 27 of the Constitution given that the Procuring Entity has a countrywide office network with an office in every county.

In response, the Procuring Entity submitted that the pre-qualification process was done in an open process through newspaper advertisement and through its website and it invited all eligible tenderers to participate in the pre-qualification process indiscriminately.

The Black Law Dictionary defines 'discrimination' as follows: -

"The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of age, sex, nationality, relation or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."

Discrimination is therefore the effect of a law or practice that confers or denies privileges or differential treatment on a person or group of persons resulting to a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.

Discrimination is prohibited under Article 27 of the Constitution which provides as follows: -

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law;***
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms;***
- (3)***
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).***
- (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any***

disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8)

According to the above provision, all persons are guaranteed of equality before the law and the equal protection and benefit of the law. Further, direct or indirect discrimination by the State is prohibited on the basis of "race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth") and the State is mandated to take legislative and other measures, to redress any disadvantage suffered by individuals or groups because of past discrimination.

The Board observes that a 'person' as defined under Article 260 of the Constitution includes: -

"...a company, association or other body of persons whether incorporated or unincorporated"

Consequently, the Applicant and the tenderers who participated in the subject tender are persons for purposes of Article 27 of the Constitution.

With respect to procurement of public goods and services, Article 227 (1) of the Constitution provides as follows: -

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

This means that the procurement of public goods and services by a State organ or any other public entity should be conducted in a system that is fair and equitable.

The Board observes that section 3 (b) of the Act stipulates that public procurement and asset disposal processes by state organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation: -

"(a)

(b) the equality and freedom from discrimination provided for under Article 27;"

Further, section 60(1) of the Act provides as follows: -

"An accounting officer of a procuring entity shall 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."

According to the above provision, a procuring entity is required to prepare requirements relating to goods, works or services to be

procured that *interalia* allow for fair and open competition among those who wish to participate in the procurement proceedings.

The Board examined the Procuring Entity's confidential file and observes that the Procuring Entity advertised the subject tender in the Daily Nation Newspaper on 28th April 2020.

The Board studied the Procuring Entity's 'Invitation for Pre-Qualification' dated 28th April 2020 and observes that the Procuring Entity invited 'competent and interested' legal firms to apply for pre-qualification for purposes of ***"identifying and registering qualified legal firms in the Commission's Suppliers' list for provision of legal services on as and when required basis for the period ending, June 2023"***.

Further, the Procuring Entity directed interested candidates to download the pre-qualification document from the Procuring Entity's website.

From the foregoing the Board observes that the subject Tender was an Open Tender for prequalification of firms for provision of Legal Services and was therefore open to any tenderer to submit a tender.

The Board further examined the Procuring Entity's Pre-Qualification Document and observes therein no provision restricting submissions of bids from tenderers based in any region or county.

The Board examined the Procuring Entity’s Evaluation Report and observes that no tenderer was declared non-responsive or disqualified from further evaluation by the Procuring Entity’s Evaluation Committee, based on the region from which they operate or are based.

The Board observes from the Procuring Entity’s Professional Opinion prepared by the Procuring Entity’s Director, Supply Chain Management signed on 8th June 2020 and approved on the same date by the Accounting Officer that sixty-three (63) firms were approved for pre-qualification with respect to the subject tender.

The Board observes that the sixty-three (63) firms pre-qualified by the Procuring Entity were drawn from the regions as outlined below: -

	Region	Number of Bidders	Percentage
1.	Nairobi only	38	60.3%
2.	Nairobi plus other regions	19	30.2%
3.	Other regions (exclusive of Nairobi)	6	9.5%
	TOTAL	63	100%

From the above analysis, the Board notes, 38 of the pre-qualified firms were drawn from Nairobi which amounted to 60.3% of the total pre-qualified firms and not over 85% as alleged by the Applicant. Further, 30.2% of the total pre-qualified firms were drawn from firms with offices in and outside Nairobi while 9.5% of the total pre-qualified firms had an office exclusively outside Nairobi.

On this basis therefore, it is the Board's considered view that based on the information before it, the Applicant has not provided any real or tangible evidence demonstrating that the Procuring Entity discriminated against bidders practicing outside Nairobi in the award of the subject tender and more so against the Applicant who was rightfully and fairly found to be non-responsive at the Preliminary Evaluation Stage.

As held in the High Court in **Petition 257 of 2015 Githunguri Dairy Farmers Co-operative Society Ltd v Attorney General & 2 others [2016] eKLR: -**

"...for an inference of discrimination to be ascertained, the Petitioner has to furnish the Court with better particulars of what it alleges to amount to discrimination. The Court cannot and should not be drawn into determining whether certain 'acts' amount to discrimination without such particulars being furnished to the court"

It is therefore the finding of this Board that the Applicant has failed to furnish the Board with better particulars, real and tangible evidence to demonstrate that the Procuring Entity discriminated against bidders practicing outside Nairobi in the award of the subject tender

In totality of the foregoing, the Board holds that the Request for Review lacks merit and the same is hereby dismissed.

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 Request for Review filed on 14th August 2020 with respect to Tender No. IEBC/PRQ/01/2019-2020 for Pre-Qualification for Provision of Legal Services be and is hereby dismissed.**

- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi, this 3rd Day of September 2020

CHAIRPERSON

PPARB

SECRETARY

PPARB