

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 143/2020 OF 24TH NOVEMBER 2020

BETWEEN

MAVERICK DIGITAL LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY.....1ST RESPONDENT

KENYA PORTS AUTHORITY.....2ND RESPONDENT

AND

ZOCOM LTD.....1ST INTERESTED PARTY

TRAPOZ CONTRACTORS LTD.....2ND INTERESTED PARTY

ISLAND UNIFORMS LTD.....3RD INTERESTED PARTY

EL-MA SOLUTIONS LTD.....4TH INTERESTED PARTY

BROADFIELDS LTD.....5TH INTERESTED PARTY

KENZURI AFRICA LLP.....6TH INTERESTED PARTY

SADENA AGENCIES LTD.....7TH INTERESTED PARTY

KEMA (EA) LTD.....8TH INTERESTED PARTY

BRINKER INVESTMENTS LTD.....9TH INTERESTED PARTY

Review against the decision of Kenya Ports Authority with respect to Tender
No. KPA/124/2019-20/PSM for Supply of Staff Uniforms.

BOARD MEMBERS

1. Ms. Faith Waigwa -Chairperson

2. Qs. Hussein Were -Member

- 3. Mrs. Irene Kashindi -Member
- 4. Mr. Alfred Keriolale -Member
- 5. Ms. Isabelle Juma -Member

IN ATTENDANCE

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

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Ports Authority (hereinafter referred to as “the Procuring Entity”) invited sealed bids from tenderers to demonstrate their technical and financial capability in providing services to the Procuring Entity in respect of Tender No. KPA/124/2019-20/PSM for Supply of Staff Uniforms (hereinafter referred to as “the subject tender”). To that end, the Procuring Entity published an advertisement in the Daily Nation Newspaper and its Website (www.kpa.co.ke) on 16th April 2020.

Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of twenty-six (26) bids by the bid submission deadline of 7th August 2020. The same were opened shortly thereafter by a Tender Opening Committee in the presence of tenderers’ representatives.

Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was carried out in the following stages: -

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

1. Preliminary Evaluation

At this stage, the Evaluation Committee applied the criterion outlined in Clause 2.8.1. of the Appendix to Instructions to Tenderers of the Tender Document. At the end of evaluation at this stage, 13 tenderers were found responsive and thus eligible to proceed to Technical Evaluation. These included the following: -

- M/s Brinker Investments Ltd;
- M/s Elma Solutions;
- M/s Brand International;
- M/s Trapoz Construction Ltd;
- M/s Broadfields Limited;
- M/s Kenzuri Africa LLP;
- M/s Zocom Limited;
- M/s Island Uniforms Ltd;
- M/s Wandas General Supplies;
- M/s Kema (E.A) Ltd;
- M/s Sadena Agencies Ltd;
- M/s Motion Industries Ltd; and
- M/s Exclusive Equipments.

2. Technical Evaluation

At this stage, the Evaluation Committee applied the criterion under Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers of the Tender Document which required tenderers to demonstrate their compliance to technical specifications and to achieve an overall technical score of 75% to proceed to Financial Evaluation. At the end of Technical Evaluation, the Evaluation Committee observed that 9 tenderers achieved the overall technical score of 75% and thus eligible to proceed to Financial Evaluation. These tenderers included the following: -

- M/s Brinker Investments Ltd;
- M/s Elma Solutions;
- M/s Trapez Construction Ltd;
- M/s Broadfields Limited;
- M/s Kenzuri Africa LLP;
- M/s Zocom Limited;
- M/s Island Uniforms Ltd;
- M/s Sadena Agencies Ltd; and
- M/s Kema (E.A) Ltd.

4. Financial Evaluation

At this stage, the Evaluation Committee examined the Price Schedule of Goods submitted by the remaining 9 tenderers in their respective financial bids in order to determine the lowest evaluated tenderers.

Recommendation

The Evaluation Committee recommended award of the subject tender to the tenderers determined to have submitted the lowest evaluated tender prices per item and per set, where applicable.

Professional Opinion

In a professional opinion dated 5th November 2020, the Procuring Entity's Acting Head of Procurement and Supplies outlined the manner in which the Procuring Entity undertook the subject procurement process including evaluation of bids in the subject tender. He expressed his satisfaction that the subject procurement process met the requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and Article 227 (1) of the Constitution, thus advising the Procuring Entity's Acting Managing Director to approve award of the subject tender to the lowest evaluated tenderers per item and per set (where applicable) on the basis of "as and when required" for a period of 3 years to several tenderers determined to have submitted lowest evaluated tender prices. The said professional opinion was approved by the Acting Managing Director on 5th November 2020.

THE REQUEST FOR REVIEW

M/s Maverick Digital Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 24th November 2020 and filed on even date together with a Supporting Affidavit sworn on 24th November 2020 and filed on even date and a Further Affidavit sworn on 4th December 2020 and

filed on 7th December 2020, through the firm of Sigano & Omollo LLP, seeking the following orders: -

- a) An order annulling and setting aside the notification of award of Tender No. KPA/124/2019-20/PSM for Supply of Staff Uniforms addressed to M/s Trapoz Contractors Ltd, M/s Island Uniforms Ltd, M/s EL-MA Solutions Ltd, M/s Broadfields Ltd, M/s KEMA (EA) Ltd, M/s Kenzuri Africa LLP Ltd, M/s Sadena Agencies Ltd and M/s Brinker Investments Ltd;***
- b) An order annulling and setting aside the notification of unsuccessful bid dated 9th November 2020 addressed to the Applicant and any other bidders in Tender No. KPA/124/2019-20/PSM for Supply of Staff Uniforms;***
- c) An order directing the Procuring Entity to re-evaluate the Applicant's bid in accordance with the criteria contained in the Tender Document;***
- d) In lieu of order (c) above, an order directing the Procuring Entity to terminate the procurement process in Tender No. KPA/124/2019-20/PSM for Supply of Staff Uniforms and to re-tender for the same taking into account the findings of the Review Board;***
- e) Any other relief that the Review Board deems fit and just to grant; and***
- f) An order for Costs of the Review.***

In response, the 1st and 2nd Respondents lodged a Memorandum of Response dated 30th November 2020 and filed on 2nd December 2020 together with an Affidavit in Support of the 1st and 2nd Respondents' Memorandum of Response, sworn on 30th November 2020 and filed on 2nd December 2020 through Addraya Dena Advocate. The 6th Interested Party addressed a letter dated 4th December 2020 to the Board Secretary and filed on 7th December 2020 while the 3rd Interested Party addressed a letter dated 4th December 2020 and filed on 7th December 2020.

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

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 would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged Written Submission dated 4th December 2020 and filed on 7th December 2020 while the Respondents lodged Written Submissions dated and filed on 11th December 2020. None of the Interested Parties lodged written submissions despite having been served with all pleadings.

BOARD'S DECISION

The Board has considered each of the parties' pleadings and written submissions including the confidential documents submitted pursuant to section 67 (3) (e) of the Act and finds that the following issues call for determination: -

I. Whether the Procuring Entity evaluated the Applicant's bid at the Preliminary Evaluation Stage in accordance with section 79 (1) and 80 (2) of the Act in respect of the following criteria:

-

a) Data Sheets for Material Quality for Uniforms Quoted for as per KPA designs and Quality Standards required in Clause 2.8.1 (vii) of the Appendix to Instructions to Tenderers of the Tender Document; and

b) Certificate of Conformity from relevant certifying bodies for Textile Quality for Fabrics quoted required in Clause

2.8.1 (viii) of the Appendix to Instructions to Tenderers of the Tender Document.

- II. Whether the Procuring Entity evaluated bids in the subject tender within the period of 30 days specified in section 80 (6) of the Act.**
- III. Whether the Procuring Entity awarded the subject tender to the lowest evaluated tenderer (s) in accordance with Clause 2.22.4 of Section II. Instructions to Tenderers of the Tender Document read together with Addendum No. 4 dated 16th June 2020 and Section 86 (1) (a) of the Act read together with Regulation 77 (3) of the Public Procurement and Asset Disposal Regulations 2020.**
- IV. Whether the Procuring Entity undertook a due diligence exercise in the subject tender in accordance with Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act.**
- V. Whether the Procuring Entity issued letters of notification of unsuccessful bid in accordance with section 87 (3) of the Act read together with Regulation 82 of the Public Procurement and Asset Disposal Regulations 2020**

Before addressing the above issues, the Board would like to address a preliminary aspect cited by the Respondents regarding the question whether

or not the Applicant has *locus standi* required to lodge a Request for Review before this Board.

At paragraph 24 of their Memorandum of Response, the 1st and 2nd Respondents aver that the Applicant has not demonstrated how it will suffer loss and damage including lost income and profit having been found non-responsive at the Preliminary Evaluation Stage. According to the Respondents, the Applicant lacks the requisite locus standi under section 167 (1) of the Act to lodge the instant Request for Review. At paragraph 25 of their Memorandum of Response, the Respondents aver that the Board has jurisdiction to entertain the Request for Review but assert the Request for Review lacks merit and ought to be dismissed. In response to this averment, the Applicant avers at paragraphs 19 to 23 of its Written Submissions that the locus standi required to lodge a Request for Review before this Board is expressed by the meaning of the words “candidate” and “tenderer” explained in section 2 of the Act. According to the Applicant, the Respondents already conceded to the fact that the Applicant submitted its tender in the subject procurement proceedings. In the Applicant’s view, the mere declaration that the Applicant was non-responsive at the Preliminary Evaluation Stage does not automatically deprive the Applicant of the requisite locus standi under section 167 (1) of the Act to lodge a Request for Review.

From the onset, the Respondents confirm at paragraph 4 of their Memorandum of Response that the Applicant was among twenty-six tenderers who submitted their tenders in response to the Procuring Entity’s

Tender Advertisement Notice dated 16th April 2020. In addition to this, the Respondents do not oppose the jurisdiction of this Board but confirm at paragraph 25 of their Memorandum of Response that the Board has jurisdiction to entertain the Request for Review. The Respondents however contend that despite the Applicant's participation as a tenderer in the subject procurement proceedings, the Applicant lacks locus standi to institute the instant Request for Review because it was found non-responsive at the end of Preliminary Evaluation.

In addressing this issue, the Board observes that section 2 of the Act defines a tenderer to mean: ***"a person who submitted a tender pursuant to an invitation by a public entity"***. Clause 1.4 of the Tender Opening Minutes of 7th August 2020 submitted together with the Procuring Entity's confidential documents pursuant to section 67 (3) (e) of the Act confirm the Applicant was among 26 tenderers who submitted tenders pursuant to the Tender Advertisement Notice dated 16th April 2020. Furthermore, the Applicant's original tender was furnished to the Board by the Procuring Entity as required by section 67 (3) (e) of the Act. It is therefore a settled issue that the Applicant is a tenderer in the subject procurement process.

On one hand, section 167 (1) of the Act allows candidates and tenderers who: -

"claim to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by the Act or the Regulations, the right to seek administrative review within fourteen days of notification of award or date

of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed". [Emphasis by the Board].

On the other hand, Article 227 (1) of the Constitution requires procurement and asset disposal proceedings by state organs and public entities to be undertaken in a system that is *fair equitable, transparent, cost-effective and competitive*. A candidate or a tenderer risks suffering loss if it can demonstrate that a procuring entity has failed to undertake a procurement process in accordance with the principles set out in Article 227 (1) of the Constitution and the guiding principles outlined in section 3 of the Act. The Applicant's Request for Review challenges the Procuring Entity's decision on the Applicant's bid, the Award Criteria applied by the Procuring Entity, the period taken for evaluation of bids in the subject tender, the manner in which due diligence was conducted and issuance of notification letters to tenderers. The Applicant raised alleged breaches of the Constitution and the Act by the Procuring Entity based on the aforestated grounds. More importantly, is the fact that the Applicant is aggrieved by the Procuring Entity's decision on its tender and the first avenue that a tenderer has is this Board. This Board has a statutory mandate under section 28 (1) (a) of the Act to determine tendering and asset disposal disputes where a tenderer who participated in a procurement process risks suffering loss due to a procuring entity's failure to comply with the Act and the Constitution in evaluating such tenderer's tender. If the Board finds the Applicant was not fairly evaluated at the Preliminary Evaluation Stage, the Board is likely to direct the Procuring Entity

to carry out a re-evaluation. Thus, at this point, the Applicant is likely to suffer loss if it can demonstrate its tender was unfairly declared non-responsive and the Board would, in such an instance, come to its rescue and order a re-evaluation.

It therefore behooves upon this Board to determine whether or not the Procuring Entity complied with the Constitution and the Act in evaluating the Applicant's tender at the Preliminary Evaluation Stage having established the jurisdiction of this Board in so far as the Applicant's participation as a tenderer and the timelines required to lodge a Request for Review are concerned, are not issues in dispute.

Having dispensed with the above preliminary issue, the Board shall now address the issues framed for determination as follows: -

At paragraph 12 (b) of the Request for Review, the Applicant avers that the Respondents evaluated the Applicant's tender using extraneous criteria thereby contravening the express provisions of section 80 (2) and (3) of the Act. According to the Applicant, it met the requirements of the Tender Document and ought to have proceeded to Financial Evaluation and considered for award of the subject tender. At paragraph 28 of its Written Submissions, the Applicant states that it submitted data sheets for the material quality of the fabric required in the Tender Document in respect of the items quoted by the Applicant. It was the Applicant's submission that the data sheets submitted can be found at pages 35 to 41 of the Applicant's

original bid and that it also provided certificates of conformity at pages 42 to 70 of its original bid. To that end, the Applicant maintained its position that it satisfied the criterion under Clause 2.8.1 (viii) of the Appendix to Instructions to Tenderers of the Tender Document on provision of certificates of conformity from relevant certifying bodies and Clause 2.8.1 (vii) of the Appendix to Instructions to Tenderers of the Tender Document on provision of data sheets for material quality of the fabric for the uniforms quoted as per the Procuring Entity's designs, thus ought to have been found responsive.

In response to these averments, the Respondents assert at paragraph 15 of their Memorandum of Response that the Applicant was found non-responsive at the Preliminary Evaluation Stage for failing to comply with the mandatory requirements on submission of data sheets for material quality of the fabric for uniforms quoted as per the Procuring Entity's designs and quality standards thus failing to comply with Clause 2.8.1 (vi) of the Appendix to Instructions to Tenderers of the Tender Document. At paragraph 16 of their Memorandum of Response, the Respondents further aver that the Applicant failed to provide a certificate of conformity from relevant certifying bodies for the fabrics quoted and that no test and inspection reports by relevant certifying bodies were attached by the Applicant as required by Clause 2.8.1 (viii) of the Appendix to Instructions to Tenderers of the Tender Document. In the Respondents' view, this was a criteria provided in the Tender Document and applied during evaluation of bids in accordance with section 80 (2) of the Act.

Having considered parties' pleadings, it is important to first examine the contents of the Applicant's letter of notification dated 9th November 2020 which reads as follows: -

"Reference is made to your participation in the above captioned tender.

This is to inform you that pursuant to section 87 (3) of the Public Procurement and Asset Disposal Act, 2015, your bid was not successful because of the following reasons: -

- i. You did not submit data sheets for material quality of the fabric for uniforms quoted for as per the KPA designs and quality standards, contrary to the requirement under Clause 2.8.1 (vii) of the Tender Document but instead you provided general technical data sheet (pages 35-41) but was not specific to the items quoted for as per the tender.***
- ii. You did not provide certificate of conformity from relevant certifying bodies for fabrics quoted for and thus, no attachment of Test and Inspection Reports by relevant certifying bodies to conform to the specifications in the tender document as required under Clause 2.8.1 (viii) of the tender but instead you provided general certificates and technical report, including ISO Certification for design (pages 46-70) but were not***

stipulating method of test, stability to washing & dry-cleaning, colour fastness to washing & sunlight (hot pressing), tensile strength, tearing strength, wrinkle/crease recovery of fabric and pilling resistance, among others...”

In addressing the question whether the Procuring Entity rightfully found the Applicant’s bid non-responsive, the Board must address its mind to the criterion in dispute as provided in the Tender Document, whether the Applicant provided the required eligibility and mandatory documents and/or information in response to the criterion and whether such documents met the eligibility and mandatory requirements specified in the Tender Document. This is because an evaluation committee ought to stick to the criteria and procedures specified in the Tender Document when carrying out evaluation of bids as stated in section 80 (2) of the Act which reads: -

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

As regards, the first limb on the question whether the Applicant’s bid was rightfully evaluated, the Board makes the following findings: -

- **Data Sheets for Material Quality for Uniforms Quoted**

Clause 2.8.1 (vii) of the Appendix to Instructions to Tenderers of the Tender Document provides that: -

"The bidder shall submit data sheets for material quality for uniforms quoted for as per the KPA designs and quality standards for items in xiv" (Mandatory)

Further, Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers of the Tender Document outlined the specific items in the subject tender whilst stating as follows: -

"Bidders shall submit samples of the following uniforms in accordance with specifications given in the tender document; bidder will be expected to clearly label the samples indicating the description of sample as per tender name and name of bidder" (Mandatory)

- a) Item No. UNF/03 (A);***
- b) Item No. UNF/04 (A) and UNF/04 (B);***
- c) Item No. UNF/06 (B);***
- d) Item No. UNF/06 (A);***
- e) Item No. UNF/07;***
- f) Item No. UNF/09 (C);***
- g) Item No. UNF/09 (A);***
- h) Item No. UNF/09 (B);***
- i) Item No. UNF/08 (B);***
- j) Item No. UNF/24 (B);***
- k) Item No. UNF/25 (B);***
- l) Item No. UNF/21 (A);***

- m) Item No. UNF/29 (A);***
- n) Item No. UNF/35;***
- o) Item No. UNF/40;***
- p) Item No. UNF/66 (A);***
- q) Item No. UNF/68. "***

Clause 5.1.1 of Section V. Technical Specifications the Tender Document further directed tenderers on the following: -

Clause 5.1.1: These specifications describe the requirements for goods. Tenderers are requested to submit with their offers the detailed specification, drawings, catalogues, etc for the products they intend to supply

On its part, Clause 5.2. Particulars-Staff Uniforms Specifications of Section V. Technical Specifications at pages 41 to 134 of the Tender Document gives particulars of the technical specifications of all items to be supplied in the subject tender in the following headings: -

Clause 5.2. Particulars-Staff Uniforms Specifications

Item No.	Picture	Description	Colour	Fabric Specifications (Minimum Quality)	Design Specifications

Thus, it is evident from the foregoing that: -

- *It was mandatory for tenderers to submit data sheets for material quality for uniforms quoted for as per the Procuring Entity's designs and quality standards for the 17 items listed in Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers of the Tender Document;*
- *It was mandatory for tenderers to clearly label the samples indicating the description of each sample as per tender name and name of tenderer for the 17 items listed in Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers of the Tender Document;*
- *Tenderers were requested to submit with their offers, the detailed specification, drawings and catalogues for the products they intend to supply; and*
- *The Tender Document provided a schedule that would guide tenderers on the Item Number, a sample picture of the item, item description, item colour, fabric specifications of the items and their respective design specifications.*

The Board studied the Applicant's original bid and notes that the Applicant bid for all the 17 items listed in Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers of the Tender Document as specified in the letter dated 7th August 2020 addressed to the Procuring Entity found at page 113 of the Applicant's original bid. The Applicant attached 6 documents known as **"Technical Data Sheets"** which demonstrate results of tests undertaken by a company known as **"Master Textile"** in respect of Fabrics whose codes are indicated in the said Technical data sheets as: **"CA-201"**, **"DR-04"**, **"DR-10"**, **"DR-98"**, **"DR-147"** & **"TW-31"** at pages 35, 37, 38, 39, 40 & 41 of the Applicant's original bid, respectively. Upon studying the 6

Technical Data Sheets, the Board observes that the Applicant did not specify the item and/or items for which the tests were undertaken. For example, there is no way of ascertaining whether the Technical Data Sheet for **Fabric CA-201** is a test for one, several or all items listed in Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers of the Tender Document.

The Applicant also provided a Specifications Compliance Sheet at pages 197 to 246 of its original bid where the Applicant completed the Table outlined in Clause 5.2. Particulars-Staff Uniforms Specifications of Section V. Technical Specifications at pages 41 to 134 of the Tender Document whilst introducing a column for Offered Specifications for the 17 items in the subject tender as follows: -

Item No.	Picture	Description	Colour	Fabric Specifications (Minimum Quality)	Design Specifications	Offered Specifications

This prompted the Board to compare the information in the Specifications Compliance Sheet found at pages 197 to 246 of the Applicant's original bid to the Technical Data Sheets at pages 36 to 41 of the Applicant's bid and we note that whereas the Applicant provided item numbers in its Specifications Compliance Sheet, it is still not clear whether the Technical Data Sheets at pages 36 to 41 of the Applicant's bid are for one, several or all items listed in Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers of the Tender Document.

What is striking to the Board's eye is the fact that the Applicant provided **6** Technical Data Sheets which are not clearly labelled in terms of specifying the item for which the tests were undertaken while on the other hand, the Applicant bid for all **17** items listed in Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers of the Tender Document.

It is the Board's considered view that the 6 Technical Data Sheets found at pages 36 to 41 of the Applicant's original bid are general in the sense that the Applicant did not specify the item (s) for which the tests were undertaken and we find that the tests ought to have been specific and thus an important aspect of this criterion because: (i) each item in the subject tender had its own fabric and design specifications outlined in Clause 5.2. Particulars-Staff Uniforms Specifications of Section V. Technical Specifications at pages 41 to 134 of the Tender Document, (ii) it was a mandatory requirement for tenderers to clearly label the samples indicating the description of each sample and (iii) since the Applicant submitted a bid for all the 17 items in the subject tender, nothing could have been easier than to clearly indicate the item (s) and its/their corresponding technical data sheet (s), having noted that the Applicant's bid only has 6 Technical Data Sheets whereas the Applicant bid for all 17 items in the subject tender.

It was not sufficient for the Applicant to provide a duly completed Specifications Compliance Sheet with drawings and catalogues but fail to clearly indicate the item (s) and its/their corresponding Technical Data

Sheets found at pages 36 to 41 of its original bid. The Procuring Entity had no way of ascertaining which of the items to be supplied by the Applicant met all the fabric and design specifications outlined in Clause 5.2. Particulars-Staff Uniforms Specifications of Section V. Technical Specifications at pages 41 to 134 of the Tender Document. This is because the Applicant merely attached Technical Data Sheets without labelling them or specifying the items for which the tests were undertaken, thus failing to comply with a mandatory requirement outlined in Clause 2.8.1 (vii) & Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers read together with Clause 5.1.1 & Clause 5.2 of Section V. Technical Specifications of the Tender Document.

Accordingly, the Board finds that the Procuring Entity evaluated the Applicant's bid at the Preliminary Evaluation Stage in accordance with Clause 2.8.1 (vii) & Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers read together with Clause 5.1.1 & Clause 5.2 of Section V. Technical Specifications of the Tender Document.

- **Certificate of Conformity**

Clause 2.8.1 (viii) of the Appendix to Instructions to Tenderers of the Tender Document provides as follows: -

"The bidder shall be expected to attach certificate of conformity from relevant certifying bodies for textile quality for fabrics quoted for items in xiv" (Mandatory)

The criterion for submission of a certificate of conformity, mentions Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers of the Tender Document which relates to 17 of the items to be supplied in the subject tender already outlined hereinbefore. The Board studied the Applicant's original bid and notes that in response to this criterion, the Applicant attached the following: -

- *At page 43 of its original bid, an authorization certificate valid until 30th November 2020 issued by Instituto Tecnológico Textil Plaza Emilio Sala to Master Textile Mills Limited based on test reports on woven fabrics for the Standard 100 by OEKO-TEX mark;*
- *At pages 44 to 51 of its original bid, a Technical Report dated 24th October 2019 issued by SATRA Technology Centre Ltd to Master Textile Mills Ltd in respect of High Visibility Assessment and Burst Strength Testing for Sample WX-V1001, Size: M, Yellow and Sample WX-V1002, Size: M, Orange;*
- *At pages 52 to 54 of its original bid, a Certificate of Compliance issued by USB Certification Denetim, Gozetim ve Bekgelendirme Hizmetleri Ltd to Master Textile Mills Ltd, on 19th November 2019 certifying that Master Textile Mills Ltd has been inspected and assessed according to Global Organic Textile Standard Version V.5 and that the Yarns, Garments & Fabrics processed by Master Textile Mills Ltd complied with the aforementioned standard;*
- *At pages 55 to 58 of its original bid, a Certificate of Compliance issued by USB Certification Denetim, Gozetim ve Bekgelendirme Hizmetleri Ltd to Master Textile Mills Ltd, on 19th November 2019*

certifying that Master Textile Mills Ltd has been inspected and assessed according to Global Organic Textile Standard Version V.4 and that the Yarns, Garments & Fabrics processed by Master Textile Mills Ltd complied with the aforementioned standard;

- *At pages 60 of its original bid, a Certificate No. PK09/02410 issued by SGS United Kingdom Ltd to Master Textile Mills Ltd, on 26th July 2018 certifying that Master Textile Mills Ltd has been assessed and certified as meeting the requirements of ISO 9001: 2015 for Manufacturing and Export of yarn, Greige & Processed Fabrics, Denim and Fashion ready-made apparel;*
- *At page 61 of its original bid, a Certification No. PAK18.1864-U dated 12th July 2018 issued by Bureau Veritas Certification Holding SAS-UK Branch to Master Textile Mills Ltd certifying that Master Textile Mills Ltd has been audited and found to have met the requirements of the management system of ISO 14001: 2015 in respect of Manufacturing and Export of Yarn, Greige Fabrics, Processed Fabrics and Garments;*
- *At pages 62 to 65 of its original bid, a Certificate of Compliance issued on 19th November 2019 by USB Certification Denetim, Gozetim ve Bekgelendirme Hizmetleri Ltd to Master Textile Mills Ltd having been inspected and assessed according to the Organic Content Standard (OCS) Version V.2 in respect of Yarns, Fabrics and Garments;*
- *At pages 66 to 69 of its original bid, a Certificate of Compliance issued on 19th November 2020 by USB Certification Denetim,*

Gozetim ve Bekgelendirme Hizmetleri Ltd to Master Textile Mills Ltd having been inspected and assessed according to the Recycled Claim Standard (RCS) Version 2 in respect of Yarns, Fabrics and Garments; and

- *At page 70 of its original bid, a Certificate No. PK14/00107 issued by SGS Italia S.P.A valid from 19th September 2017 to 17th August 2020 certifying that the management system of Master Textile Mills Limited has been assessed and certified as meeting the requirements of SA 8000: 2014 for manufacturing & export of Yarn, Greige & Processed Fabric and Garments.*

Having studied the aforementioned documents against the criterion under Clause 2.8.1 (viii) of the Appendix to Instructions to Tenderers of the Tender Document, the Board notes that it was mandatory for tenderers to attach certificates of conformity from relevant certifying bodies for textile quality for fabrics quoted for the items in Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers of the Tender Document. The 17 items listed in the aforementioned provision contain specific item numbers, fabric and design specifications outlined in Clause 5.2. Particulars-Uniform Specifications of Section V. Technical Specifications of the Tender Document. These items comprise of; Retro-Reflective Safety Jacket [Item No. UNF/03 (A)], Raincoat [Item No. UNF/04 (A) & Item No. UNF/04 (B)], Leather Shoes Ladies [Item No. UNF/06 (A)], Leather Shoes Gents [Item No. UNF/06 (B)], BUI BUI [Item No. UNF/07], Ladies Short Sleeve Jacket [Item No. UNF/09 (C)], Ladies Working Trouser [Item No. UNF/09 (A)], Ladies Working Skirt [Item No. UNF/09 (B)], Men's Working Shirt [Item No. UNF/08 (B)], Overall-

Men [Item No. UNF/24 (B)], Work Wear Ladies [Item No. UNF/25 (B)], Working Attire Men's Trouser [Item No. UNF/21 (A)], Ceremonial Jacket-Men [Item No. UNF/29 (A)], Working Boot Gents [Item No. UNF/35], Endurance Weather Jacket [Item No. UNF/40], Unisex Polo Shirt [Item No. UNF/66 (A)] & Ball Cap [Item No. UNF/68].

As already established by this Board, the Applicant bided for all the 17 items outlined hereinbefore as can be seen from the letter dated 7th August 2020 found at page 113 of the Applicant's original bid. The Technical Reports found at pages 44 to 51 of the Applicant's original bid are with respect to Fabric Samples whose codes are identified as **"Sample WX-V1001, Size: M, Yellow"** and **"Sample "WX-V1002", Size: M, Orange"**. The Applicant's Certificates of Compliance issued to Master Textile Mills Ltd demonstrate that the company deals in the manufacturing and export of Yarn, Greige, Woven and Processed Fabrics, Garments, Denim and Fashion ready-made apparel.

In a nutshell, the certificates of compliance demonstrate that generally, Master Textile Mills Ltd deals in the business of manufacturing and export of Yarn, Greige, Woven and Processed Fabrics, Garments, Denim and Fashion ready-made apparel. On the other hand, the Technical Reports do not indicate the specific items for which the reports were generated but instead show that two samples (which have different codes not specified in the Tender Document) were submitted for testing.

Each of the 17 items listed in Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers of the Tender Document had their own fabric and design specifications. The Applicant did not indicate the items for which the technical reports were generated.

It is the Board's considered view that the certificates of compliance attached to the Applicant's bid gave general information regarding the manufacture and export of Yarn, Greige, Woven and Processed Fabrics, Garments, Denim and Fashion ready-made apparel by Master Textile Mills Ltd whereas the technical reports only indicate that samples were submitted for testing with no indication whether those samples correspond to the items in the subject tender. In any case, the Applicant did not provide any evidence before this Board to demonstrate its relationship with Master Textile Mills Limited and how the technical reports correspond to the items in the subject tender. As a result, the Board is of the considered view that during evaluation, the Procuring Entity could not ascertain whether the technical reports and certificates of compliance correspond to the items listed in Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers of the Tender Document, thus did not meet the mandatory requirement provided in Clause 2.8.1 (viii) & Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers of the Tender Document.

Accordingly, the Board finds that the Procuring Entity evaluated the Applicant's bid in accordance with Clause 2.8.1 (viii) & Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers of the Tender Document.

It is also worth noting that section 80 (2) of the Act requires a procuring entity to undertake **“the evaluation and comparison using the procedures and criteria set out in the tender documents”**. The Board studied the criterion on submission of data sheets and the criterion on certificate of conformity from relevant certifying bodies and notes it was necessary for the Procuring Entity to consider these two criteria against the provisions of Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers & Clause 5.1.1 and Clause 5.2 of Section V. Technical Specifications of the Tender Document, so that the Procuring Entity is certain that all items to be supplied by a tenderer meet the specifications in the Tender Document.

As a result, the Applicant’s allegation that the Procuring Entity used extraneous criteria during evaluation has not been substantiated because the Board has established that the Procuring Entity applied the criterion outlined in Clause 2.8.1 (vii) & Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers. In order to ascertain whether the technical reports and data sheets submitted by the tenderers correspond to items in the subject tender, the Procuring Entity considered the specifications outlined in Clause 5.1.1 & Clause 5.2 of Section V. Technical Specifications of the Tender Document.

The Respondents made reference to section 79 (1) of the Act which states as follows: -

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

At paragraph 20 of their written submissions, the Respondents cited the decision in **Republic v. Public Procurement Administrative Review Board & Another Ex parte Roben Aberdare (K) Ltd (2019) eKLR** where the question of responsiveness of bids was considered and the High Court held as follows: -

"The purpose of competitive bidding is to ensure fairness, efficiency and security in public projects. Competitive bidding is aimed at benefiting and protecting the public and not for the benefit of bidders.

The starting point is that the bid documents require bidders to demonstrate capacity and competence. Demonstrating capacity and competence is the key test. It is correct to emphasize that an "acceptable tender" means any tender, which in all respect complies with the specifications, conditions (and mandatory requirements) of the tender as set out in the tender document" [Emphasis by the Board]

The Applicant failed to satisfy two mandatory requirements in the Tender Document evaluated against Clause 2.8.1 (vii), Clause 2.8.1 (viii) & Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers read together with Clause 5.1.1 & Clause 5.2 of Section V. Technical Specifications of the Tender Document and thus the Evaluation Committee had no option but to find the Applicant's tender non-responsive.

In totality of this issue, the Board finds that the Procuring Entity evaluated the Applicant's bid in accordance with Clause 2.8.1 (vii), Clause 2.8.1 (viii) & Clause 2.8.1 (xiv) of the Appendix to Instructions to Tenderers and Clause 5.1.1 & Clause 5.2 of Section V. Technical Specifications of the Tender Document read together with section 79 (1) and 80 (2) of the Act.

On the second issue for determination, the Applicant challenged the period taken by the Respondents in evaluating bids in the subject tender. At paragraph 12 (c) of its Request for Review and paragraph 50 of the Applicant's written submissions, the Applicant avers that the Respondents carried out evaluation of bids beyond the period specified in section 80 (6) of the Act. At paragraph 3 and 8 of their Memorandum of Response, the Respondents state that tenders were opened on 7th August 2020 and evaluation of bids completed by 5th September 2020. According to the Respondents, this was within the mandatory period specified in section 80 (6) of the Act for evaluation of bids.

It is worth noting that, section 80 (6) of the Act specifies the period for evaluation of bids in open tender as follows: -

“The evaluation shall be carried out within a maximum period of thirty days”

In addressing this issue, the Board is mindful that on several occasions in the past, it has addressed the meaning of the word **"evaluation"** so as to make a determination on the date from which the period of 30 days under section 80 (6) of the Act ought to start running. Having considered provisions of Regulations 2020, the Board observes there is no express provision therein stating the date from which the 30 days for evaluation ought to start running.

In **PPARB Application No. 136 of 2020, Chania Cleaners Limited v. The Accounting Officer, National Social Security Fund & Another** (hereinafter referred to as the "Chania Cleaners Ltd Case"), the Board considered the meaning of **"tender evaluation"** provided in the Third Schedule of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") and held as follows: -

"Tender evaluation — is the process used to identify the most preferred bidder technically and financially. This process should not take more than 30 calendar days... Having established that evaluation is the process of identifying the most preferred bidder technically and financially, it means that the period of 30 days for evaluation ought to be the number of days taken by an evaluation committee to identify the most preferred bidder that is technically and financially responsive. Therefore, the number of days between commencement of evaluation and signing of the evaluation report would constitute the period taken to determine the

preferred bidder that is both technically and financially responsive”

In the Chania Cleaners Limited Case, the Board held that that the period of 30 days for evaluation ought to be the number of days taken by an evaluation committee to identify the most preferred tenderer that is technically and financially responsive. In most instances, the Tender Document does not specify the date from which evaluation ought to start running. In addition to this, the Act and Regulations 2020 are silent on the issue, save for the Third Schedule to Regulations 2020 which states that evaluation shall take 30 calendar days.

Turning to the circumstances in the instant Request for Review, the Board observes that the Procuring Entity computed the period of evaluation of bids from the tender opening date because Clause 2.23.3 of Section II. Instructions to Tenderers of the Tender Document specified that the Evaluation Committee would evaluate tenders within 30 days from the date of tender opening. In determining the days taken for evaluation of bids in the subject tender, the Board is mindful of section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which guides on the manner in which time ought to be computed for purposes of written law. The said provision states as follows: -

"In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done

The event of tender opening in the subject procurement process took place on 7th August 2020 and is therefore excluded in computing the time taken for evaluation of bids pursuant to section 80 (6) of the Act. Therefore, if this provision is considered, then evaluation of bids in the subject tender took 29 days after 7th August 2020, which was within the 30 days specified in section 80 (6) of the Act.

To that end, the Board finds that the Procuring Entity evaluated bids in the subject tender within the maximum period of 30 days specified in section 80 (6) of the Act.

The third issue for determination relates to the Applicant's allegation that the Procuring Entity failed to award the subject tender in accordance with the award criteria specified in the Tender Document. At paragraph 7 of its Request for Review, the Applicant avers that Clause 2.26.4 of Section II. Instructions to Tenderers of the Tender Document stated that award of the subject tender would be made to the tenderer determined to be substantially responsive and has offered the lowest evaluated tender price. At paragraph 12 of its Request for Review, the Applicant further states that the Respondents purported to award the subject tender to multiple tenderers contrary to the express provision of section 86 (1) (a) of the Act and

Regulation 77 (3) of Regulations 2020. In response to these averments, the Respondents at paragraph 18 (a) of their Memorandum of Response the subject tender was awarded to the tenderers with the lowest evaluated prices for all the items in the sets in accordance with section 86 (1) (a) of the Act and Rule 77 (3) of Regulations 2020. To support this submission, the Respondents at paragraph 4 of their Memorandum of Response refer to Addendum No. 4 dated 16th June 2020 requiring some items to be quoted as sets and that for those items, award was made to the lowest evaluated tender price for all the items in the set.

Having considered parties' submissions, the Board observes that Clause 2.22.4 of Section II. Instructions to Tenderers of the Tender Document provided the award criteria for the subject tender as follows: -

"The Procuring Entity will award the contract to the successful tenderer (s) whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily"

Addendum No. 4 dated 16th June 2020 cited by the Procuring Entity provides as follows: -

"Pursuant to Clause 2.5.2 of the Tender Document, the Authority issues the following clarification to the tender"

The following items are to be treated and quoted as sets. The other remaining items in the attached Staff Uniforms Specification & Schedule of Requirements to be quoted per item number separately:

S/No	Set	Description
1	UNF/08 (A) and UNF/08 (B)	Men's working attire general-trouser and shirt (excluding pilots and tug masters)
2	UNF/08 (A), UNF/08 (B) and UNF/63	Men's suit general-jacket, trouser and shirt (excluding pilots and tug masters)
3	UNF/09 (B), UNF/09 (A) & UNF/09 (D)	Ladies working attire general- trouser/skirt and blouse (excluding pilots and tug masters) user will choose either trouser and skirt
4	UNF/09 (B), UNF/09 (A). UNF/09 (D) and UNF/09 (C)	Ladies suit general- trouser/skirt, blouse and short sleeve jacket (excluding pilots and tug masters) user will choose either trouser and skirt
5	UNF/15 (A), UNF/15 (B) and UNF/15 (C)	Men's Pilot ceremonial trouser, shirt and jacket
6	UNF/16 (A) and UNF/16 (B)	Men's Demi-Official trouser and bush jacket
7	UNF/17 (A) and UNF/17 (B), UNF/17 (C) and UNF/17 (D)	Ladies Pilot ceremonial skirt/trouser, jacket and shirt user will choose either trouser and skirt
8	UNF/18 (A) and UNF/18 (B)	Sailor Ceremonial trouser and shirt
9	UNF/19 (A) and UNF/19 (B)	Men's working attire trouser and shirt (Pilots and tug masters)
10	UNF/20 (A) and UNF/20 (B)	Ladies working attire trouser and shirt (Pilots and tug masters)
11	UNF/21 (A) and UNF/08 (B)	Men's working attire trouser and shirt (excluding Pilots and tug masters)
12	UNF/22(A) and UNF/08 (c)	Ladies working attire trouser and shirt (excluding Pilots and tug masters)
13	UNF/21 (D) and UNF/08 (C)	Men's working attire trouser and shirt (excluding Pilots and tug masters)
14	UNF/22 (D) and UNF/08 (C)	Ladies working attire trouser and shirt (excluding Pilots and tug masters)

15	UNF/29 (A) and UNF/15 (A) and UNF/14 (B)	Men's security services ceremonial jacket, trouser and shirt
16	UNF/29 (B) and UNF/17 (D), UNF/17 (B) and UNF/17 (A)	Ladies' security services ceremonial jacket, trouser and shirt user will choose either trouser and skirt
17	UNF/37 (A) and UNF/21 (B)	Men's security services attire shirt and trouser
18	UNF/37 (B) and UNF/22 (C) and UNF/22 (D)	Ladies' security services working attire skirt/trouser and shirt user will choose either trouser and skirt
19	UNF/15 (A), UNF/43 (A) and UNF/15 (B)	Men's fire services ceremonial trouser, jacket and shirt
20	UNF/43 (B), UNF/17 (D), UNF/17 (B) and UNF/17 (A)	Ladies' fire services ceremonial skirt/trouser, jacket and shirt user will choose either trouser and skirt
21	UNF/37 (A) and UNF/21 (C)	Men's fire services working attire trouser and shirt
22	UNF/37 (B), UNF/22 (C), UNF/22 (D)	Ladies' fire services working attire skirt/trouser and shirt user will choose either trouser and skirt
23	UNF/44 (A), UNF/44 (B) (C) and UNF/15 (B)	Chief Nursing Officer and Senior Nursing Officer men's ceremonial jacket, trouser and shirt
24	UNF/45 (A), UNF/45 (B) UNF/45 (C) and UNF/45 (D)	Chief Nursing Officer and Senior Nursing Officer ladies' ceremonial jacket, trouser/skirt and blouse user will choose either trouser and skirt
25	UNF/47 and UNF/19 (A)	Nurse men's working attire tunic and trouser
26	UNF/20 (A), UNF/22 (D), UNF/48	Nurse ladies working attire tunic and trouser/skirt user will choose either trouser and skirt
27	UNF/53 (A), UNF/53 (B)	Ambulance crew working attire trouser and shirt
28	UNF/53 (D), UNF/53 (E), UNF/53 (F)	St. John's Ambulance shirt, trouser and jacket
29	UNF/54 (D), UNF/54 (B)	Ladies kitchen cook skirt and tunic
30	UNF/54 (C), UNF/54 (B)	Men's kitchen cook trouser and tunic
31	UNF/57 (A), UNF/57 (B)	Kitchen steward shirt and trouser
32	UNF/58 (A), UNF/58 (B)	Waiter tunic shirt and trouser
33	UNF/59 (A), UNF/54 (A), UNF/58 (B)	Waitress tunic shirt and trouser/skirt user will choose either trouser and skirt
34	UNF/60 (A), UNF/57 (B)	Men's housekeeping shirt and trouser

35	UNF/61 (A), UNF/57 (B)	Ladies housekeeping tunic shirt and skirt/trouser user will choose either trouser and skirt
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Clause 2.5.2 of Section II. Instruction to Tenderers of the Tender Document cited in Addendum No. 4 dated 16th June 2020 deals with responses given by the Procuring Entity following clarifications sought by tenderers. Addenda issued by a procuring entity are recognized in section 75 of the Act which states that: -

- "(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender.***
- (2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.***
- (3) A procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.***
- (4) The addendum shall be deemed to be part of the tender documents"***

Thus it is evident from the provision of section 75 (4) of the Act that Addendum No. 4 dated 16th June 2020 became part of the Tender Document

thus clarifying the manner in which the Procuring Entity would treat items in a set in applying the award criteria specified in Clause 2.22.4 of Section II. Instructions to Tenderers of the Tender Document. Section 86 (1) (a) of the Act provides that: -

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

- (a) the tender with the lowest evaluated price***
- (b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;***
- (c) the tender with the lowest evaluated total cost of ownership; or***
- (d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges."***

Regulation 77 of Regulations 2020 cited by the Applicant and the Respondents deals with the manner in which Financial Evaluation is

undertaken. In specific, Regulation 77 (3) of Regulations 2020 states as follows: -

"Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act"

It is clear that award to a successful tender is made in accordance with the award criterion applicable under section 86 (1) of the Act and as specified in the Tender Document. In this instance, Clause 2.22.4 of Section II. Instructions to Tenderers of the Tender Document demonstrates it was likely for award of the subject tender to be made to a successful tenderer or successful tenderers especially because Addendum No. 4 dated 16th June 2020, which is part of the Tender Document, specified items that would be quoted as sets. This information was communicated to all tenderers, including the Applicant herein who had sufficient knowledge that this was an open tender and thus section 86 (1) (a) of the Act was the applicable award criterion as specified in the Tender Document. The Applicant also knew that tenderers were at liberty to quote the items listed in Addendum No. 4 as "items in a set" and thus award would be made to the lowest evaluated tenderer in a given set.

The Board studied the Financial Evaluation Report dated 5th September 2020 and the Professional Opinion dated 5th November 2020 and notes that a Schedule of Awards is attached therein specifying the items awarded to the lowest evaluated tenderers in sets and those awarded separately as stand-

alone items in accordance with Clause 2.22.4 of Section II. Instructions to Tenderers of the Tender Document read together with Addendum No. 4 dated 16th June 2020 and Section 86 (1) (a) of the Act read together with Regulation 77 (3) of Regulations 2020. This is clear demonstration that the Procuring Entity did not depart from the award criterion applicable in the instant procurement proceedings

Accordingly, the Board finds that the Procuring Entity awarded the subject tender in accordance with Clause 2.22.4 of Section II. Instructions to Tenderers of the Tender Document read together with Addendum No. 4 dated 16th June 2020 and Section 86 (1) (a) of the Act read together with Regulation 77 (3) of Regulations 2020.

The fourth issue for determination before this Board relates to the manner in which a procuring entity ought to undertake due diligence in public procurement and asset disposal procedures. At paragraph 19 of their Memorandum of Response, the Respondents aver that a due diligence was conducted on 9 tenderers who proceeded to Technical Evaluation between 29th August 2020 and 1st September 2020. At paragraph 22 of their Affidavit in Support of the Memorandum of Response, the Respondents depone that on the aforementioned dates, the Evaluation Committee established that all the nine tenderers who progressed to Technical Evaluation had the relevant qualifications after verifying their physical location, equipment and technical staff. Having perused the Respondents' pleadings and in response to the same, the Applicant deponed at paragraph 7 of its Further Affidavit that the

Respondents violated the provisions of section 83 of the Act in conducting due diligence before conclusion of evaluation.

The Board first studied the Procuring Entity's confidential file and notes that the Procuring Entity undertook Preliminary and Technical Evaluation between 20th to 28th August 2020 whereas Financial Evaluation was undertaken between 4th and 5th September 2020 as stated in the Procuring Entity's Evaluation Reports. On the other hand, the Respondents depone that they undertook a due diligence exercise on **9** tenderers between **29th August 2020 and 1st September 2020**. This is a clear admission that a due diligence exercise was conducted on several tenderers before Financial Evaluation. The Board was not furnished with a Due Diligence Report detailing the manner in which the said due diligence exercise was conducted. However, Clause 7.1 and 7.2 of the Technical Evaluation Report received on 2nd September 2020 by the Head of Procurement and Supplies states that: -

"Following preliminary and detailed evaluation, nine tenderers qualified to be progressed to the next stage of technical evaluation involving site visit. Subsequently, the Management accorded approval for the tender evaluation committee to conduct due diligence to verify whether the information provided in the technical submissions is accurate (post-qualification process) before opening and evaluation of the financial bids"

In their Affidavit in Support of the Memorandum of Response, the Respondents depone that the due diligence exercise comprised of

verification of the physical location, equipment and technical staff of the 9 tenderers. At this moment, it is important to establish what the law provides on the manner in which due diligence ought to be conducted. Section 83 of the Act which is instructive on this aspect states as follows: -

- "(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."***

The Board studied the Tender Document and notes that Clause 2.26 of Section II. Instructions to Tenderers also provided a procedure for due diligence in the following way: -

- "2.26.1. In the absence of pre-qualification, the Procuring Entity will determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluated responsive tender is qualified to perform the contract satisfactorily.**
- 2.26.2. The determination will take into account the tenderer's financial, technical and production capabilities. It will be based upon an examination of the documentary evidence of the tenderer qualification submitted by the tenderer, pursuant to paragraph 2.12.3 as well as such other information as the procuring entity deems necessary and appropriate.**
- 2.26.3. An affirmative determination will be a prerequisite for award of the contract to the tenderer. A negative determination will result in rejection of the tenderer's tender, in which event the Procuring Entity will proceed to the next lowest evaluated tender to make a similar determination of that tenderer's capabilities to perform satisfactorily"**

From the documentation furnished to the Board by the Procuring Entity, there is no evidence that the Procuring Entity undertook a pre-qualification exercise. This therefore means that in the absence of a pre-qualification, the Procuring Entity was required to undertake a due diligence exercise, and

since it already elected to conduct the exercise, then it ought to comply with provisions of law.

It is evident that just like section 83 (1) of the Act, the Tender Document recognized that due diligence is conducted on the lowest evaluated responsive tenderer. In addition to this, the Procuring Entity was required by section 83 (1) of the Act to first consider the lowest evaluated tenderer after tender evaluation and prior to award of the subject tender for a due diligence exercise. The Court in **Republic v Public Procurement Administrative Review Board & another Ex-parte Industrial & Commercial Development Corporation [2018] eKLR** (hereinafter referred to as the "ICDC Case") considered the import of section 83 (1) of the Act and held as follows: -

"It is clear that the due diligence which may include obtaining confidential references is supposed to take place after tender evaluation, but prior to the award of the tender."

Further, in **Miscellaneous Civil Application No. 551 of 2017, Consortium of H. Young & Co (E.A) Limited & Yantai Jereh Petroleum Equipment and Technologies Company Limited v Public Procurement Administrative Review Board & 2 others** (hereinafter referred to as the "H. Young Case"), the Court outlined some of the salient features of a due diligence exercise and held as follows: -

"since the evaluation committee's parameters of conducting due diligence are circumscribed by the Act, the committee must, in the exercise of that power, confine itself within the four corners of the said provision. If it acts outside the same, it would be construed to have acted outside its powers or in excess hereof. Firstly, the conduct of due diligence pursuant to the said provisions can only be undertaken after tender evaluation, but before the award of the tender. Secondly the purpose of the due diligence is restricted to the confirmation and verification of the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with the Act. In other words, the Committee cannot purport to conduct due diligence in respect of any other tenderer save for the lowest evaluated responsive tender to be awarded the contract in accordance with the Act."

Having considered the finding of the Court in the ICDC Case and the H. Young Case together with the provision of section 83 of the Act, the Board notes that 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 to confirm and verify qualifications of such tenderer.

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.

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. After concluding the exercise, a due diligence report (which is separate from an Evaluation Report) must be prepared outlining how due diligence was conducted together with the findings of the process. The due diligence 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.

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 negative responses received on lowest evaluated tenderer,

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.

It is not lost to the Board that the subject tender was awarded to lowest evaluated tenderers in some stand-alone items and lowest evaluated tenderers in items awarded as "sets". This means, the Procuring Entity would first undertake due diligence exercise on the lowest evaluated tenderers (per item) and if it receives negative responses, it would proceed to conduct a due diligence exercise on the next lowest evaluated tenderers (per item). That notwithstanding, the Procuring Entity did not have leeway of conducting a due diligence exercise on several tenderers prior to financial evaluation in blatant breach of section 83 (1) of the Act. Furthermore, no due diligence report was furnished before this Board which ought to be prepared in accordance with section 83 (3) of the Act. It is evident that the Respondents acted outside the confines of section 83 of the Act and moreso, ignored the provisions of Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document on due diligence. The due diligence exercise undertaken by the Procuring Entity herein fails to meet the threshold of section 83 of the Act thus rendering the same null and void.

Accordingly, the Board finds the Procuring Entity failed to conduct a due diligence exercise in the subject tender in accordance with Clause 2.26 of

Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act.

On the last issue for determination, the Applicant challenged the letters of notification issued to tenderers. On the first limb of its allegation, the Applicant deponed at paragraph 14 and 15 of its Further Affidavit that some of the successful tenderers received multiple notifications of award namely; **M/s Trapoz Limited** who received a notification of award dated 9th November 2020 in respect of 22 items in the subject tender and a subsequent notification of award dated 24th November 2020 with respect to 23 items & **M/s Sadena Agencies Limited** who received a notification of award dated 9th November 2020 with respect to 5 items and a subsequent notification of award dated 13th November 2020 with respect to 4 items in the subject tender. In the Applicant's view, the subject procurement process lacked transparency because the Procuring Entity revised schedule of awards thus issuing notification letters to successful tenderers on diverse dates.

The Board observes that the Respondents attached several letters of notification of unsuccessful bid and letters of notification of award dated 9th November 2020 and 24th November 2020 to their Memorandum of Response. Having compared the said letters, the Board observes that there were differences in the letters of notification of award dated 9th November 2020 and the ones dated 24th November 2020 addressed to **M/s Trapoz Contractors Ltd**, the ones addressed to **M/s Sadena Agencies Ltd**, the

ones addressed to **M/s Kenzuri Africa LLP** and the ones addressed to **M/s El Ma Solutions Limited** in the following sense: -

Tenderer	Letter of Notification of Award dated 9th November 2020	Letter of Notification of Award dated 24th November 2020
M/s Trapoz Contractors Ltd	Awarded 22 items in the subject tender	Awarded 23 items in the subject tender Additional item UNF 59 (A) & 54 (A) SET at Kshs. 3500
M/s Kenzuri Africa LLP	Awarded 12 items Previously awarded Item UNF 59 (A) at Kshs. 3648	Awarded 11 items Item UNF 59 (A) Removed from its letter of notification of award
M/s Sadena Agencies Ltd	Awarded 5 items in the subject tender Previously awarded Item UNF 35 at Kshs. 4780	Awarded 4 items in the subject tender Item UNF 35 at Kshs. 4780 removed from its letter of notification of award
M/s El-MA Solutions Limited	Awarded 25 items in the subject tender	Awarded 26 items in the subject tender Additional Item UNF (35) at Kshs. 3,000/-

The Board studied the Procuring Entity's Appendix 1 containing a Schedule on Recommendation of Awards which forms part of its confidential file and compared the same with the letters of notification of award addressed to the four successful tenderers outlined hereinbefore and observes that the

Procuring Entity had previously awarded **Item UNF 59 (A) at Kshs. 3648/-** to M/s Kenzuri Africa LLP which was a higher price than **Kshs. 3500/-** proposed by M/s Trapoz Contractors Ltd. In addition to this, the Procuring Entity previously awarded **Item UNF 35 at Kshs. 4780** to M/s Sadena Agencies Ltd which was a higher price than **Kshs. 3,000/-** proposed by M/s EL-MA Solutions Ltd.

The Procuring Entity had an obligation to award the subject tender to the tender with the lowest evaluated price in accordance with Clause 2.22.4 of Section II. Instructions to Tenderers of the Tender Document read together with Addendum No. 4 dated 16th June 2020 and Section 86 (1) (a) of the Act read together with Regulation 77 (3) of Regulations 2020 as was established by the Board hereinbefore. This would assist in saving tax payers' money noting further that Article 227 (1) of the Constitution requires all State organs and public entities to undertake procurement and asset disposal procedures in a system that is fair, equitable, transparent, competitive and cost-effective. It would therefore go against the principle of cost-effectiveness for the Procuring Entity to award **Item UNF 59 (A) at Kshs. 3648/-** to M/s Kenzuri Africa LLP which was a higher price than **Kshs. 3500/-** proposed by M/s Trapoz Contractors Ltd and **Item UNF 35 at Kshs. 4780** to M/s Sadena Agencies Ltd which was a higher price than **Kshs. 3,000/-** proposed by M/s El Ma Solutions Ltd.

The Board finds no mischief in the revised awards made to the four tenderers outlined hereinbefore only to the extent that the Procuring Entity made such

revision so that it ensures award of all items in the subject tender is made to the lowest evaluated tenderers. That notwithstanding, the Procuring Entity ought to exercise caution in issuing letters of notification to tenderers especially in this instance where the tender comprised of numerous items. In addition to this, letters of notification ought to be issued once and simultaneously to the successful and unsuccessful tenderers. This is because time starts running for all tenderers who would like to challenge the decision of the Procuring Entity on their tenders pursuant to section 167 (1) of the Act. It is therefore not expected that notification letters are issued on a particular date and others issued on subsequent dates.

The second limb of the Applicant's allegation relates to the ingredients of a letter of notification of unsuccessful bid. At paragraph 10 and 11 of its Further Affidavit, the Applicant cited Regulation 82 of Regulations 2020 to support its position that the letters of notification issued to tenderers failed to (i) disclose the successful tenderers in respect of each specific tender item, (ii) failed to disclose the tender price at which the successful tenderers were awarded various items of the subject tender and (iii) failed to disclose the reason why the respective bids were determined as successful i.e. whether the successful tenderers' had the lowest evaluated tender price for each item awarded.

The Board observes that section 87 (3) of the Act provides that: -

"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"

On its part, Regulation 82 of Regulations 2020 provides as follows: -

- "(1) The notification to the unsuccessful bidder under section 87(3) of the Act shall be in writing and shall be made at the same time the successful bidder is notified***
- (2) For greater certainty the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids***
- (3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86(1) of the Act"***

Having compared the foregoing provisions, the Board observes that a letter of notification of unsuccessful bid (i) is issued in writing and made at the same time the successful tenderer (s) is/are notified, (ii) it discloses the reasons relating to non-responsiveness of the unsuccessful tenderer's tender, (iii) it includes the name of the successful tenderer, the tender price

and the reason why the bid was successful in accordance with section 86 (1) of the Act and in this case such reason would be whether the successful tenderer submitted the lowest evaluated tender price.

The letters of notification of unsuccessful bid dated 9th November 2020 addressed to the Applicant and all other unsuccessful tenderers informed them of the reasons why their bids were unsuccessful and the names of the successful tenderers. The Procuring Entity did not indicate the price at which award was made to the successful tenderers in each of the items in the subject tender neither was there indication whether they were the lowest evaluated tenderers and if so, for which items. The Procuring Entity herein already prepared a schedule of awards in its confidential file detailing the successful tenderers names, the items awarded and the amount at which each item was awarded. Nothing could have been easier than to use the said Schedule of Awards in preparing letters of notification to unsuccessful tenderers while specifying the lowest evaluated tenderers (in each item awarded as stand-alone items or awarded as a set), their names, the items awarded and the amount at which each item was awarded.

Evidently, the letters of notification of unsuccessful bid dated 9th November 2020 did not meet the threshold set by section 87 (3) of the Act read together with Regulation 82 of Regulations 2020 and thus cannot be allowed to stand. In any case, the Board already established that the due diligence exercise which preceded notification to tenderers, was undertaken in blatant

breach of section 83 of the Act and thus any action taken after a flawed due diligence exercise cannot be allowed to stand.

Accordingly, the Board finds the Procuring Entity failed to issue letters of notification of unsuccessful bid in accordance with section 87 (3) of the Act read together with Regulation 82 of Regulations 2020.

In determining the appropriate orders to grant in the circumstances, the Board is mindful of its finding that Procuring Entity failed to carry out a due diligence exercise in accordance with section 83 of the Act and Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document. In addition to this, the Procuring Entity failed to issue letters of notification of unsuccessful bid in accordance with section 87 (3) of the Act read together with Regulation 82 of Regulations 2020.

The Board finds it appropriate to direct the Procuring Entity to undertake a due diligence exercise on the lowest evaluated tenderers in the respective items in the subject tender, taking into consideration the findings of the Board on the manner in which such exercise is conducted. The Procuring Entity must also bear in mind that upon conclusion of such exercise and award of the subject tender, notification letters must be issued to all tenderers in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020.

In totality, the Request for Review succeeds in respect 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 Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. KPA/124/2019-20/PSM for Supply of Staff Uniforms dated 24th November 2020 addressed to M/s Zocom Limited, be and is hereby cancelled and set aside.**
- 2) The Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. KPA/124/2019-20/PSM for Supply of Staff Uniforms dated 24th November 2020 addressed to M/s Trapez Contractors Limited, be and is hereby cancelled and set aside.**
- 3) The Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. KPA/124/2019-20/PSM for Supply of Staff Uniforms dated 24th November 2020 addressed to M/s Island Uniforms Ltd, be and is hereby cancelled and set aside**
- 4) The Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. KPA/124/2019-20/PSM for Supply of Staff Uniforms dated 24th November 2020**

addressed to M/s EL-MA Solutions Ltd, be and is hereby cancelled and set aside.

- 5) The Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. KPA/124/2019-20/PSM for Supply of Staff Uniforms dated 24th November 2020 addressed to M/s Broadfields Limited, be and is hereby cancelled and set aside.**
- 6) The Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. KPA/124/2019-20/PSM for Supply of Staff Uniforms dated 24th November 2020 addressed to M/s Kenzuri Africa LLP, be and is hereby cancelled and set aside.**
- 7) The Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. KPA/124/2019-20/PSM for Supply of Staff Uniforms dated 24th November 2020 addressed to M/s Sadena Agencies Limited, be and is hereby cancelled and set aside.**
- 8) The Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. KPA/124/2019-20/PSM for Supply of Staff Uniforms dated 24th November 2020 addressed to M/s KEMA (E.A) Limited, be and is hereby cancelled and set aside.**
- 9) The Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. KPA/124/2019-20/PSM for Supply of Staff Uniforms dated 24th November 2020**

addressed to M/s Brinker Investments Limited, be and is hereby cancelled and set aside.

10)The Accounting Officer of the Procuring Entity's Letters of Notification of Unsuccessful bid in Tender No. KPA/124/2019-20/PSM for Supply of Staff Uniforms dated 9th November 2020 addressed to the Applicant and all other unsuccessful tenderers, be and are hereby cancelled and set aside.

11)The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to conduct a due diligence exercise on the lowest evaluated tenderers with respect to all items in Tender No. KPA/124/2019-20/PSM for Supply of Staff Uniforms in accordance with Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act taking into consideration the findings of the Board in this Review.

12)Further to Order No. 11 above, the Accounting Officer of the Procuring Entity is hereby directed to conclude the subject procurement proceedings including issuance of letters of notification to all successful and unsuccessful tenderers in accordance with section 87 of the Act read together with Regulation 82 of the Public Procurement and Asset Disposal Regulations, 2020, within fourteen (14) days from the date of this decision.

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

Dated at Nairobi this 14th day of December 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB