

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 156/2020 OF 23RD DECEMBER 2020

BETWEEN

SCIENCESCOPE LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYATTA NATIONAL HOSPITAL.....1ST RESPONDENT

KENYATTA NATIONAL HOSPITAL.....2ND RESPONDENT

LUED (A) CHEMICALS LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer of Kenyatta National Hospital in relation to Tender No. KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment-Automated Clinical Chemistry Analyser.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms. Isabella Juma, CPA | -Member |
| 3. Dr. Joseph Gitari | -Member |
| 4. Qs. Hussein Were | -Member |
| 5. Mrs. Njeri Onyango | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Stanley Miheso | -Holding brief for the Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Kenyatta National Hospital (hereinafter referred to as “the Procuring Entity”) invited eligible bidders to bid for Tender No. KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment-Automated Clinical Chemistry Analyser (hereinafter referred to as “the subject tender”) through an advertisement published in the Daily Nation Newspaper on 10th November 2020.

Bid submission deadline and opening of bids

The Procuring Entity received a total of six (6) bids by the bid submission deadline of 3rd December 2020. The same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders’ representatives and recorded as follows: -

1. M/s Chem Labs Limited;
2. M/s Sciencescope Limited;
3. M/s Neo Science Africa Ltd;
4. M/s Meditec Systems Ltd;
5. M/s Renaissance Health Limited; and
6. M/s Lued (A) Chemicals Ltd.

Evaluation of bids

An Evaluation Committee appointed by the Procuring Entity’s Chief Executive Officer evaluated bids in the following stages: -

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

1. Preliminary Evaluation

At this stage, the Evaluation Committee confirmed whether or not bidders submitted mandatory documents required under Stage 1. Preliminary Evaluation of Section VI. Evaluation Criteria of the Tender Document. At the end of evaluation, all the six bidders were found responsive, and thus eligible to proceed to the Technical Evaluation Stage.

2. Technical Evaluation

At this stage, the Evaluation Committee determined bidders' compliance to the tender requirements, their technical capacity and availability of adequate resources to implement the subject tender in accordance with the criteria outlined in Stage 2. Technical Evaluation of Section VI. Evaluation Criteria of the Tender Document. At the end of evaluation at this stage, two bidders were found responsive and thus proceeded to the Financial Evaluation Stage.

3. Financial Evaluation

At this stage, the Evaluation Committee recorded the price quoted by bidders as follows: -

BIDDER NO.	TOTAL VALUE
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	KSHS
2 M/s Sciencoscope Limited	63,494,731.36
6 M/s Lued (A) Chemicals Ltd.	24,775,582.45

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Lued (A) Chemicals Ltd at the price of Kshs. 24,775,582.45 for being the lowest evaluated tenderer.

Professional Opinion

In a professional opinion dated 9th December 2020, the Procuring Entity's Acting Director, Supply Chain Management reviewed the Evaluation Report dated 8th December 2020 and took the view that the subject procurement process satisfied the requirements of Article 227 (1) of the Constitution and the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"). He advised the Chief Executive Officer to award the subject tender to M/s Lued (A) Chemicals Ltd at the price of Kshs. 24,775,582.45. The said professional opinion was approved on 9th December 2020.

Notification to Bidders

In letters dated 10th December 2020, the Procuring Entity notified the successful bidder and all unsuccessful bidders of the outcome of their bids.

THE REQUEST FOR REVIEW

M/s Sciencscope Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 22nd December 2020 and filed on 23rd December 2020 together with a Supporting Affidavit sworn by the Applicant's Director on 22nd December 2020 and filed on 23rd December 2020 and a Supplementary Affidavit sworn by the Applicant's Director on 8th January 2021 and filed on 11th January 2021, through the firm of Sigano & Omollo LLP Advocates, seeking the following orders: -

- i. ***An order annulling and setting aside the award of Tender Number KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment –Automated Clinical Chemistry Analyser) to Lued (A) Chemicals Limited;***
- ii. ***An order annulling and setting aside the Respondents' letters of notification of unsuccessful bid in respect to Tender Number KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment –Automated Clinical Chemistry Analyser) dated 10th December 2020 addressed to Sciencscope Limited;***
- iii. ***An order substituting the Respondents' decision awarding the Tender Number KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment –Automated Clinical Chemistry Analyser) to Lued (A) Chemicals Limited with a decision awarding the subject tender to the Applicant, M/s Sciencscope Limited on account of having attained the award criteria set out in the Tender Document;***

- iv. ***Any other relief that the Board may deem fit and just to grant;
and***
- v. ***An order awarding costs of the Review.***

In response, the Respondents lodged a Memorandum of Response dated 31st December 2020 and filed on 4th January 2021 together with a Supporting Affidavit sworn by the Procuring Entity's Acting Director, Supply chain Management on 31st December 2020 and filed on 4th January 2021 through the Procuring Entity's Board while the Interested Party lodged a Memorandum of Response dated 5th January 2021 and filed on even date together with a Statement in support of the Interested Party's Memorandum of Response, sworn by the Interested Party's Chief Executive Officer on 5th January 2021 and filed on even date through SMS Advocates LLP.

On 24th March 2020, the Board issued Circular No. 2/2020 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 Submissions dated 8th January 2021 and filed on 11th January 2021 while the Interested Party lodged

Written Submissions dated 7th January 2021 and filed on 8th January 2021.
The Respondents did not lodge written submissions.

BOARD'S DECISION

The Board has considered each of the parties' pleadings and confidential documents submitted to it pursuant to section 63 (1) (e) of the Act and finds that the following issues call for determination: -

- I. Whether the Procuring Entity evaluated bids at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document read together with section 80 (2) of the Act.**
- II. Whether the Procuring Entity awarded the subject tender to the Interested Party in accordance with Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act.**
- III. Whether the Applicant's letter of notification of unsuccessful bid dated 10th December 2020 was issued 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 dispense with a preliminary issue raised by the Respondents.

At paragraph 2 of their Memorandum of Response, the Respondents raised a Preliminary Objection that the Request for Review was filed on time on 23rd December 2020 but served out of time on 28th December 2020 without justification. The Applicant and the Interested Party did not respond to the said preliminary objection.

In determining this preliminary issue, the Board observes that section 168 of the Act gives the Board Secretary obligation to notify the 1st Respondent of a pending Request for Review and suspension of procurement proceedings. Regulation 205 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") reiterates this requirement whilst specifying the timelines available to the 1st Respondent for filing a response to a request for review as follows: -

"205 (1) The Secretary shall immediately after the filing of the request under regulation 203 serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act

(2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated in writing by the Review Board Secretary

(3) Upon being served with a notice of a request for review the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case

submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified

(4)

(5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3)”

Pursuant to section 168 of the Act read together with Regulation 205 (1) of Regulations 2020, the Board Secretary addressed a letter of Notification of Appeal dated 23rd December 2020 to the 1st Respondent notifying him of existence of the Request for Review, whilst stating as follows: -

"You are hereby notified that on 23rd December 2020, a Request for Review was filed with the Public Procurement Administrative Review Board in respect of the above-mentioned tender.

Under section 168 of the Public Procurement and Asset Disposal Act, 2015, the procurement proceedings are hereby suspended and no contract shall be signed between the Procuring Entity and the tenderer awarded the contract unless the Appeal has been finalized. A copy of Request for Review is forwarded herewith to the Procuring Entity”

The Board observes that Regulation 205 (1) of Regulations 2020 requires the Board Secretary to serve a copy of the Request for Review immediately after the same is filed without providing a specific time-limit for such service. However, service of a request for review to the accounting officer of a procuring entity ought to be made within reasonable time. The Court in **Judicial Review Application No. 217 of 2019, Republic v Attorney-General & another; Baps International Limited (Interested Party), Ex parte Baps Limited [2020] eKLR** (hereinafter referred to as "the Baps Limited Case") addressed the question of what would amount to reasonable time when it held as follows at paragraphs 29 and 30 thereof: -

"[29] The general rule is that any duty or function for which there is no imposition of a time limit must be undertaken without unreasonable delay. In R (S) vs Secretary of State for the Home Department (2007) EWCA Civ 546, it was held that legislative schemes implicitly impose a duty to act within a reasonable time.

[30] The concept of what is reasonable time is flexible, and will depend on the circumstances of a case. Relevant circumstances include the nature of the matter to which the action relates, any mitigating circumstances on the part of the decision maker, the adverse consequences of delay, and the need to ensure fairness. "[Emphasis by the Board]

The court in the Baps Limited Case found that where a time limit is not imposed, a duty or a function must be exercised within reasonable time. In

making that determination, the court held that the concept of what is reasonable time is flexible and depends on the circumstances of a case including; the nature of the matter to which the action relates, any mitigating circumstances on the part of the decision maker, the adverse consequences of delay, and the need to ensure fairness.

Turning to the instant case, the Board's Dispatch Register shows an entry made by the Board's Registry Officer on 23rd December 2020 showing courier services collected the letter of notification of appeal dated 23rd December 2020 on the same date so as to deliver the letter at the Procuring Entity's offices. The Posta Dispatch Delivery Docket shows that the letter of notification of appeal dated 23rd December 2020 was received by one Jane at the Procuring Entity's offices on 28th December 2020.

The circumstances of the instant Request for Review are that the period between 23rd December 2020 to 28th December 2020 fell on; Christmas day (Friday, the 25th day of December 2020), Boxing day (Saturday, the 26th day of December 2020) and Sunday, 27th day of December 2020. Section 2 (1) and Part I of the Schedule to the Public Holidays Act, Chapter 110, Laws of Kenya recognizes Christmas day and Boxing day among the public holidays observed in Kenya. To support the Board's view that Sunday is recognized as an excluded day in computation of time, the Board observes that section 57 (b) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya provides as follows: -

"if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day"

The courier services collected the letter dated 23rd December 2020 on the same date so as to deliver the same at the Procuring Entity's offices. This is sufficient evidence that there was no unreasonable delay in collecting the said letter with the intention that it would be delivered to the Procuring Entity's offices without unreasonable delay. The said letter was served upon the Respondents on 28th December 2020, which in the Board's view was a reasonable period, having noted that the period between 23rd December 2020 to 28th December 2020 fell on Christmas day (Friday, the 25th day of December 2020), Boxing day (Saturday, the 26th day of December 2020) and a Sunday, 27th day of December 2020.

Regulation 205 (3) of Regulations 2020 gives the Respondents a period of 5 days from the date of service of a Request for Review, to file a Memorandum of Response to the Request for Review together with other documents, which in this case include confidential documents submitted pursuant to section 67 (3) (e) of the Act. In computing the time within which the Respondents were required to file a response to the instant Request for Review, the Board is guided by section 57 of the Interpretation and General Provisions Act, which provides 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;

(b);

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

The period of filing a Memorandum of Response is 5 days from the date of service of the Request for Review. In essence, time for filing a response to a request for review does not start running when a request for review is filed, but the same starts running when a request for review is served (i.e. received) upon the Respondents. Pursuant to section 57 (d) of the Interpretation and General Provisions Act, the Respondents had up to 5th

January 2021 to file a response to the Request for Review because; 28th December 2020 (first day of an event), Friday, 1st January 2021 (a public holiday and thus an excluded day), Saturday, 2nd January 2021 (an official non-working day for the Board) and Sunday 3rd January 2021 (an excluded day) are not reckoned (i.e. considered) in computing the period of 5 days within which to file a response after receiving the request for review.

Having considered the finding in the Baps Limited case, the Board observes that the nature of Request for Reviews filed before the Board is that they must be completed within 21 days from the date of filing, and to ensure fairness, the Respondents were afforded an opportunity to file their response within the required 5 days from the date of service of a copy of the Request for Review, and thus, suffered no prejudice.

In the circumstances, the Board finds that the Respondents were not served out of time with a copy of the Request for Review, but were served within a reasonable period and thus suffered no prejudice. Accordingly, the Preliminary Objection raised at paragraph 2 of the Respondents' Memorandum of Response fails.

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

The first issue for determination revolves around the question whether the Procuring Entity evaluated bids at the Financial Evaluation Stage in accordance with the criteria outlined in Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document. We say so because, a reading of paragraphs 13 (b), (c), (d), 14 & 15 of the Applicant's Request for Review alleges that the Interested Party's tender sum of Kshs. 24,775,582.45 was an "underbid" because it did not reflect reasonable costs for performance of the subject tender and that the Interested Party's bid ought to be declared non-responsive.

Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document provides as follows: -

"Evaluation will include the following:

- (a) Determination of evaluated price for each bid using the following***
 - (i) There will be no corrections of arithmetic errors as per Public Procurement and Asset Disposal Act, 2015 Section 82***
 - (ii) Converting of all tenders to same currency using a uniform exchange rate prevailing at the closing date of the tender***
 - (iii) Application of any discount offered on the tender***

(iv) Establish if items quoted are within prevailing market rates from the known retail outlets & Public Procurement Regulatory Authority price index. A written undertaking that the prices shall remain valid for 12 months from the date of contract in line with the Public Procurement and Asset Disposal Act 2015, section 139 (3)

(b) Ranking of tenders according to their evaluated prices”

The Board studied the Evaluation Report dated 8th December 2020 and notes that during Financial Evaluation, the Evaluation Committee recorded the outcome of evaluation as follows: -

BIDDER NO.	TOTAL VALUE KSHS
2 M/s Sciencescope Limited	63,494,731.36
6 M/s Lued (A) Chemicals Ltd.	24,775,582.45

Thereafter, the Evaluation Committee recommended award of the subject tender to the Interested Party for being the lowest evaluated bidder at the price of Kshs. 24,775,582.45.

Having considered the criteria outlined in Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document, the Board notes that the same comprised of two limbs, that is, **(a) Determination of evaluated**

price for each bid based on four components [that is, (i) no corrections of arithmetic errors as per the Act (ii) converting of all tenders to same currency using a uniform exchange rate prevailing at the closing date of the tender, (iii) application of any discount offered on the tender, (iv) establishing if items quoted are within prevailing market rates from known retail outlets & Public Procurement Regulatory Authority (hereinafter referred to as “the Authority”) price index] and **(b) Ranking of tenders according to their evaluated prices.**

From the Evaluation Report dated 8th December 2020, there is no indication that the criteria specified in clause (a) Determination of evaluated price for each bid was applied by the Evaluation Committee before ranking tenders according to their evaluated prices pursuant to clause (b) of Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document. The Evaluation Committee ranked tenders by merely recording tenderers’ respective tender sums without first applying the procedure and criteria for Financial Evaluation outlined in clause (a) of Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document.

At this point, the Board deems it necessary to address the importance of procedures and criteria set out in a tender document. Section 80 (2) of the Act which guides on this aspect states as follows: -

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

The Supreme Court of Appeal of South Africa in the case of **Metro Projects CC and Another v Klerksdorp Local Municipality and Others 2004 1 SA 16 (SCA)** stressed the value of abiding by the criteria provided in tender documents when it held at page 11 thereof as follows: -

"an 'acceptable tender' is one that 'in all respects complies with the specifications and conditions of tender as set out in the tender document'. Bid specifications can, of course, also be said to create a legitimate expectation on the part of bidders that the municipality calling for bids will consider and evaluate bids based on the specifications advertised"

In Kenya, the High Court in **Miscellaneous Civil Application No. 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** addressed its mind on the importance of criteria set out in tender documents when it held as follows: -

"[62]. 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 shall be rejected if it is not acceptable.

[63]. Section 80 (2) of the Act provides in mandatory terms that the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents"

It is therefore clear from the foregoing cases that the Evaluation Committee in this case had an obligation to conduct evaluation and comparison of tenders using the procedures and criteria set out in the Tender Document so as to arrive at an acceptable tender, otherwise known as a responsive tender described in section 79 (1) of the Act as follows: -

"A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents"
[Emphasis by the Board]

The criteria applicable at the Financial Evaluation Stage was clearly outlined in two parts under Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document. Having studied the Evaluation Report dated 8th December 2020, there is no proof that the Evaluation Committee arrived at the evaluated price for each bid based on the four components outlined in Clause (a) of Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document and moreso, there is no indication whether the Evaluation Committee satisfied itself that the items quoted by bidders are within prevailing market rates from known retail outlets and the Authority's price index. Furthermore, the Respondents did not make any averments in their Response to the Request for Review explaining whether or not the evaluated prices outlined in the Evaluation Report were arrived at after applying the criteria under Clause (a) of Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document, prior to ranking tenders according to their evaluated prices

pursuant to Clause (b) of Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document. In the absence of any proof, the Board concludes that the Respondents merely ranked tenderers based on their tender sums without first determining bidders' evaluated prices having ignored the criteria set out in Clause (a) of Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document. This shows the Procuring Entity departed from the criteria set out in its own Tender Document and thus, goes against section 80 (2) of the Act which requires an evaluation committee to stick to the procedures and criteria set out in the Tender Document whilst evaluating bids. The principle of fairness under Article 227 (1) of the Constitution requires the Evaluation Committee to be guided by the procedures and criteria for evaluation provided for in the Tender Document and known to bidders. In the instant case, the Evaluation Committee undermined the principle of fairness by ignoring the set out procedures and criteria in Clause (a) of Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document when such procedures and criteria was well known to bidder who had a legitimate expectation that evaluation would be conducted in accordance with provisions of the Tender Document.

Having noted that the Procuring Entity specified the procedure for arriving at the evaluated price at the Financial Evaluation Stage, it is important to establish whether or not bidders factored in the prices of goods required by the Procuring Entity in their respective tender sums.

From the tender name of the subject tender, the Board observes that the Procuring Entity invited bids for Operational Leasing of a Laboratory Equipment known as an **"Automated Clinical Chemistry Analyser"**. The Board studied the Tender Document to establish whether or not the **"Automated Clinical Chemistry Analyser"** had other components being procured by the Procuring Entity and notes that Section V. Technical Specifications of the Tender Document shows that the **"Automated Clinical Chemistry Analyser"** comprises of; One Main Unit (for Biochemistry Lab) and Three Back-up Units (Biochemistry Lab, Renal, KPCC)

As regards the tender sum, Clause 2.8.1 of Section II. Instructions to Tenderers of the Tender Document specified that: -

"2.8.1 The tender prepared by the tenderers shall comprise the following components

(a) a Tender Form and a Price Schedule completed in accordance with paragraph 2.9, 2.10 and 2.11 below"

Clause 2.9 of Section II. Instructions to Tenderers of the Tender Document further provides that: -

"The tenderer shall complete the Tender Form and the appropriate Price Schedule furnished in the tender documents, indicating the goods to be supplied, a brief description of the goods, their country of origin, make/brand, quantity, and prices."

On its part, Clause 2.10 of Section II. Instructions to Tenderers of the Tender Document states that: -

"2.10.1. The tenderer shall indicate on the appropriate Price Schedule the unit prices and total tender price of the goods it proposes to supply under the contract

2.10.2. Prices indicated on the Price Schedule shall include all costs including taxes, insurances and delivery to the premises of the entity."

Clause 2.11 of Section II. Instructions to Tenderers as amended by the Appendix to Instructions to Tenderers of the Tender Document touches on currency and specifies that: -

"Any price quoted in foreign currency will be converted to Ksh. at the mean rate of the central bank of Kenya ruling on the closing date of tender"

The Procuring Entity provided a Form of Tender under Section X. Standard Forms of the Tender Document to be completed by bidders as follows: -

***SECTION X - STANDARD FORMS
10.1 FORM OF TENDER***

Date:

Tender No.

To:

[name and address of Hospital]

Gentlemen and/or Ladies:

1. Having examined the tender documents including all addendum where applicable the receipt of which is hereby duly acknowledged, we, the undersigned, offer to supply & deliver (..... (insert item

description) in conformity with the said tender documents for the sum of.....(total tender amount in words and figures).

2. We undertake, if our Tender is accepted, to deliver the item in accordance with the delivery schedule specified in the Schedule of Requirements.

3. If our Tender is accepted, we will obtain the guarantee of a bank in a sum of equivalent to 5% percent of the Contract Price for the due performance of the Contract, in the form prescribed Kenyatta National Hospital.

4. We agree to abide by this Tender for a period of 120 days from the date fixed for tender opening of the Instructions to tenderers, and it shall remain binding upon us and may be accepted at any time before the expiration of that period.

5. This Tender, together with your written acceptance thereof and your notification of award, shall constitute a Contract, between us. Subject to signing of the Contract by the parties.

6. We understand that you are not bound to accept the lowest or any tender you may receive.

Dated this day of 20

[signature] [in the capacity of]

Duly authorized to sign tender for an on behalf of....

Even though bidders were required to provide a duly completed Price Schedule, the Procuring Entity did not provide a sample of the same in its Tender Document, but instead, provided a Schedule of Requirements comprising of 41 items found at pages 37 to 39 of the Tender Document whose costs were to be specified by bidders.

Pursuant to the Addendum dated 24th November 2020, the Procuring Entity directed bidders on the following: -

"Tender No. KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment-Automated Clinical Chemistry Analyser.

The hospital wishes to clarify as follows:

- (a) That the pricing of reagents such as controls, calibrators, auxiliary reagents and other consumables can be provided on a separate listing***
- (b) That the total volumes for the chemistry analyzer has been treated as one entity and should be treated as such"***

The Applicant's Schedule of Requirements comprises of the 41 items specified at pages 37 to 39 of the Tender Document and additional items referred to by the Applicant as **"Other Consumables, Controls, Calibrators and Auxillary Reagents"**, comprising of 72 items. The Applicant's Schedule runs through pages 00041 to 00044 of its original bid, totaling to Kshs. 63,494,731.37, which amount is for the 41 items in the Schedule of Requirements at pages 37 to 39 of the Tender Document and was carried forward to the Applicant's Form of Tender dated 2nd December 2020, found at page 00040 of its original bid, for supply and delivery of the **"Automated Clinical Chemistry Analyser"**.

On the other hand, the Interested Party's Schedule of Requirements contains the 41 items specified at pages 37 to 39 of the Tender Document and runs through pages 000040 to 000041 of the Interested Party's original bid. The

Interested Party indicated the total amount of the said 41 items as Kshs. 20,848,037.45.

The Interested Party further provided a separate Schedule for Calibrators and Controls at page 000042 of its original bid and another Schedule for Consumables and ISE Reagents for BS20000 and BS430 at pages 000043 to 000044 of its original bid. The Interested Party indicated the total costs for the items outlined in its Schedule of Requirements as: - (i) Total Cost of Reagents-Kshs. 20,848,037, (ii) Total Cost for Calibrators and Controls-Kshs. 695,775.00 and (iii) Total Cost for Consumables and ISE Reagents-Kshs. 3,181,770.00, totaling to Kshs. 24,775,582.45. The amount of Kshs. 24,775,582.45 was carried forward to the Interested Party's Form of Tender dated 30th November 2020, found at page 000045 of its original bid. The Interested Party states in its Form of Tender that the tender sum of Kshs. 24,775,582.45 is for supply and delivery of the **"Automated Clinical Chemistry Analyser"**. Both the Applicant and the Interested Party priced the 41 items listed in the Schedule of Requirements at page 37 to 39 of the Tender Document.

Having noted the manner in which the Procuring Entity was required to conduct Financial Evaluation, application of the criteria under of Clause (a) of Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document before proceeding to Clause (b) ranking of tenders according to their evaluated prices, would have been an opportunity for the

Evaluation Committee to establish whether the 41 items in the Schedule of Requirements on page 37 to 39 of the Tender Document by all tenderers who made it to the Financial Evaluation Stage are within prevailing market rates from known retail outlets & the Authority's price index.

The Applicant did not furnish the Board with any evidence of the prevailing market rates to prove that the Interested Party's tender sum was below the prevailing market rates for the subject tender. That notwithstanding, the responsibility of determining prevailing market rates lies with the Respondents and not bidders such as the Applicant herein. We say so because, in the instant review, the Tender Document required the Evaluation Committee to establish if items quoted for were within prevailing market rates from known retail outlets and the Authority's price index. Further, a procuring entity's head of procurement, in his or her professional opinion, is under an obligation to include information whether the recommended price for standard goods, services and works are within the indicative market prices as stipulated in Regulation 78 (4) read together with Regulation 78 (3) of Regulations 2020.

In this review, the 2nd Respondent's Acting Director-Supply Chain Management, in his professional opinion dated 9th December 2020 did not indicate whether the recommended price of Kshs. 24,775,582.45 was within prevailing market rates but instead indicated the budget for operational leasing of laboratory equipment for financial year 2020-2021 is Kshs. 265,475,000.00 which is not clear on which specific laboratory equipment. A

mention of operational leasing of laboratory equipment in the professional opinion is not indicative of the specific equipment noting that in the 2nd Respondent's Advertisement of National open tenders dated 10th November 2020 invited bidders to tender for 6 different laboratory equipments namely; Fully Automated Immunoassay for Immunochemistry Analyser; Automated Immunology Analyser; Automated Clinical Chemistry Analyser (the subject tender); Automated Flow Cytometer Analyser; Hymoglobin-protein Electrophoresys and Tissue Embedding Station, Staining and Glass Cover Slipping Work Stations; Immuno-histochemistry Equipment Tissue Vacuum Infiltration Processor.

The Board observes that establishing whether prices quoted for the 43 items in the Schedule of Requirements on page 37 to 39 of the Tender Document are within prevailing market rates from known retail outlets and the Authority's price index was a requirement for determining the evaluated price of a tender at the Financial Evaluation Stage in part (iv) of Clause (a) of Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document before proceeding to Clause (b) ranking of tenders according to their evaluated prices. This therefore means, the Respondents ought to discharge their burden of proving that the said procedures and criteria were applied as required in the Tender Document and moreso, to demonstrate the Evaluation Committee satisfied itself that the prices quoted for the 41 items are within prevailing market rates from known retail outlets and the Authority's price index. This burden of proof has not been discharged by the Procuring Entity.

Accordingly, the Board finds that the Procuring Entity failed to evaluate bids at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document read together with section 80 (2) of the Act.

The starting point in addressing the second issue for determination is to reiterate the Board's finding that Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document had two limbs which ought to have been applied during Financial Evaluation so as to arrive at the evaluated price of a tender.

Evaluation of bids at the Financial Evaluation Stage in an open tender where the Request for Proposal method of tendering is not used, involves a consideration of price and in the instant Request for Review, arriving at the evaluated price had four components outlined in Clause (a) of Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document. It is only after the Evaluation Committee arrives at the evaluated price of each tender at the Financial Evaluation Stage, that it proceeds to rank such tenders to determine the lowest evaluated tender price. Thereafter, the Evaluation Committee recommends award of the tender according to the award criteria applicable pursuant to section 86 (1) of the Act and as specified in the Tender Document.

In this case, the Procuring Entity used an open tender without the Request for Proposal method of tendering and thus, the award criterion applicable is specified in section 86 (1) (a) of the Act as follows: -

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

(a) the tender with the lowest evaluated price"

Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document recognized this award criterion as applicable to the subject tender whilst specifying the manner in which the same will be applied. The said provision states as follows: -

2.26: Award of contract

(a) Post-qualification

2.26.1. In the absence of pre-qualification, the Hospital 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 financial, technical, and production capabilities. It will be based upon an examination of the documentary evidence of the tenderers qualifications submitted by the tenderer, pursuant

to paragraph 2.12.3 as well as such other information as the Hospital 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 Hospital will proceed to the next lowest evaluated tender to make a similar determination of that Tenderer's capabilities to perform satisfactorily

(b) Award Criteria

2.26.4 The Hospital 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

Having studied the foregoing provision, the Board observes that award of the subject tender would be made to a tenderer that is; substantially responsive and has the lowest evaluated tender on condition that such tenderer is qualified to perform the contract satisfactorily.

The Board takes cognizance that an evaluation committee first determines bidders' responsiveness to eligibility and mandatory requirements (including

technical specifications) before a consideration of price is undertaken at the Financial Evaluation stage so as to arrive at the lowest evaluated tender. Upon recommendation of award on the lowest evaluated tenderer, an Evaluation Committee conducts due diligence depending on the question whether a due diligence exercise was a procedure specified in the Tender Document. Notably, Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document specified a post-qualification process otherwise known as a procedure for due diligence.

Pursuant to Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document, the Procuring Entity had obligation to conduct a post-qualification exercise in the absence of pre-qualification. Through a post-qualification exercise (otherwise known as due diligence), the Procuring Entity would determine whether the lowest evaluated responsive tenderer is qualified to perform the contract (that is, the subject tender) satisfactorily before award of the subject tender is made.

From the Procuring Entity's confidential file submitted to the Board, the Procuring Entity did not carry out a pre-qualification exercise and thus was under an obligation to carry out a due diligence exercise on the lowest evaluated responsive tender as required by Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document. Section 83 of the Act also recognizes due diligence as a post-qualification exercise conducted on the lowest evaluated responsive tender 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"***

Having compared the procedure outlined in Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document to the one outlined in section 83 of the Act, the Board notes some similarities between the two provisions and finds that a due diligence exercise ought to be conducted using the following procedure: -

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.

The procedure for due diligence was provided for in the Tender Document to be applied as a post-qualification exercise in the subject tender especially in this instance where pre-qualification never took place. This was an important exercise whose main objective is to enable the Evaluation Committee to establish whether the lowest evaluated responsive tenderer is qualified to perform the contract satisfactorily, thus ought not to have been overlooked.

In essence, the Respondents had an obligation to determine; (i) the tenderer that is responsive to eligibility and mandatory requirements including technical specifications, (ii) the lowest evaluated tenderer at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document and (iii) whether the lowest evaluated tenderer qualifies to perform the contract satisfactorily through a due diligence exercise on such tenderer undertaken in accordance with Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act. Thereafter, to award the subject tender in accordance with the award criteria specified in Clause

2.26.4 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act.

From the Procuring Entity's confidential file, there is no documentation showing the Respondents undertook a due diligence exercise pursuant to Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act to verify and confirm whether the lowest evaluated tenderer was qualified to perform the subject tender and thus the Board finds the Respondents failed to conduct a due diligence exercise as required in the aforementioned provisions.

The Board has established that the Procuring Entity herein failed to conduct Financial Evaluation in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria read together with section 80 (2) of the Act and further failed to conduct a due diligence exercise on the lowest evaluated tenderer in accordance with Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act. Consequently, the award of the subject tender to the Interested Party cannot be said to have met the threshold of Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act. This is because the Procuring Entity arrived at the award decision whilst departing from the procedures and criteria for Financial Evaluation and due diligence specified in the Tender Document. This fortifies the Board's finding made hereinbefore that the Procuring Entity did not adhere to the procedures and criteria set out in the Tender Document contrary to

the requirement of section 80 (2) of the Act and thus the award of the subject tender to the Interested Party cannot stand.

To that end, the Board finds that the Procuring Entity failed to award the subject tender to the Interested Party in accordance with Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act.

On the third issue for determination, the Board observes that on 10th December 2020, the Applicant received an email from the Respondents stating as follows: -

"RE: NOTIFICATION OF INTENTION TO AWARD IN RESPECT TO TENDER NO. KNH/T/85/2021-2026 FOR OPERATIONAL LEASING OF LABORATORY EQUIPMENT-AUTOMATED CLINICAL CHEMISTRY ANALYSER

Good afternoon,

This is to inform you that the notification of intention for the above-named subject is ready for collection, please send someone with a job ID/email printout/national ID/complimentary note to come, Supply Chain Management Department room no. 6 during normal working hours"

To support its view that notification to bidders did not meet the requirements of section 87 of the Act and Regulation 82 of Regulations 2020, the Applicant

took the view that bidders were not notified simultaneously since; (i) no specific date and time for collection of the notifications was stated, (ii) the Respondents did not disclose the tender price at which the successful bidder was awarded the subject tender, (iii) no specific reasons as to why the Applicant's tender was found non-responsive were availed and (iv) no reason was given as to why the successful bidder was successful, that is, whether the successful bidder had the lowest evaluated tender price. The Respondents took the view that the reason given to the Applicant in its letter of notification was clear because it was informed that its bid was not successful at the financial evaluation stage.

It is worth noting that pursuant to section 64 (1) of the Act, ***"all communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing"***. This explains why notification of the outcome of evaluation to the successful and unsuccessful bidders is made in writing. Section 87 of the Act which specifies this requirement states as follows: -

"(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2)

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

Section 87 of the Act recognizes that notification of the outcome of evaluation is made in writing. Even if a procuring entity were to send emails, such a procuring entity would be required to attach scanned copies of the notification letters on the emails addressed to bidders. The email of 10th December 2020 referred to by the Applicant is not a notification letter because the same did not inform the Applicant of the outcome of its bid but merely alerted the Applicant that its letter of notification was ready for collection at the Procuring Entity's offices. In essence, the email dated 10th December 2020 is not a notification letter contemplated under section 87 of the Act and the same cannot be used in determining whether or not bidders were notified of the outcome of their bids simultaneously neither can it be used to determine whether all other requirements of section 87 of the Act read together with Regulation 82 of Regulations 2020 were satisfied.

The Board shall therefore resort to the Applicant's letter of notification of unsuccessful bid dated 10th December 2020 attached to its Request for Review which we note, contains the following details: -

***"NOTIFICATION OF INTENTION TO AWARD IN RESPECT TO
TENDER NO. KNH/T/85/2021-2026 FOR OPERATIONAL
LEASING OF LABORATORY EQUIPMENT-AUTOMATED
CLINICAL CHEMISTRY ANALYSER***

***The hospital intends to award the above named tender and
regrets to inform you that your bid was not successful at the
financial evaluation stage***

The successful bidder was:

Lued (A) Chemicals Ltd"

As regards, notification to unsuccessful bidders, the procedure for notification under section 87 (3) of the Act is outlined in 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 provisions of section 87 (3) of the Act to Regulation 82 of Regulations 2020, 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 is 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 successful tenderer's bid was successful in accordance with section 86 (1) of the Act and in this case such reason would be that the successful tenderer submitted the lowest evaluated tender price.

The Procuring Entity did not furnish the Board with evidence of the date bidders collected their letters of notification neither did the Respondents respond to this issue in their Response to the Request for Review. That notwithstanding, the Board notes that all bidders were informed to collect their respective letters of notification through emails that were sent on 10th December 2020. It is important for the Board to point out that the fourteen (14) day period specified in section 167 (1) of the Act would start running a day after a bidder receives its letter of notification of unsuccessful bid. The letter of notification of unsuccessful bid dated 10th December 2020 addressed to the Applicant informed it that its bid was not successful at the Financial Evaluation Stage and the name of the successful tenderer. It would have been prudent for the Procuring Entity to indicate whether or not the Applicant failed to submit the lowest evaluated tender since the award criteria was that of lowest evaluated tender price specified in Clause 2.26.4

of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act.

The Procuring Entity did not specify the price at which award was made to the Interested Party neither was there indication whether the Interested Party was the lowest evaluated tenderer in accordance with Clause 2.26.4 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act and Regulation 82 of Regulations 2020, but merely stated the Interested Party's name. Evidently, the Applicant's letter of notification of unsuccessful bid dated 10th December 2020 does 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 event, the Board has established that the Procuring Entity awarded the subject tender to the Interested Party whilst departing from the procedures and criteria for Financial Evaluation and due diligence specified in the Tender Document contrary to section 80 (2) of the Act and thus any action taken emanating from a flawed evaluation process cannot be allowed to stand.

Accordingly, the Board finds that the Applicant's letter of notification of unsuccessful bid dated 10th December 2020 was not issued in accordance with section 87 (3) of the Act read together with Regulation 82 of Regulations 2020.

The upshot of the foregoing findings is that the Request for Review succeeds in terms of the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the 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 Intention to Award in respect to Tender No. KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment-Automated Clinical Chemistry Analyser dated 10th December 2020, addressed to the Applicant and all other unsuccessful bidders, be and are hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Intention to Award in respect to Tender No. KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment-Automated Clinical Chemistry Analyser dated 10th December 2020, addressed to the Interested Party, be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby ordered to re-instate the Applicant's tender and all other tenders that made it to Financial Evaluation, at the Financial**

Evaluation Stage and to direct the Evaluation Committee to conduct a re-evaluation at the Financial Evaluation Stage in accordance with Stage 3. Financial Evaluation of Section VI. Evaluation Criteria of the Tender Document, taking into consideration the Board's findings in this case.

- 4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby ordered to ensure the procurement proceedings in Tender No. KNH/T/85/2021-2026 for Operational Leasing of Laboratory Equipment-Automated Clinical Chemistry Analyser proceed to its logical conclusion including the making of an award in accordance with Clause 2.26 of Section II. Instructions to Tenderers of the Tender Document read together with section 86 (1) (a) of the Act and to issue letters of notification of intention to enter into a contract to all bidders in accordance with section 87 of the Act read together with Regulation 82 of Regulations 2020, subject to a post-qualification exercise conducted on the lowest evaluated responsive tenderer in accordance with Clause 2.26 (a) of Section II. Instructions to Tenderers of the Tender Document read together with section 83 of the Act.**

5. Given that the subject procurement proceedings is not complete, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 12th day of January 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB