

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATIONS NO. 145/2020, 146/2020 & 147/2020 OF 1<sup>ST</sup>**

**DECEMBER 2020 (CONSOLIDATED)**

**BETWEEN**

**BLUE GARNET PR LIMITED.....1<sup>ST</sup> APPLICANT**

**SILVERFOX BRANDING KE LIMITED.....2<sup>ND</sup> APPLICANT**

**SAVME LIMITED.....3<sup>RD</sup> APPLICANT**

**AND**

**THE PRINCIPAL SECRETARY**

**MINISTRY OF ICT, INNOVATION**

**& YOUTH AFFAIRS STATE DEPARTMENT**

**FOR BROADCASTING AND**

**TELECOMMUNICATIONS.....PROCURING ENTITY**

Review against the decision of The Principal Secretary, Ministry of ICT, Innovation & Youth Affairs State Department for Broadcasting and Telecommunications with respect to Tender No. MOICT/SDBT/2/2020-2021 for Provision of Advertising Services in Periodicals – Magazines.

**BOARD MEMBERS**

- |                      |              |
|----------------------|--------------|
| 1. Ms. Faith Waigwa  | -Chairperson |
| 2. Dr. Joseph Gitari | -Member      |
| 3. Ms. Isabella Juma | -Member      |

4. Dr. Paul Jilani -Member  
5. Mr. Jackson Awele -Member

### **IN ATTENDANCE**

1. Mr. Philip Okumu -Holding brief for Secretary

### **BACKGROUND TO THE DECISION**

#### **The Bidding Process**

The Ministry of ICT, Innovation & Youth Affairs State Department For Broadcasting and Telecommunications (hereinafter referred to as “the Procuring Entity”) invited interested and eligible bidders to submit bids in response to Tender No. MOICT/SDBT/2/2020-2021 for Provision of Advertising Services in Periodicals - Magazines (hereinafter referred to as “the subject tender”), which is a Framework Tender, via an advertisement in the MyGov pull-out newspaper on 15<sup>th</sup> September 2020 as well as publication in the Procuring Entity’s website [www.ict.go.ke](http://www.ict.go.ke) and the Public Procurement Information Portal (PPIP) portal [www.tenders.go.ke](http://www.tenders.go.ke).

#### **Bid Submission Deadline and Opening of bids**

A total of sixteen (16) bidders/firms submitted bids in response to the subject tender which were opened on 23<sup>rd</sup> September 2020 in the presence of bidders and their representatives who chose to attend and which bids were recorded as follows: -

<b>S/NO</b>	<b>FIRM NAME</b>	<b>ADDRESS</b>	<b>BID SECURITY AMMOUNT</b>	<b>SOURCE OF BID SECURITY</b>
<b>1.</b>	The East African Business Times Ltd	28318 – 00200, Nairobi	-	-
<b>2.</b>	Byroerne Media Net. Com. Ltd	25582-00100, Nairobi	100,000.00	AMACO
<b>3.</b>	Medical Media Services Ltd	698 – 00521, Nairobi	100,000.00	AMACO
<b>4.</b>	Mediamax Network	103618 – 00101, Nairobi	-	-
<b>5.</b>	Newsmedia Communications Ltd	35291 – 00100, Nairobi	100,000.00	The Monarch Insurance
<b>6.</b>	Savme Ltd	9269 – 00100 Nairobi	100,000.00	Family Bank
<b>7.</b>	Shrend Publishers and Suppliers Ltd	7732 – 00100 Nairobi	100,000.00	KCB
<b>8.</b>	Musline Communication Media Ltd	65824 - 00607	-	-
<b>9.</b>	Kenya Institute of Management	43706 – 00100 Nairobi	100,000.00	Co-operative Bank
<b>10.</b>	Stellan Consult Ltd	50795 – 00200 Nairobi	100,000.00	KCB
<b>11.</b>	Fortinet Investments Co. Ltd	172013 – 00100 Nairobi	100,000.00	The Monarch Insurance
<b>12.</b>	The Sun Publishers Ltd	38955 – 00200, Nairobi	100,000.00	Rafiki Micro Finance Bank
<b>13.</b>	The Nairobi Law Monthly	57731 – 00200, Nairobi	100,000.00	First Community Bank
<b>14.</b>	Blue Garnet PR Ltd	9269 – 00100, Nairobi	100,000.00	Co-operative Bank
<b>15.</b>	Silverfox Branding KE Ltd	9269 – 00100, Nairobi	100,000.00	Co-operative Bank
<b>16.</b>	Smartbound East Africa Ltd	37671 – 00100, Nairobi	100,000.00	Rafiki Micro Finance Bank

## **Evaluation of Bids**

The evaluation process was conducted in three stages:

1. Preliminary Evaluation;
2. Technical Evaluation;

### 3. Financial Evaluation.

#### 1. Preliminary Evaluation

At this stage of evaluation, all bids were subjected to the Preliminary Evaluation criteria as follows: -

<b>S/NO</b>	<b>CRITERIA</b>
1.	Valid Trade License or Single Business Permit.
2.	Certificate of Incorporation or Registration
3.	Valid Tax Compliance Certificate.
4.	Original bid bond of Kshs. 100, 000/-

Upon conclusion of Preliminary Evaluation, Bidders No. **3, 5, 6, 9, 10, 11, 14, 15** and **16** were found responsive and therefore qualified to proceed to the next stage of evaluation.

#### 2. Technical Evaluation

At this stage of evaluation, bids were subjected to the technical evaluation criteria as provided in the Tender Document. Bidders who scored 70% and above qualified to proceed to the next stage of evaluation.

The results were as follows: -

<b>S/No</b>	<b>Requirements</b>	<b>Marks</b>	<b>B3</b>	<b>B5</b>	<b>B6</b>	<b>B9</b>	<b>B10</b>	<b>B11</b>	<b>B14</b>	<b>B15</b>	<b>B16</b>
1	Provide 4 samples of previous work undertaken over the last 2 years	20	20	20	20	20	20	0	20	20	20

2	Certificate of registration in terms of Part II of the Books and Newspapers Act Cap III	15	15	15	15	0	15	0	15	15	15
3	Evidence of compliance with Part III of the Books and Newspapers Act in terms of Publishing Bond	15	15	15	15	0	15	0	15	15	15
4	Evidence of compliance with Part V and Second Schedule of the Media Council Act No. 46 of 2013	15	15	15	15	0	15	0	15	15	15
5	Submit audited accounts for preceding two(2)years(10 marks for each year)	15	15	15	15	15	15	15	15	15	15
6	Original bid bond of Kshs.100, 000.	10	10	10	10	10	10	4	10	10	10
7	Duly filled, signed and stamped business questionnaire.	5	5	5	5	5	5	3	5	5	5
8	Fully filled and signed sworn statement	5	5	5	5	5	5	5	5	5	5
	<b>Total Marks</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>55</b>	<b>100</b>	<b>27</b>	<b>100</b>	<b>100</b>	<b>100</b>

As captured in the table above, Bidders No. **9** and **11** did not attain the 70% pass mark and were therefore disqualified from further evaluation.

Bidders No. **3, 5, 6, 10, 14, 15** and **16** attained above the 70% pass mark and qualified for financial evaluation.

### **3. Financial Evaluation**

At this stage of evaluation, comparison of prices quoted by Bidders No. **3, 5, 6, 10, 14, 15** and **16** was conducted by the Evaluation Committee.

The Evaluation Committee observed as follows: -

- Bidders No. **6, 14** and **15** were registered on the same date on 22<sup>nd</sup> January, 2018.
- That the firms have common directors.
- That they have provided similar rates for the magazines.
- That they provide different types of magazines.
- That they have a common Postal Address.

### **The Evaluation Committee's Recommendation**

In view of the evaluation process, the Evaluation Committee recommended the following bidders for award of the subject tender: -

- a) Bidder No. 3 **M/s Medical Media Services;**
- b) Bidder No. 5 **M/s Newsmedia Communications Limited;**
- c) Bidder No. 6 **M/s Savme Limited;**
- d) Bidder No. 10 **Stellan Consult Limited;**
- e) Bidder No. 14 **M/s Blue Garnet PR Limited;**
- f) Bidder No. 15 **M/s Silverfox Branding KE Limited;** and

g) Bidder No. 16 **M/s Smart Bound East Africa Limited.**

### **Negotiated Rates**

The Evaluation Committee observed that various bidders reach different target audience and each MDA may prefer any of them. In view of this it was decided to bring all responsive bidders on board. The bidders were therefore subjected to negotiation for purposes of ensuring that the Government gets value for the rendered services.

### **Professional Opinion**

The Assistant Director, Supply Chain Management reviewed the Evaluation Report and only concurred with the Evaluation Committee's recommendation for award of the subject tender to Bidders No. **3, 5, 10** and **16** and disagreed with the recommendation of award of the subject tender to Bidder No. 6 **M/s Savme Limited**, Bidder No. 14 **M/s Blue Garnet PR Limited** and Bidder No. 15 **M/s Silverfox Branding KE Limited** for the following reasons as stated in his Professional Opinion dated 12<sup>th</sup> November 2020: -

***"Based on the above, it is my professional opinion that the procurement process was done in accordance with the Public Procurement and Assets Disposal Act, 2015. However, I do not agree with the recommendations of the Evaluation Committee to award a contract to the three firms because their directors have a case with the Ministry for the provision of the same services being tendered and the case has not been concluded..."***

The Principal Secretary of the Procuring Entity approved the recommendation made by the Evaluation Committee with respect to Bidder No. 3 **M/s Medical Media Services**, Bidder No. 5 **M/s Newsmedia Communications Limited**, Bidder No. 10 **M/s Stellan Consult Limited** and Bidder No. 16 **M/s Smart Bound East Africa Limited** on 13<sup>th</sup> November 2020.

### **REQUEST FOR REVIEW NO. 145 OF 2020**

Blue Garnet PR Limited (hereinafter referred to as “the 1<sup>st</sup> Applicant”), lodged Request for Review No. 145/2020 dated 30<sup>th</sup> November 2020 and filed on 1<sup>st</sup> December 2020 together with an Affidavit in Support of the Request for Review and a Supporting Affidavit of the Request for Review both sworn on 30<sup>th</sup> November 2020 and filed on 1<sup>st</sup> December 2020 through the firm of Kale Maina & Bundotich Advocates.

The 1<sup>st</sup> Applicant also lodged a Notice of Motion Application dated 14<sup>th</sup> December 2020 and filed on 15<sup>th</sup> December 2020 together with a Supporting Affidavit sworn on 14<sup>th</sup> December 2020 and filed on 15<sup>th</sup> December 2020.

Further, the 1<sup>st</sup> Applicant filed an Amended Request for Review No. 145/2020 dated 14<sup>th</sup> December 2020 and filed on 15<sup>th</sup> December 2020.

In response, the Procuring Entity lodged a Memorandum of Response dated 7<sup>th</sup> December 2020 and filed on 8<sup>th</sup> December 2020 together with an Affidavit in Support of the Respondents' Memorandum of Response sworn on 7<sup>th</sup> December 2020 and filed on 8<sup>th</sup> December 2020, through its Deputy Chief State Counsel, Mr. Christopher Maina.

The Board Secretary notified all the bidders who participated in the subject tender, including the four (4) successful bidders, of the existence of Request for Review No. 145/2020, vide letters dated 11<sup>th</sup> December 2020. However, none of the four (4) successful bidders filed any pleadings in response to the same.

The 1<sup>st</sup> Applicant sought for the following orders in the Amended Request for Review No. 145/2020: -

- a. An order that the decision of the Procuring Entity to award Tender No. MOICT/SDBT/2/2020-2021 be set aside;***
- b. An order that the decision of the Procuring Entity rejecting the Applicant's bid be set aside;***
- c. An order directing the Procuring Entity to re-evaluate the tenders afresh in accordance with the tender documents and the law;***
- d. Any other or further orders as the Board may find appropriate.***

## **REQUEST FOR REVIEW NO. 146 OF 2020**

Silverfox Branding KE Limited (hereinafter referred to as “the 2<sup>nd</sup> Applicant”), lodged Request for Review No. 146/2020 dated 30<sup>th</sup> November 2020 and filed on 1<sup>st</sup> December 2020 together with an Affidavit in Support of the Request for Review and a Supporting Affidavit of the Request for Review both sworn on 30<sup>th</sup> November 2020 and filed on 1<sup>st</sup> December 2020 through the firm of Kale Maina & Bundotich Advocates.

The 2<sup>nd</sup> Applicant also lodged a Notice of Motion Application dated 14<sup>th</sup> December 2020 and filed on 15<sup>th</sup> December 2020 together with a Supporting Affidavit sworn on 14<sup>th</sup> December 2020 and filed on 15<sup>th</sup> December 2020.

Further, the 2<sup>nd</sup> Applicant filed an Amended Request for Review No. 146/2020 dated 14<sup>th</sup> December 2020 and filed on 15<sup>th</sup> December 2020.

In response, the Procuring Entity lodged a Memorandum of Response dated 7<sup>th</sup> December 2020 and filed on 8<sup>th</sup> December 2020 together with an Affidavit in Support of the Respondents’ Memorandum of Response sworn on 7<sup>th</sup> December 2020 and filed on 8<sup>th</sup> December 2020, through its Deputy Chief State Counsel, Mr. Christopher Maina.

The Board Secretary notified all the bidders who participated in the subject tender, including the four (4) successful bidders, of the

existence of Request for Review No. 146/2020 vide letters dated 11<sup>th</sup> December 2020. However, none of the four (4) successful bidders filed any pleadings in response to the same.

The 2<sup>nd</sup> Applicant sought for the following orders in the Amended Request for Review No. 146/2020: -

- a. An order that the decision of the Procuring Entity to award Tender No. MOICT/SDBT/2/2020-2021 be set aside;***
- b. An order that the decision of the Procuring Entity rejecting the Applicant's bid be set aside;***
- c. An order directing the Procuring Entity to re-evaluate the tenders afresh in accordance with the tender documents and the law;***
- d. Any other or further orders as the Board may find appropriate.***

### **REQUEST FOR REVIEW NO. 147 OF 2020**

Savme Limited (hereinafter referred to as "the 3<sup>rd</sup> Applicant"), lodged Request for Review No. 147/2020 dated 30<sup>th</sup> November 2020 and filed on 1<sup>st</sup> December 2020 together with an Affidavit in Support of the Request for Review and a Supporting Affidavit of the Request for Review both sworn on 30<sup>th</sup> November 2020 and filed on 1<sup>st</sup> December 2020 through the firm of Kale Maina & Bundotich Advocates.

The 3<sup>rd</sup> Applicant also lodged a Notice of Motion Application dated 14<sup>th</sup> December 2020 and filed on 15<sup>th</sup> December 2020 together with a Supporting Affidavit sworn on 14<sup>th</sup> December 2020 and filed on 15<sup>th</sup> December 2020.

Further, the 3<sup>rd</sup> Applicant filed an Amended Request for Review No. 147/2020 dated 14<sup>th</sup> December 2020 and filed on 15<sup>th</sup> December 2020.

In response, the Procuring Entity, lodged a Memorandum of Response dated 7<sup>th</sup> December 2020 and filed on 8<sup>th</sup> December 2020 together with an Affidavit in Support of the Respondents' Memorandum of Response sworn on 7<sup>th</sup> December 2020 and filed on 8<sup>th</sup> December 2020, through its Deputy Chief State Counsel, Mr. Christopher Maina.

The Board Secretary notified all the bidders who participated in the subject tender, including the four (4) successful bidders, of the existence of Request for Review No. 147/2020 vide letters dated 11<sup>th</sup> December 2020. However, none of the four (4) successful bidders any pleadings in response to the same.

The 3<sup>rd</sup> Applicant sought for the following orders in the Amended Request for Review No. 147/2020: -

- a. An order that the decision of the Procuring Entity to award Tender No. MOICT/SDBT/2/2020-2021 be set aside;***

- b. An order that the decision of the Procuring Entity rejecting the Applicant's bid be set aside;***
- c. An order directing the Procuring Entity to re-evaluate the tenders afresh in accordance with the tender documents and the law;***
- d. Any other or further orders as the Board may find appropriate.***

The Board observes that the tender in dispute in the three Amended Request for Review Applications No. 145/2020, No. 146/2020 and No. 147/2020 is the same.

Regulation 215 of the Public Procurement and Asset Disposal Regulations, 2020 provides as follows: -

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

The Board notes that in the three amended request for review applications the tender in dispute is the same, the Procuring Entity is the same and the grounds for review revolve around the same tender. The Board is satisfied that the three amended request for review applications meet the requirements for consolidation under Regulation 215 of the Public Procurement and Asset Disposal Regulations, 2020.

The Board hereby consolidates the three Amended Request for Review Applications No. 145/2020, No. 146/2020 and No. 147/2020 and proceeds to determine them as one Amended Request for Review, with M/s Blue Garnet PR Limited as the 1<sup>st</sup> Applicant, M/s Silverfox Branding KE Limited as the 2<sup>nd</sup> Applicant and M/s Savme Limited as the 3<sup>rd</sup> Applicant.

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

On 24<sup>th</sup> 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 be canvassed by way of written submissions.

The Board further cautioned all parties to adhere to the timelines as specified in its directive as the Board would strictly rely on documentation filed before it within the timelines specified to render its

decision within twenty-one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act").

The 1<sup>st</sup> Applicant, the 2<sup>nd</sup> Applicant and the 3<sup>rd</sup> Applicant all lodged written submissions dated 18<sup>th</sup> December 2020 on even date whereas the Procuring Entity did not lodge any written submissions.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, the documents filed before it, confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") including the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants' written submissions.

The issues that arise for determination are as follows: -

- I. Whether the Procuring Entity issued the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants with letters of notification of unsuccessful bid that meet the threshold under section 87 (3) of the Act read together with Regulation 82 of the 2020 Regulations;**
- II. Whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants' bids were found non-responsive in accordance with the provisions of the Tender Document, section 80 (2) of**

## **the Act read together with Article 227 of the Constitution**

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

The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Applicants contend that the Procuring Entity is in breach of section 87 of the Act as they only received their respective letters of notification of unsuccessful bid dated 16<sup>th</sup> November 2020, on 24<sup>th</sup> November 2020, upon making inquiries from the Procuring Entity on the same.

On its part, the Procuring Entity disputes these submissions and contends that the letters of notification of unsuccessful bid issued to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants dated 16<sup>th</sup> November 2020, were issued in accordance with section 87 (3) of the Act and moreover, were dispatched to the respective Applicants on the same date.

The Board is cognizant of section 87 of the Act and Regulation 82 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "the 2020 Regulations") which provisions provide as follows: -

Section 87 of the Act provides 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) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.**
- (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.**
- (4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security." [Emphasis by Board]**

Further, Regulation 82 of the 2020 Regulations 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.** [Emphasis by Board]

On the other hand, Section 86(1) of the Act referred to in Regulation 82 of the 2020 Regulations provides as follows: -

***"The successful tender shall be the one who meets any one of the following specified in the tender documents-***

***(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.”***

In view of the foregoing provisions, the Board observes that a procuring entity must notify, in writing, the bidder who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. This section further requires that in the same breath, a procuring entity must also notify other bidders who participated in the subject tender that their respective bids were not successful.

Moreover, a procuring entity's notification of unsuccessful bid to a bidder should disclose the reason(s) why its bid was unsuccessful which reason(s) shall relate to the respective bidder's specific bid. Further, a procuring entity should disclose the successful tenderer in the procurement process therein, who is determined at the conclusion of an evaluation process, including the successful bidder's tender price and the reason why the successful bidder's tender was found successful. The reasons to be given why the successful bidder was found successful should be that the tender of the successful bidder met any of the following (a) was the lowest evaluated price, (b) was the responsive proposal with the highest score determined 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

proposal, (c) was the tender with the lowest evaluated total cost of ownership or (d) was 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.

The Board notes that the requirement to disclose the successful bidder of a subject tender as stipulated under section 87 (3) of the Act read together with Regulation 82 (3) of the 2020 Regulations, affords unsuccessful bidders the opportunity to challenge the successful bidder's eligibility to participate and qualify for an award in a tender if need be.

The obligation of a procuring entity to disclose the identity of a successful bidder in addition to the amount the tender was awarded is central to the principle of transparency as outlined in Article 227 of the Constitution which provides that: -

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

This means that all processes within a procurement system, including notification of unsuccessful bid, must be conducted in a fair, equitable and transparent manner.

Turning to the instant case, the Board studied the letters of notification of unsuccessful bid issued to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants and observes that the Procuring Entity informed the three applicants in their respective letters of notification, that their bids were found unsuccessful for the following reason: -

***"This is to notify you that your application for the above mentioned tender was not successful because the directors of your company have an on-going court case with the Ministry over the provision of the same services being procured for...."***

The Board observes from the submissions made by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants that the three Applicants aver that they collected their respective letters of notification of unsuccessful bid from the Procuring Entity on 24<sup>th</sup> November 2020. In support of this submission, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants each filed supporting affidavits dated 30<sup>th</sup> November 2020, sworn by one Eric Marenyo, who avers that he collected the letters of notification of unsuccessful bid issued by the Procuring Entity to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants from the office of the Procuring Entity on 24<sup>th</sup> November 2020.

On its part, the Procuring Entity submitted to the Board a copy of a one-page document attached to its Memorandum of Response, marked Exhibit KO2, which it refers to in paragraph 5 of its Memorandum of Response as *'a copy of the central registry's page indicating that the*

*letters were dispatched'*, with the only legible information therein being as follows: -

**"16/11 Regret letter letter Silverfox Branding  
Savme Limited  
The Nairobi Law Monthly  
The Sun Publishers Limited  
Musline Communication  
Shrend Publishers  
MediaMax Network  
Byroernne Media  
East Africa Business Times"**

From this excerpt, the Board notes that it is not clear to whom the regret letters addressed to bidders were dispatched to. In the event the said letters were dispatched to the post office, there is no evidence of receipt by the post office and whether the regret letters were then sent to the various bidders as listed via ordinary mail or via registered post. Moreover, there is no evidence of receipt of the said letters by the respective bidders.

In this regard therefore, the Board cannot ascertain from the said document when the 1<sup>st</sup> Applicant, the 2<sup>nd</sup> Applicant and the 3<sup>rd</sup> Applicant received their letters of notification of unsuccessful bid and thus cannot rely on the Procuring Entity's submission in this regard.

The Board is therefore left with the submissions made by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Applicants, that they collected their respective letters of notification of unsuccessful bid dated 16<sup>th</sup> November 2020 from the Procuring Entity on 24<sup>th</sup> November 2020.

Upon further scrutiny of the contents of the letters of notification of unsuccessful bid issued to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants, and to all unsuccessful bidders, the Board observes that the Procuring Entity did not disclose the identity of the four (4) successful bidders and their tender prices therein.

In this regard therefore, the Board finds that the Procuring Entity's letters of notification of unsuccessful bid issued to all the unsuccessful bidders, including the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants, did not meet the threshold of section 87 (3) of the Act read together with Regulation 82 of the 2020 Regulations.

The Board will now proceed to the second issue for determination: -

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants contend that the reason for the rejection of their respective bids was not a criterion in the Tender Document and thus the Procuring Entity relied on an extraneous factor in the evaluation of their respective bids contrary to section 80 (2) of the Act which

requires a procuring entity to conduct evaluation of bids using the criteria and procedures set out in the Tender Document.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants submit that the reason advanced by the Procuring Entity for the rejection of their respective bids is inconsistent with the provisions of section 55 (1) (e) of the Act as read together with section 41 of the Act, as a bidder's bid can only be rejected if the bidder or its directors have been debarred from participating in procurement proceedings which is not the case in this instance.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants contend that their bids conformed to all the requirements as outlined in the Tender Document and thus the Procuring Entity's decision to disqualify their respective bids is irrational, unreasonable, discriminative and unlawful.

In this regard therefore, it is the view of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants that the Procuring Entity is in breach of Article 227 (1) of the Constitution as the Procuring Entity did not conduct the subject evaluation process in a fair, competitive and transparent manner and further that the Procuring Entity did not take into account Articles 50 (1), 50 (2) (a) of the Constitution read together with Article 21 (1) of the Constitution in the evaluation of their respective bids.

In response, the Procuring Entity contends that in as much as the bids submitted by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants were responsive, their

respective bids could not be considered because the directors of the three Applicants were the subject of unresolved criminal proceedings, where the said directors are charged for fraudulently stealing from the Procuring Entity funds totaling approximately Kshs 2.5 billion. In support of this submission, the Procuring Entity referred the Board to section 66 (3) of the Act which bars any person involved in corrupt dealings from entering into any contract under the Act.

The Procuring Entity is of the view that all matters pending before the courts touching on the conduct of the directors of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants with respect to previous procurement transactions with the Procuring Entity have to be resolved before the Procuring Entity can enter into new procurement transactions with the three respective applicants. According to the Procuring Entity, fairness and probity in public procurement must not only be done but must be seen to be done.

The Procuring Entity therefore argues that if the bids submitted by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants were considered, this would erode public confidence in its procurement processes and may invite scrutiny from investigation and prosecution agencies taking into account the uncompleted criminal proceedings against the three respective applicants.

According to the Procuring Entity, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants were not discriminated upon but limited from participating in the subject procurement proceedings, pending the hearing and determination of the

corruption cases facing the directors of the three respective Applicants. The Procuring Entity contends that it carried out the subject procurement process in strict adherence to the provisions of the Constitution, the Act and the 2020 Regulations and thus the Consolidated Request for Review does not merit the prayers sought therein and should be dismissed forthwith.

In its determination of this issue, the Board is guided by section 80 (2) of the Act which states as follows:

***"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."*** [Emphasis by the Board]

Accordingly, evaluation and comparison of bids shall be done using the procedures and criteria set out in the Tender Document.

With this in mind, the Board examined the Evaluation Report signed on 23<sup>rd</sup> October 2020 which forms part of the Procuring Entity's confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act, and observes on page 10 thereof, that upon conclusion of the subject evaluation process, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants' respective bids were found responsive and recommended for award of the subject tender.

However, the Board observes that the Assistant Director, Supply Chain Management, in his Professional Opinion dated 12<sup>th</sup> November 2020, disagreed with the recommendation of award made to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants for the following reason as captured on page 11 thereof: -

***"Based on the above, it is my professional opinion that the procurement process was done in accordance with the Public Procurement and Assets Disposal Act, 2015. However, I do not agree with the recommendations of the Evaluation Committee to award a contract to the three firms because their directors have a case with the Ministry for the provision of the same services being tendered and the case has not been concluded..."***

Thereafter, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants were informed by the Procuring Entity in their respective letters of notification of unsuccessful bid dated 16<sup>th</sup> November 2020, that their bids were found unsuccessful for the following reason: -

***"This is to notify you that your application for the above mentioned tender was not successful because the directors of your company have an on-going court case with the Ministry over the provision of the same services being procured for...."***

The Board studied the evaluation criteria as outlined in the Tender Document and observes no provision therein requiring disclosure by a

bidder of any court cases, pending or finalized, which a bidder may be involved in, with the Procuring Entity or any other party. In short, the reason why the bids submitted by the 1<sup>st</sup> Applicant, the 2<sup>nd</sup> Applicant and the 3<sup>rd</sup> Applicant were found non-responsive was not part of the evaluation criteria in the Tender Document and thus in the Board's considered view was an extraneous factor as far as the provisions of the Tender Document are concerned.

However, the Board observes in paragraph 8 of the Procuring Entity's Memorandum of Response, the following statement: -

***"The Procuring Entity through its letter dated 16<sup>th</sup> November, 2020, informed the Applicant why its bid was declined/not successful. That the decline was lawful as the Applicant has an active case in court (CR 131/369/2018) where its Directors are charged for fraudulently stealing from the Procuring Entity funds totalling approximately Kshs. 2.5B."***

In support of this submission, the Board observes that the Procuring Entity annexed the following articles to its Memorandum of Response which are marked Exhibit KO1:

- a) A printout of an article published by the Standard Media dated 31<sup>st</sup> October 2018 titled '*Two more officials charged in Kshs 122 million advertising scandal*' and

- b) A printout out of an article published by Citizen Television dated 29<sup>th</sup> October 2018 titled '*Former ICT PS to be charged over Kshs. 2.5B advertising scandal.*'

The Procuring Entity also annexed to its Memorandum of Response and marked as Exhibit K03 a copy of a letter issued by the Directorate of Criminal Investigations dated 7<sup>th</sup> November 2018 and signed by one Kuriah Obadiah, CFE, on behalf of the Director of Criminal Investigations, addressed to the Principal Secretary, Ministry of Information, Communication and Technology with respect to criminal proceedings instituted against one Sammy Ishundu Itemere and seventeen (17) officers of the Procuring Entity in Criminal Case No. CR/121/369/2018 CF No. 2053/2018.

Further marked as Exhibit KO4 are copies of seventeen (17) letters issued by the Ministry of Information, Communications and Technology dated 14<sup>th</sup> November 2018 and signed by one Joe Mucheru EGH, Cabinet Secretary, addressed to seventeen (17) officers of the Procuring Entity, informing them of their interdiction because criminal charges had been instituted against the said officers in Criminal Case No. CR 121/369/2018 CF No. 2053/2018.

In view of the foregoing, the Board examined the 1<sup>st</sup> Applicant's original bid, the 2<sup>nd</sup> Applicant's original bid and the 3<sup>rd</sup> Applicant's original bid and observes from their respective confidential business questionnaires, the three Applicants provided details of their directors as follows: -

<b><i>"Name</i></b>	<b><i>Nationality</i></b>	<b><i>Shares</i></b>
<b><i>1. Ayub Angantia Savula</i></b>	<b><i>Kenyan</i></b>	<b><i>500</i></b>
<b><i>2. Melody Ringeera</i></b>	<b><i>Kenyan</i></b>	<b><i>500</i></b>

Notably, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants, have common directors who are the same directors mentioned in the two articles annexed to the Procuring Entity's Memorandum of Response as cited hereinabove, in connection with corruption charges relating to a Kshs 122 million advertising agency scandal.

It is a matter of public notoriety that the directors of the 1<sup>st</sup> Applicant, the 2<sup>nd</sup> Applicant and the 3<sup>rd</sup> Applicant and several officials of the Procuring Entity have been charged in a court of law with several offences in connection with a Kshs. 122 million advertising scandal as reported by various media outlets. From the information in the public domain as captured in the two articles attached to the Procuring Entity's Memorandum of Response, criminal charges have been instituted against the Directors of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants.

However, the Board observes that the Procuring Entity has not provided any documentation before this Board of the said criminal case instituted against the Directors of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants or that the said criminal case has been concluded or has resulted in a conviction thereof.

Article 227 of the Constitution provides as follows: -

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

***(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—***

***(a) .....***;

***(b) .....***;

***(c) .....; and***

***(d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.***"

**[Emphasis by the Board]**

The Public Procurement and Asset Disposal Act is a creature of Article 227 (2) of the Constitution which under sub-section (d) provides that the Act may *interalia* provide for sanctions against persons who have been found guilty of corrupt practices.

An example of such sanctions is provided for under section 41 of the Act thereof which provides as follows –

***"(1) The Board shall debar a person from participating in procurement or asset disposal proceedings on the ground that the person—***

- (a) .....
- (b) .....
- (c) .....
- (d) .....
- (e) .....
- (f) .....
- (g) .....
- (h) ***is guilty of corrupt or fraudulent practices; or***
- (i) .....
- (2) .....
- (3) .....
- (4) A debarment under this section shall be for a specified period of time of not less than three years.***
- (5) The procedure for debarment shall be prescribed by Regulations."***

Accordingly, a person may be debarred from participating in procurement and asset disposal proceedings if they are *interalia* found guilty of corrupt and fraudulent practices.

The term 'debarment' is defined under the Black's Law Dictionary as:

***"Any exclusion or preclusion that prevents having or doing something"***

Debarment in the instant circumstances can therefore be interpreted to mean the exclusion of a person from participating in procurement and asset disposal proceedings.

The procedure for debarment is outlined under Regulation 22 (1) of the 2020 Regulations which provides that the process of debarment may be initiated by the following persons:

***"(a) by the accounting officer of a procuring entity, or any other person with knowledge of facts that may support one or more grounds for debarment;***

***(b) by the Director-General on his or her own motion based on findings from investigations, inspections, or reviews; or***

***(c) on the recommendation of a law enforcement agency with an investigative mandate."***

In this regard therefore, debarment of a bidder from procurement and asset disposal proceedings is undertaken by the Public Procurement Regulatory Board and is initiated by either the accounting officer of a procuring entity, the Director General of the Public Procurement Regulatory Authority or on the recommendation of a law enforcement agency with an investigative mandate.

In light of the foregoing, the Board observes that any sanctions to be imposed against a bidder who has been accused of corrupt or fraudulent

practices, such as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants' Directors in this instance, may only be imposed where the said bidder has been found guilty of corrupt and fraudulent practices pursuant to Article 227 (2) (d) of the Constitution. Further, a bidder may be debarred by the Public Procurement Regulatory Board if they are found guilty of corrupt and fraudulent practices.

Notably, no evidence has been provided before this Board demonstrating that the Directors of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants have been found guilty in the criminal court proceedings instituted against them or that they have been debarred from procurement and asset disposal proceedings by the Public Procurement Regulatory Board.

In fact, the Procuring Entity in its Memorandum of Response, admits that the criminal proceedings against the Directors of the 1<sup>st</sup> Applicant, the 2<sup>nd</sup> Applicant and the 3<sup>rd</sup> Applicant have not been concluded and states as follows in paragraph 2, 7 and 9 thereof as follows: -

***"2. Subsequently, the Applicant submitted their bid documents for consideration. However, in as much as their bid was responsive, the same could not be considered because the Applicant's directors are the subject of unresolved criminal proceedings.***

***...7. ....The bids submitted by the Applicants if considered would erode public confidence in the Ministry's procurement processes and may invite scrutiny from investigation and prosecution agencies taking into account***

***the un-concluded criminal proceedings against the Applicants.***

***....9. The Applicant was not discriminated upon but limited from participating in the Ministry's procurement proceedings in accordance with the Act pending the hearing and determination of the corruption case facing the Applicant's directors."***

In this regard therefore and in the absence of conclusive proof that the directors of the 1<sup>st</sup> Applicant, the 2<sup>nd</sup> Applicant and the 3<sup>rd</sup> Applicant have been found guilty of corrupt and fraudulent practices, the Board is mindful of the principles of natural justice which find expression in our Constitution as follows: -

Article 25 of the Constitution provides:

***"Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—***

***(a) .....***;

***(b) .....***;

***(c) the right to a fair trial; and***

***(d) ....."***

Article 50 of the Constitution states that: -

**"(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**

**(2) Every accused person has the right to a fair trial, which includes the right—**

**(a) to be presumed innocent until the contrary is proved;**

**(b).....;**

**(c) to have adequate time and facilities to prepare a defence; [Emphasis by the Board]**

The right to a fair trial is a fundamental human right recognized in our Constitution, which guarantees every person the right to have any dispute heard and determined before a court of law or any other independent/impartial decision making body. The right to a fair hearing is also among the fundamental rights and freedoms that cannot be limited or abridged. Furthermore, the presumption of innocence is one of the cornerstones of a fair trial and applies at all stages of criminal proceedings, until the contrary is proved.

The importance of the right to a fair trial and the purpose of the presumption of innocence was explained by the High Court in **Petition No. 430 of 2015 Senator Johnstone Muthama v Director of**

**Public Prosecutions & 2 others; Japhet Muriira Muroko (Interested Party) [2020] eKLR as follows: -**

***"..So important is the right to a fair trial that under Article 25 of the Constitution, it is one of the rights that may not be limited or abridged. The Right to a fair trial is an absolute right. It follows that the infringement cannot be a permissible limitation under Article 24 of the Constitution.***

***.....The presumption of innocence protects the fundamental liberty and human dignity of every person accused of criminal conduct. It ensures that until the State proves an accused persons' guilt beyond a reasonable doubt, he or she cannot be convicted. The right is vital to an open and democratic society committed to fairness and social justice.***"

Further, the High Court in **Criminal Appeal 69 of 2012 Joseph Ndungu Kagiri v Republic [2016] eKLR** opined as follows: -

***"In the Kenyan criminal jurisprudence, the accused is placed in a somewhat advantageous position. The criminal justice administration system in Kenya places the right to a fair trial at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the accused is entitled to fairness and true investigation and the court is expected to play a balanced role in the trial of an accused person. .....The trial should be***

***judicious, fair, transparent and expeditious but must ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 50 of the Constitution of Kenya 2010. The Right to a Fair Trial is one of the cornerstones of a just society.***

***The Supreme Court of India in Rattiram v. State of M.P., a three-Judge Bench ruled thus: -***

*"Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism."*

*And again: -*

*"Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused...."*

Accordingly, an accused person is presumed innocent until proven guilty and is entitled to a fair trial and the opportunity to present evidence in his/her defence pursuant to Article 50 (2) (a) and (c) of the Constitution, which rights ought to be safeguarded by any court or decision making body.

The Board is a creature of statute owing to the provision of Section 27 (1) of the Act which provides that: -

***"27. Establishment of the Public Procurement Administrative Review Board***

***(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."***

Further, Section 28 of the Act provides as follows: -

***"28. Functions and powers of the Review Board***

***(1) The functions of the Review Board shall be—***

***(a) reviewing, hearing and determining tendering and asset disposal disputes; and***

***(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

This Board is therefore a custodian of the law and is mandated to ensure that constitutional safeguards are jealously protected and upheld at all times.

Noting that no evidence has been presented before this Board demonstrating that the Directors of the 1<sup>st</sup> Applicant, the 2<sup>nd</sup> Applicant and the 3<sup>rd</sup> Applicant have been found guilty of corrupt and fraudulent practices, it is the Board's considered view that the said directors should not be subject to any sanctions metered by the Procuring Entity in the subject procurement process as they have not been found guilty of corrupt and fraudulent practices before a court of law.

The Board also considered the Procuring Entity's submission that in addition to disqualifying the bids submitted by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Applicants, it similarly interdicted its staff who were charged in the criminal proceedings alongside the said directors.

The Board examined the Procuring Entity's website [www.ict.go.ke](http://www.ict.go.ke) and observes that the Procuring Entity is a ministry which was created by the Government of Kenya, through Executive Order No. 2 of 2013, to develop and implement appropriate policies and programmes aimed at generating ICT related products and services required by providers of such goods and services in both Government and the private sector.

The Board is cognizant of Article 260 of the Constitution which defines a 'public officer' as: -

***(a) any State officer; or***

***(b) any person, other than a State Officer, who holds a public office;***

Further, the interpretation section of the Public Officer Ethics Act, No. 4 of 2003 defines a 'public officer' as: -

***"any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following—***

***(a) the Government or any department, service or undertaking of the Government;***

A public officer is therefore any officer, employee or member of the government or any department, service or undertaking of the government.

Further, the Oxford Dictionary assigns the following meaning to the term 'interdict': -

***"an authoritative prohibition"***

Section 70 (1) of the Public Service Commission Act No. 10 of 2017, states as follows with respect to interdiction: -

***"Where an authorized officer is satisfied that public interest requires that a public officer should immediately cease to exercise the powers and functions of a public office, the authorised officer may, where proceedings which may lead to the public officer's dismissal are being taken or are about to be taken or criminal proceedings are being instituted against the public officer, interdict the public officer from the exercise of those functions and powers."***

Accordingly, a public officer may be interdicted, that is, stopped from exercising the powers and functions of his/her public office, where *inter alia* criminal proceedings are instituted against the said officer.

Interdiction is further defined under the Public Service Commission Discipline Manual for the Public Service (May 2016) on page (x) thereof as follows: -

***"barring an accused officer from performing official duties to give room for further investigation of the case"***

The process of interdiction is provided for on page 8 and 9 thereof as follows: -

***"(a) An officer may be interdicted where gross misconduct which is likely to lead to dismissal is reported and requires investigation or a report that an officer has been charged in criminal proceedings is received."***

**(b) If the case relates to a criminal charge, the officer is served with an interdiction letter, a sample of which is provided in Appendix I.**

**(c) .....**

**(d) .....**

**(e) .....**

**(f) .....**

Interdiction is therefore a disciplinary process provided under law mostly with respect to the public service where a public officer is temporarily removed or relieved from his or her duties pending investigations in cases of alleged gross misconduct or where criminal proceedings have been instituted against the said public officer. In the latter scenario, the public officer in question is issued with an interdiction letter and is barred from performing his/her duties forthwith.

Turning to the instant case, the Board notes, the Procuring Entity interdicted seventeen (17) of its officers vide letters dated 14<sup>th</sup> November 2018, once criminal charges were instituted against them in Criminal Case No. CR 121/369/2018 CF No. 2053/2018 with respect to a different tender. However, it is important to note that this disciplinary process as undertaken by the Procuring Entity cannot be imposed on the Directors of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants who are private citizens and not public officers in so far as participating in the subject tender is concerned.

Moreover, as mentioned hereinbefore, sanctions may only be imposed against the Directors of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Applicants, if they are found guilty of corrupt and fraudulent practices pursuant to Article 227 (2) (d) of the Constitution. To impose any sanctions on the Directors of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Applicants before the criminal proceedings in issue are concluded and a conviction issued by a court of law, would amount to condemning a person unheard in violation of the principles of natural justice and the right to a fair hearing as espoused under Article 50 (2) (a) and (c) of the Constitution as explained hereinbefore, thus prejudicing the accused person(s).

It is important to note that all tenderers who participated in the subject procurement process were duly guided by the provisions in the Procuring Entity's Tender Document and as such a legitimate expectation was created in the minds of all tenderers that the evaluation process would comply strictly with the provisions of the Tender Document and that their respective bids would be considered and evaluated in accordance with the criteria provided in the Tender Document.

The Court of Appeal in **Civil Appeal No. 314 of 2009 Serah Njeri Mwobi v. John Kimani Njoroge** explained the doctrine of estoppel as follows: -

***"The doctrine of estoppel operates as a principle of law which precludes a person from asserting something***

***contrary to what is implied by a previous action or statement of that person.***

***....It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced."***

According to the doctrine of estoppel, a person is precluded from asserting something contrary to what is implied by a previous action or statement of that person.

As mentioned hereinbefore, the Board has established that the Tender Document did not require a bidder to disclose its litigation history with the Procuring Entity or any other party and moreso, this requirement was not outlined as a criterion for evaluation under the Tender Document. In this regard therefore, the Procuring Entity is *estopped* from disqualifying a bidder based on a requirement not provided for under the Tender Document.

It is therefore the finding of this Board that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants' bids were found non-responsive contrary to the provisions of the Tender Document, section 80 (2) of the Act read together with Article 227 of the Constitution.

In totality, the Board has found that the Procuring Entity's letters of notification of unsuccessful bid issued to all the unsuccessful bidders, including the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants, did not meet the threshold of section 87 (3) of the Act since the Procuring Entity failed to disclose the successful bidders of the subject tender and their respective tender prices therein. It is also the finding of this Board that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respective Applicants' bids were found non-responsive contrary to the provisions of the Tender Document, section 80 (2) of the Act read together with Article 227 of the Constitution.

The Board takes cognizance of section 173 (b) of the Act, which states that: -

***“ Upon completing a review, the Review Board may do any one or more of the following-***

***(a).....;***

***(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings...”***

In this regard therefore, the Board deems it fit to direct the Procuring Entity to issue fresh letters of notification to enter into a contract to all bidders found responsive and recommended for award of the subject tender by the Evaluation Committee and simultaneously issue fresh letters of notification of unsuccessful bid to all bidders whose bids were found non-responsive by the Evaluation Committee as captured in its Evaluation Report signed on 23<sup>rd</sup> October 2020, in accordance with section 87 of the Act read together with Regulation 82 of the 2020 Regulations.

In totality of the foregoing, the Board holds that the Consolidated Request for Review succeeds with respect to the following specific orders: -

### **FINAL ORDERS**

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

- 1. The Accounting Officer of the Procuring Entity's Letter of Award dated 16<sup>th</sup> November 2020 with respect to Tender No. MOICT/SDBT/2/2020-2021 for Provision of Advertising Services in Periodicals – Magazines addressed to M/s Medical Media Services Limited, M/s News Media Communications Limited, M/s Stellan Consult Limited, M/s Smart Bound East Africa Limited, be and are hereby cancelled and set aside.**

- 2. The Accounting Officer of the Procuring Entity's Letters of Notification of Unsuccessful Bid dated 16<sup>th</sup> November 2020 with respect to Tender No. MOICT/SDBT/2/2020-2021 for Provision of Advertising Services in Periodicals – Magazines, addressed to all unsuccessful bidders, including the 1<sup>st</sup> Applicant, the 2<sup>nd</sup> Applicant and the 3<sup>rd</sup> Applicant herein, be and are hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby directed to issue fresh letters of notification to enter into a contract to all bidders found responsive and recommended for award of the subject tender by the Evaluation Committee and to simultaneously issue fresh letters of notification of unsuccessful bid to all bidders whose bids were found non-responsive by the Evaluation Committee, as captured in its Evaluation Report signed on 23<sup>rd</sup> October 2020, in accordance with section 87 of the Act read together with Regulation 82 of the Public Procurement and Asset Disposal Regulations, 2020, taking into consideration the Board's findings in this Review.**
- 4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to conclude the subject procurement within fourteen (14) days from the date of this decision.**

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

**Dated at Nairobi this 22<sup>nd</sup> Day of December 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**