

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 12/2021 OF 1ST FEBRUARY 2021

BETWEEN

FIVE BLOCKS ENTERPRISES LIMITED..... APPLICANT

AND

MANAGING DIRECTOR, KEBS..... ACCOUNTING OFFICER

KENYA BUREAU OF STANDARDS (KEBS)..... PROCURING ENTITY

Review of International Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts.

BOARD MEMBERS

- | | |
|----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Qs. Hussein Were | -Member |
| 3. Mr. Jackson Awele | -Member |
| 4. Ms. Rahab Robi | -Member |

IN ATTENDANCE

- | | |
|------------------------|-----------------------------------------------|
| 1. Mr. Philemon Kiprop | -Holding brief for the Acting Board Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Kenya Bureau of Standards (hereinafter referred to as "the Procuring Entity") invited interested and eligible bidders to submit bids in response to International Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts (hereinafter referred to as "the subject tender") via an advertisement in the Daily Nation Newspaper published on Tuesday, 19th January 2021 as well as publication in the Procuring Entity's website www.kebs.org.

Bid Submission Deadline

Upon issuance of an Addendum on 3rd February 2021, the bid submission deadline was extended to 25th February 2021 at 11:00 am.

REQUEST FOR REVIEW NO. 12 OF 2021

Five Blocks Enterprises Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated 2nd February 2021 and filed on 1st February 2021 together with a Statement of Support dated 2nd February 2021 and filed on 1st February 2021 and a Reply to the Respondents' Memorandum of Response dated and filed on 12th February 2021, through the firm of Momanyi & Associates Advocates, seeking the following orders: -

- i. An order annulling the tender in its entirety and terminating/cancelling the procurement process.***

- ii. An order directing the Procuring Entity to initiate a new procurement process for the subject services that comply with the requirements of the Public Procurement and Asset Disposal Act, 2015 and its attendant Regulations, 2020.***
- iii. An order awarding costs of this Request for Review which was necessitated by the incompetence of the Procuring Entity.***

In response, the Procuring Entity lodged a 'Respondents' Memorandum of Response' dated 8th February 2021 and filed on 9th February 2021, through its advocate, Ms. Caroline Mokeira.

M/s Niavana Agencies Limited lodged a letter addressed to the Acting Board Secretary dated 15th February 2021 and filed on 16th February 2021 requesting to be enjoined as an Interested Party to the Request for Review. It further filed a 'Notice of Preliminary Objection' dated 19th February 2021 on 22nd February 2021.

Pursuant to the Board Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic, 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 strict 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").

Parties to the Request for Review did not file 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 Act and finds that the following issues call for determination: -

I. Whether the Request for Review is properly filed before this Board.

Depending on the outcome of the first issue: -

II. Whether the Request for Review requires this Board to review the Procuring Entity's choice of procurement method thereby ousting the jurisdiction of this Board by dint of section 167 (4) (a) of the Act.

Depending on the outcome of the second issue: -

III. Whether the Procuring Entity's Tender Document provides for preference and reservation schemes applicable to the subject tender.

In its determination of the third issue framed for determination, the Board will address the following sub-issues: -

- a) Whether the Procuring Entity breached the provisions of section 157 (9) of the Act read together with Regulation 165 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter "Regulations 2020") and section 155 (2) of the Act for failure to provide for a mandatory preliminary evaluation criterion in the Tender Document requiring all foreign tenderers to source at least forty percent of their supplies from citizen contractors prior to submitting their tenders.*
- b) Whether the Procuring Entity breached the provisions of section 158 of the Act read together with section 157 (8) (a) of the Act and Regulation 163 of Regulations, 2020 for failure to provide for exclusive preference to citizen contractors in the Tender Document;*
- c) Whether the Procuring Entity breached the provisions of section 158 of the Act read together with section 157 (8) (b) of the Act and Regulation 164 of Regulations, 2020 for failure to provide for a margin of preference in the Tender Document.*

IV. Whether the Procuring Entity's Tender Document provides for financial evaluation criteria in compliance with Regulation 77 of Regulations 2020.

V. Whether the award criteria of the subject tender as provided in Clause 2.22.3 of the Tender Document complies with section 86 (1) of the Act.

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

The Board observes that M/s Niavana Agencies Limited through the law firm of Adrian Kamotho Njenga & Company Advocates, lodged a letter addressed to the Acting Board Secretary dated 15th February 2021 on 16th February 2021 seeking to be enjoined as an Interested Party to the Request for Review and requesting to be supplied with the pleadings lodged by parties in the said review proceedings.

In a letter dated 18th February 2021, the Acting Board Secretary responded as follows: -

"We wish to inform you that you are at liberty to file your response in support or in opposition to the subject Request for Review noting that the Review Board is scheduled to deliver its decision on or before 22nd February 2021 in accordance with section 171 of the Public Procurement & Asset Disposal Act, 2015.

Copies of the Request for Review, the Respondents' Memorandum of Response and the PPARB Circular No.

02/2020 of 24th March 2020 are attached hereto for your reference."

On 22nd February 2021, M/s Niavana Agencies Limited, through its advocates, filed a 'Notice of Preliminary Objection' dated 19th February 2021 alleging as follows: -

"1. THAT the Request for Review is incompetent and fatally defective on account of the following: -

a) Both the Request for Review and the attendant statement of response are dated 2nd February 2021 yet the said documents were lodged before the tribunal on 1st February 2021;

b) The phenomenal discrepancy in the execution and filing dates renders it impossible to delineate the timelines prescribed under section 171 of the Public Procurement and Asset Disposal Act, 2015;

c) Under the Public Procurement and Asset Disposal Act, 2015 matters of dates and timelines are substantive, stringent and uncompromising/

2. THAT in any event, no leave has been sought from, or granted by the Honourable Board to amend the request for review."

In view of the foregoing, the Board notes from the pleadings before it that the Applicant did not have an opportunity to reply to the 'Notice of

Preliminary Objection' filed by M/s Niavana Agencies Limited, noting that the same was filed on 22nd February 2021, this being the last day for determining the Request for Review.

This notwithstanding, the Board examined the Request for Review Application and observes that it is indeed dated 2nd February 2021 but was stamped with the official stamp of the Board as filed on 1st February 2021.

The Board would like to point out that pursuant to section 167 (1) of the Act, in determining the period taken by an applicant to lodge a request for review application, the Board uses the date of filing as evidenced by the official stamp of the Board which is affixed on the face of a request for review application. Notably, the Interested Party is not challenging whether or not the Request for Review was filed out of time but is challenging the discrepancy in execution and filing dates of the Request for Review and alleges that it is impossible to delineate the timelines prescribed under section 171 of the Act. Having established that the Request for Review was filed on 1st February 2021, the Board has twenty-one days from that date to determine the Request for Review.

The Board is cognizant of Article 159 (2) (d) of the Constitution which requires courts, tribunals and other decision making bodies to administer justice without undue regard to technicalities. In order to ensure fairness and having noted the Interested Party interfered with the Applicant's right to rejoinder by filing a Notice of Preliminary Objection

on the last day for determining the Request for Review, the Board finds that the Request for Review was properly filed before it on 1st February 2021 evidenced by the official stamp of the Board affixed on the face of the Request for Review application.

It has well been an enunciated principle that jurisdiction is everything, following the decision in **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, where Justice Nyarangi opined as follows: -

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Further in **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011**, the court had occasion to interrogate the instruments that arrogate jurisdiction to courts and other decision making bodies. The court held as follows: -

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

This 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.

The jurisdiction of this Board flows from Section 167 of the Act, which provides as follows: -

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed...

(2).....;

(3).....;

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b); and

(c)

Section 167 (4) (a) of the Act expressly stipulates that the jurisdiction of this Board is ousted in instances where the choice of a procurement method is the subject of review proceedings before this Board.

In its pleadings before the Board, the Procuring Entity in paragraph 5 and 9 of its Memorandum of Response contends that the choice of a procurement method is the responsibility of the Procuring Entity and shall not be subject to review as stipulated under section 167 (4) (a) of the Act. The Procuring Entity takes the view that it may enter into a framework agreement through open tender pursuant to section 114 (1) of the Act and avers that the subject tender duly satisfies the requirements for use of framework agreements through use of open international tenders.

On its part, the Applicant argues in paragraph 3 of its 'Reply to the Respondents' Memorandum of Response' that it is not seeking a review of the choice of procurement method but the failure by the Procuring Entity to comply with the Act and its attendant regulations.

In order to establish whether the instant Request for Review requires this Board to review the Procuring Entity's choice of procurement method, the Board examined the Applicant's Request for Review Application and observes that the Applicant raised the following five (5) grounds for review with respect to the subject tender as follows: -

- a) **Ground No. 1:** The Procuring Entity (PE) breached the provisions of section 157 (9) of the Public Procurement and Asset Disposal Act, 2015 and Regulation 165 of the Public Procurement and Asset Disposal Regulations, 2020 because the PE (KEBS) did not include as a mandatory requirement in the preliminary evaluation criteria

in the tender document that all foreign tenderers source at least forty percent of their supplies from citizen contractors as required by this provision.

- b) **Ground No. 2:** The Procuring Entity breached the requirements of section 158 of the Act and Regulation 163 and 164 of the Public Procurement and Asset Disposal Regulations, 2020 because the Procuring Entity did not specify in the Tender Document how exclusive preference shall be given to citizen contractors or how the margin of preferences shall be implemented to firms where Kenyan citizens hold shares as prescribed in Regulation 163 and 164 of the Regulations, 2020.
- c) **Ground No. 3:** The Procuring Entity breached the requirements of Regulation 77 of the Public Procurement and Asset Disposal Regulations, 2020 because the Tender Document does not provide financial evaluation criteria that shall ensure that the requirement of this Regulation 77 are satisfied.
- d) **Ground No. 4:** The Procuring Entity (KEBS) breached the provisions of section 86 (1) of Public Procurement and Asset Disposal Act, 2015, because the mode of award of contract stated in the Tender Document on Clause 2.22.3 on page 21 of 91 go against the requirements of section 86 (1) of the Act given that all the award options (a, b, c and d) prescribed in this section 86 (1) of the Act state that the successful tender or the proposal shall be ONE not many (four) as suggested by the Procuring Entity (KEBS).
- e) **Ground No. 5:** In view of the breaches in points No. 1, 2, 3 and 4 above, the Procuring Entity has breached the requirements of

Section 53 (1) of the Public Procurement and Asset Disposal Act, 2015 which prescribes that all procurements undertaken by public entities are subject to the rules and principles of this Act.

From a cursory examination of the above grounds for review, the Board notes that the instant Request for Review raises issues touching on the contents of the Tender Document, specifically compliance of provisions of the Tender Document to the Act and its attendant Regulations. Further, no ground was raised by the Applicant challenging the Procuring Entity's choice of procurement method in the subject tender.

This was confirmed by the Applicant in paragraph 3 of its 'Reply to the Respondents' Memorandum of Response' whereby it states as follows: -

"In response to paragraph 5 of the Memorandum of Response, the Applicant states that it is not seeking a review of the choice of a procurement method but the failure by the Respondents to comply with the Act and its attendant Regulations."

Evidently, as noted from the foregoing averment and as confirmed from the Applicant's Request for Review, the Applicant is not seeking a review of the Procuring Entity's choice of a procurement method through its Request for Review.

It is therefore the finding of this Board that the Request for Review does not require this Board to review the Procuring Entity's choice of

procurement method. The effect of this finding is that the Board has jurisdiction to entertain the Request for Review and shall now address the third issue framed for determination.

On the first sub-issue of the third issue framed for determination, the Board observes Article 227 (2) (a) of the Constitution provides as follows: -

"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) categories of preference in the allocation of contracts.

(b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination."

The law contemplated under Article 227 (2) is the Act, which outlines the preference and reservation schemes that may be applicable in a public procurement under Part XII thereof.

The interpretation section of the Act defines the term 'preference' as follows: -

"the right or opportunity to select a tenderer from an identified target group that is considered more desirable than another"

Preference is therefore the right or opportunity for a procuring entity to select a tenderer from a defined target group in procurement proceedings.

The Board notes, the subject tender is an international tender for the procurement of services as indicated in its title thereof which reads: -

"International Tender for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts."

In so far as international tenders are concerned, section 157 (9) of the Act provides as follows: -

"For the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender"

Further, Regulation 165 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") provides as follows: -

"For greater certainty, supplies under section 157 (9) of the Act shall include goods, works, non-consulting and consulting services"

Moreover, section 2 of the Act defines a citizen contractor as: -

"a person or a firm wholly owned and controlled by persons who are citizens of Kenya"

Having considered the foregoing provisions, a procuring entity is required to make provision in its tender document as a mandatory requirement forming part of preliminary evaluation criteria, for all foreign tenderers participating in international tenders to source at least forty percent of their supplies, which includes non-consulting services, from persons or firms wholly owned and controlled by persons who are citizens of Kenya, prior to submitting a tender.

Further to this, section 89 (f) of the Act provides that in international tendering and competition: -

"If there will not be effective competition for a procurement unless foreign tenderers participate, the following shall apply—"

(f) where local or citizen contractors participate they shall be entitled to preferences and reservations as set out in section 155

It is worth noting that section 89 (f) of the Act expressly states that the provisions of section 155 of the Act will apply in the case of international tendering and competition in order to afford local and citizen contractors the preferences and reservations set out in section 155 of the Act.

Section 89 (f) read together with section 157 (9) of the Act gives the impression that it is necessary (rather than discretionary) in international tendering and competition for a procuring entity to make provision in its tender document as a mandatory requirement forming part of preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender.

In the instant case, the Applicant avers in paragraph 1 of its Statement of Support that as a citizen firm registered in Kenya, it is entitled to the benefits resulting from the implementation of section 157 (9) of the Act by the Procuring Entity pursuant to Regulation 147 (1) (b) of the Act. It is the Applicant's contention that the failure by the Procuring Entity to implement section 157 (9) of the Act which is a necessary obligation under law has denied the Applicant the rightful potential benefits from the subject tender.

The Procuring Entity disputes the Applicant's allegation and contends in paragraph 6 of its response that the subject services are to be carried out in foreign countries thus it was not possible for the Procuring Entity to implement section 157 (9) of the Act in the subject tender.

It is not in dispute that the Procuring Entity did not make provision in its tender document as a mandatory requirement forming part of preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender in accordance with section 157 (9) of the Act read together with Regulation 165 of the Regulations 2020. However, it is the Procuring Entity's contention that the said provision was not applicable in the subject tender noting that the subject services were to be implemented in foreign countries.

As mentioned hereinbefore, the subject tender is an international tender for procurement of services described under Clause 6.1.1 of Section VI Description of Services under the Appendix: Instructions to Tenderers as follows: -

"Kenya Bureau of Standards offers *pre-export inspection of used vehicles, equipment and used spare parts for vehicles to determine conformity to the requirements of the KS 1515:2019- Kenya Standard Code of Practice for Inspection of Road Vehicles and other standards as applicable.*

The inspection service is offered through appointed inspection company in Japan, United Kingdom, United Arab Emirates, Thailand, Singapore, South Africa and Australia. This is a mandatory inspection carried out pursuant to the provisions of the Standards Act and any other enabling provisions of the Laws of Kenya and importers of used vehicles coming from the mentioned countries are required to demonstrate conformity to the standard before shipment.

Under PVoC regime used vehicles, specified used equipment and used parts are required to undergo inspection at country of supply (exporting) and a Certificate of Roadworthiness (COR) or Certificate of Conformity (CoC) issued as applicable to demonstrating conformity to applicable standards and regulations. Where the item under inspection fails to meet the approved specifications, a Nonconformity Report (NCR) shall be issued and such goods shall not be allowed for importation into Kenya.

The conformity assessment elements undertaken include but are not limited to physical inspection prior to shipment and documentary check of conformity to regulations and ownership.

The purpose of this tender is to recruit qualified company(ies) to provide Pre-Export Verification of conformity Services for used vehicles, equipment and used

spare parts on behalf of the Kenya Bureau of Standards
("The Client")."

The subject services are pre-export inspection services of used vehicles, equipment and used spare parts for vehicles, which is a mandatory inspection carried out pursuant to the provisions of the Standards Act and other enabling provisions of the Laws of Kenya of importers of the said goods, to be carried out by appointed inspection companies in Japan, United Kingdom, United Arab Emirates, Thailand, Singapore, South Africa and Australia on behalf of the Procuring Entity.

Countries where certification will be undertaken in the subject tender are listed under Clause 6.3 of Section VI Description of Services under the Appendix: Instructions to Tenderers as follows: -

"Certification under this tender shall be done in Japan, United Kingdom, United Arab Emirates, South Africa, Singapore, Thailand and Australia"

The countries where certification will be conducted by qualified inspection companies on behalf of the Procuring Entity include Japan, United Kingdom, United Arab Emirates, South Africa, Singapore, Thailand and Australia.

Clause 2.1.1 of Section II Instructions to Tenderers of the Tender Document provides that the tender is open to: -

"...all tenderers eligible as described in the Instructions to Tenderers."

ITT Reference Clause 2.1 of the Appendix: Instructions to the Tenderers on page 15 and 16 of the Tender Document describes 'Eligible Tenderers' in the subject tender as follows: -

"Each tenderer proposing in this Tender shall fulfil the following requirements:

- i. The tenderer must be an inspection company legally registered to perform services required in this tender in Japan, United Kingdom and United Arab Emirates.***
- ii. The tenderer must have the physical and technological infrastructure required to satisfactorily perform services required under this tender in Japan.***
- iii. The tenderer shall demonstrate capacity, either singly or through subcontractor(s) to offer services required under this tender in Japan, United Kingdom, United Arab Emirates, South Africa, Singapore, Thailand and Australia. In any of these countries where the tenderer proposes to use subcontractor/s the subcontractor to be used by the tenderer must be a legally registered company with physical technological infrastructure to offer the inspection services....."***

Further, Clause 2.1 of the Appendix: Instructions to the Tenderers on page 21 of the Tender Document provides as follows as regards 'Eligible Tenderers': -

"xiv. The tenderer must be an inspection company legally registered to perform services required in this tender in Japan, United Kingdom and United Arab Emirates.

xv. The tenderer must have the physical and technological infrastructure required to satisfactorily perform services required under this tender in Japan.

xvi. The tenderer shall demonstrate capacity, either singly or through subcontractor(s) to offer services required under this tender in Japan, United Kingdom, United Arab Emirates, South Africa, Singapore, Thailand and Australia. In any of these countries where the tenderer proposes to use subcontractor/s, the subcontractor to be used by the tenderer must be a legally registered company, with physical and technological infrastructure to offer the inspection services....."

The foregoing provisions of the Tender Document reveal that eligible tenderers in the subject tender must be inspection companies legally registered to perform the subject services in Japan, the United Kingdom and the United Arab Emirates. Further, tenderers must have the physical and technological infrastructure required to satisfactorily perform services required under this tender in Japan and must demonstrate capacity, either singly or through subcontractor(s) to offer services required under this tender in Japan, United Kingdom, United Arab Emirates, South Africa, Singapore, Thailand and Australia.

It is therefore clear that not only are the subject services to be performed/implemented in foreign countries but the physical and technological infrastructure required to perform the subject services would also be located in a foreign country. This means that the Procuring Entity in the subject services is in essence 'outsourcing' the subject services to tenderers who are qualified and have the technology and infrastructure in place to perform/implement the said services in a foreign country, that is, outside Kenya, on its behalf.

This therefore leads the Board to determine whether it is possible for the Procuring Entity in the subject tender to require all foreign tenderers to source at least forty percent of their supplies, from citizen contractors.

In essence, this requirement as encapsulated under section 157 (9) of the Act is designed to encourage participation by citizen contractors in public procurement, with a view to improving local economic growth and ensuring sustainable promotion of local industry.

The Asian Development Bank in its booklet titled 'Domestic Preference Guidance Note on Procurement' [2018] explained the rationale behind domestic preference as it applies specifically in developing countries as follows: -

"The main argument supporting the use of domestic preference is that businesses in lower-income countries are at a disadvantage when competing with foreign firms, given that there may be an asymmetry of information

between local and foreign firms. Foreign firms may have better access to technology, finance, and infrastructure to increase productivity and lower production costs. Among other things, foreign firms may benefit from economies of scale. Thus, local firms in lower-income countries may need preference to be able to compete with foreign firms in terms of price and/or other protective measures.

Awarding contracts to local firms is deemed to give greater social and economic benefit to local communities, in the form of increased employment, incomes, and tax revenues, compared to contracts awarded to foreign firms that produce, employ staff, and pay taxes offshore. By granting domestic preference, it is assumed that local benefits incurred by awarding a contract to a local firm outweigh the potential for higher financial costs to the executing agency compared to a situation where the contract was awarded to a foreign firm.”

Domestic preference is lauded for enabling local firms to compete with foreign firms and is credited for according greater social and economic benefits to local communities, in the form of increased employment, incomes, and tax revenues.

However, it is not lost to this Board that the subject tender is an international tender which in essence allows the Procuring Entity access to international markets and suppliers. Further, the Board has established that the subject services are intended to be

performed/implemented outside the country and will largely depend on infrastructure and technology that is situated in foreign countries. It is therefore possible to assume that placing a requirement for all foreign tenderers to source 40% of their supplies from citizen contractors would not be practical, when the tender and its implementation thereof is largely dependent on infrastructure and technology situated outside the country.

Moreover, in the subject tender, the requirement under section 157 (9) of the Act presupposes that prior to submission of a bid by a foreign tenderer (who is based in a foreign country), the said tenderer must export from Kenya 40% of the services to be supplied under the subject tender to one of the seven (7) countries it elects to provide the subject services, for the sole purpose of implementing/performing the subject tender. In the Board's considered view, this is not only impractical but also unreasonable.

Notably, Section 155 (2) of the Act does envisage a limitation to the application of preferential treatment as provided for under the Act as it categorically states: -

"Subject to availability and realisation of the applicable international or local standards, only such manufactured articles, materials or supplies wholly mined and produced in Kenya shall be subject to preferential procurement"

Noting that supplies in this instance includes services, it therefore follows that the subject services which are to be

performed/implemented outside the country may not be subject to preferential treatment in so far as section 157 (9) of the Act read together with Regulation 165 of the Regulations 2020 is concerned, noting that preferential treatment may only be applied with respect to services wholly produced/provided in Kenya.

This notwithstanding, the Board studied the Procuring Entity's confidential file and observes therein a document titled 'Approved Procurement Plan for the Financial Year 2020-2021' and on page 4 thereof the following provision: -

<i>"Total proposed procurement budget</i>	<i>2,073,782,509</i>
<i>Total committed amount</i>	<i>1,728,070,704</i>
<i>Available budget</i>	<i>345,711,805</i>
<i>30% of 325,491,805 special group (AGPO)</i>	<i>103,713,542</i>
<i>2% PWD</i>	<i>2,074,271</i>
<i><u>40% of 345,711,805 Buy Kenya Build Kenya</u></i>	<i>138,284,722"</i>

Notably, out of Kshs. 345,711,805.00 of its available procurement budget, the Procuring Entity has allocated 40%, that is, Kshs 138,284,722.00 to what it refers to as 'Buy Kenya Build Kenya' which in essence involves purchase of supplies made in Kenya, demonstrating its commitment to promote local industry in other tenders to be undertaken in the financial year 2020-2021.

It is therefore the finding of this Board that the Procuring Entity did not breach the provisions of section 157 (9) of the Act read together with Regulation 165 of Regulations 2020 for failure to provide for a mandatory preliminary evaluation criterion in the Tender Document requiring all foreign tenderers to source at least forty percent of their supplies from citizen contractors prior to submitting their tenders, noting that the said provisions may not be applicable in the subject tender and further may be construed as a limitation to the application of preferential treatment envisaged under section 155 (2) of the Act.

As pertains to the second sub-issue of the third issue framed for determination, the Applicant contends that the Procuring Entity breached the requirements of section 158 of the Act read together with Regulation 163 of the Regulations 2020 since the Procuring Entity did not specify in the Tender Document how exclusive preference shall be accorded to citizen contractors.

In response, the Procuring Entity contends in paragraph 7 of its response that it prepared an annual procurement plan approved by the national standards council and a copy sent to the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") in accordance with the Act, clearly demonstrating the application of preference and reservations in its procurements.

In addressing this issue, the Board observes that Part XII of the Act not only provides for preferences applicable in public procurement but also reservations, which term is defined under section 2 of the Act to mean: -

"exclusive preference to procure goods, works, and services set aside to a defined target group of tenderers within a specified threshold or region"

Exclusive preference or reservations so to speak involves the setting aside of procurement of *interalia* services to a defined target group of tenderers within a specified threshold or region.

The Board is cognizant of section 158 of the Act which provides as follows: -

"(1) The procuring entities shall integrate preferences and reservations in their procurement plans.

(2) The procuring entity shall submit to the Authority the part in its procurement plan demonstrating application of preference and reservation schemes in relation to procurement budget within sixty days after commencement of the financial year.

(3) All procurement awards by procuring entities where a preference or reservation scheme was applied shall be reported with disaggregated data to the Authority on a quarterly basis."

Section 158 of the Act bestows an obligation on a procuring entity to integrate preferences and reservations in its annual procurement plan.

Further a procuring entity is required to submit to the Authority the part of its procurement plan demonstrating application of preference and reservation schemes in relation to its annual budget, within sixty days after commencement of the financial year, and moreover, report all procurement awards where a preference of reservation scheme was applied to the Authority on a quarterly basis.

As concerns 'exclusive preference' the Board studied the provisions on preference and reservation schemes under Part XII of the Act, specifically, section 157 (8) (a) of the Act which provides guidance on the application of exclusive preference as follows: -

"Section 157 (8) In applying the preferences and reservations under this section—

(a) exclusive preferences shall be given to citizens of Kenya where—

(i) the funding is 100% from the national government or county government or a Kenyan body; and

(ii) the amounts are below the prescribed threshold;

(iii) the prescribed threshold for exclusive preference shall be above five hundred million shillings

Further, Regulation 163 of the Regulations 2020 prescribes the threshold for exclusive preference as follows: -

"For the purpose of section 157(8)(a)(ii) and (iii) of the Act, the threshold which exclusive preference shall be given to citizen contractors shall be—

(a) one billion shillings for procurements in respect of works, construction materials and other materials which are made in Kenya; and

(b) five hundred million shillings for procurements in respect of goods and services."

From the foregoing provisions, for exclusive preference (that is given to citizens of Kenya) to apply, firstly, the funding must be 100% from the National Government or County Government or a Kenyan body. Secondly, the amounts must be below the prescribed threshold, as stipulated in Regulation 163 of the Regulation 2020.

The Board has established that the subject tender is an international tender which is in essence a tender that is floated inviting bids from not only domestic bidders but also foreign bidders and allows procuring entities to enter international markets and source for *interalia* goods or services that may or may not be easily accessible or available in the domestic markets. In the Board's considered view, to apply exclusive preference in an international tender would beat the very objective of an international tender as explained hereinbefore.

Further, exclusive preference as envisaged under section 157 (8) (a) of the Act read together with Regulation 163 of the Regulations 2020, requires certain conditions to be fulfilled, that is, funding for the subject tender must be 100% from the National Government or County Government or a Kenyan body and further, the amounts must be below the prescribed threshold, as stipulated in Regulation 163 of the Regulations 2020.

Upon further scrutiny of the subject Tender Document, the Board observes the following provisions therein:

Clause 2.9.1 and 2.9.2 of Section II Instructions to Tenderers on page 7 of the Tender Document: -

"2.9.1 The tenderer shall indicate on the Financial Proposal the inspection and royalty fees per country bid for.

2.9.2 Prices indicated on the Financial Proposal shall include the cost of the services quoted and all the royalty fees to be paid to KEBS. This excludes taxes applicable in the countries bid for.

Financial Evaluation of Clause 2.11.2 Evaluation Criteria of Section 2.0 Appendix to Instructions to the Tenderers on page 27 and 28 of the Tender Document: -

"For the financial evaluation, the tenderer shall clearly state the following:

1. The proposed inspection fee for used spare parts and mobile equipment shall be at a rate of 0.6% of FOB Value. This shall be subject to a minimum of two hundred and sixty-five United States Dollars (USD 265) and a maximum of two thousand seven hundred United States Dollars (USD 2700) exclusive of all applicable taxes.

2. The proposed used motor vehicle inspection cost (inspection fee) in United States Dollars charged to the exporter for the inspection services provided per motor vehicle subject to the following maximum fees as indicated in Table 1 below:

<i>Country</i>	<i>Inspection Fee (USD) Per Unit</i>
<i>Japan</i>	<i>155</i>
<i>United Kingdom</i>	<i>225</i>
<i>United Arab Emirates</i>	<i>192</i>
<i>South Africa</i>	<i>225</i>
<i>Thailand</i>	<i>250</i>
<i>Singapore</i>	<i>220</i>
<i>Australia</i>	<i>250</i>

3. The royalty fee the tenderer proposes to remit to KEBS on a monthly basis subject to a minimum of 35% of income obtained from inspection of spare parts.

4. The royalty fee the tenderer proposes to remit to KEBS on a monthly basis subject to a minimum royalty as per Table 2 below per motor vehicle inspected.

<i>Country</i>	<i>Inspection Fee (USD) Per Unit</i>	<i>KEBS Royalty (Minimum in USD)</i>
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Japan	155	54
United Kingdom	225	78
United Arab Emirates	192	67
South Africa	225	78
Thailand	250	87
Singapore	220	77
Australia	250	87

Clause 2.22.3 of Section 2.0 Appendix to Instructions to the Tenderers on page 34 of the Tender Document: -

"KEBS shall award the tender to the tenderer(s) that is (are) responsive to Technical and Financial bids with the highest royalty fee offer subject to a minimum of four (4) tenderers. Where bidders tie in technical scores and are financial responsive both shall be awarded."

From the foregoing provisions, it is evident that the subject tender did not require allocation of a budgetary amount by the Procuring Entity, noting that successful tenderers would charge for provision of the subject services and thereafter, remit royalties to the Procuring Entity on a monthly basis. This means that in view of section 157 (8) (a) of the Act read together with Regulation 163 of the Regulations 2020, there was no funding for the subject tender from the National Government or County Government or from the Procuring Entity itself and further, the Procuring Entity would not expend money in its performance of the subject tender but would instead earn royalties from its implementation thereof.

The Board therefore finds that the Procuring Entity is not in breach of section 158 of the Act read together with section 157 (8) (a) of the Act and Regulation 163 of Regulations 2020 for failure to provide for exclusive preference to citizen contractors in the Tender Document, noting that the said provisions may not be applicable in the subject tender.

With respect to the third sub-issue of the third issue framed for determination, the Board has established hereinbefore the meaning of preference and observes that section 157 (8) (b) of the Act provides guidance on the application of preference schemes as follows: -

"In applying the preferences and reservations under this section—

b) prescribed margin of preference shall be given—

(i) in the evaluation of tenders to candidates offering goods manufactured, assembled, mined, extracted or grown in Kenya; or

(ii) works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed."

Further, Regulation 164 of the 2020 Regulations prescribes as follows
:-

"For purposes of section 157(8) (b) of the Act, the margin of preference for international tendering and competition pursuant to section 89 of the Act shall be—

(a) twenty percent (20%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi-processed in Kenya and the percentage of shareholding of Kenyan citizens is more than fifty percent (50%);

(b) fifteen percent (15%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi-processed in Kenya;

(c) ten percent (10%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is more than fifty percent (50%);

(d) eight percent (8%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is less than fifty percent (50%) but above twenty percent (20%); and

(e) six percent (6%) margin of preference of the evaluated price of the tender, where percentage of shareholding of Kenyan citizens is above five percent (5%) and less than twenty percent (20%)."

Having considered the foregoing provisions, the Board observes that one of the preference schemes provided under the Act is what is referred to as a margin of preference.

Budget Transparency Network in its book 'Critical Issues in Public Expenditure Management' [2006] provides a definition for the term 'margin of preference' as follows: -

"the extra mark up on price allowed any domestic contractor or supplier bidding under International Competitive Bidding without being otherwise disadvantageous to the bid in terms of price"

A margin of preference is therefore the extra mark-up allowed to a domestic contractor in for example an international competitive bidding process without being disadvantageous to the said bid in terms of price.

According to section 157 (8) (b) of the Act read together with Regulation 164 of the Regulations 2020, a margin of preference of the evaluated price of the tender shall be accorded to bidders in two ways: (i) to bidders offering goods manufactured, assembled, mined, extracted or grown in Kenya; or (ii) to bidders offering works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed in the said Regulation.

As concerns the first option, the Board has established that the subject tender is an international tender for the procurement of services intended to be performed/implemented outside the country and will largely depend on infrastructure and technology that is situated in foreign countries. It is therefore possible to conclude that it would not be necessary to place a margin of preference of the evaluated price of the tender for bidders offering goods manufactured, assembled, mined, extracted or grown in Kenya as the subject tender is for the procurement of services and not goods.

With respect to the second option, the Board observes that it is possible that a margin of preference may be applied to a prospective bidder's evaluated tender price if it meets the percentage shareholding of Kenyan citizens as prescribed under Regulation 164 of the Regulations 2020. Such a provision would ensure that any bidders with a percentage shareholding of Kenyan citizens would benefit from a prescribed margin of preference and thus have a better chance to participate in the subject tender.

Notably, Regulation 147 (2) of the Regulations 2020 provides as follows:

-

"A citizen contractor registered outside Kenya shall only be eligible to benefit from the preferences and reservations scheme when bidding in international tendering and competition"

According to the above regulation, a citizen contractor registered outside Kenya shall only be eligible to benefit from preferences when bidding in an international tender. This provision envisages a scenario whereby a firm is registered in a foreign country but may be fully owned and controlled by persons who are Kenyan citizens. Such a firm would be entitled to a margin of preference whilst participating in an international tender in accordance with section 157 (8) (b) (ii) of the Act read together with Regulation 164 of the Regulations 2020.

Notably, section 157 (8) (b) (ii) of the Act categorically states that a prescribed margin of preference 'shall' be applied in the procurement of *interalia* services depending on the percentage of shareholding of the locals on a graduating scale as prescribed in Regulation 164 of the Regulations 2020, giving the impression that it is necessary (rather than discretionary) in international tendering and competition for the Procuring Entity to provide for a margin of preference in the subject tender, if applicable, and failure to do so would amount to breach on the part of the Procuring Entity.

In this regard therefore, the Board finds that the Procuring Entity breached the provisions of section 158 of the Act read together with section 157 (8) (b) (ii) of the Act and Regulation 164 of the Regulations 2020 for failure to provide for a margin of preference in the Tender Document.

With respect to the fourth issue framed for determination, the Board observes the Applicant's allegation in paragraph 3 of its Request for Review, that the Procuring Entity breached the requirements of Regulation 77 of the Regulations 2020 since the Tender Document did not provide for financial evaluation criteria. The Procuring Entity disputes this allegation in paragraph 8 of its Response and contends that the financial evaluation criteria applicable in the subject tender has been clearly spelt out in the Tender Document, which provides that responsive bidders shall be ranked according to their proposed royalties to the Procuring Entity subject to meeting the other requirements in the Tender Document.

In addressing this issue, the Board studied Regulation 77 of the Regulations 2020 which provides as follows: -

"(1) Upon completion of the technical evaluation under regulation 76 of these Regulations, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

(2) The evaluated price for each bid shall be determined by—

(a) taking the bid price in the tender form;

(b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79 (2) (a) of the Act;

(c) where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date;

(d) applying any margin of preference indicated in the tender document.

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act.”

This Regulation provides that following completion of evaluation of bids at the Technical Evaluation Stage, a procuring entity’s evaluation committee shall conduct a financial evaluation and comparison of tenders to determine the evaluated price of each tender, which shall be determined by *interalia* applying any margin of preference indicated in the Tender Document.

The Board scrutinised the Tender Document relevant to the subject tender and observes Clause 2.11.2 ‘Evaluation’ of Section 2.0 Appendix to Instructions to the Tenderers which provides as follows: -

***The tenderer’s tender evaluation shall consist of three parts:
a) Preliminary evaluation, b) Technical evaluation and c) Financial evaluation.***

a) Preliminary Evaluation

.....

b) The Technical Evaluation

.....

c) Financial Evaluation

For the financial evaluation, the tenderer shall clearly state the following:

1. The proposed inspection fee for used spare parts and mobile equipment shall be at a rate of 0.6% of FOB Value. This shall be subject to a minimum of two hundred and sixty-five United States Dollars (USD 265) and a maximum of two thousand seven hundred United States Dollars (USD 2700) exclusive of all applicable taxes.

2. The proposed used motor vehicle inspection cost (inspection fee) in United States Dollars charged to the exporter for the inspection services provided per motor vehicle subject to the following maximum fees as indicated in Table 1 below:

<i>Country</i>	<i>Inspection Fee (USD) Per Unit</i>
<i>Japan</i>	<i>155</i>
<i>United Kingdom</i>	<i>225</i>
<i>United Arab Emirates</i>	<i>192</i>
<i>South Africa</i>	<i>225</i>
<i>Thailand</i>	<i>250</i>
<i>Singapore</i>	<i>220</i>
<i>Australia</i>	<i>250</i>

3. The royalty fee the tenderer proposes to remit to KEBS on a monthly basis subject to a minimum of 35% of income obtained from inspection of spare parts.

4. The royalty fee the tenderer proposes to remit to KEBS on a monthly basis subject to a minimum royalty as per Table 2 below per motor vehicle inspected.

Country	Inspection Fee (USD) Per Unit	KEBS Royalty (Minimum in USD)
Japan	155	54
United Kingdom	225	78
United Arab Emirates	192	67
South Africa	225	78
Thailand	250	87
Singapore	220	77
Australia	250	87

Clause 2.22.2 'Criteria for Evaluation of Financial Proposals' of Section 2.0 Appendix to Instructions to the Tenderers on page 34 of the Tender Document provides as follows: -

"The financial evaluation will be based on the table for royalty fees as in Table 2.

Note 1: Any royalty fee below the minimum as provided for in Table 2 shall be deemed nonresponsive.

Note 2: Any inspection fee above the maximum allowable shall be deemed nonresponsive

Note 3: Any non-responsiveness in either the inspection and/or royalty fees shall render the entire financial bid nonresponsive"

Further, Clause 2.22.3 of Section 2.0 Appendix to Instructions to the Tenderers on page 34 of the Tender Document: -

"KEBS shall award the tender to the tenderer(s) that is (are) responsive to Technical and Financial bids with the highest royalty fee offer subject to a minimum of four (4)

tenderers. Where bidders tie in technical scores and are financial responsive both shall be awarded.”

From the foregoing clauses in the Tender Document, it is evident that the Procuring Entity outlined in its Tender Document financial evaluation criteria applicable in the subject tender, whereby bidder’s tender prices would be assessed based on their proposed inspection fee for used spare parts and mobile equipment, their proposed used motor vehicle inspection cost and their proposed royalties for remittance to the Procuring Entity using the tables cited hereinbefore, and the tender would be awarded to the tenderer (s) with the highest quoted royalty fee. However, the Procuring Entity did not provide in its financial evaluation criteria how it shall apply any margin of preference in the subject tender in accordance with Regulation 77 (2) (d) of the 2020 Regulations, noting our finding in sub-issue three of the third issue framed for determination, that the Procuring Entity is in breach of the provision of section 158 of the Act read together with section 157 (8) (b) (ii) of the Act and Regulation 164 of the Regulations 2020 for failure to provide for a margin of preference in the Tender Document.

It is therefore the finding of this Board that the Tender Document does not provide for financial evaluation criteria in compliance with Regulation 77 of Regulations 2020, noting the Procuring Entity’s failure to provide in its financial evaluation criteria how it shall apply any margin of preference in the subject tender in accordance with Regulation 77 (2) (d) of the 2020 Regulations.

With respect to the fifth issue for determination, it is the Applicant's contention that the mode of award as stated in the Tender Document contravenes section 86 (1) of the Act, since all the award options as provided under the said section of the Act provide that the successful tenderer shall be one and not many, as provided for by the Procuring Entity in its Tender Document. In paragraph 3 of its Reply to the Respondents' Memorandum of Response', the Applicant argues that the Procuring Entity's Invitation to Tender does not specify that the subject tender is a framework agreement where an award of contract shall be done through call of orders or through inviting a mini-competition among seven (7) vendors pursuant to section 114 (3) of the Act and Regulation 103 (2) of the Regulations 2020 thereof and thus for all intents and purposes the Tender Document is not compliant with section 86 (1) of the Act.

The Procuring Entity on its part contends that the subject tender satisfies the requirement for use of framework agreements through use of open international tenders as provided under section 114 (1) of the Act.

Section 2 of the Act assigns the following meaning to 'framework agreement': -

"a pact between a procuring entity and a selected supplier (or suppliers) or contractor (or contractors) identified for a definite term to supply goods works or services whose

quantities and delivery schedules are not definable or determinable at the beginning”

A framework agreement is therefore a pact between a procuring entity and a selected contractor or contractors identified to *interalia* supply services for a certain period of time, whose quantities and delivery schedules are not determinable at the onset.

Notably, a framework agreement is identified under section 92 of the Act as one of the methods of procurement that may be utilized by a procuring entity to procure services in procurement proceedings.

Section 114 of the Act provides as follows with respect to framework agreements: -

“(1) A procuring entity may enter into a framework agreement open tender if—

(a) the procurement value is within the thresholds prescribed under Regulations to this Act;

(b) the required quantity of goods, works or non-consultancy services cannot be determined at the time of entering into the agreement; and

(c) a minimum of seven alternative vendors are included for each category.

(2) The maximum term for the framework agreement shall be three years and, for agreements exceeding one year, a value for money assessment undertaken annually

to determine whether the terms designated in the framework agreement remain competitive.

(3) When implementing a framework agreement, a procuring entity may—

***(a) procure through call-offs order when necessary;
or***

(b) invite mini-competition among persons that have entered into the framework agreement in the respective category.

(4) For the purposes of subsection (3)(a), "call-offs order" means an order made using a framework agreement with one or more contractors, suppliers or consultants for a defined quantity of works, goods, consultancy covering terms and conditions including price that users require to meet the immediate requirements.

(5) Evaluation of bids under category specified by subsection (3)(b) shall be undertaken by an evaluation committee as provided for under this Act.

(6) A procurement management unit shall prepare and submit to the accounting officer with a copy to the internal auditor quarterly reports detailing an analysis of items procured through framework agreements and these reports shall include, an analysis of pattern of usage, procurement costs in relation to the prevailing market rates and any recommendations.

(7) For greater certainty procurements undertaken through framework agreements may be subject to preferences and reservations as provided for in this Act

From the above provision, a procuring entity may enter into a framework agreement through **an open tender** for a maximum period of three (3) years if: (i) the procurement value is within the thresholds prescribed under Regulations to this Act, (ii) the required quantity of goods, works or non-consultancy services cannot be determined at the time of entering into the agreement; and (iii) a minimum of seven alternative vendors are included for each category. Further, in its implementation of a framework agreement, a procuring entity may procure through call offs (placing an order made using a framework agreement with one or more contractors, suppliers or consultants for a defined quantity of *interalia* services) or through mini-competition among persons who have entered into the framework agreement in the respective category.

Regulation 104 of the 2020 Regulations provides that the threshold for framework agreements shall be as specified in the Second Schedule to the Regulations 2020, the latter of which stipulates that with respect to services in an international open tender, under section 89 of the Act, there shall be no minimum amount and the '***maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement.***'

Conditions for entering into a framework agreement through open tender are outlined under Regulation 101 of Regulations 2020 as follows: -

"(1) A procuring entity may enter into a framework agreement through open tender in accordance with section 114 for the supply of goods, works or services where—

(a) the quantities and delivery schedules are not definable or determinable at the beginning; and

(b) the need for the subject procurement is expected to arise on a repeated basis over a definite period of time.

(2) A procuring entity shall not use a framework agreement in such a way as to prevent, restrict or distort competition.

(3) A procuring entity shall not award a contract under the framework agreement where there is evidence demonstrating that—

(a) the prices of goods, works or services are above the indicative market prices; or

(b) material corporate governance issues have been detected.

(4) A procuring entity shall not procure using a framework agreement of another procuring entity except

for those concluded under institutional frameworks prescribed in the Act and these Regulations.”

In addition to the instances listed hereinbefore where a procuring entity may enter into a framework agreement through open tender in accordance with section 114 of the Act, a procuring entity may enter into a framework agreement where the need for the subject procurement is expected to arise on a repeated basis over a definite period of time.

The procedure for entering into a framework agreement is outlined in Regulation 102 (1) of Regulations 2020 as follows: -

“Subject to section 114 of the Act, a procuring entity may enter into a framework agreement through open tender using an invitation to tender which shall specify—

- (a) that the procuring entity intends to establish a framework agreement;***
- (b) the number of suppliers or contractors which shall not be less than seven alternative vendors;***
- (c) the duration of the framework agreement which shall not exceed three years;***
- (d) the evaluation criteria;***
- (e) an estimate of the total volume or scope of work or quantity of purchases expected to be made for the duration of the framework agreement, as appropriate; and***

(f) any other information as may be deemed relevant.”

Accordingly, a procuring entity entering into a framework agreement through open tender using an invitation to tender, is required to specify the foregoing terms in its invitation to tender, including its intention to establish a framework agreement, the duration of the framework agreement and the number of suppliers or contractors under the said agreement which shall not be less than seven (7) alternative vendors.

Having considered the foregoing provisions, the Board studied the Procuring Entity’s Tender Document, specifically Section I Invitation to Tender which provides as follows: -

“Tender to offer Pre-Export Verification of Conformity (PVOC) Services for Used Road Vehicles, Used Vehicle Parts and other Mobile Equipment in accordance with the provisions of the Standards Act and any other enabling provisions of the Laws of Kenya

1.1 The Kenya Bureau of Standards (KEBS) invites sealed technical and financial proposals from eligible companies for the provision of pre-export verification of conformity to standards for a period of three years. The verification of conformity is to be conducted on the basis of Kenya Standards or specifications approved by the Kenya Bureau of Standards.

1.2 Interested eligible companies may obtain further information from and inspect the tender documents at The

***Procurement Office, Kenya Bureau of Standards KEBS
CENTRE Popo Road off Mombasa Road during normal
working hours (between 0800hrs and 1700hrs).***

***1.3 A complete set of tender documents may be obtained
by interested companies from the procurement office upon
payment of a non-refundable fee of KES 1,000.00 in cash
or bankers cheque payable to Kenya Bureau of standards
or downloaded for free from the KEBS website:
www.kebs.org. Companies which download the tender
documents from the website must notify KEBS through
renam@kebs.org and procurement@kebs.org and
info@kebs.org immediately.***

***1.4 Prices quoted must be expressed in United States
Dollars and shall remain valid for a period of 180 days
from the closing date of the tender.***

***1.5 Completed tender documents shall be enclosed in plain
sealed envelopes, marked with the tender number and be
deposited in the tender box provided at KEBS CENTRE,
Popo Road off Mombasa Road or be addressed and posted
to***

Managing Director

Kenya Bureau of Standards

P.O. Box 54974-00200

NAIROBI-Kenya

Email address: info@kebs.org; procurement@kebs.org and renam@kebs.org to be received on or before Wednesday 10th February 2021 at 1200hrs (East African Time).

1.6 Tenderers must be accompanied by Tender Security of USD 200,000 (Two Hundred Thousand) in the form of a bank guarantee from reputable bank.

1.7 Tender/s will be opened immediately thereafter in the presence of the tenderers representatives who choose to attend the opening at KEBS CENTRE, Popo Road off Mombasa Road. Tenders delivered outside the required time will not be accepted."

From the foregoing and from the title of the subject tender which is cited hereinbefore, the Board observes that the subject tender is an **international open tender**. Further, the subject services, that is, the provision of pre-export verification of conformity to standards are to be undertaken for a period of three years. However, the Board observes that the Procuring Entity's Invitation to Tender does not specify that the Procuring Entity intends to establish a framework agreement, the number of supplier or contactors in the said agreement, the evaluation criteria or an estimate of the total volume or scope of work to be made for the duration of the framework agreement as required under Regulation 102 (1) of the Regulations 2020.

The Board then examined Clause 6.1.1 of Section VI Description of Services under the Appendix: Instructions to Tenderers as cited

hereinbefore to establish the scope of work and notes that the subject services are pre-export inspection services of used vehicles, equipment and used spare parts for vehicles, which is a mandatory inspection carried out pursuant to the provisions of the Standards Act and other enabling provisions of the Laws of Kenya of importers of the said goods, which services are to be carried out by appointed inspection companies on behalf of the Procuring Entity.

Further, countries where certification will be undertaken in the subject tender on behalf of the Procuring Entity are listed under Clause 6.3 of Section VI Description of Services under the Appendix: Instructions to Tenderers and include Japan, United Kingdom, United Arab Emirates, South Africa, Singapore, Thailand and Australia.

Clause 2.22.1 Criteria for Evaluation of Technical Proposals outlines the number of centers that the subject services would be provided in the various countries as follows: -

"Tenderer's presence and location, to provide Inspection services in

- ***United Kingdom – Two (2) Centers.***
- ***Japan- fourteen (14) Centers***
- ***United Arab Emirates - One (1) Center***
- ***Thailand - One (1) Center***
- ***South Africa-One (1) Center***
- ***Singapore – One (1) Center***

- ***Australia – One (1) Center”***

Moreover, the Board observes Clause 2.22.3 of Section 2.0 Appendix to Instructions to the Tenderers on page 34 of the Tender Document which outlines the award criteria of the subject tender as follows: -

"KEBS shall award the tender to the tenderer(s) that is (are) responsive to Technical and Financial bids with the highest royalty fee offer subject to a minimum of four (4) tenderers. Where bidders tie in technical scores and are financial responsive both shall be awarded."

Accordingly, the subject tender would be awarded to a minimum four (4) tenderers responsive at the Technical Evaluation Stage with the highest royalty fees. Further, where two bidders tie in scores attained at the Technical Evaluation Stage and are found to be financially responsive, both bidders shall be awarded.

Notably, section 86 (1) of the Act provides 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;

(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.”

The wordings of this provision of the Act refer to one tender being the successful tender and not many tenders.

In view of the foregoing, the Board observes from the Tender Document that it is the Procuring Entity's intention that the subject services would be undertaken on behalf of the Procuring Entity in seven countries, that is, Japan, United Kingdom, United Arab Emirates, South Africa, Singapore, Thailand and Australia for a period of three (3) years, with two (2) centers in the United Kingdom, fourteen (14) centers in Japan and one (1) center each in the United Arab Emirates, Thailand, South Africa, Singapore and Australia. It is therefore evident that the scope of work to be undertaken in the subject tender is not only to be performed/implemented in seven different jurisdictions but is also considerably massive and thus may be challenging if not impossible for one tenderer to handle on its own. This is also in view of the fact that eligible tenderers must be inspection companies legally registered to perform the subject services in the said countries and must have the

physical and technological infrastructure required to satisfactorily perform the subject services either singly or through subcontractor(s).

In this regard therefore, the Board finds that an award of the subject tender to more than one tenderer is justifiable in this instance noting that it is the Procuring Entity's intention to award multiple tenderers to effectively perform/implement the subject services.

However, as established hereinbefore, the Procuring Entity ought to expressly indicate in its Invitation to Tender of its intention to establish a framework agreement, the number of suppliers or contactors in the said agreement (which should not be less than seven alternative vendors), the evaluation criteria and an estimate of the total volume or scope of work to be undertaken for the duration of the framework agreement as required under Regulation 102 (1) of the Regulations 2020.

In the alternative, the Procuring Entity may elect to unbundle the subject tender into lots, with one lot representing a center in one of the seven (7) countries where the Procuring Entity intends to implement/perform the subject tender. The Procuring Entity would then award the tender with the lowest evaluated price in accordance with section 86 (1) of the Act with respect to each lot, with one tenderer assigned to a specific lot.

In determining the appropriate orders to issue in the circumstances, the Board observes from the Procuring Entity's confidential file that it issued an Addendum to the Tender Document titled 'Extension and Clarification of Tenders' dated 3rd February 2021 which provides as follows: -

"Kenya Bureau of Standards (KEBS) wishes to inform firms participating in the tenders below that clarifications have been deemed necessary calling for an addendum to the Tenders. The closing date has therefore been extended as shown below to give bidders adequate time to respond appropriately.

TENDER NAME	ITEM DESCRIPTION	ORIGINAL CLOSING DATE	NEW CLOSING DATE
KEBS/TO12/2020/2021	International Tender for Provision of Pre-Export Verification of Conformity (PVoC) to Standards Services For Used Motor Vehicles, Equipment and Spare Parts	10 th February 2021 1100hrs (East African Time)	25 th February 2021 1100 hrs (East African Time)
KEBS/T013/2020/2021	International Tender for Provision of Pre-Export Verification of Conformity (PVoC) To Standards Services For Services For Goods	10 th February 2021 1100hrs (East African Time)	25 th February 2021 1100 hrs (East African Time)

From the foregoing addendum, the Board notes the Procuring Entity extended the tender submission deadline from 10th February 2021 to

25th February 2021 vide a notice in the Daily Nation Newspaper dated 3rd February 2021.

Noting that the Request for Review was filed on 1st February 2021, the Board would like to point out that once a request for review application is filed, all procurement proceedings are suspended forthwith.

This was explained by the Honourable Justice Nyamweya in **Judicial Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR** as follows: -

"section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound.

53. Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point, at least for any deadlines

defined by reference to a period of time, which in this case included the tender validity period. It would also be paradoxical and absurd to find that procurement proceedings cannot proceed, but that time continues to run for the same proceedings.”

This means that upon filing of a request for review application, an automatic stay of proceedings takes effect which suspends all procurement proceedings and prevents any further steps from being taken in the tender in question. Further, procurement proceedings shall resume at the point they were, when the stay comes to an end, once the request for review has been heard and determined by the Board.

In this regard therefore, the Board finds that the Procuring Entity’s Addendum to the Tender Document titled ‘Extension and Clarification of Tenders’ dated 3rd February 2021, was issued after filing of the Request for Review on 1st February 2021, which filing stayed any further steps being taken with respect to the subject procurement process as from 1st February 2021, rendering the said addendum null and void.

Moreover, 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...

The Board has established that the Procuring Entity breached the provisions of section 158 of the Act read together with section 157 (8) (b) of the Act and Regulation 164 of Regulations 2020 for failure to provide for a margin of preference in the Tender Document. Further, the Board has established that the Tender Document does not provide for financial evaluation criteria in compliance with Regulation 77 of Regulations 2020, noting the Procuring Entity's failure to provide in its financial evaluation criteria how it shall apply any margin of preference in the subject tender in accordance with Regulation 77 (2) (d) of the 2020 Regulations. Moreover, the Board has established that the Procuring Entity did not expressly indicate in its Invitation to Tender of its intention to establish a framework agreement, the number of suppliers or contactors in the said agreement (which should not be less than seven alternative vendors), the evaluation criteria and an estimate of the total volume or scope of work to be undertaken for the duration of the framework agreement in compliance with Regulation 102 (1) of the Regulations 2020.

The Board considered section 75 of the Act which reads as follows: -

"(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by

issuing an addendum without materially altering the substance of the original tender.

(2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.

(3) A procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.

(4) The addendum shall be deemed to be part of the tender documents.

(5) If the tender documents are amended when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, or the time remaining is less than the period indicated in instructions to tenderers, the accounting officer of a procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.

According to this provision, a procuring entity may amend a tender document at any time before the deadline for submitting tenders, on its own initiative or in response to an inquiry by a candidate or tenderer, by issuing an addendum without materially altering the substance of the original tender, which shall be deemed to be part of the original tender document. Further, the accounting officer of a procuring entity shall extend the deadline as necessary to allow the amendment of the tender

documents to be taken into account in the preparation or amendment of tenders.

In this regard therefore, the Board finds it necessary to direct the Procuring Entity to issue an addendum to the Tender Document directing bidders on the applicable margin of preference at the Financial Evaluation Stage and further clarify to all bidders of its intention to establish a framework agreement in the subject tender in accordance with section 114 of the Act read together with Regulation 102 and 103 of the Regulations 2020 or its intention to unbundle the subject procurement into lots, noting that the choice of a procurement method is at the discretion of the Procuring Entity, taking into consideration the Board's findings in this review.

Accordingly, the Board finds that the Request for Review Application 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, 2015, the Board makes the following orders in the Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's Addendum to the Tender Document in International Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts titled 'Extension and Clarification of Tenders' dated 3rd February 2021 be and is hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity is hereby directed to issue an addendum to amend the Tender document in International Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts to provide for a margin of preference, application of a margin of preference as a criterion for evaluation at the financial evaluation stage and at its discretion, provisions to satisfy the requirements for a framework agreement in accordance with section 114 of the Act read together with Regulation 102 and 103 of the Regulations 2020 or to unbundle the tender to provide for lots, within thirty (30) days from the date of this decision, taking into consideration the findings of this Board in this review.**
- 3. The Accounting Officer of the Procuring Entity is hereby directed to extend the tender submission deadline for a further fourteen (14) days from the date of issuance of the addendum referred to in Order No. 2.**

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

Dated at Nairobi this 22nd Day of February 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB