

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 130/2021 OF 27th OCTOBER, 2021

BETWEEN

**UNIPRINT A DIVISION OF
INSIDEDATA (SOUTH) PTY LTD APPLICANT**

AND

**THE ACCOUNTING OFFICER,
INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION 1ST RESPONDENT
INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION 2ND RESPONDENT
M/S INFORM LYKOS (HELLAS) S.A 1ST INTERESTED PARTY
GO INSPIRE SOLUTIONS 2ND INTERESTED PARTY**

Review against the decision of the Accounting Officer of Independent Electoral and Boundaries Commission in relation to Tender No. IEBC/OIT/002/21/2021/2022 for Supply and Delivery of Ballot Papers; Register of Voters; Statutory Election Result Declaration Forms To Be Used At The Polling Station; Election and Referendum Result Declaration Forms To Be Used At The Constituency, County and National Tallying Centre.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Ambrose Ogeto | -Member |
| 3. Mr. Jackson Awele | -Member |
| 4. Ms. Rahab Robi | -Member |
| 5. Ms. Phyllis Chepkemboi | -Member |

IN ATTENDANCE

Mr. Philip Okumu -Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

Independent Electoral and Boundaries Commission, the 2nd Respondent herein, invited sealed tenders, for Tender No IEBC/OIT/002/21/2021/2022 for Supply and Delivery of Ballot Papers; Register of Voters; Statutory Election Result Declaration Forms To Be Used At The Polling Station; Election and Referendum Result Declaration Forms To Be Used At The Constituency, County and National Tallying Centre (hereinafter referred to as “the subject tender”) from qualified and eligible tenderers through an open international tender advertised on the Daily Nation Newspaper, the 2nd Respondents’ website (www.iebc.or.ke) and the Public Procurement Information Portal (www.tenders.go.ke) on 14th July 2021.

Addenda

Through Addendum 1 of 26th July 2021, the 2nd Respondent made amendments to clause 4.9, 2.1 of the Preliminary examination of Tenders and clause 2.3 of the Qualification Evaluation Criteria. Through Addendum 3 of 9th August 2021, the 2nd Respondent issued clarifications on additional information sought by prospective tenderers and extended the tender submission deadline from 13th August 2021 to 27th August 2021, further through Addendum 4 of 23rd August 2021, it made further clarifications and extended the tender submission deadline from 27th August 2021 to 10th September 2021.

Clarifications

In Clarifications of 23rd July 2021, 3rd August 2021 and 4th August 2021, the 2nd Respondent issued responses to various clarifications sought by tenderers.

Tender Submission Deadline and Opening of Tenders

The 2nd Respondent received a total of twelve (12) tenders by the revised tender submission deadline of 10th September 2021 at 11:00 hrs. According to the tender opening register and minutes, the 2nd Respondent's Tender Opening Committee shortly thereafter opened the tenders virtually on Microsoft teams virtual platform in the presence of tenderers' representatives who joined the tender opening session through a link that had earlier on

been provided. The following twelve (12) tenderers were noted as having submitted their tenders.

- 1. Go Inspire Solutions**
- 2. UNIPRINT a Division of Insidedata (South) PTY Ltd**
- 3. Aerovote Security Print and Electoral Supplies**
- 4. Masar Printing and Publishing LLC**
- 5. United Printing & Publishing LLC, UAE**
- 6. Al Ghurair Printing and Publishing LLC**
- 7. TALL Security Print Limited**
- 8. Inform Lykos (Hellas) S.A**
- 9. Ellams Products Limited**
- 10. Africa Infrastructure Development Company**
- 11. Sessaasai Business forms PVT LTD**
- 12. Kwanginsa Co. LTD**

Evaluation of Tenders

An Evaluation Committee appointed by the 2nd Respondent's Acting Secretary/CEO, vide memo dated 8th September 2021, comprised of the following members:

- | | | |
|---------------------|-------|-------------|
| 1. Silas Njeru | DICT | Chairperson |
| 2. Gideon Balang | DVREO | Member |
| 3. Abdidahir Maalim | DVREO | Member |

4. Victoria Chege	DF	Member
5. Leonard Lewar	DICT	Member
6. Elizabeth Obegi	DSCM	Secretary

The 2nd Respondent’s Evaluation Committee (hereinafter referred to as the “Evaluation Committee”) evaluated tenders in the following stages: -

Stage 1- Preliminary Examination;

Stage 2- Technical Evaluation;

Stage 3- Qualification Evaluation; and

Stage 4- Financial Evaluation.

Preliminary Examination

At this stage, the Evaluation Committee applied the criteria outlined in sub-clause 2.1 Preliminary examination of Tenders of Clause 2. Evaluation of Tenders of Section III - Evaluation and Qualification Criteria at page 33 to 35 of the Tender Document which required compliance with mandatory requirements. At the end of evaluation at this stage, nine (9) tenders including the Applicant’s and the 2nd Interested Party’s tenders were found non-responsive .

The Applicant’s and the 2nd Interested Party’s tenders were disqualified at this stage of evaluation for the following reasons:

Bidder No. 1 (Go Inspire Solutions) did not: -

- i. Submit all correctly filled, signed and stamped as appropriate, the Tendering Forms provided in the tender document in the format provided including support documents and sample for each item i.e. Form of Tender: Form1 and Declaration on Corruption and Fraudulent Practice.
- ii. Chronologically serialize all pages of the tender documents submitted.
- iii. Submit notarized/certified Copies of Certificate of incorporation, business registration or equivalent for foreign tenderers.
- iv. Submit notarized/certified Valid tax compliance certificate from Kenya Revenue Authority, or similar document for foreign tenderers.
- v. Submit notarized/certified Audited Accounts for the years 2018, 2019 and 2020. An Auditor's certificate indicating company's unqualified report must be attached.
- vi. Submit notarized/certified ISO 14298 Certificate or its equivalent for security printing from a recognized authority.

Bidder No. 2 (UNIPRINT a Division of Insidedata (South) PTY Ltd) did not:

- i. Submit notarized/certified Audited Accounts for the years 2018, 2019 and 2020. An Auditor's certificate indicating company's unqualified report must be attached.
- ii. Submit notarized/certified ISO 14298 Certificate or its equivalent for security printing from a recognized authority.

Three (3) tenders including the 1st Interested Party's tender were found responsive after evaluation at this stage, thus proceeded to the technical evaluation stage.

Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in sub-clause 2.2 Technical Evaluation criteria of Clause 2. Evaluation of Tenders of Section III - Evaluation and Qualification Criteria at page 36 to 49 of the Tender Document to determine samples and literature submitted by tenderers conform to the offered product and to the required specifications. Tenders were evaluated on a pass/fail basis and all the aforementioned three (3) tenders were found responsive, thus eligible to proceed to the next stage of evaluation i.e. Qualification Evaluation.

Qualification Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in sub-clause 2.3 Qualification Evaluation Criteria of Clause 2. Evaluation of Tenders of Section III - Evaluation and Qualification Criteria at page 50 to 51 of the Tender Document by carrying out post-qualification specified in the Tender Document. All the aforementioned three (3) tenders were found responsive, thus proceeded for evaluation at the Financial Evaluation stage.

Financial Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in sub-clause 2.4 Financial Evaluation Criteria of Clause 2. Evaluation of Tenders of Section III - Evaluation and Qualification Criteria at page 52 of the Tender Document.

According to the Evaluation report, the Evaluation Committee is reported to have carried out a further post-qualification evaluation to determine whether a tenderer submitted a local content plan (**Form 5**) or a separate proposal demonstrating that the tenderer satisfied or met the requirement, *inter alia*, of forty percent (40%) local content in accordance with provisions of section 155(5)(b) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') and Regulation 144(1) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as the 'Regulations 2020').

The 1st Interested Party's tender was found to be the only tenderer who had submitted a responsive tender at the end of evaluation at this stage.

Recommendation

The Evaluation Committee accordingly recommended the 1st Interested Party herein, Inform Lykos (Hellas) S.A 5TH KLM VARIS-KOROPIOU AVENUE 19400 KOROPI, GREECE, to be awarded the subject tender being the most responsive tenderer.

Due diligence

The Evaluation Committee further recommended for due diligence to be carried out before award of the subject tender and proceeded with the following arrangements;

1. Communicating with the responsive tenderer of the intention to carry out due diligence exercise;
2. Circularized one of the reference clients to confirm and obtain reference about the responsive tenderer; and
3. Logistical and travel arrangements.

The Evaluation Committee is said to have further carried out due diligence on both the primary and business continuity plants of the responsive tenderer and verified the physical and chemical properties of the paper to be used using data sheet provided by the tenderer but no due diligence report as provided for in section 83 of the Act formed part of the confidential documents submitted to the Board pursuant to section 67(3)(e) of the Act.

Professional Opinion

In a Professional Opinion signed on 13th October 2021, the 2nd Respondent's Director, Supply Chain Management, Mr. Harley Mutisya, reviewed the

manner in which the subject procurement process was undertaken including evaluation of tenders, concurred with the recommendations of the Evaluation Committee recommending the 1st Interested Party for award of the subject tender. The 2nd Respondent's acting Secretary/CEO, Mr. Marjan Hussein Marjan, approved the Professional Opinion on the same day, 13th October 2021.

Notification to Tenderers

In letters dated 14th October 2021, the Respondents notified tenderers of the outcome of their respective tenders in the subject tender and of the decision to award the subject tender to the 1st Interested Party.

Aggrieved by the said decision the Applicant herein challenged the same through its Request for Review dated 27th October 2021 and filed with the Board on even date.

REQUEST FOR REVIEW NO. 130 OF 2021

The Applicant filed a Request for Review dated 27th October 2021 together with a Statement in Support of the Request for Review dated 27th October 2021 on even date together with a schedule of documents dated and filed on 27th October 2021 through the firm of CM Advocates LLP, seeking the following orders reproduced verbatim: -

- 1. The Applicant's Request for Review is merited, and the Board is pleased and hereby quashes and annuls in to the decision of the Respondent reposed in the letter dated 14th October, 2021; including cancellation of the award of TENDER NO. IEBC/OIT/002/21/2021/2022 for the supply and delivery of ballot papers; register of voters; statutory election declaration forms to be used at the constituency, county and national tallying centre framework contract for a period of three (3) years to M/S Inform Lykos (Hellas) S.A.**
- 2. The Applicant's Request for Review is merited, and the Board is pleased and hereby directs the Respondents to readvertise in strict conformity with the law TENDER NO. IEBC/OIT/002/21/2021/2022 for the supply and delivery of ballot papers; register of voters; statutory election declaration forms to be used at the constituency, county and national tallying centre framework contract for a period of three (3) years; and,**
- 3. The Respondent be awarded costs on a full indemnity basis.**

Vide letters dated 27th October 2021 the Acting Board Secretary notified the Respondents of the existence of the Request for Review.

In response, on 2nd November 2021, the 1st and 2nd Respondents filed a Notice of Appointment of Advocates, a Memorandum in Response dated 2nd November 2021, a Replying Affidavit sworn by Marjan Hussein Marjan, the 2nd Respondent's acting Chief Executive Officer and Secretary on 2nd November 2021 through the firm of Wekesa & Simiyu Advocates.

Vide letters dated 4th November 2021, the Acting Board Secretary notified tenderers in the subject tender of the existence of the Request for Review while inviting them to supply the Board with any information and arguments touching on the subject tender.

On 8th November 2021, the 1st Interested Party filed a Notice of Appointment of Advocates together with a Memorandum of Response dated 8th November 2021 through the firm of Okubasu, Munene & Kazungu Advocates LLP.

On 10th November 2021, the 2nd Interested Party filed a Notice of Appointment of Advocates dated 9th November 2021 by the firm of Omwoyo, Momanyi Gichuki & Co. Advocates.

The Applicant filed Written Submissions together with a list of authorities dated 8th November 2021 on 10th and 11th November 2021 respectively. The 1st and 2nd Respondents filed Written Submissions dated 9th November 2021 and Supplementary Submissions dated 11th November 2021 on 9th and 12th

November 2021 respectively. The 1st Interested Party filed Written Submissions dated 8th November 2021 on even date.

APPLICANT'S CASE

The Applicant avers that it is a leading security printer, with demonstrable experience in supporting and facilitating the provision of election materials in Africa's largest democracies, that it submitted a complete tender which required them to submit *inter alia* certified/notarized Audited Account and an ISO 14298 certificate. That in response, it submitted duly certified and notarized Audited Accounts for the year 2018, 2019 and 2020 and a notarized certificate from print secureTM certification, which in its opinion is an equivalent of ISO 14298, administered by Print Secure SA in response to the 2nd Respondent's tender notice. However, vide an email sent on 18th October 2021, it received its notification letter dated 14th October 2021 rejecting its tender for failure to (i) Submit notarized/certified Audited Accounts for the year 2018, 2019, and 2020. An Auditor's certificate indicating company's unqualified report must be attached (ii) Submit notarized/certified ISO 14298 Certificate or its equivalent for security printing from a recognized authority.

According to the Applicant, this decision was unfair, discriminatory, unreasonable and abrogates its rights and interest's because it submitted a responsive tender. Further, that it was allowed to submit an equivalent of an ISO 14298 certificate, thus why it submitted a certificate from Print Secure

SA which is one of two security printing standards and accreditation bodies in South Africa offered to all South African printers and suppliers of security products evincing accreditation and certification locally, and in Africa. Further, that Printing SA has four categories of security printing under the PrintSecure Standards and Accreditation Scheme including the General/Qualified Security Printers category issued to security printing of any nature including government documents and ballot papers *inter alia*. This certification is issued to certified printers who complied with a strict security checklist and audit. It avers that the Respondents failed to seek any clarification they may have required especially because the subject tender was an open international tender, in addition to this, it is the Applicants averment that the Respondents fixed the deadline for submission of requests for debrief for midnight 17th October 2021, yet it received its notification letter on 18th October 2021 at 11.02 am after the lapse of the deadline and was therefore denied an opportunity to exercise its right to be heard, which action was unfair and unjust.

The Applicant contends that criterion No. 5 in the Preliminary examination of tenders of the Tender Document, is neither objective nor quantifiable hence does not serve the criteria, this is because the criterion required tenderers to submit audited accounts for the year 2018, 2019 and 2020 to prove that it is not solvent however, section 420 of the Companies Act as read together with section 29 of the Limited Liability Partnerships Act and section 398 of the Insolvency Act requires that it is only a directors' or

partners' (where applicable) Solvency Statement or Statutory Declaration of Solvency that are adequate to establish a company is solvent as at that date.

Accordingly, the Respondents violated Articles 10, 24, 27 (1), 47, 227(1) and 232 of the Constitution, Section 3, 3(b), 4(1), 7(2)(a)(d)(f)(i)(k)(l)(m) and (n) of the Fair Administrative Action Act, Sections 3, 44(2)(g) and (j), 46(1)(3), 55(1), 79,80, 81(1), 86(1)(a) and 89(d) of the Act and Regulation 74(1), 75, 76 and 77 of Regulations 2020.

The Applicant avers that its tender conformed to all the eligibility and mandatory requirements, thus it ought to have been subjected to both technical and financial evaluation and ultimately awarded the subject tender.

Finally, the Applicant avers that the Respondents failed to ensure the Evaluation Committee had the requisite competence, to process and evaluate tenders submitted and consequently evaluate tenders in accordance with the law.

During the hearing (on zoom, a virtual platform) on 12th November 2021, the Applicant was represented by Mr. Wilfred Lusi who submitted that the Applicant met the requirements in the tender document and the decision of the Respondents to disqualify it was in violation of the Act. It was Mr. Lusi's submission that the Applicant on page 395 of its original tender provided an equivalent to the ISO certificate, that is, a letter from print secure which is a certification arm of Printing South Africa which confirms the certification it

grants in as far as secure printing is concerned conforms to the ISO 14298 of 2013 standard. Mr. Lusi further submitted that the name on the certificate appears as Uniprint Forms because that is the Applicant's trading name used in its secure printing business and also a division of Insidedata South Africa Proprietary Limited.

On the issue of the Applicant's second reason for disqualification, it was Mr. Lusi's submission that it availed audited accounts for the year 2018, 2019 and 2020, further that the accounts for 2018 and 2019 are in respect to Tiso Blackstar Group because Uniprint was previously owned by that company which accounts were certified by Deloitte and Touche. Further, for the year 2020 the audited accounts were certified by Chartered Accountants, a firm based in South Africa, and the documents are in respect of Insidedata South Africa Proprietary Limited which company is the new owner of Uniprint.

RESPONDENTS' CASE

The Respondents contend that the evaluation and comparison of tenders for a three-year framework contract in the subject tender was conducted using the procedures and criteria set out in the tender document and the provisions of section 2 and 141 of the Act and regulation 134 of Regulations 2020. It avers that the Tender Document required tenderers to submit *inter alia*; Audited Accounts for the year 2018, 2019 and 2020. An auditors certificate indicating company's unqualified report must be attached. In response to this, the Applicant submitted audited accounts, however, the audited accounts for 2018 and 2019 were for Tiso Blackstar Group SE and the 2020

audited accounts were for InsideData South Pty Ltd, and not Uniprint a division of Insidedata South Pty Ltd. Further that, they were not submitted together with an Auditor's certificate, and even if the Applicant submitted the Auditor's certificate, the same would not be applicable because the audited accounts are from different companies other than the Applicant.

The Respondents further submit that tenderers were also required to submit an ISO 14298 certificate, this is an international standard that specifies a minimum set of security printing management system requirements. It is their averment that the Applicant submitted a PrintSecure certificate issued to Uniprint forms an entity whose legal standing was not established in the Applicant's original tender document. Further, that Printsecure and Print SA certificates are from federations of the printing industries in South Africa and not an ISO 14298 certificate. Further that this was a mandatory requirement and failure to meet the requirement led to the disqualification of the Applicant's tender. While the Respondents concede that tenderers could submit an equivalent to ISO 14298, they submit that the Applicant has not referred the Board to the exact page of its original tender where it submitted an equivalent.

The Respondents contend that section 46 of the Act gives the Accounting Officer the mandate to constitute an Evaluation Committee which was done in accordance with regulations 27, 28 and 29 of Regulations 2020. It is the Respondents contention that the Applicant has not named the specific members of the Evaluation Committee that the Applicant deems

incompetent, thus this allegation is not underpinned on a breach of any provision of law and should be rejected. It is the Respondents submission that the 2nd Respondent is the only elections management body in Kenya thus has the requisite competency to evaluate tenders in the subject tender.

The Respondents contend the allegation that the Applicant received its notification letter well after the debrief deadline is untrue and that the Applicant should be put to strict proof, further that they still responded to debriefs sent by tenderers after the deadline, but they did not receive any debrief from the Applicant.

On the issue of criterion 5 on proof of not being insolvent, in receivership, bankrupt or in the process of being wound up, the Respondents submit that the best way to determine that a company was still a going concern was through the notarized/certified audited accounts because they show the financial position of a company, and that the Applicant is not allowed by law to set out its own criteria for evaluation, further that the Applicant did not raise this issue upon obtaining the tender document and is thus estopped from raising the issue after award because the same is time barred pursuant to section 167 of the Act.

Finally, that the request for review is defective because the factual statement has been signed by an advocate and not the Applicant, and that the subject procurement process was above board and in compliance with the law, therefore the Applicant's Request for Review does not meet any statutorily

or judicially set threshold for the Board to grant any orders, the same should be dismissed with costs and the award to the 1st interested Party upheld.

During the hearing, the Respondents were represented by Mr. Cyprian Wekesa and Mr. Edmond Wesonga who conceded that indeed tenderers were to provide an ISO 14298 certificate or its equivalent, however, it was Mr. Wekesa's submission that the Applicant provided a letter which is neither a certificate or its equivalent, further that the equivalent would have been CWA 15374 which is known as an international standard printing.

Mr. Wesonga submitted that the Applicant was acquired by Insidedata South Africa on 1st February 2021 and therefore could not submit audited accounts for the year 2020 from this company because it was not part of it then, on the audited accounts for 2018 and 2019, he submitted that on page 91, 92 and 223 of the Applicant's original documents, it submitted unsigned certificates that do not show Uniprint was previously a division of Tiso Blackstar Group and further that the documents introduce another company called Heart and Tata Group which is referred to as a subsidiary of Tiso Blackstar Group. Mr. Wesonga submitted that the Applicant did not provide any documents to show the relationship between Uniprint and Tiso Blackstar Group. It was Mr. Wesonga's submission that the Applicant cannot raise the issue of objectivity or the quantifiable nature of the criterion in the Tender Document because the Applicant did not seek any clarification on the same before submitting its original tender.

1ST INTERESTED PARTY'S CASE

The 1st Interested Party in support of the Respondent, avers that it was awarded the subject tender in accordance with section 86 of the Act. That the Applicant's tender was found non-responsive and was disqualified by virtue of regulation 75 of Regulations 2020. That the evaluation criterion was objective and quantifiable and that under section 60 of the Act, the Accounting Officer is entitled to prepare requirements relating to the tender and the Applicant cannot then impose additional terms as it deems fit, because this would be tantamount to impeaching the competency of the Evaluation Committee.

It submits that it is evident from the Respondents response that the Applicant was disqualified for a failure to comply with mandatory requirements of the Tender Document, thus prays the Board finds the instant Request for Review lacks merit and ought to be dismissed accordingly.

During the hearing, the 1st Interested Party was represented by Mr. Duncan Okubasu who submitted that the it was proper for the Respondents to find the Applicant's tender non-responsive, because there are several accreditation bodies from which the Applicant could have sought an equivalent certificate, however the Applicant provided a letter from a South African Company. That while Mr. Okubasu is not sure whether printsecure is an accreditation company, printsecure's website has a disclaimer to the effect that *'it does not cover high security printers, bank notes and other negotiable instruments'*. On the issue of audited accounts, Mr. Okubasu

submits that the Respondents wanted to ensure prospective tenderers were solvent and to satisfy their financial position. It was Mr. Okubasu's averment that the Applicant provided accounts from different companies, none of which were in respect to the Applicant.

Mr. Okubasu, relied on Justice Odunga's decision in Republic V PPARB and 4 others Ex Parte Britam Life Assurance, in stating that tenderers should comply with tender conditions and that if they failed to do so it defeats the underlying purpose for supplying information and defeats the entire evaluation and the prerequisite under the Act.

APPLICANT'S REJOINDER

The Applicant reiterates that it submitted audited accounts for 2018, 2019 audited by Independent auditors, that is Deloitte and Touche which firms were hired by Tiso Blackstar Group SE; and 2020 audited by Chartered Accountants (SA) contracted by InsideData South (Pty) Ltd.

The Applicant further submits that Uniprint is an unincorporated trading division within InsideData South (PTY) Ltd, a legal entity incorporated in South Africa. This is evidenced in the Applicant's Board Resolution which confirms that Uniprint is a division of InsideData South (Pty) Ltd. It is therefore the Applicants submission that the 2020 financial statements submitted for InsideData South Proprietary Limited A.K.A InsideData South (Pty) includes Uniprint which forms part of its unincorporated trading

divisions or business portfolio. Further that Pty Ltd is short for Proprietary Limited and these words may be used interchangeably.

It is the Applicants contention that the Respondents misconstrued InsideData South Proprietary Limited as being different from InsideData South (Pty) Ltd whereas it is one and the same entity. In addition to the foregoing, the UniPrint trading division was previously owned by Tiso Blackstar Group SE, evidenced by the documents submitted on page 79, 80 and 213 of its original tender where Tiso Blackstar Group SE sets out in the report its divisions include Uniprint hence the reason why its statements for 2018 and 2019 are in the name of Tiso Blackstar Group SE. Evidently, Uniprint could only produce its owners' statements as it does not exist independently.

It is the Applicant's submission that contrary to the Respondents averments that they are not permitted to seek clarification, section 81(1) of the Act allows procuring entity's to engage tenderers and seek clarifications that would assist in the evaluation and comparison of tenders.

Mr. Lusi submitted that the Applicant additionally provided a solvency statement sworn by its directors. Mr. Lusi also submitted , that an equivalent to the ISO certificate was provided by the Applicant and further, that the subject tender was not for provision of negotiable instruments or for bank notes in order to be in the list of exclusions provided by Mr. Okubasu.

2ND INTERESTED PARTY'S CASE

When the Request for Review first came for hearing on 11th November 2021, Mr. Ogeji held brief for Mr. Nyaberi for the 2nd Interested Party. However, following the unavailability of Mr. Lusi on 11th November 2021, the Request for Review was adjourned to 12th November 2021 at the request of the Applicant and with no objection from the 2nd Interested Party.

When the Request for Review proceeded for hearing on 12th November 2021, the 2nd Interested Party's lawyer was not present and no submissions were made on behalf of the 2nd Interested Party.

BOARD'S DECISION

The Board has considered each of the parties' pleadings, written submissions, list of authorities and confidential documents submitted by the Respondents pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and finds the following issues crystalize for determination:

- 1. Whether the Applicant has substantiated its allegation that the Respondents failed to ensure the Evaluation Committee bore the requisite competence to process and/or evaluate tenders and the consequent orders thereof;**
- 2. Whether the 2nd Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with the**

provisions of the Tender Document, the Act and the Constitution at the preliminary examination of tenders with respect to:

a) Criteria No.5 on Audited Accounts for years 2018, 2019 and 2020. An Auditor's certificate indicating company's unqualified report must be attached; and

b) Criteria No.11 on ISO 14298 Certificate or its equivalent

3. Whether the Applicant suffered any prejudice for having received the Notification of Intention To Award transmitted on 14th October 2021 on 18th October 2021.

On the first issue framed for determination, the Board notes the Applicant merely made allegations that the Respondents failed to ensure the Evaluation Committee bore requisite competence which was in violation of the provisions of the Act. However, we note that no evidence was adduced to support this allegation neither did the Applicant particularize the names of the members of the Evaluation Committee against their respective skills and competency they lack as alleged. In the circumstances, the Applicant's allegation remains unsubstantiated and the same fails as a ground in the instant Request for Review.

On the 2nd issue framed for determination, Article 227(1) of the Constitution requires the 2nd Respondent to have a procurement system that is fair, equitable, transparent, competitive and cost-effective and provides for a legislation that governs public procurement and asset disposal framework as follows:

227. Procurement of public goods and services

(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).....

The Board observes the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 (1) and (2) of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:-

80. Evaluation of tenders

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected under section 82(3)

(2) 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.

Section 80(2) of the Act as seen above requires the Evaluation Committee to evaluate and compare tenders using the procedures and criteria set out in the Tender Document.

The Board has carefully studied the Tender Document of the subject tender and notes the criteria for evaluation of the subject tender was set out in Section III - Evaluation and Qualification Criteria running through pages 33 to 52 of the Tender Document. The criteria for evaluation specific to the 2nd issue framed for determination are criteria 5 and 11 of sub-clause 2.1. Preliminary examination of Tenders of clause 2. Evaluation of Tenders of Section III – Evaluation and Qualification Criteria at page 34 and 35 of the Tender Document which provides as follows:

"SECTION III – EVALUATION AND QUALIFICATION CRITERIA

1.

1.1.

1.2.

2. Evaluation of Tenders

2.1 Preliminary examination of Tenders

The Procuring Entity will start by examining all tenders to ensure they meet in all respects the eligibility criteria and other mandatory requirements in the ITT, and that the tender is complete in all aspects in meeting the requirements provided for in the preliminary evaluation criteria outlined below. Tenders that do not pass the Preliminary Examination will be considered non-responsive and will not be considered further in the evaluation.

No.	Criteria	Required Documentary Evidence	Pass / Fail
1.	
2.	
3.	
4.	

5.	<i>The Tenderer shall not be insolvent, in receivership, bankrupt, or in the process of being wound up.</i>	<i>Audited Accounts for the years 2018, 2019 and 2020. An Auditor's certificate indicating company's unqualified report must be attached.</i>	
6.	<i>.....</i>	<i>.....</i>	
7.	<i>.....</i>	<i>.....</i>	
8.	<i>.....</i>	<i>.....</i>	
9.	<i>.....</i>	<i>.....</i>	
10.	<i>.....</i>	<i>.....</i>	
11	<i>The Tenderer shall be certified for security printing from a recognized authority.</i>	<i>ISO 14298 Certificate</i>	
12.	<i>.....</i>	<i>.....</i>	
13.	<i>.....</i>	<i>.....</i>	

Tenders that do not pass the Preliminary Examination will be considered nonresponsive and will not be considered further."

Emphasis ours.

Further, the Respondents clarified and/or amended criteria 5 and 11 in Addendum 1 dated 26th July 2021 and Addendum 4 dated 23rd August 2021 respectively as follows:

Addendum 1

NO.	PREVIOUS	REFERENCE	CLARIFICATION/ADDENDUM
1.
2.	<p>2.1</p> <p>Preliminary examination of Tenders</p> <p>The tenderers shall submit a complete bid in all aspects without material deviations.</p> <p>The Tenderer</p>	<p>Section III – Evaluation And Qualification Criteria.</p> <p>2.1 Preliminary examination of Tenders on Pages 33-35</p>	<p>1.</p> <p>2.....</p> <p>3. The following documents MUST be Notarized/certified by Commissioner of Oaths:</p> <p>(a)</p> <p>(b)</p> <p>(c)</p> <p>(d)</p> <p>(e)</p> <p>(f)</p> <p>(g) Copies of Audited Accounts for the years 2018, 2019 and 2020.</p>

	<p><i>Shall have submitted all correctly filled Tendering Forms provided in the tender document in the format provided including support documents and sample for each item.</i></p>		<p><i>(h) Copy of ISO 14298 Certificate</i></p> <p><i>(i) Any other document that is external to the firm.</i></p>
3.	

Addendum 4

<i>NO.</i>	<i>PREVIOUS</i>	<i>REFERENCE</i>	<i>RESPONSE/CLARIFICATION</i>
1.	
2.	<i>Previously Tenderers were</i>	<i>2.1 Preliminary</i>	<i>Amended to read: Tenderers are required to provide certified ISO 14298</i>

	<i>required to provide certified ISO 14298 Certificate for security printing from a recognised authority</i>	<i>examination of Tenders</i>	<i>Certificate or its equivalent for security printing from a recognised authority</i>
3.	<i>.....</i>	<i>.....</i>	

In essence, tenderers in the subject tender, such like the Applicant herein, were required to provide in their respective tenders (i) copies of their Audited Accounts for years 2018, 2019 and 2020 duly notarised/certified by a commissioner of oaths, (ii) an Auditor’s certificate indicating company’s unqualified report and (iii) a copy of an ISO 14298 Certificate or its equivalent for security printing from a recognised authority duly notarised/certified by a commissioner of oaths. Criteria 5 and 11 of sub-clause 2.1.Preliminary examination of Tenders of clause 2.Evaluation of Tenders of Section III – Evaluation and Qualification Criteria at page 34 and 35 of the Tender Document were mandatory requirements in which tenderers were required to satisfy failure to which one’s tender would be disqualified from proceeding to the technical evaluation.

The Board notes, copies of audited accounts for years 2018, 2019 and 2020 duly notarised/certified by a commissioner of oaths together with an auditor's certificate indicating company's unqualified report were evidence meant to prove a tenderer was not insolvent or in receivership or bankrupt or in the process of being wound up. On the other hand, a copy of an ISO 14298 Certificate or its equivalent for security printing from a recognised authority duly notarised/certified by a commissioner of oaths was evidence meant to prove that a tenderer was certified for security printing from a recognised authority.

The Applicant submitted that audited accounts do not at all in law prove a company or a limited liability partnership is not insolvent or in receivership or bankrupt or in the process of being wound up and that only a director's or partners' solvency statement or statutory declaration of solvency would establish that a company is solvent as at the date. With this, the Applicant submitted that it is impossible to objectively and quantifiably satisfy criterion 5 of sub-clause 2.1. Preliminary examination of Tenders of clause 2. Evaluation of Tenders of Section III – Evaluation and Qualification Criteria at page 34 of the Tender Document.

The Respondents submitted they have the statutory discretion to set out the requirements and the best way for them to establish a tenderer is a going concern is through financial position of a tenderer and therefore, criterion 5 of sub-clause 2.1. Preliminary examination of Tenders of clause 2. Evaluation of Tenders of Section III – Evaluation and Qualification Criteria at page 34

of the Tender Document was objective and quantifiable and the Applicant is by law not permitted to set its own criteria for evaluation.

The 1st Interested Party concurred with the Respondents submissions and further submitted that the Applicant cannot seek to impose additional terms that it deems fit especially where the Applicant has not proven the said criterion offends the law.

We agree with the Respondents and Interested Party's submissions that under section 60 of the Act, the responsibility for preparing specific requirements relating to goods works or services being procured rests with the 1st Respondent and the Applicant has no role to play if it did not seek clarification on such requirements to cause an amendment of the same through an addendum by the Respondents.

In the instant Request for Review, even though the Applicant provided a Solvency Statement at page 74 of its original tender, the same was not a requirement in the subject tender. The Applicant did not seek any clarification on this issue before submitting its original tender and cannot now query whether the subject criteria can objectively and quantifiably be satisfied when it all along knew that a solvency statement was not a requirement for the subject tender and never queried the same. In the circumstances, this ground of the Request for Review fails.

Moving forward, with respect to the first sub-issue of the second issue framed for determination, the Board has carefully studied the Applicant's original tender and notes the Applicant provided the following documentation in its original tender in trying to satisfy criterion 5 of sub-clause 2.1. Preliminary examination of Tenders of clause 2. Evaluation of Tenders of Section III – Evaluation and Qualification Criteria at page 34 of the Tender Document:

- (i) At page 75 running through to page 201 of the Applicant's original tender is an Integrated Annual Report **2018** for **tiso blackstar group** containing tiso Blackstar group's Annual Financial Statements running through from page 115 to 191 of the Applicant's original tender and an Independent Auditors' Report – South Africa running through from page 119 to 123 signed by Deloitte & Touche and another Independent Auditors' Report –United Kingdom running through from page 123 to 128 by the firm of Deloitte LLP. The Annual Financial Statements are certified as true copies of their original by a commissioner for oaths, Megan Anne Van Der Watt of 11 Stott Street, Selby, Johannesburg.

- (ii) At page 203 running through to page 344 of the Applicant's original tender is an Integrated Annual Report **2019** for **Tiso Blackstar Group SE** containing Tiso Blackstar Group SE's Annual Financial Statements running through from page 259 to 333 of the Applicant's original tender and an Independent Auditor's Report, South Africa,

running through from page 263 to 265 by the firm of Deloitte & Touche and another Independent Auditor's Report, United Kingdom running through from page 267 to 269 by the firm of Deloitte LLP. The Annual Financial Statements are certified as a true copy of the original by a commissioner for oaths, Megan Anne Van Der Watt of 11 Stott Street, Selby, Johannesburg.

- (iii) At page 345 running through to page 354 of the Applicant's original tender is an Audited Annual Financial Statements for the year ended **29 February 2020** for **Insidedata South (Proprietary) Limited** containing an Independent Auditor's Report running through from page 346 to 347 signed by De Vos Richards of L de Vos Partner Chartered Accounts (SA) Auditors. The Annual Financial Statements are certified as a true copy of the original by a notary public Kerry-Lee Van Heerden of Kwazulu-Natal, South Africa.

The Board observes that even though the Applicant provided Annual Financial Statements for 2018 and 2019 audited by the firms of Deloitte & Touche in South Africa and Deloitte LLP in the United Kingdom and Audited Annual Financial Statements audited by De Vos Richards of L de Vos Partner Chartered Accounts (SA) Auditors for the year ended 29th February 2020 together with their respective independent auditor's reports, none of the audited financial statements was for the Applicant, Uniprint A Division of Insidedata (South) PTY Limited, the tenderer indicated on page 1 of the Applicant's original tender. Infact, all the audited financial statements

provided by the Applicant bore three different names namely, tiso blackstar group, Tiso Blackstar Group SE and Insidedata South (Proprietary) Limited.

During the hearing, Mr. Lusi on behalf of the Applicant attempted to explain the nexus between the three companies whose names appeared in the audited financial statements provided by the Applicant and the Applicant. However, the Respondent argued that such an explanation being made by Mr.Lusi ought to have been provided in the Applicant's original tender.

The Board notes that no such explanation was provided by the Applicant in its original tender and in lieu thereof finds the Applicant did not provide any audited financial statements for years 2018, 2019 and 2020 of its own.

With respect to the second sub-issue of the second issue framed for determination, the Board notes the Applicant provided the following documentation in its original tender in trying to satisfy criterion 11 of sub-clause 2.1. Preliminary examination of Tenders of clause 2. Evaluation of Tenders of Section III – Evaluation and Qualification Criteria at page 35 of the Tender Document:

- (i) At page 394 of the Applicant's original tender is **a certified copy of a letter dated 4th August 2021** addressed to whom it may concern and to the attention of Mr. Grant Hubbard from PrintSecure Powered by Printing SA confirming printsecure accreditation standards are

aligned to Graphic technology-Management of Security printing processes (ISO 14298:2013).

- (ii) At page 395 of the Applicant's original tender **is a certified copy of a certificate** issued by PrintSecure Powered By Printing SA, Security Printing Accreditation Scheme of the Printing, Industries Federation of South Africa NPC certifying **Uniprint Forms** as having the necessary procedures in place to provide a QUALIFIED secure printing and finishing service for general security printing subject to implementation of defined security measures during security runs.

- (iii) At page 396 of the Applicant's original tender is a certified copy of **a certificate** issued by DNV GL – Business Assurance certifying **Uniprint Forms, A Division of Hirt & Carter South Africa (Pty) Ltd's** management system to having been found to conform to the Quality Management System standard: ISO 9001:2015. This certificate is valid for the design, development, manufacture, storage and delivery of documents, till rolls, transactional forms, ballot papers and security documents to retailers, FMCG manufacturers, telecommunications companies and financial institutions.

- (iv) At page 397 of the Applicant's original tender is a certified copy of **a letter dated 17th August 2021** to whom it may concern from Printing Sa confirming that **Uniprint a Division of Inside**

Data South (Pty) Ltd is an ordinary (full) member in good standing with the Printing Industries Federation of South Africa NPC.

- (v) At page 398 of the Applicant's original tender is a certified copy of **a letter dated 17th August 2021** to whom it may concern from Printing Sa confirming that **Uniprint a Division of Inside Data South (Pty) Ltd** is a paid up member in good standing with the Printing Industries Federation of South Africa NPC.

The Board observes that even though the Applicant provided four documents in an attempt to satisfy criterion 11 of sub-clause 2.1. Preliminary examination of Tenders of clause 2. Evaluation of Tenders of Section III – Evaluation and Qualification Criteria at page 35 of the Tender Document, only two of the said four documents are certificates while the other two are letters.

However, the certificate at page 395 of the Applicant's original tender is with respect to **Uniprint Forms** and not the Applicant while the certificate at page 396 of the Applicant's original tender is with respect to **Uniprint Forms, A Division of Hirt & Carter South Africa (Pty)** not the Applicant and for **management system** and not security printing.

During the hearing, Mr. Lusi on behalf of the Applicant attempted to explain the nexus between Uniprint Forms, Uniprint Forms, A Division of Hirt &

Carter South Africa (Pty) and the Applicant. However, the Respondents argued that such an explanation being made by Mr.Lusi ought to have been provided in the Applicant's original tender.

The Board notes that no such explanation was provided by the Applicant in its original tender and in lieu thereof finds that the Applicant did not provide a certified ISO 14298 Certificate or its equivalent for security printing from a recognised authority.

From the Evaluation Report signed by members of the Evaluation Committee on 15th October 2021, the Board notes the Evaluation Committee found the Applicant's tender non-responsive at the Preliminary examination of Tenders stage of evaluation for the following reasons, thus disqualified it from proceeding to the technical evaluation stage:

"Bidder No. 2

Bidder two (2) did not: -

- i. Submit notarized/certified Audited Accounts for the years 2018, 2019 and 2020. An Auditor's certificate indicating company's unqualified report must be attached.***
- ii. Submit notarized/certified ISO 14298 Certificate or its equivalent for security printing from a recognized authority."***

The aforementioned reasons were communicated to the Applicant vide a Notification of Intention To Award indicated to have been transmitted on 14th October 2021.

Section 79 of the Act provides for responsiveness of tenders as follows:

“79 Responsiveness of tenders

- (1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.***
- (2) A responsive tender shall not be affected by—***
 - (a) minor deviations that do not materially depart from the requirements set out in the tender documents; or***
 - (b) errors or oversights that can be corrected without affecting the substance of the tender.***
- (3) A deviation described in subsection (2)(a) shall—***
 - (a) be quantified to the extent possible; and***
 - (b) be taken into account in the evaluation and comparison of tenders.”***

Simply put, tenders that do not conform to mandatory requirements in a tender document would be non-responsive.

In Miscellaneous Civil Application No. 85 of 2018, Republic v Public Procurement Administrative Review Board Ex parte Meru

University of Science & Technology; M/s Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR, the court pronounced itself on the importance of a tender conforming to requirements set out in a tender document when it held as follows:-

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

Criteria 5 and 11 of sub-clause 2.1. Preliminary examination of Tenders of clause 2. Evaluation of Tenders of Section III – Evaluation and Qualification Criteria at page 34 and 35 of the Tender Document required tenderers to

satisfy the same or be declared non-responsive since the criteria was on a pass/fail basis.

In order for tenderers to compete on an equal footing for award of the subject tender, the Evaluation Committee was under an obligation to apply the evaluation criteria at the Preliminary examination stage, including all other stages of evaluation uniformly to all tenderers.

In **Miscellaneous Civil Application 140 of 2019 Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR** Justice Mativo at paragraph 87 stated as follows: -

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

The import of the aforementioned case is that mandatory requirements cannot be waived neither can there be minor deviations from mandatory requirements. In this instance therefore, the Evaluation Committee had no option but to find the Applicant's tender non-responsive at the Preliminary examination stage, having failed to submit notarized/certified Audited Accounts for the years 2018, 2019 and 2020, an Auditor's certificate indicating company's unqualified report and an ISO 14298 for security printing or its equivalent from a recognized authority.

Accordingly, the Board finds that the Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document, the Act and the Constitution at the preliminary examination of tenders.

On the third issue framed for determination, the Applicant complained that it received the Notification of Intention to Award indicated to have been transmitted on 14th October 2021 on 18th October 2021 well after the lapse of the deadline in which a tenderer could request for a debrief with respect to evaluation of such tenderer's tender i.e. on or before the midnight of 17th October 2021. To this end, the Applicant alleged that it was deprived of the full and lawful opportunity to enforce its rights accruing under the Contract.

The Board observes the said Notification of Intention to Award provided two instances when the Respondents would respond to a tenderer who had made a request for debriefing namely (i) if a request is made within 3 business

days of receipt of the Notification of Intention to Award, the Respondents would reply within 5 business days of receiving the request and (ii) if a request is made after the deadline of the said 3 business days has expired, the Respondents would reply not later than 15 business days from the date of publication of the Contract Award Notice.

The Respondents submitted that they did continue to reply to requests for debriefing by tenderers even after the deadline for such requests had expired and that the Applicant did not make any request for debriefing either within the period required or even after the deadline for such request had expired.

Having noted that the Applicant was still entitled to request for debriefing even after the deadline for such request to be made had expired and the Applicant failed to take advantage of the same, the Board finds no prejudice was visited upon the Applicant. We buttress our finding by recognizing the Applicant has had an opportunity to challenge the decision of the Respondents' to disqualify its tender in this Request for Review, therefore, affording the Applicant a right to be heard on any complaints against the Respondents with respect to the subject tender. Accordingly, this ground fails.

In totality, the Request for Review fails and is ripe for dismissal. Taking judicial notice of the orders of the Board in consolidated Request for Review Application Nos. 129 of 2021, 132 of 2021 and 133 of 2021 Shailesh Patel t/a Africa Infrastructure Development Company and 2 others versus the

Accounting Officer, Independent Electoral and Boundaries Commission and 4 others, where the Board ordered for a re-evaluation of tenders at the financial evaluation stage and noting that the subject procurement process is not complete, the Board finds it just to order each party to bear its own costs in this Request for Review.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board issues the following orders in the Request for Review dated 27th October 2021: -

- 1. The Request for Review dated and filed on 27th October 2021 be and is hereby dismissed;**

- 2. Given that the procurement process of the subject tender is not complete, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 17th day of November 2021.

**CHAIRPERSON
PPARB**

**SECRETARY
PPARB**

Delivered via virtual platform on 17th day of November 2021 in the presence of :

1. Mr. Wlfred Lusi for the Applicant and 2nd Interested Party;
2. Mr. Edmond Wesonga for the 1st and 2nd Respondents;
5. Dr. Duncan Okubasu for the 1st Interested Party; and
6. Mr. Ogeji holding brief for Mr. Nyaberi for the 2nd Interested Party.