

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 66/2021 OF 6th MAY 2021

BETWEEN
INTERNATIONAL SUPPLY CHAINS SOLUTIONS
LIMITED T/A ISCS CONSULTING..... APPLICANT
AND

COUNTY GOVERNMENT OF KISUMU.....1ST RESPONDENT

THE AG. CHIEF OFFICER-FINANCE
& ECONOMIC PLANNING.....2ND RESPONDENT

Review against the decision of the Acting Chief Officer-Finance & Economic Planning, County Government of Kisumu in respect of Tender No. CGK/ICT/01/2020-2021, Consultancy Services for the Development of Automation and Digitization Roadmap.

BOARD MEMBERS:

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Paul Jilani | -Member |
| 3. Mrs. Irene Kashindi | -Member |
| 4. Mr. Nicholas Mruttu | -Member |
| 5. Ms. Isabella Juma, CPA | -Member |

IN ATTENDANCE:

- | | |
|----------------------|--------------------------|
| 1. Mr. Phillip Okumu | - Acting Board Secretary |
|----------------------|--------------------------|

BACKGROUND TO THE DECISION

The Bidding Process

The County Government of Kisumu, Department of Education, ICT and HCD (hereinafter referred to as "the Procuring Entity") invited proposals for Tender No. CGK/ICT/01/2020-2021 for Procurement of Consultancy Services for the Development of Automation and Digitization Roadmap (hereinafter referred to as "the subject tender") through an advertisement published on the Procuring Entity's website on 25th March 2021.

Bid submission deadline and opening of bids

Two bidders submitted their bids by the bid submission deadline of 13th April 2021. The said two bids were opened by a Tender Opening Committee in the presence of bidders' representatives and recorded as follows: -

Bid No.	Bidder Name
1.	Crystal Enterprises Resource Planning (ERP) Limited in joint venture with Delta 4 Services and 313 Labs Limited
2.	International Supply Chain Solutions LTD. T/a ISCS Consulting in joint venture with Premium Strategies Limited.

Evaluation of Bids

An Evaluation Committee appointed by the Procuring Entity's Acting Chief Officer – Finance and Economic Planning, evaluated bids in the following three stages: -

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

1. Preliminary Evaluation

At this stage, the Evaluation Committee subjected the 2 bids received to the criteria set out in Clause.13 Mandatory Requirements of section III. Instructions to Tenderers on page 20 of the Tender Document. At the end of Preliminary Evaluation, Bidder No. 2, M/s International Supply Chain Solutions Ltd T/A ISCS Consulting was found responsive and eligible to proceed to Technical Evaluation.

Bidder No. 1, M/s Crystal Enterprises Resource Planning (ERP) Limited, did not proceed to technical evaluation due to the following reasons:

- a. Expired Tax Compliance Certificate;
- b. Expired Business Permit; and
- c. Failure to provide audited accounts for the financial 2017 and 2018.

2. Technical Evaluation

At this stage, the Evaluation Committee subjected the bid of M/s International Supply Chain Solutions LTD T/A ISCS Consulting to the criteria outlined in Clause 14. Evaluation Method at page 21-24 of the Tender Document read together with section IV at page 26 of the Tender Document. Bidders were required to achieve a minimum technical score of 50% to proceed to the Financial Evaluation stage. The Evaluation Committee noted that the bidder's proposed key personnel for the assignment were personnel of M/s Premium Strategic Limited.

At the end of Technical Evaluation, M/s International Supply Chain Solutions LTD T/A ISCS Consulting achieved a technical score of 72.5% against the minimum score of 50% as can be seen from the table below:

No.	Evaluation Mandatory Criteria	Company Experience	Methodology	Proposed Team & Experience	Total Score %
-----	-------------------------------	--------------------	-------------	----------------------------	---------------

	Maximum Score	25	25	50	100
	INTERNATIONAL SUPPLY CHAIN SOLUTIONS LIMITED T/A ISCS CONSULTING	15.5	22.5	34.5	72.5

3. Financial Evaluation

At this stage, the Evaluation Committee subjected the bid of M/s International Supply Chain Solutions LTD T/A ISCS Consulting to a Financial Evaluation in accordance with Clause 14. Evaluation Method on page 24 of the Tender Document Section. V of the Tender Document. M/s International Supply Chain Solutions LTD T/A ISCS Consulting was the only bidder that made it to the Financial Evaluation stage.

Evaluation Committee Observations

According to the Evaluation Report executed on 14th April 2021, the Evaluation Committee made the following observations:-

- ✓ *The proposed work is budgeted for and is in the procurement plan;*
- ✓ *The bidder's bid price was very competitive and within the Procuring Entity's budget;*
- ✓ *M/s International Supply Chain Solutions LTD T/A ISCS Consulting only attached key personnel of M/s Premium Strategic Limited; and*
- ✓ *M/s International Supply Chain Solutions LTD T/A ISCS Consulting did not provide a financial breakdown as per the activity/work plan.*

Consequently, the Evaluation Committee sought professional guidance from the Procuring Entity's Procurement Director.

Professional Opinion

In a professional opinion dated 14th April 2021, the Procuring Entity's Head of Supply Chain Management reviewed the manner in which the subject procurement process was undertaken including evaluation of bids. He took note of the Evaluation Committee's observations and took the view that M/s International Supply Chain Solutions LTD T/A ISCS Consulting did not meet the threshold required by law for award of the subject tender, thus recommended as follows:

"A re-tender of CGK/ICT/01/2020-2021 CONSULTANCY SERVICES FOR THE DEVELOPMENT OF AUTOMATION AND DIGITIZATION ROAD MAP since the firm was non-responsive at the technical level."

The professional opinion was approved by the Ag. Chief Officer- Finance and Economic Planning on 14th April 2021.

Notification to Bidders

In a letter dated 29th April 2021, the Ag. Chief Officer-Finance and Economic Planning notified M/s International Supply Chain Solutions LTD T/A ISCS Consulting that pursuant to section 87 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") its bid was unsuccessful because ***"key personnel attached were all from Premium Strategic Limited which is a joint venture of the company."*** On the other hand, M/s Crystal Enterprises Resource Planning (ERP) was notified that pursuant to section 87 of the Act its bid was unsuccessful because; ***"i. tax compliance expired and ii. The Audited accounts were of wrong financial years, different from what was required."***

THE REQUEST FOR REVIEW

M/s International Supply Chain Solutions Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated 6th May 2021 and filed on even date together with a Statement Supporting the Request for Review that is signed by the Applicant's Director and not dated but filed on 6th May 2021, through the firm of Oduge-Otieno & Associates seeking the following orders:-

- 1. An order setting aside the letter dated 29th April 2021 and the decision of the Respondent contained therein;***
- 2. An order suspending any further activities by the Respondent relating to this procurement process pending the decision of the Board;***
- 3. An order directing the Respondents to award the tender to the Applicant if the reason indicated in the letter of 29th April 2021 is determined to be the sole reason for not awarding the Applicant the tender;***
- 4. An order directing costs of the application to be borne by the Respondents; and***
- 5. Any other order that the Board considers just and fair under the circumstances.***

In response, the Respondents lodged a Replying Affidavit sworn on 12th May 2021 and filed on 13th May 2021 through the Procuring Entity's Acting Chief Officer – Finance & Economic Planning.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, detailing an administrative and contingency management plan to mitigate

Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

Consequently, the Applicant lodged its written submissions dated 24th May 2021 and filed on even date. The Respondents did not file written submissions.

BOARD'S DECISION

The Board has considered each of the party's cases, the pleadings and confidential documents submitted by the Procuring Entity pursuant to section 67(3) (e) of the Act and frames the issues for determination as follows:

I. Whether the Procuring Entity found the Applicant's bid non-responsive in accordance with the provisions of the Tender Document read together with section 80 (2) of the Act;

II. Whether the Applicant's letter of notification dated 29th April 2021 satisfies the principles of fairness and transparency under Article 227 (1) of the Constitution; and

III. What are the appropriate orders to grant in the circumstances?

The Board shall now address the issues framed for determination as follows:

Regarding the first issue for determination, the Applicant averred that the Respondent adopted a criterion that was not provided in the Tender Document when evaluating the Applicant's bid.

At paragraph one of its Request for Review, the Applicant averred that section 80 (2) of the Act provides that:

"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."

The Applicant further states at paragraph two of its Request for Review that Clauses 2.3.3 and 13 of the Tender Document allows bidders to include joint venture partners in their bids and therefore the fact that the bidder included experts of its technical joint venture partner cannot under any circumstances be the reason to declare a bid unsuccessful.

The Applicant also considers the reason provided by the Respondent that "the key personnel" provided in the bid were all from the technical joint venture of the Applicant" to be contrary to Clauses 2.3.3 and 13 of the Tender Document. The Applicant believes that it should not be penalized

for relying on qualified professionals and technical expertise as envisaged under its joint venture arrangement. At paragraph 3 of the Request for Review, the Applicant referred to Clause 2.8 of the Tender Document to support its allegation that it did not receive any notification indicating that it did not meet the minimum technical score and this is indicative of the fact that its bid passed the technical evaluation stage. The Applicant's case is that this was contrary to the provisions of section 80(2) of the Act and clause 2.7.1 of the Tender document.

In response, the Respondents aver that they have since stopped any further activities on the said tender pending the retendering process but did not specifically address the Applicant's complaint regarding the criteria used during evaluation of the Applicant's bid. The Respondents state that they did not award the tender to any bidder, and that the reason for this is that the scope of the tender has since changed and the Respondents intend to re-advertise the said tender under a new scope.

In addressing this issue, the Board observes that the Applicant received a letter of notification of unsuccessful bid dated 29th April 2021 containing the following details:

"THE DIRECTOR

INTERNATIONAL SUPPLY CHAIN SOLUTIONS LTD

P. O. BOX 7041 – 00200 NAIROBI

REGRET LETTER

***RE: CONSULTANCY SERVICES FOR THE DEVELOPMENT OF
DIGITIZATION AND AUTOMATION ROAD MAP –
CGK/ED/2020-2021/001***

This is to inform you that in accordance with section 87 of the Public Procurement & Asset Disposal Act, 2015, your offer in relation to the above tender has been determined to be unsuccessful upon evaluation due to the following reason(s):

1) Key personnel attached were all from Premium Strategic Limited which is a joint venture of the company. However, we thank you for showing interest in doing business with us.

WILSON ABIERO

AG. CHIEF OFFICER – FINANCE AND ECONOMIC PLANNING

It is worth pointing out that evaluation of bids in a procurement process is undertaken using the procedures and criteria set out in the Tender Document. Section 80 (2) of the Act puts it in the following terms:

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

Considering the provisions of section 80(2), the Board shall establish if the Procuring Entity evaluated the Applicant's bid according to the criteria set out in the Tender Document.

The Board notes the reason given by the 2nd Respondent for the decision that the Applicant's bid was unsuccessful was that "**Key personnel attached were all from Premium Strategic Limited which is a joint venture of the company**" as stated in the Applicant's letter of notification.

Upon perusal of the Evaluation Report as submitted to the Board by the Respondents, the Board observes that the Evaluation Committee determined the Applicant's bid was responsive at the Mandatory Requirements/Preliminary, and Technical Evaluation stages. At the end of Technical Evaluation, the Applicant achieved a score of 72.5% against the minimum technical score of 50% required to proceed to Financial Evaluation.

At the Financial Evaluation stage, the Evaluation Committee evaluated the Applicant's bid and before it could make recommendation for an award, the Evaluation Committee made the following observations after the Financial Evaluation:-

- i) The proposed work is budgeted for and is in the procurement plan;*
- ii) The Applicant's bid price was very competitive and within the budget;*
- iii) The Applicant only attached key personnel from Premium Strategic Limited; and*
- iv) That the Applicant did not provide a financial breakdown as per the activity/work plan.*

The Board notes that the Evaluation Committee in its report did not make any recommendation on award of the subject tender but sought "*professional guidance from the Procurement Director*". It is the Head of Supply Chain of the Procuring Entity who, in his Professional Opinion noted that the Applicant's bid "*did not meet the threshold required by Law to be awarded*" the Tender, based on the observation by the Evaluation Committee that the Applicant "*had a joint venture with Premium Strategic Limited and the Lead Company which is the Applicant only attached the key personnel for Premium Strategic Limited*".

The Head of Supply Chain Management did not indicate which criteria in the Tender Document or which section of the Law the Applicant's bid did not conform to.

It therefore behoves upon this Board to establish the stage at which a bidders' proposed personnel would be considered and whether bidders were precluded from relying on key personnel of their joint venture partners.

The Board studied the Tender Document and notes that a bidder's proposed personnel formed part of the Technical Evaluation Criteria found in Clause 14. Evaluation Method found at page 21 of the Tender Document which provides as follows:

"Proposed team and experience:

The presence of a team comprising of Kenyan citizens with a good understanding of the context is recommended. High level of experience in doing similar work.

Program Manager – 10 Marks

Professional Qualification

- Should have experience of more than 20 years in ICT – 2 marks***
- Should have experience in building IT Governance, policies – 2 Marks***
- Should have worked and instrumental in Business Transformation projects in the past. – 1 Marks***
- Should have done at least 2 such projects in the last 5 years – 1 Mark***
- Should have extensive experience in working across the Technology division, i.e. IT Infrastructure/ Application/ IT Security – 1 mark***
- Should have managed a team of 20 or more in the past. – 1 Mark***

Academic Qualification

- Post Graduate degree and above – 1 Mark***
- Certification in Project Management such as PMP or Prince 2, MUST submit professional and academic certifications. Provide proof in each item – 2 Marks***

Application Specialist – 10 Marks

Professional Qualification

- Should have experience of more than 15 years – 2 Marks***
- Should have worked on and implementing at least 5 ERP/IMIS implementations – 2 marks***

- Should have done at least 2 such projects in the last 5 years – 1 Mark

- Should have extensive experience in working across various Technologies, Platforms, ERPs – 1 Mark

Academic Qualification

- Post-Graduation/Bachelor/Diploma in IT or related area – 2 Marks

Certification in any ERP/IMIS, MUST submit professional and academic certifications. Provide proof in each item. – 2 Marks

IT Infrastructure Specialist – 10 Marks

Professional Qualification

- Should have experience of more than 15 years – 2 marks

- Should have worked on and implementing at least 5 ICT Infrastructure projects – 1 Marks

- Should have Completion Certificate at least 2 such projects in the last 5 years – 1 Marks

- Should have worked on Enterprise level Servers, Storages, Backup solutions, Network devices and have experience in Data Centre and Hyper Converged Infrastructure set up. – 1 Mark

Academic Qualification

- Bachelor Degree in Computer Science or related area – 1 Mark

- Certification in Professional IT infrastructure or related area – 1 Mark

- Certification on Enterprise Servers from IBM/ HP or Dell – 1 Mark

- Certification on Storage or related areas. – 1 Mark

- Certification on Back up or related areas. – 1 Mark

MUST submit professional and academic certifications.

Provide proof in each item 10

IT Security Specialist – 10 Marks

Professional Qualification

- Should have experience of more than 15 years in Security Audits – 2 Marks

- Should have worked on at least 5 IT Security projects/ audits. - 2 Marks

- Should have done at least 2 such projects in the last 5 years – 1 Marks

- Should have worked on building IT Security/ policies – 1 Marks

Academic Qualification

- Degree in IT or related area – 2 Marks

- Certification in CISA or equivalent. MUST submit professional and academic certifications. Provide proof in Each item – 2 Marks

ICT Digital Electronic Document Management System - (EDMS) Specialist –10 Marks

Professional Qualification

- Should have experience of more than 10 years in ICT – 3 Marks

- ***Should have experience in Electronic Document Management and Workflow Management Systems, should have done at least 2 (Two) EDMS projects in the last 7 years – 2 Marks***

Academic Qualification

- ***Post Graduate degree and above – 2 Marks***
- ***Should have exposure to 3 digitalization technologies such as Microsoft SharePoint, Alfresco, File360, InfoRouter, File Share, Kodak etc. MUST submit professional and academic certifications - 3 Marks.***

Provide proof in each item.”

NOTE: Only technical proposals that will score a minimum of 50 points will be considered for further review of financial proposal.

It is evident from the foregoing that a bidder’s proposed personnel would be considered as part of the Technical Evaluation Criteria and not the Financial Evaluation Criteria. As already established by the Board, the Applicant’s bid was found responsive at the Technical Evaluation Stage, thus proceeded to the Financial Evaluation Stage. Despite this, the Applicant was informed that it was non-responsive because the “***Key personnel attached were all from Premium Strategic Limited which is a joint venture of the company***”.

As regards “Eligible Tenderers” in the subject tender Clause.3 Section III- Terms of Reference at page 15 of the Tender Document provided as follows:

"3. ELIGIBILITY OF THE FIRM/CONSORTIUM/SUB-CONTRACTORS

This is an open national tender and all eligible companies are allowed to participate in this assignment. In case, one firm does not meet all the requirements, then it can form consortium or include sub-contractor to cumulatively meet technical requirements. However, in case of participation of more than one firm, it is mandatory to define the Primary/Lead Partner/Firm who would be responsible to deliver the assignment on behalf of the consortium. Local Firms can tie-up Foreign Partner/Firms if required to be part of the consortium. In an event of the Consortium formation or Sub-Contracting, all the associated partners/firms require to provide a joint venture agreement and Power of Attorney appointing an authorized representative for the joint venture."

From the foregoing Clause, the Board observes that the subject tender is an open national tender where all eligible companies are allowed to participate. The Tender Document allowed companies that don't meet all technical requirements to form a consortium or to include a sub-contractor to cumulatively meet all technical requirements. In case a consortium or a sub-contracting arrangement is formed, parties to such partnership were required to define the Primary/Lead Partner/Firm who would be responsible to deliver the assignment on behalf of the consortium (partnership). Further, parties to the consortium or the sub-contracting arrangement were required to provide; a Joint venture agreement and a

Power of Attorney appointing an authorized representative for the joint venture.

Jan Bouckaert in his Article known as **"Consortium or Joint Venture: the same or very different?"** (Published on 23rd November 2018) describes Joint Ventures and Consortiums as follows:

"In certain countries and cultures, the words "joint venture" or "JV" and "consortium" may be used as synonyms.

Both a consortium and a JV (Joint Venture) are ways for two, or more, parties to join forces and participate to a tender. And, if successful, they will jointly execute the contract. Thanks to the "joint and several liability", the employer is no worse off compared to dealing with a single contractor. In fact, joint & several means that the employer can go to either, or both, for fulfillment of the contract or recovery of damage"

The Board observes that in the Article by **Jan Bouckaert**, the Author takes the view that Joint Ventures and Consortiums are similar because in his view, a consortium and a Joint Venture are ways for two, or more, parties to join forces and participate in a tender and if successful, the two parties (companies) will execute the contract jointly. Having noted the Procuring Entity required parties to a consortium or a sub-contracting arrangement to provide a Joint venture agreement, then it means, the

Procuring Entity viewed consortiums or sub-contracting arrangements as having characteristics of a joint venture.

On page 16 of the Applicant's bid, the Applicant has attached a Joint Venture Agreement between International Supply Chain Solutions Ltd, T/A ISCS Consulting and Premium Strategies Ltd and read as follows:

JOINT VENTURE AGREEMENT

Between

**INTERNATIONAL SUPPLY CHAIN SOLUTIONS LTD, T/A ISCS
CONSULTING NAIROBI, KENYA**

And

PREMIUM STRATEGIES LTD, NAIROBI, KENYA

This is to certify that **International Supply Chain Solutions Ltd, T/A ISCS Consulting (ISCS)** operating from Vision Plaza, Mombasa Road, Nairobi, Kenya, and **Premium Strategies Ltd (PSL)** operating from Chaka Road, Titan Complex, Nairobi, Kenya, have agreed to collaborate and jointly submit **a proposal for Consultancy Services for the Development of Automation & Digitization Roadmap.**

The two firms have also agreed to collaborate and jointly execute the assignment once successful. **ISCS** will be the lead firm, with **PSL** as its Joint Venture technical partner.

On page 19 of the Applicant's bid, it provided the power of Attorney dated 9th April 2021 for the Joint Venture Agreement and states as follows:-

".....International Supply Chain Solutions Ltd & Premium Strategies Limited hereby appoint and

authorise Mr. Fred Manyallah ID No. 9137896 as THEIR duly authorised ATTORNEY with full rights of substitution and delegation to be its lawful attorney "the Attorney" and to in its name and on its behalf to cat for and do or execute all or any of the following acts or things:-

i. All such acts, things and deeds necessary in connection with or incidental to proposals for bids or tenders submitted by the joint venture, including signing and submission of all documents, providing information or responses, representing the Joint Venture in all matters and generally dealing with all matters in connection with proposal for the said Bid/ Tender....."

From the foregoing, the Board notes that Mr. Fred Manyallah was given Power of Attorney to act on behalf of the parties in the Joint Venture in all matters in connection with their Bid/Tender.

The Board has carefully examined the Applicant's documents before it and observes that the statement supporting Request for Review was sworn by one Fred Manyallah, on behalf of the Applicant.

The Board studied the Tender Document in its entirety but did not find any provision that limited the key personnel proposed by a bidder to be from a lead firm in a joint venture and not from the other partner or partners in a joint venture.

It is evident, the Applicant submitted a bid as a Joint Venture in the subject tender comprising of the Applicant as the Lead Partner and M/s Premium Strategies Limited as the Joint Venture Technical Partner.

Further, the Applicant provided a list of Personnel at pages 213-214 of its original bid as follows:

NAME	POSITION	CURRENT EMPLOYER
Ted Odhiambo	Program manager	Premium Strategic Limited
David Ngesa	Application Specialist	"
Dennis Abuya	IT Infrastructure Specialist	"
Dismus Ongondi	IT Security Specialist	Synalock Cybersecurity LLC; Premium Strategies Limited; UNDP
Isaac Kiprop Kirui	IT Digital Electronic Document Management System- (EDMS)- Specialist	CPF Financial Services

Having noted the Tender Document did not preclude bidders from relying on the technical expertise of their joint venture partners, it is the Board's considered finding that bidders were at liberty to propose Key Personnel employed by such bidder's Joint Venture Partner. It therefore follows that disqualifying the Applicant's bid for the reason that the proposed Personnel are personnel of one of its joint venture partner, means the Evaluation Committee in their Observations did not take into account the fact that the Tender Document did not preclude bidders from relying on the technical expertise of their joint venture partners.

The Evaluation Committee ought to have confined itself to the procedures and criteria set out in the Tender Document when evaluating the Applicant's bid as required by section 80 (2) of the Act. In any case, the Evaluation Committee introduced an extraneous criterion at the Financial

Evaluation Stage, yet the Applicant's bid was found responsive at the end of the Technical Evaluation stage where the sub-category of "**Proposed Team and Experience**" ought to have been considered.

Accordingly, the Board finds that the Procuring Entity found the Applicant's bid non-responsive contrary to the provisions of the Tender Document read together with section 80 (2) of the Act because the Applicant was found non-responsive through the Professional Opinion dated 14th April 2021 on a criterion that was not in the Tender Document.

On the second issue for determination, the Applicant avers that the Respondent contravened section 87 (3) of the Act by failing to disclose the successful bidder and the price at which award was made.

At paragraph 4 of its Request for Review, the Applicant avers that section 87 (3) of the Act provides that "when a person submitting the successful tender is notified under subsection (1), the accounting officer of the Respondent shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof." Further, in its Statement Supporting the Request for Review, the Applicant avers that the Respondent failed to disclose to it who won the tender and at what price contrary to section 87(3) of the Act.

In response to this allegation, the Respondents stated that they did not communicate who the winning bidder was because none of the bidders was awarded the tender.

Having considered parties' rival cases, the Board notes that section 87 (3) of the Act provides that "***when a person submitting the successful tender is notified under subsection (1), the accounting officer of the Respondent shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.***"

On the other hand, Regulation 82 of Regulations 2020 provides as follows:-

"82(1) the notification to the unsuccessful bidder under section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

82(2) for greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

82(3) the notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86(1) of the Act. [Emphasis added]

In view of the provisions of section 87(3) and Regulation 82 of Regulations 2020 set out hereinbefore, the Board has severally held that, a notification must contain both the reason why the bidder's bid was found non-responsive as well as a disclosure of the winning bidder and the price at

which award was made including the reason why a successful bidder was found to be successful in accordance with Section 86(1) of the Act. This is the ideal position in promotion of the principle of transparency envisaged under Article 227 (1) of the Constitution.

It is worth pointing out that the successful bidder and the amount at which an award is made form part of the ingredients of a letter of notification of unsuccessful bid. That notwithstanding, a successful bidder and the amount of award to that successful bidder can only be made in a case where a procuring entity has awarded a tender.

The Evaluation Report executed on 14th April 2021 shows that the Evaluation Committee never recommended any bidder for award of the subject tender. The Professional Opinion dated 14th April 2021 by the Head of Supply Chain Management shows that he recommended a retender of the subject tender. Further, this recommendation was approved by the 2nd Respondent on 14th April 2021. In essence, the subject tender was not awarded. In a case where award is made, then it would have been incumbent for the 2nd Respondent to disclose the specific reasons why the Applicant's bid was unsuccessful, the successful bidder, reason why such a bidder was successful (that is, for having submitted the lowest evaluated tender price) and the amount at which award was made.

In the instant scenario, the Applicant ought to have been informed of the specific reasons why its bid was found unsuccessful and the reason why the subject tender would be retendered. It is worth noting that the Applicant was not informed that it did not provide a financial breakdown as per the activity/work plan.

It is worth pointing out that, in ordinary practice, a procuring entity re-tenders for similar services because a previous tender process was terminated. This in the Board's view means that if the Procuring Entity terminated the subject tender thus paving way for a re-tender, then the specific reason for the termination ought to have been disclosed to bidders within the timelines provided in section 63 (4) of the Act.

Having studied the Evaluation Report executed on 14th April 2021, the Board notes the Applicant's bid was found non-responsive because of the following reasons:

"THE EVALUATION COMMITTEE OBSERVATION

- ✓ ***The committee noted that ISCS consulting only attached key personnel from Premium Strategic Limited.***
- ✓ ***The committee notes that ISCS Consulting did not provide a financial breakdown as per the activity/work plan.***

With the above observations the committee therefore seek for professional guidance from the Procurement Director."

On the other hand, the Applicant's letter of notification of unsuccessful bid dated 29th April 2021 contains the following reasons:

REGRET LETTER

**RE: CONSULTANCY SERVICES FOR THE DEVELOPMENT OF
DIGITIZATION AND AUTOMATION ROAD MAP-
CGK/ED/2020-2021/001**

This is to inform you that in accordance with section 87 of the Public Procurement & Asset Disposal Act 2015, your offer in relation to the above tender have been determined to be unsuccessful upon evaluation due to the following reason(s);

- 1) Key personnel attached were all from Premium Strategic Limited which is a joint venture of the company.***

However, we thank you for showing interest in doing business with us."

Further, at paragraph 6 of its Replying Affidavit, the Respondents depone that they are seeking a re-tender on the basis that there is a change of scope of the tender. This was first introduced in the Replying Affidavit filed herein and was not captured in the evaluation report dated 14th April 2021, the Professional Opinion dated 14th April 2021 neither was this reason disclosed to bidders.

Evidently, the Applicant was not furnished with all the specific reasons why its bid was non-responsive because the Applicant was not informed that ***it did not provide a financial breakdown as per the activity/work plan.*** Further, the Applicant was not informed of the reason why the subject tender would be re-tendered.

As already established by the Board, the reason that was disclosed to the Applicant was derived from extraneous criteria that does not form part of the procedures and criteria in the Tender Document as already established by the Board.

Article 227 (1) of the Constitution provides that:

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

The Applicant's letter of notification of unsuccessful bid cannot stand because; the 2nd Respondent did not disclose all the specific reasons why the Applicant's bid was unsuccessful. Secondly, the reason disclosed to the Applicant related to an extraneous criterion that was not provided in the Tender Document. Thirdly, the Applicant was not informed of the reason (s) why the subject tender would be re-tendered and the allegation on "**change of scope**" was not disclosed to the Applicant in its letter of notification. These are instances where the 2nd Respondent failed to act in a fair and transparent manner.

Accordingly, the Applicant's letter of notification of unsuccessful bid dated 29th April 2021 fails to satisfy the principles of fairness and transparency under Article 227 (1) of the Constitution, thus cannot be allowed to stand.

In determining the appropriate orders to grant as the last issue for determination, the Board observes that the Respondents deposed at

paragraph 3 of their Replying Affidavit that the scope of the subject tender has since changed and they intend to re-advertise the subject tender under the new scope. It is therefore the Respondents' prayer that the Board allows the Respondents to re-advertise the subject tender to capture the new scope of the intended re-tender.

The Board is alive to its findings that the Procuring Entity failed to evaluate the Applicant's bid in accordance with the procedures and criteria set out in the Tender Document since the Evaluation Committee introduced extraneous criteria at the Financial Evaluation Stage. Whereas the Evaluation Committee did not recommend award of the subject tender, the Head of Procurement function recommended a re-tender, thus the stage at which the Applicant's bid was found non-responsive is not specified in the Evaluation Report dated 14th April 2021 or the Professional Opinion dated 14th April 2021.

The Board further notes that an evaluation committee is the one that determines the responsiveness of bidders. Therefore, the reasons why a bidder is found non-responsive is provided in the Evaluation Report. Section 80 (4) of the Act provides that:

"The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation."

On the other hand, the role of the Head of Procurement function is provided in section 84 of the Act as follows:

"(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.

(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.

(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1)."

A Professional Opinion serves as a central aspect between tender evaluation and award recommendation. It is the Board's considered view that the Head of Procurement function ought to have provided guidance to the Evaluation Committee in light of the observations made after evaluating the Applicant's bid at the Financial Evaluation stage. Such guidance would have assisted the Evaluation Committee in ensuring the Applicant's bid is evaluated using the procedures and criteria set out in the Tender Document.

Given that the Board has found the Evaluation Committee applied extraneous criteria whilst evaluating the issue of Proposed Team Experience at the Financial Evaluation Stage, the Head of Procurement ought to have provided guidance to the effect that **“Proposed Team Experience”** formed part of Technical Evaluation and not Financial Evaluation. Further, the Head of Procurement ought to have directed the Evaluation Committee that a bidder can rely on personnel of its joint venture partner in response to the criterion of **“Proposed Team Experience”**. According to Clause 14. Evaluation Method on page 21 of the Tender Document, a score of 20 points was allocated to the Financial Evaluation Criteria. The Procuring Entity would then determine the total points for technical and financial proposals. It was therefore appropriate in the circumstances for the Head of Procurement function to advise the 2nd Respondent to recommend an award to the bidder with the highest combined technical and financial scores because the subject tender is a Request for Proposal tender.

The Board has considered the Respondent’s prayer urging the Board to allow the Respondents to re-advertise the subject tender so as to capture the new scope of the intended re-tender. In the Board’s view, this prayer is not justified because the Respondents never furnished any evidence to the Board demonstrating the subject tender was terminated in accordance with the substantive and procedural requirements of section 63 of the Act so as to pave way for a re-tender of the same services. Furthermore, the Respondent did not furnish any evidence to the Board demonstrating the how the scope of the subject tender has changed.

In any case, having found the Applicant's bid was not properly evaluated, any action undertaken thereafter emanating from an unlawful evaluation cannot be allowed to stand because such actions are consequently null and void.

The averment that **"there has been a change of scope"** was raised during the Request for Review proceedings to the detriment of bidders who participated in the subject tender who were never informed of the specific reasons why the subject tender would be retendered. It therefore disenfranchises bidders for them to learn that a tender in which they participated was re-tendered without being informed whether such a re-tender emanates from a termination that satisfies the statutory pre-conditions set out in section 63 of the Act. Evidently, the Respondents' actions go against the principles of fairness and transparency provided in Article 227 (1) of the Constitution.

Having considered the role of the Head of Procurement function under section 84 of the Act, the Board notes that the head of procurement function does not evaluate tenders with a view of determining whether they are responsive or non-responsive, but advises the Accounting Officer on the Evaluation Committee's evaluation and recommendation.

Having found the Procuring Entity found the Applicant's bid non-responsive contrary to the provisions of the Tender Document read together with section 80 (2) of the Act, the Board deems it necessary to order the 2nd Respondent to direct the Evaluation Committee to re-instate the Applicant's tender back into the procurement process and to recommend award of the subject tender in accordance with Clause 14.

Evaluation Method on page 24 of the Tender Document, taking into consideration, the Board findings in this Review. In concluding the subject procurement process, the Accounting Officer of the Procuring Entity must ensure all bidders are notified of the specific reasons of the outcome of evaluation of their bids.

In totality, the Request for Review succeeds in terms of the following specific orders:

FINAL ORDERS

In exercise of the powers under section 173 of the Act, the Board makes the following orders:

- 1. The Procuring Entity's Accounting Officer's Letters of Notification dated 29th April 2021 with respect to Tender No: CGK/ICT/ 01/2020-2021 for Consultancy Services for the Development of Automation and Digitization Roadmap addressed to the Applicant and all other tenderers who participated in the subject procurement proceedings, be and are hereby cancelled and set aside.**
- 2. The Procuring Entity's Accounting Officer is hereby ordered to direct the Evaluation Committee to re-instate the Applicant's tender back into the procurement process and to recommend an award of Tender No: CGK/ICT/ 01/2020-2021 for Consultancy Services for the Development of Automation and Digitization Roadmap to the bidder with the highest combined technical and financial proposal in accordance with Section 86 (1) (b) of the Act.**

- 3. Further to Order No. 2 above, the Accounting Officer of the Procuring Entity is hereby directed to ensure that the procurement proceedings in Tender No: CGK/ICT/01/2020-2021 for Consultancy Services for the Development of Automation and Digitization Roadmap proceed to its logical conclusion, including the making of an award and issuance of notification of the outcome of the subject tender to all tenderers within fourteen (14) days from the date of this decision.**
- 4. Each party shall bear its own costs in the Request for Review**

Dated at Nairobi this 26th day of May 2021

**CHAIRPERSON
PPARB**

**SECRETARY
PPARB**