

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 98/2021 OF 6th July 2021

BETWEEN

**KENSUN ENTERPRISES (JV GUANGDONG DIOUS FURNITURE
INDUSTRY CO. LTD) APPLICANT**

AND

**THE ACCOUNTING OFFICER,
PARLIAMENTARY JOINT SERVICES,
PARLIAMENTARY SERVICE COMMISSION..... 1ST RESPONDENT
PARLIAMENTARY JOINT SERVICES,
PARLIAMENTARY SERVICE COMMISSION..... 2ND RESPONDENT**

Review against the decision of the Accounting Officer of Parliamentary Joint Services, Parliamentary Service Commission in respect to Tender No. PJS/018/2020-2021 for Supply, Delivery, Installation and Commissioning of Office Furniture Systems for the Multi-Storey Office Block for The Kenya National Assemblies.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Joseph Gitari | -Member |
| 3. Mr. Nicholas Mruttu | -Member |
| 4. Ms. Phyllis Chepkemboi | -Member |
| 5. Ms. Rahab Robi Chacha | -Member |

IN ATTENDANCE

Mr. Stanley Miheso

-Holding brief for the Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

Parliamentary Service Commission (hereinafter referred to as the "Procuring Entity") invited sealed tenders for Tender No. PJS/018/2020-2021 for Supply, Delivery, Installation and Commissioning of Office Furniture Systems for the Multi-Storey Office Block for The Kenya National Assemblies (hereinafter referred to as the "subject tender") through an Invitation to Tender Notice published in the Daily Nation Newspaper, the Standard Newspaper, on the Procuring Entity's website (www.parliament.go.ke) and the IFMIS portal (www.supplier.treasury.go.ke) on 8th April 2021.

Pre-tender Meeting and Site Visit

The Procuring Entity carried out a pre-tender meeting on 27th April 2021 at the ground floor of Protection House attended by forty-three (43) representatives from different prospective tenderers' firms. Prospective tenderers were allowed to seek clarifications on the Tender Document.

Addendums

Through Addendum 1 dated 29th April 2021 the Procuring Entity revised the Tender Document based on clarification sought by prospective tenderers in the pre-tender meeting. Through Addendum 2 dated 7th May 2021 the tender submission deadline was extended to 25th May 2021.

Tender Submission Deadline and Opening of Tenders

The initial tender submission deadline was 10th May 2021 but the same was extended to 25th May 2021 through Addendum 2 dated 7th May 2021. The Procuring Entity received a total of fifteen (15) tenders by the tender submission deadline of 25th May 2021. The said tenders were opened in the presence of tenderers' representatives by a Tender Opening Committee and recorded as follows: -

1. M/s Kensun Enterprises in a joint venture with M/s Guangdong Dious Furniture Industry Co. Ltd
2. M/s Fairdeal Furniture Ltd
3. M/s Victoria Furnitures Limited
4. M/s Winget Investments
5. M/s Zadok Furniture Systems Ltd in a joint venture with M/s EAKO Holdings Ltd
6. M/s Sai office Supplies Ltd
7. M/s Narella Holdings Limited in a joint venture with M/s Ashut Engineers Limited
8. M/s Tile and Carpet Center Ltd
9. M/s Swiss Grade Consult Ltd
10. M/s China Gansu International Corporation for Economic and Technical Cooperation Kenya Company Limited in a joint venture with M/s China Gansu International Economic and Technical Cooperation Co. Ltd
11. M/s China Jiangxi International Kenya Ltd
12. M/s Furniture Elegance Limited

13. M/s Bevaj Furniture Ltd. in a joint venture with M/s Gopi Furniture and Joinery Ltd
14. M/s Panesar's Kenya Limited
15. M/s China Furniture (Kenya) Limited

Evaluation of Tenders

The Evaluation Committee evaluated tenders in the subject tender in the following five stages: -

- i.** Compliance with Mandatory Requirements;
- ii.** Compliance with Technical Specifications;
- iii.** Compliance with Technical Specifications on capacity to deliver the contract;
- iv.** Financial Evaluation; and
- v.** Due diligence.

Compliance with Mandatory Requirements

At this stage of evaluation, the Procuring Entity's Evaluation Committee (hereinafter referred to as the "Evaluation Committee") evaluated tenders to ensure they are substantially responsive to the criteria set out in Stage 1: Determination of Responsiveness of the Appendix to Instructions to Tenderers at page 22 of the Tender Document. Two (2) tenders were found responsive whilst thirteen (13) tenders were found non-responsive at this stage. The Applicant's tender was among the thirteen (13) tenders that were found non-responsive at this stage of evaluation. The two tenders found responsive at this stage were those submitted by M/s Narella Holdings

Limited in a joint venture with M/s Ashut Engineers Limited and M/s China Gansu International Corporation for Economic and Technical Cooperation Kenya Company Limited in a joint venture with M/s China Gansu International Economic and Technical Cooperation Co. Ltd.

Compliance with Technical Specifications

The Evaluation Committee evaluated the two (2) tenders that proceeded for evaluation at this stage against the criteria set out in Section V- Technical Specifications at page 23 of the Tender Document where both tenders were found responsive and proceeded to the next stage of evaluation.

Compliance with Technical Specifications

The Evaluation Committee evaluated the two tenders for compliance with the criteria set out in Stage 3: Technical Evaluation on Capacity to Deliver the Contract of the Appendix to Instructions to Tenderers at page 23 of the Tender Document. Tenders were required to attain a minimum score of 80% in order to proceed to the next stage of evaluation. The tender submitted by M/s China Gansu International Corporation for Economic and Technical Cooperation Kenya Company Limited in a joint venture with M/s China Gansu International Economic and Technical Cooperation Co. Ltd was found non-responsive whilst the tender submitted by M/s Narella Holdings Limited in a joint venture with M/s Ashut Engineers Limited was found responsive thus proceeded to the next stage of evaluation having scored 99.6% at this stage of evaluation.

Financial Evaluation

At this stage, the Evaluation Committee evaluated the remaining tender against the Criteria Set out in Stage 4: Financial Evaluation of the Appendix to Instructions to Tenderers at page 24 of the Tender Document. The tender submitted by M/s Narella Holdings Limited in a joint venture with M/s Ashut Engineers Limited was found responsive at this evaluation stage as the lowest evaluated responsive tender at the sum of Kshs. 1,297,436,170.00.

Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Narella Holdings Limited in joint venture with M/s Ashut Engineers Limited at the sum of Kshs. 1,297,436,170.00 having submitted the lowest evaluated responsive tender.

Professional Opinion

In a professional opinion dated 14th June 2021 (hereinafter referred to as the "Professional Opinion"), the Chief Procurement Officer reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders. He opined that the sum of Kshs. 1,297,436,170.00 was over the budget set for the subject tender of Kshs. 840,000,000.00 a difference of 54.4% above the allocated budget and that competitive negotiations under the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the "Act") could not be applied because available budget has been exceeded by more than 25%. He therefore recommended termination of the subject procurement proceedings. The 1st Respondent

approved the Professional Opinion, thus terminating the subject procurement proceedings on 14th June 2021.

Termination Notice

In letters dated 23rd June 2021 the 1st Respondent notified tenderers of the outcome of evaluation of their respective tenders and further, of termination of the procurement proceedings of the subject tender.

REQUEST FOR REVIEW

The Applicant filed a Request for Review dated 6th July 2021 and filed on even date together with a Supporting Affidavit sworn by Navdeep Singh Mehta on 6th July 2021 and a Further Affidavit sworn by Navdeep Singh Mehta on 15th July 2021 through the firm of Kosgei, Muriuki & Koome Advocates, seeking the following orders as paraphrased hereinbelow:

- 1. An order that the Procuring Entity's Letters of Notification dated 23rd June 2021 purporting to adjudge the Applicant's tender as nonresponsive be cancelled and set aside;**
- 2. An order that the Respondent's Letters of Notification dated 23rd June 2021 terminating the procurement proceedings in the subject tender addressed to the Applicant herein be cancelled and set aside;**
- 3. An order that the Respondent reinstates the Applicant's tender and re-evaluate it in the Technical and Financial Evaluation stages in compliance with the law and the criteria set out in the tender document;**

- 4. An order that in the alternative to (2) above, the Respondent be directed to award the tender to the Applicant herein;**
- 5. An order for the Respondent to reimburse the Applicant the cost of and incidental to the Request for Review;**
- 6. Such other order as the Board may deem just and expedient.**

In response the Respondents filed a Response on 12th July 2021 through Arnold Angaya, Advocate.

In letters dated 13th July 2021, the Acting Board Secretary notified all tenderers in the subject tender of the existence of the Request for Review. In the said letters, the Acting Board Secretary invited tenderers to submit their responses to the Request for Review.

M/s Zadok Furniture Systems Ltd filed a letter dated 19th July 2021 via email on 21st July 2021 complaining that its tender was not evaluated at the Mandatory Stage of evaluation in accordance with the Tender Document and they ought not to have been found non-responsive at the Mandatory Stage of evaluation and that its tender price was within the acceptable budget.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed that all requests for review applications 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.

The Applicant filed written submissions dated 15th July 2021 and filed on even date whilst the Respondent filed written submissions dated 19th July 2021 on 22nd July 2021.

BOARD'S DECISION

The Board has considered each of the parties' pleadings, written submissions and confidential documents submitted to the Board by the Procuring Entity pursuant to section 67 (3) (e) of the Act and finds the following issues call for determination: -

- 1. Whether the 1st Respondent terminated the procurement proceedings of the subject tender in accordance with section 63 of the Act, thus ousting the jurisdiction of the Board pursuant to section 167(4)(b) of the Act;**

Depending on the determination of the first issue framed for determination;

- 2. Whether the Applicant's tender was evaluated in accordance with the criteria set out in Stage 1: Determination of Responsiveness of the Appendix to Instructions to Tenderers at page 22 of the Tender Document.**

The Board would like to dispense with a preliminary issue before embarking on the issues framed for determination. Zadok Furniture Systems Ltd one of the tenderers in the subject tender filed a letter with the Board complaining of the reasons why its tender was found non-responsive. The Board notes the said complaint was not filed in accordance with section 167 of the Act as

a Request for Review and the same was an attempt by Zadok Furniture Systems Ltd to seek a review through the backdoor without incurring the fees required for filing of the same. In the circumstances, the Board has no jurisdiction to entertain the complaint by Zadok Furniture Systems Ltd and shall refrain from pronouncing itself on the same.

On the first issue framed for determination, the Applicant avers that the Respondent erred in terminating/cancelling the subject tender when in fact there was a responsive tender by the Applicant whose tender sum/price was significantly below the available budget. It is the Applicant's contention that had it not been found non-responsive at the mandatory evaluation stage, it would have been awarded the tender as the lowest evaluated tenderer.

The Respondents on the other hand submitted that they terminated the subject tender in accordance with section 63 of the Act on two grounds (i) that all tenders were non-responsive and (ii) inadequate budgetary provision as the only tenderer whose tender was evaluated at the financial evaluation stage submitted a tender price which was way above the approved budget. The Respondents submitted that the budget allocated for the subject tender was Kshs .840,000,000.00 and the lowest evaluated responsive tenderer had quoted a sum of Kshs. 1,297,436,170.00 and that the Act does not allow for competitive negotiations where the lowest evaluated responsive tender sum exceeded 25% of the budget. It is the Respondents contention that the lowest evaluated responsive tender sum was in excess of 54.4% of the budget allocated for the subject tender.

Where an Accounting Officer of a Procuring Entity terminates procurement proceedings in accordance with section 63 of the Act, the jurisdiction of the Board is ousted by dint of section 167(4)(b) of the Act because a tenderer, who claims to have suffered or to risk suffering, loss or damage due to such termination, cannot seek administrative review from the Board. Section 167(4)(b) of the Act provides as follows:-

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

(a);

(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and

(c)

Section 63 of the Act provides as follows: -

(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement have been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer."

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.

A reading of section 63 of the Act provides for substantive and procedural requirements that have to be met for a termination of procurement proceedings to be said to have been done in accordance with section 63 of the Act and for the jurisdiction of the Board to be ousted by dint of section 167(4)(b) of the Act.

The statutory pre-conditions for termination of procurement proceedings requires this Board to consider both substantive and procedural

requirements for such termination to be deemed to have taken place in accordance with section 63 of the Act.

In **Republic v. Public Procurement Administrative Review Board & another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR**, the court held that: -

"In a nutshell therefore, the procuring entity is under duty to place sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Procuring Entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of section 63 of the Public Procurement and Asset Disposal Act, 2015"

The Board will now proceed to interrogate the manner in which the procurement proceedings of the subject tender was terminated. If the Board finds the procurement proceedings with respect to the subject tender was done in accordance with section 63 of the Act, then its jurisdiction will be ousted and will therefore not proceed to determine the second issue framed for determination. On the other hand, if the termination of the procurement proceedings for the subject tender was not done in accordance with section 63 of the Act, the Board will proceed to determine the second issue framed for determination because its jurisdiction will not have been ousted by a termination that was not done in accordance with section 63 of the Act.

The Board has carefully studied the Evaluation Report dated 11th June 2021, which forms part of confidential documents and notes the Evaluation Committee recommended award of the subject tender to M/s Narella Holdings Limited in joint venture with M/s Ashut Engineers Limited at the sum of Kshs. 1,297,436,170.00 having submitted the lowest evaluated responsive tender. However, the Chief Procurement Officer in his professional opinion advised the 1st Respondent, which advise the 1st Respondent accepted, to terminate the procurement proceedings for the subject tender on the basis that the tenderer recommended for award had quoted Kshs.1,297,436,170.00 as its tender sum, which sum was 54.4% above the allocated budget of Kshs.840,000,000.00 for the subject tender. Based on this, the Chief Procurement Officer further advised the 1st Respondent that since the tenderer recommended for award had provided a tender sum that was above 25% of the budget allocated for the subject tender competitive negotiations could not be applied.

The 1st Respondent vide a letter dated 23rd June 2021 notified the Applicant of the reason why its tender was found non-responsive and further, that the subject tender was terminated because all bidders were non-responsive in line with section 63(1)(f) of the Act. The said notification letter dated 23rd July 2021 reads as follows:-

"TERMINATION NOTICE

SUPPLY, DELIVERY INSTALLATION AND COMMISSIONING OF OFFICE FURNITURE SYSTEMS FOR THE MULTI-STOREY OFFICE BLOCK – PJS/018/2020-2021

The above captioned tender refers.

Following the conclusion of the procurement process, we regret to inform you that your tender was not successful due to the reasons cited below: -

- You did not attach your manufacturer's ISO 21015:2007 Certificate or equivalent Kenya Bureau of Standards Quality for Office Chairs and
- Your attached bid bond was not valid for 210 days from the date of tender opening. The bid bond is valid up to 6th December, 2021.

We wish to disclose that all bidders were non-responsive. The above tender has therefore been terminated under Section 63 (i) as the only bidder who qualified to be evaluated at the financial stage, quoted a tender price of Kshs. 1,297,436,170.00 (One Billion, Two Hundred and Ninety-Seven Million, Four Hundred and Thirty-six Thousand, One Hundred and Seventy Only) inclusive of all taxes which was more than 25% above the available budget of the commission of Kshs. 840 million (Eight Hundred and Forty Million) and was therefore non-responsive due to inadequate budgetary provision.

Thank you for responding to our invitation and look forward to your participation in our future tenders.

Yours faithfully."

It is clear from the notification letter dated 23rd June 2021, the 1st Respondent terminated the procurement proceedings of the subject tender on two grounds namely, (i) all evaluated tenders were non-responsive being one of the available conditions allowed for termination under section 63(1)(f) of the Act and (ii) the only tenderer whose tender made it to the financial evaluation stage, submitted a tender price that was more than 25% above the available budget for the subject tender.

The Board has hereinbefore noted that the Evaluation Committee recommended award of the subject tender to M/s Narella Holdings Limited in joint venture with M/s Ashut Engineers Limited at Kshs 1,297,436,170.00 having submitted the lowest evaluated responsive tender. It was therefore not correct for the 1st Respondent to notify the Applicant that all tenders were non responsive when in essence one tender was found to be responsive at all stages of evaluation and recommended for award by the Evaluation Committee but could not be awarded because the tender price quoted therein was 25% above the budget allocated for the subject tender. On this reason alone, the Board finds the notification letter of 23rd June 2021 gave one erroneous reason for termination of the procurement proceedings of the subject tender.

The reason for termination of the subject procurement proceedings under section 63 (1)(f) of the Act was therefore not available for the 1st Respondent to anchor his termination of the procurement proceedings of the subject tender.

Where only one tender is found responsive to proceed to the financial evaluation stage and subsequently found to be the lowest evaluated responsive tender but cannot be awarded due to its tender sum being above the allocated budget for such a tender, the reason for termination of such procurement proceedings would be inadequate budgetary provision under section 63(1)(b) of the Act and not under section 63(1)(f) of the Act.

It is worth noting, there are circumstances where an Accounting Officer is allowed to consider competitive negotiations in instances where the lowest evaluated price is in excess of available budget as provided in section 131 (c) read together with section 132(1)(b), (2), (3), (4) and (5) of the Act which provide as follows: -

131. Competitive Negotiations

An accounting officer of a procuring entity may conduct competitive negotiations as prescribed where—

(a);

(b);

(c) the lowest evaluated price is in excess of available budget; or

(d)

132. Procedure for Competitive Negotiations

(1) In the procedure for competitive negotiations, an accounting officer of a procuring entity shall—

(a);

(b) identify the tenderers that quoted prices above available budget; or

(c)

(2) In the case of tenderers that quoted above the available budget, an accounting officer of a procuring entity shall—

(a) reveal its available budget to tenderers; and

(b) limit its invitation to tenderers whose evaluated prices are not more than twenty five percent above the available budget.

(3) An accounting officer of a procuring entity shall request the identified tenderers to revise their tenders by submitting their best and final offer within a period not exceeding seven days.

(4) The revised prices shall not compromise the quality specifications of the original tender.

(5) Tenders shall be evaluated by the evaluation committee appointed in the initial process.

In the circumstances of the subject review, the quoted tender sum of the only tenderer whose tender made it to the financial evaluation stage was allegedly 54.4% more than the budget allocated for the subject tender thus competitive negotiations were not available for application by the 1st Respondent.

The Applicant did not challenge the budget amount of Kshs. 840,000,000.00 allocated for the subject tender. The Board finds the same is uncontroverted.

However, the Applicant's contention is that it was wrongfully found non-responsive at the compliance with mandatory requirement stage and that if it had been found responsive, its tender price was significantly below the budget allocated for the subject tender. The issue whether the Applicant's tender was evaluated in accordance with the criteria set out in Stage 1: Determination of Responsiveness of the Appendix to Instructions to Tenderers at page 22 of the Tender Document will only be handled after the Board finds that it has jurisdiction.

The Board studied all the confidential documents but did not find any written report on termination of the procurement proceedings of the subject tender with reasons for such termination that had been submitted to the Public Procurement Regulatory Authority (hereinafter referred to as the "Authority") in accordance with section 63(2) and (3) of the Act. In the absence of this written report, the Board finds termination of the proceedings of the subject tender was not procedurally done. Section 63 (2) and (3) of the Act imposes an obligation upon an accounting officer of a Procuring Entity to submit a written report on termination to the Authority with reasons within fourteen (14) days from the date of termination. In the subject review, this ought to have been done within 14 days of approval of the Professional Opinion by the 1st Respondent. There is no evidence submitted to the Board showing the 1st Respondent complied with the procedural requirements under section 63 (2) & (3) of the Act.

In the circumstances, the Board finds the 1st Respondent did not terminate the procurement proceedings for the subject tender in accordance with

section 63 of the Act, thus the Board has jurisdiction to hear and determine the subject review.

On the second issue for determination, the Applicant contends that contrary to the reason of non-responsiveness embodied in the notification letter of 23rd June 2021, the Applicant submitted a responsive tender that complied with all the eligibility and other mandatory requirements set out in the Tender Document. It is the Applicant's contention that one of the partners of its joint venture, Ms. Guangdong Dious Furniture Industry Co Ltd (who the 1st Respondent indicated had not supplied a Tax Compliance Certificate or its Equivalent or a self-declaration in line with mandatory requirement 3 (hereinafter referred to as "MR3")), is a company duly incorporated in 2004 in the Republic of China and is duly compliant for tax purposes.

The Applicant further contends that, Ms. Guangdong Dious Furniture Industry Co Ltd is not a company incorporated in Kenya and could not be expected to supply a tax compliance certificate issued by Kenya Revenue Authority as it is not a tax resident for purposes of taxation in Kenya. Further, that it submitted a Unified Social Credit Code which is the Equivalent of a Tax Compliance for Ms. Guangdong Dious Furniture Industry Co Ltd that suffices as official authority confirming the tax compliance status of an entity within the Republic of China. It was the Applicant's submission that the Respondents ought to have sought clarification in accordance with section 81 of the Act and the Tender Document or inquired about the same or proceeded to evaluate the Applicant in the next stages (Technical and Financial Evaluation) to later confirm the position at the final Due Diligence

stage permitted under section 83 of the Act. The Applicant, further submitted that failure to do so arbitrarily and unfairly led to the inevitable and premature conclusion that the Applicant's tender was non-responsive with the resultant effect of precluding the Applicant's tender from further evaluation.

The Respondents on the other hand contend that the Tender Document required the Applicant to submit a tax compliance certificate and a business licence incorporation for each of the joint venture partners, however, the Applicant submitted a Unified Social Credit score which is prima facie a Business Licence of Incorporation and was evaluated as such by the Evaluation Committee.

Section 80(2) of the Act prescribes the manner in which evaluation and comparison of tenders should be conducted and provides as follows: -

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

The Board has carefully studied the Tender Document of the subject tender and notes the criteria for evaluation set out in Stage 1: Determination of

Responsiveness of the Appendix to Instructions to Tenderers at page 22 of the Tender Document provided for the mandatory requirements to be met as follows: -

- MR1. Registration/Incorporation certificate. In case of a joint Venture, all parties must submit and attach a duly signed & executed joint venture agreement;**
- MR2. Power of Attorney delegating authority to the signatory of the tender to commit the tenderer and in joint venture, a party to the joint venture should be nominated to commit on behalf of the whole team;**
- MR3. Bidders shall provide valid tax compliance and PIN certificates. In case of a joint venture all parties must submit a valid tax compliance certificate or its equivalent. In an absence of tax compliance certificate in the country of origin (for foreign companies), then a self-declaration must be provided by the candidates;**
- MR4. Financial Capability – The bidder shall provide proof in form of certified audited accounts for the last three (3) financial years of the bidder with a turnover of at least Kshs. 500 million per years (2017, 2018 and 2019). In the event of a joint venture, only one of the partners shall meet this requirement and submit the certified audited accounts;**
- MR5. Certificate issued to Manufacturer that chair mechanisms, gas lift and castors meet BIFMA Standard,**

ISO 21015:2007 or equivalent Kenya Bureau of Standards Quality for Office Chairs.; MR6 A signed statement that the bidder is not debarred; In case of a joint venture all parties must submit the statement;

MR7. Duly completed confidential business questionnaire; In case of a joint venture all parties must submit a valid confidential business questionnaire;

MR8. Available Cash in hand and Credit lines of at least Kshs. 500,000,000.00 (attach a letter from a reputable bank and bank statements). In the event of a joint venture, only one of the partners shall meet this requirement and submit the letter from a reputable bank;

MR9. Manufacturer authorization letter (the manufacturer authorisation form shall be in the format provided). In the event of joint venture only one of the partners shall meet this requirement;

MR10. Submission of a tender security in the form of a bank guarantee of Kshs. 8 million valid for a period of 210 days from the date of tender opening;

MR 11. The original and (1) copy of tender documents should be properly Tape Bound and paginated in the correct sequence and all pages must be initialled/signed/stamped. NB: Spiral Binding and use of Spring or Box Files will not be allowed and will result in automatic disqualification;

- MR 12. Submission of valid CR12 form showing the list directors /shareholding (issued within the last 1 year) or National Identity Card for Sole Proprietor, in case of a joint Venture, all parties must submit a CR 12;**
- MR 13. Letter of authority to seek references from the Tenderer's bankers;**
- MR 14. Duly filled and signed Anticorruption declaration;**
- MR 15. Dully filled and signed form of tender; and**
- MR 16. Details of any current litigation or arbitration proceedings in which the bidder is involved as one of the parties**

Mandatory Requirement 1 (MR1) in the tender document reads as follows;

"Registration/Incorporation certificate. In case of joint venture, all parties must submit and attach a duly signed & executed joint venture agreement;"

While Mandatory Requirement 3 (MR3) in the tender document reads as follows:-

"Bidders shall provide valid tax compliance and PIN certificates. In case of a joint venture all parties must submit a valid tax compliance certificate or its equivalent. In an absence of tax compliance certificate in the country of origin (for foreign

companies), then a self-declaration must be provided by the candidates;”

Tenderers were required to submit a registration/incorporation certificate. Where a partner of a joint venture tenderer was a foreign company, like Ms. Guangdong Dious Furniture Industry Co Ltd, such a foreign company was required to submit a valid tax compliance certificate or its equivalent or a self-declaration in the absence of a tax compliance certificate in the country of origin of the foreign company.

The Board has perused the Applicant’s original tender and notes that in satisfaction of MR1, the Applicant submitted a Certificate of Registration No. 108882 for Kensun Enterprises Limited dated 2nd May 1985 and a Business Licence Incorporation No. 30-2 dated 5th May 2019 for Guangdong Dious Furniture Industry Co. Ltd at pages 7 and 8 respectively of the Applicant’s original tender.

In satisfaction of MR3, the Applicant submitted a copy of a PIN certificate number A002356156V dated 7th October 2015 and a copy of a valid Tax Compliance Certificate dated 12th May 2021 from Kenya Revenue Authority for Kensun Enterprises Limited at page 15 of the Applicant’s original tender. However, with respect to Guangdong Dious Furniture Industry Co. Ltd, the Applicant submitted a copy of the Business License of Incorporation No. 30-2 dated 5th May 2019 (the same that was submitted on page 8 of its original tender in satisfaction of MR1) on page 17 of its original tender in satisfaction of MR3.

The said Business License of Incorporation reads as follows: -

“Unified social credit code

91442000770978582P **BUSINESS LINCENSE OF INCOPORATION**

(duplicate) NO:30-2)

The Enterprise Name Guangdong Dious Furniture Industry Co.
LTD.

Type of Business Limited Lability Corporation (Natural Investment
and holdings) Legal Representative: Huang Shoujin

Business Scope Research, Design, Manufacture, Sell: Office, Hotel
Furniture, Metal Furniture, Home Furniture, School Furniture, Medical
Furniture (not contain medical apparatus and instruments) Plastic
Furniture, Goods Shelf. Storage rack, Book rack; sale: Class 1 Medical
Devices, Carpet, Curtain, lighting; furniture assembly, maintain,
undertake interior decoration project, Graphic Design, import and
export goods or technology (items except for forbidden by law and
administrative regulations)

Registration Authority

Date of Issued: 2019-05-5”

The said Business License of Incorporation contains information on a unified social credit code, the enterprise name, type of business, scope of business, registered capital, date of establishment, term of operation and address of Ms. Guangdong Dious Furniture Industry Co Ltd. There is no information on tax compliance or the same being an equivalent of a tax compliance. Further,

there is no evidence of a self-declaration in the Applicant's original tender to suggest that Ms. Guangdong Dious Furniture Industry Co Ltd's country of origin does not issue a tax compliance certificate or its equivalent. No explanation or evidence was given in the Applicant's original tender to the effect that the Unified Social Credit Code contained in Ms. Guangdong Dious Furniture Industry Co Ltd's Business License of Incorporation is a valid Tax Compliance Certificate or an equivalent of a valid Tax Compliance Certificate. The Evaluation Committee was duty bound to evaluate tenders in accordance with section 80(2) of the Act based on what was submitted before it. In the subject review, the Evaluation Committee had to evaluate Ms. Guangdong Dious Furniture Industry Co Ltd's Business License of Incorporation provided on page 17 of the Applicant's tender in order to satisfy itself whether the Applicant satisfied the requirements of MR3.

It is only during the pendency of the subject review that the Applicant submitted a certificate dated 1st July 2021 in support of its Request for Review evidencing that the Unified Social Credit Code No. 91442000770978582P on the registration certificate is tax compliant. The said certificate reads as follows: -

“ Certificate
(Translation)

We confirm that Guandong Dious Furniture Industry Co. Ltd., Unified Social Credit Code 91442000770978582P, on Registration Certificate if tax compliant.

State Administration of Taxation
Zhongshan Taxation Bureau

Xiaolan Branch

July 1st, 2021

[Seal] State Administration of Taxation,

Zhongshan Taxation Bureau

Xiaolan Branch”

The Board notes the Certificate dated 1st July 2021 does not form part of the Applicant’s original tender, thus was not before the Evaluation Committee during evaluation of the Applicant’s tender. The same was only availed to the Board during the pendency of the subject review and could not have formed part of the Applicant’s original tender because it is dated 1st July 2021 whilst the extended deadline for submission of the subject tender was 25th May 2021. It is the Board’s considered view that the Evaluation Committee could only evaluate the Applicant’s original tender based on the documents submitted by the Applicant by the extended tender submission deadline of 25th May 2021. Allowing the Evaluation Committee to consider the certificate dated 1st July 2021, while evaluating the Applicant’s tender, amounts to allowing the Applicant to modify its tender after the extended tender submission deadline contrary to section 76 of the Act and to the detriment of other tenderers contrary to the principle of fairness enshrined in Article 227(1) of the Constitution. Section 76 of the Act and Article 227 (1) of the Constitution provide as follows: -

Section 76 of the Act

Modification of bids

(1) Before the deadline for submitting tenders, a person who submitted a tender may only change or withdraw it in accordance with the following—

(a) the change or withdrawal shall be in writing; and

(b) the change or withdrawal shall be submitted before the deadline for submitting tenders and in accordance with the procedures for submitting tenders.

(2) After the deadline for submitting tenders, a person who submitted a tender shall not change, or offer to change the terms of that tender.

Article 227 of the Constitution

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.

In ***Miscellaneous application No. 407 of 2021, Republic vs Public Procurement Review Board; Arid Contractors and General Suppliers (Interests Party) ex parte Meru University of Science & Technology [2019]eKLR***, the court held that: -

“an acceptable tender under the Act complies with the specification and conditions of tender as set out in the tender document. Compliance with the mandatory requirements in the tender documents issued in accordance with the Constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that the Procuring Entity of the Review Board or even this court will disregard at whim. To hold otherwise would undermine the demand of equal treatment, transparency and efficiency under the Constitution.”

Further in the case of ***Republic v Public Procurement Administrative Review Board & 3 Others Ex Parte Saracen Media Limited [2018] eKLR*** the court held as follows: -

“it is a universally accepted principle of Public Procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be registered as non-responsive and rejected without further consideration.”

The requirement in MR3 was a mandatory requirement and the Evaluation Committee had an obligation to ensure tenders met the Mandatory requirements in the first stage of evaluation before they could proceed to evaluate such tenders at the technical evaluation stage.

Further, the Board observes that in the Appendix to Instructions to Tenderers, at page 23 of the tender document after the listing of all the mandatory requirements MR1-MR16 there is a Note that states as follows;

"a....."

b. The tenderers who do not satisfy any of the above requirements shall be considered non-responsive and their tenders will not be evaluated further."

Evidently, once a tender was found to be non-responsive for failure to satisfy any of the sixteen (16) mandatory requirements, such a tender would not be evaluated any further.

The Board has already held that the Applicant in satisfaction of MR3 provided a Business License of Incorporation for a foreign company, Ms. Guangdong Dious Furniture Industry Co Ltd a partner of the Applicant's joint venture, which Business License of Incorporation did not indicate it is an equivalent of a tax compliance certificate. Further, the Board has also held that the Certificate dated 1st July 2021 which the Applicant relied on to explain that the Unified Social Credit Code contained in the Business License of Incorporation could not be considered by the Evaluation Committee while evaluating the Applicant's tender because the said Certificate dated 1st July 2021 did not form part of the documents submitted by the Applicant in its tender at the extended tender submission deadline of 25th May 2021. Lastly, the Board has found that the Applicant's original tender does not contain any self-declaration required under MR3 in the absence of a valid tax compliance

certificate in the country of origin of Ms. Guangdong Dious Furniture Industry Co Ltd. In the circumstances, the Board finds the Evaluation Committee evaluated the Applicant's tender in accordance with the criteria set out in Stage 1: Determination of Responsiveness of the Appendix to Instructions to Tenderers at page 22 of the Tender Document by lawfully finding the Applicant's tender non-responsive with respect to MR3.

In view of the board's finding that the 1st Respondent did not terminate the procurement proceedings of the subject tender in accordance with section 63 of the Act because it indicated the wrong reason for termination in the notification letters dated 23rd June 2021 and did not fully comply with the procedural requirements of section 63(2) and (3) of the Act, the Board deems it fit to direct the 1st Respondent to issue fresh letters of notification that contain the reason for termination as inadequate budgetary provision and to adhere with the procedures for termination in section 63 (2) and (3) of the Act. We say so because the Board has already found the Applicant's tender was lawfully found to be non-responsive.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in this Request for Review: -

- 1. The letters of notification dated 23rd June 2021 with respect to Tender No. PJS/018/2020-2021 for Supply, Delivery, Installation and Commissioning of Office Furniture Systems**

for the Multi-Storey Office Block for The Kenya National Assemblies issued to all tenderers by the 1st Respondent be and are hereby cancelled and set aside.

2. The 1st Respondent is hereby directed to issue fresh letters of notification with respect to Tender No. PJS/018/2020-2021 for Supply, Delivery, Installation and Commissioning of Office Furniture Systems for the Multi-Storey Office Block for The Kenya National Assemblies to all tenderers in the subject tender in accordance with section 87 and 63 of the Act within three (3) days from the date hereof taking into consideration the Board's findings in this decision.

3. In view of Order 2, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 27th day of July 2021

**CHAIRPERSON
PPARB**

**SECRETARY
PPARB**