REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 39/2021 OF 23RD MARCH 2021
BETWEEN

FIVE BLOCKS ENTERPRISES LTD.....APPLICANT

AND

MANAGING DIRECTOR,
KENYA BUREAU OF STANDARDS.....ACCOUNTING OFFICER
KENYA BUREAU OF STANDARDS.....PROCURING ENTITY

Review against the decision of the Managing Director of Kenya Bureau of Standards in relation to International Tender No. KEBS/T/012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Spare Parts.

BOARD MEMBERS

1. Ms. Faith Waigwa	-Chairperson
2. Mr. Jackson Awele	-Member
3. Ms. Rahab Chacha	-Member
4. Arch. Steven Oundo, OGW	-Member
5. Qs. Hussein Were	-Member

IN ATTENDANCE

1. Mr. Philemon Kiprop	-Holding brief for the Acting Board Secretary

BACKGROUND TO THE DECISION

The Bidding Process

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

Bid Submission Deadline

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

REQUEST FOR REVIEW NO. 12 OF 2021

M/s Five Blocks Enterprises Limited lodged a Request for Review dated and filed on 1st February 2021 together with a Statement of Support dated and filed on 1st February 2021 and a Reply to the Respondents' Memorandum of Response dated and filed on 12th February 2021, through the firm of Momanyi & Associates Advocates, seeking the following orders: -

i. ***An order annulling the tender in its entirety and terminating/cancelling the procurement process.***
ii. ***An order directing the Procuring Entity to initiate a new procurement process for the subject services that comply with***

the requirements of the Public Procurement and Asset Disposal Act, 2015 and its attendant Regulations, 2020.

iii. An order awarding costs of this Request for Review which was necessitated by the incompetence of the Procuring Entity.

After considering each of the parties' cases, the documents filed before it, including confidential documents filed pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"), the Board issued the following orders on 22nd February 2021 in **PPARB Application No. 12 of 2021, Five Blocks Enterprises v. The Managing Director, Kenya Bureau Standards & Another**: -

1. **The Accounting Officer of the Procuring Entity's Addendum to the Tender Document in International Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts titled 'Extension and Clarification of Tenders' dated 3rd February 2021 be and is hereby cancelled and set aside.**
2. **The Accounting Officer of the Procuring Entity is hereby directed to issue an addendum to amend the Tender document in International Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts to provide for a margin of preference, application of a margin of preference as a criterion**

for evaluation at the financial evaluation stage and at its discretion, provisions to satisfy the requirements for a framework agreement in accordance with section 114 of the Act read together with Regulation 102 and 103 of the Regulations 2020 or to unbundle the tender to provide for lots, within thirty (30) days from the date of this decision, taking into consideration the findings of this Board in this review.

3. **The Accounting Officer of the Procuring Entity is hereby directed to extend the tender submission deadline for a further fourteen (14) days from the date of issuance of the addendum referred to in Order No. 2.**
4. **Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Addendum No. 2

On 10th March 2021, the Procuring Entity issued Addendum No. 2 amending several provisions of the Tender Document and extending the tender submission deadline to 24th March 2021. On 17th March 2021, Momanyi & Associates Advocates acting on behalf of M/s Five Blocks Enterprises Limited addressed a letter to the Managing Director of the Procuring Entity expressing their dissatisfaction with the contents of Addendum No. 2 dated 10th March 2021.

REQUEST FOR REVIEW NO. 39 OF 2021

M/s Five Blocks Enterprises Limited (hereinafter referred to as "the Applicant"), lodged another Request for Review dated 23rd March 2021 and filed on even date together with a Statement in Support of the Request for Review sworn on 23rd March 2021 and filed on even date, a Reply to the Respondents' Memorandum of Response, dated 31st March 2021 and filed on 1st April 2021 and a Supplementary Affidavit sworn on 6th April 2021 and filed on even date, through the firm of Momanyi & Associates Advocates, seeking the following orders: -

1. ***An order annulling the tender in its entirety and terminating the procurement process herein be since it looks like the procuring is unable or not willing to implement the decision of the Board;***
2. ***An order directing the Procuring Entity to issue another Addendum that complies with the Board's orders issued earlier; and***
3. ***An order awarding costs of this Request for Review necessitated by incompetence of the Procuring Entity.***

The Procuring Entity issued a Public Notice in respect of International Tender No. KEBS/T/012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Spare Parts alerting prospective bidders that a Request for Review was filed in respect of the subject tender. The Procuring Entity

further informed bidders that they would be advised on the progress of the tender upon finalization of the Request for Review.

In response to the Request for Review, the Procuring Entity lodged a Respondents' Memorandum of Response dated 29th March 2021 and filed on even date through Ms. Caroline Mokeira Advocate.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate the effects of 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. However, none of the parties filed written submissions.

BOARD'S DECISION

After careful consideration of the parties' pleadings including confidential documents submitted pursuant to section 67 (3) (e) of the Act, this Board finds that the following issues call for determination: -

I. **Whether the Request for Review was filed within the statutory period of 14 days specified in section 167 (1) of the Act to invoke the jurisdiction of the Board.**

Depending on the outcome of the above issue: -

II. Whether the Accounting Officer of the Procuring Entity complied with the orders of the Board rendered on 22nd February 2021 in PPARB Application No. 12 of 2021, Five Blocks Enterprises v. The Managing Director, Kenya Bureau Standards & Another (hereinafter referred to as "Review No. 12/2021").

It is trite law that courts and other decision making bodies can only act when they have jurisdiction to entertain a matter. This has been the finding of our courts in several cases including the following:-

In **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd (1989) K.L.R 1**, Justice Nyarangi held that:-

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

Similarly, in the case of **Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR**, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:

> ***"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question best taken at inception. "***

To establish whether or not it has jurisdiction, the Board finds it important to establish from what such jurisdiction flows. In the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** the Supreme Court held that:-

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

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

> ***"27. Establishment of the Public Procurement Administrative Review Board***
>
> ***(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."***

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

"28. Functions and powers of the Review Board

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

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

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

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

At paragraph 3 of the Respondents' Memorandum of Response, the Procuring Entity opposed the jurisdiction of the Board. According to the Procuring Entity, the Applicant's Request for Review lacks basis and amounts to an abuse of the process of the Board, thus the same ought to be struck out and dismissed with costs. To support its submission that the Request for Review was filed out of time, the Respondents aver at paragraph 6 of their Memorandum of Response that the Applicant breached section 175(1) of the Act by seeking review after Twenty-Nine days (29) days.

The Applicant deponed at paragraph 6 of its Supplementary Affidavit that section 167 (1) of the Act allows it to file a Request for Review within fourteen (14) days from the date of occurrence of an alleged breach, thus the Board would have jurisdiction as long as the required timelines are

complied with. To support this submission, the Applicant stated at paragraph 5 of its Reply to the Memorandum of Response that the Addendum in question was issued on 10th March 2021 whereas the Request for Review was filed on 23rd March 2021. In the Applicant's view, the period between 10th March 2021 and 23rd March 2021 conforms to the mandatory period of 14 days required to file a Request for Review, thus the period of 29 days referred to by the Procuring Entity does not suffice.

Having considered parties' rival cases, it is worth pointing out that the jurisdiction of the Board is invoked through section 167 (1) of the Act which states as follows:-

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

Section 167 (1) of the Act directs that a candidate or a tenderer who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity, that may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process.

On the other hand, section 175 (1) of the Act referred to by the Procuring Entity deals with the period for filing judicial review applications at the High Court. The same provides as follows: -

> ***"A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties"***

The Respondents took into account the period between 22nd February 2021 (when the Board rendered a decision in Review No. 12/2021) to 23rd March 2021 (when the Applicant filed the instant Request for Review) to arrive at the conclusion that the instant Request for Review was filed after the lapse of 29 days contrary to section 175 (1) of the Act. The Board finds this position to be erroneous because the period for filing a request for review is provided in section 167 (1) of the Act as fourteen days from notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process.

Having perused the Request for Review, the Board observes that the substantive issue therein is on the question whether the changes introduced through Addendum No. 2 dated 10th March 2021 comply with the orders of the Board in Review No. 12/2021. Given the Applicant has a right to seek administrative review within 14 days from the date of occurrence of an alleged breach of duty, the date under consideration in the instant case is 10th March 2021 when Addendum No. 2 was issued by the Procuring Entity.

Section 57 (a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which deals with computation of time specified in written law states as follows: -

> ***"(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done"***

Section 57 (a) of the Interpretation and General Provisions Act provides that the day an event happens is excluded when computing the time taken for doing an act or thing. This means, 10th March 2021, being the date when Addendum No. 2 was issued is excluded from computation of time. If this date is considered, then the Applicant had up to 24th March 2021 to file a Request for Review.

The date of 10th March 2021 shows the Applicant's Request for Review filed on 23rd March 2021 is still within the statutory period of 14 days specified in section 167 (1) of the Act.

Accordingly, the Board finds that it has jurisdiction to entertain the Request for Review and shall now address the substantive issue framed for determination.

A brief background to the instant Request for Review is that the Procuring Entity advertised the subject tender in the Daily Nation Newspaper and its official website (www.kebs.org.) on 19th January 2021. Shortly thereafter, the Applicant filed a Request for Review on 1st February 2021 challenging

some provisions of the Tender Document. On its part, the Procuring Entity issued an Addendum on 3rd February 2021 extending the bid submission deadline to 25th February 2021.

The Board having considered each of the parties' pleadings including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act, rendered a decision dated 22nd February 2021 in Review No. 12/2021 directing as follows: -

1. **The Accounting Officer of the Procuring Entity's Addendum to the Tender Document in International Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts titled 'Extension and Clarification of Tenders' dated 3rd February 2021 be and is hereby cancelled and set aside.**
2. **The Accounting Officer of the Procuring Entity is hereby directed to issue an addendum to amend the Tender document in International Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts to provide for a margin of preference, application of a margin of preference as a criterion for evaluation at the financial evaluation stage and at its discretion, provisions to satisfy the requirements for a framework agreement in accordance with section 114 of the Act read together with Regulation 102 and 103 of the**

Regulations 2020 or to unbundle the tender to provide for lots, within thirty (30) days from the date of this decision, taking into consideration the findings of this Board in this review.

3. **The Accounting Officer of the Procuring Entity is hereby directed to extend the tender submission deadline for a further fourteen (14) days from the date of issuance of the addendum referred to in Order No. 2.**
4. **Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

It is worth noting that the Board; nullified the Addendum to the Tender Document applicable in the subject tender issued on 3rd February 2021, directed the Accounting Officer of the Procuring Entity to issue an addendum to amend the Tender document applicable in the subject tender to provide for a margin of preference, application of a margin of preference as a criterion for evaluation at the financial evaluation stage and at its discretion, provisions to satisfy the requirements for a framework agreement in accordance with section 114 of the Act read together with Regulation 102 and 103 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") or to unbundle the tender to provide for lots, within thirty (30) days from 22nd February 2021, taking into consideration the findings of the Board Review No. 12/2021. The Board further directed the Accounting Officer of the Procuring Entity to extend the

tender submission deadline for a further period of fourteen (14) days from the date of issuance of the addendum referred to in Order No. 2 of the decision in Review No. 12/2021 and that each party would bear its own costs in Review No. 12/2021.

The salient findings of the Board in respect to Order No. 2 and 3 of the decision in Review No. 12/2021 were as follows: -

- *At page 24 of its decision, the Board found that the services being procured in the subject tender will be performed/implemented in foreign countries (that is, Japan, United Kingdom, United Arab Emirates, South Africa, Singapore, Thailand and Australia listed in Clause 2.1 of the Appendix to Instructions to Tenderers on page 21 of the Tender Document) but the physical and technological infrastructure required to perform the subject services would also be located in a foreign country;*
- *At page 26 of its decision, the Board found that placing a requirement for all foreign tenderers to source 40% of their supplies from citizen contractors would not be practical, when the tender and its implementation thereof is largely dependent on infrastructure and technology situated outside the country;*
- *At page 27 of its decision, the Board observed that out of Kshs. 345,711,805.00 of its available procurement budget, the Procuring Entity allocated 40%, that is, Kshs 138,284,722.00 to what it refers to as 'Buy Kenya Build Kenya' which in essence involves purchase of supplies made in Kenya, demonstrating its commitment to promote the*

local industry in other tenders to be undertaken in the financial year 2020-2021;

- *At page 28 of its decision, the Board found that the Procuring Entity did not breach the provisions of section 157 (9) of the Act read together with Regulation 165 of Regulations 2020 for failure to provide for a mandatory preliminary evaluation criterion in the Tender Document requiring all foreign tenderers to source at least forty percent of their supplies from citizen contractors prior to submitting their tenders, noting that the said provisions may not be applicable in the subject tender and further may be construed as a limitation to the application of preferential treatment envisaged under section 155 (2) of the Act;*
- *At page 34 of its decision, the Board found that, there was no funding for the subject tender from the National Government or County Government or from the Procuring Entity itself and further, the Procuring Entity would not expend money in its performance of the subject tender but would instead earn royalties from its implementation thereof;*
- *At page 35 of its decision, the Board found that the Procuring Entity was not in breach of section 158 of the Act read together with section 157 (8) (a) of the Act and Regulation 163 of Regulations 2020 for failure to provide for exclusive preference to citizen contractors in the Tender Document, noting that the said provisions may not be applicable in the subject tender;*

- *At pages 35 to 37 of its decision, the Board considered the import of Regulation 164 of Regulations 2020 and held that even though the subject tender is an international tender, the same is for the procurement of services intended to be performed/implemented outside the country and will largely depend on infrastructure and technology that is situate in foreign countries. As a result, the Board concluded it would not be necessary to place a margin of preference of the evaluated price of the tender for bidders offering goods manufactured, assembled, mined, extracted or grown in Kenya as the subject tender is for the procurement of services outside Kenya and not goods;*
- *At page 38 of its decision, the Board found that it was possible to apply a margin of preference to a prospective bidder's evaluated tender price if it meets the percentage shareholding of Kenyan citizens as prescribed under Regulation 164 of the Regulations 2020. Such a provision would ensure that any bidders with a percentage shareholding of Kenyan citizens would benefit from a prescribed margin of preference and thus have a better chance to participate in the subject tender;*
- *At page 39 of its decision, the Board found that the Procuring Entity breached the provisions of section 158 of the Act read together with section 157 (8) (b) (ii) of the Act and Regulation 164 of the Regulations 2020 for failure to provide for a margin of preference in the Tender Document;*

- *At page 44 of its decision, the Board found that the Tender Document did not provide for financial evaluation criteria in compliance with Regulation 77 of Regulations 2020, having established the Procuring Entity failed to provide (in its financial evaluation criteria) how it shall apply any margin of preference in the subject tender in accordance with Regulation 77 (2) (d) of the 2020 Regulations;*
- *At page 47 to 48, the Board considered the import of section 114 of the Act and held that a procuring entity may enter into a framework agreement through an open tender for a maximum period of three (3) years if: (i) the procurement value is within the thresholds prescribed under Regulations to this Act, (ii) the required quantity of goods, works or non-consultancy services cannot be determined at the time of entering into the agreement; and (iii) a minimum of seven alternative vendors are included for each category. Further, in its implementation of a framework agreement, a procuring entity may procure through call offs (placing an order made using a framework agreement with one or more contractors, suppliers or consultants for a defined quantity of inter alia services) or though mini-competition among persons who have entered into the framework agreement in the respective category;*
- *At page 57 of its decision, the Board held that the Procuring Entity ought to expressly indicate in its Invitation to Tender of its intention to establish a framework agreement, the number of suppliers or contactors in the said agreement (which should not be less than seven alternative vendors), the evaluation criteria and an estimate of the total*

volume or scope of work to be undertaken for the duration of the framework agreement as required under Regulation 102 (1) of the Regulations 2020; and

- *At page 57 of its decision, the Board held that the Procuring Entity may elect to unbundle the subject tender into lots, with one lot representing a centre in one of the seven (7) countries where the Procuring Entity intends to implement/perform the subject tender. The Procuring Entity would then award the tender with the lowest evaluated price in accordance with section 86 (1) of the Act with respect to each lot, with one tenderer assigned to a specific lot;*

At paragraph 2 of its Request for Review, the Applicant avers that the Procuring Entity breached section 175 (1) of the Act because the orders of the Board in Review No. 12/2021 are final and binding to the Procuring Entity having failed to challenge that decision through Judicial Review proceedings at the High Court. The Procuring Entity on the other hand states at paragraph 6 of the Respondents' Memorandum of Response that the Procuring Entity implemented the orders of the Board issued in Review No. 12/2021.

The Board observes that the Applicant commenced Judicial Review proceedings at the High Court through a Notice of Motion Application dated 8th March 2021 challenging the decision of the Board in Review No. 12/2021. On 15th March 2021, the Honourable Justice Jairus Ngaah granted the Applicant leave to apply for an Order of Certiorari for purposes of quashing of the decision of the Board in Review No. 12/2021. However, the Court did not grant orders of stay of the decision in Review No. 12/2021 and to the

Board's knowledge, the High Court has not quashed the decision in Review No. 12/2021

The Procuring Entity on the other hand, alleged that it took reasonable steps to implement the decision of the Board in Review No. 12/2021. It now behooves upon this Board to determine whether the Accounting Officer of the Procuring Entity complied with the orders of the Board, specifically in relation to the findings in Review No. 12/2021 that the Accounting Officer of the Procuring Entity was required to take into consideration.

A determination of this issue falls squarely on the question whether the Procuring Entity rightfully construed the directions given by the Board through Order No. 2 of the decision in Review No. 12/2021 which required the Accounting Officer to issue an addendum to amend the Tender document applicable in the subject tender to provide for a margin of preference, application of a margin of preference as a criterion for evaluation at the financial evaluation stage and at its discretion, provisions to satisfy the requirements for a framework agreement in accordance with section 114 of the Act read together with Regulation 102 and 103 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") or to unbundle the tender to provide for lots, within thirty (30) days from 22nd February 2021, taking into consideration the findings of the Board Review No. 12/2021.

The Board observes that pursuant to Order No. 2 of the decision in Review No. 12/2021, providing a margin of preference and application of the same as a criterion for evaluation at the Financial Evaluation Stage was mandatory.

However, the Accounting Officer had discretion to make provisions to satisfy requirements on framework agreement or unbundling the tender to provide for lots. This is evident from the salient findings of the Board's decision in Review No. 12/2021 outlined hereinbefore.

Having established it was mandatory for the Accounting Officer to provide a margin of preference in the Tender Document and application of the same as a criterion at the Financial Evaluation Stage, the Board studied the contents of Addendum No. 2 dated 10th March 2021 and notes the following:-

Clause 9 of the said Addendum amended Clause 2.11.2 (C) of the Appendix to Instructions to Tenderers of the Tender Document in the following way:

> ***"An additional Clause No. 5 has been added to cater for margin of preference to Kenyan citizens as per section 164 (d) of the Public Procurement and Disposal Regulations (PPADR) 2020***
>
> ***The clause shall read as follows:***
>
> ***(5) Eight percent (8%) margin of preference where percentage of shareholding of Kenyan citizens is less than fifty percent (50%) but above twenty percent (20%). The base royalty shall be the highest royalty fee given. KEBS indicated royalty fee is fixed.***
>
> ***For example:***
>
> ***International Firm A without Kenyan shareholding has given the highest royalty of USD 40.***

International Firm B without Kenyan shareholding has given royalty of USD 38.

International Firm C with Kenyan shareholding has given royalty of USD 37

Upon calculating, will notice that International Firm B percentage on the base is 5%

International Firm C with Kenyan shareholding percentage on the base is 7.5%

Since International Firm C has Kenyan Shareholding it shall be preferred and awarded

The preference shall not surpass 8%

Note:

i. ***Notarized documentation on proof of shareholding must be presented to qualify for preference application.***
ii. ***Margin of preference shall apply to royalties only"***

Clause 2.11.2 Evaluation Criteria of Section 2.0 Appendix to Instructions to the Tenderers referenced above provided that: -

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

1. ***The proposed inspection fee for used spare parts and mobile equipment shall be at a rate of 0.6% of FOB Value. This shall be subject to a minimum of two hundred***

and sixty-five United States Dollars (USD 265) and a maximum of two thousand seven hundred United States Dollars (USD 2700) exclusive of all applicable taxes.

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

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

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

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

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

Singapore	***220***	***77***
Australia	***250***	***87***

Having considered the provisions of Clause 9 of Addendum No. 2 which amended Clause 2.11.2 (C) of the Appendix to Instructions to Tenderers of the Tender Document, the Board observes that the Procuring Entity specified that the margin of preference applicable would be the one provided in Regulation 164 (d) of Regulations 2020. Regulation 164 of Regulations 2020 prescribes the following: -

> ***"For purposes of section 157(8) (b) of the Act, the margin of preference for international tendering and competition pursuant to section 89 of the Act shall be—***
>
> ***(a) twenty percent (20%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi-processed in Kenya and the percentage of shareholding of Kenyan citizens is more than fifty percent (50%);***
>
> ***(b) fifteen percent (15%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi-processed in Kenya;***
>
> ***(c) ten percent (10%) margin of preference of the evaluated price of the tender, where the percentage***

of shareholding of Kenyan citizens is more than fifty percent (50%);

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

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

As already outlined hereinbefore, the Board in Review No. 12/2021 found it would not be necessary to apply a margin of preference of the evaluated price of the tender for bidders offering goods manufactured, assembled, mined, extracted or grown in Kenya as the subject tender is for the procurement of services outside Kenya and not goods. It therefore follows that Regulation 164 (a) and (b) of Regulations 2020 would not apply in the subject tender. However, application of Regulation 164 (d) of Regulations 2020 to the exclusion of Regulation 164 (c) and (e) of Regulations 2020 goes against the findings of the Board in Review No. 12/2021. This is because application of a margin of preference pursuant to Regulation 164 (c), (d) and (e) of Regulations 2020 depend on a percentage of shareholding of the locals on a graduating scale namely, more than fifty percent (50%) [Regulation

164 (c)], less than fifty percent (50%) but above twenty percent (20%) [Regulation 164 (d)] and above five percent (5%) and less than twenty percent (20%) [Regulation 164 (e)].

The Procuring Entity was not required to elect the application of Regulation 164 (d) to the exclusion of Regulation 164 (c) and (e) of Regulations 2020 locking out firms where Kenyan citizens shareholding is more than fifty percent (50%) and firms where Kenyan citizens shareholding is above five percent (5%) and less than twenty percent (20%) from benefiting from a margin of preference applicable to them. The Procuring Entity ought to have provided for a margin of preference under Regulation 164 (c), (d) and (e) of Regulations 2020 which margin of preference would then be applied during Financial Evaluation pursuant to Regulation 77 (2) (d) of Regulations 2020. Regulations 77 (2) (d) of Regulations 2020 recognizes that **"applying any margin of preference indicated in the tender document"** is one of the components of Financial Evaluation.

To that end, the Board finds that the Accounting Officer of the Procuring Entity excluded application of Regulation 164 (c) and (e) of Regulations 2020 in breach of the Board's finding in Review No. 12/2021.

The second limb of Order No. 2 of the Board's decision in Review No. 12/2021 was discretionary thus giving the Procuring Entity the option to make provisions in the tender document to satisfy the requirements for a framework agreement or to unbundle the tender to provide for lots.

It is worth noting that in Review No. 12/2021, the Procuring Entity already stated that the subject tender is being undertaken through a framework agreement as observed at page 12 of the Board's decision in Review No. 12/2021 as follows: -

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

The Board has also established the Accounting Officer of the Procuring Entity had the discretion of unbundling of the tender to provide for lots in the subject tender. The Board held at page 57 of the decision in Review No. 12/2021 that the Procuring Entity may elect to unbundle the subject tender into lots, with one lot representing a centre in one of the seven (7) countries where the Procuring Entity intends to implement/perform the subject tender. The Procuring Entity would then award the tender with the lowest evaluated price in accordance with section 86 (1) of the Act with respect to each lot, with one tenderer assigned to a specific lot.

The Procuring Entity in this instance elected to provide provisions to satisfy the requirements for a framework agreement as opposed to unbundling the tender into lots hence ought to satisfy the provisions on framework agreement.

The Board at page 51 of the decision in Review No. 12/2021 held that: -

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

It is worth pointing out that the Procuring Entity referred the Board to a Public Notice in respect of International Tender No. KEBS/T/012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Spare Parts (Framework Agreement) alerting prospective bidders that a Request for Review was filed in respect of the subject tender. The Procuring Entity further informed bidders that they would be advised on the progress of the tender upon finalization of the Request for Review. This public notice is not an invitation to tender because an invitation to tender contains the provisions specified in section 74 (1) of the Act. Furthermore, the same is not a notice to Addendum No. 2 because the public notice was alerting the public on

existence of a request for review and further directions that may be given once the request for review proceedings are completed.

Given the Procuring Entity already issued an invitation to tender under Section I of the Tender Document the first time it advertised the subject tender, then it ought to have amended the Invitation to Tender through an addendum expressing its intention to use a framework agreement.

The Board studied the provisions of Addendum No. 2 dated 10th March 2021 but did not find any clause amending the invitation to tender and expressing the Procuring Entity's intention to use a framework agreement.

With respect to other provisions on framework agreement, the Procuring Entity provided at Clause 10 of Addendum No. 2 dated 10th March 2021 the Procuring Entity provided some requirements for framework agreement on awarding to multiple tenderers as follows: -

> "***This is a multiple award tender***
>
> ***KEBS shall award the tender to the tenderer (s) that is (are) responsive to Technical and Financial bids with the highest royalty fee offer subject to a minimum of seven (7) tenderers (service providers). Where bidders tie in technical scores and are financial responsive both shall be awarded"***

It is worth noting that previously, the Procuring Entity provided in Clause 10 of the Appendix to Instructions to Tenderers of the Tender Document that award would be made to a minimum of four (4) tenderers. However, pursuant to Clause 10 of the Addendum issued on 10th March 2021, award

will be made to a minimum of 7 tenderers in accordance with section 114 (1) (c) of the Act as the Board had established in Review No. 12/2021.

Further, the Procuring Entity provided guidance to bidders under Clause 6.3 of Section VI. Description of Services at page 47 of the Tender Document on the projection of motor vehicles previously procured between February 2018 to September 2020, so that bidders would take this into account in quoting for the subject tender. This is permitted by section 114 (1) (b) of the Act in instances where the required quantity of goods, works or non-consultancy services cannot be determined at the time of entering into the framework agreement as observed by the Board in Review No. 12/2021.

According to Clause 2.1 (xvi) of Addendum No. 2, the contract period of the subject tender is three years as required by section 114 (2) of the Act in relation to framework agreements.

The Board when interrogating the award criteria in the subject tender held at pages 56 to 57 of the decision in Review No. 12/2021 as follows: -

> ***"[t]he Board observes from the Tender Document that it is the Procuring Entity's intention that the subject services would be undertaken on behalf of the Procuring Entity in seven countries, that is, Japan, United Kingdom, United Arab Emirates, South Africa, Singapore, Thailand and Australia for a period of three (3) years, with two (2) centres in the United Kingdom, fourteen (14) centres in Japan and one (1) centre each in the United Arab Emirates, Thailand, South Africa,***

Singapore and Australia. <u>It is therefore evident that the scope of work to be undertaken in the subject tender is not only to be performed/implemented in seven different jurisdictions but is also considerably massive and thus may be challenging if not impossible for one tenderer to handle on its own</u>. This is also in view of the fact that eligible tenderers must be inspection companies legally registered to perform the subject services in the said countries and must have the physical and technological infrastructure required to satisfactorily perform the subject services either singly or through subcontractor(s).

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

It is the Board's considered view that the royalty fee can be considered as the evaluated price of a tender in this instance because the royalty fee is a component in determining the successful bidder taking into account the responsive tender with the highest royalty fee. The Procuring Entity provided in Clause 9 of Addendum No. 2 that the margin of preference will be hinged on percentage of Kenyan citizen shareholding and the royalty fee proposed by bidders. Having found that Regulation 164 (c), (d) and (e) of Regulations 2020 are applicable in the subject tender, the Board observes that during financial evaluation, the Procuring Entity shall apply a margin of preference

depending on the percentage of Kenyan citizen shareholding and royalty fee proposed by bidders so as to arrive at the evaluated price in accordance with Regulation 77 (2) and (3) of Regulations 2020.

Having considered the Board's finding in Review No. 12/2021, it is our considered view that the Procuring Entity's action of electing to provide provisions to satisfy the requirements of framework agreement as opposed to unbundling the tender into lots cannot be faulted because in a framework agreement, the Procuring Entity would be entitled to award several successful tenderers (with a minimum of 7 as required by section 114 (1) (c) of the Act) given the expansive scope of work in the subject tender. That notwithstanding, having elected to use framework agreement, then all requirements on framework agreement ought to have been satisfied. The Procuring Entity in this case failed to issue an addendum amending the invitation to tender specifying its intention to establish a framework agreement.

In totality of the second issue, the Board finds that the Accounting Officer of the Procuring Entity failed to fully comply with the orders of the Board in Review No. 12/2021 to the extent that the Accounting Officer (i) failed to issue an addendum amending the invitation to tender specifying its intention to establish a framework agreement and (ii) excluded application of a margin of preference specified in Regulation 164 (c) and (e) of Regulations 2020, which are applicable in the subject tender.

The upshot of the foregoing findings is that the Request for Review succeeds with respect to the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review: -

1) **The provisions of the Accounting Officer of the Procuring Entity's Addendum No. 2 dated 10th March 2021 in so far as it provides for a margin of preference under Clause 9 thereof, amending Clause 2.11.2 (C) of the Appendix to Instructions to Tenderers of the Tender Document for International Tender No. KEBS/T/012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for used Motor Vehicles, Mobile Equipment and Spare Parts, be and is hereby cancelled and set aside.**

   For the avoidance of doubt, the rest of the provisions in Addendum No. 2 dated 10th March 2021 remain valid.

2) **The Accounting Officer of the Procuring Entity is hereby directed to issue an addendum to amend the Tender document in International Tender No. KEBS/T012/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services for Used Motor Vehicles, Mobile Equipment and Spare Parts within seven (7) days from the**

date of this decision, whilst taking into consideration the findings of this Board in this Review, to provide for the following:

a) **The Procuring Entity's intention to establish a framework agreement pursuant to section 114 of the Act; and**
b) **A margin of preference and application of a margin of preference as a criterion for evaluation at the Financial Evaluation stage in accordance with Section 157 (8) (b) of the Act read together with Regulation 164 (c), (d) & (e) and Regulation 77 (2) (d) of Regulations 2020.**

3) **The Accounting Officer of the Procuring Entity is hereby directed to extend the tender submission deadline for a further period of fourteen (14) days from the date of issuance of the addendum referred to in Order No. 2 above.**
4) **Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 12th day of April 2021.

CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**