

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 139/2021 OF 15th NOVEMBER 2021

BETWEEN

ISUZU EAST AFRICA LIMITED APPLICANT

AND

**THE ACCOUNTING OFFICER,
STATE DEPARTMENT OF PUBLIC WORKS,
MINISTRY OF TRANSPORT,INFRASTRUCTURE,
HOUSING, URBAN DEVELOPMENT &
PUBLIC WORKS RESPONDENT**

SIMBA CORPORATION LIMITED 1ST INTERESTED PARTY

DELUXE TRUCKS AND BUSES (EA)

LIMITED 2ND INTERESTED PARTY

Review against the decision of the Accounting Officer of State Department of Public Works, Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works in relation to Tender No. SDPW/SB/006/2021-2023 for the Supply and Delivery of Cranes as and when required for Two Years .

BOARD MEMBERS

- | | |
|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mrs. Irene Kashindi | -Member |
| 3. Dr. Paul Jilani | -Member |
| 4. Qs. Hussein Were | -Member |
| 5. Ms. Isabella Juma | -Member |

IN ATTENDANCE

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

BACKGROUND TO THE DECISION

The Tendering Process

The Respondent herein, invited sealed tenders for Tender No. SDPW/SB/006/2021-2023 for Supply and Delivery of Cranes as and when required for Two Years (hereinafter referred to as the "subject tender") from qualified and eligible tenderers through MyGov newspaper and the Supplies Branch website (www.suppliesbranch.go.ke) on 13th July 2021 under framework contract through open tender. The items to be tendered for were five (5) different types of cranes namely:

1. 30 Ton Hydraulic Crane, 8x4 (hereinafter referred to as 'Item 1')
2. 5 Ton Crane Mounted on a 6x4 Truck (hereinafter referred to as 'Item 2')
3. 7-10 Ton Hydraulic Crane Mounted on a Large 4x2 Low Sided Truck (hereinafter referred to as 'Item 3')

4. 12-15 Ton Hydraulic Crane Mounted on a Large 6x4 Low Sided Truck (hereinafter referred to as 'Item 4')
5. 50 Ton Hydraulic Crane, 8x4 (hereinafter referred to as 'Item 5')

Tender Submission Deadline and Opening of Tenders

The State Department of Public Works, Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works (Supplies Branch) (hereinafter referred to as the 'Procuring Entity') received a total of fifteen (15) tenders by the tender submission deadline of 28th July 2021 at 10:00 am. The tenders were opened shortly thereafter by a tender opening committee in the presence of tenderers' representatives and the following tenderers were recorded as having submitted their respective tenders:

1. Isuzu East Africa
2. Equip Agencies Ltd
3. Transafrica Motors Ltd
4. Intertractor Company Ltd
5. Kenya Trucks and Tractors Ltd
6. Deluxe Trucks and Buses E.A Ltd
7. Toyota Kenya Ltd
8. Simba Corporation Ltd
9. Multi-line Motors Kenya Ltd
10. XCMG East Africa Ltd
11. Rhombus Construction Co. Ltd
12. Rockey Africa Ltd
13. Advanced Tech Agencies Ltd
14. Royal Associates Insurance Brokers
15. Achelis Material Handling Ltd

Evaluation of Tenders

The Procuring Entity's Evaluation Committee (hereinafter referred to as the "Evaluation Committee") evaluated tenders in the following three (3) stages as captured in the report of tender evaluation committee signed by all the members of the Evaluation Committee on 27th August 2021 (hereinafter referred to as the 'Evaluation Report'):

Stage 1: Preliminary Mandatory Evaluation/ Examination;

Stage 2: Technical Evaluation/Responsiveness to Specifications; and

Stage 3: Financial Evaluation.

Preliminary Mandatory Evaluation/Examination

At this stage, the Evaluation Committee applied the criteria outlined in Clause 2.2 Evaluation of Tenders, Preliminary Examination for Determination of Responsiveness of Section III-Evaluation and Qualification Criteria of the Tender Document. At the end of this stage of evaluation, all the fifteen (15) tenders were found responsive thus proceeded to the next stage of evaluation. i.e Responsiveness to Technical specifications/requirements.

Technical Evaluation/Responsiveness to Technical Specifications

At this stage, the Evaluation Committee applied the criteria outlined in Clause 2.2.1 Evaluation of Technical Aspects of the Tender of Section III-Evaluation and Qualification Criteria of the Tender Document read with Clause 1. Technical Specifications of Section V-Schedule of Requirements of the Tender Document and the Forms provided under the Technical Specifications Particulars of the Detailed Technical Specifications and Standards of Section

V-Schedule of Requirements of the Tender Document. At the end of this stage of evaluation, all fifteen (15) tenders were found responsive for various items tendered for as follows and therefore proceeded to the next stage of evaluation:

1. Isuzu East Africa	-Items 2, 3, 4,
2. Equip Agencies Ltd	-Items 2, 3, 4, 5
3. Transafrica Motors Ltd	-Items 3,
4. Intertractor Company Ltd	-Items 2, 3, 4, 5
5. Kenya Trucks and Tractors Ltd	-Items 1, 2, 3, 4, 5
6. Deluxe Trucks and Buses E.A Ltd	-Items 2,
7. Toyota Kenya Ltd	-Items 2, 3, 4,
8. Simba Corporation Ltd	-Items 2, 3,
9. Multi-line Motors Kenya ltd	-Items 1, 2, 3, 4, 5
10. XCMG East Africa ltd	-Items 1, 3, 5
11. Rhombus Construction Co. Ltd	-Item 4, 5
12. Rockey Africa Ltd	-Item 5,
13. Advanced Tech Agencies ltd	-Item 5
14. Royal Associates Insurance Brokers	-Items 2
15. Achelis Material Handling ltd	-Items 2, 3, 4, 5

Financial Evaluation

At this stage, the Evaluation Committee applied the criteria in the Price Evaluation of Section III-Evaluation and Qualification Criteria of the Tender Document read with Financial Evaluation Criteria of Section IV-Tendering Forms of the Tender Document.

Recommendation

The Evaluation Committee recommended the fourteen (14) Tenders for award of different items based on Circular Ref: OP/CAB.39/1A dated 5th

February 2019 on Implementation of Government Motor Vehicle Procurement Policy and Sections 114 and 141 of the Public Procurement and Asset Disposal Act 2015 (hereinafter the "Act") as follows:

1. Isuzu East Africa	-Items 2, 3, 4,
2. Equip Agencies Ltd	-Items 2, 3, 4, 5
3. Transafrica Motors Ltd	-Items 3,
4. Intertractor Company Ltd	-Items 2, 3, 4, 5
5. Kenya Trucks and Tractors Ltd	-Items 1, 2, 3, 4,
6. Deluxe Trucks and Buses E.A Ltd	-Items 2,
7. Toyota Kenya Ltd	-Items 2, 3, 4,
8. Simba Corporation Ltd	-Items 2, 3,
9. Multi-line Motors Kenya Ltd	-Items 1, 2, 3, 4, 5
10. XCMG East Africa Ltd	-Items 1, 3, 5
11. Rhombus Construction Co. Ltd	-Items 4, 5
12. Rockey Africa Ltd	-0
13. Advanced Tech Agencies Ltd	-Item 5
14. Royal Associates Insurance Brokers	-Item 2
15. Achelis Material Handling Ltd	-Items 2, 3, 4, 5

Rockey Africa Ltd's tender was found non-responsive at this stage of evaluation and was not recommended for award of any item of the subject tender.

Professional Opinion

In a Professional Opinion dated 24th October 2021, the Senior Deputy Director, Supply Chain Management, Mr. K. K. Kieti, in his recommendation made, *inter alia*, the following remarks;

"Evaluation of the tenders was carried out by an ad hoc Tender Evaluation Committee appointed by the Accounting Officer vide letter Ref: SDPW/SB/26/202 dated 26th July, 2021. The evaluation was carried out as per criteria set out in the tender document. This is supported by Section 80 of the Act. The successful firm being the firm with the lowest evaluated price was awarded the proposed item."

In Senior Deputy Director, Supply Chain Management's opinion, the tender process met all the tenets of the Act on the process of a Framework agreement through open tender . He further indicated that he concurred with the evaluation committee's recommendation for tender award for the subject tender to M/S Multi-line Motors Kenya Ltd for Item 1 of the subject tender at Duty Paid Unit Price of Kshs.29,000,000.00 and to M/S Achellis Material Handling Ltd for Items 2, 3, 4, and 5 of the subject tender at Duty Paid Unit Price of Kshs.11,368,000.00, 14,384,000.00, 20,880,000.00 and 33,669,000.00 respectively being the tenderers who submitted tenders with the lowest evaluated price .

The Respondent approved the professional opinion on 9th November 2021 while making the following remarks:

"Awarded to the lowest as per the evaluation."

Notification to Tenderers

In letters dated 3rd November 2021 , the Respondent notified all tenderers of the outcome of their respective tenders in the subject tender.

THE REQUEST FOR REVIEW

On 17th November 2021, Isuzu East Africa Limited, the Applicant herein, filed a Request for Review dated 17th November 2021 together with a Supporting Affidavit sworn by Anthony Musyoki, the Manager in charge of the Applicant's Legal Services and the Applicant's Company Secretary, on 17th November 2021 through the firm of Kemboy & Company Advocates, seeking the following orders verbatim:

- 1. The Procuring Entity should furnish the Review Board and the Applicant a Summary of the Evaluation Report in line with Section 67(3) and 80(4) of the Public Procurement and Asset Disposal Act.**
- 2. The Procuring Entity should furnish the Review Board and the Applicant the name of the successful bidder(s) and the reasons thereof.**
- 3. The Procuring Entity should furnish the Review Board and the Applicant the reasons why the Applicant's bid was unsuccessful.**
- 4. The Procuring Entity to request a professional opinion on the summary report of the evaluation committee and furnish the same to the Review Board.**

- 5. The Procuring Entity to re-evaluate all the bids from the bidders including the Applicant's bid and award all the qualifying bidders.**
- 6. To annul the letter of regret issued by the Procuring Entity to the Applicant.**
- 7. The Procuring Entity to award the tender to the Applicant having successfully met all the attendant requirements.**
- 8. Orders as to Costs of this matter.**

Vide letters dated 17th November 2021 the Acting Board Secretary notified the Respondent of the existence of the Request for Review.

The Respondent on 24th November 2021 filed a letter dated 23rd November 2021 responding to the allegations raised by the Applicant in the Request for Review.

Vide letters dated 25th November 2021, the Acting Board Secretary notified tenderers in the subject tender of the existence of the Request for Review while inviting them to supply the Board with any information and arguments touching on the subject tender. Further, the Acting Board Secretary furnished all tenderers with the Board's Circular No. 2/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19.

On 30th November 2021, the 1st Interested Party filed a Notice of Appointment and a Replying Affidavit sworn by Nixon Oduor, the head of

Government sales and leasing of the 1st Interested Party, on 29th November 2021 through the firm of Sagana, Biriq & Co. Advocates. On the same 30th November 2021, the 2nd Interested Party filed a Replying Affidavit sworn by Ameet Shroff, the Managing Director, Motors of the 2nd Interested Party through the firm of Sagana, Biriq & Co. Advocates.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed 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.

APPLICANT'S CASE

The Applicant avers that pursuant to the Respondent's tender advertisement inviting tenders from local assemblers of motor vehicles for Supply and Delivery of Cranes, it submitted a tender that satisfied all the attendant requirements as per the tender specifications. It is the Applicant's averment the subject tender was one where a framework contract was to be issued and as long as a tenderer qualified on all technical grounds, such a tenderer should be awarded. It further avers that its tender was responsive and qualified on all technical grounds, qualifying for an award of the subject tender.

However, it is the Applicant's averment that on 12th November 2021 it received a letter of regret dated 3rd November 2021 and which letter of regret

informed the Applicant that its tender was not successful but failed to disclose the successful tenderer and the reasons as to why the Applicant's tender was unsuccessful in accordance with section 87(3) of the Public Procurement Asset and Disposal Act (hereinafter referred to as the 'Act').

The Applicant avers that Section 114(1) of the Act allows for a procuring entity to enter into a framework agreement open tender if- a minimum of seven alternative vendors are included for each category and believes the Procuring Entity has not fulfilled the same.

RESPONDENT'S CASE

In response to the allegations raised by the Applicant, the Respondent contends that the Evaluation Committee recommended award of the subject tender to a number of tenderers including the Applicant per item. However, it is the Respondent's contention that the Head/SCMS in his professional opinion dissented on the recommendation made by the Evaluation Committee and instead recommended award of the subject tender to the lowest evaluated tenderer in line with Section 38.1 of Section I-Instructions To Tenderers of the Tender Document which requires the subject tender to be awarded to the lowest evaluated tenderer.

It is the Respondent's contention that the subject tender was advertised with the intention of forming a framework agreement through open tender as envisaged in Section 86(1)(a) of the Act read with Section 114 of the Act.

The Respondents contend that while the Applicant's tender was responsive and qualified on technical grounds it was not the lowest evaluated tenderer and was disqualified on this basis. Further, that, the Applicant was informed immediately the letter of notification was signed by the Respondent and there was no discrimination in the timing of the release of award and regret letters. The Respondent admitted not notifying the Applicant of the successful tenderer and reasons why the Applicant's tender was unsuccessful and noted such omission on its part was inadvertent.

The Respondent concludes by stressing that the subject tender was allocated to the lowest tenderer and the Applicant's tender did not qualify in this respect.

1ST INTERESTED PARTY'S CASE

The 1st Interested Party supports the Request for Review. However, it proceeds to allege breach of duty imposed on the Procuring Entity by the Act with respect to a Letter of Regret dated 3rd November 2021 allegedly received by it on 11th November 2021.

The 1st Interested Party avers that it submitted a responsive tender for the subject tender as per the tender specifications and section 77(3) and 79(1) of the Act. Further, that it satisfied all the mandatory requirements and after due evaluation, had a legitimate expectation of being awarded the subject tender having met the set evaluation criteria. It is the 1st Interested Party's averment that the Respondent without any colour of right or justification and

by a letter dated 3rd November 2021, informed it, of its unsuccessful tender. In the opinion of the 1st Interested Party the Letter of Regret contravened Article 227 and 232 of the Constitution because it was not only the most responsive tenderer but it also offered the best price. Further, that the Letter of Regret did not specify (i) the reasons why its tender was unsuccessful and (ii) who the successful tenderer was for the subject tender in contravention of Section 87(3) of the Act demonstrating bad faith and discrimination against the lowest responsive tenderer, that is, the 1st Interested Party. The 1st Interested Party contends that the aforementioned omission renders the procurement process opaque and shrouded in secrecy in contravention of the principles of transparency, fairness, cost-effectiveness enshrined in Articles 10 and 227 of the Constitution read with Section 3 and 87 of the Act making it difficult for the 1st Interested Party to challenge the reasons for award of the subject tender and the subject procurement process.

The 1st Interested Party avers that having submitted a responsive tender, it ought to be awarded the same and further, that it risks suffering loss due to huge expenses incurred towards preparing tenders, where it engaged various technicians on the supply of the tenders due to the short delivery period. Thus, the Procuring Entity's action of finding its tender non-responsive is unfair and unscrupulous and a contravention of the procurement principles.

Finally, the 1st Interested Party prays for the following orders;

- a. The Honorable Board do allow the Request for Review.*
- b. The decision of the Procuring Entity through its letter dated 3rd November 2021 Ref No. SDPW/SB/26 that the 1st Interested Party had not been successful in Tender Number SDPW/SB/006/2021-2023 for Supply and Delivery of Cranes be annulled.*
- c. The decision of the Procuring Entity through its letter dated 3rd November 2021 Ref No. SDPW/SB/26 that the 1st Interested Party had not been successful in Tender Number SDPW/SB/002/2021-2023 for Supply and Delivery of Tippers be annulled.*
- d. The Honorable Board do direct the Procuring Entity to award Tender No. SDPW/SB/002/2021-2023 for Supply and Delivery of Tippers to the 1st Interested Party.*
- e. The Honorable Board do direct the Procuring Entity to award Tender No. SDPW/SB/006/2021-2023 for Supply and Delivery of Cranes to the 1st Interested Party.*
- f. In the alternative, this Honorable Board does re-evaluate the tenders and award the 1st Interested Party in the two tenders Tender No. SDPW/SB/002/2021-2023 for Supply and Delivery of Tippers and Tender No. SDPW/SB/006/2021-2023 for Supply and Delivery of Cranes it bid.*
- g. Costs of and/or incidental to this Review be borne by the Procuring Entity*
- h. Any other orders that deem just and fit in the circumstances.*

2nd INTERESTED PARTY'S CASE

The 2nd Interested Party supports the Request for Review. However, it proceeds to allege breach of duty imposed on the Procuring Entity by the Act with respect to a Letter of Regret dated 3rd November 2021 allegedly received by it on 11th November 2021.

The 2nd Interested Party avers that it submitted a responsive tender for the subject tender as per the tender specifications and section 77(3) and 79(1) of the Act. Further, that it satisfied all the mandatory requirements and after due evaluation, had a legitimate expectation of being awarded the subject tender having met the set evaluation criteria. It is the Applicant's averment that the Respondent without any colour of right or justification and by letter dated 3rd November 2021, informed it, of its unsuccessful tender. In the opinion of the 2nd Interested Party, the Letter of Regret contravened Article 227 and 232 of the Constitution because the 2nd Interested Party was not only the most responsive tenderer but also offered the best price. Further, the Letter of Regret did not specify (i) the reasons why its tender was unsuccessful and (ii) who the successful tenderer was for the subject tender in contravention of Section 87(3) of the Act demonstrating bad faith and discrimination against the lowest responsive tenderer, that is, the 2nd Interested Party. The 2nd Interested Party contends that the aforementioned omission renders the procurement process opaque and shrouded in secrecy in contravention of the principles of transparency, fairness, cost-effectiveness enshrined in Articles 10 and 227 of the Constitution read with Section 3 and 87 of the Act making it difficult for the 2nd Interested Party to

challenge the reasons for award of the subject tender and the subject procurement process.

The 2nd Interested Party avers that having submitted a responsive tender, it ought to be awarded the subject tender and further, that it risks suffering loss due to huge expenses incurred towards preparing its tender, where it engaged various technicians on the supply of the tender due to the short delivery period. Thus, the Procuring Entity's action of finding its tender non-responsive is unfair and unscrupulous and a contravention of the procurement principles.

Finally, the 2nd Interested Party prays for the following orders;

- a. The Honorable Board do allow the Request for Review.*
- b. The decision of the Procuring Entity through its letter dated 3rd November 2021 Ref No. SDPW/SB/26 that the 1st Interested Party had not been successful in Tender Number SDPW/SB/006/2021-2023 for Supply and Delivery of Cranes be annulled.*
- c. The decision of the Procuring Entity through its letter dated 3rd November 2021 Ref No. SDPW/SB/26 that the 1st Interested Party had not been successful in Tender Number SDPW/SB/002/2021-2023 for Supply and Delivery of Tippers be annulled.*
- d. The Honorable Board do direct the Procuring Entity to award Tender No. SDPW/SB/002/2021-2023 for Supply and Delivery of Tippers to the 2nd Interested Party.*

- e. The Honorable Board do direct the Procuring Entity to award Tender No. SDPW/SB/006/2021-2023 for Supply and Delivery of Cranes to the 2nd Interested Party.*
- f. In the alternative, this Honorable Board does re-evaluate the tenders and award the 2nd Interested Party in the two tenders Tender No. SDPW/SB/002/2021-2023 for Supply and Delivery of Tippers and Tender No. SDPW/SB/006/2021-2023 for Supply and Delivery of Cranes it bid.*
- g. Costs of and/or incidental to this Review be borne by the Procuring Entity*
- h. Any other orders that deem just and fit in the circumstances.*

BOARD'S DECISION

The Board has considered all the parties' pleadings filed before it, including confidential documents submitted to it by the Respondent pursuant to Section 67 (3) (e) of the Act and finds that the following issues call for determination: -

- 1. Whether the subject tender requires a minimum of seven alternative vendors for each item being procured as envisaged in Section 114 of the Act read with Section 2 of the Act and Regulations 101 to 106 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as 'Regulations 2020');**

- 2. Whether the Evaluation Committee recommended award of the subject tender in accordance with Clause 38.1 and 40 of Section I- Instructions To Tenderers of the Tender Document read with Section 86(1)(a) of the Act;**
- 3. Whether the Letter of Regret dated 3rd November 2021 addressed to the Applicant by the Respondent complies with the provisions of Section 87(3) of the Act and Regulation 82 of Regulations 2020.**

The Board would like to dispense with a preliminary issue it has noted with respect to the 1st and 2nd Interested Party's Replying Affidavits.

The Board notes, the 1st and 2nd Interested Parties support the Request for Review. However, in addition to such support, they make allegations with respect to breach of duty imposed on the Respondent by the Act when canvassing the legality or lack thereof of Letters of Regret dated 3rd November 2021 addressed to them by the Respondent and further, seek specific orders for award of the subject tender to them.

We note no Request for Review has been filed by the 1st and 2nd Interested Party within fourteen days of receiving the said Letters of Regret outlining breach of duty imposed on the part of the Respondents by the Act or Regulations 2020 as required under Section 167(1) of the Act read with Section 170 of the Act, Regulations 203 of Regulations 2020 and the

Fourteenth Schedule of Regulations 2020 to invoke the jurisdiction of the Board to hear and determine the 1st and 2nd Interested Parties allegations with respect to their respective tenders.

Section 170 of the Act provides for parties to a review as follows:-

170. Parties to review

The parties to a review shall be—

(a) the person who requested the review;

(b) the accounting officer of a procuring entity;

(c) the tenderer notified as successful by the procuring entity;
and

(d) such other persons as the Review Board may determine.

Section 167(1) of the Act provides for who has locus to invoke the jurisdiction of the Board while setting the timelines within which such jurisdiction can be invoked and provides as follows:

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or

the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

The manner in which a request for review is made is prescribed in Regulation 203 of Regulations 2020 which provides as follows-

203. Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

(b) be accompanied by such statements as the applicant considers necessary in support of its request;

(c) be made within fourteen days of—

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

(d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

(4) The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.

The Form set out in the Fourteenth Schedule of Regulations 2020 infers that an Applicant is the person who requests for review of the decision of the procuring entity.

A reading of the aforementioned provisions of the Act infers that an Applicant to a Request for Review, who is a candidate or tenderer and who claims to have suffered or is likely to suffer loss due to breach of duty imposed on a procuring entity by the Act or Regulations, may seek administrative review within fourteen days of notification of award by filing a request for review in the form set out in the Fourteenth Schedule of Regulations 2020 with the

Board Secretary and upon payment of the requisite fees set out in the Fifteenth Schedule to have locus before the Board and invoke the jurisdiction of the Board.

We note, from the confidential documents submitted by the Respondent to the Board, the 1st and 2nd Interested Parties are indeed tenderers having participated in the subject tender and having been notified of the outcome of their tenders vide Letters of Regret dated 3rd November 2021 allegedly received by the 1st and 2nd Interested Parties on 11th November 2021. However, the 1st and 2nd Interested Parties did not seek administrative review within fourteen days of notification of award, which days lapsed on 25th November 2021, by filing a request for review in the form set out in the Fourteenth Schedule of Regulations 2020 with the Board Secretary upon payments of the requisite fees set out in the Fifteenth Schedule with respect to a request for review.

What the 1st and 2nd Interested Parties filed on 30th November 2021 are Replying Affidavits to the Applicant's Request for Review instead of filing their own requests for review. In this instance, the 1st and 2nd Interested Parties are simply interested parties in the instant Request for Review with a limited role of either supporting or opposing the instant Request for Review but cannot seek administrative review with respect to their individual tenders.

We find the 1st and 2nd Interested Parties attempt to seek administrative review with respect to their individual tenders with specific orders for award of the subject tender to them, as trying to file a Request for Review out of time, through the backdoor while avoiding to meet their obligations on payment of the requisite filing fees required in law.

In the circumstances, the Board will not consider the deposition as contained in the 1st and 2nd Respondents Replying Affidavits in so far as they touch on their respective tenders and seek to be awarded the subject tender.

Turning to the first issue framed for determination, we note, the Applicant alleges that the subject tender is one where a framework contract is to be issued and as long as a tenderer qualifies on all technical grounds, their tender should be awarded. Further, the Applicant believes the Procuring Entity has not satisfied the conditions set out in Section 114(1)(c) of the Act requiring a procuring entity to enter into a framework agreement open tender if a minimum of seven alternative vendors are included for each category.

On the other hand, the Respondent contends that the subject tender was advertised with an intention of forming a framework agreement through open tender as envisaged in Section 86(1) read with Section 114 of the Act anticipating framework agreement with one or more contractors who are the lowest evaluated tenderers.

The 1st and 2nd Interested Parties also allege, just like the Applicant, that the subject tender is in the form of framework contract and that an applicant (we believe they meant a tenderer) who provided all the mandatory requirements and satisfied technical requirements should be awarded the contract.

It is important that we first establish what framework agreement is because, the same has been referred to by the Applicant and the Respondent. Thereafter, we shall establish what framework contract is because the same has been referred to by the Applicant and the 1st and 2nd Interested Party before making a determination of the first issue framed for determination.

Section 2 of the Act assigns the meaning of framework agreement as: _

a pact between a procuring entity and a selected supplier (or suppliers) or contractor (contractors) identified for a definite term to supply goods works or service whose quantities and delivery schedules are not definable or determinable at the beginning.

Article 2(e) (i) of United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement 2011 defines Framework Agreement as:

an agreement between the procuring entity and the selected supplier (or suppliers) or contractor (or contractors) concluded upon completion of the first stage of the framework agreement procedure.

The assigned definition of framework agreement infers an arrangement between a procuring entity and a selected successful tenderer (or tenderers) i.e. suppliers or contractors, for a specific term to supply goods, works or service. However, the quantities of goods, works or service to be supplied or their time of delivery is not ascertainable at the time of such an arrangement. Simply put, a framework agreement is a first arrangement between a procuring entity and a successful tenderer(s) as a precursor for a possible future defined engagement for the supply of goods, works and service within a stipulated time frame.

Section 92 read with Section 114 of Part IX – Methods of Procurement of Goods, Works and Services identifies framework agreement as a method of procurement and provides as follows:-

92. Methods of procurement

Subject to this Act and prescribed provisions, an accounting officer of a procuring entity shall procure goods, works or services by a method which may include any of the following—

- (a) open tender;***
- (b)***
- (c)***
- (d)***
- (e)***
- (f)***
- (g)***
- (h)***
- (i)***
- (j)***
- (k)***
- (l) framework agreements; and***
- (m)***

114. Framework agreement

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

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

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

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

(2) The maximum term for the framework agreement shall be three years and, for agreements exceeding one year, a value for money assessment undertaken annually to determine whether the terms designated in the framework agreement remain competitive.

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

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

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

(4) For the purposes of subsection (3)(a), "call-offs order" means an order made using a framework agreement with one or more contractors, suppliers or consultants for a defined quantity of

works, goods, consultancy covering terms and conditions including price that users require to meet the immediate requirements.

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

(6)

(7)

Further features of a framework agreement, *inter alia*, requires a procuring entity (i) to enter into it pursuant to an open tender and (ii) with a minimum of seven alternative vendors for each category as part of what we have hereinbefore referred to as the first arrangement/phase. For a framework agreement to be in place, there must be at least seven alternative vendors for each category after conclusion of the first phase of a framework agreement and should not be for a period of more than 3 years.

The second phase of a framework agreement entails its implementation. In this phase there is a definite procurement. Simply put, the procuring entity procures goods, works and service whose quantity is determinable/ascertainable and whose terms and conditions including price and delivery time frame is specific/ascertainable. This, the procuring entity effects through call-offs order or mini competition among those vendors

(from the minimum seven selected for each category in the first phase) the procuring entity has entered into a framework agreement with, in the respective categories.

Regulation 101 to 106 of Regulations 2020 provide for conditions for use of framework agreement, the procedure to be used, contracts to be entered and procedure for ordering as follows:-

101. Conditions for use of framework agreement method

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

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

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

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

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

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

(b) material corporate governance issues have been detected.

(4) A procuring entity shall not procure using a framework agreement of another procuring entity except for those concluded under institutional frameworks prescribed in the Act and these Regulations.

102. Procedure for framework Agreement

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

(a) that the procuring entity intends to establish a framework agreement;

(b) the number of suppliers or contractors which shall not be less than seven alternative vendors;

(c) the duration of the framework agreement which shall not exceed three years;

(d) the evaluation criteria;

(e) an estimate of the total volume or scope of work or quantity of purchases expected to be made for the duration of the framework agreement, as appropriate; and

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

(2)

(3)

(4) An ad hoc evaluation committee shall be appointed by the accounting officer in accordance with section 46 of the Act.

(5) The bids submitted shall be evaluated in accordance with the provisions of the Act and these Regulations.

(6) The evaluation committee shall apply the evaluation criteria set out in the bid documents when evaluating the bids and the evaluation report shall be submitted to the head of the procurement function.

(7) The head of the procurement function shall prepare a professional opinion and submit it to the accounting officer for consideration prior to the approval and award of the framework agreement.

(8) An accounting officer shall award a contract under the framework agreement in accordance with section 86 of the Act.

103. Contracts under the framework agreement

(1) Parties to a framework agreement entered into under regulation 102 shall not make substantial amendments to the terms specified in that framework agreement when entering into a contract under it.

(2) An accounting officer may award a contract under a framework agreement either through—

(a) call-off orders where the price has been determined in the contract by applying the terms specified without reopening competition; or

(b) inviting mini-competition amongst the suppliers under the framework agreement.

(3) For the purposes of paragraph (2)(a) an accounting officer may from time to time, make a call-off order for goods, works or services based on the procuring entity's needs.

(4) Where an accounting officer awards a contract under framework agreement through the provisions of paragraph (2)(b), the following procedures shall be followed—

(a) for each contract to be awarded, the procuring entity shall invite in writing the suppliers or contractors that have entered into the framework agreement to participate in the mini-competition;

(b) the procuring entity shall give a minimum of three days for bidders to submit their financial bids;

(c) suppliers or contractors shall submit their financial bids in writing;

(d) the procuring entity shall keep the content of the financial bids confidential until the deadline for receiving tenders has expired;

(e) the procuring entity shall award the contract to the tenderer that has submitted the lowest evaluated price on the basis of the award criteria set out in the framework agreement.

104.

105.

106. Procedure for ordering

(1) A procuring entity is not required to advertise or invite quotations from persons not shortlisted under the framework agreement where a framework agreement has been entered into by the procuring entity.

(2) Individual orders shall include all the details required to establish the full cost or price for the delivery of goods, works or services.

(3) Call-off orders shall be within the specific requirements issued within the period of performance in a format provided by the Authority.

(4) Orders may be placed by using electronic means or as specified in the framework agreement.

(5) A procuring entity shall ensure the price or quantities for all the orders does not exceed any ceiling amount stated in the contract.

(6) Orders placed on the basis of a contract under the framework agreements shall contain the following information—

(a) date of order;

(b) agreement number and order number;

(c) for goods and services, contract item number and description, quantity, and unit price;

(d) delivery or performance schedule;

(e) place of delivery or performance (including the details of the consignee, where applicable);

(f) any packaging, packing, and shipping instructions;

(g) method of payment; and

(h) any other information as may be deemed necessary from time to time by the procuring entity.

(7) The requirement of the performance security shall be included in the bid documents and determined by a procuring entity in accordance with value of the orders made.

In light of the aforementioned provisions of law, a framework agreement may be referred to as an “Umbrella agreement.” This is because it sets out the terms that would be applied on any contract that would be awarded under it. Thus, the purpose of a framework agreement is to set out the terms which are to govern the awarding of contracts during a given period. As such, a framework agreement is not a contract by itself.

We infer the rationale for the use of framework agreements is that, with various processes completed and the terms and conditions established before an order is placed, purchases can be made with lower transaction costs and shorter delivery times than would be the case were each purchase tendered for, separately. Consequently, it follows that once a framework agreement is established, the procuring entity is only required to place individual orders with the supplier or suppliers enrolled in the framework when actual need arises. This in turn, reduces the procedural costs involved in conducting each procurement process separately.

Additionally, framework agreements involves a two-face award process. The first stage entails the conducting of tender processes by the procuring entity with the aim of admitting a potential vendor to the framework. Upon receipt of the offers by various vendors, the procuring entity evaluates them against relevant criteria, and subsequently enrolls or admits a vendor (in a single vendor-framework) or vendors (in a multiple-vendors framework) into a contract, which establishes the parties' agreement for the supply of future requirements.

With respect to the second face of award, this is where the procuring entity places order for supplies when the actual need arises. This is done either through call-off order or through inviting mini-competition among the selected vendors. Notably, the choice of the method to be used by the procuring entity depends on the rules of the framework.

In conclusion, the features of a framework agreement can be summarised as follows (i) it is for anticipated procurement of a specific category of goods, works, services whose quantities and delivery schedules cannot be ascertained at the start (ii) must be established through an open competitive procurement process (first phase), (iii) it is entered into between a procuring entity and a minimum of seven alternative vendors included for each category, (iv) it is for a maximum term of three years (v) it is implemented through call-offs order or mini competition from among the selected minimum of seven alternative vendors included for each category (vi) its first phase is not a contract, and does not create any legally binding obligations

(vii) it contains terms and conditions upon which parties agree to contract as and when need arises (viii) there is no obligation on the procuring entity to procure (ix) a vendor has no guarantee of being awarded a call-off contract (x) it prescribes the method and procedure for the second phase (selection of vendor and award of a call-off contract in accordance with Section 86 of the Act), (xi) second phase is not openly advertised, (xii) no contract exists between the parties until a call-off contract is created (xiii) establishes the price mechanism that will apply to establish contract price for each call-off contract (xiv) each call-off contract is governed by its own general and special conditions of contract (xv) call-off contracts can only be used to purchase the specific goods or services for which the framework agreement has been designed.

Having established what framework agreement is, we shall proceed to establish what framework contract is.

Section 2 of the Act assigns the meaning of framework contract as: _

a pact between a procuring entity and a selected supplier (or suppliers) or contractor (contractors) identified for a definite term to supply goods works or service whose quantities and deliveries are not definable or determinable at the beginning, with a commitment to order a minimum quantity of the required goods, works, or services.

We deduce, from the definition that a framework contract is similar to a framework agreement save that a framework contract requires a procuring entity to commit to order a minimum quantity of the required goods, works or services whereas in a framework agreement no such commitment is required.

However, unlike framework agreement, a framework contract is not a method of procurement but a procurement contract. We say so, because framework contracting is referred to under Section 141 of the Act under Part XI-Procurement Contracts as follows:-

141. Framework Contracting

Subject to any prescribed restrictions an accounting officer of a procuring entity may apply framework contracting arrangements by making awards of indefinite-delivery contracts and multiple awards of indefinite-quantity contracts for procurements under this Act.

Regulations 134 (1) of Regulations 2020 provide for framework contracting as follows:-

134. Framework contracting

(1) Pursuant to section 141 of the Act, an accounting officer of a procuring entity may—

(a) use open tendering method to develop a list of contractors or suppliers for an award of indefinite delivery framework contracts or multiple awards of indefinite quantity framework contracts for procurement;

(b) enter into a framework contract for a duration not exceeding three years, subject to the satisfactory performance of the supplier or contractor;

(c) enter into a framework contract with an unlimited number of suppliers or contractors; and

(d) ensure that the price of goods, works or services to be procured is established in the framework contract.

(2) For the purpose of efficiency of the procurement process and reduction of procurement transaction costs, an accounting officer may enter into a framework contract where it is determined that—

(a) the need for the subject matter of procurement is expected to arise on a repeated basis during a given period of time;

(b) by virtue of the nature of the subject matter of procurement, the need for it may arise on an urgent basis during the period of the framework contract; or

(c) other grounds and circumstances have arisen which justify recourse to a framework contracting arrangement.

(3)

(4) The conditions and procedure for framework agreements provided in Regulations 102 to 106 of these Regulations shall apply mutatis mutandis to framework contracts.

(5) The National Treasury shall, pursuant to section 7(2)(1) of the Act, issue guidelines with respect to arrangements relating to framework contracts and framework agreements.

We deduce that a framework contract is an agreement between a vendor and a procuring entity which obliges the procuring entity to source from the vendors concerned. Both the price and quantity of goods, works and service specifications are always fixed. This is contrary to framework agreements which do not oblige the procuring entity to source from the vendors and the procuring entity can conclude agreements with several vendors.

An agreement is said to be a framework contract if it commits the procuring entity to obtain specific requirements from a vendor and establishes all the

conditions for doing this in a specific contract and not under an 'umbrella agreement'. In this regard, quality-price competition is entirely concentrated in the first stage, whereas the second stage, at which the specific contracts are awarded, is simply reduced to issuing of purchase orders. In summary, a framework contract is a framework agreement that establishes all the terms to be applied in orders which are to be made by procuring entities and at times arise from the first phase of a framework agreement. A framework contract is a contract by itself and does not involve further negotiations between the procuring entity and the vendors therein. A framework contract may be the end product of a process involving a framework agreement open tender method of procurement or may be an end product of a different method of tendering.

Generally, frameworks are particularly useful where a procuring entity needs to order requirements on a repeat basis, but is uncertain about its actual demand over a specific duration, as it avoids repeat purchases in small uneconomic quantities, thereby reducing transaction costs, and supporting value for money.

Having established what a framework agreement is, the Board will now address the first issue framed for determination on whether the subject procurement requires a minimum of seven alternative vendors included for each category.

The Board has carefully studied the confidential documents submitted to it by the Respondent and notes that no reference has been made with respect to framework agreement open tender in the Tender Notice and in the Tender Document of the subject tender. However, both the Tender Notice and only page 1 and 2 of the Tender Document indicate the subject tender is a framework contract through open tender. There is no other reference made in the entire Tender Document with respect to framework contract.

We have hereinbefore found that one of the features of a framework agreement is a requirement for the same to be entered into by a procuring entity and a minimum of seven alternative vendors included for each category. This information is also required, *inter alia*, to be communicated to prospective tenderers/vendors through an invitation to tender as stipulated in Regulation 102 (1)(b) of Regulations 2020. As already stated, page 2 of the Tender Document (which is the Invitation To Tender) makes reference to a framework contract and not a framework agreement. However, the said Invitation To Tender does not disclose to prospective tenderers/vendors that the procuring entity intends to enter into a framework agreement with a minimum of seven alternative vendors included for each category, *inter alia*, thus falling short of the mandatory requirements under Section 114(1)(c) of the Act read with Regulation 102(1) of Regulations 2020 with respect to freamework agreements.

Further, we note the criteria for award of the subject tender provided for in Clause 40 read with Clause 38 of the Instructions To Tenderers of the Tender Document was to the lowest evaluated tender which provides as follows-

40. Award Criteria

The Procuring Entity shall award the Contract to the successful tenderer whose tender has been determined to be the Lowest Evaluated Tender in accordance with procedures in Section 3: Evaluation and Qualification Criteria.

38. Lowest Evaluated Tender

38.1 Having compared the evaluated prices of Tenders, the Procuring Entity shall determine the Lowest Evaluated Tender. The Lowest Evaluated Tender is the Tender of the Tenderer that meets the Qualification Criteria and whose Tender has been determined to be:

- a) Most responsive to the Tender document; and***
- b) the lowest evaluated price.***

From the foregoing, we find the intention of the procuring entity was not to award a minimum of seven alternative tenderers/vendors for each item of the subject tender but to award the lowest evaluated tender.

In the circumstances, the Board finds the subject tender does not require a minimum of seven alternative tenders/vendors for each item being procured as envisaged in Section 114 of the Act read with Section 2 of the Act and Regulations 101 to 106 of Regulations 2020.

On the second issue framed for determination on recommendation for award of the subject tender. We observe that the Evaluation Committee of the Procuring Entity recommended for multiple award for each of the five (5) items of the subject tender as captured in the background of this decision under the belief that the subject tender is a framework agreement, which we have found is not, because it lacks the features of a framework agreement. However, the Procuring Entity's Senior Deputy Director, Supply Chain Management, opines in his professional opinion that the award of the subject tender to the tenderers who submitted tenders with the lowest evaluated price for each item of the subject tender be awarded. Though the Procuring Entity's Senior Deputy Director, Supply Chain Management's opinion is right having noted the award criteria provided in the Tender Document was to the lowest evaluated tender, the procedure for recommendation of award after the professional opinion was rendered was flawed. We say so because a professional opinion is provide to the

accounting officer of a procuring entity on the manner in which a procurement process and evaluation have been undertaken and in some instances guides in the event of dissenting opinions between tender evaluation and award recommendation as provided in section 84 of the Act.

84. Professional opinion

(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).

The Accounting Officer takes into consideration the professional opinion before awarding a tender. In the subject tender, the Senior Deputy Director, Supply Chain Management ought to have rendered his opinion with respect to the fact that the Evaluation Committee ought not to have recommended

award of the subject tender to multiple tenderers in each Item of the subject tender. He should have proceeded to recommend to the Accounting Officer, in his professional opinion, to have the evaluation report returned to the Evaluation Committee for recommendation of award to the lowest evaluated tender. Thereafter, the Respondent would have returned the Evaluation Report to the Evaluation Committee with a directive that the Evaluation Committee considers the recommendations of the Senior Deputy Director, Supply Chain Management as rendered in his professional opinion.

Nevertheless, we find the Evaluation Committee did not recommend award of the subject tender in accordance with Clause 40 of the Instructions To Tenderers of the Tender Document read with Section 86(1)(a) of the Act.

On the last issue framed for determination on the legality of, or lack thereof of the Letter of Regret dated 3rd November 2021 issued to the Applicant by the Respondent, the Board has perused the same and notes it reads as follows:-

"...The above-named tender in which you participated refers.

This is to notify you that your bid was not successful. Please arrange to collect the original bid bond as soon as possible from the Office of Head Supply Chain Management (Supplies Branch).

Thank you for showing interest in working with us.

.....”

A reading of the excerpt of the said Letter of Regret shows the Applicant was informed that its tender was not successful. However, the Applicant was not notified why its tender was unsuccessful. Further, the Applicant was not notified of the successful tenderer(s) and the price the successful tenderer(s) were awarded the subject tender and reasons for such tenderer(s) successfulness contrary to the provisions of section 87(3) of the Act and Regulation 82 of Regulations 2020 which provide as follows:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity 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.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

Regulation 82. Notification of intention to enter into a contract

(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.

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

(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.

The law requires unsuccessful tenderers be notified of the outcome of evaluation of their tenders at the same time the successful tenderer is notified to enable the stand still period of 14 days within which a contract cannot be signed and to allow a dissatisfied tenderer to challenge a decision of a procuring entity at the Board to start running at the same time. Further, the reasons why an unsuccessful tenderer's tender was found non-

responsive needs to be disclosed to such unsuccessful tenderer to allow the unsuccessful tenderer to challenge such reasons if need be. In any case Article 47 (2) of the Constitution provides for any person adversely affected or is likely to adversely be affected by administrative action, has a right to be given written reasons for such action. The law requires the procuring entity to disclose successful tenderers, the price at which award was made and reasons why such successful tenders were successful. One of the reasons that can be disclosed as a reason why a successful tenderer was successful is that such a tenderer submitted a tender with the lowest evaluated price as provided in Section 86(1)(a) of the Act. These disclosures go a long way to apply, promote and adhere to the principles of Public Procurement of fairness and transparency under Article 227 of the Constitution, principle of public service of accountability for administrative acts under Article 232 (e) of the Constitution and the guiding principles under section 3 of the Act.

The Respondent having admitted that it omitted to make the above disclosures, albeit inadvertently, rendered the Letter of Regret dated 3rd November 2021 addressed to the Applicant by the Respondent a nullity for failure to comply with the provisions of Section 87(3) of the Act and Regulation 82 of Regulations 2020 read with Article 47, 227 and 232 of the Constitution.

Having held that the Evaluation Committee did not recommend award of the subject tender in accordance with Clause 40 and 38 of the Instructions To

Tenderers of the Tender Document read with Section 86(1)(a) of the Act and that the Letter of Regret issued to the Applicant was a nullity, the Board deems it necessary to cancel the notifications of award to all successful tenderers and cancel all letters of regret issued to all unsuccessful tenderers in the subject tender and order the Evaluation Committee to recommend an award of the subject tender to the lowest evaluated tender(s) in accordance with the provisions of the Tender Document and the Act. Cancellation of notifications of award and letters of regret is necessary to pave way for a lawful processes of recommending for award and actual award of the subject tender and subsequent issuance of notification of award and letters of regret to tenderers at the same time.

The upshot of our findings herein is that the Request for Review is allowed in the following specific orders.

FINAL ORDERS

In exercise of the powers under section 173 of the Act, the Board makes the following orders with respect to the Request for Review dated 17th November 2021:

- 1. The Respondent's Notifications of Award dated 3rd November 2021 addressed to all successful tenderers in Tender No. SDPW/SB/006/2021-2023- for Supply and Delivery of Cranes as and when required for Two Years be and are hereby cancelled and set aside.**

- 2. The Respondent's Letters of Regret dated 3rd November 2021 addressed to the Applicant together with all the unsuccessful tenderers in Tender No. SDPW/SB/006/2021-2023- for Supply and Delivery of Cranes as and when required for Two Years be and are hereby cancelled and set aside.**
- 3. The Respondent is hereby ordered to direct the Evaluation Committee to re-admit the Applicant's tender to the Recommendation stage (the stage after financial evaluation stage) together with all other tenderers' tenders that made it to the Recommendation stage, and recommend award of the five (5) items in Tender No. SDPW/SB/006/2021-2023- for Supply and Delivery of Cranes as and when required for Two Years to the tenderer who submitted the tender with the lowest evaluated price in accordance with Clause 40 and 38 of the Instructions To Tenderers of the Tender Document read with Section 86(1)(a) of the Act taking into consideration the findings of the Board in this Request for Review.**
- 4. Further to order No. 3 above, the Respondent is hereby directed to proceed with the procurement process in Tender No. SDPW/SB/006/2021-2023- for Supply and Delivery of Cranes as and when required for Two Years to its logical conclusion within fourteen (14) days from the date of this decision.**

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

Dated at Nairobi this 8th Day of December 2021.



CHAIRPERSON
PPARB



SECRETARY
PPARB