

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
(APPLICATION NOs. 79 /2021 AND 80/2021)
(CONSOLIDATED)
BETWEEN

**LEAH AMBALE NANDWA
T/A LENOX GENERAL SUPPLIES.....1ST APPLICANT**

SPECICOM TECHNOLOGIES LIMITED.....2ND APPLICANT

AND

**COMMISSIONER GENERAL,
KENYA REVENUE AUTHORITY.....1ST RESPONDENT
DIGNITY TRADERS LIMITED.....2ND RESPONDENT**

Review against the decision of the Commissioner General of Kenya Revenue Authority with respect to Tender No. KRA/HQS/NCB-034/2020-2021 for Supply and Delivery of Laptop Computers (Re-Advertisement).

BOARD MEMBERS

- | | |
|--------------------------|------------------|
| 1. Mrs. Irene Kashindi | -Member Chairing |
| 2. Qs. Hussein Were | -Member |
| 3. Mr. Ambrose Ngare | -Member |
| 4. Eng. Mbiu Kimani, OGW | -Member |

IN ATTENDANCE

1. Mr. Stanley Miheso -Holding brief for the Acting Board Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Revenue Authority (hereinafter referred to as "the Procuring Entity") invited sealed tenders for Tender No. KRA/HQS/NCB-034/2020-2021 for Supply and Delivery of Laptop Computers (hereinafter referred to as "the Subject Tender") through an Invitation to Tender Notice published on *MyGov* Newspaper and the Procuring Entity's Website (www.kra.go.ke.) on 19th January 2021.

Bid Submission Deadline and Opening of Bids

The initial bid submission deadline of 23rd February 2021 was extended to 9th March 2021 through an Addendum issued by the Procuring Entity on 22nd February 2021. The Procuring Entity received a total of twenty (20) bids by the bid submission deadline of 9th March 2021. The same were opened in the presence of bidders' representatives by a Tender Opening Committee and recorded as follows: -

Bidder No.	Bidder Name
1.	Mega world Space Solutions Limited
2.	Sampoint Commuincations Limited
3.	Prisjabali Classic Enterprises
4.	Swiftflix Ventures Limited
5.	Nextech Network Limited

6.	Trans Business Machine Limited
7.	Computech Limited
8.	Specicom Technologies Limited
9.	Sifteaqlearn Enterprises
10.	Computerways Limited
11.	Technology Associates East Africa Limited
12.	Crescent Tech Limited
13.	Copierforce Kenya Limited
14.	Yes Telkom Company
15.	Agile Cloud Limited
16.	Dignity Traders Limited
17.	Lenox General Supplies
18.	Computer Revolution Africa Group Limited
19.	Integrated Supplies and Consultancy Limited
20.	Brimar General Enterprises

The Subject Tender was divided into 2 lots (lot I and II). All Bidders submitted Tenders for Lot I and II except Bidder 2: M/s Sampoint Communications Limited and Bidder 3: M/s Prisjabali Classic Enterprises who submitted no form of Tender.

Evaluation of Bids

The evaluation process was undertaken as follows:

1. Preliminary Evaluation/Tender Responsiveness

At this stage, the Evaluation Committee evaluated bids against the Mandatory Evaluation Criteria outlined in Clause 2.21 of the Instructions to Tenderers read together with Clause (c) of Section VI: Schedule of Requirements at page 39 of the Tender Document. The results of bidders

who were found responsive and thus qualified to proceed to Technical Evaluation in the two lots were recorded as follows: -

Bidder No.	Bidder Name
1.	Mega world Space Solutions Limited
4.	Swiftflix Ventures Limited
5.	Nextech Network Limited
6.	Trans Business Machine Limited
8.	Specicom Technologies Limited
10.	Computerways Limited
11.	Technology Associates East Africa Limited
12.	Crescent Tech Limited
14.	Yes Telkom Company
15.	Agile Cloud Limited
16.	Dignity Traders Limited
19.	Integrated Supplies and Consultancy Limited

2. Vendor Evaluation

At this stage, the Evaluation Committee evaluated bids against the Vendor Evaluation Criteria outlined in Clause (b) of Section VI: Schedule of Requirements at page 39 of the Tender Document and Addendum Set 3 dated 5th March 2021. The results of bidders who were found responsive and qualified to proceed to Technical Evaluation in the two lots were recorded as follows: -

Bidder No.	Bidder Name
5.	Nextech Network Limited
6.	Trans Business Machine Limited
12.	Crescent Tech Limited

16.	Dignity Traders Limited
19.	Integrated Supplies and Consultancy Limited

3. Technical Use Evaluation

The Evaluation Committee evaluated bids against the Technical Specifications outlined in Section IV: Technical Specifications at pages 27-40 of the Tender Document. Bidder No. 16, M/s Dignity Traders Limited was the only bidder found responsive at the Technical Evaluation stage thus proceeded to the Financial Evaluation stage.

4. Financial Evaluation

At this stage the Evaluation Committee evaluated the Financial Proposal of Bidder No. 16 M/s, Dignity Traders Limited.

5. Recommendation

The Evaluation Committee recommended award of the subject tender to M/s Dignity Traders Limited as follows:

- i. Lot I- High-End Laptops at a cost of Kshs 5,820,000.00 (Five Million Eight Hundred Twenty Thousand Kenya Shillings); and
- ii. Lot II-Standard Laptops at a cost of Kshs 56,780,000.00 (Fifty-Six Million Seven Hundred and Eighty Thousand Kenya Shillings)

6. Professional Opinion

In a Professional Opinion dated 6th May 2021, the Procuring Entity's Assistant Manager-Supply Chain Management reviewed the manner in which the subject procurement process was undertaken including evaluation of bids.

He took the view that the procurement process satisfied the requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and the Constitution. Consequently, he advised the Commissioner General to award the subject tender in the two (2) respective lots as recommended by the Evaluation Committee. The Commissioner General approved the said professional opinion on 6th May 2021.

7. Notification to Tenderers

In letters dated 12th May 2021, the Procuring Entity notified all tenderers of the outcome of their bids.

REQUEST FOR REVIEW NO. 79/2021

M/s Dignity Traders Limited lodged a Request for Review dated 3rd June 2021 and filed on 4th June 2021 together with a Statement in support of the Request for Review sworn on 3rd June 2021 and filed on 4th June 2021, a Further Affidavit sworn on 16th June 2021 and filed on even date, through the firm of Sylvia W. Mwawuda, Advocate, seeking the following orders: -

- 1. An order nullifying the decision by the 1st Respondent of disqualifying the Applicant in Tender No. KRA/KQS/NCB-034/2020-2021: Supply and Delivery of Laptop computers, contained in the letter dated 12th May 2021;***
- 2. An order terminating the subject matter procurement proceedings undertaken by the 1st Respondent for not adhering to the provisions of section 86(1)(a) of the Act;***

- 3. An order directing the Accounting Officer to re-tender for the Supply and Delivery of Laptop computers;***
- 4. An order for costs of instituting this Request for review; and***
- 5. Any other necessary orders the Board may consider just.***

In response, the 1st Respondent lodged a Memorandum of Response dated 14th June 2021 and filed on 15th June 2021 through Zipporah Mambo, Advocate. The 1st Respondent also filed submissions dated 24th June 2021.

REQUEST FOR REVIEW NO. 80/2021

M/s Specicom Technologies Limited lodged a Request for Review No. 80/2021 dated 4th June 2021 and filed on even date together with a Statement in Support of the Request for Review sworn on 4th June 2021 and filed on even date, a Further Affidavit sworn on 18th June 2021 and filed on 21st June 2021, and Written Submissions dated 22nd June 2021 and filed on 23rd June 2021 through the firm of Mwaniki Gachuba Advocates, seeking the following orders: -

- 1. An order annulling and setting aside the disqualification of the Applicant's tender;***
- 2. An order annulling and setting aside the award of the Tender for Supply and Delivery of Laptop Computers (Tender No.***

- KRA/HQS/NCB-034/2020-2021) dated January, 2021 to Dignity Traders Limited;***
- 3. An order annulling and setting aside the letter dated 12th may 2021;***
 - 4. An order directing the 1st Respondent to re-admit the Applicant's tender and conduct technical evaluation thereof afresh in compliance with the law and the Tender Document; and***
 - 5. An order awarding costs of the Application to the Applicant.***

In response, the 1st Respondent lodged a Memorandum of Response dated 14th June 2021 and filed on 15th June 2021 through Ms. Zipporah Mambo Advocate. The 1st Respondent also filed written submissions dated 24th June 2020 on even date.

The Acting Board Secretary notified M/s Dignity Traders Limited of Request for Review No. 79 of 2021 and Request for Review No. 80 of 2021 of the successful bidder through an email dated 11th June 2021. The Acting Board Secretary also attached the Board's Circular No. 2/2020 dated 24th March 2021 detailing an Administrative and contingency plan to mitigate against Covid-19 pandemic. According to the said Circular M/s Dignity Traders Limited had a period of 3 days to file responses to the two Request for Review Applications.

However to date M/s Dignity Traders Limited has not filed responses to the Request for Review.

CONSOLIDATION OF REQUEST FOR REVIEW APPLICATION NO. 79 OF 2021 AND NO.80 OF 2021

Request for Review No. 79 of 2021 filed by Leah Ambale Nandwa T/A Lenox General Supplies and Request for Review No. 80 of 2021 filed by M/s Speciom Technologies Limited relate to the same tender advertised by the same procuring entity.

The Board observes that Applicants in Request for Review No. 79 of 2021 and Request for Review No. 80 of 2021 participated in the same procurement process advertised by the same procuring entity lodged two separate request for review applications. The Board thus addressed its mind on the question whether the circumstances in both Request for Review Applications justify consolidation of the two Request for Review applications to proceed as one Request for Review application.

In addressing this question, the Board considered Regulation 215 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") which provides as follows: -

"Where two or more requests for review are instituted arising from the same tender or procurement proceeding the Review Board may consolidate the requests and hear them as if they were one request for review"

In **Petition No. 14 of 2013, Law Society of Kenya v. Center for Human Rights and Democracy and 12 Others (2014) eKLR**, the Supreme Court of Kenya observed as follows: -

"The essence of consolidation of suits is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties."

Having considered the meaning and purpose of consolidation of cases as explained in the foregoing case, this Board observed that in procurement proceedings, an accounting officer of a procuring entity has the primary responsibility under section 44 (1) of the Act of ensuring a procuring entity complies with the Act. In doing so, the accounting officer must ensure it complies with any directions given to it by this Board pursuant to section 173 (b) of the Act with respect to anything to be done or redone in the procurement or disposal proceedings.

In order to save costs, time and effort and to ensure that there is clear and unambiguous directions to the Accounting Officer of the Procuring Entity on the manner in which the subject procurement process ought to proceed, the Board found it convenient to consolidate the two requests for review applications to proceed as one Request for Review pursuant to Regulation 215 of Regulations 2020.

In Request for Review No. 79/2021 the successful bidder was joined as the 2nd Respondent, and in Request for Review No. 80/2021 as an Interested Party.

Consequently, parties to the consolidated Request for Review shall be identified as follows:

- M/s Leah Ambale Nandwa T/A Lenox General Supplies.....1st Applicant

- M/s Specicom Technologies Limited.....2nd Applicant
- Commissioner General, Kenya Revenue Authority.....1st Respondent
- M/s Dignity Traders Limited.....2nd Respondent

Pursuant to the Board's Circular, the Board dispensed with physical hearings and directed that all request 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.

BOARD'S DECISION

After careful consideration of the parties' pleadings and written submissions, the documents and authorities in support thereof and confidential documents submitted to the Board pursuant to section 67 (3) (e) of the Act, we find that the following issues crystallize for determination: -

- I. Whether the Procuring Entity evaluated the Applicants' bids in accordance with the Tender Document read together with Section 80 (2) of the Act with respect to the following criteria;***
 - a) Submission by the 1st Applicant of a Power of Attorney as outlined in Clause 2.16.2 of the Instructions to Tenderers and Section VI(b) and (c) of the Tender Document; and***
 - b) Submission by the 2nd Applicant of proof of satisfactory prior experience within the last 5 years, from at least 2 clients as outlined in Section VI (d) of the Tender Document***

- II. Whether the letter of notification dated 12th May 2021 issued to the 2nd Applicant satisfies the requirements of Section 87 (3) of the Act read together with Regulation 82 of the Public Procurement and Assets Disposal Regulations 2020 (hereinafter, referred to as Regulations 2020).**
- III. Whether the preference and reservations scheme under the Act and Regulations 2020 apply to the subject tender.**
- IV. Whether the award of the subject tender to the Interested Party breached Article 227 (1), of the Constitution and Section 86 (1) (a) of the Act.**
- V. What are the appropriate orders to grant in the circumstances?**

In considering the first limb of the first issue for determination, the Board notes that the 1st Applicant was issued with a letter of regret dated 12th May 2021 which states in part as follows:

"...We have now completed the evaluation of the tender and regret to advise you that your bid was not successful. The bid submitted had a power of attorney of a partnership firm whereby one of the partners (Ms. Leah Ambale Nandwa) appointed herself without evidence of consent of the other partner (Anthony Nyoike)."

The 1st Applicant averred that Ms. Leah Ambale Nandwa signed the Power of Attorney as the lawfully authorized person in accordance with the firm's Board resolutions dated 15th February 2019. The 1st Applicant added that the firm had the legal capacity by virtue of the registration within the confines

of the Registration of Business Names Act, Chapter 499, Laws of Kenya, under which a certificate has been issued and therefore, M/s Lenox General Supplies is identified as a person as per Article 260 of the Constitution of Kenya 2010 hence qualifies within the meaning of a person as per Section 2 of the Act.

The 1st Applicant also stated that the rejected Power of Attorney would not have affected the responsiveness of its tender as outlined under Section 79 (2) of the Act because Lenox General Supplies was previously awarded Tender No. KRA/HQS/NCB-047/2018-2019 in 2019 on the strength of the same Power of Attorney.

The 1st Applicant added that it was within the purview of the Procuring Entity to request for clarifications as pursuant to Section 81 of the Act, in order to fully realize the provisions of Section 58 (2) of the Act. It was also the 1st Applicant's case that the Procuring Entity ought to have exercised its power and to seek clarification because it is required to rely on standard tender documents in all procurement proceedings as provided under Section 70 (1) and (2) of the Act as read with Regulation 68 (1) of the Regulations 2020, which document formats are yet to be provided by the Public Procurement Regulatory Authority as mandated under Section 9 (f) of the Act.

In response the Procuring Entity contends that a Power of Attorney is a formal instrument by which one person empowers another to represent him or act on their behalf. The Procuring Entity added that an individual cannot empower themselves to act on behalf of themselves. According to the Procuring Entity, the Applicant had donated herself the power of attorney and that no consent from the other proprietor was provided. The Procuring

Entity stated that notwithstanding lack of a standard format for a power of attorney, the signature of both parties was a mandatory requirement.

The Procuring Entity added that the previous tender in which the 1st Applicant submitted the same Power of Attorney was not in any way related to the current tender. The Procuring Entity asserted that the circumstances obtaining when the 1st Applicant tendered in the previous bid in 2019 were different in that the 1st Applicant was trading as a sole proprietor, whereas in the matter under review the business is now a partnership. According to the Procuring Entity, the change in circumstances required a properly executed Power of Attorney signed by the partners to be submitted in the current tender. The Procuring Entity stated that the Power of Attorney was dated 22nd February 2019 and was executed before the advertisement of the current tender at a time when the business was trading as a sole proprietorship. The Procuring Entity further stated that by the Certificate of Change of Particulars dated 10th December 2019, the 1st Applicant's business changed to a partnership and therefore the previous Power of Attorney was no longer tenable.

The Procuring Entity further stated that responsiveness of a tender or lack thereof is guided by Section 79 (1) of the Act, and that a bid is responsive if it conforms to all requirements of the tender. According to the Procuring Entity, the 1st Applicant's bid failed to meet the mandatory requirements as stipulated in the Tender Document.

It was also the Procuring Entity's case that eligibility to submit a tender is governed by Section 55 (1) (a) of the Act which stipulates that a person is

eligible to bid only if the person has the legal capacity to enter into a contract for procurement or asset disposal procedures.

As to whether or not the Procuring Entity ought to have sought clarifications from the 1st Applicant, the Procuring Entity stated the omission in the Power of Attorney could not be cured by way of a clarification and that would have necessitated submission of a fresh power of attorney. The Procuring Entity added that such a fresh Power of Attorney would have resulted into an amendment of the bid in contravention of section of 81(2) of the Act. According to the Procuring Entity, the disqualification of the submitted Power of Attorney was not based on the format of the document, but rather its substance, specifically, on signing of the Power of Attorney where only one partner appointed herself to the exclusion of the other partner.

In response to the Procuring Entity's Memorandum of Response, the 1st Applicant vide a Further Affidavit sworn by Leah Ambale Nandwa averred that the Procuring Entity ought to have sought clarifications as the Procuring Entity cannot purport to know the 1st Applicant's indoor management. The Applicant in this regard relied upon the rule established in the *Turquand's* case, such that an outsider has reason to believe that internal rules in a business establishment have been complied with.

At paragraph 6 of the 1st Applicant's Further Affidavit, Ms. Leah Ambale Nandwa stated that she was issued with a Certificate of Change of Particulars dated 24th May 2006 by the Assistant Registrar to the effect that Mr. Antony Nyoike was included as a partner of Lenox General Supplies in 2006 and therefore in 2009 Lenox General Supplies was a partnership and NOT a sole

proprietor. She annexed the Certificate of Change of Particulars dated 24th May 2006 as exhibit *FALN-1*.

The 1st Applicant further deponed in the Further Affidavit that it filled a Confidential Business Questionnaire disclosing the details of the partners in Lenox General Supplies, clearly stating that it is a partnership. The 1st Applicant added that the Certificate of Registration for Change of Particulars dated 10th December, 2019 merely shows a change in Lenox General Supplies' physical address and therefore cannot be said to indicate when Lenox General Supplies changed into a partnership.

The 1st Applicant reiterated that the Power of Attorney it submitted would not in any way have affected the responsiveness of its tender pursuant to the provisions outlined under Section 79(2) of the Act as it was executed by the managing partner.

The evaluation of public procurement tenders should be undertaken in accordance with the criteria set out in the Tender Documents. This is captured by Section 80(2) of the Act which provides as follows;

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

Considering the provisions of section 80(2), it behooves the Board to establish if the Procuring Entity evaluated the 1st Applicant's bid according to the criteria set out in the Tender Document.

The relevant evaluation criteria is outlined at page 39 of the Tender document as follows:-

"(c) Tender Responsiveness Criteria

Submission of Tender Documents

-
- ***Power of Attorney (Sole Proprietors exempted)."***

On the same page 39 under Clause (d) on "***Overall Tender Evaluation Criteria***" it is indicated that the tender responsiveness criteria was a mandatory requirement meaning bidders were required to provide all these documents.

In addition, Clause 2.16.2 of the Instructions to Tenderers at page 10 of the blank Tender Document provides as follows:

***"2.16.2 The tender shall be typed or written in indelible ink and shall be signed by the tenderer or a person or persons duly authorized to bind the tenderer to the contract. The latter authorization shall be indicated by written power-of-attorney accompanying the tender. All pages of the tender, except for unamended printed literature, shall be initialled by the person or persons signing the tender.*"**

The Board notes from the confidential documents that a Certificate of Registration under the Registration of Business Names Act, Chapter 499 of the Laws of Kenya was issued on **5th July 2005** certifying that Ms. Leah Ambale Nandwa was registered as carrying on business under the business name of Lenox General Supplies. The certificate states in part that:

"I HEREBY CERTIFY that Miss Leah Ambale Nadwa carrying on the business under the business name of LENOX GENERAL SUPPLIES at Plot No 20/1413/22, Accra Road, P. O Box 43729 00100 Nairobi has been duly registered under number 419943 pursuant to and in accordance with the provisions of the Registration of Business Names Act and the Rules made thereunder"

The Board further notes from the confidential documents that a Certificate of Registration of Change of Particulars dated **10th December, 2019** was issued certifying the change of particulars of the business as follows:

"I hereby CERTIFY that a change of particulars has this day been registered in the registry of Business Names in respect of the business of LENOX GENERAL SUPPLIES which business was originally registered under the provisions of the Registration of Business Names Act on 05 Jul 2005 under the Business Registration Number 19943. Consequent on the registration of such change of particulars-
LEAH AMBALE NADWA, MUIRURI ANTHONY NYOIKE is (sic) now registered as carrying on business as COMMODORE OFFICE SUITES ROOM 3H, KINDARUMA ROAD, KILIMANI,

**WESTLANDS DISTRICT, NAIROBI P.O BOX 43729-00100
G.P.O NAIROBI"**

The Board also notes from the confidential documents that an official search dated 7th January 2021 from the Business Registration Services indicates Leah Ambale Nandwa and Muiruri Anthony Nyoike as proprietors of Lenox General Supplies.

Section VI of the Tender Document under Schedule of Requirements required tenderers to submit Business Registration Certificates. The 1st Applicant submitted the following registration documents in its original tender document:-

- 1. Page 17 - Certificate of Registration No.419943 dated 5th July, 2005 indicating the registration of Miss Leah Ambale Nandwa only, trading as Lenox General Supplies***
- 2. Page 18 – Certificate of Registration of Change of Particulars dated 10th December, 2019 indicating the registration of change in particulars with the names Leah Ambale Nandwa and Muiruri Anthony Nyoike.***
- 3. Page 19 – Record of the business name/Official search 7th January, 2021 with the names Leah Ambale Nandwa and Muiruri Anthony Nyoike at proprietors***

The 1st Applicant exhibited a Certificate of Change of Particulars **dated 24th May 2006** as exhibit FALN-1 in the Further Affidavit by which Muiruri

Anthony Nyoike was introduced as a Partner to the business. The Board has considered the 1st Applicant's original bid forming part of the Confidential Documents filed by the Procuring Entity and has noted that this Certificate of Change of Particulars **was not** submitted by the 1st Applicant's as part of its bid. It was introduced for the first time in the Further Affidavit sworn on 16th June 2021 and lodged on even date. It would be irregular for the Board to consider the Certificate dated 24th May 2006 which was not part of the 1st Applicant's bid since it did not form part of evaluation process. The Board will thus not consider the Certificate dated 24th May 2006.

Lenox General Supplies does not have a separate legal entity separate from the proprietors. Unlike an incorporated company which has its own separate legal personality as was enunciated in the famous English case of ***Solomon v Solomon [1897] AC 22*** which is widely applied in the Kenyan legal system, an ordinary partnership does not have its own separate legal entity.

In the case of **Kinoti v G.J Kibanga [2010] eKLR**, the court affirmed the principle that an ordinary partnership has no separate corporate personality of its own and stated that:

"It is clear from that definition that partnership is the relationship which exists between persons carrying on a business in common with a view to profit. That relationship involves firstly an agreement between the parties to enter into a legally binding relationship which essentially is

contractual in the nature. Tindal C.J. stated in this respect in Green vs. Beesley [1885] 2 Bing NC: - "I have always understood the definition of partnership to be a mutual participation." It should however be noted that such participation mentioned in that case does not create a legal entity called a partnership. A partnership is essentially composed of people who have entered into a contract with each other."

As such the argument by the 1st Applicant that the business is a "person" within the meaning of Article 260 of the Constitution of Kenya 2010 and Section 2 of the Act is not sustainable.

Given that an ordinary partnership has no separate corporate legal structure of its own (as is the case in limited liability companies or limited liability partnerships) the liability of ordinary partnerships attaches as against the registered proprietors.

As already noted above, Clause 2.16.2 of the Tender Document, tenders were to be submitted by a person or persons ***"duly authorized to bind the tenderer to the contract. The authorization was to be indicated by written power-of-attorney accompanying the tender"***

The Power of Attorney submitted by the 1st Applicant provides as follows

"POWER OF ATTORNEY

THIS POWER OF ATTORNEY created on this 22nd day of February 2019 by LEAH AMBALE NANDWA ID card Number 21960143 and of P. O. Box 43729 – 00200 NAIROBI proprietor of LENOX GENERAL SUPPLIES.

NOW THIS DEED WITNESSETH that LEAH AMBALE NANDWA proprietor of LENOX GENERAL SUPPLIES under business number BN/2010/522179 (hereinafter referred to as "the Business Name") hereby nominate, constitute, appoint and ordain LEAH AMBALE NANDWA as the proprietor of LENOX GENERAL SUPPLIES identified by Kenya ID Number 21960143 to be our true and lawful attorney and agent with full power and authority from us and in our name, and for our account and our benefit of in respect of our interest in the company to any dealings that we would ourselves have with LENOX GENERAL SUPPLIES including but not limited to executing any documents, opening and operating local company bank account (s), issue Performance Bond, Advance Payment Guarantees, negotiate all contracts and giving any consent to all acts requiring the our consent in respect of all or any of the interests of the Company the powers hereinbefore given.

AND I LEAH AMBALE NANDWA ID card 21960143 and of P. O. BOX 43729 – 00200 NAIROBI proprietor of LENOX GENERAL SUPPLIES hereby ratify, allow, confirm and promise at all times to ratify and confirm all and whatever our said Attorney shall lawfully do or cause to be done for the benefit of the company in exercise of the power herein given.

IN WITNESS WHEREOF we have hereunto set out hands this 22nd day of February in the year of Our Lord Two Thousand and Nineteen.

SIGNED

LEAH AMBALE NANDWA

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In the presence of:

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DRAWN BY:

Macharia Gakaria & Associates

Advocates

Shankardass House, 2nd Floor

Moi Avenue

P. O. Box 70662 – 00400

Nairobi

As is evident from the foregoing the 1st Applicant provided a Power of Attorney dated 22nd February, 2019 which states that it was made by Leah Ambale Nandwa who also signed it. The Power of Attorney indicated that the said Leah Ambale Nandwa was the proprietor of Lenox General Supplies. It did not indicate anywhere, the other partner Muiruri Anthony Nyoike as a co-proprietor. The Power of Attorney appointed the said Leah Ambale Nadwa to act as agent and attorney of the business with full power and authority to *inter alia* execute any documents and negotiate contracts. The Power of Attorney also referred to the business as a company yet it is not a company.

Considering the foregoing, the Board finds that the Power of Attorney submitted by the 1st Applicant did not suffice as a proper authorization that would have bound both partners within the requirements of Clause 2.16.2 of the Tender Document. A valid Power of Attorney ought to have been authorized by both partners in order to fit within the objectives set out in the Tender Document of confirming that the person signing the tender had the authority to bind the tenderer to the contract.

The Board agrees with the Procuring Entity that a clarification by the Procuring Entity would not have cured the irregularity.

The Board is also of the view that nothing turns on the format of the Power of Attorney since there was no prescribed format by the Procuring Entity. The format used is thus immaterial. The Board has considered the substance of the Power of Attorney and finds that it was not regular.

The 1st Applicant argued that the Turquand rule (also known as the indoor management rule) applies herein to the effect that an outsider should believe that the internal rules in a business establishment have been complied with. The Turquand rule was established in the English case of ***Royal British Bank v Turquand (1856) 6 E&B 327*** in which it was held that people transacting with companies are entitled to assume that internal company rules are complied with, even if they are not.

The Board is not convinced that the Turquand rule applies to deal with the irregularity in the Power of Attorney which on the face of it was made as if the business was a sole proprietor yet it was a partnership.

The 1st Applicant argued that the Procuring Entity awarded the 1st Applicant Tender NO KRA/HQS/NCB-047/2018-2019 in 2019 on the strength of the same Power of Attorney without referring to the business as a partnership. The legality or otherwise of the tender which was said to have been awarded to the 1st Applicant in 2019 is not currently for determination before this Board. The Board will thus not make any findings with respect to that tender.

Considering the above, the ground for review relating to the Power of Attorney therefore fails.

Regarding the second limb of the first issue for determination, the 2nd Applicant averred that the disqualification of its tender was unfair, unlawful and unreasonable as it breached Section 70 (6) (i) and 80 (2) of the Act, Regulation 30 (a) and 76 (1) of the Regulations and Section VI (c) (b) of the Tender Document as read with Articles 47 (1) and 227 (1) of the Constitution.

The Board notes the 2nd Applicant was considered unsuccessful at the vendor evaluation stage. The letter of regret dated 12th May, 2021 issued to the 2nd Applicant gives the reason for disqualifying the 2nd Applicant as follows;

"...The references provided did not meet the threshold value for contracts of similar or higher value of Kshs. 36.3 million executed within the last five years as stipulated in the tender requirements. In addition, your proposed reference from Ministry of ICT was not specific on which hardware was supplied."

Section 80 (2) of the Act requires evaluation of bids to be carried out in accordance with the criteria set out in the Tender Document. The Board shall therefore determine if the 2nd Applicant's bid was disqualified in accordance with the criteria set out in the Tender Document.

The relevant evaluation criteria is outlined at page 39 of the Tender Document and it states as follows:-

"(b) Vendor Evaluation Criteria

Experience/Reputation

Proof of satisfactory service for contracts of similar or higher value executed within the last three (3) years. Submit reference letters from at least two (2) clients accompanied by either an order or a signed contract document. (Maximum Score 10)

Reference letter should have full contacts; postal address, telephone and email address"

Through an addendum dated 5th March 2021, the foregoing requirement was amended from three years to five years.

The Vendor Evaluation Criteria was to be undertaken as follows:-

"The following criteria will be used in the evaluation of all potential suppliers.

The documents submitted will be evaluated for suitability and awarded scores to a maximum of 20 marks. The cut off score shall be 12 out of 20."

The Evaluation Report indicates that the 2nd Applicant was found non responsive for this criteria because:

"On the Experience/ Reputation of the firm, bidders were required to provide at least two (2) previous contracts of similar or higher value executed within the last five (5) years that were successfully completed. The bidder provided reference that did not meet the threshold of value for contracts of similar or higher value executed within the last five years as stipulated on evaluation criteria and also the proposed reference from Ministry of ICT was not specific on which hardware supplied. Therefore the bidder was considered non –responsive on this evaluation criterion."

The 2nd Applicant averred that it submitted reference letter, purchase orders and contracts from more than five (5) customers on pages 182 to 311 of its tender. The 2nd Applicant added that most of the supply contracts annexed were framework agreements hence its tender met the requirements of Section VI (c) (b) of the Tender Document.

The 2nd Applicant further stated that it demonstrated that it had the experience, reputation and technical capacity to supply the required 40 pieces of high-end laptops and 436 pieces of standard laptops.

The 2nd Applicant therefore claimed that its tender was unfairly disqualified as the reason given by the Procuring Entity had no factual basis.

In response, the Procuring Entity averred that the tender requirement was that bidders were required to provide proof of satisfactory service for contracts of similar or higher value executed within the last five years and submit reference letters from at least two (2) clients accompanied by either an order or a signed contract.

The Procuring Entity added that the 2nd Applicant provided reference letters from only the Ministry of ICT instead of two reference letters from at least two (2) different clients as required. According to the Procuring Entity, only one order of Kshs. 50.8 Million met the threshold required of Kshs.36.3 Million and above and that this was short of the required two contracts.

From the Confidential documents, the Board notes that the 2nd Applicant provided the following documents in its original tender document:

(a). Proof of satisfactory service for contracts of similar or higher value executed within the last three (3) years.

Page No.	Document	Organisation	Date	Details	Amount (Kshs)
194	PO 4600001083	KRA	09/04/2018	60 Android tablets	2,234,400.00
196-201	Letter of Offer	KTDA	03/03/2021	Framework contract for supply of computers and laptops for 1 year from 1 st March 2021	None
202-208	Letter of Offer	KTDA	07/01/2021	Framework contract for supply of computers and laptops for 1 year from 15 th January 2021	None
210-216	Contract	KETRACO	09/07/2020	60 HP Elite Book Laptops	6,848,850.00

Page No.	Document	Organisation	Date	Details	Amount (Kshs)
217-224	Contract	Kenya Power Pension Fund	18/09/2020	10 Laptops and mouse	1,782,000.00
225	Letter of notification	KAA	27/11/2020	Framework contract for supply of computers and laptops for 3 years	None
227-230	Contract	ICT Authority	27/06/2019	Laptop computers Lot 1 29No and Lot 2 141 No.	19,151,900.00
231-237	Contract	ICT Authority	05/07/2016	Supply, Installation and commissioning of hardware and software for 46 counties.	279,913,000.00
239-224	Contract	Ministry of ICT	09/06/2019	Framework agreement to supply laptops for 1 year from date of agreement @ Ksh.254,000.00	none
250	PO 1906	Ministry of ICT	12/03/2020	Supply of laptop computers 200 No to National Treasury	50,800,000.00
251	PO 1866	Ministry of ICT	04/03/2020	Supply of laptop computers 6 No to State Department of early and basic education	1,524,000.00
253-257	Contract	Ministry of ICT	22/11/2018	Framework agreement to supply tablet computer for 1 year from date of agreement @ Ksh.78,000.00	none
258	PO 702	Ministry of ICT	04/02/2019	Supply of tablet computers 60 No to National Treasury	4,680,000.00
259	PO 2000	Ministry of ICT	27/04/2020	Supply of tablet computers 30 No to State	2,340,000.00

Page No.	Document	Organisation	Date	Details	Amount (Kshs)
				Department for Public Service	
260	LPO 4290	KIPPRA	26/05/2020	Tablet computers 20 No.	1,560,000.00
261	LPO 1541357	KIPI	11/08/2020	Tablet computers 13 No.	1,014,000.00
262	PO 3276	State Department for Devolution	15/10/2020	Supply of tablet computers 24 No.	1,872,000.00
263	LPO 3307237	National Employment Agency	22/05/2020	Supply of tablet computers 12 No.	936,000.00
264	PO 1018	Ministry of ICT	10/05/2019	Supply of tablet computers 20 No to State Department for Mining.	1,560,000.00
265	LPO 10288	Konza Tech Dev Agency	17/06/2020	Supply of tablet computers 17 No.	1,248,000.00
267-272	Contract	Parliamentary Service Comm	12/11/2020	Supply, delivery and configuration of 50 tablets	9,240,000.00
276-278	Contract	Treasury-Project Implementation Unit	18/05/2020	Supply and delivery of IT Equipment	15,885,800.00
281-283	Contract	Ministry of Education	22/05/2019	Supply of ICT equipment	13,479,360.00
284-285	PO SOM10-0000027942	UNDP Somalia	19/11/2019	Supply of mobile phones	3,115,767.15
286	PO 14909	NCC	15/06/2019	Supply of tablet computers 8 No.	1,560,000.00
287	PO 289106801	TNS RMS EA Ltd	29/01/2019	Samsung Galaxy Tab 44 No.	1,545,593.28
288	PO 104106999	Milward Brown EA Ltd	29/01/2019	Samsung Galaxy Tab 60 No.	2,107,627.20
289	PO THI 0074	Jhpiego Kenya	20/08/2018	Samsung Galaxy Tab 33 No.	1,254,052.00

Page No.	Document	Organisation	Date	Details	Amount (Kshs)
290	PO THI 0044	Jhpiego Kenya	17/07/2018	Samsung Galaxy Tab 30 No.	1,140,048.00
292-301	Contract	NTSA	29/05/2019	Supply of rugged tablets 65No.	4,803,500.00
303-311	Contract	IRA	Aug 2018	Provision of electronic notepads 40No.	2,920,000.00

(b). Submission of reference letters from at least two (2) clients accompanied by either an order or a signed contract document.

Page No.	Organisation reference letter	Date	PO/Contract and details	PO Amount (Kshs)
182	KRA	26 Oct, 2020	Pg.194- PO 4600001083- Android tablets- 09/04/2018	2,234,400
183	Ministry of ICT	10 Sept 2020	Pg. 239-224- Contract- Framework agreement to supply laptops for 1 year- 09/06/2019	None
			Pg.250- PO 1906- laptop computers- 12/03/2020	50,800,000
			Pg.251- PO 1866- laptop computers- 04/03/2020	1,524,000
			Pg.253-257- Framework agreement to supply tablet computer for 1 year- 22/11/2018	None
			Pg.258- PO 702- tablet computers- 04/02/2019	4,680,000
			Pg.259- PO 2000- tablet computers- 27/04/2020	2,340,000
			Pg. 264- PO 1018- tablet computers- 15/10/2020	1,560,000

Page No.	Organisation reference letter	Date	PO/Contract and details	PO Amount (Kshs)
184	KTDA	17 June 2020	Pg. Letter of Offer- Framework contract for supply of computers and laptops for 1 year- 03/03/2021	None
			Pg. Letter of Offer- Framework contract for supply of computers and laptops for 1 year- 07/01/2021	None
185	Ministry of Education	06 Oct 2020	Pg.281-283- Contract- Supply of ICT equipment- 22/05/2019	13,479,360
186	KETRACO	10 Sept 2020	Pg.210-216- Contract- Laptops- 09/07/2020	6,848,850p
187	Treasury-Project Implementation Unit	25 Aug 2020	Pg.276-278- Contract- IT Equipment- 18/05/2020	15,885,800
188	Kenya Power Pension Fund	24 July 2020	Pg.217-224- Contract- Laptops- 18/09/2020	1,782,000
189	Kimisitu Sacco Ltd	6 July 2020	None	None
190	Millward Brown	22 April 2020	Pg.288- PO 104106999- Samsung Galaxy Tab- 29/01/2019	2.107,627

From the above analysis, it is evident that the 2nd Applicant did not submit proof of satisfactory service for contracts of higher value executed within the last five (5) years which was to be demonstrated by submission of reference letters from at least two (2) clients accompanied by either an order or a signed contract document.

The Board agrees with the Procuring Entity that only one contract fulfilled this requirement, namely the one relating to Purchase Order No 1906 from the Ministry of ICT dated 12th March, 2020 for the Supply of 200 laptop computers to the National Treasury in the sum of Kshs. 50,800,000.00. The contract dated 5th July 2016 with the Ministry of ICT for the sum of

279,913,000.00 was indeed general in description as asserted by the Procuring Entity and was not specific on which hardware supplied so as to fit within the tender requirements.

The Board therefore finds that the 2nd Applicant's bid was evaluated in accordance with the tender document. This ground for review accordingly fails.

With respect to the second issue for determination, the 2nd Applicant averred that the notification of award was null and void *ab initio* as it was issued contrary to Section 87(1)(3) of the Act and Regulation 33(3) of the Regulations 2020.

The 2nd Applicant in its Supporting Affidavit sworn by Henry Kamau its Managing Director added that the notification letter dated 12th May, 2021 is null and void *ab initio* as it was not issued by Procuring Entity's Commissioner General nor was it issued for him.

In response the Procuring Entity contends that it strictly adhered to Section 87(1) (3) of the Act.

The Board notes that the notification letter to the 2nd Applicant dated 12th May, 2021 was signed by one Grace Murichu Kariuki (Mrs.) the Deputy Commissioner – Supply Chain Management.

Section 87(3) of the Act states that:-

"(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."

The Deputy Commissioner – Supply Chain Management who signed the notification letter is not the Accounting Officer. The Procuring Entity did not present any evidence to prove that the said Grace Murichu Kariuki (Mrs.) was authorized to sign the letter of notification on behalf of the Commissioner General who is the Procuring Entity's Accounting Officer.

The Procuring Entity relied on Regulation 61(3) of the Regulation 2020 to contend that the Head of Procurement Function is also authorized by the Act to sign notification letters. The said Regulation 61(3) provides as follows:

"61. E-notification and acceptance of e-tender awards

- (1) A procuring entity shall notify all bidders participating in the e-tendering process of the outcome of the award electronically and simultaneously.***
- (2) The system approved in section 64 of the Act shall be interactive and have the capability to enable bidders participating in a procurement procedure to be notified and accept tender awards electronically.***
- (3) The accounting officer or head of the procurement function shall, in accordance with section 87 of the Act, sign and send a notification to—***
 - (a) The successful tenderer that their bid was successful;***
 - and***

(b) To unsuccessful tenderers that their bids were unsuccessful, giving reasons thereof."

The Board does not agree that Regulation 61 applies since the marginal note makes it clear that it relates to e-tender award yet the Subject Tender was not conducted under e-procurement proceedings. Even if Regulation 61 applied, allowing the head of procurement function to sign letters of notification would conflict with the provisions of section 87 of the Act which makes it clear that the notifications should be issued by the Accounting Officer. The head of a procurement function is under an obligation under section 84 of the Act to issue a professional opinion and should not be the same person issuing notifications to bidders. In line with established rules of legislative interpretations, the conflict between Regulation 61 and Section 83 should be resolved by upholding what is set out in the Act, being the substantive legislation.

The Board accordingly finds that the letter of notification letter dated 12th May, 2021 issued to the 2nd Applicant was not in compliance with the requirements of Section 87(3) of the Act.

Regarding the third issue for determination, the 1st Applicant stated at paragraph 9 of the Request for Review that

"....In view of competition, Section 157(4) (b) of the Act affords reservations and preferences to micro, small and medium enterprises such as the Applicant."

The 1st Applicant further stated at paragraph 3 of the Supporting Statement that Lenox General Supplies is registered in the Women Category under the

Access to Government Procurement Opportunities (AGPO) programme as a small to medium enterprise.

In response, the Procuring Entity contended that that the tender was open and was not reserved for any group be it micro, small and medium enterprises such as the 1st Applicant.

It is not clear from the Applicant's averments what the alleged breach with respect to reservation is. The 1st Applicant seems to allude to the fact that the tender ought to have been reserved under AGPO.

The Preference and Reservations scheme is governed by the provisions set out in Part XII of the Act and Part XII of the Regulations 2020. In particular, Section 157 (10) and Regulation 149 of Regulations 2020 requires procuring entities to reserve at least 30% of their budget to youth, women and people leaving with disabilities. A procuring entity has the prerogative to decide which procurements are to be reserved under this scheme provided the 30% threshold is met. It is not within the purview of the Board to impose which procurements should be reserved by a procuring entity. The 1st Applicant's contention is not that the Procuring Entity has failed to meet the 30% threshold which would have been incumbent for the Board to determine. The 1st Applicant rather contends that the subject tender ought to have been reserved under AGPO. The Board cannot impose such a directive on a procuring entity. This ground for review therefore fails.

With respect to the fourth issue for determination, both Applicants contended that the 2nd Respondent ought not to have been awarded the subject tender.

The 1st Applicant averred that the 2nd Respondent's quoted price of Kshs. 62,600,000.00 was higher than the current prevailing market rates and that this went against the requirements of Section 54 (4) of the Act. The 1st Applicant averred that it quoted Kshs. 44,592,000.00 having evaluated the prevailing market price of the laptop computers required by the 1st Respondent. The 1st Applicant urges the Board, in exercise of its powers to make a finding establishing whether the 2nd Respondent met the relevant criteria laid out in the Tender Document.

In response, the Procuring Entity averred that the lowest evaluated bidder conformed to all aspects of the tender and therefore was the bidder with lowest evaluated price in accordance with Section 86 (1) of the Act . The Procuring Entity added that the current prevailing market prices cannot be pegged on prices from one particular vendor only. The Procuring Entity further stated that the tender opening minutes show that the prices ranged Lot 1 ranged between Kshs. 4,252,000.00 to Kshs. 8,648,556.10 whereas for lot II, the prices ranged from Kshs. 40,340,000.00 to Kshs. 214,581,780.00.

The Procuring Entity contends that the Tender was awarded in strict compliance with the law and there is no evidence of unreasonably inflated prices in reference to this tender.

The Procuring Entity further averred that quoting a lower price does not automatically guarantee a vendor to be declared the lowest evaluated bidder. The vendor must satisfy all the evaluation criteria stated in the tender document which the Applicants failed to do. Consequently, the Procuring Entity added, the lowest evaluated bid that meets all the

evaluation requirements of the tender achieves the maximization of value for money principle.

In response to the Procuring Entity's Memorandum of Response, the 1st Applicant through its Further Affidavit sworn by Leah Ambale Nandwa stated that the Procuring Entity has not demonstrated how the selection among the bidders who participated in the subject tender was conducted and whether the purported lowest evaluated bidder fully conformed to all aspects of the tender. The 1st Applicant added that the Procuring Entity has not demonstrated how maximization of value for money was realized and transparency of the process was achieved as the Procuring Entity is yet to provide a summary of evaluation report that would show how the evaluated bidders were ranked and the comparisons made from lowest to the highest in the fourth stage of financial evaluation.

The 2nd Applicant averred that the award of the tender to the 2nd Respondent was in breach of Article 227 (1) of the Constitution and Section 86 (1) (a) of the Act as its tender was not the lowest evaluated nor was it cost effective. The 2nd Applicant in its Supporting Affidavit sworn by Henry Kamau added that the 2nd Respondent was therefore unfairly awarded the subject tender.

In response, the Procuring Entity stated that the award of the subject tender was made to the lowest evaluated bidder pursuant to Section 86 (1) (a) of the Act. The Procuring Entity added that cost effectiveness was addressed when the lowest evaluated tender was awarded through an open competitive process.

The Board notes that, other than asserting that the 2nd Respondent price was high, the Applicants have not specified grounds upon which they assert that the 2nd Respondent ought to have been awarded the Tender. The lowest evaluated bidder under section 86(1) (a) of the Act is not synonymous as the lowest price.

Section 167 of the Act as read with Regulation 205 require applicants in applications for review to specify breaches of the Act, Regulations or the Constitution as grounds for review. The Applicants did not specify other grounds other than the issue of price.

The 1st Applicant has asked the Board to establish whether the 2nd Respondent met the relevant criteria laid out under the Tender document referred to above. The Board's jurisdiction under section 167 of the Act is invoked once specific breaches of the Constitution, the Act, and Regulations 2020 are made. What the 1st Applicant is asking the Board to do amounts to a fishing expedition. Specific breaches must be outlined in a request for review since it is not open to the Board to consider unspecified breaches.

The 1st Applicant stated that the Procuring Entity has not provided a summary of the evaluation report to enable the 1st Applicant determine if the 2nd Respondent's bid met the requirements in the Tender Document. The 1st Applicant did not however move this Board for an order to compel the Procuring Entity to furnish a summary, which is an avenue that was open to the 1st Applicant under section 67(4) of the Act which provides that

"The disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 67 (2) (d) (iii)" [that is, Section 68 (2) (d) (iii)]

The use of the phrase "applicant" connotes that it is open to an applicant in an application for review to seek an order for a summary of the evaluation report.

Considering the above, the challenge of the award of the subject tender to the 2nd Respondent accordingly fails.

In totality, the Board issues the following orders in the consolidated Request for Review:

FINAL ORDERS

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

- 1. The Accounting Officer of the Procuring Entity's Letters of Notification of Tender No. KRA/HQS/NCB-034/2020-2021 for Supply and Delivery of Laptop Computers (Re-Advertisement) dated 12th May 2021 addressed to all tenderers who participated in the subject procurement proceedings including the 1st Applicant and the 2nd Applicant herein, be and are hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification Award of Tender No. KRA/HQS/NCB-034/2020-2021 for Supply and Delivery of Laptop Computers (Re-**

Advertisement) dated 12th May 2021 addressed to M/s Dignity Traders Limited the 2nd Respondent herein, be and is hereby cancelled and set aside.

3. The Accounting Officer the Procuring is hereby ordered to re-issue fresh letters of notification of the outcome of evaluation of Tender No. KRA/HQS/NCB-034/2020-2021 for Supply and Delivery of Laptop Computers (Re-Advertisement) to all tenderers who participated in the subject procurement proceedings in accordance with Section 87 of the Act read together with Regulation 82 of Regulations 2020 within seven (7) days from the date of this decision.
4. Given that the procurement process has not been concluded, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 24th day of June 2021



.....
CHAIRPERSON
PPARB



.....
SECRETARY
PPARB

