

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 35/2021 OF 12TH MARCH 2021

BETWEEN

ULTRA LAB EAST AFRICA LIMITED.....APPLICANT

AND

THE CHIEF EXECUTIVE OFFICER

(ACCOUNTING OFFICER)

KENYA MEDICAL SUPPLIES AUTHORITY.....RESPONDENT

Review against the decision of Kenya Medical Supplies Authority with respect to Tender No. KEMSA/GOK-CPF/HIV-20/21-OIT 04 For Supply of HIV/Syphilis Testing Duo Kit.

BOARD MEMBERS

- | | |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Paul Jilani | -Member |
| 3. Ms. Phyllis Chepkemboi | -Member |
| 4. Ms. Rahab Chacha | -Member |
| 5. Arch. Steven Oundo, OGW | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Philemon Kiprop | -Holding brief for Ag. Board Secretary |
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BACKGROUND TO THE DECISION

Kenya Medical Supplies Authority (hereinafter referred to as “the Procuring Entity”) invited interested and eligible bidders to submit bids

in response to Tender No. KEMSA/GOK-CPF/HIV-20/21-OIT 04 For Supply of HIV/Syphilis Testing Duo Kit (hereinafter referred to as “the subject tender”) via an advertisement in the Daily Nation Newspaper published on 13th October 2020.

Bid Submission Deadline and Opening of bids

A total of three (3) bidders/firms submitted bids in response to the subject tender which were opened on 12th November 2020 in the presence of bidders and their representatives who chose to attend and which bids were recorded as follows: -

No.	Bidding Firm
1.	M/s Ultra Lab E.A. Ltd.
2.	M/s Premier Medical Corporation Ltd.
3.	M/s Steplabs Technical Services Ltd.

Evaluation of Proposals

The evaluation process was to be conducted in the following stages:

1. Preliminary Examination;
2. Technical Evaluation;
3. Financial Evaluation.
4. Post Qualification.

1. Preliminary Examination

At this stage of evaluation, bids were evaluated using the following mandatory criteria: -

- a) Bidding documents must be paginated/serialized. All bidders are required to submit their documents paginated in a continuous

ascending order from the first page to the last in this format; (i.e. 1,2,3.....n where n is the last page) (MANDATORY).

- b) Copy of Certificate of incorporation/registration (MANDATORY)
- c) Copy of valid Tax Compliance Certificates (K.R.A) (Applicable to Local Bidders Only) (MANDATORY).
- d) Tender Form duly completed and signed by the tenderer or his authorized agent (MANDATORY).
- e) Original Tender Security amounting to USD 20,000.00 or KES 2,000,000.00 or equivalent in a freely convertible currency and valid for not less than 120 days (i.e. valid up to 11th April 2021 and beyond) from the date of the tender opening (MANDATORY).
- f) Anti-Corruption Declaration must be signed (MANDATORY)
- g) Duly completed Business Questionnaire

Any bidder who failed to meet any of the mandatory criteria listed hereinabove would be disqualified from further evaluation.

Upon conclusion of this stage of evaluation, all three (3) bidders (Bidders No. 1, 2 & 3) were found to be responsive and qualified to proceed to the next stage of evaluation.

2. Technical Evaluation

Technical Evaluation was carried out in two stages: -

- Documents Evaluation;
- Product Evaluation;

Technical proposals of bidders were examined for the following: -

- a) Must provide Manufacturer's Authorization (if tenderer is not the manufacturer).
- b) Kit must be approved and must appear in the current WHO prequalification list.
- c) Should adhere to Good Manufacturing Practices (GMP) standards as set out by the WHO.
- d) Must provide Quality certificate (ISO/KEBS).
- e) Must be registered and retained by the Pharmacy and Poisons Board (PPB) - Bidder must provide valid registration/retention certificate.
- f) The products must be validated by the locally authorized bodies, especially the Ministry of Health (KMLTTB).

Any tenderer/bidder who failed to meet any of the foregoing requirements would be found non-compliant and disqualified from further evaluation.

Bidder No. 2 M/s Premier Medical Corporation Ltd. was found non-responsive and therefore disqualified from further evaluation while Bidder No. 1 M/s Ultra Lab E.A. Ltd and Bidder No. 3 M/s Steplabs Technical Services Ltd were found responsive and therefore qualified to proceed for Financial Evaluation.

3. Financial Evaluation

At this stage of evaluation, the financial bids of the two responsive bidders, Bidders No. 1 and 3 were evaluated as follows: -

The goods from the two responsive bidders were not manufactured in Kenya and therefore a margin of preference was applied based on the shareholding of the locals. Both bidders qualified for a 10% preference of the evaluated price where the percentage of the shareholding of the Kenyan citizens was more than fifty percent (51%).

The table below shows price comparison before and after application of margin of preference.

No	Bidder Name	Qty	UoM	Unit Cost (as per the bid)	Total Cost (as per the bid)	Margin of Preference %	Total Preference Value	Delivery Schedule
1	Ultra Lab E.A Ltd	40,000	Kit of 25's	5,112.50	204,500,000.00	10%	KES 184,050,000.00	8 to 16 Weeks
3	Steplabs Technical Services Ltd	40,000	Kit of 25's	5,600.00	224,000,000.00	10%	KES 201,600,000.00	8 Weeks

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to Bidder No. 1 **M/s Ultra Lab East Africa Ltd** at a unit cost of **Kshs. 5,112.50 (Five Thousand, One Hundred and Twelve Shillings and Fifty Cents Only)** and a total cost of **Kshs. 204,500,000.00 (Kenya Shillings**

Two Hundred and Four Million, Five Hundred Thousand Only) for being the lowest evaluated responsive bidder.

Post-Qualification

M/s Ultra Lab E.A. Ltd. was subjected to post qualification evaluation in line with ITT Clause 34 of the Tender Document to determine if the bidder was qualified to perform the contract satisfactorily. The findings of the post qualification exercise were summarized as follows: -

No	POST QUALIFICATION PARAMETERS	Bidder No. 1 Ultra Lab E.A Ltd YES / NO
1.	Minimum number of 3 (three) supply contracts of items within the past 3 years. The tenderer should provide documentary evidence in support of the experience of previous supply (Contracts, Purchase Orders, Reference letters and Contact details of previous supply.	Yes Provided. Attached several copies of PO's and several notifications letters from KEMSA for supply HIV/Syphilis Duo kit under CPF and International Organization for Migration(IOM).
2.	Copies of Tenderers audited financial statement. Average annual turnover in the last three (3) years of similar items at least two times the value of the items offered	Yes, provided Audited financial statement. Value of items Kshs. 204,500,000.00 2017 – 291,547,737.00 2018 – 349,031,536.00 2019 – 480,873,760.00 Average Turnover of Kes373,817,677.00.
3.	Statement of Installed Manufacturing Capability from Manufacturer	Provided statement. of installed manufacturing capacity for 3 years 2019 – 14,360,778annual capacity 2018 – 6,726,050 annual shipments 2017 – 6,152,550 annual shipments
	Verdict	Bidder has the financial capability to perform the contract satisfactorily and therefore recommended for award.

The Evaluation Committee made the following observations: -

- ✓ Four members of the Evaluation Committee were of the view that even though Bidder No. 1's average annual turnover is **Kshs**

373,817,677.00 in the last three (3) years compared to the total value of recommended award of **Kshs 204,500,000.00**, the turnover is above the value of the award. This was therefore, considered a minor deviation since Bidder No. 1 had satisfactorily performed in the previous supply contracts and evidence in support of experience provided.

In view of this Bidder No. 1 was determined to have the capacity to perform the contract satisfactorily and therefore recommended for award.

- ✓ One member of the Evaluation Committee disqualified the bidder on the grounds that it did not meet the post qualification criteria (financial capability) based on the average annual turnover compared to the total value of recommended award. In his view, the lowest responsive bidder had an average turnover of **Kshs 373,817,677.00** compared to the total value of recommended award (two times) **Kshs. 409,000,000.00**.

Professional Opinion

In a professional opinion dated 28th January 2021, the Ag. Director, Procurement reviewed the Evaluation Report and made the following recommendations: -

- a) The Evaluation Committee be reconvened to re-evaluate the tender in accordance with section 79 (1) and 80 (2) of the Act.
- b) The Evaluation Committee to conduct post qualification in line with section 83 of the Act and Regulation 80 (1) and (2) (a) of the

Public Procurement and Asset Disposal Regulations, 2020 and Clauses 33.1, 33.2 and 33.3 of the Tender Document.

c) The Evaluation Committee take into account observations made in the Professional Opinion in complying with the foregoing recommendations.

The Ag. Chief Executive Officer of the Procuring Entity approved the recommendations made in the Professional Opinion on 10th February 2021.

Re-evaluation of Bids

The Tender Evaluation Committee met on 4th March 2021 to conduct a re-evaluation of bids as directed by the Ag. Chief Executive Officer in his letter dated 10th February 2021.

1. Preliminary Examination

At this stage of evaluation, bids were evaluated using the mandatory requirements outlined hereinbefore.

Upon conclusion of this stage of evaluation, all three (3) bidders (Bidders No. 1, 2 & 3) were found to be responsive and qualified to proceed to the next stage of evaluation.

2. Technical Evaluation

Technical Evaluation was carried out in two stages: -

- Documents Evaluation;
- Product Evaluation;

Technical proposals of bidders were examined against the technical criteria outlined hereinbefore.

Bidder No. 2 was found non-responsive and therefore disqualified from further evaluation while Bidders No. 1 and 3 were found responsive and therefore qualified to proceed for Financial Evaluation.

3. Financial Evaluation

At this stage of evaluation, the financial bids of the two responsive bidders, Bidders No. 1 and 3 were evaluated in line with ITT Clause 32 of the Tender Document.

The table below shows price comparison before and after application of margin of preference.

No	Bidder Name	Qty	UoM	Unit Cost (as per the bid)	Total Cost (as per the bid)	Margin of Preference %	Total Preference Value	Delivery Schedule
1	Ultralab E.A Ltd	40,000	Kit of 25's	5,112.50	204,500,000.00	10%	KES 184,050,000.00	8 to 16 Weeks
3	Steplabs Technical Services Ltd	40,000	Kit of 25's	5,600.00	224,000,000.00	10%	KES201,600,000.00	8 Weeks

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended award of the subject tender to Bidder No. 1 **M/s Ultra Lab East Africa Ltd** at a unit cost of **Kshs. 5,112.50 (Five Thousand, One Hundred and Twelve Shillings and Fifty Cents Only)** and a total cost of **Kshs. 204,500,000.00 (Kenya Shillings Two Hundred and Four Million, Five Hundred Thousand Only)** for being the lowest evaluated responsive bidder.

Post-Qualification

M/s Ultra Lab E.A. Ltd. was subjected to post qualification evaluation pursuant to section 83 of the Act and in line with ITT Clauses 33.1, 33.2 and 33.3 of the Tender Document to determine if the bidder was qualified to perform the contract satisfactorily. The findings of the post qualification exercise were summarized as follows: -

No	POST QUALIFICATION PARAMETERS	Bidder No. 1 Ultra Lab E.A Ltd YES / NO
1.	Minimum number of 3 (three) supply contracts of items within the past 3 years. The tenderer should provide documentary evidence in support of the experience of previous supply (Contracts, Purchase Orders, Reference letters and Contact details of previous supply.	Yes Provided. Attached several copies of PO's and several notifications letters from KEMSA for supply HIV/Syphilis Duo kit under CPF and International Organization for Migration(IOM).
2.	Copies of Tenderers audited financial statement. Average annual turnover in the last three (3) years of similar items at least two times the value of the items offered	No. The average turnover is Kshs. 373,817,677.00 which is not at least two times the tender sum (409,000,000). Value of award is Kshs. 204,500,000.00 . Provided Audited Financial Statement 2017 – 291,547,737.00 2018 – 349,031,536.00 2019 – 480,873,760.00 Average Turnover of Kshs 373,817,677.00 .

3.	Statement of Installed Manufacturing Capability from Manufacturer	Provided statement. of installed manufacturing capacity for 3 years 2019 – 14,360,778 annual capacity 2018 – 6,726,050 annual shipments 2017 – 6,152,550 annual shipments
	Verdict	Bidder did not have the financial capability to perform the contract satisfactorily and therefore disqualified.

Guided by the Professional Opinion dated 28th January 2021, the Evaluation Committee observed that even though Bidder No. 1 had previously supplied similar contracts, there was no evidence to establish that the said bidder had the financial and technical capacity necessary to perform the contract. Bidder No. 1 was therefore disqualified at the post qualification stage.

Thereafter, the Evaluation Committee conducted a post qualification exercise on the second lowest bidder, that is, Bidder No. 3 M/s Steplabs Technical Services Ltd. The findings of the post qualification exercise were summarized as follows: -

No	POST QUALIFICATION PARAMETERS	Bidder No. 3 Steplabs Technical Services Ltd. YES / NO
1.	Minimum number of 3 (three) supply contracts of items within the past 3 years. The tenderer should provide documentary evidence in support of the experience of previous supply (Contracts, Purchase Orders, Reference letters and Contact details of previous supply.	Yes Provided. Attached several copies of PO's and several notifications letters from KEMSA for supply of laboratory consumables under KEMSA Capital and GF.
2.	Copies of Tenderers audited financial statement. Average annual turnover in the last three (3) years of similar items at least two times the value of the items offered	No. The average turnover is Kshs. 83,673,534.67 which is not at least two times the tender sum (448,000,000). Value of award is Kshs. 224,000,000.00 . Provided Audited Financial Statement 2019 – 67,655,560.00 2018 – 111,254,984.00 2017 – 72,109,970.00

		Average Turnover of Kshs 83,673,534.67. Turnover above the value of the items offered
3.	Statement of Installed Manufacturing Capability from Manufacturer	Provided statement. of installed manufacturing of 75 million tests per month that covers all in vitro diagnostic items including HIV/Syphilis Duo kit
	Verdict	Bidder did not have the financial capability to perform the contract satisfactorily and therefore disqualified.

However, the Board observes that one member of the Evaluation Committee dissented with the Evaluation Committee's verdict and recommended Bidder No. 3 for award using the joint venture document of which the bidder qualified at an average annual turnover of Kshs. 6,556,835,903.67 compared to the total value of recommended award (two times) Kshs 448,000,000.00. and thus in his view, Bidder No. 3 had the financial capability to perform the contract satisfactorily.

REQUEST FOR REVIEW NO. 35 OF 2021

Ultra Lab Africa Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated 11th March 2021 and filed on 12th March 2021 together with a Statement in Support of the Request for Review dated 11th March 2021 and filed on 12th March 2021, through the firm of A.E. Kiprono & Associates, seeking the following orders: -

a. An order directing the Respondent to award Tender No. KEMSA/GOK-CPF/HIV-20/21-OIT 04 to the successful tenderer;

b. An order extending the tender validity period to enable KEMSA finalize with the tendering process;

c. An order awarding costs of the Request for Review to the Applicant;

d. Any other relief that the Review Board deems fit to grant in the circumstances.

In response, the Procuring Entity lodged a Replying Affidavit sworn by its Acting Chief Executive Officer on 22nd March 2021 and filed on 23rd March 2021, through the firm of Anne Munene and Company Advocates.

M/s Steplabs Technical Services Limited lodged a response to the Request for Review in form of a letter addressed to the Ag. Board Secretary dated 24th March 2021 on even date.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions. The Board further cautioned all parties to adhere to the timelines as specified in its directive as the Board would strictly rely on documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Act.

BOARD'S DECISION

The Board has considered each of the parties' cases, the pleadings filed before it, including confidential documents submitted by the Procuring Entity pursuant to section 67 (3) (e) of Act and finds that the following issues arise for determination: -

- I. Whether the Procuring Entity in undertaking the subject procurement process breached the timelines specified in Section 80 (6) of the Act, Regulations 78 (2) and 79 (1) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020').**
- II. What are the appropriate orders to grant in the circumstances?**

The Board will now proceed to address the first issue framed for determination as follows: -

In its pleadings before the Board, the Applicant contends that the Procuring Entity has failed to award the subject tender within the period stipulated under the law. The Applicant avers that the Act and its attendant Regulations 2020 provide clear timelines for procurement proceedings as stipulated in section 80 (6) of the Act, Regulation 78 (2) and Regulation 79 (1) of the Regulations 2020 and thus there is no valid justification why the subject tender has taken more than one hundred and twenty days to conclude.

The Applicant avers that the only communication it has received from the Respondent is a letter dated 8th March 2021 informing the Applicant that the tender validity period has been extended by thirty (30) days. The Applicant avers that to date it has not received any communication from the Procuring Entity communicating the outcome of the Applicant's bid contrary to section 87 of the Act. The Applicant contends that it is apprehensive that it will suffer loss and damage since no award has been made in the subject tender and further, by dint of section 88 (1) of the Act, the Procuring Entity cannot extend the tender validity period further once it lapses.

On its part, the Respondent avers that it opened the subject tender on 12th November 2020 and the process of evaluation commenced immediately thereafter. According to the Respondent, once the Evaluation Committee concluded the evaluation process, it forwarded its evaluation report to the Head of Procurement Function pursuant to section 80 (4) of the Act. The Respondent avers that the Head of Procurement Function reviewed the Evaluation Report and issued a professional opinion in accordance with section 84 (1) of the Act, providing guidance in the subject procurement proceedings since there was a dissenting opinion in the evaluation process. The Respondent avers that the professional opinion was then forwarded together with the Evaluation Report to the Accounting Officer, who directed the Evaluation Committee to re-convene and re-evaluate the tender in accordance with section 79 (1) and 80 (2) of the Act since it had failed to take into account the provisions of Clause 33.1 on page 23 of the Tender Document and part D of the Evaluation Criteria on page 92 of

the Tender Document. The Respondent avers that it was apprehensive that the tender validity period would lapse and thus it extended the tender validity period for a further period of thirty days in accordance with section 88 (1) of the Act and Clause 18.3 of the Tender Document. The Respondent avers that the tender validity period expires on 11th April 2021 thus it is still within the timelines in which it is required to communicate to tenderers on the outcome of their bids and award of the subject tender. It is therefore the Respondent's contention that the Request for Review has no merit and should be dismissed forthwith to allow the Respondent finalize the post qualification process and award the subject tender within the prescribed tender validity period.

Having considered parties' rival cases, the Board examined the Procuring Entity's confidential documents submitted by the Board in accordance with section 67 (3) (e) of the Act, in order to establish the processes undertaken by the Procuring Entity in the subject procurement proceedings.

According to the confidential documents furnished to the Board, the Procuring Entity advertised the subject tender on 13th October 2020. Thereafter, the Procuring Entity opened the subject tender on 12th November 2020, as observed from the Tender Opening Register dated 12th November 2020.

The Board examined the Bid Evaluation Report signed on 18th January 2021 and observes on pages 3 and 4 thereof the following remarks: -

"The Chief Executive Officer appointed the Tender Evaluation Committee on 18th November 2020 vide letters Ref: KEMSA/GOK-CPF/HIV-20 and comprised of the following officers from the Ministry of Health and KEMSA... The Tender Evaluation Committee met and conducted the evaluation process on 1st, 3rd and 7th December 2020..."

From the foregoing excerpt, the Board observes that the Chief Executive Officer of the Procuring Entity appointed the Evaluation Committee on 18th November 2020, who met and conducted the evaluation process on 1st, 3rd and 7th December 2020.

With this in mind, the Board studied Section 80 (6) of the Act which specifies the period for evaluation of open tenders as follows: -

"The evaluation shall be carried out within a maximum period of thirty days"

In addressing this issue, the Board is mindful that on several occasions in the past, it has addressed the meaning of the word **"evaluation"** so as to make a determination on the date from which the period of 30 days under section 80 (6) of the Act ought to start running. Having considered provisions of Regulations 2020, the Board observes there is no express provision therein stating the date from which the 30 days for evaluation ought to start running.

In PPARB Application No. 136 of 2020, Chania Cleaners Limited v. The Accounting Officer, National Social Security Fund &

Another (hereinafter referred to as the “Chania Cleaners Ltd Case”), the Board considered the meaning of “**tender evaluation**” provided in the Third Schedule of Regulations 2020 and held as follows: -

“Tender evaluation — is the process used to identify the most preferred bidder technically and financially. This process should not take more than 30 calendar days... Having established that evaluation is the process of identifying the most preferred bidder technically and financially, it means that the period of 30 days for evaluation ought to be the number of days taken by an evaluation committee to identify the most preferred bidder that is technically and financially responsive. Therefore, the number of days between commencement of evaluation and signing of the evaluation report would constitute the period taken to determine the preferred bidder that is both technically and financially responsive”

In the Chania Cleaners Limited Case, the Board held that the period of 30 days for evaluation ought to be the number of days taken by an evaluation committee to identify the most preferred tenderer that is technically and financially responsive. In certain instances, the Tender Document does not specify the date from which evaluation ought to start running. In addition to this, the Act and Regulations 2020 are silent on when the 30 days of evaluation commences, save for the Third Schedule to Regulations 2020 which states that evaluation shall take 30 calendar days.

As observed hereinbefore, the Evaluation Committee was appointed on 18th November 2020 and conducted evaluation of bids on the 1st, 3rd and 7th of December 2020. Further, the Board has observed that the Evaluation Report was signed on 18th January 2021. However, upon examination of the contents of the Bid Evaluation Report, the Board observes that the said report not only contains a summary of the evaluation process and the Evaluation Committee's recommendation of award, but it also contains a summary of post-qualification exercise.

In essence, evaluation of bids is concluded once the Evaluation Committee prepares and signs an Evaluation Report containing a summary of evaluation, comparison of tenders and recommendation of award. The Board would like to point out that the period of evaluation of bids does not include post qualification (also known as a due diligence exercise) pursuant to section 83 of the Act, a professional opinion rendered by the Head of Procurement Function pursuant to section 84 of the Act and award of tenders by the Accounting Officer pursuant to section 87 of the Act.

In the instant case, the Board notes that although it is possible to deduce that the evaluation process commenced on 1st December 2020, it is not possible to know when it was concluded, and at what point post-qualification exercise conducted by the Evaluation Committee commenced. In this regard therefore, it is not possible to conclusively determine the period within which evaluation was conducted, noting that the evaluation report captures both the evaluation of bids and post-

qualification exercise. Notably, the provisions of section 83 of the Act read together with Regulation 80 of the Regulations 2020 do not prescribe a specific timeline within which post qualification ought to be carried out, except that it ought to be undertaken prior to award of the tender and within the tender validity period.

It is worth noting that section 176 (1) (c) of the Act provides that a person shall not: -

"delay without justifiable cause the opening or evaluation of tenders, the awarding of contract beyond the prescribed period or payment of contractors beyond contractual period and contractual performance obligations"

The above provision requires the Procuring Entity to ensure that evaluation of tenders is not delayed without justifiable cause. In the Board's considered view, a procuring entity can take steps to ensure compliance with this provision by appointing an evaluation committee shortly before opening of tenders so as to commence evaluation of tenders immediately after the tenders are opened by the Tender Opening Committee. This ensures the integrity of the procurement process is maintained and that bids provided are not tampered with after they have been opened.

Accordingly, the Board finds that it is not possible to conclusively determine the period within which evaluation was conducted in the subject tender, noting that the Bid Evaluation Report signed on 18th

January 2021, contains a summary of evaluation and post qualification exercise and thus it is not possible to ascertain when evaluation was concluded and at what point post qualification exercise in the subject tender conducted by the Evaluation Committee commenced.

The Board also observes from the confidential documents that upon conclusion of evaluation and post-qualification exercise, the Ag. Director of Procurement prepared a professional opinion dated 28th January 2021 whereby he recommended that the Evaluation Committee be reconvened to re-evaluate bids in accordance with section 79 (1) and 80 (2) of the Act and further, conduct post-qualification evaluation in line with section 83 of the Act and Regulation 80 (1) (2) (a) of the Regulations 2020 and Clauses 33.1, 33.2 and 33.3 of the Tender Document. Notably, these recommendations were approved by the Accounting Officer of the Procuring Entity on 10th February 2021.

The Board is cognizant of Section 80 (4) of the Act which provides as follows: -

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

An Evaluation Committee having conducted an evaluation of tenders, recommends a bidder for award of tender which process is captured in a

report and submitted to the Head of Procurement Function for his or her review and recommendation.

Section 84 of the Act provides as follows: -

- "(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.**
- (2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.**
- (3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1)."**

Further, Regulation 78 of the Regulations 2020 provides as follows: -

- "(1) An evaluation report prepared under section 80 (4) of the Act shall include.....**
- (2) The evaluation report under paragraph (1), shall be reviewed by the head of the procurement function and forwarded to the accounting officer together with the**

professional opinion referred to in section 84 of the Act within a day upon receipt of the evaluation report.

(3) The head of the procurement function may seek for clarification from the evaluation committee before making a professional opinion.

(4) The professional opinion referred to under paragraph (3) shall be in the format set out in the Ninth Schedule of these Regulations and shall include the following information—

(a) a review of the procurement or asset disposal proceedings;

(b) adherence to evaluation criteria stipulated in the bid documents;

(c)

(d)

(e); and

(f)

(5) Where the accounting officer has approved the recommendation of the head of procurement function under paragraph (4) (f), the head of procurement function shall—

(a)

(b) refer the matter back to the evaluation committee for review and recommendation to the accounting officer;

(c); and

(d) make appropriate recommendation to the accounting officer, taking into account the views of the user department, the evaluation committee and the successful bidder.

Moreover, Regulation 79 of the 2020 Regulations provides as follows: -

(1) Upon receipt of the evaluation report and professional opinion, the accounting officer shall take into account the contents of the professional opinion and shall within a day, in writing—

(a) approve award to the successful tenderer;

(b) seek clarification from the head of the procurement function or the evaluation committee prior to approving or rejecting the award; or

(c) reject the recommendations.

(2) Where the accounting officer rejects the recommendations under paragraph (1)(c), the accounting officer shall give reasons and provide further directions to the head of the procurement function, in writing.

(3) Pursuant to section 68(2)(g) of the Act, any further directions, approval or rejection by the accounting officer shall form part of the procurement records.”

The foregoing provisions demonstrate that a professional opinion is a central aspect between tender evaluation and award recommendation.

The professional opinion emanates from the Head of Procurement and offers a review/overview of the entire procurement process to the accounting officer in order to ensure adherence to the evaluation criteria stipulated in the tender document. He/she also provides guidance in the event of any dissenting opinions between tender evaluation and award recommendations. The Head of Procurement function reviews the Evaluation Report and offers his/her opinion/advice/views to the Accounting Officer on the appropriate decision to make with respect to a procurement process, within a day upon receipt of the evaluation report. This professional opinion is thereafter forwarded to the accounting officer together with a copy of the evaluation report, who shall take into account the contents of the professional opinion and shall within a day, approve or reject the recommendations made therein.

Turning to the circumstances in the instant review, the Board notes, it is not possible to ascertain from the Procuring Entity's confidential file when the Ag. Director of Procurement received the Evaluation Report dated 18th January 2021 in order for the Board to determine the period within which he reviewed the said report and prepared his professional opinion on the evaluation process. Moreover, it is also not possible to ascertain when the Accounting Officer received the professional opinion dated 28th January 2021, in order to determine the period within which he considered and approved the recommendations of the Ag. Director of Procurement.

This notwithstanding, the Board notes that the Ag Director of Procurement in his professional opinion dated 28th January 2021, made the following remarks concerning the evaluation process: -

"The Technical Evaluation criteria required the committee to make a 'Yes' or 'No' determination. The committee deviated and made observations that introduced issues that were not part of the criteria set out in the Tender Document.

It is therefore evident that the committee did not evaluate the tender in accordance with section 80 (2) which states that evaluation and comparison of tenders shall be done using the procedures and criteria set out in the Tender Document.

The committee further contravened section 79 (1) of the Act which states that a tender is responsive if it conforms to the eligibility and other mandatory requirements in the Tender Document.....

Post Qualification

The committee subjected Bidder No. 1 Ultra Lab E.A. Ltd to a post qualification process as detailed under clause 4 on page 14 of this report who according to the report is the lowest evaluated bidder....The committee observed that the bidder did not satisfy parameter two (2) which required bidders to provide evidence of an average annual turnover that is at least two (2) times the tender sum in the last three years...The committee however observed that since the average annual turnover was above the bidder's tender sum, they considered this to be a minor deviation and that they were aware that the bidder had satisfactory performance in the previous supply contracts. The committee therefore failed to undertake post qualification in line with the criteria set out in the Tender Document. This criterion required bidders to demonstrate that their average turnover was at least twice their tender sum. It therefore set the minimum acceptable turnover at twice the bidder's

tender sum and did not provide room for any deviations. In any event, minor deviations apply when tenders are being determined for responsiveness prior to the evaluation as provided for by section 79 (1) of the Act. This section does not envisage application of minor deviation at post qualification. Section 79 (2) (a) of the Act describes minor deviations as deviations that do not materially depart from the requirements set out in the Tender Document and that Clause 29.2 of the Tender Document states that the Purchaser may waive any minor informality, non-conformity or irregularity in a tender that does not constitute a material deviation, provided such a waiver does not prejudice or affect the relative ranking of any tenderer. This is done at the examination of tenders and determination of responsiveness as provided for under Clause 29 of the Tender Document and prior to the detailed evaluation as provided for under Clause 29.3 of the Tender Document pursuant to Clause 32 of the Tender Document.

By observing that they were aware that the bidder had satisfactorily performed in previous supply contracts, and therefore had the capacity to perform the contract satisfactorily, they applied their own knowledge contrary to Clause 7.1 (a) of the Tender Document that required a tenderer to provide documentary evidence to establish to the purchaser's satisfaction that the tenderer had the financial and technical capability necessary to perform the contract as well as Clause 33.2 of the Tender Document which required the determination of the tenderer's financial, technical and production capabilities to be based on an examination of the documentary evidence of the tenderer's qualifications submitted by the tenderer.

One member dissented and applied post qualification determination on the second lowest bidder 'Steplabs Technical Services Ltd' arriving at an affirmative determination and recommending them for award.

Recommendations

1) That the Evaluation Committee be re-convened to re-evaluate the tender in accordance with sections 79 (1) of the Act and 80 (2) of the Act.

2) The Committee to conduct post-qualification in line with section 83 of the Act and Regulation 80 (1) (2) (a) of the Public Procurement and Asset Disposal Regulations, 2020 and Clauses 33.1, 33.2 and 33.3 of the Tender Document.

3) That the Committee takes into account observations made in this professional opinion in complying with recommendation 1 and 2."

According to the above excerpt, the Ag. Director of Procurement following his review of the Evaluation Report, made two key observations concerning the evaluation process. Firstly, the Evaluation Committee at the Technical Evaluation Stage, introduced issues that were not part of the criteria set out in the Tender Document instead of making a 'Yes' or 'No' determination thus evaluated bids at this stage of evaluation contrary to section 79 (1) and section 80 (2) of the Act. Secondly, in conducting a post qualification exercise on M/s Ultra Lab East Africa Limited, the Evaluation Committee observed that the Applicant did not satisfy the post-qualification parameter that required bidders to provide evidence of an average annual turnover that is at least two (2) times the tender sum in the last three years but nevertheless found the same to be a minor deviation because the average annual turnover in the last three years was above the Applicant's tender sum and that the Applicant had satisfactorily performed in previous supply contracts.. In the view of the Ag. Director of Procurement, minor deviations do not apply at the post qualification stage and thus the Evaluation Committee applied their own knowledge contrary to Clause 7.1a and Clause 33.2 of the Tender

Document. The Ag. Director of Procurement thereafter recommended the Evaluation Committee be re-convened to re-evaluate bids in accordance with section 79 (1) and 80 (2) of the Act and further, to conduct post-qualification evaluation in line with section 83 of the Act and Regulation 80 (1) (2) (a) of the Regulations 2020 and Clauses 33.1, 33.2 and 33.3 of the Tender Document.

Following the recommendations made by the Ag. Director of Procurement, the Board observes from the 'Review of Bid Evaluation Report' signed on 5th March 2021, the Evaluation Committee reconvened on 4th March 2021 and conducted a re-evaluation of bids in the subject tender. As captured on page 11 of the said report, the Evaluation Committee recommended award of the subject tender to M/s Ultra Lab E.A. Ltd, the Applicant herein, and thereafter proceeded to conduct a post qualification exercise on the said bidder. As observed on page 12 of the said report, post qualification exercise was conducted with respect to specific parameters which are outlined herein below together with the findings of the post qualification exercise: -

No	POST QUALIFICATION PARAMETERS	Bidder No. 1 Ultra Lab E.A Ltd YES / NO
1.	Minimum number of 3 (three) supply contracts of items within the past 3 years. The tenderer should provide documentary evidence in support of the experience of previous supply (Contracts, Purchase Orders, Reference letters and Contact details of previous supply.	Yes Provided. Attached several copies of PO's and several notifications letters from KEMSA for supply HIV/Syphilis Duo kit under CPF and International Organization for Migration(IOM).
2.	Copies of Tenderers audited financial statement. Average annual turnover in the last three (3) years of similar items at least two times the value of the items offered	No. The average turnover is Kshs. 373,817,677.00 which is not at least two times the tender sum (409,000,000). Value of award is Kshs. 204,500,000.00. Provided Audited Financial Statement

		2017 – 291,547,737.00 2018 – 349,031,536.00 2019 – 480,873,760.00 Average Turnover of Kshs 373,817,677.00.
3.	Statement of Installed Manufacturing Capability from Manufacturer	Provided statement. of installed manufacturing capacity for 3 years 2019 – 14,360,778 annual capacity 2018 – 6,726,050 annual shipments 2017 – 6,152,550 annual shipments
	Verdict	Bidder did not have the financial capability to perform the contract satisfactorily and therefore disqualified.

Notably, the Applicant was found non-responsive with respect to the Post Qualification Criteria requiring an average annual turnover for the last three years to be at least two times its tender sum.

The Evaluation Committee thereafter proceeded to conduct a post qualification exercise on the second lowest evaluated bidder, this being M/s Steplabs Technical Services Limited whose findings are summarized in the table herein below: -

No	POST QUALIFICATION PARAMETERS	Bidder No. 3 Steplabs Technical Services Ltd. YES / NO
1.	Minimum number of 3 (three) supply contracts of items within the past 3 years. The tenderer should provide documentary evidence in support of the experience of previous supply (Contracts, Purchase Orders, Reference letters and Contact details of previous supply.	Yes Provided. Attached several copies of PO's and several notifications letters from KEMSA for supply of laboratory consumables under KEMSA Capital and GF.
2.	Copies of Tenderers audited financial statement. Average annual turnover in the last three (3) years of similar items at least two times the value of the items offered	No. The average turnover is Kshs. 83,673,534.67 which is not at least two times the tender sum (448,000,000). Value of award is Kshs. 224,000,000.00. Provided Audited Financial Statement 2019 – 67,655,560.00 2018 – 111,254,984.00 2017 – 72,109,970.00 Average Turnover of Kshs 83,673,534.67. Turnover above the value of the items offered
3.	Statement of Installed Manufacturing Capability from Manufacturer	Provided statement. of installed manufacturing of 75 million tests per month that covers all in

		vitro diagnostic items including HIV/Syphilis Duo kit
	Verdict	Bidder did not have the financial capability to perform the contract satisfactorily and therefore disqualified.

From the above summary, the Board observes that M/s Steplabs Technical Services Limited was also found non-responsive with respect to the Post Qualification Criteria requiring an average annual turnover for the last three years to be at least two times its tender sum.

The Board further observes on pages 13 and 14 of the 'Review of Bid Evaluation Report' signed on 5th March 2021 that one member of the Evaluation Committee dissented with the Evaluation Committee's verdict with respect to the Post Qualification exercise conducted on M/s Steplabs Technical Services Limited and found that the said bidder did comply with the Post Qualification Criteria requiring an average annual turnover for the last three years to be at least two times its tender sum. In his dissent, one member of the evaluation committee concluded that using the audited financial statements of both M/s Steplabs Technical Services Limited and its joint venture partner, the average annual turnover would amount to Kshs 6,556,835,903.67.00, which is more than two times the said bidder's tender sum.

The Board would like to point out that in procurement proceedings, an evaluation committee first determines bidders' responsiveness to eligibility and mandatory requirements (including technical specifications) before a consideration of price is undertaken at the Financial Evaluation stage so as to arrive at the lowest evaluated responsive tenderer. Upon

recommendation of award to the lowest evaluated responsive tenderer, an Evaluation Committee conducts due diligence depending on the question whether a due diligence exercise was a procedure specified in the Tender Document.

Section 83 of the Act is instructive on the process of due diligence and provides as follows: -

- "(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.***
- (2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***
- (3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—***
- (a) initial each page of the report; and***
- (b) append his or her signature as well as their full name and designation"***

From the foregoing provision, due diligence should be conducted by the Evaluation Committee after tender evaluation but prior to award of the tender to confirm and verify the qualifications of the bidder determined by the Procuring Entity to have submitted the lowest evaluated responsive tender.

Prior to commencing the due diligence exercise, the Evaluation Committee must first conclude evaluation of tenders at the Preliminary, Technical and Financial Evaluation Stages and recommend the lowest evaluated responsive tenderer for award of the tender. Further, section 83 (2) of the Act suggests one of the parameters of due diligence that an evaluation committee may adopt when undertaking a due diligence exercise, that is, obtaining confidential references from persons with whom the tenderer has had prior engagement. After concluding the exercise, a due diligence report (which is separate from an Evaluation Report) must be prepared outlining how due diligence was conducted together with the findings of the process. The due diligence report is signed only by members of the Evaluation Committee who took part in the due diligence exercise, and they must include their designation. Further, the report must be initialled on each page.

Assuming the lowest evaluated tenderer is disqualified after the first due diligence, this fact must be noted in the Due Diligence Report with reasons. In view of the negative responses received on lowest evaluated tenderer, the Evaluation Committee then recommends award to the next lowest evaluated tenderer. Thereafter, a similar due diligence process is

conducted on such tenderer. This procedure is applied until a successful tenderer for award of a tender is determined.

Notably, Clause 33 and Clause 34 of Section I. Instructions to Tenderers on page 23 and 24 of the Tender Document provides as follows: -

"F: Award of contract

33. Post-qualification

33.1. In the absence of pre-qualification, the Purchaser will determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluated responsive tender is qualified to perform the contract satisfactorily in accordance with the criteria listed in ITT sub-clause 7.1 and any additional post-qualification criteria stated in the TDS, if a pre-qualification process was undertaken for the Contract(s) for which these tender documents were issued, the Purchaser will determine in the manner described above that no material changes have occurred after the pre-qualification that negatively affect the ability of the Tenderer that has submitted the lowest evaluated tender to perform the Contract.

33.2 The determination will take into account the Tenderer's financial, technical, and production capabilities. It will be based on an examination of the documentary evidence of the Tenderer's qualifications submitted by the Tenderer, pursuant to ITT sub-clause 7.1 as well as other

information the Purchaser deems necessary and appropriate

33. An affirmative determination will be a prerequisite for award of the contract to the tenderer. A negative determination will result in rejection of the Tenderer's tender, in which event the Purchaser will proceed to the next lowest evaluated tender to make a similar determination of that Tenderer's capabilities to perform satisfactorily

34. Award Criteria

34.1 Pursuant to ITT Clauses 32, 33 and 38, the Purchaser will award the contract to the Tenderer whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the Tenderer is determined to be qualified to perform the contract satisfactorily, pursuant to Clause 34.

Accordingly, the Procuring Entity had an obligation to conduct a post-qualification exercise in the absence of pre-qualification. Through a post-qualification exercise (otherwise known as due diligence), the Procuring Entity would determine whether the lowest evaluated responsive tenderer is qualified to perform the contract (that is, the subject tender) satisfactorily before award of the subject tender is made. Further, the post qualification exercise would involve an examination of the documentary evidence of the Tenderer's qualifications submitted by the

Tenderer, in accordance with the criteria listed in ITT sub-clause 7.1 and any additional post-qualification criteria stated in the TDS.

The Board examined the Tender Document and observes that there is no ITT sub-clause 7.1 therein. Nevertheless, the Board takes note of the following relevant clauses in the Tender Document: -

Clause 7.1 of Section I. Instructions to Tenderers on pages 11 and 12 of the Tender Document provides as follows: -

"7. Qualifications of the Tenderer

7.1 The Tenderer shall provide documentary evidence to establish to the Purchaser's satisfaction that:

(a) The Tenderer has the financial and technical capability necessary to perform the contract, meets the qualification criteria specified in the TDS, and has a successful performance history in accordance with criteria specified in the TDS. If a pre-qualification process has been undertaken for the contract, the Tenderer shall, as part of its tender, update any information submitted with its application for prequalification.

(b) In the case of a Tenderer offering to supply Health Sector Goods identified in the TDS, that the Tenderer did not manufacture or otherwise produce, the Tenderer has been duly authorized by the manufacturer or producer of such goods to supply the Goods in the Purchaser's country.

(c) In the case of a Tenderer who is not doing business within the Purchaser's country (or for other reasons will not itself carry out service/maintenance obligations) the Tenderer is or will be (if awarded the contract) represented by a local service/maintenance provider in the Purchaser's country, equipped and able to carry out the Tenderer's warranty obligations prescribed in the Conditions of Contract and/or Technical Specifications."

Further, Clause D Post Qualification – Evaluation Criteria of Section VIII Evaluation Criteria on page 92 of the Tender Document which provides as follows: -

"In line with ITT 34 sub-clause 34.2 and 34.3, the tenderer/s selected as having submitted the lowest evaluated responsive bidder/s will be subjected to post-qualification to determine if they are qualified to perform the contract satisfactorily.

1. Minimum number of 3 (three) supply contracts within the past 3 years. The Tenderer should provide documentary evidence in support of the experience of previous supply (Contracts, Purchase Orders, Reference Letters and Contact details of previous supply contracts.)

2. Copies of the tenderer's audited financial statements for the past three fiscal years.

3. Average annual turnover in the last three (3) years at least two times the value of the items offered.

4. Statement of annual production capacity by manufacturing firm.”

Accordingly, the Procuring Entity would conduct a post qualification exercise on the bidder selected as having submitted the lowest evaluated responsive bidder/s using the four criteria/parameters listed hereinabove, in order to determine to its satisfaction that the said bidder has the financial and technical capability necessary to perform the resultant contract.

As observed hereinbefore, the Evaluation Committee conducted a post-qualification exercise on the Applicant herein as captured in the 'Review of Bid Evaluation Report' signed on 5th March 2021, who was found non-responsive with respect to the Post Qualification Criteria requiring an average annual turnover for the last three years to be at least two times its tender sum. The Board observes that the said post qualification parameter did not form part of the qualifications required by the evaluation criteria at the Preliminary, Technical and/or Financial Evaluation Stages.

As explained hereinbefore, the purpose/objective of a post qualification exercise/due diligence exercise is to confirm and verify the qualifications of the bidder determined by the Procuring Entity to have submitted the lowest evaluated responsive tender. These qualifications are provided by the said bidder in its original bid which bid has been assessed by the Procuring Entity at either the Preliminary, Technical and/or Financial Evaluation Stages and found to be the lowest evaluated responsive bid.

At the post qualification stage, all that remains is for the Procuring Entity to confirm and verify the authenticity of the qualifications provided by the said tenderer in the tenderer's original bid in order to determine to its satisfaction that the lowest evaluated responsive tenderer can perform the subject tender.

In the Board's considered view, the Procuring Entity's criteria at the post qualification stage introduced a new qualification when it required a bidder to have an average annual turnover in the last three (3) years at least two times the value of the items offered, which qualification does not form part of the qualifications required by the evaluation criteria at the Preliminary, Technical and/or Financial Evaluation Stages, contrary to what is envisaged under section 83 of the Act. In the Board's considered view, the Procuring Entity could not assume to confirm or verify the qualification of the tenderer who submitted the lowest evaluated responsive tender using a qualification that it has not evaluated the said tenderer on at the Preliminary, Technical and Financial Evaluation stages.

For the Procuring Entity to disqualify the Applicant with respect to a post qualification parameter that did not form part of the qualifications required by the evaluation criteria at the Preliminary, Technical and/or Financial Evaluation Stages was not only improper but contrary to the public procurement principles of fairness and transparency as espoused under Article 227 (1) of the Constitution.

Further, the Board observes from the 'Review of the Bid Evaluation Report' signed on 5th March 2021 that the summary of evaluation and post-qualification was captured in one report. As explained hereinbefore, section 83 of the Act requires a procuring entity to prepare a post-qualification report (which is separate from an Evaluation Report) outlining how post-qualification was conducted together with the findings of the process. This report is signed only by members of the Evaluation Committee who took part in post-qualification, and they must include their designation. Further, the report must be initialled on each page. In view of the foregoing, the Board finds that the Procuring Entity did not conduct post qualification in the subject tender in accordance with section 83 of the Act.

It is also worth noting from the Review of the Bid Evaluation Report that the Evaluation Committee did not make any recommendation of award in the subject procurement process, noting the dissent by one member of the evaluation committee at the post qualification stage. Moreover, the Board observes that the Procuring Entity's confidential file does not contain a second professional opinion prepared by the Procuring Entity's Head of Procurement, reviewing a recommendation of award by the Evaluation Committee upon conclusion of the re-evaluation and post-qualification process or approval of such award by the Procuring Entity's Accounting Officer.

The Board is therefore persuaded by the Procuring Entity's averments as captured in paragraph 26 of its Replying Affidavit that it is yet to finalize

post-qualification and therefore no notification of intention to enter into a contract in accordance with section 87 of the Act, has been sent to a successful or unsuccessful bidders alike. The Board therefore finds that the Procuring Entity is not in breach of section 87 of the Act, noting that it is yet to conclude the subject procurement process.

In conclusion, the Board has established that it is not possible to conclusively determine the period of the initial evaluation process since the Bid Evaluation Report signed on 18th January 2021 contained a summary of evaluation and post-qualification and thus it is not possible for the Board to ascertain at what point evaluation was concluded and at what point post qualification exercise in the subject tender conducted by the Evaluation Committee commenced. The Board has also established that it is not possible to conclusively determine the period within which the Ag. Director of Procurement reviewed the Bid Evaluation Report signed on 18th January 2021 and prepared his professional opinion on the evaluation process, since the Board cannot ascertain the date of his receipt of the said report. Moreover, the Board has established that it is also not possible to conclusively determine the period within which the Accounting Officer considered and approved the recommendations of the Ag. Director of Procurement since the Board cannot ascertain when the Accounting Officer received the professional opinion dated 28th January 2021.

In view of the foregoing and in totality of this issue, the Board finds that the Procuring Entity in undertaking the subject procurement process did

not breach the timelines specified in Section 80 (6) of the Act and Regulations 78 (2) and 79 (1) of Regulations 2020.

In determining the appropriate orders to issue in this review, the Board observes the Applicant's prayer No. 2 which states as follows: -

"An order extending the tender validity period to enable KEMSA finalize the tendering process"

It is not in dispute that the tender validity period is still valid. However, the Applicant contends in paragraph 4 of its Request for Review that it is apprehensive that it will suffer loss and damage because the extended tender validity period lapses on 11th April 2021 yet the Respondent has not made an award in the subject tender contrary to sections 87 (1) and 88 (3) of the Act and by dint of section 88 (3) of the Act, the Respondent cannot extend the tender validity period further.

The Board examined the Tender Document and observes ITT Clause 18.1 of Section II. Appendix – Tender Data Sheet (TDS) on page 29 of the Tender Document which specified that: -

"The tender validity period shall be 120 days after the deadline for tender submission as specified below in reference to ITT Clause 23."

Further, ITT Clause 23.1 of Section II. Appendix – Tender Data Sheet (TDS) on page 30 of the Tender Document specified as follows: -

"Deadline for tender submission is:

Friday 12th November, 2020 at 10:00 AM (Nairobi local time)”

It is worth noting that the tender validity period of the subject tender was 120 days after the tender submission deadline of 12th November 2020 and thus, the same was to lapse on 12th March 2021. However, the Board observes a letter dated 8th March 2021 annexed to the Applicant’s Request for Review issued by the Ag. Chief Executive Officer of the Procuring Entity and addressed to the Applicant which reads as follows:

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"EXTENSION OF BID VALIDITY FOR TENDER NO. KEMSA/GOK-CPF/HIV-20/21 – OIT 04 FOR SUPPLY OF HIV/SYPHILLIS TESTING DUO KIT

We refer to the above subject tender.

You are hereby notified that the validity period for this tender has been extended by 30 days as provided for under Instruction to Tender Clause 18.1 of the Tender Document.

You are required to extend your tender security for 30 days if the extension of validity is acceptable.”

Notably, the Procuring Entity extended the tender validity period for a further period of thirty (30) days prior to expiry of the same, pursuant to section 88 (1) of the Act. This extension of the tender validity period by the Procuring Entity was further confirmed by M/s Steplabs Technical

Services Limited in its response to the Request for Review in form of a letter addressed to the Ag. Board Secretary filed on 24th March 2021.

The Board observes that vide a letter dated 9th March 2021, which is annexed to the Statement in Support of the Request for Review, the Applicant wrote to the Procuring Entity signifying its acceptance of the extension of the tender validity period and confirmed that it would extend its bid validity for a further thirty (30) days from 9th April 2021 as requested by the Procuring Entity. In view of this extension of the tender validity period by the Procuring Entity for a further thirty (30) days, the Board notes that the tender validity period is set to lapse on 11th April 2021. However, it is not lost to the Board of the existence of an intervening factor in the computation of the tender validity period in this instance, which is the filing of the Request for Review before this Board.

Section 168 of the Act provides that: -

“Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed”

The High Court in **Judicial Review No. 540 of 2017, Republic v. Public Procurement Administrative Review Board & Others, ex**

parte Transcend Media Group Limited (2018) eKLR (hereinafter referred to as “the Transcend Media Case”) had occasion to interrogate the import of section 168 of the Act where it held as follows: -

"The question that needs to be answered by this Court is whether the Respondent correctly interpreted the provisions of the law on the effect of the litigation before it on the tender validity period. The Respondent in this respect held that a notice by the Secretary of the Review Board and any stay order contained therein can only affect the procurement process from proceeding further but cannot act as an extension of the tender validity period, nor can it stop the tender validity period from running. In this respect, it relied on its previous decisions on this interpretation, which are not binding on this Court, and which were decided before the Public Procurement and Asset Disposal Act of 2015 was enacted.

I find that this position is erroneous for three reasons, Firstly, section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is

to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time-specific and time-bound.

Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point, at least for any deadlines defined by reference to a period of time, which in this case included the tender validity period. It would also be paradoxical and absurd to find that procurement proceedings cannot proceed, but that time continues to run for the same proceedings.”

From the foregoing case, suspension of procurement proceedings pursuant to section 168 of the Act includes suspension of the running of the tender validity period. This means that when the Applicant filed the Request for Review on 12th March 2021, the tender validity period stopped running and was suspended on 12th March 2021. The Board observes that at the point of filing the Request for Review, thirty (30) days of the tender validity period were remaining, which will resume upon completion of the Request for Review. The question that now arises is whether the tender validity period is sufficient for the Procuring Entity to complete the subject procurement process.

The High Court in **Judicial Review No. E002 of 2021, Republic v. Public Procurement Administrative Review Board & Another, ex**

parte The Kenya Ports Authority & Another (2021) addressed the question whether the Board can extend tender validity period and opined as follows on paragraphs 47 to 51: -

"47. Section 88(1) & (2) expressly refer to the powers of the Accounting officer in extending time but not the Review Board. Sub-section (3) refers to the accounting officer's powers of extension of validity period once and not beyond 30 days pursuant to sub-section (1).

48. From the plain reading of that Section, it is only applicable and binding on the accounting officer and nobody else. Nothing would have been easier than the legislators to include or provide the Review Board's mandate under that section. To that extent, I do agree with counsel for the Interested Party that Section 88 (3) of the Act does not bar the Review board from making decisions that are deemed to be necessary for the wider attainment of substantive justice. These Residual powers can be derived from Section 173 of the Act which provides;

"Upon completing a review, the Review Board may do any one or more of the following;

a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

- b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;*
- c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;*
- d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and*
- e) order termination of the procurement process and commencement of a new procurement process"*

49. Under section 173 (a) (b) & (c) of the Act, the Board has wide discretionary powers for the better management of tendering system to direct the doing or not doing or redoing certain acts done or omitted from being done or wrongly done by the accounting officer. Although the Act does not expressly limit the powers of the Board from extending tender validity period more than once, one can imply that the powers conferred upon the Review board includes powers to extend validity period to avert situations where the accounting officer can misuse powers under Section 88 to frustrate tenderers or bidders not considered favourable.

50. In any event, the exparte applicant has already complied with the order for extension of the validity period by engaging in competitive negotiation whereby the Interested Party emerged the lowest bidder within the

budgetary allocation. To that extent, the excuse that tax payers were to lose money by spending more than budgeted for does not arise. At para 33 of the verifying affidavit, the exparte Applicant admitted that the only reason why they could not issue the notification letter was complaints regarding corruption against the I/party.

51. Having complied with the order partly by extending time, the exparte Applicant acknowledged the legality of the decision and therefore cannot be heard to allege commission of any illegality by the Board. How would they engage in an illegality themselves by accepting to extend time, engage in competitive negotiation within the budgetary allocation and then retreat by claiming that the board committed an illegality? To raise such an argument is a fallacy which in my view amounts to abuse of the court process. I do agree with the Board's finding that, under section 173 of the Act, they have residual powers to direct extension of validity period more than once. Without those supervisory powers, the procuring entities can frustrate the tendering process. Since it was one day to the expiry, the Interested Party had to move with speed to avoid being trapped into the technicality of the validity period having expired hence nothing remaining to extend. Therefore, I do find that the extension of time was not illegal, unreasonable nor without jurisdiction.

The High Court in the foregoing case confirms the position that the Board has the power to extend tender validity period in procurement

proceedings as per the provision of section 173 of the Act. However, this power is discretionary and may be exercised to avert situations where an accounting officer can misuse powers under Section 88 of the Act to frustrate tenderers or bidders not considered favourable. In this instance the Board has established that the tender validity period is still in existence, with a remaining period of thirty (30) days.

In its findings in the instant review, the Board has established that the Procuring Entity in undertaking the subject procurement process did not breach the timelines specified in Section 80 (6) of the Act and Regulations 78 (2) and 79 (1) of Regulations 2020. Further, the Board has established that the Procuring Entity did not conduct Post-Qualification in the subject procurement process in accordance with section 83 of the Act. The Board has also established that the Procuring Entity is yet to finalize the subject procurement process and therefore no notification of intention to enter into a contract in accordance with section 87 of the Act has been issued to a successful or unsuccessful bidders alike.

The Board takes cognizance of section 173 (b) of the Act, which states that: -

“Upon completing a review, the Review Board may do any one or more of the following-
(a).....;
(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings...”

The Board therefore deems it fit to order the Accounting Officer of the Procuring Entity to direct the Evaluation Committee to conduct Post-Qualification exercise on the lowest evaluated responsive tenderer in the subject procurement process in accordance with section 83 of the Act, and proceed with the subject procurement process to its logical conclusion, including the making of an award, whilst taking into consideration the Board's findings in this review. In order to allow the Procuring Entity to conclude the subject procurement process, the Board finds it just to extend the tender validity period, in addition to the remaining 30 days in terms of the final orders herein in order to allow the Procuring Entity's Evaluation Committee to conduct Post-Qualification exercise on the bidder determined to have submitted the lowest evaluated responsive tender in accordance with section 83 of the Act, for the Head of Procurement Function to prepare a professional opinion in accordance with section 84 of the Act read together with Regulation 78 (2) of Regulations 2020, for the Accounting Officer to approve the same in accordance with Regulation 79 of the Act, issue notification of intention to enter into a contract in accordance with section 87 of the Act to the successful and unsuccessful bidders alike and to execute a contract with the successful bidder while taking into account the provision of section 135 (3) of the Act.

The upshot of the foregoing findings is that the Request for Review succeeds in terms of the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act No. 33 of 2015, the Board makes the following orders in the Request for Review: -

- 1. Clause 8.0 on Post-Qualification as contained on pages 12, 13 and 14 of the Procuring Entity's Review of Bid Evaluation Report signed on 5th March 2021 be and is hereby expunged.**

For the avoidance of doubt, the summary of evaluation and comparison of tenders and recommendation of award to the lowest evaluated bidder at the Financial Evaluation Stage contained in the Review of Bid Evaluation Report signed on 5th March 2021 remains valid.

- 2. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to conduct Post-Qualification exercise on the lowest evaluated responsive tenderer in accordance with section 83 of the Act, taking into consideration the Board's findings in this Review.**
- 3. Further to Order No. 2 above, the Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement process to its logical conclusion, including the making of an award, within fourteen (14) days from the date of this decision.**

- 4. The Tender Validity Period of the subject tender is hereby extended for a further thirty (30) days from the date of expiry of the remaining 30 days.**
- 5. Given that the procurement process is not complete, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 31st Day of March 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB