

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.25/2022 OF 22ND MARCH 2022

BETWEEN

URBANTECH ENTERPRISES..... APPLICANT

VERSUS

THE CLERK NAIROBI CITY COUNTY ASSEMBLY.....RESPONDENT

STERA IT SOLUTIONS INTERESTED PARTY

Review against the decision of the Nairobi City County Assembly Service Board in relation to Tender No: NCCASB/OT/09/01/FY2021-2022 for Supply Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly.

BOARD MEMBERS

- | | |
|---------------------------|---------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Ms. Phyllis Chepkemboi | - Member |
| 3. Ms. Rahab Chacha | - Member |
| 4. Mr. Nicholas Mruttu | - Member |
| 5. Mr. Ambrose Ogeto | - Member |

IN ATTENDANCE

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

BACKGROUND TO THE DECISION

The Tendering Process

Nairobi City County Assembly (hereinafter referred to as the 'Procuring Entity') through its Clerk, the Respondent herein, invited sealed tenders from eligible, competent, qualified youth enterprises registered appropriately with National Treasury and interested tenderers for Tender No: NCCASB/OT/09/01/FY2021-2022 for Supply Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly (hereinafter referred to as the 'subject tender') by way of open tendering method advertised in The Standard Newspaper, The Star Newspaper, the Procuring Entity's website (www.nairobiassembly.go.ke) and at the Public Procurement Information Portal www.tenders.go.ke on 27th January 2022.

Tender Submission Deadline and Opening of Tenders

At the tender submission deadline of 8th February 2022 at 12.00 noon, the Procuring Entity received five (5) tenders. The Tender Opening Committee opened the tenders shortly thereafter in the presence of tenderers' representatives present and recorded the following tenderers as

having submitted their respective tenders as captured in the minutes for tender opening committee meeting held on 8th February 2022 (hereinafter referred to as the 'Tender Opening Minutes'):

S/N	BIDDER NAME	REMARKS
01/09	Stera IT Solutions	Joint Venture Stera IT Solutions and Nextsense Technology Ltd.
02/09	Digital Vision (E.A) Ltd	-
03/09	Ergo Enterprises Ltd	Joint Venture 1. Ergo Enterprises Ltd 2. Dignity Traders Ltd 3. Software Technologies Ltd
04/09	Technology Benchmark Ltd	Joint Venture Urbantech Enterprises and Technology Benchmark Ltd
05/09	Brisk Solution Limited	-

After opening the five (5) tenders, the Tender Opening Committee observed that:

- a) Digital Vision (E.A) Ltd failed to enclose and seal its tender in an envelope as instructed in the blank tender document issued to tenderers by the Procuring Entity (hereinafter referred to as the 'Tender Document') and further that Digital Vision (E.A) Ltd failed to submit Form of Tender but provided a financial document indicating the tender price; and
- b) Urbantech Enterprises, the Applicant herein, failed to fill in the Form of Tender but submitted the tender price information in a financial table.

Evaluation of Tenders

An Evaluation Team/Tender Processing Committee appointed by the Respondent (hereinafter referred to as the 'Evaluation Committee') adopted the Tender Opening Minutes with the following observations as captured in the Evaluation Report signed by members of the Evaluation Committee on 10th March 2022 (hereinafter referred to as the 'Evaluation Report'):

- a) Digital Vision (E.A) Ltd tendered as a joint venture with BakhyBakhx Traders Ltd and further that Digital Vision (E.A) Ltd failed to submit its tender as required under ITT 24 – Submission, Sealing and Marking of Tenders, where the documents were submitted in a box file with loose leaf papers; and
- b) Technology Benchmark Ltd customized and filled Form of Tender inserted under mandatory technical evaluation.

Thereafter, the Evaluation Committee evaluated the five (5) tenders in the following stages as captured in the Evaluation Report:

- 1) Preliminary/Mandatory Evaluation;
- 2) Technical Evaluation;
 - i. Firm's Technical Evaluation
 - ii. Conformity to Specifications- Mandatory Technical Evaluation
- 3) Financial Evaluation

Preliminary/Mandatory Evaluation

At this stage, the Evaluation Committee was required to apply the criteria outlined as Stage One: Preliminary/Mandatory Evaluation of Section III – Evaluation and Qualification Criteria at page 39 of the Tender Document. Tenders needed to meet all the mandatory requirements at this stage to proceed to the next stage of evaluation.

At the end of evaluation at this stage, two (2) tenders were found non-responsive and another three (3) tenders, which included the tender submitted by the Applicant in joint venture with Technology Benchmark Ltd, were found responsive. The tenders that were found responsive proceeded to the next stage of evaluation.

Technical Evaluation

At this stage, the Evaluation Committee was required to apply the criteria outlined as Firm's Technical Evaluation and Conformity to Technical Specifications (Mandatory Technical Evaluation) of Stage Two: Technical Evaluation of Section III – Evaluation and Qualification Criteria at page 40 to 45 of the Tender Document. Tenders needed to attain a minimum score of 80 out of 100 marks at the Firm's Technical Evaluation stage before proceeding to the Conformity to Technical Specifications (Mandatory Technical Evaluation) Evaluation stage. Tenders needed to meet all the mandatory technical requirements at the Conformity to Technical Specifications Evaluation stage to proceed to the next stage of evaluation.

At the end of evaluation at the Firm's Technical Evaluation stage, two (2) tenders scored below 80 out of 100 marks thus found non-responsive. However, the tender submitted by the Applicant in joint venture with Technology Benchmark Ltd scored 100 out of 100 marks and was thus the only responsive tender at this stage. The tender submitted by the Applicant in joint venture with Technology Benchmark Ltd proceeded for evaluation at the Conformity to Technical Specifications (Mandatory Technical Evaluation) Evaluation stage.

At the end of evaluation of the Conformity to Technical Specifications (Mandatory Technical Evaluation) Evaluation stage, the tender submitted

by the Applicant in joint venture with Technology Benchmark Ltd was determined to be responsive to proceed to the next stage of evaluation.

Financial Evaluation

At this stage, the Evaluation Committee was required to apply the criteria outlined as Stage Three: Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 45 of the Tender Document.

The Evaluation Committee observed that the tender submitted by the Applicant in joint venture with Technology Benchmark Ltd was the only tender that proceeded to the Financial Evaluation stage and determined the same to be the lowest evaluated responsive tender at a total price of Kshs. 31,810,000.00.

Post Qualification

The Evaluation Committee was required to conduct a due diligence on the tenderer whose tender was determined to be the lowest evaluated tender to determine the tenderers capability/capacity to provide the required services.

The Evaluation Committee obtained confirmation of recommendation letters attached in the tender submitted by the Applicant in joint venture with Technology Benchmark Ltd through an email communication sent out to the clients whom Technology Benchmark Ltd had prior engagement.

Further, the Evaluation Committee held a virtual meeting with Technology Benchmark Ltd for demonstration of the proposed solution in which meeting a demonstration on customization, support, integration and language translation was done.

At the end of the post qualification exercise, the Evaluation Committee, as captured in the Post-Qualification Report signed by members of the Evaluation Committee on 10th March 2022 (hereinafter referred to as the 'Post-Qualification Report'), determined that Applicant in joint venture with Technology Benchmark Ltd as capable with capacity to provide the required service and the proposed system met the requirements stipulated in the Tender Document.

The Evaluation Committee observed that the lowest responsive tenderer, the Applicant in joint venture with Technology Benchmark Ltd, qualified technically and financially to perform the contract satisfactorily.

Recommendation

The Evaluation Committee recommended the subject tender be awarded to the Applicant in joint venture with Technology Benchmark Ltd for being the lowest responsive tenderer at a sum of Kshs.31,810,000.00 (Kenya Shillings Thirty-One Million, Eight Hundred and Ten Thousand) only.

Professional Opinion

In a professional opinion vide a memo dated 10th March 2022 addressed to the Respondent (hereinafter referred to as 'Professional Opinion'), the Procuring Entity's Principal Procurement Officer, Mr. Agure Erick, noted that the subject tender was budgeted and planned for in the current financial year, funds provided for the same were adequate, the method of procurement (open tender) used was appropriate and that the evaluation process conducted on 1st – 4th March 2022 was carried out as per the set criteria in the Tender Document. However, Mr. Agure opined that the due diligence carried out by the Evaluation Committee failed to consider the authenticity and credibility of the Tax Compliance Certificate submitted by the Applicant in joint venture with Technology Benchmark Ltd who had a joint venture agreement and that further due diligence carried out through the KRA Tax compliance checker had shown that the Applicant in joint venture with Technology Benchmark Ltd submitted expired Tax Compliance Certificates.

In view of the further due diligence conducted on the Applicant in joint venture with Technology Benchmark Ltd's Tax Compliance Certificates, Mr. Agure recommended for termination of the procurement process under Section 63 (f) of the Public Procurement and Asset Disposal Act, 2015(hereinafter referred to as the 'Act').

On the same day of 10th March 2022, the Respondent noted the contents of the Professional Opinion and thereafter directed for commencement of a fresh process as per the Act.

Notification to Tenderers

In letters of notification of regret dated 10th March 2022, the Ag. Clerk, Nairobi City County Assembly, Mr. Gavin R. Castro notified all tenderers of the outcome of the subject tender.

REQUEST FOR REVIEW NO.25 OF 2022

On 22nd March 2022, Urbantech Enterprises, the Applicant herein, lodged a Request for Review dated 22nd March, 2022 together with a Supporting Affidavit sworn by Mr. Urbanus Kioko Musango, the Sole Proprietor of the Applicant, on 22nd March 2022 and a Reply to Memorandum of Response dated 7th April 2022 and filed on 7th April 2022 through the firm of S. O. Owino & Associates Advocates, seeking the following orders:

- a) The decision of the respondent not to award the tender be nullified and set aside;**
- b) The respondent's decision that the Applicant's tax compliance certificate contradicted validity be set aside;**
- c) The respondent be ordered to award the Tender No.NCCASB/OT/09/01/2021-2022 to the applicant;**
- d) In the alternative and without prejudice to the request in (c) above, the respondent be ordered to evaluate the Tender**

No. NCCASB/OT/09/01/2021-2022 and award the Tender in compliance with the provisions of the Public Procurement and Disposal of Assets Act, 2015, the regulations therein and the Tender documents issued by the respondent;

e) The costs of the review be awarded to the Applicant; and

f) Any other relief that this Board may deem fit and just to grant.

In a Notification of Appeal and a letter dated 22nd March 2022, the Acting Board Secretary, Mr. Philip Okumu, notified the Respondent of the existence of the Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the Respondent a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 22nd March 2022.

On 28th March 2022, the Procuring Entity responded to the Request for Review by filing a Procuring Entity's Memorandum of Response dated 28th March 2022 through the firm of OLM Law Advocates LLP.

Vide letters dated 4th April, 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective addresses as provided by the Respondent, of the existence of the Request for Review while forwarding to the tenderers a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020. Further, all tenderers were invited to submit to the Board any information and arguments about the subject tender within 3 days from 4th April 2022.

On 6th April 2022, Stera IT Solutions responded to the Acting Board Secretary's letter of 4th April 2022 on behalf of the joint venture of Stera IT Solutions and Nextsense Technologies Limited.

Pursuant to the Board's Circular No.2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

None of the Party's filed their Written Submissions.

APPLICANT'S CASE

On 27th February 2022, the Applicant entered into a joint venture agreement with Technology Benchmark Limited (hereinafter referred to as

the 'joint venture') for purposes of participating in the subject tender and the joint venture provided for distinct roles of the parties in the performance of the subject tender.

The Applicant avers that sometime in January 2022, the Respondent advertised an invitation to tender in respect of the subject tender and that it downloaded the Tender Document, completed the same and submitted its tender with all the mandatory attachments on 7th February 2022 at a tender sum of Kenya Shillings Thirty-One Million Eight Hundred Ten Thousand (Kshs. 31,810,000/=) only. It is the Applicant's averment that at the opening of the tender, the Respondent announced and read out loud the prices of various tenderers.

The Applicant avers that its tender was responsive and was evaluated under all the mandatory stages; Mandatory, Technical, Financial and due diligence. It is the Applicant's averment that on or about 17th March 2022, the joint venture partner, Technology Benchmark Limited, was called by one Caroline, from the Respondent's procurement, via mobile number 0721206475 requesting Technology Benchmark Limited to collect a letter from the Respondent.

The letter in context turned out to be a Letter of Notification of Regret which was dated 10th March 2022 (hereinafter referred to as the 'Letter of Notification of Regret') but received on 18th March 2022 and the reason

indicated in the Letter of Notification of Regret was that *a due diligence report on the Tax Compliance Certificate submitted contradicted validity of the document.*

The Applicant avers that the Respondent did not provide it with the minutes of evaluation committee as well as the due diligence report conducted on the Tax Compliance Certificate which the Applicant believes it ought, to have been given and that it communicated to the Procuring Entity of its dissatisfaction with the reason for rejection of its tender through a letter dated 18th March 2022.

The Applicant is aggrieved by the contents of the Letter of Notification of Regret for the following reasons: (a) that the same was wrongly addressed to Technology Benchmark Limited instead of the Applicant because the Applicant submitted its tender as the lead tenderer, (b) the Applicant had provided a valid Tax Compliance Certificate which was a requirement under the preliminary/mandatory evaluation stage and that the Applicant's tender had passed through all the stages of the tender evaluation process in line with Sections 46 and 83 of the Act.

The Applicant alleges that the decision to unilaterally reject the Applicant's tender at the contract award stage was against the principle of legitimate expectation, the Applicant, having made financial arrangements in readiness for due performance of the contract. The Applicant further

alleges that the Respondent blatantly disregarded and failed to evaluate the tender in accordance with the provisions of Section 46 of the Act and therefore the decision not to award the tender to any of the tenderers was erroneous and in clear contravention of the relevant laws.

According to the Applicant, unless the said error is rectified by the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board'), the integrity and legality of the entire tender evaluation process stands to be prejudiced. The Applicant alleges it is for this reason that it is exercising its statutory right so as to determine the integrity and propriety of the tender evaluation process, a right whose exercise ought to be preserved by granting the orders sought in the instant Request for Review.

PROCURING ENTITY'S RESPONSE

The Procuring Entity contends that the objective of the subject tender was to automate the sessions of the Nairobi City County Assembly to support remote access and virtual meetings while giving a background and summary of tender process that is largely similar to what was hereinbefore captured as a background to this decision.

According to the Respondent, based on the results of the Preliminary, Technical and Financial Evaluation stages, the Evaluation Committee noted that the Applicant was qualified technically and financially to perform the

contract satisfactorily thus recommended the subject tender be awarded to the Applicant in joint venture with Technology Benchmark Limited as the lowest evaluated tenderer at the tender sum of Kshs.31, 810,000.00.

The Respondent contends that the Evaluation Committee proceeded to conduct post qualification due diligence exercise on the Applicant in accordance with Section 83 of the Act and prepared a due diligence report confirming the capacity and technical competency of the Applicant and which due diligence report was signed and/or initialed by all members of the Evaluation Committee.

The Respondent contends that the Procuring Entity's Head of Procurement purportedly conducted a further due diligence and prepared an opinion recommending the termination of the procurement process under Section 63 (f) of the Act. According to the Respondent, the recommendation for termination was based on a misconceived allegation that further due diligence had revealed the Applicant and its joint venture partner had submitted expired tax compliance certificates by virtue of the Head of Procurement use of KRA's Tax Compliance Checker yet no proof was annexed to the Professional Opinion to support this allegation.

The Respondent confirms that the Letter of Notification of Regret was issued informing the Applicant that its tender was not successful.

The Respondent contends that on 24th March 2022, through an internal memo, the Chairperson of the Evaluation Committee confirmed that the Evaluation Committee; (a) had evaluated the tenders and recommended the award of the subject tender to the Applicant, (b) invited the Applicant to give a demo of the solution, which demo met the requirements of the tender, (c) conducted due diligence on the Applicant to establish, *inter alia*, whether the Applicant's previous assignments had been handled to the satisfaction of its clients and (d) due diligence exercise supported an award of the subject tender to the Applicant.

The Respondent contends that on 24th March 2022, the Procuring Entity's Senior Legal Counsel issued a legal opinion to the Acting Clerk of the Procuring Entity to the effect that the subject tender was irregularly terminated and advised that; (a) the scope of the Professional Opinion issued by the Head of Procurement was limited to the provisions of Section 84 of the Act and; (b) post qualification due diligence was an exercise to be conducted by the Evaluation Committee and not the Head of Procurement.

The Procuring Entity contends that the decision to terminate the subject tender's procurement proceedings was made following the advice of the Head of Procurement and that the Procuring Entity has since come to the realization that it should not have followed the recommendation of the

Head of Procurement in terminating the subject tender's procurement proceedings for the ensuing reasons;

- (a) *The impugned "further due diligence and the professional opinion resulting therefrom are illegal and invalid. Under section 83 of the Act the function of conducting due diligence post tender evaluation is vested in the evaluation committee not the head of procurement. Accordingly, the procuring entity's Head of procurement acted ultra vires in purporting to conduct due diligence on the Applicant. Under section 84 of the Act, the Head of procurement is only required to;*

 - i. *Review the tender evaluation report;*
 - ii. *Provide to the Accounting officer a signed professional opinion on the procurement proceedings*
- (b) *The outcome of the purported due diligence was not signed or initialed by each member of the tender evaluation committee as required under section 83(3) of the Act.*
- (c) *The findings of the impugned "further due diligence" are incorrect since the Tender Evaluation Committee entity tasked with evaluating the responsiveness of the Applicants Tender, conclusively established that the Applicant had submitted compliant tax compliance certificates. It was not open for the head of procurement to re-open the issues of the responsiveness of the Applicants bid at the tail of the process as he did. To reiterate the head of procurement did not annex any proof of the expired tax compliance certificates.*

- (d) *The Professional opinion is fatally incompetent for failing to abide the provisions of Regulation 78(4) of the public procurement and Asset Disposal Regulations 2020 as read together with the ninth schedule thereof; in particular, the Professional opinion does not;*
- i. Give a statement of the outcome of the due diligence conducted by the Evaluation Committee on the successful Bidder;*
 - ii. State how the Evaluation Criteria set forth in the Tender Document was applied and whether or not the Tender Evaluation Committee members adhered to the law in the bid evaluation.*

The Respondent admits that the Applicant submitted a responsive tender within the contemplation of Section 79 of the Act and the Tender Document which conformed to all the eligibility and other mandatory requirements in the Tender Document.

The Respondent contends that the Procuring Entity has no obligation in law to supply the Applicant with minutes of the evaluation committee together with the due diligence report and that Section 67(1) of the Act expressly prohibits the Respondent from disclosing, *inter alia*, (a) information relating to the evaluation comparison or clarification of tenders proposals or quotations; or (b) the contents of tenders proposals or quotations.

In light of the above, the Respondent leaves it to the Board to grant the orders it will deem just, appropriate and fit but prays for each party to bear

its own costs because any order for costs against the Respondent will ultimately be borne by the taxpayers of Nairobi City County.

INTERESTED PARTY'S RESPONSE

By a letter dated 6th April 2022 addressed to the Board, the Interested Party stated that the joint venture between the Applicant and Technologies Benchmark Limited did not meet the required threshold at the opening of tenders to proceed further because no name or amount was on form of tender, there was no form of tender and figures of Kshs.31,809,000 were read out loud from financial table with respect to the Applicant's tender.

According to the Interested Party, the Applicant's joint venture tender could not pass mandatory evaluation stage having not met the threshold at the opening of tenders.

APPLICANT'S REJOINDER

In a rejoinder to the Procuring Entity response, the Applicant contends that in view of the admissions made in the memorandum of response, it is clear that its disqualification was not only unfair but unreasonable, unlawful and unprocedural since the requirements in the Tender Document were duly met by it.

According to the Applicant, its disqualification was not pegged on the evaluation criteria but rather on the opinion of the Head of Procurement and a 'further due diligence' which opinion and action was fatally defective and inconsistent with the Act, Public Procurement and Asset Regulations, 2020 (hereinafter referred to as 'Regulations 2020') and the provisions of the Tender Document.

The Applicant contends that Section 46 of the Act gives the Evaluation Committee the sole responsibility of determining the responsiveness of tenders; a duty that was discharged by the Evaluation Committee but wrongfully usurped by the Procuring Entity's Head of Procurement function through an unlawful 'further due diligence exercise'.

It is the Applicant's contention that the Head of Procurement's usurpation of the role of the Evaluation Committee was unlawful, should not have been used to disqualify the Applicant's tender and such action in itself renders the impugned termination of the subject procurement null and void *ab initio* because the Applicant's tender was wrongfully held to be non-responsive by a person whose acts were *ultra vires* when it comes to determining the responsiveness of tenders.

The Applicant reiterated that it participated in the subject tender as a joint venture firm and provided a valid Tax Compliance Certificate and that the Tender Document did not restrict this criterion in any way when it came to

firms bidding as joint venture partners. A bidder participating as a joint venture firm was required to provide a valid Tax Compliance Certificate of the bidder (in this case, the Applicant as a joint venture partner) by the tender submission deadline.

The Applicant prays for annulment of the termination of the subject tender and an order for the Respondent to award the subject tender to the Applicant as the lowest evaluated responsive tenderer in accordance with Section 86(1)(a) of the Act within such period as may be specified by the Board.

BOARDS DECISION

The Board has considered each of the parties' cases, documents, pleadingstogether with confidential documents submitted to it by the Respondent pursuant to Section 67 (3) (e) of the Act and finds the issues that crystalize for determination are as follows:

- 1. What action should the Procuring Entity's Head of Procurement function have taken with respect to conducting a further post-qualification (further due diligence) exercise on the Applicant in joint venture with Technology Benchmark Limited;**
- 2. Whether the Respondent erred in issuing the Letter of Notification of Regret dated 10th March 2022 to Technology**

Benchmark Limited on behalf of the Applicant in joint venture with Technology Benchmark Limited; and

3. What orders should the Board grant in the circumstances.

What action should the Procuring Entity's Head of Procurement function have taken with respect to conducting a further post-qualification (further due diligence) exercise on the Applicant in joint venture with Technology Benchmark Limited.

Vide an internal memo dated 10th March 2022, the Principal Procurement Officer of the Procuring Entity, Mr. Agure Erick, issued his professional opinion to the Respondent pursuant to Section 84 of the Act with respect to evaluation of tenders and post-qualification exercise touching on the subject tender. He opined that, even though the evaluation process was carried out as per the set criteria in the Tender Document, due diligence carried out by the Evaluation Committee did not consider the authenticity and credibility of the Tax Compliance Certificates submitted by the Applicant in joint venture with Technology Benchmark Ltd. He further indicated that a further due diligence carried out had shown that the Applicant in joint venture with Technology Benchmark Ltd had submitted expired Tax Compliance Certificates which were proven by the KRA portal on Tax Compliance Checker evidencing that the certificate numbers were invalid. In view of the foregoing, Mr. Agure recommended for termination of the procurement proceedings of the subject tender based on the due

diligence conducted with respect to Tax Compliance Certificates submitted by the Applicant in joint venture with Technology Benchmark Ltd.

On its part, the Applicant contended that the mandate to conduct due diligence exercise rested with the Evaluation Committee under Section 83 of the Act and that the Head of Procurement function in purporting to conduct a further due diligence exercise usurped the role of the Evaluation Committee.

The Procuring Entity admitted that the purported further due diligence was illegal and invalid and that under Section 83 of the Act, the function of conducting due diligence, post tender evaluation, is vested in the Evaluation Committee, not the Head of Procurement function and that the Head of Procurement function acted *ultra vires* in purporting to conduct a further due diligence on the Applicant in joint venture with Technology Benchmark Limited.

We agree with both the Applicant and the Respondent who are in concurrence that the organ vested with the responsibility to conduct a post-qualification (due diligence) exercise is the Evaluation Committee and not the Head of Procurement function. We say so because Section 83 of the Act read with Regulation 80 of Regulations 2020 are prescriptive on who conducts a due diligence exercise, what may entail such an exercise and how such an exercise is to be reported as follows:

Section 83. Post-qualification

(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.

Regulation 80. Post-qualification

(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation

committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.

(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—

(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or

(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method.

On the other hand, Section 84 of the Act is prescriptive on the role of the Head of Procurement function with respect to evaluation of tenders as it provides as follows:

84. Professional opinion

(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.

(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.

(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).

It is clear from the provisions of Section 83 of the Act read with Regulation 80 of Regulations 2020 and Section 84 of the Act that the roles of the Evaluation Committee and those of the Head of Procurement function are distinct. The Evaluation Committee is the only organ of a procuring entity that is vested with the responsibility of conducting a due diligence exercise to confirm and verify the qualifications of a tenderer who submitted the lowest evaluated responsive tender to be awarded a contract. To this end, the purported 'further due diligence' as indicated in Mr. Agure's professional opinion cannot be said to be lawful because, (a) the same was not conducted by the Evaluation Committee and (b) there is no proof of such 'further due diligence' being reduced into a report in writing as required under Section 83 of the Act. In essence, the purported 'further due diligence' is null and void *ab initio*.

We note that Section 47 of the Act provides as follows with respect to procurement function:

Section 47. Procurement function

(1) A procurement function shall be handled by procurement professionals whose qualifications are recognized in Kenya.

(2) The head of the procurement function shall among other functions under this Act, be responsible for rendering procurement professional advice to the accounting officer.

(3) The Cabinet Secretary shall make regulations for the better carrying out of this section in respect to low value procurement.

A reading of Section 47 of the Act provides for the Head of Procurement function to be procurement professional and to be the one responsible for rendering procurement professional advice to the accounting officer.

Armed with the provisions of Section 47 and 84 of the Act, Mr. Agure, alongside the report to the evaluation committee as secretariat comments, was mandated to review the Evaluation Report and provide a Professional Opinion to the Respondent.

In our considered view, nothing stopped Mr. Agure from pointing out any breach of law or malpractice that he may have detected that took place during evaluation of tenders, in his Professional Opinion, because he had a responsibility to render professional procurement advice to the Respondent.

With respect to the alleged invalid Tax Compliance Certificates submitted by the Applicant in joint venture with Technology Benchmark Limited, Mr. Agure ought to have brought this to the attention of the Respondent via his Professional Opinion and recommended for the Respondent to direct the Evaluation Committee to conduct a further due diligence with respect to the Tax Compliance Certificates submitted by the Applicant in joint venture with Technology Benchmark Limited noting that Section 55 (1)(f) of the Act requires one to have fulfilled their respective tax compliance certificate to be eligible to tender for a contract in procurement.

Mr. Agure should not have conducted the purported further due diligence on his own volition nor did he have powers to direct the Evaluation Committee to conduct such further due diligence.

Given the forgoing, it is our finding that the Procuring Entity's Head of Procurement should have advised and recommended via his Professional Opinion to the Respondent, for the Respondent to direct the Evaluation Committee to conduct a further post-qualification (due diligence) exercise on the Applicant in joint venture with Technology Benchmark Limited with respect to the Tax Compliance Certificates submitted by the Applicant in joint venture with Technology Benchmark Limited with respect to the subject tender.

Whether the Respondent erred in issuing the Letter of Notification of Regret dated 10th March 2022 to Technology Benchmark Limited on behalf of the Applicant in joint venture with Technology Benchmark Limited.

It is common ground that the Respondent issued the Letter of Notification of Regret dated 10th March 2022 to Technology Benchmark Limited and not to the Applicant.

The Applicant contends that it tendered for the subject tender as a lead tenderer in joint venture with Technology Benchmark Limited and that the Letter of Notification of Regret dated 10th March 2022 should not have been issued to Technology Benchmark Limited but to it.

The Respondent did not respond to this issue.

Section 87 of the Act read with Regulation 82 of Regulations 2020 is prescriptive on who should and how should participants in a procurement processes be notified of the outcome of evaluation and award of tenders as follows:

Section 87. Notification of intention to enter into a contract

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

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

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

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

Regulation 82. Notification of intention to enter into a contract

(1) The notification to the unsuccessful bidder under section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

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

(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86(1) of the Act.

A reading of Section 87(3) of the Act requires an accounting officer of a procuring entity to notify all other persons submitting tenders (other than the successful tenderer) that their tenders were not successful. The persons submitting tenders (other than the successful tenderer) whose tenders are not successful are construed to be the unsuccessful tenderers under Regulation 82(1) of Regulations 2020.

Clause 4.1 of Section I – Instructions to Tenderers (ITT) at page 13 of the Tender Document provides as follows in part:

4. Eligible Tenderers

4.1 A Tenderer may be a firm that is a private entity, a state-owned enterprise or institution subject to ITT 4.6, or any combination of such entities in the form of a joint venture (JV) under an existing agreement or with the intent to enter in to such an agreement supported by a Form of Intent..... In the case of a joint venture, all members shall be jointly and severally liable for the execution of the contract in accordance with the Contract terms. The JV shall nominate a Representative who shall have the authority to conduct all business for and on behalf of any and all the members of the JV during the Tendering process and, in the event the JV is awarded the contract, during contract execution......[Emphasis by the Board]

With the above provision, neither the Applicant nor Technology Benchmark Limited in their own individual capacity were tenderers in the subject tender. Instead, the joint venture of the Applicant and Technology Benchmark Limited was the tenderer in the subject tender having

submitted one original tender jointly and as admitted by the Applicant in its Request for Review and Reply to Memorandum of Response.

We have perused the original tender submitted jointly by the Applicant in joint venture with Technology Benchmark Limited and we note at pages 087 to 089 is a copy of a Joint Venture Agreement dated 27th February 2022 made between and executed by the Applicant and Technology Benchmark Limited. Schedule 1 of the said Joint Venture Agreement provides for the role of the Applicant as the lead partner providing resources to execute the project in Design, Development, Implementation, Deployment, Training of system and Infrastructure set up while that of Technology Benchmark Limited as the overall project management, quality assurance, technical qualification and financial capacity.

At page 001 of the original tender submitted jointly by the Applicant in joint venture with Technology Benchmark Limited is a technical proposal submission form signed by Mutisya Mathew the Senior MIS Consultant of Technology Benchmark Limited.

At pages 097 to 102 of the original tender submitted jointly by the Applicant in joint venture with Technology Benchmark Limited are Confidential Business Questionnaire for each of the joint venture partner

i.e. the Applicant and Technology Benchmark Limited. We note the Business Questionnaire of the Applicant has the physical and postal address of the Applicant but has no name and email address of the Applicant's contact person as required under Clause 5 . Full Address and Contact Details of the Tenderer of Clause a). Tenderer's details. We also note the Business Questionnaire of Technology Benchmark Limited has the physical and postal address of the Applicant and the email address of Technology Benchmark Limited's contact person as required under Clause 5- Full Address and Contact Details of the Tenderer of Clause a)-Tenderer's details.

Even though the Joint Venture Agreement stipulates that the Applicant is the lead partner, the same does not indicate that the Applicant is the contact entity/person for the joint venture tenderer. Secondly, the Applicant has failed to point out to the Board where in the original tender submitted jointly by the Applicant in joint venture with Technology Benchmark Limited the Applicant was indicated as the contact person for the joint venture.

Notwithstanding the foregoing, we find that it would have been reasonable for the Respondent to issue the Letter of Notification of Regret addressed to both the Applicant and Technology Benchmark Limited because the original tender submitted jointly by the Applicant in joint venture with

Technology Benchmark Limited did not indicate who the contact person of the joint venture was.

What orders should the Board grant in the circumstances.

The Board has held that Mr. Agure usurped the role of the Evaluation Committee when he purported to have a further due diligence with respect to Tax Compliance Certificates submitted by the Applicant in joint venture with Technology Benchmark Limited and that such further due diligence is null and void. We find it just that we remit back the procurement proceedings of the subject tender to the Head of Procurement Function to issue a Professional Opinion to the Respondent in line with Section 84 of the Act taking into consideration our findings herein on this issue. For this to happen, we have no option but to cancel and set aside the letters of notification of regret dated 10th March 2022 issued to all tenderers by the Respondent.

We note that the subject procurement proceedings were not terminated in accordance with Section 63 of the Act in that the Respondent never approved the recommendation to terminate the same but only noted and ordered for commencement of a fresh process as per the Act. Further, tenderers and the Public Procurement Regulatory Authority were never informed of termination of the subject tender's procurement proceedings as required under Section 63(2), (3) and (4) of the Act. In essence, there is

no termination of the subject tender's procurement process and therefore there is no point of annulling a non-existent termination of procurement process. For avoidance of doubt, the subject tender's procurement proceedings are in existence and alive, therefore no fresh procurement process can commence with respect to the subject tender as long as the procurement proceedings of the subject tender have not been terminated.

In totality, the Request for Review succeeds with respect to the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon it under Section 173 of the Act, the Board makes the following orders with respect to the Request for Review dated 22nd March 2022:

- 1. The Letter of Notification of Regret with respect to Tender No: NCCASB/OT/09/01/FY2021-2022 for Supply Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly dated 10th March 2022 issued to the**

Applicant and all other tenderers in the subject tender by the Respondent be and are hereby cancelled and set aside.

- 2. The Respondent is hereby ordered to remit the procurement proceedings of Tender No: NCCASB/OT/09/01/FY2021-2022 for Supply Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly back to the Procuring Entity's Head of Procurement function for the Procuring Entity's Head of Procurement function to, alongside the report to the Evaluation Committee as secretariat comments, review the Evaluation Report signed by members of the Evaluation Committee on 10th March 2022 and provide a signed professional opinion to the Respondent on the procurement proceedings of Tender No: NCCASB/OT/09/01/FY2021-2022 for Supply Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly, taking into account the Board's findings in this decision.**
- 3. Further to Order 2 above, the Respondent is hereby ordered to ensure the procurement proceedings of Tender No: NCCASB/OT/09/01/FY2021-2022 for Supply Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support**

Remote Access and Virtual Meetings for Nairobi City County Assembly proceeds to its logical conclusion within 14 days from the date of this decision.

- 4. Given that the procurement proceedings of the subject tender are not complete, each party shall bear its own costs in this Request for Review.**

Dated at Nairobi this 12th Day of April 2022.



CHAIRPERSON

PPARB



SECRETARY

PPARB

