

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 56/2022 OF 30TH JUNE 2022

BETWEEN

ACACIA SATLINK LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 2ND RESPONDENT

M/S OSTA TECH LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer, Independent Electoral and Boundaries Commission in respect to Tender No. IEBC/CNC/22/001/2021-2022 for provision of KIEMS network for August 2022 general elections.

BOARD MEMBERS

- | | |
|---------------------------|---------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Mr. Ambrose Ngare | - Member |
| 3. Ms. Phyllis Chepkemboi | - Member |
| 4. Ms. Rahab Chacha | - Member |
| 5. Mr. Jackson Awele | - Member |

IN ATTENDANCE

Mr. Stanley Miheso -Secretariat

INTRODUCTION

The Independent Electoral and Boundaries Commission, the Procuring Entity and the 2nd Respondent herein, sought for provision of KIEMS Network for 2022 General Election under Tender No. IEBC/CN/22/001/2021-2022. The 2nd Respondent invited tenders from eligible tenderers through National Competitive Negotiation. The invitation was issued to three tenderers on 20th April, 2022. The tenders were received and opened on Friday, 27th April, 2022 at 11:00 A.M by a Tender Opening Committee. As per the tender opening minutes submitted to the Board by the Respondents as part of confidential documents pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), three (3) tenderers responded to the invitation as follows:-

1. Acacia Satlink Limited;
2. Safa ITC General Trading LL.C & Osta Tech Ltd; and
3. Airtel Network Kenya Ltd

TENDER EVALAUTION.

The Tender Evaluation Committee (hereinafter referred to as the 'Evaluation Committee') was appointed by the 1st Respondent vide a Memo dated 28th April, 2022.

Tender Evaluation Criteria

The evaluation was carried out using the criteria set out in the blank tender document issued to prospective tenderers by the Respondents (hereinafter referred to as the 'Tender Document'). The criteria comprised of three stages namely: -

- a) Stage 1: Preliminary Evaluation
- b) Stage 2: Vendor Technical Evaluation
- c) Stage 3: Financial Evaluation

Additionally, the evaluation committee was guided by Instructions to Tenderers and the Tender Data Sheet in the Tender Document.

Stage 1: Preliminary Evaluation (Mandatory Requirements)

Tenders were checked for responsiveness and completeness to determine if they conform to eligibility as stipulated in the Tender Document. At this stage, tenders were required to adhere to various mandatory requirements.

At the end of evaluation at this stage, only the tender submitted by Safa ITC General Trading LL.C & Osta Tech Ltd (hereinafter referred to as the 'Interested Party') was determined responsive to proceed to the Vendor Technical Evaluation.

Stage 2: Vendor Technical Evaluation

At this stage, a tendere was either Compliant or non-Compliant with the vendor's technical evaluation criteria provided. Tenders were required to be 100% compliant with the evaluation criteria. Any non-compliant tender would be eliminated and not considered for further evaluation.

At the end of evaluation at this stage, the tender submitted by the Interested Party was found to be Compliant with and responsive to both preliminary and technical requirements thus proceeded to the Financial Evaluation stage.

Stage 3: Financial Evaluation Stage

The Interested Party's tender being the only one that made it to this stage was determined to have the lowest evaluated tender at Kshs.201,947,609.00.

EVALUATION COMMITTEE RECOMMENDATION.

The Evaluation Committee proceeded to recommend the Interested Party to be considered for Negotiation on the price, scope, quality and quantity of Tender No. IEBC/CN/22/001/2021-2022 for Provision of KIEMS Network for 2022 General Election- Lot 2 on a three year framework contract .

Professional Opinion

Having reviewed the professional opinion and related documents, the head of procurement function Approved the Award of Tender No. IEBC/CN/22/001/2021-2022 for Provision of KIEMS Network for 2022 General Election -Lot 2 for a Three (3) Year Framework Contract to the Interested Party on an as and when required basis owing to the reasons given by Director, Supply Chain Management.

REQUEST FOR REVIEW NO. 56/2022

The Request for Review was lodged by M/s Acacia Satlink Limited, on 30th June, 2022 seeking the following orders:

- i). A declaration that the Procurement Entity breached the provisions of Article 227(1) of the Constitution and Section 79(1) of the Public Procurement and Disposal Act;**
- ii). The decision of the Procuring Entity to award the Tender to the Interested Party be annulled and set aside;**

- iii). The Board be pleased to order a re-evaluation of Tender No IEBC/CN/22/001/2021-2022 FOR THE PROVISION OF KIEMS NETWORK FOR AUGUST 2022 GENERAL ELECTIONS, and award the tender to the Applicant who strongly believes it has the lowest, and most competitive bid;**
- iv). The Board be pleased to annul any contract that may have been entered into by the Respondents and the Interested Party before the lapse of the 14-day period within which tenderers may seek administrative review;**
- v). The Board be pleased to stop any implementation of any such contract entered into between the Respondents and Interested Party;**
- vi). The Respondents be compelled to pay the costs to the Applicant arising from/and incidental to this Application;**
- vii). The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.**

In Response to the application the Respondents and Interested Party filed the following documents;

1. The Respondents' Response to the Request for review dated 7th July 2022
2. The Respondents' Replying Affidavit dated 7th July 2022
3. The Respondents' notice of preliminary objection dated 7th July 2022
4. The Respondents' written submissions dated 7th July 2022
5. The Interested Party's Notice of Preliminary Objection dated 14th July 2022

6. The Interested Party's Memorandum of Response dated 14th July 2022

7. The Interested Party's Replying Affidavit dated 14th July 2022

The Board has considered the totality of the documents filed by the parties to these proceedings including the confidential documents supplied pursuant to Section 67(3) of the Act and finds as follows;

PRELIMINARY OBJECTION

It is trite law that courts and decision-making bodies can only act in cases where they have jurisdiction to do so. As the preliminary objections herein inter-alia challenge the jurisdiction of the Board to entertain the Application on its merits, it behoves the Board to consider and determine the preliminary objections in the first instance and only proceed to the merits of the Request for Review if it determines that the preliminary objections cannot be sustained.

In the leading authority on this point, Nyarangi JA in the *locus classicus* case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) eKLR** opined as follows

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

before it the moment it holds the opinion that it is without jurisdiction. [Emphasis added]

Three jurisdictional issues arise from the foregoing preliminary objections lodged by the Respondents and Interested Party;

- i) That the Request for review was filed out of time;
- ii) That the Board lacks Jurisdiction in the matter as the Application was filed after the contract had been signed;
- iii) That the challenge to the Interested Party's competence is time barred.

i) That the Request for review was filed out of time

The Respondents and Interested Party aver that the Application is time barred by dint of Section 167 of the Act which requires a review application to be brought before this board within 14 days of notification of award or date of occurrence of the alleged breach. They contend that the instant Application has been filed more than 55 days after the date when the notification of award was issued.

The Applicant states that it obtained a copy of the said letter by physically visiting the Procuring Entity's premises on 17th June 2022 whence it was informed that the decision to award had been made and was ready for collection. It states that it received the said communication informing it that its tender had been rejected on that date.

The Respondent concedes that while it is true that the Notification of Award sent to the Applicant was dated 9th May 2022, the same was communicated simultaneously with the Award to the successful tenderer on 9th May 2022 and not 17th June, 2022, as alleged. The Respondents have attached a scan of a stamped envelope purportedly used to post the notification to the Applicant. The respondent also filed a copy of a register in which a letter to the Applicant was collected by Posta on 27th May 2022

The Interested Party did not present any arguments to this preliminary objection.

Section 167(1) of the Act states THAT:-

"167. Request for a review

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

Having considered the parties' rival submissions on this issue, the Board observes that under Section 87(1) of the Act, the Respondents bear the duty to notify all tenderers of the outcome of the procurement process. The onus to demonstrate how or when the said notifications were transmitted and

therefore when time starts running for purposes of section 167(1) of the Act squarely reposes in the Respondents. Therefore where, as in this case, the date of service is disputed, the onus lies on the Respondents to prove service on a balance of probabilities in order to shift the burden to the tenderer to disprove service. In this case, the Board observes that the Respondents' copy of the notification/letter of Regret to the Applicant filed before this Board is dated 20th May, 2022 whereas the Applicant's copy of the same letter as filed before this board is dated 9th May, 2022. The Board further notes that whereas the Respondents allege that they served the Applicant by post, there is no proof of when the said notification reached the Applicant or that it was delivered in the first place.

It is for this reason that in contested proceedings such as these, proof of postage by ordinary mail is of little or no probative value. In **APPLICATION NO. 114 OF 2021, COBRA SECURITY COMPANY LIMITED VS THE ACCOUNTING OFFICER, NATIONAL CEREALS AND PRODUCE BOARD & 4 OTHERS** this Board held as follows in this regard;

"It is settled law that there cannot be a presumption that a letter sent by ordinary post would reach the addressee. Such a presumption arises only in the case of a letter sent by registered post as prescribed in section 3(5) of the Interpretation and General Provisions Act, (cap 2). See the Court of Appeal decision in Shah vs. Padamshi [1982] eKLR. In the circumstances, absent a certificate of registered post or a copy of the notification duly signed by the Applicant as received or an email read receipt, there is no plausible way of ascertaining that the notification letters were sent out by the

Respondent or more importantly that they were received by the Applicant on the 31st of August as asserted by the Respondent."

In the premises, absent plausible evidence of service, the Board is inclined to grant the Applicant the benefit of doubt and accordingly finds that this limb of the preliminary objection lacks merit and is dismissed.

ii) That the Board lacks Jurisdiction in the matter as the Application was filed after the contract had been signed

The second limb of the Preliminary Objection is that the Board lacks jurisdiction to hear the matter because a contract had been signed as at 30th June 2022 when this Application was filed. The Board observes from the record that the contract was signed between the 1st Respondent and the Interested Party on 30th May, 2022. Going by the notification letter provided by the Respondents dated 20th May, 2022, the said contract was signed 10 days from the date of notification of award. Going by the Notification letter filed by the Applicant dated 8th May, 2022, the Contract ought to have signed on or after the 24th of May 2022.

Under Section 167(4)(c) of the Act this Board is divested of jurisdiction to hear applications for review in instances where a contract has already been signed. The sad provision stipulates;-

"167(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(c) where a contract is signed in accordance with section 135 of this Act.”

However, it is now settled that before downing its tools in such circumstances, the Board must first satisfy itself that the contract was signed in strict compliance with the relevant provisions of the Act to wit; Section 135(3) thereof stipulates as follows:-

"135 (3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period."

Having found under the first limb of the preliminary objection that the Respondents failed to demonstrate the date of service of the notification, it necessarily follows that the signing of the contract before the lapse of 14 days from the date when all tenderers are deemed to have been served (which in this case is deemed to be 17th June 2022) was of null effect in law. Going by the said date, the earliest the Respondents could have lawfully executed the contract was on or about the **2nd of July, 2022**. The Board is accordingly inclined to give the Applicant the benefit of the doubt and finds no merit in this limb of the preliminary objection and the same is dismissed.

iii) That the challenge to the Interested Party's competence is time barred

On this limb of the preliminary objection, the Applicant challenges the Interested Party's competence to fulfil the contract and further contends that the Interested Party was not the lowest tender and was accordingly not fairly awarded the contract. The Respondents on their part contend that the tender opening was held on 27th April 2022 and therefore the cause of action accrued on the same date for purposes of calculating when time started running for purposes of section 167(1) of the Act. In the event, it is the Respondent's contention that time lapsed on the said issue on 5th May 2022.

The Board observes that like all other tenderers, the contents of a tenderer's tender are confidential and cannot reasonably be expected to come to the attention of a tenderer during a procurement process. Moreover, noting that the Applicant challenges the competence of the Interested Party as the *successful tenderer* the Board is of the considered opinion that the challenge to a successful tenderer's competence could only have been possible after the notification of award to the said successful tenderer which we have held was the 17th of June 2022 when the Applicant is deemed to have been notified of the same. Before then, none of the parties knew who the successful tenderer was as to verify their competence for the task or otherwise. In the premises we find no merit in this limb of the preliminary objection and dismiss the same.

The Board now proceeds to consider the Substantive issues raised in the Request for review. The Board has considered the rival pleadings, supporting documents and submissions filed by parties together with the confidential documents supplied by the Respondents pursuant to section 67 (3) (e) of the Act and has crystallized the following as the issues for determination;

- i) Whether the Applicant was fairly disqualified at preliminary evaluation
- ii) Whether the award to Interested Party was lawful
- iii) Who should bear the costs of these proceedings?

Before we turn to consider these issues, it is important to set out the applicable law that should guide evaluation of tenders.

Under Section 79 of the Act:

(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

(2) A responsive tender shall not be affected by—

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall—

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders.

Under section 80(2) of the Act;

"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act

and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.”

Regulation 74 (1) of the Act provides;

Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—

- (a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;***
- (b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;***
- (c) any tender security submitted is in the required form, amount and validity period, where applicable;***
- (d) the tender has been duly signed by the person lawfully authorised to do so through the power of attorney;***
- (e) the required number of copies of the tender have been submitted;***
- (f) the tender is valid for the period required;***
- (g) any required samples have been submitted; and***
- (h) all required documents and information have been submitted.***

(2) Subject to section 79(2)(b) of the Act, any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major

deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive.

Under section 75 of the Act;

- (1) A procuring entity shall reject all tenders, which are not in conformity to the requirements of section 79 of the Act and regulation 74 of these Regulations.***
- (2) The classification of a deviation from the requirements as minor under section 79(2)(a) of the Act shall be applied uniformly and consistently to all tenders received by a procuring entity.***

To put the foregoing provisions into perspective, the Board take the liberty to reproduce in extenso the following exposition as rendered by Mativo J (as he then was) in **Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR**. The Learned Judge held:

"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory

prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a *sine qua non* for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. In public procurement regulation it is a general rule that ***procuring entities should consider only conforming, compliant or responsive tenders.*** Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying

purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.

The learned Judge also made a similar holding in **Republic vs Public Procurement Administrative Review Board & 3 Others Ex-parte Saracen Media Limited, (supra).**

Applying the foregoing explication of the law to the issues at hand, the Board finds as follows;

i) Whether the Applicant was fairly disqualified at preliminary evaluation.

The Board has considered the rival pleadings, supporting documents and submissions filed by parties together with the confidential documents supplied by the Procuring Entity pursuant to section 67 (3) (e) of the Act and observes that vide a notification letter dated 20th May, 2022, the Respondents inter-alia informed the Applicant as follows:-

"We hereby regret to inform you that you were unsuccessful because you did not;

- 1. Submit a Form of tender is not duly filled as per the tender instructions.**
- 2. Sequentially paginate/serialize on each page including all the attachments in the sequence required.**
- 3. Did not submit duly filled appendix on fraud and corruption.**
- 4. Dully filled, signed and stamped the price schedule in the format provided....”**

The Respondent in its Response and Replying Affidavit expounds on the foregoing reasons as follows;

- a) That the Applicant did not fill out all the critical information in the form as required.
- b) That the Applicant changed/altered the Form of tender by cutting out the Certificate of Independent Tender Determination, which is supposed to be part (ii) of the said Form, thereby unlawfully altering the character of the Form of Tender
- c) That the Applicant failed to sequentially serialize and paginate its tender document (including attachments) contrary to the mandatory provisions of the tender document. In this regard, it avers that the reverse of page 038 of the Applicant's original tender was not paginated.
- d) That the Applicant failed to provide a duly filled, signed and stamped Price Schedule in the format provided in the Tender Document. That the actual activity dates and alternative numbers at pages 134,135,137 and

138 of the Price Schedule forms contained in the Applicant's original tender were missing.

The Applicant on the other hand asserts;

- a) That the Procuring Entity unlawfully disqualified its tender and that the Form of Tender it submitted together with the attachments thereto were all sequentially paginated.
- b) That a duly filled appendix on fraud and corruption was submitted.
- c) That it submitted a duly filled, signed and stamped price Schedule in the format.

The Applicant accordingly maintains that it fully complied with the eligibility criteria and mandatory requirements under the tender document and therefore submitted a valid tender.

The Board has taken liberty to review the confidential documents supplied by the Respondents pursuant to section 67 (3) (e) of the Act and observes as follows on each of the disqualification reasons stated in the notification letter;

Failure to Submit a Form of tender that is duly filled as per the tender instructions.

The form of Tender was provided as item No.4 on page 25 of the preliminary evaluation criteria of the Tender Document and states:-

No.	Qualification Subject	Qualification Requirement to be met	Document To be Completed by Tenderer
4	Price validity	The form of tender to be duly filled and signed to confirm prices are valid for 120 days from the tender closing date.	Must submit a Duly filled, signed and stamped form of tender

Further instructions for form of tender as found on page 29 of the Tender document provided as follows:-

"FORM OF TENDER

INSTRUCTIONS TO TENDERERS

- i) The Tenderer must prepare this Form of Tender on stationery with its letterhead clearly showing the Tenderer's complete name and business address.***
- ii) All italicized text is to help Tenderer in preparing this form.***
- iii) Tenderer must complete and sign CERTIFICATE OF INDEPENDENT TENDER DETERMINATION and the SELF DECLARATION OF THE TENDER attached to this Form of Tender.***
- iv) The Form of Tenders shall include the following Forms duly completed and signed by the Tenderer.***
 - a) Tenderer's Eligibility - Confidential Business Questionnaire***

b) Certificate of independent Tender Determination

c) Self-Declaration of the Tenderer”

The certificate of independent tender determination is found on page 29 of the Tender Document, the self-declaration forms are found on pages 30 to 31 of the Tender Document while the eligibility-confidential business questionnaire is found on pages 32 to 34 of the Tender Document.

That said, the Board observes that the Applicant’s original Tender had the form of tender in pages 44 to 46 and the Board noted the following:-

1. Item f) of the form of tender does not include calculations of discounts. The Board however notes that discount calculations were only relevant in so far as a tenderer elected to offer discounts on its price. In this case none was offered and in the premises no calculations were necessary;
2. Item h) on performance security was combined with item g) on tender validity period. The Board notes that that Item h) and g) are distinct requirements of the Tender Document.
3. Only the last page was signed. The Board however notes that there is no express requirement that each page of the form of tender be signed.
4. The Applicant’s confidential business questionnaire was found on pages 52 to 56 of its original Tender Document. The document was filled as required.

5. The Certificate of independent Tender Determination was found on pages 57 to 58 of the Applicant's original tender. The document was filled as required.

6. The Self-Declaration of the Tenderer was found on page 47 (SD1) and pages 48 to 49(SD2) of the Applicant's original tender. The following was noticed:-
 - (i). Form SD1 self-declaration concerning debarment
 - The document was filled as required

 - (ii). Form SD2 self-declaration concerning corrupt and fraudulent practice
 - The document was filled as required

Based on the foregoing, the Board observes that save for the merging of items h) and g), the Respondents averment in their pleadings that the arrangement of the documents in the Applicant's form of tender changed is an afterthought and belatedly made. The same was not stated as a reason for disqualification of the Applicant's tender. In any event, the Board observes that in the Instructions to tenderers, tenderers were merely required to ensure that the Form of Tender includes the said three forms as follows;

- a) Tenderer's Eligibility - Confidential Business Questionnaire***

- b) Certificate of independent Tender Determination***

- c) Self-Declaration of the Tenderer"***

No mention is made of the sequencing of the said documents and it is accordingly the Board's considered opinion that provided they were sequentially paginated, Duly filled, signed and stamped the Applicant cannot be faulted for following a particular order of arrangement in their presentation. In the Premises, the Board finds merit in this ground of disqualification to the extent only that the Applicant elected to merge items h) and g) of the form of tender with the effect that the numbering of the same changed and omitted paragraph h) from the Applicants form of tender.

Failure to sequentially paginate/serialize on each page including all the attachments in the sequence required.

The requirement to sequentially paginate/serialize each page of the tender was found on page 26 of the Tender Document and states:-

No	Qualification Subject	Qualification Requirement to be met	Document To be Completed by Tenderer
10	Serialization	To safeguard tender documents from mutilation and manipulation.	Tender document MUST be sequentially serialize on each page including all the attachments

The Board notes that all pages of the Tender Document apart from the reverse side of page 38 are paginated. The reverse side of page 38 has the back of the ID card shown on page 38. To the extent that the said part of the ID was integral to the Applicant's tender, failure to number the same amounted to non-compliance with the mandatory requirement for sequential serialization of

each page of the Tender Document in accordance with page 26 of the Tender Document.

Failure to submit duly filled appendix on fraud and corruption.

This requirement for an appendix on fraud and corruption was found on page 25 and states:-

No.	Qualification Subject	Qualification Requirement to be met	Document To be Completed by Tenderer
7	The Tenderer has not been convicted of corrupt or fraudulent practices	The following documents to be duly filled. a) Form of Tender b) SD2-Declaration on Corruption and c) Fraudulent Practice, Declaration of Commitment to the Code of Ethics, and. d) Appendix on Fraud and Corruption.	1. SD2- Declaration on Corruption and fraudulent Practice, 2. Declaration of Commitment to the code of Ethics, and. 3. Appendix on Fraud and Corruption

The Board notes that the appendix on fraud and corruption was found on pages 50 and 51 of the Applicant’s original tender and from the Board’s observation, the Applicant attached it as is as the form had instructions that ***“Appendix 1 shall not be modified”***. The Board accordingly finds that that the said form was duly filled as required and accordingly finds no merit on this ground of disqualification.

Failure to provide a Duly filled, signed and stamped price schedule in the format provided

This requirement of the price schedule was found on page 26 and states:-

No	Qualificati on Subject	Qualification Requirement to be met	Document To be Completed by Tenderer
11	Price Quotation	To provide contractual Pricing offer for the goods and services to be rendered.	Must submit a Dully Filled, signed and stamped the Price Schedule in the format provided.

The Tender Document had the price schedule on pages 60-64. The Applicant's price schedule was on pages 134 to 141 and 395 to 402 of its original tender document. The Board notes from the record that the price schedule did not have two items filled:-

1. Alternative No. on the top of the page; and
2. Delivery date in column No.4

On the first item, the Board observes that neither in the instructions to tenderers nor in the Respondent's pleadings has it been demonstrated that it was mandatory to fill in the alternative number where the ITT No. is filled. The Board is of the considered opinion that the alternative number was exactly just that; a substitute. Therefore provided the principal provisions of the ITT were

filled in, a tenderer was under no obligation to provide an alternative. We however cannot say the same of delivery dates in column 4. No information was provided by the Applicant regarding the same and we deem the same to have been a mandatory requirement with which tenderers were required to comply.

The long and short of the foregoing is that the Applicant failed to comply with the mandatory formalities of the tender document and was accordingly lawfully disqualified from proceeding to technical evaluation. In this regard, we can do no better than lay emphasis on the pronouncements of Mativo J. (as he then was) in the **Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited** (supra) thus;

“...Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.”

ii) **Whether the award to Interested Party was lawful**

On this ground, the Applicant contends that the Procuring Entity awarded the tender to the Interested Party while aware that it (the Interested Party) did not meet the capacity to fulfil the contract as it lacks technical knowledge and experience in the sector and further that it was not the lowest tenderer. The Applicant further contends that the Interested Party is affiliated to Public Officers, and parties interested in the August 2022 General elections.

Upon consideration of the Parties' rival pleadings and submissions, the Board observes that the Interested Party was the only tenderer who proceeded to technical and financial evaluation. It was thereby deemed the lowest evaluated tenderer there being no other tender with which its tender could be compared with. Further, it was recommended for award as the successful tenderer after evaluation of its technical competence to execute the contract in the subject procurement.

The Evaluation committee of the procuring entity is deemed to understand and appreciate the technical competencies required from tenderers and unless cogent evidence is provided to the contrary. Without such evidence it would be whimsical and tantamount to usurpation of the evaluation committee's mandate for the Board to substitute its opinion with that of the evaluation committee as to the technical competencies of a tenderer. In the instant case, the Applicant's allegations that the Interested Party lacks capacity or industry knowledge to fulfill the contract or that it is affiliated to conflicted third parties has not been made out in evidence or at all and the same is accordingly unmerited.

The Upshot of the foregoing is that the Request for Review partially succeeds and the Board makes the following specific orders:-

FINAL ORDERS

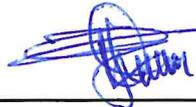
In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:-

- 1. The Preliminary Objections dated 7th July and 14th July, 2022 lack merit and are hereby dismissed.**
- 2. The Procuring Entity's decision to award the contract to the Interested Party and to disqualify the Applicant at preliminary Evaluation stage is hereby upheld.**
- 3. The Contract dated 30th May 2022 is declared a nullity and is hereby set aside. The Respondents are directed to regularize the same by executing the contract anew with the Interested Party being the successful tenderer.**
- 4. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi, this 20th day of July, 2022.



PPARB CHAIRPERSON



PPARB BOARD SECRETARY