

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 17 OF 2022 OF 25TH FEBRUARY, 2022

BETWEEN

TIMOTHY KYALLO & ASSOCIATES..... APPLICANT

AND

UNCLAIMED FINANCIAL ASSETS AUTHORITY..... 1ST RESPONDENT

ACCOUNTING OFFICER,

UNCLAIMED FINANCIAL ASSETS AUTHORITY.... 2ND RESPONDENT

Review against the decision of the Accounting Officer, Unclaimed Financial Assets Authority in relation to tender number UFAA/CA/020/2021/2022 for the provision of compliance audit services under framework agreement.

BOARD MEMBERS

- | | |
|----------------------|--------------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Mrs Njeri Onyango | - Vice Chairperson |
| 3. Mr. Hussein Were | - Member |
| 4. Dr. Joseph Gitari | - Member |
| 5. Ms. Isabela Juma | -Member |

IN ATTENDANCE

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

BACKGROUND TO THE DECISION

The Tendering Process

The 2nd Respondent invited tenders for tender number **UFAA/CA/020/2021/2022** for provision of compliance audit services under framework agreement (hereinafter referred to as the subject tender) from qualified and eligible tenderers through a national open tender advertised in the Daily Nation and The Standard of 31st December, 2021 and the Authority's website (www.ufaa.go.ke)

Tender Submission Deadline and Opening of Tenders

The 2nd Respondent (hereinafter Respondent or PE) received a total of forty-five (45) tenders by the tender submission deadline of 17th January, 2022 at 10.30am. The Tender Box was opened shortly thereafter in the presence of the tenderers representatives and the following bids were submitted as having their tenders with the following outcomes:

1. Gemal & Company- Kshs 200,000
2. Lobonyo & Associates- Kshs 200,000
3. PSK Associates- Kshs 200,000
4. WIA East Africa- Kshs 200,000
5. P Kinyua Associates- Kshs 200,000
6. D.K. Wambugu & Associates- Kshs 200,000
7. GMK Accountants LLP-Kshs 200,000
8. Naomi Kariru & Associates- Kshs 200,000
9. Nelson AND Francis –Kshs 200,000

10. MSM Chris & Associates- Kshs 200,000
11. Amg Kenya (Banking & Sacco)- Kshs 200,000
Amg Kenya (Privately owned institutions)-Kshs 200,000
12. Kaxton CPA- Kshs 200,000
13. Said Abed Said & Co- Kshs 200,000
14. Walubengo & Associates- Kshs 200,000
15. EB Morgane CPA- Kshs 200,000
16. Kimotho K. & Associates- Kshs 200,000
17. Charles Joshua & Associates- Kshs 200,000
18. Ogunda & Associates CPA- Kshs 200,000
19. Ronalds LLP- Kshs 200,000
20. Fitzgerald & Associates – Kshs 200,000
21. Kirenge & Associates- Kshs 200,000
22. PKF Kenya CPA- Kshs 200,000
23. KM Ndura & Associates CPA- Kshs 200,000
24. Matengo & Associates- Kshs 200,000
25. M.N Cliff & Associate- Kshs 200,000
26. FN Mabeya & Associates- Kshs 200,000
27. Ochako & Associates-Kshs 200,000
28. Nganga Mwangi & Associates- Kshs 200,000
29. Isanic& Associates CPA- Kshs 200,000
30. Jackson &Wetosi & Associates – Kshs 200,000
31. Orwar & Company- Kshs 200,000
32. Ernest & Martin CPA & Ferkan Howell Associates
33. Peter Githae & Associates- Kshs 200,000

34. Kalama & Associates – Kshs 200,000
35. Mokua Onwonga- Kshs 200,000
36. Njoroge Chege& Associates- Kshs 200,000
37. Randi & Company Associate- Kshs 200,000
38. Timothy Kyallo & Associates- Kshs 200,000
39. Beemkay & Company CPA- Kshs 200,000
40. Obiria & Company- Kshs 200,000
41. Bironga & Associates- Kshs 200,000
42. Kreston KM & Co CPA- Kshs 200,000
43. BENKIM Associates (BKM) CPA- Kshs 200,000
44. Clyde & Associates – Kshs 200,000
45. Ruoro Kotut and Company
Government Sector – Kshs 200,000

Evaluation of Tenders

Going by an Evaluation Report executed by the 2nd Respondent's Evaluation Committee members on 2nd February, 2022 (hereinafter referred to as the '**Evaluation Report**') the 2nd Respondent's Evaluation Committee (hereinafter referred to as '**Evaluation Committee**') evaluated tenders with respect to the subject tender in the following ways:

1. Preliminary Evaluation
2. Technical Evaluation

Preliminary Evaluation/Mandatory

At this stage the Evaluation Committee applied "**SECTION III-EVALUATION AND QUALIFICATION CRITERIA**" of the Provision of Compliance Audit Services Under Framework Agreement (hereinafter referred to as 'Tender Document')

According to the Evaluation Report, at the end of this evaluation stage only thirty-five (35) bids including the Applicant's bid passed the Preliminary Evaluation Stage having met the Mandatory requirements.

Technical Evaluation

At this stage, the Technical Committee applied the criteria outlined under the Technical Evaluation Stage of the Tender Document. The pass mark at the Technical Evaluation Stage was 80% but the Applicant scored 80%. The Applicant therefore failed to meet the minimum requirement of this particular stage and was informed of that decision vide a letter dated 11th February, 2022 with reason stated thereof.

Recommendation

The Evaluation Committee recommended shortlisting of 19 qualified firms in the Banking/Sacco sector and 21 qualified firms in the privately owned sector under Framework Agreement.

Professional Opinion

In a Professional Opinion dated 9th February, 2022 the Procurement Professional was of the opinion that the Procurement process had satisfied the constitutional requirements of Article 227 (1), statutory requirements of

PPADA, 2015,(hereinafter the Act) Public Procurement (Preference &Reservations) Regulations, 2011 and Public Procurement and Asset Disposal Regulations 2020.

The Procurement professional further opined that nineteen (19) firms be shortlisted for the provision of Compliance Audit Services under Framework Agreement.

Notification of Tenders

The Procuring Entity through a letter dated 11th February, 2022 notified all bidders (the Applicant included) on the outcome of evaluation of their respective tenders.

REQUEST FOR REVIEW

Timothy Kyallo& Associates the Applicant herein lodged a Request for Review dated 24th February, 2022 and filed on 25th February, 2022 together with a Supporting Affidavit drawn by OruenjoKibet& Khalid Advocates 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) and 80(2) of the Public Procurement and Disposal Act;***
- II. The board be pleased to order a re-evaluation of Tender No UFAA/CA/020/2021/2022 and award the tender to the Applicant who strongly believes it was qualified technically based on the technical scoring table.***

III. The Respondent be compelled to pay the costs to the Applicant arising from/and incidental to this Application.

IV. 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.

The Procuring Entity through their Advocate on record filed a Memorandum of Response dated 3rd March, 2022 opposing the Review.

APPLICANT'S CASE

The Applicant submits that the Procuring Entity is in breach of the Act as read together with Article 227 of the Constitution, in that it failed to adhere to the Technical Evaluation criteria set in the Tender document

The Applicant further submits that it fully complied with the eligibility criteria and mandatory requirements under the tender document and thus the action by the Procuring Entity Failed to promote transparency, fairness and integrity of the procurement process by disregarding the mandatory requirements under the technical stage of the tender document.

The Applicant avers that it's legitimate expectation was prejudiced and the Procuring Entity failed to comply with its own tender conditions and criteria since the Applicant and its team have been involved both directly and indirectly in over 18 Unclaimed Financial Assets Audits all pronounced in its

technical proposal and its team are technically sound and capable to execute the assignments technically.

The Applicant further submits that based on the review of the documents the Applicant shared with UFAA and further correspondences, it is rather clear that the Applicant successfully proved its experience and successfully won the tender UFAA/CA/013/2020-2021.

The Applicant allege that the Action of the Procuring Entity is now questionable as to why and how the current tender was declined yet all key matters of the tender documents were the same. Specifically, the Terms of Reference, the Technical Evaluation Criteria and wordings of the tender document were the same. Thus clear manifestation of bias towards the Applicant which resulted in the Applicant losing 24 marks as per the technical scoring table.

The Applicant states that it was the Entity's view that the Applicant did not prove experience in audit and advisory service simply because the referee companies addressed the Applicant in his name and practice number and not the Applicant's Firm. This is despite the fact that in the previous tender the documents being challenged were observed and full marks awarded.

The Applicant state that the Procuring Entity is further in contravention with Section 79(2) (a) & (b) with regards to claiming that the Applicant did not have the financial audit experience in the holder's sector and had not

also proven experience in undertaking forensic audits. Yet they relied on the same reason that the reference letters were not addressed to the firm but solely to the Applicant. Similarly, the said attached letters were not opposed in the previous tender.

The Applicant states that in the previous tendering, the Applicant was involved in a tender bidding and passed with a 98% rate in the last tendering that was done by UFAA. The Applicant is thus concerned that it did not score the 80% technical score that ought to have made its bid proceed to the next level despite there being minimal changes in the terms of reference and technical evaluation scoring table and a re-calculation by the Applicant takes him to 95%.

The Applicant state that they had meeting with the Procuring Entity and Following a meeting between the Applicant and the Evaluation Team on the 23rd day of February, 2022, the Team did acknowledge that the Applicant's previous **tender was granted full marks on the now contested areas** however the changes that were needed for the next stage were not communicated to the bidders.

The Applicant state that it clearly spelt out its concerns to the PE but the Procuring Entity had no objective response to that end as they said they would go consult further on the same. It is rather odd that the team that

was present declined to comment on the tender UFAA/CA/013/2020-2021 yet this was the main reason why the Applicant sought audience.

THE RESPONDENT'S CASE

In response the Procuring Entity states that they received forty-five (45) bids amongst them being the applicant's bid. The bidders consequently went through the Preliminary Evaluation and only thirty-five (35) firms passed the preliminary evaluation having met the mandatory requirements.

The Procuring Entity further state that successful bids proceeded to the Technical Evaluation stage. They were evaluated in strict adherence with the Constitution of Kenya, the Public Procurement and Asset Disposal Act and Regulations and the tender requirements and it was clearly indicated in the bid documents that the pass-mark at Technical Evaluation stage was 80%.

The Procuring Entity state that the Applicant scored 71% in the technical evaluation because did not meet the requirements of the tender and vide a letter dated **11th February, 2022** informed the Applicant that it was an unsuccessful bidder and stated the reason thereof.

The Procuring Entity state that it is evident in the referral letters submitted by the Applicant that they referred directly to CPA Timothy

Kyallo Mulatya as an individual and not M/S Timothy Kyallo & Associates which was the firm that placed a bid. Those are two distinct legal persons and their qualifications and experience cannot be interchanged.

The procuring Entity states that the above deviations are material and cannot be corrected as minor errors under Section 79(2)(b) of the Act. The deficiencies would affect the ability of the firm to deliver the services tendered for.

Further the Procuring Entity state that contrary to the tender requirements, some of the persons named as part of the Applicant's team are not in their employment and the Curriculum Vitaes submitted are a proof of the same. For instance: *Evelyne Chanya Shuma – Works at Nairobi Water and Sewerage Company.*

The Procuring Entity state that the applicant's allegation that the Terms of Reference were almost 'similar' cannot be the basis for a Request for review; the subject tender and any other tenders that the Applicant may have been successful in are mutually exclusive and therefore the procuring Entity was guided by the principles and values of public procurement and It accorded the all bidders a fair chance in the procurement process.

THE BOARD'S DECISION

The Board has considered each of the party's pleadings and the confidential documents submitted to it pursuant to Section 63 (1) (e) of the Act and finds that the following issue calls for determination:

Whether the Evaluation Committee evaluated the Applicant's Tender in accordance with Sections 79 and 80 (2) of the Act as read together with the requirement set out at Section III Technical Evaluation and the Evaluation Criteria in the Tender Document

The Board will now proceed to address the issue as framed above.

The 2nd Respondent vide a letter dated 11th February, 2022 notified the Applicant of the outcome of Evaluation of its Tender as follows

"The Managing Director

M/s Timothy Kyallo & Associates

P.O Box 57715-00200

info@tkassociates.co.ke

Dear Sir/Madam,

TENDER NO. UFAA/CA/020/2021/2021: PROVISION PF COMPLIANCE AUDIT SERVICES UNDER FRAMEWORK AGREEMENT

This is to notify you that following the evaluation of all tenders submitted for the above tender, your bid was considered unsuccessful because of the following reason(s)

- *You did not attain the technical pass mark of 80%, your technical score was 71%*

19 firms under Banking/Sacco sector were shortlisted as follows; PSK Associates, P Kinyua & Associates, Naomi Kariru&Associates, MSM Chris & Associates, AMG Kenya, Kaxton CPA, Said Abeid Said & Co, EB Morgane CPA, Kimotho K. & Associates CPA, Charles Joshua & Associates, Oguda& Associates CPA, Ronalds LLP, Fitzgerald & Associates, KM Ndura& Associates CPA, Matengo & Associates, Peter Githae & Associates CPA, Beemkay& Company CPA, Obiria& Company, Clyde & Associates

21 firms under Private Owned Institutions sector were shortlisted as follows ; PSK Associates, P Kinyua & Associates, GMK Accountants LLP, Naomi Kariru& Associates, MSM Chris & Associates, AMG Kenya, Kaxton CPA, Said Abed Said & Co, Kimotho K. & Associates CPA, Fitzgerald & Associates, Kirenge & Associates CPA, KM Ndura& Associates CPA, Matengo & Associates, FN Mabeya & Associates, Ernest & Martin CPA & Fekan Howell Associates, Peter Githae & Associates CPA, Mokuwa Onwonga& Associates, Njoroge Chege & Associates CPA, Beemkay & Company CPA, Obiria & Company, BENKIM Associates (BKM) CPA

The three other sectors were non-responsive because they did not attract a minimum of seven successful firms.

We thank you for participating in the bidding process”.

The Applicant is aggrieved by the said decision of the Procuring Entity in finding its tender unsuccessful by reason of failing to meet the mandatory technical score of 80%. The Applicant’s position is that it provided all the documents required under Section III (b) of the Technical Evaluation score table and therefore it could not have failed to attain the required minimum score of 80%.

Section 79 of the Act forms the guiding basis on responsiveness of a Tender and is set out as follows :-

79. Responsiveness of tenders

(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.

The Board is equally cognizant that the Evaluation of a Tender should conform to the requirements of Section 80 (2) & (3) of the Act which are set out as follows

80. Evaluation of tenders

1.

2. 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.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

4.

5.

6.

7.

The import of Section 80 (2) & (3) of the Act as read together with Article 227 (1) of the Constitution requires an Evaluation Committee to evaluate tenders in a system that is fair using the procedure that is laid out in the tender documents. Such a system would be one that is fair and provides equal treatment of all tenders based on criteria of Evaluation known by all the Tenderers and which are provided within the Tender Documents issued by the Procuring Entity.

In respect of the present Application, the Technical Evaluation must be guided by the Technical Evaluation score table set out at Section III (b) found at page 29 to 31 of the Tender Document which is as follows

No.	ItemCategory	Max. Marks	Criteriaforawardingmarks
1	Proven experience in audit and advisory service on financial management or any other service relevant to the assignment. (provide evidence of any three (3) assignments successfully completed in the relevant sector (Banking, Insurance, Sacco, Listed companies, Pension sector, Governments sector, Telecoms or Privately owned institutions including Educational institutions.)	6Marks	References giving the contact person(s) (2Mark per reference letter for the attached data sheet)

2	Experience in providing unclaimed financial assets audit (Provide any 3 testimonials for the last 4 years) per attached reference, contract, LSO (Where applicable)	6 Marks	Testimonials, contract extracts & LSOs (2 Marks per reference letter, contract, LSO)
3	Financial audit experience in the holder's sector applied for (Provide 4 testimonials for the last 5 Years) attached reference letter, contract extract, LSO where applicable)	12 Marks	References giving the contact person(s) (3 Mark preference letter as per the attached data sheet)
4	Proven experience in undertaking forensic audits, in-depth/investigations relevant to the assignment (provide 3 references - 2 marks per reference)	6 Marks	References giving the contact person(s) details (2 Marks per reference letter for the attached data sheet)
5	Financial Capability: Provide 3 years audited financial statements signed by certified Auditor 2018, 2019 & 2020 (Attach documentary evidence)	3 Marks	Liquidity Ratio Current Assets/Current Liabilities 2:1 - 3 Marks 1:1 - 2 Marks Less than 1 - 0 Marks

The Board has also considered the Applicant's Application and notes that the Application is based on the Applicant's Tender Document wherein the Applicant has applied for consideration in the following categories

“UFAA/CA/012/202-2022: PROVISION OF COMPLIANCE AUDIT SERVICES – UFAA/CA/020/2021-2022

a) Banking & Sacco

b) Listed companies & Telcos

The cluster qualified for in line with the bidder’s annual turnover was “cluster A”

The Applicant has relied on its grounds contained in the Application for Review and in the Supporting Affidavit of Timothy Kyalo Mulatya. The Applicant states that it submitted supportive documents in respect to the tender categories it applied for and that it has in previous year’s undertaken Audit assignments for the Procuring Entity being similar assignments of the current tender which thereby shows the Applicant’s competency, efficiency and professionalism in executing such assignments. Further, it is the Applicant’s position that for a previous similar tender, it had scored 98% in the Technical scoring table based on the same documents as in the present Tender Application, and there is no reason therefore that the current tender would have failed to score 80% being the minimum required. The Applicant therefore argues that the score awarded of 71% could only have been as a result of the PE’s failure to evaluate the Applicant’s tender and supporting documents in terms of the criteria set out at Section III under the Tender scoring table.

On its part, the Procuring Entity at paragraph 11 of its Memorandum of Response to the Request for Review states as follows

11. ***THAT*** the procuring entity responded to the said letter per the attached letter of 25th February, 2022 and noted as follows;

a. The proposal was assessed objectively and as per the set criteria;

b. the firm did not demonstrate direct financial/audit/advisory services Experience in the sectors applied (Banking/ Sacco and Listed/Telcos) and forensic audit experience

c. The evidence provided was for the partner working individually for other audit firms and this was scored under the partner/project director experience. The firm did not have the required experience and qualifications.

The Board finds that before proceeding further in determination of this matter, it is important to make a determination on the statement contained in paragraph 11 (c) as cited above. The Tender document I-Instructions to Tenderers part 4 (4.1) describes a Tenderer as follows

Eligible Tenderers

4.1 A Tenderer may be a firm that is a private entity, a state-owned entity 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 into 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 entire 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. Members of a joint venture may not also make an individual tender, be a sub contract or in a separate tender or be part of another joint venture for the purposes of the same Tender. The maximum number of JV members shall be specified in the **TDS***

On its part the Act defines a Tenderer as follows

"tenderer" means a person who submitted a tender pursuant to an invitation by a public entity;

The Board has perused the original Tender Document submitted by the Applicant and has taken note of the documents produced by the Applicant under the Mandatory requirements of the Tender Document. This Document are found at page 93 -100 of the Applicant's original documents. It is notable that these documents had in the Preliminary Evaluation Stage been reviewed, assessed and evaluated by the Evaluation Committee and had been found to have met the preliminary mandatory requirements therefore permitting the Applicant's tender to proceed to the Technical stage.

At page 99 of the Applicant's original tender documents is the Applicant's copy of the registration certificate issued under the Registration of Business Act (Cap 499 Section 14). The same confirms the registration of the PE and certifies that **TIMOTHY MULATYA KYALLO, P/2541 M/NO 6246** is registered as carrying out business under the name **TIMOTHY KYALLO & ASSOCIATES**. The certificate is dated 28th August, 2020.

At page 100, the Applicant did provide a valid copy of form C13 for Sole Proprietorship. The same is issued under the Business Registration Services and confirms that Timothy Kyallo & Associates as at 6th January, 2022 was a duly registered business name registered on 28th August 2020 carrying on the business of Accountants.

Equally, at page 97 the Applicant annexed the annual practice certificate of CPA Timothy Kyallo Mulatya authorized to practice in Kenya as an accountant in the name and style of **TIMOTHY KYALLO & ASSOCIATES** under practicing number **P/2541**. At page 98 there is a certificate of confirmation from the Chief Executive Officer of ICPAK confirming that **CPA TIMOTHY KYALLO MULATYA** is a member of the Institute in good standing.

At page 96, document 17.4 MR 4 contains a copy of the Practice Certificate from ICPAK for the firm of Timothy Kyallo and Associates which is licensed to practise in Kenya as certified Public Accountant Firm under practicing Firm Number **PF/934** the same was valid upto December, 2022 and is renewable annually.

Having reviewed those documents, the Board is satisfied that the Tender Documents presented by Timothy Kyallo & Associates whose Sole Proprietor is Timothy Kyallo Mulatya meet the description of a tenderer under section I sub-section 4, 4.1 of the Tender Documents

Eligible Tenderers

*4.1 A Tenderer may be a firm that is a private entity, a state-owned entity 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 into 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 entire 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. Members of a joint venture may not also make an individual tender, be a sub contract or in a separate tender or be part of another joint venture for the purposes of the same Tender. The maximum number of JV members shall be specified in the **TDS***

The Board is of the view that the arguments raised at paragraph 11 and 13 of the Procuring Entity's Response in regard to the legal persona of the Applicant and its proprietor cannot hold.

The Board further notes from the letter of notification dated 11th February, 2022 that the only ground for the Applicant's tender being declared unsuccessful was stated to be the failure to attain the technical pass mark of 80% having only attained a score of 71%. In the circumstances the Board would consider the current attempt to distinguish the legal persona of the proprietor and the firm as an afterthought. Similarly, the statements

contained at paragraph 14 and 15 of the Response are not matters that arose in the Evaluation of the Applicant's tender and the same cannot be presently considered in this Application.

The Board will therefore turn to the issue of the scoring in the Technical Evaluation.

From the documents available and the statements contained in the Affidavit of Timothy Kyallo, the Board notes that upon receipt of the letter of notification dated 11th February 2022, the Applicant by a letter of 14th February, 2022 requested for a meeting for a debrief seeking clarifications on its performance in the Evaluation. It is evident that a meeting was held on the 23rd of February, 2022 between representatives of the committee and the Applicant and Counsel for the Applicant.

Thereafter, a letter dated 25th February, 2022 was issued by the PE to the Applicant. The letter is in the following terms

***"CPA Timothy KyalloMulatya
Managing Partner
M/s Timothy Kyallo & Associates
P.O Box 57715-00200***

Dear Sir,

*TENDER NO. UFAA/CA/020/2021/2022: PROVISION OF COMPLIANCE
AUDIT SERVICES UNDER FRAMEWORK AGREEMENT*

Reference is made to your letter dated 14th February, 2022 seeking clarifications on your performance in the above mentioned tender and the physical meeting held on 23.02.2022 between the Evaluation Committee Representatives and your firm representatives (CPA Timothy Kyallo and Ms. Shalen Odhiambo – Oruenjo and Associates)

In your letter and in the meeting, you sought to know how you did not score the 80% technical pass mark yet you had attained high score in the previous audit tender. Additionally, you indicated that you have been involved in unclaimed assets audits directly and indirectly.

The Evaluation Committee representatives gave you a detailed explanation on your performance (per parameter) vis a vis the tender documents submitted and highlighted the pertinent specific points raised during evaluation.

We wish to reiterate that your proposal was assessed objectively and as per the set criteria. Compared to the last tender you have referred to, the evaluation criteria was reviewed to recognize audit experience in the specific sectors and reduce focus on unclaimed assets audit experience. Each of our audit tenders are independent and mutually exclusive from the previous tenders.

Upon review of your scores and as highlighted in the meeting, we note that you demonstrated experience in audit of unclaimed assets. However, the firm did not demonstrate direct financial

audit/advisory services experience in the sectors applied (Banking/Sacco and Listed/Telcos) and also forensic audit experience. The evidence provided was for the partner working individually for other audit firms and this was scored under the Partner/Project Director experience. (Emphasis added)

The Authority remains committed to ensuring that all our procurement processes and transactions are conducted in a manner promoting transparency and fairness. We thank you for the services provided by you to the Authority and we look forward to a continued cordial business relationship.

Your Sincerely,

John Mwangi

CHIEF EXECUTIVE OFFICER & MANAGING TRUSTEE"

The Board has given specific consideration to the requirements of the technical evaluation scoring table and the requirements to support the same. The Board will therefore examine the Applicant's tender document in regards to each of those technical requirements and the mark awarded by the Evaluation Committee.

In regard to the Applicant's complaint, The Evaluation Committee scored the Applicant as follows:

Pass mark – 80% (80 Marks)- Banking & Saccos(b) – 13 Firms

Table 4 (b): Evaluation Criteria and Average Scores for provision of Compliance Audit Services to Audit Holders of Unclaimed Financial Assets

PARAMETER MEASURED	Criteria for awarding marks	Max score	B38
<p>Proven experience in audit and advisory service on financial management or any other service relevant to the assignment.</p> <p>Provide evidence of any three (3) assignments successfully completed in the relevant sector (Banking & Sacco Sector)</p>	<p>References giving the contact person(s)</p> <p>(2 Mark per reference letter for the attached data sheet)</p>	6	0
<p>Financial Audit experience in the holders' sector applied for</p> <p>Provide 4 testimonials for the last 5 Years) attach reference letter, contract, LSO where applicable)</p>	<p>References giving the contact person(s)</p> <p>(3 Mark per reference letter for the attached)</p>	12	0
<p>Proven experience in undertaking forensic audits, in-depth/ investigations relevant to the assignment (provide 3 reference- 2</p>	<p>References giving the contact person(s)</p> <p>(2 Marks per</p>	6	0

marks per reference)	reference letter for the attached data sheet)		
	Procedure to guide in the review of the ICT systems (5)	5	4
TOTAL SCORE		100	71

Stage 2: Technical Evaluation (100Mks) Pass mark – 80% (80 Mks)- Listed Companies and Telcos - 5 Firms. Table 4d: Evaluation Criteria and Average Scores for provision of Compliance Audit Services to Audit Holders of Unclaimed Financial Assets

PARAMETER MEASURED	Criteria for awarding marks	Maximum score	B	B
Proven experience in audit and advisory service on financial management or any other service relevant to the assignment.	References giving the contact person(s) (2 Mark per	6	3	4

Provide evidence of any three (3) assignments successfully completed in the relevant sector (Listed companies & Telecoms)	reference letter for the attached data sheet)			
Financial Audit experience in the holders' sector applied for Provide 4 testimonials for the last 5 Years) attach reference letter, contract, LSO where applicable)	References giving the contact person(s) (3 Mark per reference letter for the attached)	12	0	0
Proven experience in undertaking forensic audits, in-depth/ investigations relevant to the assignment (provide 3 reference- 2 marks per reference)	References giving the contact person(s) (2 Marks per reference letter for the attached data sheet)	6	0	6
	Procedure to guide in the review of the ICT systems (5)	5	4	5
	Any other 2 relevant qualification including IT, Audit or Legal Expert (max 2 staff) - 3 Marks each (6marks total) (2 Marks Experience min. 3	6	3	6

	yrs.; 1 Marks professional qualification)			
TOTAL SCORE		10	7	7
		0	1	1

In the specific areas that the Applicant has complained about, the Board notes that a Tenderer was required to provide information of the specific qualifications backed by References giving the contact person and as necessary to give copies of the contract or LSOs. Having reviewed the Applicant's documents and having scored the Applicant in the table above, the Applicant having scored 71% The Evaluation Committee found that the Applicant did not meet the requirement of 80%.

The Evaluation Committee made the following comments in regards to the Applicant's tender

- **"Bidder 38 did not demonstrate financial audit/ advisory services experience in the Banking/sacco and listed/telcos sector and no forensic audit experience."**

The Applicant's position is that it had submitted sufficient documents to demonstrate its experience in those areas and that the Evaluation Committee was wrong to have failed to award it marks in those sectors hence failure to attain the 80% and that if it had been awarded marks in those areas it would have scored a minimum of 95%. Thus the Applicant argues that under the Technical Evaluation area there was clear

manifestation of bias against the Applicant in the scoring resulting in the Applicant losing 24 marks.

The Applicant's main complaint is that the evaluation committee failed to correctly award it marks because the referee companies referred to the experience of Timothy Kyallo in his practice number and not that of the firm and he complains therefore that this was erroneous as in a previous tender the documents being challenged were the same ones used and full marks were awarded at the time.

The other complaint is that the Evaluation Committee contravened Section 79 (2) a & b when it claims the Applicant did not have the financial audit experience in the holder's sector and did not also prove experience in undertaking forensic audit yet the same reference letters had been relied upon previously to award the previous tender.

At stage 2 table 4 (b): Banking Sector and Saccos where thirteen firms (13) had successfully passed the Preliminary mandatory stage, The Applicant was required to:

- a) Provide evidence of three assignments successfully completed in the relevant sector (Banking and Sacco) that the Applicant sought to be considered.
- b) Provide financial audit experience in the holder sector applied for and to provide four (4) testimonials for the last five (5) years attach reference letter, contract, LSO where applicable

- c) Proven experience in undertaking forensic audits, in-depth/investigations relevant to the assignment (provide 3 references)

Before embarking on analysis of this matter, it would be appropriate to set out the Board's understanding of the issues of the requirement of audit and forensic audit. The difference is defined on the basis that the audit is conducted to give a guarantee that the financial statements that have been checked are true and fair and are reasonable while forensic audit helps to analyse and investigate sets of transactions to find out if any fraud has occurred.

In respect of stage 2: Technical Evaluation Listed Companies and Telcos, 4 (d) the (Evaluation Criteria and Average Scores for provision of Compliance Audit Services to Audit Holders of Unclaimed Financial Assets) parameter measures were as follows:

- 1) Proven experience in audit and advisory services on financial management or any other service relevant to the assignment, provide evidence of any three (3) assignments successfully completed in the relevant sector (Listed Companies & Telcos) **(6 marks)**
- 2) Financial Audit experience in the **holders' sector applied for**, provide 4 testimonials for the last 5 (five) years attach reference letter, contract, LSO where applicable) **(Emphasis added) (6 marks)**

- 3) Proven experience in undertaking **forensic Audit, in depth/investigations** relevant to the assignments (provide 3 reference – 2 marks per reference **(6 marks)**)

In all the above, the Applicant was scored NIL against the provided mark making a total of 18 points missed in each table.

Turning to the requirements above under both sectors (Banking and SACCO sector& Listed Companies and Telcos), the Applicant relied on a set of letters as follows

- i. At pages150-162: documents intended to show/evidence experience in providing Unclaimed Financial Assets Audit
- a) Letter from Clyde & Associates on page 151 on compliance Review Audit of unclaimed Financial Assets as follows:

REFERENCE-CPA TIMOTHY KYALLO/P2541, COMPLIANCE REVIEW AUDIT OF UNCLAIMED FINANCIAL ASSETS

This is to confirm that CPA Timothy Kyallo of P/N 2541 was engaged by our Firm in between the periods February 2020 to June 2020 as the Lead Audit Consultant to execute the Unclaimed Financial Assets Audit for our Client UFAA.

The main objective of this assignment entailed identifying unclaimed financial assets as per UFA Act 2011 and retrospective in nature (Since incorporation of the holder) to the latest qualifying date of unclaimed financial assets.

CPA Timothy Kyallo carried out the assignment diligently, professionally, delivery was remarkable and the audit efficiently executed ensuring the objectives of the audit were met.

CPA Timothy Kyallo executed the below Unclaimed Financial Assets Compliance Review Audits, the Holders were in the Insurance and Sacco sectors:

- I. Cosmopolitan Sacco Society, a holder in the Sacco Sector based in Nairobi*
- II. Geminia Insurance Company, an Insurance Company based in Nairobi*
- III. Hazina Sacco Society, a holder in the Sacco Sector based in Nairobi*
- IV. Kenya Bankers Sacco, a holder in the Sacco Sector based in Nairobi*
- V. Unaitas Sacco Society, a holder in the Sacco Sector based in Nairobi.*

Should you require further clarification do not hesitate to contact the undersigned.

Regards

CPA Clyde Mutsotso

Managing Partner

b) Letter from Matengo Githae dated 25th November, 2020 on page 152

REFERENCE-CPA TIMOTHY KYALLO/P2541, UNCLAIMED FINANCIAL ASSETS SERVICE PROVISION ENGAGEMENT

This is to confirm that CPA Timothy Kyallo of Practice Number 2541 was subcontracted and engaged by our Firm in 2019 as the Team Lead – Audit Consultant to lead and execute the Unclaimed Financial Assets Audit for our Client UFAA.

CPA Timothy performed the exercise diligently and the objective of this assignment entails identifying unclaimed financial assets as per UFA Act, 2011 and retrospective in nature (since incorporation of the holder) to the latest qualifying date of unclaimed financial assets. The Holders audited was one (1) listed Company in the manufacturing industry and sacco sector.

Unclaimed Financial Assets Audits were carried out for the below holders

- British American Tobacco (Listed Company)*
- Elgon Sacco Society*
- Imarika Sacco Society*
- Kenya Police Sacco Society*

The services were carried out professionally and to the satisfaction of the Client, Engagement partner and deliverables met.

Should you require further clarification kindly contact the undersigned.

Regards

Meshack Matengo

Managing Partner

c) The letter by Matengo & Associates dated 25th November, 2020 on page 153

**REFERENCE-CPA TIMOTHY KYALLO/P2541, UNCLAIMED
FINNANCIAL ASSETS SERVICE PROVISION ENGAGEMENT**

This is to confirm that CPA Timothy Kyallo of Practice Number 2541 was subcontracted and engaged by our Firm in 2019 as the Team Lead-Audit Consultant to lead and execute the Unclaimed Financial Assets Audit for our Client UFAA

CPA Timothy performed the exercise diligently and the objective of this assignment entails identifying unclaimed financial assets as per UFA Act, 2011 and retrospective in nature (since incorporation of the holder) to the latest qualifying date of unclaimed financial assets. The Holders audited was a listed Company in the agricultural industry and in the sacco sector.

Unclaimed Financial Assets Audits were carried out for the below holders

- *Limuru Tea PLC (Listed Company)*
- *Safaricom Sacco Society*

The services were carried out professionally and to the satisfaction of the Client, Engagement partner and deliverables met.

Should you require further clarification kindly contact the undersigned.

Regards,

Meshack Matengo

Managing Partner

d) The letter from Peter Githae & Associates dated 23rd November, 2020 on page 154 as follows:

REF: RECOMMENDATION OF CPA TIMOTHY KYALLO P/N2541
FOR AUDIT OF UNCLAIMED FINANCIAL ASSETS

This is to confirm that CPA Timothy Kyallo of P/N 2541 was engaged by our firm in April 2020 as an Audit Consultant for the audit of Unclaimed Financial Assets at WPP Scan Group which is a Publicly Trading Company.

The main objective of this assignment entailed identifying unclaimed financial assets since incorporation of the company/holder in line with UFA Act, 2011.

CPA Timothy Kyallo as the lead auditor for the assignment carried out the assignment with professionalism and achieved the objective of the audit to the satisfaction of our firm and the Unclaimed Financial Assets Authority.

We therefore have no reservations as we recommend him for engagement in a similar assignment.

For more information, please contact the undersigned.

Yours Faithfully,

For and on behalf of
Peter Githae and Associates

At page 155-162 of the Applicant's original Tender Document is a contract dated 23rd July, 2021 executed between The Applicant and the Procuring Entity the 2nd Respondent herein in respect of a contract for provision of

Audit services to Audit Holders of Unclaimed Financial Assets. The specific assignments were as follows

	Assignment No. as per Tender Document	Auditee
1.	2	Kenya Orchards Limited
2.	5	Centum Investment Company Plc
3.	9	Occidental Insurance Company Limited

The Applicant relied on the above cited letters and one contract. Bearing in mind the parameters provided, it would be appropriate to look at the specific letters to be relied upon against the parameter measures as per the Evaluation table. In doing so the Board bears in mind that the letters above at page 151-164 are the same letters that are replicated at page 163-167 to demonstrate Audit experience in the Holders sector for Banking and Sacco as well as Listed Companies and Telcos.

The letter at page 151 of the Applicant's original tender document states that between the period of February, 2020 to June 2020 Timothy Kyallo was engaged by Clyde & Associates as the lead Audit consultant to execute the unclaimed financial Assets Audit for the 2nd Respondent (the PE) and conducted such services on six (6) SACCOs. The letter at page 152 from Matengo Githae & Associates stated that the Applicant was subcontracted and engaged by the said organization in 2019 as Team

Leader, Audit consultant on unclaimed financial Asset in three SACCOs and one listed company.

The letter at page 153 of the Applicant's original tender from Matengo & Associates states that Timothy Kyallo was subcontracted and engaged by the said firm in 2019 as a Team Leader-Audit consultant to execute unclaimed financial Assets for the 2nd Respondent. The services were to Limuru Tea PLC (a listed company) and Safaricom SACCO Society. The final letter is from Peter Githae & Associates and it relates to an engagement of Timothy Kyallo by the said firm in April 2020 as an audit consultant for the audit of unclaimed financial assets at **WPP Scan Group** which is a publicly trading company. The assignment was for and on behalf of the 2nd Respondent.

It is noted that in all the above letters there does not appear to be any reference to financial advisory to any companies that provision of financial services were rendered, yet this was a necessary requirement in the evaluation criteria. Further, all the services were rendered to SACCOs and a few listed companies yet this documents as per the arrangement of the Tender document were intended to support the Banking and SACCO sector together with the listed companies and Telcos. For avoidance of doubt, none of the testimonials referred to any company in the Banking Sector. The evaluation criteria is clear that it is sector specific.

The Board also notes that the letters/documents relied upon do not appear to meet the specific requirement as to the period of experience. Notably,

under experience in providing unclaimed financial assets audit, the period of experience prescribed was **four (4) years**. Under financial audit experience in the holders' sector applied for, period prescribed was **the last five (5) years**. On reviewing the letters relied upon, it is notable that the letter from Clyde & Associates was in respect of services covering February 2020 to June 2020. The letter from Matengo Githae, the services provided are stated to be provided from 2019 and the letter is dated 25th November, 2020. The other letter at page 153 from Matengo Associates states that services were rendered in 2019 and is also dated 25th November 2020. The letter from Peter Githae & Associates at page 154 refers to an engagement of Timothy Kyallo specifically April 2020, the letter is dated 23rd November 2020. The contract between the Applicant and the Procuring Entity appears to have been executed on 23rd July, 2021 (page 155-162). In the Board's assessment the period covered by those letters does not cover the specific requirements of four (4) years and five (5) years in the parameter measures referred to above. To that extent, those references and documents fail to meet the specific criteria provided for in the Tender Document. The basis for failure to award points to the Applicant under the Bank and SACCO sector as per the letter of Notification is that the Applicant did not demonstrate Financial Audit/ Advisory services experienced at all, and also, specific to those sectors. From the review of the letters above it would appear that in deed none of those letters and documents refer to the provision of financial audit service to any of the sectors applied. Accordingly, the Board is of the view that the evaluation committee acted properly in evaluating the compliance of

the Applicant's tender document to the criteria applicable and therefore failed to award points to the Applicant under those areas.

Turning to the experience in undertaking Audit/in-depth forensic investigations, the documents in support thereof are at page 168-170. It would appear that the Applicant had no direct contracts of such assignments in its name or that of its Sole Proprietor Mr. Timothy Kyallo and fully relied on a reference by Clyde & Associates CPA. It is indicated in the said documents that Timothy Kyallo had over a period starting November 2016 to October 2020 been subcontracted by the said firm to provide Forensic Audit services to a number of their Clients. The Clients mentioned are:

1. Society supermarket
2. Wild fire SACCO
3. County Government of Kisumu
4. Maendeleo ya Wanawake Organization

In all the documents provided it would appear that there is no previous experience in auditing, financial advice or forensic audit within the Banking and Telcos sector yet these are a major part of the sector specific areas that the Applicant's tender applied for. Accordingly, the Banking sector and the Telco sector are not covered under the Applicant's Tender documents. From page 171-217 of the original Tender document, the Applicant gave professional academic certificates of staff and personnel that would be engaged in the assignments if the Applicant was successful in its bid. Apart

from the various experiences by Timothy Kyallo as detailed above it would appear that there are no specific experiences in the services bid for demonstrated in respect of the other staff and personnel to be engaged. The academic and professional qualifications of the said personnel are provided. Therefore, the only experience demonstrated is that of Timothy Kyallo which the Board has reviewed above and which the Board finds not to have met the specific terms and requirements of the three sections under stage 2 of the Technical Evaluation criteria and where the Applicant failed to score relevant marks thereby losing a total of 24 points.

Under Technical proposal and Criteria in regard to the Audit, under provision 3.2 at page 90 headed Adequacy of proposal work plan and methodology, a tenderer was required to demonstrate .

- i. Ability to meet deadline and flexibility in meeting clients' needs should be demonstrated
- ii.
- iii. Major public, private and financial sector clients handled
- iv. Clients handled **in the same sector as the proposed entity to be audited**
- v.
- vi.

Accordingly, the Board is of the view that failure to demonstrate experience and handling audit, financial audit/analysis for clients in the Banking sector as well Telcos was a major omission as far as the Tender

related to the Banking and SACCO as well as Listed Companies and Telcos sector was concerned.

In the table set out above under Banking and SACCO as well as Listed Companies and Telcos there was requirement to provide letter of reference, contract or LSO. The only contract that has been found in the original tender document is that between the Applicant and the Procuring Entity dated 23rd July, 2021. Where the Applicant has referred on refence letters where he has been sub contracted, there are no copies of contracts, LSOs or any other such supportive documents supplied in the Applicant's Tender Documents. Noting that these were subcontracted works it would be appropriate that the same be supported by relevant engagement contract between the referee and Mr. Timothy Kyallo.

The Applicant has variously in both its Application and Supporting Affidavit referred to its qualification in a previous tendering process conducted by the (PE) the 2nd Respondent herein. The Applicant is of the view that having been qualified in such previous tender which is stated to be similar to the present and in which the Applicant states that he relied on the same documents that he produced in support of the current tender application, and which were accepted at the time, the same should even in the present circumstances be sufficient and should stand good in enabling the Applicant to score the relevant mark. It is the Applicant's position that at the previous occasion he scored a mark of 98% and that since the documents used then are the very same documents he has relied on now

its score should at the worst be the same score or just slightly less than what it scored last. It is contested therefore that based on the same documents, the score of 71% is clearly an error on the part of the Evaluation Committee. The Board finds it difficult to analyse this proposition noting that the previous tender document is not before the Board for Review. The Board does not enjoy the benefit of information of the criteria for evaluation and the scoring parameters in that previous tender. In any event, the Board understands the position to be that each tendering process must be evaluated and reviewed based on its own provisions as in deed is requirement of Section 79 of the Act. Accordingly, the Board will not give consideration to the Applicant's argument relating to a previous tender that is not before it for Review. Further, in the letter dated 25th, February, 2022 addressed to the Applicant after the meeting held between the Applicant and The Procuring Entity, it is specifically stated that the current tender requirements had been reviewed **to recognize audit experience in sectors and reduce focus on unclaimed Assets audit experience**. This statement in our view should put to rest the Applicant's bid to rely on the previous score in the 2020-2021 tender.

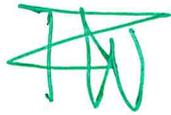
Having reviewed the matters above, the Board is of the view that the Applicant has not demonstrated to the satisfaction of the Board that its tender was not evaluated in accordance with the provisions of Section 79 & 80 as read together with the Tender Document.

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 Request for Review No.17/2022 of 25th February 2022 be and is hereby dismissed.**
- 2. Each party shall bear its own costs**

Dated at Nairobi this 17th Day of March 2022.



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**CHAIRPERSON
PPARB**



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**SECRETARY
PPARB**