REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 67/2022 OF 27th JULY, 2022

BETWEEN

AZAMSOFT CONSULTING LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER

NATIONAL CONSTRUCTION AUTHORITY.....1ST RESPONDENT

NATIONAL CONSTRUCTION AUTHORITY.....2ND RESPONDENT

Review against the decision of National Construction Authority in respect of tender No **NCA/T/072/2021-2022** for **RETENDER FOR SUPPLY, DELIVERY, INSTALLATION & COMMISSIONING OF AUDIT MANAGEMENT SOFTWARE**

BOARD MEMBERS

1. Mrs. Njeri Onyango – Vice Chair (panel Chair)
2. Isabella Juma - Member
3. Hussein Were - Member
4. Joseph Gitari - Member

IN ATTENDANCE

1. Mr. Stanley Miheso -Holding brief for Secretary

BACKGROUND

THE TENDERING PROCESS

The National Construction Authority (hereinafter referred to as the Procuring Entity or Respondent) invited eligible and interested bidders to submit bids in response to tender number **NCA/T/072/2021-2022 (**hereinafter referred to as the subject tender) through an open advertised national tender for re-tender for supply, Delivery, installation & commissioning of audit management software.

Tender Submission Deadline and Opening of Tenders

By dint of Section 96 of the Public Procurement and Asset Disposal Act 2015, the Procurement Entity by way of intention to procure invited bidders to show interest in participating in the Tender. The tenders were opened on 15th June, 2022 at 11.00 am by a tender opening committee at KCB Towers 9th floor Boardroom Kenya Road Upperhill.

The following tenderers were recorded as having submitted their tenders:-

Bidder	Name of Bidder	Bid Price	Tender Security Amount	Origin of Tender Security	No of Pages	**Remarks**
1.	Azamsoft Consulting Ltd	9,524,760	50,000	Rafiki Microfinance	467	2 copies
2.	Dynasoft Business Solutions Ltd	6,844,000	50,000	I & M Bank	402	2 copies

The Applicant is among the two that submitted their bids.

Evaluation of Tenders

The Procuring Entity vide internal memo Ref. NCA7/SC/INT/VOL1 dated 15th June, 2022 appointed the following members to its Evaluation Committee:-

1. Ms Winnie Masare - Chairperson
2. Ms. Caroline Korir - Member
3. Ms. Angeline Muthoka Member

4. Mr. Bedan Mulei - Member
5. Mr. Kipkoech Kirui- Member
6. Ms. Rosemary Omolo Member

Going by an Evaluation Report executed by the Procuring Entity Evaluation Committee members on 20th June, 2022 (hereinafter referred to as the Evaluation Report) the Evaluation Committee evaluated the tender with respect to the tender with the following three stages: -

1. Preliminary/Mandatory Evaluation
2. Technical Evaluation
3. Financial Evaluation

Preliminary/Mandatory Evaluation

Tenderers were required to meet the following mandatory requirements before being considered for the detailed Technical Evaluation: -

List of preliminary/mandatory requirements

No.	Requirements
1.	Copy of certificate of incorporation/registration
2.	A copy of Valid Tax Compliance Certificate from KRA
3.	Original tender security of Kenya shillings **(Kshs.50,000)** in the form of a bankers guarantee or an Insurance Company Guarantee issued by an insurance firm approved by the Public Procurement Regulatory Authority, Cash, Letter of Credit or Guarantee by deposit taking microfinance institution, Sacco society, the Youth Enterprise Development Fund or the Women Enterprise Fund valid for **150 days** from the date of tender opening in the format provided in the tender document
4.	Audited financial accounts for the last 3 years 2018, 2019 & 2020 or 2019,2020 & 2021.
5.	A copy of CR12 for limited company and Sole proprietor & Partnership companies to provide copies of directors I.Ds
6.	Valid single business licence from county government 2022
7.	Dully **filled signed** & **stamped** certificate of independent tender determination form
8.	Dully **filled signed** & **stamped** form of tender
9.	Dully **filled, signed** & **stamped** price schedule form

No.	Requirements
10.	Dully **filled, signed** & **stamped** confidential business questionnaire form
11.	Dully filled, signed and stamped self-declaration form SD1
12.	Dully filled, signed and stamped self-declaration form SD2
13.	Dully filled, signed and stamped declaration and commitment to the code of ethics
14.	Response to all functional requirements without any deviations or modifications
15.	Attach current dated and signed Manufacturer's authorization certificate as distributor, dealer or service representative for the proposed audit software
16.	A valid registration/Accreditation letter from the ICT Authority 1 No. for Service Category: Information Software ICTA Grade 5 and above.
17.	Original and copy of tender document, which must be properly bound and Paginated/serialized/ Numbered sequentially on all pages including attachments in the order of 1,2,3
	Responsiveness.

Note: Bidders MUST meet all the mandatory requirements to qualify for technical evaluation

Result of preliminary/mandatory requirements

Bidder	B1	B2
Responsiveness.	NR	R

From the mandatory requirement in the table above, the committee made the following observations:-

a) **Bidder 1, M/s Azmasoft Consulting Limited** did not meet the following mandatory requirement hence was disqualified from further evaluation.
   - Did not sequentially serialize/paginate original and copy of Tender document in the form of i. e 1, 2, 3, 4....on each page including all the attachments (tender security not paginated)
   - Did not attach Audited financial accounts for the last 3 years
   - Did not attach a dully filled signed and stamped price schedule form.

Observation

The following one bidder met all mandatory requirements and proceeded for technical evaluation:

- Bidder 2, M/s Dynasoft Business Solutions Limited.

Technical Evaluation

No.	Criteria	Marks
1.	**Appropriateness of the methodology and work schedule and the completeness of the description of the same in relation to the TORs:** *a)* Bidders product or solution to the TORs and additional suggestions (show clearly your additional suggestions and proposal) *(7 marks)* *b)* Technical approach, Implementation plan and methodology *(5 marks)* *c)* Organization & staffing (show your organizational structure) *(5 marks)* *d)* In the format provided, provide a separate list of technical staff that shall be deployed in the NCA's assignment. In the list, indicate clearly the person(s) designated as the Team leader, and other technical personnel and their roles in the assignment. *(2 marks)* *e)* Compliance to the TOR s under section Mandatory Technical Specifications *(6 marks)*	25
2.	**Experience of the firm:**	
	a) Attach up to five (5) contracts/LSOs with public entities as proof of having carried out similar assignments within the last five (5) years *(3 marks each)* *(Attach contracts or LSOs)*	15
	b) With reference to item (2a) above, Attach up to 5 reference letters in clients' letter heads indicating how similar assignment were completed. The letters must have been written within the tendering period of this tender) *(2 marks for each letter)*	10
3.	**Qualification & Experience of Key Technical Staff to be deployed in NCA's assignment:**	
	a) Academic and Professional qualifications of the Team Leader *(Attach copies of certificates)* • Degree in IT or a related field *(6 marks)* • Diploma in IT or a related field (*2 marks)* • Certification in relevant field *(3 marks)*	9
	b) Team leader's experience: *(Attach CV in format provided)* • Number of Similar solutions handled (implementing & supporting similar solutions) *(1 mark for each project to a maximum of 5)* • Number of years of experience in handling similar projects *(1 marks for each year's experience to a max of 5 years)*	10

No.	Criteria		Marks
	c) Academic and Professional qualifications of **two technical personnel** *(Attach Appropriate copies of certificates)*	• Degree in IT or a related field *(4 marks per person)* • Diploma in IT or a related field *(1marks per person)* • Certification in the security solution – *(2 points per person)*	12
	d) Experience of the t**wo technical staff** in implementing & supporting similar assignments *(Attach CV in format provided) (1 mark for each project upto a maximum of 5 projects for each staff)*		10
4.	**Financial Capability; Liquidity ratio:** • 2:1 ratio Max – *3 marks for each year* • 1:1 ratio Max – *2 marks for each year* • Less – 0 point		9
	Total Marks		**100**

Technical Evaluation marks

Bidder	**B2**
Total Marks	87

Note:

The pass mark in Technical evaluation was 75%. Bidders who did not score 75% and above did not proceed to Financial Evaluation.

Observation

From the above analysis, one bidder qualified at technical evaluation having met the technical requirements and therefore proceeded to financial evaluation.

Financial Evaluation

The Bidder who was determined as the lowest evaluated bidder was considered and recommended for award.

Bidder No.	Bidder Name	Tender Sum	Rank
2	M/s Dynasoft Business Solution Ltd	6,844,000.00	1

Award Criteria

The firm achieving the lowest evaluated price after qualifying in technical evaluation shall be recommended for award.

Recommendation

The Committee unanimously agreed and recommended that the tender for supply, Installation and commissioning of Audit Management software Tender **No. NCA/T/072/2021-2022** be awarded to the lowest evaluated bidders M/s **Dynasoft Business Solution Limited of P.O Box 3209-00506 Nairobi** at total cost of **Kenya Shillings Six Million Eight Hundred and Forty-Four Thousand (Kshs. 6,844,000.00) only** inclusive of all applicable taxes.

PROFESSIONAL OPINION

Part A – Basic Information

1. **Procuring Entity:** National Construction Authority.
2. **Item Description:** Supply, Delivery, Installation and Commissioning of Audit management Software.
3. **Tender No:** NCA/T/072/2021-2022
4. **Date Tenders Invited:** 7th June, 2022
5. **Date Tenders Opened:** 15th June, 2022
6. The Tender Opening Committee were appointed in accordance to section 78 of the PPAD Act 2015 vide memo no. NCA 7/SC/INT/VOL. 1 (477)
7. Bidders' representative present: 2
8. No. of Tenderers Issued with Tenders Documents: All tenders downloaded the tender documents

9. No. of Bids received: 2

10. Method of Procurement Applied/used: Open Tender

11. The Evaluation Committee Members were appointed in accordance with Section 46 of the Act vide memo no. NCA 7/INT/VOL. 1 (481)

Part B – Legal & Practical Aspects of the Tender

1. The procurement proceeding for Supply, Delivery, Installation and Commissioning of Audit management Software was carried out as below:

a) Procurement Planning:

The procurement for Supply, Delivery, Installation and Commissioning of Audit management Software was provided for in NCA Annual Procurement Plan for FY 2021-2022 ICTD department, item no. 2.4.5.1.3 on page 43 in accordance with section 53 of the Act.

b) Initiation and confirmation of availability of funds

The procurement process was initiated by ICT department and availability of funds was confirmed vide procurement requisition no. 04475 in accordance with section 53(8) and 73 of the Act.

c) Invitation to Bid

The invitation to bid was done vide open tender method in accordance to Section 96 of the Act.

d) Tender Opening

Tender opening committee was appointed vide memo Ref. No NCA7/SC/INT/VOL. 1 (477) dated 15th June, 2022 and the tender opening was done in accordance with Section 78 of the Act.

e) Evaluation

Evaluation Committee was appointed vide memo Ref. No NCA7/SC/INT/VOL. 1(481) dated 15th June, 2022 in accordance to Section 46 of the Act. The evaluation process was done in accordance with Section 80 of the Act, and a report prepared in line with section 80(4) of the Act.

2. The procurement method used was open tender and the recommendation for award for Supply, Installation and Commissioning of Audit Management Software to **M/s Dynasoft Business Solution Limited** of P.O Box 3209-00506 Nairobi at a total cost of **Kenya Shillings Four Million Seven Hundred and Forty Six Thousand (Kshs. 6,844,000.00) only** inclusive of all applicable taxes for a period of six months is in line with the requirements under the second schedule of the regulations and in accordance with section 86 of the Act and as was provided in the tender document.

3. The recommended amount of **Kenya Shillings Four Million Seven Hundred and Forty Six Thousand (Kshs. 6,844,000.00) only** inclusive of all applicable taxes for a period of six months for the lowest responsive bidder is within the Authority Budget.

4. The Tender Evaluation Committee members carried out the evaluation and comparison of the tenders using the procedures and criteria set out in the tender document pursuant to clause 80(2) of the Act. Evaluation was concluded within 30 days in accordance with section 80 (6) of the Act.

5. Adequate funds were provided for in the financial year 2021-2022 budget for Supply, Delivery, Installation and Commissioning of Audit management Software.

Part C – Recommendation to Accounting Officer for Approval/ Rejection

In my opinion, the procurement process has been carried out in line with the requirements of the Act and considering that tender sum is within the approved budget, I therefore recommend the tender for Supply, Installation and Commissioning of Audit Management Software tender no. NCA/T/072/2021-2022 to be awarded to the lowest responsive bidder **M/s Dynasoft Business Solution Limited** of P.O Box 3209-00506 Nairobi at a total cost of **Kenya Shillings Four Million Seven**

Hundred and Forty Six Thousand (Kshs. 6,844,000.00) only inclusive of all applicable taxes for a period of six months inclusive of all applicable taxes for a period of six months.

Request to the Accounting Officer

The accounting officer is requested to consider & approve award of the tender for Supply, Installation and Commissioning of Audit Management Software tender no. NCA/T/072/2021-2022 to **M/s Dynasoft Business Solution Limited** of P.O Box 3209-00506 Nairobi at a total cost of **Kenya Shillings Four Million Seven Hundred and Forty Six Thousand (Kshs. 6,844,000.00) only** inclusive of all applicable taxes for a period of six months.

Notification of Tender

The Applicant vide a letter dated 20th June, 2022 by the Procuring Entity was notified that his tender was unsuccessful.

THE REQUEST FOR REVIEW

Azamsoft Consulting Limited, the Applicant herein lodged a Request for review dated 26th July, 2022 and filed on 27th July, 2022 together with an Affidavit of David Wagacha sworn on 27th July, 2022. The Applicant sought for the following orders:-

1. **The Procuring Entity to cancel the award of the tender and re-tender**
2. **The Procuring Entity to bear the review Costs**

The Respondents through their Advocate on record Mr. Samson Lukoba filed their Memorandum of Response dated 2nd August, 2022 and filed on 2nd August, 2022. Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate the effects

of Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specifies that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

APPLICANT'S CASE

The Applicant requests the Board to review the whole/part of the decision of the Procuring Entity on the following grounds that:-

1. **On Tender Security Pagination, the Applicant confirms that its tender documents were sequentially paginated as required. With regards to the Tender security, the original copy from the bank which cannot be tampered with was attached on page 69.**
2. **On attachment of Audited accounts for the last 3 years the Applicant confirms that it attached its audited financial accounts for the last 3 years (2018, 2019, 2020) in our proposal under appendix 7 on pages 70-79. The Submitted audited accounts are also attached.**
3. **On Duly filled and stamped price schedule form, the Applicant confirms that it attached a duly filled signed and stamped price schedule under appendix 3 on pages 61-63 of our proposal. The submitted duly filled and stamped price schedule is also attached.**
4. **The regret letter was sent via post office and an electronic copy was not sent thus causing a delay in our response. As indicated in the tender document, any complaints were to be delivered to the procuring entity using the 'quickest means available'. As such, the procuring entity did not use the quickest means available to them to inform us that our bid was unsuccessful by sending the regret letter**

via Post office and not availing a copy electronically. That automatically gave us an unfair chance to respond in a timely manner. This led to delay in our response with regard to the time the regret letter was dated.

RESPONDENT'S RESPONSE

On their part the Respondents request the Review Board to dismiss the application with costs on the basis of its frivolity in line with the Section 172 of the Act as read together with Section 35 of the Public Procurement Asset Disposal (Amendment) Act 2022.

In response the Respondents aver that the mandatory requirement of serialized pages for each tender bid is prescribed under Section 74(1)(i) of the Act. The requirement also formed the mandatory evaluation criteria which prescribed "Original and copy of tender document, which must be properly bound and paginated/serialized/numbered sequentially on all pages including attachments in order of 1,2,3."

According to the Respondents, the Applicant inserted an unmarked page between page 68 and 69 which did not meet the requirements of a sequentially numbered and paginated tender document as per the criteria. Furthermore, the Applicant's assertion that the Original Tender cannot be tampered and therefore not paginated is baseless as there is no requirement that affirms this position in the law or tender evaluation criteria and requirements.

The Respondents aver that the mandatory requirements were for bidders to submit audited financial statements for the last three (3) years from either 2018, 2019 & 2020 or 2019, 2020 & 2021. The Applicant provided financial statements for 2020, 2019, 2018 which were signed by "Ernest & Martin" under the report of the independent auditors. In review of the auditor's report, the signature of the

"Ernest & Martin" was not authenticated by an individual signature, an adjoining certified auditor stamp or seal and, as such, there was no proof to confirm that the audited accounts were issued by an auditor/audit firm in line with the provisions of Section 735 of the Companies Act 2015.

The Respondents further states that the evaluation criteria included a requirement for a price schedule form which was to be dully filled, signed and stamped. The form included a total price that was to be transferred to the form of tender. As much as the Applicant had signed and stamped the price schedule form, they included two items under the price schedule form which altered the format of the form and total price. Notably, the Procuring Entity had not listed the additional items provided by the Applicant as part of the price schedule form and hence the Applicant's form was marked as non-responsive at evaluation stage.

Lastly, the Respondents aver that the tender process was not an e-tendering process in lien with Section 61(1) of the Act which requires that that notification of all bidders in the process of the outcome of award is forwarded electronically and simultaneously. As such, a notification letter was forwarded vide letter REF: NCA7/SC/GEN/Vol. 13 (605) dated 20th June, 2022 to the Applicant's registered postal address as provided in their documentation.

BOARD'S DECISION

The Board has considered each party's case, the pleadings before it together with all the annexed documents as well as the confidential documents submitted by the Respondent pursuant to Section 67 (3) (e) of the Act and finds the following issues call for determination:-

1. **Whether or not the Applicant's tender was properly disqualified at the preliminary mandatory stage in terms of the Evaluation Criteria set out in the Tender document?**

2. What are the appropriate orders to grant in the circumstances?

ISSUE 1: ***Whether or not the Applicants Tender was properly disqualified at the Preliminary Mandatory Stage in terms of the Evaluation Criteria set out in the Tender document?***

The Applicant disputes the 3 grounds upon which its tender was disqualified at the preliminary mandatory stage of evaluation. The Mandatory requirements set out for the Preliminary Stage were

No.	Requirements
1.	Copy of certificate of incorporation/registration
2.	A copy of Valid Tax Compliance Certificate from KRA
3.	Original tender security of Kenya shillings **(Kshs.50,000)** in the form of a bankers guarantee or an Insurance Company Guarantee issued by an insurance firm approved by the Public Procurement Regulatory Authority, Cash, Letter of Credit or Guarantee by deposit taking microfinance institution, Sacco society, the Youth Enterprise Development Fund or the Women Enterprise Fund valid for **150 days** from the date of tender opening in the format provided in the tender document
4.	Audited financial accounts for the last 3 years 2018, 2019 & 2020 or 2019,2020 & 2021.
5.	A copy of CR12 for limited company and Sole proprietor & Partnership companies to provide copies of directors I.Ds

No.	Requirements
6.	Valid single business licence from county government 2022
7.	Dully **filled signed** & **stamped** certificate of independent tender determination form
8.	Dully **filled signed** & **stamped** form of tender
9.	Dully **filled, signed** & **stamped** price schedule form
10.	Dully **filled, signed** & **stamped** confidential business questionnaire form
11.	Dully filled, signed and stamped self-declaration form SD1
12.	Dully filled, signed and stamped self-declaration form SD2
13.	Dully filled, signed and stamped declaration and commitment to the code of ethics
14.	Response to all functional requirements without any deviations or modifications
15.	Attach current dated and signed Manufacturer's authorization certificate as distributor, dealer or service representative for the proposed audit software
16.	A valid registration/Accreditation letter from the ICT Authority 1 No. for Service Category: Information Software ICTA Grade 5 and above.

No.	Requirements
17.	Original and copy of tender document, which must be properly bound and Paginated/serialized/ Numbered sequentially on all pages including attachments in the order of 1,2,3
	Responsiveness.

The letter of Notification to the Applicant dated 20th June, 2022 (send by post) informed the Applicant that its tender was unsuccessful on 3 grounds:-

- ***You did not sequentially serialize/paginate original and copy of Tender document in the form of i.e 1,2,3,4..... On each page including all the attachments (tender security not paginated)***
- ***You did not attach audited financial accounts for the last 3 years***
- ***You did not attach a dully filled signed and stamped price schedule***

In the Application filed herein the Applicant has stated as follows

1. ***<u>Tender Security Pagination</u>: We wish to confirm that our tender documents were sequentially paginated as required. With regards to the Tender security, the original copy from the bank which cannot be tampered with was attached on page 69. The paginated page under which the Original Tender security was attached is attached.***

2. ***<u>Attachment of Audited accounts for the last 3 years:</u> We attached our audited financial accounts for the last 3 years (2018, 2019,***

2020) in our proposal under appendix 7 on pages 70-79. The Submitted audited accounts are also attached.

3. ***<u>Duly filled and stamped price schedule form:</u> We attached a duly filled signed and stamped price schedule under appendix 3 on pages 61-63 of our proposal. The submitted duly filled and stamped price schedule is also attached.***

4. ***<u>The regret letter was sent via post office and an electronic copy was not sent thus causing a delay in our response</u>. As indicated in the tender document, any complaints were to be delivered to the procuring entity using the 'quickest means available'. As such, the procuring entity did not use the quickest means available to them to inform us that our bid was unsuccessful by sending the regret letter via Post office and not availing a copy electronically. That automatically gave us an unfair chance to respond in a timely manner. This led to delay in our response with regard to the time the regret letter was dated.***

Section 79 of the Act on responsiveness of a tender provides as follows:-

Responsiveness of tenders.

79. (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

Section 80 on its part provides as follows: -

Evaluation of Tenders

80. (1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected under section 82(3).

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

(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations

(6) The evaluation shall be carried out within a maximum period of thirty days.

(7) The evaluation report shall be signed by each member of evaluation committee.

To determine whether or not the Applicant's tender was properly disqualified at the Preliminary Mandatory Stage, the Board will review each of the grounds of disqualification: -

1. **Tender security pagination**

It is the Respondent's position that the Applicant did not sequentially serialize/paginate the original and copy of the tender documents submitted in the form 1,2,3 and 4 on each page including all the attachments.

The mandatory Requirement of serialized pages of each tender bid is provided for under Section 74 (1) (i) of the Act as follows:-

74. Invitation to Tender

(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—

a) .....

b).....

c).....

d).....

e).....

f).....

g).....

h).....

i) requirement of serialisation of pages by the bidder for each bid submitted; and

j) any other requirement

The Respondent's Response states that the Applicant inserted in between pages 68 and 69 a document which was not paginated as required. This is the Tender security presented by the Applicant in compliance with a mandatory requirement.

In the Application, the Applicant confirms that in its documents it inserted "the original copy from the bank which cannot be tampered with was attached on page 69." to its understanding, since the document is an original Bank document, it should therefore NOT be tampered with.

This statement confirms that the document attached to its tender was NOT paginated. The Respondents at paragraph 20 of their response state

20. The Applicant inserted an unmarked page between page 68 and 69 which did not meet the requirements of a sequentially numbered

and paginated tender document as per the criteria. Furthermore, the Applicant's assertion that the Original Tender cannot be tampered and therefore not paginated is baseless as there is no requirement that affirms this position in the law or tender evaluation criteria and requirements

The above Statement of Response is in tandem with the admission of the Applicant that the Tender security document was not paginated. The Blank tender document under item 5 in the invitation to tender states that:-

"5. The Tenderer shall chronologically serialize all pages of the tender documents submitted in the form of 1,2,3,4(emphasis added)

Further clause 13.2 of Section 1-instructions to tenders (ITT) states: -

"In addition to the requirements under ITT 12.1, Tenders submitted by a JV shall include a copy of the Joint Venture Agreement entered into by all members. Alternatively, a Form of intent to execute a Joint Venture Agreement in the event of a successful Tender shall be signed by all members and submitted with the Tender, together with a copy of the proposed Agreement. The Tenderer shall chronologically serialize pages of all tender documents submitted. The Tenderer shall furnish in the Form of Tender information on commissions and gratuities, if any, paid or to be paid to agents or any other party relating to this Tender."

Further, Section III on evaluation and disqualification criteria (a) preliminary/mandatory evaluation item number 17, states as follows

"17. Original and copy of tender document must be properly bound and paginated, serialized, numbered sequentially on <u>all pages including attachments in the order of 1,2,3</u> (emphasis ours)

The reason the Applicant gives is that being a Bank document it could not be tampered with.

The oxford dictionary defines Tamper as follows:-

"to interfere with (something) in order to cause damage or make unauthorized alterations."

"Tampering"

Noun

1. **The act or process of changing, damaging or interfering with something especially with intent to falsify, cheat or defraud.**
2. **The act or process of dealing secretively, improperly or underhandedly with someone."**

Now having the above definition in mind and noting both the provisions of the Act on pagination and the mandatory requirements of the tender document, the Board must determine whether or not the Applicant met the specific mandatory requirement to paginate all documents "**<u>including attachments"</u>**(Emphasis)

It is the Board's view that placing a page number on a Tender security form, or letter, which was a mandatory document to be attached to the Applicant's tender bid would not amount to tampering. It would not alter, falsify, change, damage or interfere with the document. The act of tampering would in the Board's view be to change the contents of the Tender security itself such as the date, the amount of security or some important feature of it that would mislead the Respondent. A

page number placed at the bottom or top of the page would not therefore amount to tampering.

Accordingly, the failure to paginate that document contained in the Applicant's tender document which is admitted, exposed the tender document to be evaluated as non-compliant/ non responsive, to the preliminary mandatory requirement that ALL documents inclusive of attachments must be paginated sequentially. For that reason, therefore the Applicant's tender was properly disqualified as unresponsive and failed that particular preliminary mandatory criterion.

2.You did not attach Audited Financial accounts for the last 3 years

This requirement was found at Section III on evaluation and qualification criteria (a) preliminary mandatory evaluation item 4 which stated as follows:-

> ***"4 audited financial accounts for the last 3 years 2018, 2019 & 2020 or 2019, 2020 & 2021."***

The Applicant states that it attached its audited Financial statements as required for 2018, 2019 and 2020. At page 4 to 14 of its Application, the Applicant attached copies of the statement it provided within its tender document.

At paragraphs 21 to 22 of the Respondent's Memorandum of Response the Respondents state:

> 21. ***In response to Paragraph 2, the mandatory requirements were for bidders to submit audited financial statements for the last three (3) years from either 2018, 2019 as 2020 or 2019, 2020 86 2021. The Applicant provided financial statements for 2020, 2019, 2018 which were signed by "Ernest & Martin" under the report of the independent auditors.***

22. ***In review of the auditor's report, the signature of the "Ernest & Martin" was not authenticated by an individual signature, an adjoining certified auditor stamp or seal and, as such, there was no proof to confirm that the audited accounts were issued by an auditor/audit firm in line with the provisions of Section 735 of the Companies Act 2015.***

On its part Section 735 of the Companies provides as follows:-

735. Auditor to sign and date auditor's report

(1) Subject to subsection (2), an auditor shall—

(a) sign and date the auditor's report; and

(b) ensure that the auditor's name is prominently displayed in the report.

(2) If the auditor is a firm, the senior statutory auditor of the firm shall sign the report on behalf of the firm.

(3) An auditor who fails to comply with subsection (1), or a senior statutory auditor who fails to comply with (2), commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings.

The Accountants Act, No 15 of 2008 establishes the Institute of Certified Public Accountants of Kenya, ICPAK. This is the body charged with the regulations of matters relating to Accountants and Auditors. ICPAK issues guidelines for its members regulating their conduct. Under Guidelines issued by ICPAK, effective January 2014.

1.0 BY LAW No. 38 ICPAK by-law No 38 stipulates that

"Members in practice shall sign on their assurance engagements in their own names on behalf of their firm whether they are sole proprietorships or partnerships. They may however sign using the name of the firm provided the name of the person signing is indicated in a prominent place below the signature."

2.0 SCOPE

This guideline is applicable to general purpose financial statements (i.e. statutory financial statements that are required to be prepared and or audited under the Kenyan Companies Act and the requirements of any regulatory body').

3.0 PURPOSE

This guideline primarily seeks to enhance public interest by ensuring a seamless application of By-law No 38 with regard to Independent Audit Opinion.

4.0 APPLICATION

The name of the person responsible for the engagement (engagement partner) and his/her practicing number must be included in the independent auditor report. This shall be contained in the last line of the Independent Audit Opinion as provided in the illustration."

Council reaffirms that compliance with Institutes by-laws is mandatory for all members of the Institute.

The Board has reviewed the original tender document of the Applicant contained in the confidential documents supplied by the Procuring Entity under Section 67 (3) of the Act

The Board confirmed that the documents contained in the tender document at pages 71 to 73(Accounts period ending 31st December 2020) page 74-76 for period ending 31st December, 2019 and pages 77-79 for period ending 31st December, 2018 are same as those attached to the Application of the Applicant.

Those accounts all bear the name *Ernest & Martin*. It is not clear whether this is the name of the person who has prepared the documents. This also appears to be a name not a signature. There is no official stamp of either the individual so called or other way to show if that is an audit firm or company. There is no Registration number of the individual/ auditor who conducted the audit and signed it off.

The board notes that the Applicant is a Company thus the requirements of Section 735 of the Companies Act cited above apply to it. For the Applicant's attached accounts statements to comply with audit requirement and thus be reckoned as **audited** accounts, the auditor has:-

a) To sign and date the auditor's report
b) Ensure the auditor's name and number are prominently displayed in the report

It is unclear from the statement who signed the report if an individual (sole proprietor) or a firm and if a firm, which auditor in the firm (Company) executed it as required under section 735 (2) of the companies Act 2015. There is no Stamp or registration number of the auditor. To that extend, it would be doubtful that what is provided are Audited Accounts

The Oxford dictionary defines audited accounts as: -

"when the financial result which a company complies have been checked by an accountant qualified to conduct an audit. If all is well, the auditor will state that the accounts give a "true and fair "picture of the companies Affair"

An Auditor is defined as

"a person authorized to review and verify the accuracy of financial records and ensure that Companied comply with tax laws."

Taking note of the above definitions and in view of the observations made above regarding the statements contained in the Applicant's tender document, it is not possible to state that those are Audited Accounts in terms of the tender document. The question still remains, who is the auditor an individual, who signed them? To that extend, the Applicant's tender was properly disqualified at the Mandatory preliminary evaluation stage for failure to meet the requirement to produce "audited accounts for the last 3 years ".

The final ground for disqualification of the Applicant's tender was that

3.You did not attach a dully filled signed and stamped price schedule

The requirement was found under Section III on evaluation and qualification criteria (a) preliminary/mandatory evaluation item number 9 which stated as follows:-

9 Dully signed and stamped price schedule form."

The same was set out in the Tender document as follows:-

COST SUMMARY

No.	***Description***	***Unit Cost***	***Total Cost***
1	***10 licenses***		
2	***Training of 12 No. of staff***		
3	***Any Other costs***		
Total Transferred to form of tender			

At pages 62 to 63 the Applicant in their original document provided the following

COST SUMMARY

Year 1: one time costs

No.	***Description***	***Unit Cost***	***Total Cost***
1	***10 licenses: Essential package licenses for 10 users (includes TeamMate+ Audit and integrated analytics. The initial term commences on the effective date and continues for a period of three (3) years, with license fees payable annually. Subsequent annual subscription fees from year 2 onwards are set the "then" current subscription fees)***	***436,100.00***	***5,058,760.00***
2	***Training of 12 No. of staff: Including setup, configuration and training – 11 days***	***295,272.73***	***3,248,999.00***
3	***Any Other costs: Post implementation training for four (4) internal audit personnel 6 months after solution implementation – 5 days***	***243,600.00***	***1,218,000.00***
	Total Transferred to form of tender		***9,524,760.00***

The split of the 14 days are as shown below:

Setup for the SaaS (Software as a service) environment – 1 day
Configuration of TeamMate+ Audit with Integrated Analysis – 2 days
Training on TeamMate+ Audit with Integrated Analytics – 8 days

Year 2 and Year 3 Annual subscription costs

No.	*Description*	*Unit Cost*	*Total Cost*
1	*Year 2: essential package licenses fees for the 10 user (includes TeamMate+ Audit with Integrated Analytics*	*462,266.00*	*5,362,285.60*
2	*Year 3: essential package licenses fees for the 10 user (includes TeamMate+ Audit with Integrated Analytics*	*490,001.96*	*5,684,022.74*
	Grand Total VAT inclusive		*11,046,308.34*

The Board has taken note of the requirements of Clause 14 of the ITT. The same provides as follows:-

14. Form of Tender and Activity Schedule

14.1 The Form of Tender and priced Activity Schedule shall be prepared using the relevant forms furnished in Section IV, Tendering Forms. The forms must be completed without any alterations to the text, and no substitutes shall be accepted except as provided under ITT 21.3. All blank spaces shall be filled in with the information requested.

The question therefore is whether or not the Applicant complied with the requirement in the tender document and whether the third ground for disqualification of the Applicant's tender is tenable.

The Applicant in the Application stated that they attached a duly filled, signed and stamped price schedule a copy of which was attached to the Application.

At paragraph 24 of the Statement of Response, the Respondent states

24 .In as much as the Applicant had signed and stamped the price schedule form, they included two items under the price schedule form which altered the format of the form and total price. Notably,

the 2nd Respondent had not listed the additional items provided by the Applicant as part of the price schedule form and hence the Applicant's form was marked as non-responsive at evaluation stage.

A look at the Cost Summary provided by the Applicant as contained in the original Tender document and attached to the Application shows that the Applicant did stamp and sign the price schedule. However, the Applicant added and priced two other items onto the price schedule that the Respondent states were not asked for and to that extend rendered the Applicant's tender non responsive.

The Board on review of the Applicant's schedule in its Tender document finds that the same goes beyond what was required. The additions and/or alteration in the Board's view went against the requirements of Clause 14 of the ITT cited above and, on that basis, rendered the Applicant's bid subject to disqualification at the Mandatory preliminary stage.

The Board however notes that both in the Evaluation report and in the letter of Notification of 20th June,2022, the 3rd ground for disqualifying the Applicant's tender is

"Did not attach dully (sic) filled signed and stamped price schedule form. "

It is the Board's position that the ground expressed in the Notification is erroneous as the price schedule form seen was duly filled, signed and stamped. The fault was on the alteration and additions of the form as set out in the tender document, which deviated from the instructions at Clause 14 ITT

The Board having found as above is of the view that the Applicant's tender was properly disqualified at the Mandatory Preliminary stage. The Board will therefore not deal with other complaints regarding the choice of correspondence method by postage used by the Procuring Entity as the same does not go into the merits of the Applicant's Application neither has it been demonstrated to have caused the Applicant undue prejudice. The Board therefore proceeds to make orders as below:-

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 dated 27th July, 2022

1. **The Applicant's Review Application is hereby dismissed for lack of merit**
2. **Each party shall bear its own costs**

Dated at Nairobi this 17th August, 2022

.....	.....
VICE CHAIPERSON (Panel Chair)	**SECRETARY**
PPARB	**PPARB**