

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 71 OF 2022 OF 4th AUGUST 2022

BETWEEN

URBANUS KIOKO MUSANGO T/A URBANTECH

ENTERPRISES.....APPLICANT

-versus-

THE CLERK NAIROBI CITY COUNTY

ASSEMBLY.....RESPONDENT

Review of the failure by the Accounting Officer of the Nairobi City County Assembly to comply with the orders of the Board issued on 31st May, 2022 in PPARB Request for Review No. 42 of 2022 in relation to Tender Number NCCASB/OT/09/01/2021-2022 for the Supply, Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly.

BOARD MEMBERS

- | | | |
|-----------------------|---|--------------------------------|
| 1. Mrs. Njeri Onyango | - | Vice Chairperson (panel Chair) |
| 2. Phyllis Chepkemboi | - | Member |
| 3. Ambrose Ogeto | - | Member |
| 4. Nicholas Mruttu | - | Member |

IN ATTENDANCE

1. Mr. Stanley Miheso - Holding Brief for Board Secretary

BACKGROUND TO THE DECISION

The Nairobi City County Assembly Service Board (NCCASB), (hereinafter referred to as, "the Procuring Entity"), through its Clerk, the Respondent herein, invited interested, eligible competent tenderers/bidders in the category of Youth for the Supply, Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly for the financial year 2021/2022.

The advertisement requesting for bids was placed in the two Local Daily newspapers, The Standard Newspaper and The Star. A notice was also uploaded in the *Public Procurement Information Portal website: www.tenders.go.ke* and *County Assembly website: www.nairobiassembly.go.ke* on *Thursday, 27th January, 2022 to close on Tuesday, 8th February, 2022.*

Tender Submission Deadline and Opening of Bids

By the Tender submission deadline of 8th February 2022, the Procuring Entity had received a total of five (5) bids. The subject tender was opened by a Tender Opening Committee and the following tenderers were recorded as having submitted their bids per the Tender opening summary:

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

Opening Committee Observations

- Bidder 02/09 - Digital Vision (E.A) Ltd.
 - i. Bid document was submitted not enclosed and sealed in an envelope as instructed and as a requirement in the tender document.
 - ii. Did not submit Form of Tender but provided a financial document indicating the tender price.
- Bidder 04/09 - Technology Benchmark Ltd did not fill in the Form of Tender but submitted the tender price information in a financial table

Evaluation Committee Observations

The Evaluation Committee adopted the opening minutes with the following observations:

- Bidder 02/09 - Digital Vision (E.A) Ltd was bidding as a joint venture with Bakhy Bakhx Traders Ltd.
- Bidder 02/09 - 02/09 - Digital Vision (E.A) Ltd did not submit the tender document as required under ITT 24 - Submission, Sealing and Marking of Tenders, where the documents were submitted in a box file with loose leaf papers
- Bidder 04/09 - Technology Benchmark Ltd. Box 28894-00100 Nrb customised and filled Form of Tender inserted under mandatory technical evaluation.

Evaluation of Tenders

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

- a) Digital Vision (E.A) Ltd tendered as a joint venture with Bakhy Bakhx Traders Ltd and further that Digital Vision (E.A) Ltd failed to submit its tender as required under ITT 24 – Submission, Sealing and Marking of Tenders, where the documents were submitted in a box file with loose leaf papers; and

b) Technology Benchmark Ltd customized and filled Form of Tender inserted under mandatory technical evaluation.

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

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

Preliminary/Mandatory Evaluation

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

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

Technical Evaluation

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

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

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

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

Financial Evaluation

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

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

Post Qualification

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

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

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

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

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

Recommendation

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

Professional Opinion

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

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

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

Notification to Tenderers

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

REQUEST FOR REVIEW NO.25 OF 2022

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

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

NCCASB/OT/09/01/2021-2022 and award the Tender in compliance with the provisions of the Public Procurement and Disposal of Assets Act,2015, the regulations therein and the Tender documents issued by the respondent;

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

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

BOARDS DECISION IN REQUEST FOR REVIEW NO.25 OF 2022

In exercise of the powers conferred upon the Board under Section 173 of the Act, the Board made the following final orders on 12th April 2022 with respect to the Request for Review dated 22ndMarch 2022 in PPARB Application No.25 of 2022:

- 1. The Letter of Notification of Regret with respect to Tender No: NCCASB/OT/09/01/FY2021-2022 for Supply Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly dated 10th March 2022 issued to the Applicant and all other tenderers in the subject tender by the Respondent be and are hereby cancelled and set aside.*
- 2. The Respondent is hereby ordered to remit the procurement proceedings of Tender No: NCCASB/OT/09/01/FY2021-2022 for Supply Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly back to*

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

- 3. Further to Order 2 above, the Respondent is hereby ordered to ensure the procurement proceedings of Tender No: NCCASB/OT/09/01/FY2021-2022 for Supply Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly proceeds to its logical conclusion within 14 days from the date of this decision.*
- 4. Given that the procurement proceedings of the subject tender are not complete, each party shall bear its own costs in this Request for Review.*

REMITTING THE SUBJECT TENDER'S PROCUREMENT PROCEEDINGS TO THE PROCURING ENTITY'S HEAD OF PROCUREMENT FUNCTION

Second Professional Opinion

In a second professional opinion vide a memo dated 19th April 2022 addressed to the Respondent (hereinafter referred to as the 'Second Professional Opinion'), the Procuring Entity's Principal Procurement Officer, Mr. Agure Erick, while making reference to the Board's Decision dated 12th April 2022 in PPARB Application No.25 of 2022, noted that the subject tender was budgeted and planned for in the current financial year, funds provided for the same were adequate, the method of procurement (open tender) used was appropriate and that the evaluation process conducted on 1st – 4th March 2022 was carried out as per the set criteria in the Tender Document. However, Mr. Agure opined that based on Section 55(1)(f) of the Act that requires one to have fulfilled their respective tax compliance obligation to tender for a contract in procurement, he advised and recommended to the Respondent, for the Respondent to direct the Evaluation Committee to conduct further post qualification (due diligence) exercise on the recommended tenderers' Tax Compliance Certificates submitted.

Vide an internal memo dated 20th April 2022, the Respondent, while making reference to the Second Professional Opinion and the Board's Decision dated 12th April 2022 in PPARB Application No.25 of 2022, directed the Evaluation Committee to conduct further post-qualification on the recommended tenderers' Tax Compliance Certificates within a period of two days and

submit the signed post-qualification report with evidence by close of business on 22nd April 2022.

Further Post-Qualification

The Evaluation Committee, as contained in a Further Post-Qualification Report dated April 2022 and signed by all members of the Evaluation Committee on 26th April 2022, observed that a close look of the serialization/pagination of the tender submitted by the joint venture (Urbantech Enterprises Ltd and Technology Benchmark Ltd) showed inconsistencies/mismatch of page number prints containing the tax compliance certificates hence requested that the Applicant be asked to re-submit tax compliance certificates so as to verify the authenticity of the tax compliance certificates on the tender document. With this, the Evaluation Committee did not conduct the further post qualification exercise (i.e. further due diligence) on the tax compliance certificates hence adjourned until the joint venture (Urbantech Enterprises Ltd and Technology Benchmark Ltd) re-submits tax compliance certificates.

Third Professional Opinion

In a third professional opinion vide a memo dated 26th April 2022 addressed to the Respondent (hereinafter referred to as the 'Third Professional Opinion'), the Procuring Entity's Principal Procurement Officer, Mr. Agure Erick, while making reference to the Respondent's memo of 20th April 2022 directing the Evaluation Committee to conduct a further post-qualification

exercise, brought to the attention of the Respondent the Evaluation Committee's observation as contained in the Further Post-Qualification Report.

On the same day of 26th April 2022, the Respondent noted by hand on the Third Professional Opinion that (i) there was alleged interference with the tender document as observed by the Evaluation Committee report under further due diligence, (ii) the tender document were under the custody of the Ag. Clerk which is an unusual practice and the Ag. Clerk refused to handover the office to give an account of the tender documents in his custody and (iii) the law firm chosen to represent the Assembly in the PPARB review was not a registered firm to offer legal services in the assembly and at some point tender documents were under the custody of the said legal firm. With this, the Respondent terminated the procurement proceedings of the subject tender under Section 63(1) (e) of the Act on grounds that material governance issues had been detected.

Notification to Tenderers

In letters of notification of termination dated 28th April 2022, the Clerk, Nairobi City County Assembly, Mr. Edward O. Gichana, notified all tenderers that the procurement proceedings of the subject tender were terminated pursuant to Section 63(1)(e) of the Act on grounds that material governance issues affecting the procurement process were detected in the course of carrying out the procurement process.

REQUEST FOR REVIEW NO.42 OF 2022

On 11th May 2022, Urbantech Enterprises, the Applicant herein, lodged a Request for Review dated 11th May 2022 together with a Supporting Affidavit sworn by Mr. Urbanus Kioko Musango, the Sole Proprietor of the Applicant, on 11th May 2022 and a Further Affidavit sworn by Mr. Urbanus Kioko Musango on 19th May 2022 and filed on 19th May 2022 through the firm of S. O. Owino & Associates Advocates, seeking the following orders:

- a) That the validity period of Tender Number NCCASB/OT/09/01/FY2021-2022 be extended.**
- b) That a declaration be issued that the Respondent is in contempt of the orders of the Board in Request for Review No.25 of 2022 issued on 12th April 2022;**
- c) That the Respondent be ordered to award Tender Number NCCASB/OT/09/01/FY2021-2022 to the Applicant.**
- d) That time be set within which the contract award in respect of Tender Number NCCASB/OT/09/01/FY2021-2022 should be signed by the Applicant.**
- e) That the costs of this Review be awarded to the Applicant; and**
- f) Any other relief that this Board may deem fit and just to grant.**

BOARDS DECISION IN REQUEST FOR REVIEW NO.42 OF 2022

In exercise of the powers conferred upon the Board under Section 173 of the Act, the Board made the following final orders on 31st May 2022 with respect to the Request for Review dated 11th May 2022 in PPARB Application No.42 of 2022:

- 1. The Termination of the subject tender by the Respondent be and is hereby terminated.*
- 2. The Letter of Termination dated 28th April 2022 issued by the Respondent to all tenderers in the subject tender be and are hereby cancelled and set aside.*
- 3. The Respondent is hereby ordered to direct the Evaluation Committee to conduct due diligence on the Applicant's and Technology Benchmark Limited's respective Tax Compliance Certificates provided for at pages 68 and 69 respectively of the original tender submitted to the Procuring Entity by the Applicant in joint venture with Technology Benchmark Limited taking into consideration our findings herein within 7 days from the date of this decision.*
- 4. The Respondent is hereby ordered to award the subject tender to the Applicant in joint venture with Technology Benchmark Limited subject to a positive due diligence exercise conducted pursuant to order 3 above with 14 days from the date hereof.*
- 5. The Respondent is hereby ordered to extend the tender validity period for a further 30 days from 11th July 2022.*
- 6. Given the findings herein, each party shall bear its own cost in the Request for Review.*

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. E069 OF 2022

Dissatisfied with the decision of the Board in Review No. 42 of 2022, the Applicant unsuccessfully sought judicial review by the High Court in **Judicial Review Miscellaneous Application E069 of 2022 Republic v Public Procurement Administrative Review Board; Ex parte Urbantech Enterprises; Accounting Officer – Nairobi City County Assembly** and the Applicant filed its Notice of Motion dated 17th June 2022. The Applicant sought for the following Orders:

- 1. Certiorari to bring this Honourable Court for purposes of quashing the respondent's decision dated 31st May 2022.**
- 2. Prohibition restraining the interested party by itself, its agents or persons acting on his/her behalf from implementing the respondent's decision dated 31st May 2022.**
- 3. Mandamus directing the interested party to award the *Tender No: NCCASB/OT/09/01/FY2021-2022 for Supply Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly to the ex parte applicant is the lowest evaluated responsive bidder and execution of the contract in respect of the said tender.***
- 4. Declaration that the decision of the Respondent in request for review number 42 of 2022 was one, egregious, unlawful, illegal, inconsistent, ultravires and marred with procedural improprieties.**

Justice Ngaah Jairus in his Judgment delivered on 29th July 2022 dismissed the *ex parte* Applicant's Notices of Motion dated 17th June 2022 with costs to the Respondent and the Interested Party. There was no appeal against the High Court's decision in effect making the decision of the Board in Request for Review 42 of 2022 dated 31st May 2022 final and binding to all parties therein. In effect therefore, the Respondent was to conduct Due Diligence on the Tax Compliance Certificates of both the the partners in the joint venture M/S Urbantech Enterprises and M/S Technology Benchmark Ltd as per order 3 of the Board's decision in Application for Review No 42 of 2022.the Board takes note that though the Applicant has alleged that there was a Stay of the orders no such order was attached to the current Application.

Due Diligence Exercise

The Evaluation Committee was directed vide Memo dated 3rd June 2022 to have a sitting on 6th June 2022 to conduct a further post qualification on the recommended bidder's Tax Compliance Certificates dated 9th September 2021 and 3rd February 2022 for purposes of verifying their authenticity and validity taking into consideration the Board's decision in Review 42 of 2022.

A Further Post Qualification Report II dated 6th June 2022 noted that the evaluation committee conducted due diligence on the bidder's tax compliance certificates by querying the certificate numbers using KRA portal Tax compliance checker and made the following observations:

- i. Tax compliance certificate for Urbantech Enterprises under the name: Urbanus Kioko Musango (Certificate No. KRANON11933386720,PIN No.A008503034L) had expired on 8th September 2021

- ii. Tax compliance certificate for Technology Benchmark Ltd (Certificate No. KRASON1220145522,PIN No. P051352679K) was invalid.

Evaluation Committee Recommendation

In light of the results of the due diligence exercise, the committee did not recommend the award of the subject tender to any bidder.

Fourth Professional Opinion

In a fourth professional opinion vide memo dated 7th June 2022 addressed to the Respondent (hereinafter referred to as the 'Fourth Professional Opinion') , the Procuring Entity's Principal Procurement Officer, Mr. Agure Erick, while making reference to the Respondent's memo of 3rd June 2022 directing the Evaluation Committee to conduct due diligence as directed by the Board in Review 42 of 2022, brought to the attention of the Respondent the Evaluation Committee's observation as contained in the Further Post Qualification Report II.

The opinion detailed that the committee had noted that they had relied on the face of the documents to conduct evaluation without using tax compliance checker in the KRA portal. That the evaluation committee went further and conducted due diligence on the bidder's tax compliance certificates by querying the certificate numbers using KRA portal Tax compliance checker and made the following observations:

- i. Tax compliance certificate for Urbantech Enterprises under the name: Urbanus Kioko Musango (Certificate No. KRANON11933386720,PIN No.A008503034L) had expired on 8th September 2021
- ii. Tax compliance certificate for Technology Benchmark Ltd (Certificate No. KRASON1220145522,PIN No. P051352679K) was invalid.

The procurement officer in making reference to the Board's decision in review 42 of 2022 at page 57 which stated: ***'If the due diligence yields a positive report, the Applicant in joint venture with Technology Benchmark Limited should be awarded the subject tender by the Respondent in accordance with the applicable law. If the due diligence yields a negative report, the Respondent would be at liberty to terminate the subject tender in accordance with the applicable laws.'*** Noted that the Evaluation Committee determined all other tenderers non-responsive with respect to the subject tender and the negative due diligence report by the Evaluation Committee, he recommended for the termination of the procurement process under Section 63(1)(f) of the Act on the grounds that all evaluated tenders were non-responsive. The Respondent approved termination of the procurement process as recommended on 7th June 2022.

Notification to Tenderers

Vide letters dated 8th June 2022, the Respondent notified all the tenderers that the procurement proceedings of the subject tender were terminated pursuant to Section 63(1)(f) of the Act on grounds that all evaluated tenders were non-responsive. The import of the date and contents of this letter of Notification shall be discussed below.

REQUEST FOR REVIEW NO. 71/2022

The Request for Review was lodged by M/s Urbanus Kioko Musango T/A Urbantech Enterprises, on 4th August, 2022 in the matter of tender No. NCCASB/OT/09/01/2021-2022 for the Supply, Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly.

The Applicant seeks for the following orders:

- a) An order declaring that the Accounting Officer of the Procuring Entity failed to comply with the orders of this Honourable Board issued on 31st May 2022 in PPARB Request No. 42 of 2022 in relation to Tender Number NCCASB/OT/09/01/2021-2022 for the Supply, Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly.***

- b) An order directing the Accounting Officer of the Procuring Entity to immediately notify the Applicant of the status of compliance with the orders of this Honourable Board issued on 31st May 2022 in PPARB Request No. 42 of 2022 in relation to Tender Number NCCASB/OT/09/01/2021-2022 for the Supply, Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly.***
- c) In the alternative to prayer (b) above, an order of this Honourable Board awarding Tender Number NCCASB/OT/09/01/2021-2022 for the Supply, Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly to Urbantech Enterprises, the Applicant herein who submitted the lowest evaluated responsive tender in accordance with section 86 (1) (a) of the Act.***
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- d) An order directing and compelling the Procuring Entity to bear the costs of this Request for Review.***
- e) An order extending the tender validity period.***
- f) 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.***

Board Notification to the Respondent of filed Request for Review

In a Notification of Appeal and a letter dated 4th August 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") notified the Respondents of the existence of the Request for Review and suspension of procurement proceedings for the subject tender while forwarding a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondent was requested to submit any information and arguments about the subject tender within five days pursuant to the PPARB Circular No. 2/2020 dated 24th March 2020.

In opposition of the Request for Review, the Respondent filed its Memorandum of Response to the Applicant's Request for Review dated 11th August 2022 and filed on 12th August 2022.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by the COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate

the COVID-19 disease. Through this circular, the Board dispensed with physical hearings and directed that all requests for review applications shall be canvassed by way of written submissions. The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Act. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

Vide letters and notifications of appeal dated 15th August 2022, the Acting Board Secretary notified the rest of the Tenderers via email as provided in the submitted confidential documents, of the existence of the subject Request for Review while forwarding to the interested parties a copy of the Request for Review together with the Board's circular No. 02/2020 dated 24th March 2020. The tenderers were invited to submit to the Board any information and arguments about the subject tender within 3 days from 15th August 2022.

The Applicant filed a further Affidavit on 18th August 2022 in response to the Respondent's Statement of Response.

THE APPLICANT'S CASE

The Applicant confirms that it is a tenderer as envisioned under Section 167(1) of the Act since by the tender submission deadline of 15th June 2022, it submitted its bid to the Procuring Entity pursuant to the Procuring Entity's Tender Advert.

That after tender opening and evaluation, the Procuring Entity's Evaluation Committee adjudged the Applicant's bid as responsive; a determination that was challenged by the Procuring Entity's Head of Procurement function as per the Procuring Entity's Response in Request for Review No. 25 of 2022.

The Applicant avers that it learnt that the Procuring Entity went further to terminate the subject tender without any justifiable cause ignoring the Evaluation Committee's earlier finding that the Applicant's bid was responsive. Being aggrieved by this outcome, the Applicant successfully challenged the Procuring Entity's action and the Honourable Board settled the role of a Head of Procurement function and the other distinctive role of an Evaluation Committee in its decision in Request for Review No. 25 of 2022

That the Board ordered the Respondent to remit the procurement proceedings of the Tender back to the Procuring Entity's Head of Procurement function for the Procuring Entity's Head of Procurement function to, alongside the report to the Evaluation Committee as secretarial comments, review the Evaluation Report on the procurement proceedings. The Respondent failed to comply with the Board's decision prompting the Applicant to lodge a second Request for Review.

In the second Request for Review No. 42 of 2022, after considering parties' arguments, the Board rendered its decision on 31st May 2022 as follows:

- i. *The Termination of the procurement proceedings of Tender No. NCCASB/OT/09/01/FY2021-2022 for Supply, Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly by the Respondent be and is hereby terminated.*
 - ii. *The Letter of Notification of Termination dated 28th April 2022 issued by the Respondent to all tenderers in Tender No. NCCASB/OT/09/01/FY2021-2022 for Supply, Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly be and are hereby cancelled and set aside.*
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- iii. **The Respondent is hereby ordered to direct the Evaluation Committee to conduct due diligence on the Applicant's and Technology Benchmark Limited's respective Tax Compliance Certificates submitted to the Procuring Entity by the Applicant in joint venture with Technology Benchmark Limited taking into consideration our findings herein within 7 days from the date of this decision. (emphasis provided)**

- iv. *The Respondent is hereby ordered to award the subject tender to the Applicant in joint venture with Technology Benchmark Limited **subject to a positive due diligence exercise conducted pursuant to Order 3 above within 14 days from the date of this decision.***
- v. *Given the findings herein, each party shall bear its own costs in the Request for Review...*"

The Applicant being aggrieved by part of the Board's decision referring to tax compliance certificates that were never submitted by the Applicant and its Joint Venture Partner and subsequently lodged Judicial Review proceedings in Judicial Review Miscellaneous Application No. 069 of 2022, Republic versus The Public Procurement Administrative Review Board & Nairobi City County Assembly ex parte Urbantech Enterprises.

It is the Applicant's allegation that the High Court entered judgment on a preliminary issue and did not consider the Honourable Board's decision of 31st May 2022. That the status quo obtaining before the Judicial Review application was lodged was restored thereby entitling the Applicant to receive a written notice on the status of compliance with the orders of the Honourable Board in Request for Review No. 42 of 2022.

In the absence of a written notice on the status of compliance with the orders of this Honourable Board, the Applicant claims that he has a cause of action before this Honourable Board as relates to compliance with its orders which have not been set aside by any court of law.

It is the Applicant's case that the Procuring Entity breached section 175 (1) and 176 (1)(m) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") by failing to comply with the orders of the Board issued on 31st May, 2022 PPARB Request for Review No. 42 of 2022 in relation to Tender Number NCCASB/OT/09/01/2021-2022 for the Supply, Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly. The Applicant claims that he is not aware of the fate of the subject procurement process.

Additionally, that the Procuring Entity breached Section 87 of the Act by failing to notify all bidders including the Applicant of the outcome of the tender.

That the Respondent's inaction and failure to disclose the fate of the subject procurement process undermines the principle of transparency provided for under Article 227 of the Constitution of Kenya, 2010 as part of the guiding principles in any public procurement proceedings by State organs and public entities in Kenya.

The Applicant re-iterates that the tax compliance certificates submitted to the Procuring entity by the applicant and its joint venture partner are not those alluded to by the Honourable Board in its decision given on 31st May 2022 and annex the correct tax compliance certificates in the instant Request for Review.

The Applicant further states that it risks suffering loss or damage since it legitimately stood a good chance of becoming the successful bidder if only

the Respondent complied with the orders of the Board issued on 31st May 2022 in Review 42 of 2022.

The Respondent's Case

In respect of the allegations raised in the Request for Review, the Respondent confirms that it complied with the Board's Orders issued in Review 25 of 2022 on 12th April 2022 and Review 42 of 2022 on 31st May 2022.

The Respondent states that it received the Board's Orders on 3rd June 2022 and in compliance directed the Evaluation Committee to conduct due diligence as directed by the Board in Review 42 of 2022 and submit a report by 6th June 2022.

That the Evaluation Committee conducted due diligence through the Kenya Revenue Authority Tax Compliance Checker and submitted a report dated 6th June 2022 having observed that by querying the certificate numbers using KRA portal Tax Compliance checker:

- i. Tax compliance certificate for Urbantech Enterprises under the name: Urbanus Kioko Musango (Certificate No. KRANON1193386720, PIN No. A008503034L) had expired on 8th September 2021.
- ii. Tax compliance certificate for Technology Benchmark Limited (Certificate No. KRASON122014522, PIN No. P051352679K) was invalid.

In light of the above negative due diligence results, the committee did not recommend the award of the tender to any bidder. The Head of Procurement detailed a fourth opinion to the Respondent detailing the findings of the Evaluation Committee and recommended for termination of the procurement process pursuant to Section 63(1)(f) of the Act.

Subsequently, the Respondent approved the termination of the procurement process on 7th June 2022 as recommended by Head of Procurement and confirms that notification of termination of the procurement process communicated to bidders through termination letters dated 8th June 2022 which were sent to the bidders using the email addresses below:

- i. *Stera IT Solutions- steralt3olutions@gmail.com*
 - ii. *Digital Vision (FA) Limited- consultqdigitalvision.cake*
 - iii. *Ergo Enterprises Limited- infoaergo.cake*
 - iv. *Technology Benchmark Limited- infotechnologybenchmark.com*
 - v. *Urbantech Enterprises Limited- urbantechenterpriseseo@gmail.com*
 - vi. *Brisk Solution Limited- infogbsl.cake*
-

That further, the termination letters were sent to the bidders through their registered postal addresses on 8th June 2022. The same letters were also remitted by Email to the parties through their known available email addresses, and a copy of the termination report was sent to the Public Procurement Regulatory Authority via email on 8th June 2022.

The Respondent avers adherence to the Boards Orders issued in Review 42 of 2022 and that the application before the Board is an abuse of the rule of law.

The Respondent contends that the Applicant with the intention to misled the Board has attached Tax Compliance Certificate dated 30th September 2021 for one Urbanus Kioko Musango, which is materially different from the Tax Compliance Certificate that was submitted in the original Tender Application as observed by the Board in the Request for Review Application 42 of 2022 at page 54 of the Final Orders dated 31" May 2022.

The Respondent states that it is mandated under Article 227 (2) (d) of the Constitution of Kenya as read with Section 55 (1) (f) to ensure all bidders for supply of goods or services have fulfilled their tax obligations before award of any tender. That with the discovery of disparities in the fulfilment of tax obligations by the Joint Venture of Urbantech Enterprises and Technology Benchmark Limited, the Respondent with observation to his mandate under the law terminated the tender process

The Respondent prays and requests the Board to make its final and conclusive decision by not only dismissing this Application but also upholding the decision of the Respondent to terminate this tender process having demonstrated compliance with the Board's decision in Application 25 of 2022 and Application 42 of 2022 and having proved that the Applicant's tax compliance was and is not valid as at the time of bidding.

Applicant's Rejoinder

In its rejoinder, the Applicant states that the Respondent misdirected itself by carrying out a diligence exercise on Tax Compliance Certificates that do not belong to it.

That the Respondent invited sealed tenders from eligible, competent and qualified youth enterprises registered under the Access to Government Procurement Opportunities (AGPO) for the subject tender and that the tender document never barred bidders (in joint venture arrangements) from relying on the Tax Compliance Certificate of the Lead Partner given that M/s Urbantech Enterprises is registered under AGPO where it already provided a valid Tax Compliance Certificate in satisfaction of the AGPO registration requirements of the National Treasury.

That Applicant further states that as the lead partner, it provided a Tax Compliance Certificate dated 30th September 2021, KRA PIN A008503034L and Certificate No. KRANON1248032721 valid up to 29th September 2022 which ought to be the one subjected to due diligence exercise and not the ones the Applicant came across from the Post-qualification report of 6th June 2022.

Accordingly, the Applicant claims that the tax compliance certificate no. KRANON1193386720 did not originate from the Applicant and is a forged certificate best known to the Respondent.

The Applicant further claims that the Respondent's due diligence exercise was illegal having based that exercise on documents that do not belong to the Applicant rather than using the Tax Compliance Certificate of the Lead

Partner, Urbantech Enterprise that was submitted in its original bid with details specified above.

The Applicant avers that any other certificate relied upon by the Respondent is a clear demonstration that the Applicant's original bid was tampered with while in the custody of the Respondent and that the Respondent switched documents to deny the Applicant the contract.

The Applicant in relying on the provisions of Section 83(1) of the Act and Regulation 74(1)(h) of the Regulations 2020 states that the due diligence exercise on documents required in the Tender document should be based on the Tax Compliance Certificate of the Lead Partner, M/s Urbantech Enterprises as provided in the Applicant's original bid since the Applicant was at liberty to rely on the Tax Compliance of the Lead Partner.

Further, the Applicant states that the Respondent's due diligence exercise does not satisfy the threshold of Section 83 of the Act in that such an exercise ought to have been conducted in relation to the Tax Compliance Certificate of the Lead Partner, M/s Urbantech Enterprises as provided in the Applicant's original bid and not any other strange documents as cited by the Respondent in their Post Qualification Report dated 6th June 2022.

The Applicant claims that it approached the High Court Judicial Review No. E069 of 2022 because it had a legal right to challenge the findings in the Board's decision in Application No 42 of 2022 and that it was granted leave to file for judicial review proceedings which operated as a stay and the Respondent illegally proceeded to terminate the tender in disobedience of the stay orders.

The Applicant also refutes the Respondent's prayer for costs since public procurement processes and resolution of disputes before the Board are not meant to enrich public entities especially in the instance where the Respondent used tax payer's money in budgeting, advertising and implementation of the subject tender only to terminate the tender for the third time through an unlawful process.

None of the parties filed submissions.

BOARD'S DECISION

The Board has considered each of the Parties case, pleadings, documents, written submissions, authorities, and confidential documents submitted by the Respondents pursuant to Section 67 (3)(e) of the Act and finds the following issues call for determination:

- 1. Whether the Respondent complied with the orders of the Board of 31st May 2022 in PPARB Review Application No. 42 of 2022?**

Depending on the finding on the issue above,

2. Whether the Applicant was notified on status of compliance with the orders of the Board of 31st May 2022 in PPARB Review Application No. 42 of 2022?

3. Whether the Respondent terminated the subject tender's procurement proceedings in accordance with Section 63 (1)(f) of the Act ?

4. What orders should the Board grant in the circumstances?

DETERMINATION OF ISSUES

We note that this is the third time the procurement proceedings of the subject tender are subject to review before the Board and between the same parties. The first time the procurement proceedings of the subject tender was an issue before the Board was in Request for Review No. 25 of 2022 which was filed before the Board on 22nd March 2022. The Board rendered its decision on 12th April 2022.

We further note that none of the parties to the Request for Review No. 25 of 2022 sought judicial review of the decision of the Board of 22nd March 2022 at the High Court in accordance to provisions of Section 175 (1) of the Act. The decision was hence final and binding to all parties in Review No. 25 of 2022.

The Applicant later on 11th May 2022 proceeded to file a second Request for Review No. 42 of 2022 following non-compliance with the Board's Orders by the Respondent issued in Request for Review No. 25 of 2022 and proceeding to terminate the procurement process in regard to the subject tender on account of material governance issues. The Board in determining the issue of termination of the procurement process and compliance with its Orders by the Respondent proceeded to render its decision in Review 42 of 2022 on 31st May 2022. The Applicant having been dissatisfied with part of the Board's decision filed ***Judicial Review Miscellaneous Application E069 of 2022 Republic v Public Procurement Administrative Review Board; Ex parte Urbantech Enterprises; Accounting Officer – Nairobi City County Assembly*** which was struck out with costs hence the Board's Orders in Review 42 of 2022 were final and binding on all parties.

The Board shall then proceed to determine any new issue raised in the instant Request for Review No. 71 of 2022 whose occurrence took place after we rendered our decision in Request for Review No. 42 of 2022.

Whether the Respondent complied with the orders of the Board of 31st May 2022 in PPARB Review Application No. 42 of 2022?

At page 59 and 60 of its decision of 31st May 2022 in Request for Review No. 42 of 2022, the Board in exercise of the powers conferred upon it under Section 173 of the Act made the following orders:

- i. The Termination of the procurement proceedings of Tender No. NCCASB/OT/09/01/FY2021-2022 for***

Supply, Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly by the Respondent be and is hereby terminated.

- ii. The Letter of Notification of Termination dated 28th April 2022 issued by the Respondent to all tenderers in Tender No. NCCASB/OT/09/01/FY2021-2022 for Supply, Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly be and are hereby cancelled and set aside.***
- iii. The Respondent is hereby ordered to direct the Evaluation Committee to conduct due diligence on the Applicant's and Technology Benchmark Limited's respective Tax Compliance Certificates submitted to the Procuring Entity by the Applicant in joint venture with Technology Benchmark Limited taking into consideration our findings herein within 7 days from the date of this decision.***
- iv. The Respondent is hereby ordered to award the subject tender to the Applicant in joint venture with Technology Benchmark Limited subject to a positive due diligence***

exercise conducted pursuant to Order 3 above within 14 days from the date of this decision.

v. Given the findings herein, each party shall bear its own costs in the Request for Review

We understand the Applicant's allegation to be that the Respondent did not comply with the above orders of the Board delivered on 31st May 2022 and that if it at all did so, the Respondent failed to notify the Applicant on the status of compliance with the orders of the Board and failed to conclude the subject procurement proceedings within the set timelines hence being in breach with Sections 175(1), 176(1)(m), and 175(6) of the Act.

Section 175 of the Act provides for the right to judicial review in procurement disputes and stipulates the strict timelines that must be met by the High Court and the Court of Appeal when making a determination in a matter involving a procurement dispute. It provides as follows:

(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

(3) The High Court shall determine the judicial review application within forty five days after such application.

(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.

(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.

(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.

(7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.

Further **Section 176 (1) (m) of the Act** states that a person shall not contravene a lawful order of the Authority given under Part IV or the Review Board under Part XV.

On the other hand, the Respondent in its defense states that it complied with the Board's orders of 31st May 2022 and has rendered evidence in support the same per the documents filed before the Board, including confidential documents submitted to the Board pursuant to section 67 (3) (e) of the Act

We have perused the confidential documents submitted by the Respondent with reference to the subject tender and note that the Respondent on receipt

of the Board's decision in Review 42 of 2022 vide an internal memo dated 3rd June 2022 addressed to the Evaluation Committee members in reference to the evaluation of the subject tender directed the Committee to have a sitting on 6th June 2022 at 10.00 a.m. to conduct further post qualification due diligence on the recommended bidder's tax compliance certificates dated 09/09/2021 and 03/02/2022 for purposes of verifying their authenticity and validity and to conduct the verification in a manner as directed by the Board. The same reads:

".....

Reference is made to the Public Procurement Administrative Review Board decision made on 31st May 2022 under Application No. 42/2022 of 11th May, 2022 that found that the Evaluation committee shirked its responsibility to conduct due diligence with respect to the directions given vide memo ref: NBI/CA/PRCMT/04/2021/2022 (199) dated 20th April 2022 in line with the Review Board's Orders made on 12th April 2022.

This is therefore to direct the committee to have a sitting on 6th June, 2022 at 10.00 a.m to conduct further post-qualification on the recommended bidders' Tax Compliance Certificates dated 09/09/2021 and 03/02/2022 for purposes of verifying their authenticity and validity. The verification should be conducted in such a manner as directed by the Review Board. Further, you are required to submit the signed post-qualification report with evidence by close of business 6th June, 2022.

You are further reminded of the provisions of Sections 46(5),176(1)(c) and 176 (3) of the Procurement and Asset Disposal Act,2015 on Offences and Sanctions and their remedy in failure to abide by directions given herein.”

The Board further notes the Further Post Qualification Report II signed by the members of the Evaluation Committee on 6th June 2022 where the secretary is noted to have taken members through the Board’s decision in Review 42 of 2022 delivered on 31st May 2022 and the Committee members are reported to have observed that due diligence should be conducted as guided by the Review Board’s decision in Review 42 of 2022.

In proceeding with the due diligence exercise, the report states:

“.....

DUE DILIGENCE

The committee noted that they had relied on the face of the documents to conduct evaluation without using tax compliance checker in the KRA Portal. The committee noted that the TCC submitted for:

- i. Urbantech Enterprises under the name: Urbanus Kioko Musango (Cerificate No. KRANON1193386720, PIN No. A008503034L) was valid upto 8th September, 2022**
- ii. Technology Benchmark Ltd (Certificate No. KRASON1220145522, PIN No. P051352679K) was valid up to 2nd February, 2023.**

The evaluation committee conducted due diligence on the bidder's tax compliance certificates as directed by the Accounting officer and the Review Board under application No. 42/2022 by querying the certificate numbers using KRA portal Tax compliance checker and made the following observations:

- i.* Tax compliance certificate for Urbantech Enterprises under the name: Urbanus Kioko Musango (Certificate No. KRANON1193386720, PIN No. A008503034L) had expired on 8th September, 2021 (*see the attached evidence*)
- ii.* Tax compliance certificate for Technology Benchmark Ltd (Certificate No. KRASON1220145522, PIN No. P051352679K) was invalid (*see the attached evidence*)

EVALUATION COMMITTEE RECOMMENDATION

In light of the above negative due diligence results, the committee did not recommend the award of Tender No. NCCASB/OT/09/01/FY 2021-2022: Supply, Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly to any bidder.

.....”

In light of the above recommendation, the Board notes that the Principal Procurement Officer on 7th June 2022 rendered his professional opinion to the Respondent and highlighted the Board's decision of 31st May 2022 in Review 42 of 2022 at page 57 wherein we stated as follows:

“In the circumstances, we do not understand why the Evaluation Committee shirked its responsibility to conduct due diligence with respect to the above mentioned tax compliance certificates. To this end, we are of the considered opinion that the Evaluation Committee should proceed and conduct due diligence on the Applicant’s and Technology Benchmark Limited’s tax compliance certificates mentioned hereinbefore for purposes of verifying their authenticity and validity. This verification should be conducted using the Kenya Revenue Authority Tax Compliance Certificate Checker. If the due diligence yields a positive report, the Applicant in joint venture with Technology Benchmark Limited should be awarded the subject tender by the Respondent in accordance with the applicable law. If the due diligence yields a negative report, the Respondent would be at liberty to terminate the subject tender in accordance with the applicable laws.”

The Principle Procurement Officer in his report to the Respondent also noted the Evaluation Committee’s recommendation of the negative due diligence results and proceeded to recommend for termination of the procurement proceedings of the subject tender under Section 63(1)(f) of the Act on the grounds that all evaluated tenders were non-responsive.

The Board notes that the Respondent subsequently proceeded to approve the recommendation made on 7th June 2022 and proceeded to send out Notifications of termination of the procurement process of the subject tender.

It is the Applicant's contention that the Respondent misdirected itself by carrying out a diligence exercise on Tax Compliance Certificates that do not belong to the Applicant.

Paragraph 5 of the Applicant's further Affidavit states that:

"THAT the Lead Partner of the Applicant, Urbantech Enterprises provided a Tax Compliance Certificate dated 30th September, 2021, KRA PIN A008503034L, and Certificate No. KRANON1248032721, valid upto 29th September 2022 which ought to be the one being subjected to a due diligence exercise and not the ones the Applicant has now come across from the Post-Qualification Report of 6th June, 2022 served upon the Applicant by the Respondent"

Paragraph 6 of the further Affidavit continue to states that:

"THAT I reiterate that the tax compliance certificate No. KRANON1193386720 did not originate from the applicant and is a forged certificate best known to the respondent herein"

Further at paragraphs 7 and 8 of the further Affidavit, the Applicant continues to state :

7 "THAT it is the Applicant's position that the Respondent's due diligence exercise was illegal having based that exercise on documents that do not belong to the Applicant rather than using the Tax Compliance Certificate of the Lead Partner, Urbantech Enterprise that was submitted in its original bid with the details specified on paragraph 5 above "

8 "THAT any other certificate that has now been relied upon by the Respondent is a clear demonstration that the Applicant's original bid was tampered with while in the custody of the Respondent; and I believe that the respondent intentionally switched documents to deny me the contract illegally"

This Board noting the seriousness of the Applicant's allegations takes cognizance of the provisions of the rules of evidence which dictate that he who alleges must prove pursuant to **Section 107 (1) of the Evidence Act (Chapter 80 of the Law of Kenya), which provides:**

"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist..."

The burden of proof lies upon the party who invokes any legal right or liability and substantially asserts the existence of some facts. It is hence upon the Applicant to prove its allegations failure to which this Board is forced to only consider the facts before. Additionally, **Section 109 of the Evidence Act** states:

"109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The Supreme Court in the case of Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR had this to say:

"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."

This Board has studied the Applicant's original tender document submitted together with the Confidential documents and points out that the same was also done under Review 42 of 2022.

In determination of the issues presented before it in Review 42 of 2022, the Board considered the Evaluation Committee's responsibility to conduct due diligence with respect to the Applicants and Technology Benchmark Limited's Tax Compliance Certificates for purposes of verifying their authenticity and validity and stated at pages 54 ,55, and 56 as follows:

"We have perused the original tender submitted to the Procuring Entity by the Applicant in joint venture with Technology Benchmark Limited and note that at page 68 thereof is a copy of a Tax

Compliance Certificate of Urbanus Kioko Musango dated 09/09/2021 (whose Taxpayer PIN is A008503034L) which reads as follows in part:

"This is to confirm that Urbanus Kioko Musango, Personal Identification Number A008503034L has filed relevant tax returns and paid taxes due as provided by Law.

This Certificate will be valid for twelve (12) months upto 08/09/2022.

This certificate is issued on the basis of information available with the authority as at the

Caveat: certificate date mentioned above. The Authority reserves the right to withdraw the certificate if new evidence materially alters the tax compliance status of the recipient.

.....

Further at page 69 of the original tender submitted to the Procuring Entity by the Applicant in joint venture with Technology Benchmark Limited is a copy of a Tax Compliance Certificate of Technology Benchmark Limited dated 03/02/2022 (whose Taxpayer PIN is P051352679K) which reads as follows in part:

"This is to confirm that Technology Benchmark Limited, Personal Identification Number P051352679K has filed relevant tax returns and Paid taxes due as provided by Law.

This Certificate will be valid for twelve (12) months upto 02/02/2023.

This certificate is issued on the basis of information available with the authority as at the

Caveat: certificate date mentioned above. The Authority reserves the right to withdraw the certificate if new evidence materially alters the tax compliance status of the recipient.

.....”

Having noted the tax compliance certificates that the Board relied on in issuing its orders in Review No. 42 of 2022, we also wish to point out that the Tax Compliance Certificates in the name of the Applicant and its joint venture partner, Technology Benchmark Limited in the original tender document bear their official stamps as do all other pages in the tender document and specifically as do all documents submitted for the mandatory evaluation. As such, the Board is convinced that the Applicant and Technology Benchmark Limited were the source of the documents mentioned in the Board’s decision in Application No 42 of 2022, and also relied on by the Evaluation Committee in conducting its due diligence on 6th June,2022.

Black’s Law Dictionary, Ninth Edition at page 523 defines “due diligence” as **“the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation ”** with the term diligence meaning **“the attention and care required from a person in a given situation”**

A due diligence exercise is therefore a fundamental element of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender. In this regard, an evaluation committee conducts a due diligence exercise in accordance with Section 83(1) of the Act read with Regulation 80 (1) of Regulations 2020 to verify and confirm the qualifications of the lowest evaluated responsive tenderer, which exercise would be based on documents and qualifications considered during evaluation that met the minimum eligibility and mandatory requirements of the tender document. Section 83 of the Act states:

"83. Post-qualification

(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act. (Emphasis ours)

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall —

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.”

Regulation 80 of Regulations 2020 provides as follows:

“80. Post-qualification

(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.

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

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

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

It is the Board’s considered view that the Applicant is now producing new evidence in this Review in the form of different Tax Compliance Certificate other than those submitted with its original tender document and that the Applicant has not produced any material evidence to substantiate its

allegations of forgery by the Respondent. The least the Applicant could have done was supply the Board with a copy of its original tender document submitted for evaluation at the tender submission deadline.

The Board is of the considered view that the due diligence exercise conducted in terms of order 3 of its decision in Application No 42 of 2022, produced negative results hence leading to the Applicant's tender being declared as non-responsiveness and hence the Applicant could not be awarded the subject tender. The provisions of the law are very clear on what amounts to a responsive tender. Section 79 of the Act provides for responsiveness of tenders as follows:

(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.

From the above provision, a bid only qualifies as a responsive bid if it meets all requirements set out in the bid documents. In the case of **Republic v**

Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR the Court stated:

"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions..... In essence, a conforming / compliant / responsive tender is defined as a tender that complies with all the "material" or "substantial" aspects of the tender invitation. Procuring entities are allowed to consider tenders even if they contain minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents, or if they contain errors or oversights that

can be corrected without touching on the substance of the tender. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.”

From the chronology of the events detailed above and having considered that as per Order 3 in Review Application No. 42 of 2022 the Respondent was ordered to direct the Evaluation Committee to conduct due diligence on the Applicant's and Technology Benchmark Limited's respective Tax Compliance Certificates submitted to the Procuring Entity by the Applicant in joint venture, taking into consideration the Board's findings within 7 days from the 31st May 2022, and also considering that Order 4 was conditional by ordering that the Respondent to award the subject tender to the Applicant in joint venture with Technology Benchmark Limited subject to a positive due diligence exercise conducted pursuant to Order 3 within 14 days from 31st May 2022, the Board finds that the Respondent complied with the orders of the Board contained in decision of the Board dated 31st May 2022 in Request for Review No. 42 of 2022.

The Board's order 3 in Application No 42 of 2022, is not without basis. Section 55 (1) (f) of the Act is clear that a valid Tax Compliance Certificate is one of the Documents that a tenderer must avail. Also, it is the Board's

view that the definition of a tenderer as Contained in Section 2 as read together with the provisions of Section 83 of the Act, means that the Tenderer in the instant case is Not Urbantech Enterprises alone, but rather the Joint Venture of Urbantech Enterprises and Technology Benchmark Limited. Accordingly, due diligence must of essence be on both joint venture partners. The insistence of the Applicant that such an exercise should be limited to the lead partner only is therefore without basis.

Whether the Applicant was notified on status of compliance with the orders of the Board of 31st May 2022 in PPARB Review Application No. 42 of 2022?

In considering the allegation by the Applicant that the Respondent breached Section 87 of the Act by failing to provide a notification to enter into a contract with the Applicant given that the Applicant has a legitimate expectation for award of the subject tender as the only remaining bidder who was already found to have submitted the lowest evaluated responsive tender, the Board has perused the confidential documents submitted by the Respondent and confirmed that the Applicant together with other tenderers in the subject tender were duly notified of the termination of the procurement process of the subject tender by the Respondent in accordance with provisions of the Act.

Section 63(4) of the Act provides for notification of termination of procurement or asset disposal proceedings and states:

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.

The Board has studied the copy of the letter of notification dated 8th June 2022 sent by the Respondent to the Applicant which reads as follows:

“

Technology Benchmark Ltd

P.O.Box 28894-00100

NAIROBI

And

Urbantech Enterprises Ltd

P.O.Box 440-00100

NAIROBI

TERMINATION OF PROCUREMENT PROCESS

RE: TENDER NO: NCCASB/OT/01/09/2021/2022

TENDER NAME: SUPPLY, INSTALLATION, CUSTOMIZATION, CONFIGURATION, MIGRATION, TESTING AND TRAINING FOR AUTOMATION OF CHAMBER SESSIONS TO SUPPORT REMOTE ACCESS AND VIRTUAL MEETINGS FOR NAIROBI CITY COUNTY ASSEMBLY

Following your participation in the Open Tender above and the Orders given by the Public Procurement Review Board under application No. 42/2022, Nairobi City County Assembly Service Board regrets to notify you that the procurement process has been terminated under section 63(1)(f) of the PPAD Act, 2015 on grounds that all evaluated tenders are non-responsive.

Reason(s) for Non-Responsiveness

The evaluation committee conducted due diligence on your tax compliance certificates as directed by the Review Board under application No. 42/2022 by querying the certificate numbers using KRA portal Tax compliance checker and made the following observations:

- i. Tax compliance certificate for Urbantech Enterprises dated 09/09/2021 under the names: Urbanus Kioko Musango (Certificate No. KRANON1193386720, PIN NO. A008503034L) had expired on 8th September 2021 (see attached evidence)**
- ii. Tax compliance certificate for Technology Benchmark Ltd dated 03/02/2022 (Certificate No. KRASON1220145522, PIN No. P051352679K) was *invalid* (see attached evidence)**

.....”

From the confidential documents the Board observes that the notification letter was dispatched to Urbantech Enterprises Ltd Box 440-00100 via registered post on 08/06/2022 at 14.47hrs at a cost of Kshs. 165/= and to

Technology Benchmark Ltd Box 28894-00100 via registered post on 08/06/2022 at 14.48 hrs at a cost of Kshs. 165/=. The Board further notes that the Respondent sent the notification letter to the Applicant and Technology Benchmark Ltd (also copied to all other bidders) via email on 08/06/2022 at 13.13hrs under the subject matter "Regret Letter" to their respective email addresses being urbantechenterprises@gmail.com copying info@technologybenchmark.com

As such, the Board finds and holds that the Respondent adhered to the provisions under Section 87 of the Act and notified the Applicant and all other Tenderers of its decision to terminate the subject tender following compliance with the orders of the Board in review 42 of 2022.

Whether the Respondent terminated the subject tender's procurement proceedings in accordance with Section 63 (1)(f) of the Act on the grounds that all evaluated tenders were non-responsive?

The Board takes cognizance of the fact that the Jurisdiction of the Board flows from Section 167(1) of the Act.

However, in matters where a termination of procurement proceedings has been effected in accordance with Section 63 of the Act, such jurisdiction of the Board is ousted by dint of Section 167(4) of the Act because termination of procurement proceedings effected in accordance with Section 63 of the Act cannot be subject to administrative review proceedings before the Board.

Section 167 (4)(b) of the Act states that:

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

(a)...;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and

(c)...

The Board observes that the Respondent proceeded to terminate the procurement proceedings in respect to the subject tender following negative due diligence results having conducted due diligence on the Applicant as ordered by the Board in Review 42 of 2022 through the Kenya Revenue Authority Tax Compliance Checker.

The Board has noted that termination of procurement proceedings is governed by section 63 of the Act which states that:

"(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement has been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination. [Emphasis by the Board]

Given the foregoing, it is trite law that for the termination of procurement proceedings to pass the legal muster, a procuring entity must demonstrate

compliance with both the substantive and procedural requirements under section 63 of the Act.

It is therefore incumbent on this Board to establish whether the subject tender's procurement proceedings were terminated in accordance with Section 63 of the Act or not.

The Board has considered the High Court's decision in the case of ***Republic v Public Procurement Administrative Review Board; Leeds Equipment & Systems Limited (Interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR*** (hereinafter referred to as "***the Leeds Equipment case***") where it was held as follows:

"...in a nutshell therefore and based on the above-cited cases where the decision of a procuring entity to terminate procurement process is challenged before the Board the procuring entity is to place sufficient reasons and evidence before the Board to justify and support the ground of termination of the procurement process under challenge. The procuring entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of Section 63 of the Act".

Section 63 of the Act is instructive on termination of procurement proceedings being undertaken by an accounting officer of a procuring entity at any time before notification of award is made and such termination must only be effected if any of the circumstances enumerated in Section 63(1)(a) to (i) of the Act are present. This is the substantive statutory pre-condition

that must be satisfied before a termination of procurement proceedings is deemed lawful.

Further, following such termination, an accounting officer is required to give the Authority a written report on the termination with reasons and notify all tenderers, in writing, of the termination with reasons within fourteen (14) days of termination. This is the procedural statutory pre-conditions that must be satisfied before a termination of procurement proceedings is deemed lawful.

It is therefore important for the Board to determine the legality, or lack thereof, of the Respondents' decision of terminating the procurement proceedings with the foregoing in mind.

Substantive requirements for termination of procurement proceedings.

The Board has established that reasons cited by the Respondent for termination of the procurement proceedings was that all evaluated tenders were non-responsive following report by the Evaluation Committee on 6th June 2022 having conducted a further due diligence as directed by the Respondent in compliance with the Board's orders in Review 42 of 2022. The Board noted that at this juncture in the procurement process, the Applicant was the only remaining bidder whose tender had been declared as the lowest evaluated responsive tender.

The Board has established hereinabove that the Respondent complied with its orders of 31st May 2022 and specifically Order 3 where it ordered the Respondent to direct the Evaluation Committee to conduct due diligence on

the Applicant's and Technology Benchmark Limited's respective Tax Compliance Certificates submitted to the Procuring Entity by the Applicant in joint venture with Technology Benchmark Limited taking into consideration the Board's findings within 7 days from the date of the decision, being 31st May 2022.

The Board further notes that Order 4 in Review 42 of 2022 ordered the Respondent to award the subject tender to the Applicant in joint venture with Technology Benchmark Limited **subject to a positive due diligence exercise conducted pursuant to Order 3 within 14 days from the date of the decision, being 31st May 2022.**

The Board has noted the outcome of the due diligence conducted on the remaining responsive bidder by the Evaluation committee that:

- i. Tax compliance certificate for Urbantech Enterprises under the name: Urbanus Kioko Musango (Certificate No. KRANON1193386720, PIN No. A008503034L) had expired on 8th September, 2021
- ii. Tax compliance certificate for Technology Benchmark Ltd (Certificate No. KRASON1220145522, PIN No. P051352679K) was invalid

and the recommendation made by the principal procurement officer to terminate the procurement proceedings and therefore comes to the inevitable conclusion that there was no responsive bid in the procurement proceedings in regard to the subject tender. Hence the Respondent was not under any obligation to award the subject tender to the Applicant in joint venture with Technology Benchmark Limited as such award was subject to a positive due diligence exercise.

The Board consequently holds that the Respondent met the substantive requirements to justify termination of the subject tender on the grounds that all evaluated tenders were non-responsive.

Procedural Requirements

The Board notes that the procedural statutory pre-conditions for termination of the procurement proceedings were fully satisfied by the Respondent. We base this on the evidence presented from the confidential documents where we have noted a report on termination of procurement proceedings by the Respondent addressed to the Director General Public Procurement Regulatory Authority dated 8th June 2022 sent on email at 13.11hrs.

The report indicates that the stage of tender processing at the time of termination was professional approval and the date of termination was on 7th June 2022. The reasons stated for termination was all evaluated tenders are non-responsive under Section 63(1)(f). The report also enclosed an extract of the approved procurement plan; signed and approved recommendation for termination and official termination/cancellation notification letters to bidders in the subject tender notifying them of reasons their tender were non-responsive.

In the circumstances, the Board finds and hold that the Respondent adhered to the principle of fairness and promoted competition in the procurement process of the subject tender as stipulated in Article 227 of the Constitution read together with the provisions of the Public Procurement and Asset

Disposal Act 2015 and the Public Procurement and Asset Disposal Regulations 2020.

What orders should the Board grant in the circumstances?

The Board has established that the Respondent adhered to the orders issued on 31st May 2022 in PPARB Request for Review No. 42 of 2022 ordering the Respondent to direct the evaluation committee to conduct due diligence on the Applicant's and Technology Benchmark Limited's respective Tax Compliance Certificates submitted to the Procuring Entity by the Applicant in joint venture within 7 days from the 31st May 2022.

The Board has also noted the negative outcome of the due diligence exercise and the professional recommendation made by the procuring entity's principle procurement officer to proceed with termination of the procurement proceedings having considered that order No. 4 in Review 42 of 2022 conditional and that the Respondent would only award the subject tender to the Applicant in joint venture with Technology Benchmark Limited subject to a positive due diligence exercise.

Of further importance is that the decision of the Respondent to terminate the Procurement proceedings was communicated to the Applicant by a letter dated 8th June, 2022. The Board as reviewed herein above, is satisfied that the Notification was issued to the Applicant as well as its joint venture partner and other bidders. Therefore, in terms of the provisions of section 167 (1), the Applicant if aggrieved with the decision was obliged to file proceedings to challenge that decision within 14 days from 8th June 2022,

that is on or by 23rd June, 2022. The Board notes that the Applicant has in the Reply not made any mention or denied the issuance or receipt of that letter. That fact is therefore not controverted. The Board is therefore left to make the determination that the current Application filed on 4th August, 2022, was filed out of the time provided for under Section 167 (1). Further the Board having established that the subject tender was procedurally Terminated is of the view that it's jurisdiction has been ousted. The Board therefore has no Jurisdiction to grant any orders as prayed for herein.

The upshot of the Board's findings is that the Request for Review Application No. 71 of 2022 fails and the Board makes the following orders:

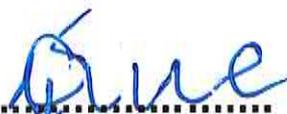
FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders in the Request for Review dated 4th August 2022:

- 1. The Request for review filed on 4th August 2022 by the Applicant herein with respect to Tender No. NCCASB/OT/09/01/FY2021-2022 for Supply, Installation, Customization, Configuration, Migration, Testing and Training for Automation of Chamber Sessions to Support Remote Access and Virtual Meetings for Nairobi City County Assembly be and is hereby struck out.**

2. Given the outcome herein, each party shall bear its own costs in the Request for Review.

Dated at Nairobi, this 25th day of August 2022


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VICE- CHAIRPERSON (Panel Chair)

PPARB


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SECRETARY

PPARB

