

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 73 /2022 OF 18TH AUGUST 2022

BETWEEN

GREEN COM ENTERPRISE SOLUTIONS LTD..... APPLICANT

AND

THE ACCOUNTING OFFICER,

**STATE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING, URBAN
DEVELOPMENT AND PUBLIC WORKS.....RESPONDENT**

**M/S COSEKE(K)LTD IN JOINT VENTURE WITH DSL SYSTEMS AND
SOLUTIONS LIMITED.....SUCCESSFUL
TENDERER/INTERESTED PARTY**

Review of the decision of Ministry of Transport, Infrastructure, Housing and Urban Development & Public Works, State Department for Housing and Urban Development, dated 28th July 2022 in the matter of Tender No. MTIHU DPW/SDHUD/CSHSF/046/2021-2022 for Supply, Design, Development, Customization, Installation, Training, Configuration, Testing, Commissioning and Technical Support of Enterprise Resource Planning (ERP) Information System.

BOARD MEMBERS

1. Mrs. Njeri Onyango - Vice Chairperson (panel Chair)
2. Mrs. Irene Kashindi - Member
3. Dr. Joseph Gitari - Member
4. Eng. Mbiu Kimani - Member

5. Mr. Nicholas Mruttu - Member

IN ATTENDANCE

1. Mr. Philemon Kiprop - Holding Brief for Board Secretary

BACKGROUND TO THE DECISION

The Ministry of Transport, Infrastructure, Housing and Urban Development & Public Works, State Department for Housing and Urban Development, (hereinafter referred to as, "the Procuring Entity"), advertised an Open Tender No. MTIHUDPW/SDHUD/CSHSF/046/2021-2022 for Supply, Design, Development, Customization, Installation, Training, Configuration, Testing, Commissioning and Technical Support of Enterprise Resource Planning (ERP) Information System (hereinafter referred to as "the subject tender").

The advertisement requesting for bids was placed in MyGov newspaper on 26th April 2022 and published on the procuring entity's website www.housingandurban.go.ke for free downloading and bids were to be initially received on or before 17th May 2022 at 11.00 a.m. Interested bidders were required to submit one original hard copy and soft copy in pdf format during the bid opening which is a replica of the original bid document.

Addenda and Clarifications

Two addenda were issued as follows:

- a) **Addendum 1** was issued to interested and eligible bidders to clarify that the Tender security required was Kshs 500,000 from a bank or an insurance company approved by PPRA.

b) **Addendum 2** was issued to notify interested and eligible bidders that the submission/closing date had been extended from Tuesday 17th May, 2022 at 11.00am to Tuesday 24th May, 2022 at 11.00 a.m.

Tender Submission Deadline and Opening of Bids

By the Tender submission deadline of 24th May 2022, the Procuring Entity had received a total of ten (10) 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/No	Firm Name	Contacts/ Postal Address /Email Address	Bid Amount (Kshs)	Bid Security Amount (Kshs)	Bid Security Provider	No. of Copies
1.	Kobby Technologies Limited	P.O. Box 5824 Nairobi	19,845,869.28	500,000	NCBA Bank	1 Original 1 Copy 1 Soft Copy
2.	Pensoft Systems LTD	P.O. Box 52624 Nairobi	67,496,241.00	500,000	The Monarch Insurance	1 Original 1 Copy 1 Soft Copy
3.	Teckno Hub Limited	P.O. Box 35120 Nairobi	38,509,680.00	500,000	AMACO	1 Original 1 Copy 1 Soft Copy
4.	COSEKE (K) Ltd in Joint Venture with DSL Systems and Solutions Limited	P.O. Box 1208 Nairobi	74,706,784.00	500,000	Middle East Bank Kenya LTD	1 Original 1 Copy 1 Soft Copy

5.	ABNO Softwares International Ltd	P.O. Box 19892 Nairobi	87,290,000.00	500,000	Family Bank	1 Original 1 Copy 1 Soft Copy
6.	Attain Enterprise solutions Ltd	P.O. Box 18286 Nairobi	60,142,126.74	500,000	Family Bank	1 Original 1 Copy 1 Soft Copy
7.	Dynasoft Business Solutions Ltd	P.O. Box 3209 Nairobi	82,809,616.00	500,000	I&M Bank	1 Original 1 Copy 1 Soft Copy
8.	Appkings Solutions Ltd	P.O. Box 358287 Nairobi	89,958,000.00	500,000	Xplico Insurance	1 Original 1 Copy 1 Soft Copy
9.	Liberty Afrika Technologies Ltd	P.O. Box 20000 – 00100 Nairobi	59,100,000.00	500,000	NCBA Bank	1 Original 1 Copy 1 Soft Copy
10.	Green Com Enterprise Solutions Limited	P.O. Box 72497 Nairobi	71,250,000.00	500,000	The Monarch Insurance	1 Original 1 Copy 1 Soft Copy

Evaluation of Tenders Bids

From the evaluation report dated 24th June 2022, the evaluation Committee noted that the subject tender was to be evaluated through a three (3)-stage evaluation process as indicated below:

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

Preliminary Evaluation

The tenders were examined for compliance with mandatory requirements as set out in the tender document.

The following two (2 No.) bidders were found to be non- responsive at the Preliminary Evaluation stage and therefore did not qualify for further evaluation.

Summary of Non-Responsive bidders

Bidder No.	Bidder's Name	Reasons
2	M/s Pensoft Systems Ltd	<ul style="list-style-type: none">• The Form of tender provided was filled, signed but not stamped• Confidential Business Questionnaire provided was filled, signed but not stamped
9	M/s Liberty Afrika Technologies Ltd	<ul style="list-style-type: none">• The Form of tender provided was filled, signed but not stamped• Confidential Business Questionnaire provided was filled, signed but not stamped• The bidder did not submit manufacturers' Authorization or accreditation from internationally recognized solution providers.• Power of Attorney/Sworn in Affidavit was not provided

The following Eight (8) bidders were found to be responsive and therefore qualified for technical evaluation:

Responsive Bidders

Bidder No.	Bidder's Name
1	M/s Kobby Technologies Limited
3	M/s Teckno Hub Limited
4	M/s COSEKE (K) Ltd in Joint Venture with DSL Systems and Solutions Limited
5	M/s ABNO Softwares International Ltd
6	M/s Attain Enterprise solutions Ltd
7	M/s Dynasoft Business Solutions Ltd
8	Appkings Solutions Ltd
10	Green Com Enterprise Solutions Limited

Technical Evaluation

The technical evaluation was conducted in two evaluation stages:

- a) Technical mandatory requirement evaluation
- b) Scoring technical evaluation

a) Technical mandatory requirement evaluation

In this stage:

- a) Bidders were to respond with YES/ NO and attach all relevant certified documentation for each item.
- b) Bidders were required to meet all the mandatory technical requirements to proceed to next level of evaluation.

c) Bidders who failed to attach the required documentation/ brochure of their proposed solution with an explanation indicating the correct page on the page number column were disqualified.

The following Four (4) bidders were found to be non- responsive at the technical mandatory stage and therefore did not qualify for the next stage of in the technical evaluation: -

Bidder No.	Bidder's Name	Reasons
1	M/s Kobby Technologies Limited	<ul style="list-style-type: none"> • Compliance list was not filled on Annex 28. • The Compliance List was not filled in the customization report.
3	M/s Teckno Hub Limited	<ul style="list-style-type: none"> • The Business functional requirements to be met by the system was not provided as per the guidelines of the tender document. • System alerts and notifications indicated a wrong reference page. Page 24 entails organizational charter but not system alerts and notification.
5	M/s ABNO Softwares International Ltd	<ul style="list-style-type: none"> • Copyright - Page 438 referred by the bidder entails SLA agreement and not copyright.
6	M/s Attain Enterprise solutions Ltd	<ul style="list-style-type: none"> • Management administration and security features of the system – Management administration and security features of the system not indicated in the document • Scalability – scalability not indicated in the document • Business continuity plan – Business continuity plan not indicated in the document. • Business Intelligence – Business Intelligence not indicated in the document. • Reports and dashboards – Reports and dashboards not indicated in the document.

Bidder No.	Bidder's Name	Reasons
		<ul style="list-style-type: none"> • Availability – Availability not demonstrated in the document. • Technical support – Technical support not indicated in the document. • Systems alerts and notification - Systems alerts and notifications not indicated in the document.

The following Four (4) bidders were found to be responsive and therefore qualified for the next stage of technical evaluation:

Bidder No.	Bidder's Name
4	M/s COSEKE (K) Ltd COSEKE (K) Ltd in Joint Venture with DSL Systems and Solutions Limited
7	M/s Dynasoft Business Solutions Ltd
8	M/s Appkings Solutions Limited
10	M/s Green Com Enterprise Solutions Limited

b) Scoring technical evaluation

Firms that met all the Technical mandatory evaluation requirement were subjected to a scoring at the scoring technical evaluation stage at a scale of 0 to 100 with the pass mark as 70 marks. The firms were evaluated on a scoring matrix as shown below.

The four (4) bidders below met the minimum qualifying score of 70 points at the scoring technical stage and therefore qualified for financial evaluation.

Responsive Bidders

Bidder No.	Bidder's Name	Score
4	M/s COSEKE (K) Ltd in Joint Venture with DSL Systems and Solutions Limited	77
7	M/s Dynasoft Business Solutions Ltd	70
8	M/s Appkings Solutions Ltd	94
10	M/s Green Com Enterprise Solutions Limited	82

Financial Evaluation

The financial evaluation was undertaken in accordance with the criteria set in the Tender Document under Section III (Evaluation and Qualification Criteria) which entailed:

1. Analysis of Completed Price Schedules Forms as instructed in the Information to Tenderers (ITT) clause 19 and in the financial evaluation criteria to verify completeness of the Financial Proposal.
2. Checking arithmetical errors in computation and summations.
3. Ranking of the bids.

a) Analysis of Completed Price Schedules Forms as instructed in ITT Clause 19 and the financial evaluation criteria

The four (4) bidders who qualified for financial evaluation were firstly evaluated on Completed Price Schedules Forms to verify completeness of the Financial Proposal as instructed in the ITT Clause 19 and financial evaluation criteria and the following was noted:

1. Bidder No. 4, 7 and 8 completed the Price Schedules Forms as was required by clause 19 of the ITT and under the financial evaluation criteria and therefore their Financial Proposal was considered complete. Their financial proposals were thus adjudged responsive.
2. Bidder No.10 did not complete the Price Schedules Forms as required by Clause 19 of the ITT and under the financial evaluation criteria and therefore its Financial Proposal was considered incomplete. The bidder only gave the grand total and did not give itemized prices for the ERP components. Its proposal was therefore not complete and it was adjudged non-responsive.

b) Checking arithmetical errors in computation and summations.

The Financial Proposals for Bidder No. 4, 7 and 8 having been determined responsive were subjected to arithmetic and error checks as shown below.

Arithmetic and other Error Check

Bid No	Name of Tenderer	Tender Sum (KShs)	Corrected Tender Sum (KShs)	Error (KShs)	% Error
4	M/s COSEKE (K) Ltd in Joint Venture with DSL Systems and Solutions Limited	74,706,784.00	-	None	None
7	M/s Dynasoft Business Solutions Ltd	82,809,616.00	-	None	None
8	M/s Appkings Solutions Ltd	89,958,000.00	-	None	None

c) Ranking of Bids

The Financial Proposals for Bidder No. 4, 7 and 8 having been checked for errors and found to be containing none were ranked as shown below.

Ranking of Bids

Bid No.	Name Of Tenderer	Tender Sum (Kshs)	Rank
4	M/s COSEKE (K) Ltd in Joint Venture with DSL Systems and Solutions Limited	74,706,784.00	1
7	M/s Dynasoft Business Solutions Ltd	82,809,616.00	2
8	M/s Appkings Solutions Ltd	89,958,000.00	3

Evaluation Committee's Recommendation

The Evaluation Committee recommended **M/S COSEKE (K) Ltd of P.O. Box 1208, Nairobi** in Joint Venture with **DSL SYSTEMS AND SOLUTIONS LIMITED of P.O. Box 3209, Nairobi** for award of the subject tender at their tender sum of **Kenya Shillings Seventy Four Million, Seven Hundred and Six Thousand, Seven Hundred and Eighty Four and Zero Cents only (Kshs.74,706,784.00)** being the lowest evaluated bidder subject to confirmation of the bidder's qualifications during post-qualification due diligence exercise pursuant to Section 83 of the Public Procurement and Asset Disposal Act, 2015 and attendant Regulations.

Due Diligence

Pursuant to Section 83 of the Public Procurement and Asset Disposal Act, 2015 and attendant Regulations, the evaluation committee carried out due diligence on the tender submitted by **M/s COSEKE (K) Ltd of P.O. Box 1208, Nairobi** in Joint Venture with **M/s DSL SYSTEMS AND SOLUTIONS LIMITED of P.O. Box 3209, Nairobi** from 27th June to 8th August, 2022. Due diligence was conducted through written correspondences to financial institutions and clients of the firms to confirm authenticity of the tender security /credit line and firms' specific experience respectively. The evaluation committee then analyzed the responses and compiled a due diligence report. The committee was therefore satisfied that **M/S COSEKE (K) Ltd of P.O. Box 1208, Nairobi** in Joint Venture with **DSL SYSTEMS AND SOLUTIONS LIMITED of P.O. Box 3209, Nairobi** had given truthful information and they are capable of Supplying, Designing,

Developing, Customizing, Installing, Training, Configuring, Testing, Commissioning and Technical Support of Enterprise Resource Planning (ERP) Information System.

Professional Opinion

By a professional opinion dated 27th July 2022 addressed to the Respondent, the Procuring Entity's Head Supply Chain Management Unit, Mr. John Maina, noted that the subject tender was budgeted for and funds had been confirmed available, and that the evaluation process together with the due diligence was carried out as per the set criteria in the Tender Document. He concurred with the Evaluation Committee's recommendation of the award of the subject tender.

On the same day of 27th July 2022, the Respondent noted the contents of the Professional Opinion and approved it.

Notification to Tenderers

By letters dated 28th July 2022, the Respondent notified the tenderers of the outcome of the subject tender via email on 5th August 2022.

REQUEST FOR REVIEW NO. 73/2022

The Request for Review regarding the subject tender was lodged by M/s Green Com Enterprise Solutions Ltd (the 1st Applicant), together with a Supporting Affidavit sworn by Geoffrey Mutisya Mwanthi, its managing director, on 18th August, 2022 through the firm of Kimatei, Nthenge & Company Advocates LLP, seeking the following orders:

- a) This request for review be allowed.**
- b) Nullify the initial award, awarded to the preferred bidder.**
- c) The Applicant's bid be readmitted to financial evaluation by the Procuring Entity.**
- d) The tender be awarded to the Applicant.**
- e) Cost of this review be awarded to the Applicant.**

In a Notification of Appeal and a letter dated 18th 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 Response to the Applicant's Request for Review dated 22nd August 2022 and filed on 23rd 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 24th 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 24th August 2022.

In response to the Board Secretary's notification, the interested party filed its statement dated 25th August 2022 filed on 26th August 2022 and an amended statement filed on 29th August 2022.

On 29th August 2022 the Applicant filed a Supplementary Affidavit sworn on 26th August 2022 in response to the Respondent's Statement of Response together with its submissions and authorities relied on.

The Applicant's Case

The Applicant has relied on eleven (11) grounds in support of its request for review.

The Applicant avers that the Interested Party's bid, which was the successful tenderer, was non-responsive as per Section 86(1)(a), (c) of the Public Procurement and Asset Disposal Act 2015 (hereinafter referred to as "the Act"). The Applicant added that its bid was responsive and was the lowest at Kshs. 71,250,000.00 whereas the Interested Party's bid was Kshs. 74,706,784.00. The Applicant thus contended that the Kenyan taxpayer shall not get value for their money from the procurement if the award remains as decided.

The Applicant further avers that the reasons advanced by the Procuring Entity as to why its bid was non-responsive are not true based on the tender document and its submitted detailed proposal. The notification of award to the Applicant dated 28th July 2022 stated that the Applicant's bid was non-responsive due to:

"You did not complete the price schedule forms as instructed in the information to Tenderers (ITT) Clause 19 and in the

financial evaluation criteria and therefore your financial proposal was considered incomplete”

The Applicant while attaching page 48-50 of its submitted bid document states that its submitted financial proposal followed all instructions and standard price schedules provided in the tender document as follows:

- i. **Grand Summary TOTAL cost table;** the table showed the Supply and Installation cost of ERP and the recurrent costs and the same figures were transferred to the form of tender.
- ii. **Supply and installation cost table;** the table was filled with the supply and installation costs summary and the same figures were transferred to the Grand Summary Table.
- iii. **Recurrent cost Summary table;** after system handover to the procurement entity, the Applicant proposed free support, maintenance, Licenses, and updates. The recurrent costs table was filled with KES: 0.00 and transferred to Grand Summary Table since the Applicant expected no extra costs to be incurred to maintain and update the original system functionality and design.
- iv. **Supply and installation cost sub-table:** the table showed the Supply and Installation cost of Proposed Supply, Design, Development, Customization, Installation, Training, Configuration, Testing, Commissioning, and Technical Support of the Enterprise Resource Planning (**ERP**) Information System as per terms of the reference in the tender document and our

proposed work plan. The costs included in this table is inclusive of all components of the proposed ERP system.

- v. **Recurrent Cost sub-table;** after system handover to the procurement entity, the Applicant proposed free support, maintenance, Licenses, and updates. The recurrent costs table was filled with KES: 0.00 and transferred to Grand Summary Table since the Applicant expected no extra costs to be incurred to maintain and update the original system functionality and design.

vi. Country of Origin Code Table

The Applicant states that its price schedule duly filled and submitted in the bid contained the total tender sum of Ksh. 71,250,000.00 being the total cost for the successful delivery of the subject tender including warranty as requested and referred to page 248 of its submitted bid document in this regard.

The Applicant contends that it had clearly stipulated in its bid the scope of work and all the deliverables as per the terms of reference in the tender whose costs were all inclusive in the Total tender sum of Ksh. 71,250,000.00. as per pages 6, 39 and 40 of its submitted bid document.

The Respondent's Case

In respect of the allegations raised in the Request for Review, the Respondent states that:

The bidder was adjudged as non-responsive at the financial evaluation stage due to the following reasons:

The Bidder did not fill the price schedule forms as prescribed under section III (Evaluation and qualification criteria) of the tender document. According to the Respondent, the bidder only gave the Grand Total and did not give itemized prices for the ERP components as prescribed under Clause 19 of the Information To Tenderers (hereinafter referred to as "ITT") and under financial evaluation criteria.

The Respondent in its response further added that the evaluation committee was guided by *clause 19* of the ITT (Tender Prices) and the Tender Data Sheet (hereinafter referred to as "TDS" (*Section II*)) which provided that prices **MUST** be quoted at a level of detail appropriate for calculation of any partial payment under the contract in accordance with the implementation schedule in *section VII*, and with the General Conditions of Contract (hereinafter referred to as "GCC") and Special Conditions of Contract (hereinafter referred to as "SCC") *clause 12* - Terms of Payment. Suppliers may be required to provide a breakdown of any composite of lump-sum items included in the cost tables. The Respondent further states that an examination of the submitted bid document did not meet the above requirements,

Further, the Respondent avers that under Financial Evaluation on Recurrent Costs the Tender Document stipulates that since the operation and maintenance of the system being procured form a major part of the implementation, the resulting recurrent costs will be evaluated according to the provisions of the Tender Document including the cost of recurrent cost items for the initial period of operation stated based on prices furnished by **each** supplier in price schedule No's 3.3. and 3.5.

The Respondent added that under the price schedule forms, *Table 4: Supply and installation cost-sub table*, bidders were instructed that prices, rates and sub-total **MUST** be quoted in accordance with clauses 17.1 and 18 of the ITT. The Respondent contended that the Applicant did not comply with these requirements.

The Evaluation Committee therefore, disqualified the Applicant's bid since it did not conform to specific requirements under the ITT, Evaluation qualification criteria, GCC and SCC. It was therefore not possible to carry out a detailed Financial Evaluation on this bid as per the requirements of this tender, contends the Respondent.

Applicant's Rejoinder

In its rejoinder, the Applicant states that the Interested Party's tender was not responsive as per Section 86(a), (b), (c), & (d) of the Act and that the Respondent's action of awarding a bidder with a higher price contravenes Article 227 of the Constitution on procurement of goods and services which requires that when a State organ or any other public entity contracts for goods or services, it shall do in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Additionally, that the Procuring Entity contravened the provisions of Section 79, 81, and 82 of the Act.

The Applicant states its financial proposal was responsive and its bid the lowest at Kshs. 71,250,000.00 while the Interested Party's bid was above at Kshs. 74,706,784.00. The Applicant added that its bid is thus in line with the guiding principles in Section 3 of the Act particularly Section (e) and (h)

which respectively prescribes the principles of public finance under Article 201 of the Constitution to be applied as well as maximization of value for money.

The Applicant further stated that in its bid, the recurrent costs table was filled with KES: 0.00 and transferred to Grand Summary Table since it expected no extra costs to be incurred to maintain and update the original system functionality and design.

The Applicant further states that the procuring entity contravened provision of Section 81 of the Act as well as the Tender Document for not seeking clarification from the Applicant and quoted Clause 30 on page 20 of the Tender Document which reads:

"30.1 To assist in examination, evaluation and comparison of tenders the Procuring Entity may, at its discretion, ask the tenderer for a clarification of its tender. The request for clarification and the response shall be in writing and no change in the prices or substance of the tender shall be sought, offered or permitted."

The Interested Party's case

The interested party submits that it filled, signed and stamped the Price schedule forms as prescribed. That according to Clause 19 of the ITT and the Financial Evaluation Criteria, it submitted the Grand Total and itemized prices for the ERP components required per the Procuring Entity requirements.

In the circumstances, the Interested Party prays for the Procuring Entity's decision awarding the subject tender to it be upheld as they are more than capable of implementing the said project and making it a success thus ensuring that the Procuring Entity gets value for their money.

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 Procuring Entity in making its award and declaring the Applicant's tender as non-responsive adhered to the evaluation criteria set out in the Tender Document.***
- 2. What orders should the Board grant in the circumstances.***

DETERMINATION OF ISSUES

Issue 1: Whether the Procuring Entity in making its award and declaring the Applicant's tender as non-responsive adhered to the evaluation criteria set out in the Tender Document

The Board observes that the Applicant's bid was found non-responsive at the Financial evaluation stage. Vide a letter of notification dated 28th July 2022, the Applicant was notified that its tender was non-responsiveness for reason that it did not complete the Price Schedules Forms as required by clause 19

of the ITT and under the financial evaluation criteria and therefore its financial proposal was incomplete.

The letter stated that:

"Your tender was non-responsive for the following reasons:

- You did not complete the Price Schedules Forms as instructed in the Information to Tenderers (ITT) clause 19 and in the financial evaluation criteria and therefore your Financial Proposal was considered incomplete."***

The Applicant contended that the Procuring Entity erred in finding the Applicant bid as unresponsive at the Financial Evaluation stage. The Applicant asserted that its bid complied with the provisions of the tender document. The Applicant contended that the Procuring Entity breached the provisions of Article 227 of the Constitution as read together with Sections 3, 79, 81,82 and 86 the Act.

The evaluation of public procurement tenders should be undertaken in accordance with the criteria set out in the Tender Documents. This is captured at Section 80(2) of the Act which provides as follows;

"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.”[Emphasis added]

Considering the provisions of section 80(2), it is incumbent upon the Board to establish if the Procuring Entity evaluated the Applicant’s bid according to the criteria set out in the Tender Document.

The Board notes that the subject tender was to be evaluated through a three (3)-stage evaluation process as follows:

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

Section III (Evaluation and Qualification Criteria) of the tender document set out the financial evaluation criteria which included:

1. Analysis of Completed Price Schedules Forms as instructed in the Information to Tenderers(ITT) clause 19 and in the financial evaluation criteria to verify completeness of the Financial Proposal.
2. Checking arithmetical errors in computation and summations.
2. Ranking of the bids.

ITT 19.2 of the Appendix to ITT provided that:

"The Supplier must tender Recurrent Cost items."

Further ITT 19.2 (a) of the Appendix to Instructions to Tenderers of the Tender Document provided that:

"The Supplier must tender for contracts of Recurrent Cost Items not included in the main Contract."

The Board observes from the Tender Document that Clause 19 provides for Tender Prices as follows:

19 Tender Prices

19.1 All Goods and Services identified in the Supply and Installation Cost Sub-Tables in System Inventory Tables in Section VII, and all other Goods and Services proposed by the Supplier to fulfill the requirements of the Information System, must be priced separately and summarized in the corresponding cost tables in the Sample Tendering Forms (Section IV), in accordance with the instructions provided in the tables and in the manner specified below.

19.2 Unless otherwise specified in the TDS, the Supplier must also tender Recurrent Cost Items specified in the Technical Requirements, Recurrent Cost Sub-Table of the System Inventory Tables in Section VII (if any). These must be priced separately and summarized in the corresponding cost tables in the Sample Tendering

Forms (Section IV), in accordance with the instructions provided in the tables and in the manner specified below:

- a. If specified in the TDS, the Supplier must also tender separate enforceable contracts for the Recurrent Cost Items not included in the main Contract;***
- b. prices for Recurrent Costs are all-inclusive of the costs of necessary Goods such as spare parts, software license renewals, labor, etc., needed for the continued and proper operation of the Information System and, if appropriate, of the Supplier's own allowance for price increases;***
- c. prices for Recurrent Costs beyond the scope of warranty services to be incurred during the Warranty Period, defined in GCC Clause 29.4 and prices for Recurrent Costs to be incurred during the Post-Warranty Period, defined in SCC Clause 1.1. (e) (xiii), shall be quoted as Service prices on the Recurrent Cost Sub-Table in detail, and on the Recurrent Cost Summary Table in currency totals.***

19.3 Unit prices must be quoted at a level of detail appropriate for calculation of any partial deliveries or partial payments under the contract, in accordance with the Implementation Schedule in Section VII), and with GCC and SCC Clause 12 – Terms of Payment. Suppliers may

be required to provide a breakdown of any composite or lump-sum items included in the Cost Tables.

19.4 *The price of items that the Supplier has left blank in the cost tables provided in the Sample Tender Forms (Section IV) shall be assumed to be included in the price of other items. Items omitted altogether from the cost tables shall be assumed to be omitted from the tender and, provided that the tender is substantially responsive, an adjustment to the tender price will be made during tender evaluation in accordance with ITT 31.3.*

19.5

The criteria for Financial/Economic Evaluation under Clause 40 of the Tender Document provided as follows:

40. Financial/ Economic Evaluation

40.1 *To evaluate a Tender, the Procuring Entity shall consider the following:*

a)

b)

c)

d) the evaluation factors indicated in Section III, Evaluation and Qualification Criteria.

e)

The Board observes that Clause 5 at Section III – Evaluation and Qualification Criteria of the Tender Document also sets out the financial evaluation of bids and required each tenderer to list their price in the price schedule to enable the evaluation committee undertake the financial evaluation of submitted bids. It states that:

5. Tender Evaluation

i.

ii.

iii.

iv. Recurrent Costs - since the operation and maintenance of the system being procured form a major part of the implementation, the resulting recurrent costs will be evaluated according to the principles given here after, including the cost of recurrent cost items for the initial period of operation stated below, based on prices furnished by each Supplier in Price Schedule Nos. 3.3 and 3.5.(Emphasis ours) The recurrent cost factors for calculation of the implementation schedule are:

i. Number of years for implementation

- ii. Hardware maintenance*
 - iii. Software licenses and updates*
 - iv. Technical services*
 - v. Telecommunication services, and*
 - vi. vi) Other services (if any).*
- v. Recurrent cost items for post- warranty service period if subject to evaluation shall be included in the main contractor a separate contract signed together with the main contract. Such costs shall be added to the Tender price for evaluation."*

The Board further notes that Section IV- Tendering Forms of the Tender Document under the Price Schedule forms provides that:

1.1 The price schedules are divided into separate schedules as follows:

- a. Grand Summary Cost Table*
- b. Supply and Installation Cost Summary*
- c. Recurrent Cost Summary Table*
- d. Supply and Installation Cost Sub-Table (s)*
- e. Recurrent Cost Sub-Tables (s)*
- f. Country of Origin Code Table*

....

1.2 ...the quoted rates and prices shall be deemed to cover the full scope of these Technical Requirements, as well as overhead and profit.

1.3 If suppliers are unclear or uncertain as to the scope of any item, they shall seek clarification in accordance with the Instructions to Suppliers in the tendering documents prior to submitting their tender."

The Board having studied the Applicant's Original Tender submitted as part of the confidential documents notes that the Price Schedules as filled by the Applicant in response to the above stipulated criterion is as follows:

GRAND SUMMARY COST TABLE

		<i>[insert: Kenya shillings] Price</i>	<i>[insert: Foreign Currency A] Price</i>	<i>[insert: Foreign Currency B] Price</i>
1.	Supply and Installation Costs (from Supply and Installation Cost Summary Table)	71,250,000.00		
2.	Recurrent Costs (from Recurrent Cost Summary Table)	0.00		
3.	Grand Totals (to Tender Submission Form)	71,250,000.00		

.....

.....

SUPPLY AND INSTALLATION COST SUMMARY TABLE

Line Item No.	Subsystem / Item	Supply and Installation Cost Sub Table No.	[insert: Kenya shillings] Price	[insert: Local Currency] Price	[insert: Foreign Currency A]Price
1	Project Plan	- -			
2	Subsystem 1		71,250,000.00		
SUBTOTALS					
TOTAL (To Grand Summary Table)			KES	71,250,000.00	

.....

.....

RECURRENT COST SUB-TABLE [INSERT: IDENTIFYING NUMBER]-WARRANTY PERIOD

Component No.	Component	Maximum all-inclusive costs(for costs in [insert:currency])						Sub-total for [insert: currency]
		Y1	Y2	Y3	Y4	...	Yn	
1.	Hardware Maintenance	Incl. in Warranty	Incl. in Warranty	Incl. in Warranty				
2.	Software Licenses & updates	Incl. in Warranty	0.00					
2.1	System and General purpose software	Incl. in Warranty	0.00					
2.2	Application, Standard and Custom Software	Incl. in Warranty	0.00					
3	Technical services		0.00					0.00

From the confidential documents submitted by the Respondent to the Board, the Board notes that the Applicant on receipt of the letter of notification dated 28th July 2022 wrote to the Respondent vide letter dated 10th August 2022 objecting the outcome and award of the subject tender stating as follows:

".....

We believe our price schedule (attached) was correctly filled because of the following reasons among others;

- 1. The Financial Proposal included Form of Tender and Price Schedules as listed***
 - i. Grand Summary Cost Table***
 - ii. Supply and Installation Cost Summary Table***
 - iii. Recurrent Cost Summary Table***
 - iv. Supply and Installation Cost Sub-Table***
 - v. Recurrent Cost Sub-Table***
 - vi. Country Of Origin Code Table***
- 2. Grand Summary TOTAL cost table was filled with KES: 71,250,000.00***
- 3. Supply and installation cost table was filled with KES: 71,250,000.00 and transferred to the Grand Summary Table.***
- 4. Recurrent cost Summary table was filled with KES:0.00 and transferred to Grand Summary Table.***

5. ***Supply and installation cost sub-table was filled with KES: 71,250,000.00 and the total was transferred to the Supply and Installation Cost Summary Table.***
6. ***Recurrent Cost sub-table was filled with KES: 0.00 and the total was transferred to the Recurrent cost summary table.***

.....”

The Respondent in response wrote back on 17th August 2022 as follows:

“.....

We have reviewed your comments and respond as follows:

<i>Item No.</i>	<i>M/s Greencom Comments</i>	<i>Response</i>
<i>1</i>	<i>Grand Summary Total cost table was filled with Kshs. 71,250,000.00</i>	<i>Complete</i>
<i>2</i>	<i>Supply and Installation cost table was filled with Kshs. 71,250,000.00 and transferred to the Grand Summary table</i>	<i>Incomplete (only one line item priced)</i>
<i>3</i>	<i>Recurrent cost summary table was filled with Kshs.0.00 and transferred to Grand summary table</i>	<i>Not filled in accordance with clause 5 (iv) of the Evaluation and Qualification Criteria</i>
<i>4</i>	<i>Supply and Installation cost sub-table was filled with Kshs. 71,250,000.00 and total was transferred to the Supply and Installation Cost Summary table</i>	<i>Failed to provide a breakdown in line with instructions for filling table 4 (Supply and Installation cost sub-table) where relevant line items comprising the ERP Information System</i>

		<i>were to be priced therefore the price schedule Incomplete</i>
<i>5</i>	<i>Recurrent Cost sub-table was filled with Kshs. 0.00 and the total was transferred to the Recurrent cost summary table</i>	<i>Not filled in accordance with clause 5 (iv) of the Evaluation and Qualification Criteria.</i>

Arising from the foregoing analysis, your Financial Proposal was declared incomplete for failing to fill the price schedules as instructed and not adequate to demonstrate reasonableness of your tendered price.

.....”

The Applicant submits that it had clearly stipulated the scope of work and all the deliverables/work plan as per the terms of reference in the tender whose **costs were all inclusive** in the total tender sum of Kshs. 71,250,000.00.

It is the Applicant’s further submission that in its submitted bid, the recurrent costs table was filled with KES: 0.00 and transferred to Grand Summary Table since the Applicant expected no extra costs to be incurred to maintain and update the original system functionality and design. This is set out in *inter alia*, its supplementary affidavit sworn on 26th August 2022. Hence, it is the Applicants submission that its bid cannot be said to be non-responsive for quoting Grand Total and quoting zero for recurrent costs and places reliance on clause 19.4 of the tender document which states that the price of items that the Supplier has left blank in the cost tables provided in the Sample Tender Forms (Section IV) shall be assumed to be included in the price of other items.

The Respondent has, however, stated that prices must be quoted at a level of detail appropriate for calculation of any partial payment under the contract

in accordance with the implementation schedule in Section VII and with GCC and SCC clause 12- Terms of payment.

The General Conditions of Contract (GCC) at Section VI of the Tender Document stipulate the terms of the contract to be executed by the Procuring Entity and the successful tenderer in the subject tender. Section VII further details the Special Conditions of Contract (SCC) which supplement or amend the General Conditions of Contract and whenever there is a conflict, the provisions of the Special Conditions of Contract shall prevail over those in the General Conditions of Contract.

The Board notes from the Tender Document at SCC clause 7 provides that the Contract Price shall be paid as specified in the SCC. SCC clause 7 provides for the Terms of Payment as follows:

- a. Advance payment.....*
- b. Information Technologies, Materials, and other Goods.....*
- c. Custom Software and Custom Materials.....*
- d. Services other than Training.....*
- e. Training*
- f. Complete System Integration*
- g. Recurrent Costs- one hundred percent (100%) of the price of the services actually delivered will be paid quarterly in arrears, on submission and Procuring Entity's approval of invoices. (Emphasis ours)*

From the foregoing, the Board notes that it was imperative for tenderers to tender for Recurrent Cost items and provide a breakdown of the same in their bid documents as this would be used during the financial evaluation stage in making comparison of submitted price schedules by various bidders and would be relied upon in ascertaining the amounts required to be paid quarterly in arrears by the Procuring Entity to the successful bidder under the contract. The Applicant admitted in its pleadings, including the supplementary affidavit that it did not breakdown its quoted price and did not provide recurrent prices. The Applicant did not in the circumstances comply with the requirements in the tender document.

The Applicant has also alleged that the Procuring Entity contravened the provisions of Section 81 and 82 of the Act by failing to seek clarification from the Applicant with regard to the value of zero quoted on the price schedule recurrent costs and the grand total.

The Board notes that Section 81 of the Act states that:

(1) A Procuring Entity may, in writing request a clarification of a tender from tenderer to assist in the evaluation and comparison of tenders.

(2) A clarification shall not change the terms of the tender.

Further, Section 82 (1) of the Act provides:

(1) Subject to subsection 2 of this section, the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be subject to

correction, revision, adjustment or amendment in any way by any person entity.

In view of the above provisions of the Act, the clarification referred to is not mandatory but is to be sought if the Procuring Entity deems it necessary. The Board follows the holding in **Republic vs. Public Procurement Administrative Review Board & Another Ex parte: Athi Water Service Board & Another [2017] eKLR** where the court held:

"Such clarification is however not a passport for the tenderer to change the terms of the tender. In my view a clarification cannot be equated to a confirmation of the procuring entity's view of the tenderer's bid. Where the procurement entity can ascertain the bid, there would be no need for the procuring entity to seek a clarification. However, the mere fact that the procuring entity seeks a clarification and a response is given does not bind the procuring entity to the purported clarification if the so-called clarification in fact amounted to change the terms of the tender."

The Board observes that there was no discrepancy in the price submitted by the Applicant to require the Procuring Entity to seek a clarification from the Applicant on the submitted tender sum. The Applicant clearly failed to follow the set criteria in filling out the price schedules and tender the recurrent costs under the price schedules. Providing that the price was all inclusive did not suffice and could not have enabled the Procuring Entity ascertain payments.

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."

In the circumstances, it is the Board's considered finding that the Applicant ought to have provided a breakdown of the recurrent costs included in the Kshs. 71,250,000.00 and is not persuaded that the Applicant was unfairly evaluated. The Board further finds that the Applicant's allegation of being the lowest evaluated bidder does not arise as its tender was non-responsive at the financial stage.

The upshot of the foregoing is that the Procuring Entity evaluated the Applicant's bid at the Financial Stage in accordance with the evaluation criteria set out in the Tender Document and in accordance with Section 80(2) of the Act and the principles provided in Article 227 (1) of the Constitution.

Issue 2: What orders should the Board grant in the circumstances.

Given the findings under issue 1 above, the Request for Review is for dismissal. Each party will bear their own costs.

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 18th August 2022:

1. The Request for review filed on 18th August 2022 by the Applicant herein with respect to Tender No. MTIHU DPW/SDHUD/CSHSF/046/2021-2022 for Supply, Design, Development, Customization, Installation, Training, Configuration, Testing, Commissioning and Technical Support of Enterprise Resource Planning (ERP) Information System be and is hereby dismissed.

2. Each party shall bear its own costs in the Request for Review.

Dated at Nairobi, this 8th day of September 2022


.....
VICE-CHAIRPERSON (PANEL CHAIR)


.....
SECRETARY

PPARB

PPARB

