REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 87/2022 OF 12th OCTOBER 2022

BETWEEN

NECTAR PRODUCE (K) LIMITED ..... APPLICANT

AND

ACCOUNTING OFFICER,

KENYA AIRPORTS AUTHORITY ..... 1ST RESPONDENT

KENYA AIRPORTS AUTHORITY ..... 2ND RESPONDENT

CROSS CULTURE CRAFTS LIMITED ..... 3RD RESPONDENT

SUZAN DUTY FREE ..... 4TH RESPONDENT

ENANAI LIMITED ..... 5TH REPONDENT

Review against the decision of the Accounting Officer, Kenya Airports Authority in relation to Tender No. KAA/RT/MBD/0210/2021-2022 Restricted Tender for Development and Management of: LOT 1: KENYAN TEA & COFFEE SHOP, LOT 2: GOLD AND JEWELRY SHOP, LOT 3: WATCH & CLOCKS STORE, LOT 4: ELECTONICS & TECHNOLOGY STORE, LOT 5: BEAUTY STORE AND LOT 6: TOY, GIFT & SOUVENIOR STORE

BOARD MEMBERS PRESENT

1. Ms. Faith Waigwa -Chairperson
2. QS Hussein Were -Member
3. CPA Isabel Juma -Member

IN ATTENDANCE

Ms. Sarah Ayoo - Holding brief for Acting Board Secretary

BACKGROUND OF THE DECISION

The Tendering Process

Kenya Airports Authority, the procuring entity and the 2nd Respondent herein, invited sealed tenders for Tender No. KAA/RT/MBD/0210/2021-2022 Restricted Tender for Development and Management of: LOT 1: KENYAN TEA & COFFEE SHOP, LOT 2: GOLD AND JEWELRY SHOP, LOT 3: WATCH & CLOCKS STORE, LOT 4: ELECTONICS & TECHNOLOGY STORE, LOT 5: BEAUTY STORE AND LOT 6: TOY, GIFT & SOUVENIOR STORE (hereinafter referred to as the "subject tender") at Jomo Kenyatta International Airport from qualified and eligible tenderers through a restricted method of tendering by online invitation on 25th May 2022 following an advertisement and notice of intention to procure through limited tender posted on the 2nd Respondent's website (www.kaa.go.ke) on 18th May 2022. The subject tender's submission deadline was initially set for 7th June 2022 at 11.00 a.m online making the same an e-procurement.

Addenda

The 2nd Respondent issued three (3) addenda namely (a) Addendum No. 1 dated 2nd June 2022 which extended the subject tender's submission deadline to 14th June 2022 at 11.00 a.m. (hereinafter referred to as "Addendum No. 1"); (b) Addendum No. 2 dated 9th June 2022 which, *inter alia*, clarified at clause No.1 that what was required is (i) a letter from the specific brand manufacturer confirming that a tenderer is a genuine Authorized Reseller for its brands and / OR letter from the Master Distributer-APPLICABLE FOR LOT 2, 3, 4, 5 and 6 only and (ii) an additional requirement for LOT 5 – MUST be an exclusive reseller for the line of cosmetics. Letter from manufacturer stating that the tenderer is an EXCLUSIVE RESELLER of its line of cosmetic products, clause No. 5 that where a tenderer was applying for more than one lot, the Tender Security would be Kenya Shillings Five Hundred Thousand only (Kshs. 500,000/=) for each lot and clause No. 7 amended clause No. 2 of Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria at page 20 of the blank tender document issued to prospective tenderers to indicate that tenderers would be required to submit an original Tender Security physically to the office of the General Manager, Procurement and Logistics department at the 2nd Respondent's Headquarters on or before the subject tender's submission deadline and a copy of the tender security would be submitted online with the tender document while extending the subject tender's submission deadline to 16th June 2022 at 11.00 a.m. (hereinafter referred to as "Addendum No. 2"); and (c) Addendum No. 3 dated 15th June

2022 extended the subject tender's submission deadline to 22nd June 2022 at 11.00 a.m.(hereinafter referred to as "Addendum No. 3").

Tender Submission Deadline and Opening of Tenders

According to the Minutes for the Opening of Tender held on 22nd June 2022 (hereinafter referred to as "Tender Opening Minutes"), the 2nd Respondent's Tender Opening Committee opened the subject tender virtually through Zoom platform and in the presence of tenderers' representatives who joined the tender opening session through a link that had earlier on been provided to tenderers who had submitted their tenders online and who wished to participate in the subject tender's opening.

A total of fifteen (15) tenderers submitted their tenders in response to the subject tender within the tender submission deadline of 22nd June 2022. The said fifteen (15) tenderers were recorded in the 2nd Respondent's Tender/Quotation Register for the subject tender dated 22nd June 2022 as follows:

Bid No	**Name of Bidder**	**Amount/Financial Proposal (USD)**
1.	Suzan Duty Free	**Minimum Annual Guarantee** LOT 1- USD 55,000.00 LOT 2- USD 50,000.00

		LOT 3- USD 50,000.00 LOT 4- USD 50,000.00 LOT 5- USD 60,000.00 LOT 6- USD 50,000.00
2.	Safari Duty Free	**Minimum Annual Guarantee** LOT 3- USD 52,000.00
3.	Cross Culture Crafts Ltd	**Minimum Annual Guarantee** LOT 1- USD 71,066.00
4.	Nectar Produce (K) Limited	**Minimum Annual Guarantee** LOT 1- USD 60,000.00 LOT 5- USD 65,000.00 LOT 6- USD 67,000.00
5.	Enanai Limited	**Minimum Annual Guarantee** LOT 6- USD 65,000.00
6.	Avane Health Limited	**Minimum Annual Guarantee** LOT 5- USD 75,000.00
7.	Mount Gift Limited	**Minimum Annual Guarantee** LOT 1- USD 50,000.00 LOT 6- USD 50,000.00

8.	Rainsoft Enterprises Ltd	**Minimum Annual Guarantee** LOT 5- USD 68,000.00
9.	The Dream Factory Kenya Limited	**Minimum Annual Guarantee** LOT 6- USD 55,000.00
10.	Goldrock International Enterprises (K) Ltd	**Minimum Annual Guarantee** LOT 1- USD 51,000.00
11.	Straightline Enterprises Ltd	**Minimum Annual Guarantee** LOT 6- USD 50,000.00
12.	Clear Vision Investments	**Minimum Annual Guarantee** LOT 1- USD 60,005.00
13.	Mind Quest Ltd	**Minimum Annual Guarantee** LOT 2- USD 55,000.00 plus VAT 16%

14.	Memories of Africa Ltd	**Minimum Annual Guarantee** LOT 6- USD 60,000.00
15.	Salute I World Ltd	**Minimum Annual Guarantee** LOT 4- USD 52,000.00

The Tender Evaluation Committee noted that all the fifteen (15) tenderers submitted their tender sureties in hard copy. However, Nectar Produce (K) Limited, the Applicant herein, submitted its tender security for one lot but had tendered for three lots as per the opening register.

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the fifteen (15) tenders in the following three stages as recorded in an Evaluation Report signed by the Evaluation Committee members on 14th July 2022 (hereinafter referred to as the "Evaluation Report"):

i. Mandatory/Preliminary Requirements;
ii. Technical Evaluation Requirements; and
iii. Financial Evaluation.

Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria at page 20 to 21 of the blank tender document issued to prospective tenderers by the 2nd Respondent (hereinafter referred to as "the Tender Document"). Tenders were required to satisfy all the 15 mandatory requirements at this stage to qualify to proceed for evaluation at the Technical Requirements stage. A failure to satisfy any one of the 15 mandatory requirements would render a tender non-responsive at this stage.

At the end of evaluation at this stage, eleven (11) tenders were found to be non-responsive which included the Applicant's tender, while four (4) tenders were found responsive which included the 3rd, 4th and 5th Respondents respective tenders. Only the responsive tenders proceeded for evaluation at the Technical Requirements stage.

Technical Evaluation Requirements

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Part II: Evaluation of Tenderer's Technical Requirements of Section III – Evaluation and Qualification Criteria at page 22 to 24 of the Tender Document. Tenders were required to fully comply with the technical evaluation requirements.

At the end of evaluation at this stage, all the aforementioned four (4) tenders were found responsive and proceeded for evaluation at the Financial Evaluation stage.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Part III Tenderer's Financial Proposal and Statement of Financial Proposal of Section III – Evaluation and Qualification Criteria at page 24 to 26 of the Tender Document. Tenderers were required to propose a Minimum Annual Guarantee and sign a Statement of Financial Compliance. Tenderers whose proposed Minimum Annual Guarantee was less than the amounts stated in column B Acceptable Minimum Annual Guarantee (USD) at page 24 and 25 of the Tender Document would be disqualified.

The tenderer with the highest proposed Minimum Annual Guarantee (MAG) in a Lot would be recommended for award. Tenderers would be recommended for award in one Lot only. At the end of evaluation at this stage, three (3) of the aforementioned tenders were found responsive while one (1) tender was found non- responsive. Tenders were ranked as follows:

Table 8- Minimum Annual Guarantee

Bid No.	**1**	**3**	**5**	**12**

Name of Bidder	SUZAN DUTY FREE	CROSS CULTURE CRAFTS LTD	ENANAI LIMITED	CLEAR VISI INVESTMEN
Lot	**MAG (USD)**	**MAG (USD)**	**MAG (USD)**	**MAG (USD**
Lot 1: Kenyan Tea & Coffee Shop	LOT 1 – USD 55,000.00	LOT 1 – USD 71,066.00	N/A	N/A
Lot 2: Gold and Jewelry Shop	LOT 2 – USD 50,000.00	N/A	N/A	N/A
Lot 3: Watch & Clocks Store	No	N/A	N/A	N/A
Lot 4: Electronics & Technology Store	LOT 4 – USD 50,000.00	N/A	N/A	N/A
Lot 5: Branded Beauty Store	LOT 5 – USD 60,000.00	N/A	N/A	N/A

Lot 6: Toy, Gift & Souvenir Store	LOT 6 – USD 50,000.00	N/A	LOT 6 – USD 65,000.00	LOT 1 – U 60,005.00
RANKING	No.1	No.1	No.1	No.2
Lot	**Lot 5**	**Lot 1**	**Lot 6**	**Lot 6**
Remarks	**Recommended**	**Recommended**	**Recommended**	**Fail**

Evaluation Committee's Recommendation

The Evaluation Committee recommended award of the subject tender as follows:

1. LOT 1: Kenyan Tea & Coffee Shop awarded to M/s CROSS CULTURE CRAFTS LTD at their proposed Minimum Annual Guarantee of United States Dollars Seventy One Thousand and Sixty-Six (USD 71,066.00) for a period of seven (7) years with mid-term review.

2. LOT 5: Branded Beauty Store awarded to M/s SUZAN DUTY FREE at their proposed Minimum Annual Guarantee of United States Dollars Sixty Thousand (USD 60,000.00) for a period of seven (7) years with mid-term review.

3. LOT 6: Toy, Gift & Souvenir Store awarded to M/s ENANAI LIMITED at their proposed Minimum Annual Guarantee of United States Dollars

Sixty Five Thousand (USD 65,000.00) for a period of seven (7) years with mid-term review.

The Evaluation Committee recommended retendering of LOT 2: Gold and Jewelry Shop; LOT 3: Watch & Clocks Store and LOT 4: Electronics & Technology Store.

Professional Opinion

In a Professional Opinion dated 3rd October 2022 (hereinafter referred to as the 'Professional Opinion'), the Acting General Manager (Procurement & Logistics), Ms. Lilian Okidi, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

Mr. Alex Gitari, the Managing Director/CEO of the 2nd Respondent and the 1st Respondent herein, approved the Professional Opinion on the same day of 3rd October 2022.

Notification to Tenderers

Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 3rd October 2022.

REQUEST FOR REVIEW

On 12th October 2022, the Applicant filed a Request for Review dated 12th October 2022 together with a Supporting Affidavit sworn by William Ngoni Wanyonyi, its director, on 12th October, 2022 through the firm of Otwal & Manwa Associates Advocates, seeking the following orders verbatim:

a) **A DECLARATION that the Tender Process in respect of Tender Number KAA/RT/OT/MBD/0210/2021-2022 for Supply of For Restricted Tender for development and management of Lot 1,2, 3,4,5, and 6 at Jomo Kenyatta International Airport in the decision of the Procuring Entity dated 3/10/2022 and *communicated on 6/10/2022* violates and falls short of the provisions of Articles 10 and 227 of the Constitution of Kenya, and the Public Procurement and Assets Disposal Act hence null and void;**

b) **AN ORDER annulling and setting aside the 2nd Respondent's Tender process and decision or outcome of the Procuring Entity dated 3rd October 2022 and *communicated on 6/10/2022* in respect of Tender Number KAA/RT/OT/MBD/0210/2021-2022 for Supply of For Restricted Tender for development and management of Lot 1,2, 3,4,5, and 6 at Jomo Kenyatta International Airport.**

c) **AN ORDER directing the 1st and 2nd Respondents to prepare another Tender Document in strict compliance with the provisions of Articles 10 and 227 of the Constitution of Kenya, and the Public Procurement and Assets Disposal Act;**

d) **AN ORDER cancelling the entire procurement process in Tender Number KAA/RT/OT/MBD/0210/2021-2022 for Supply of For Restricted Tender for development and management of Lot 1,2, 3,4,5, and 6 at Jomo Kenyatta International Airport. (Including notification of award dated 3rd October 2022 and communicated on 6th October 2022 addressed to the Applicant to unsuccessful bidders be and is hereby nullified.**

e) **Any other or further relief or reliefs as the Board shall deem just and expedient; and**

f) **The costs of this Review be borne by the 2nd Respondent.**

In a Notification of Appeal and a letter dated 12th October 2022, Mr. James Kilaka, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board"), notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension

of the procurement proceedings for the subject tender, while forwarding to the said Respondents 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 1st and 2nd Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five days from 12th October 2022.

In opposition to the Request for Review, Ms. Lilian Okidi, Acting General Manager (Procurement and Logistics) of the 2nd Respondent and on behalf of the 1st and 2nd Respondent, on 18th October 2022, filed a Reply dated 18th October 2022.

Vide letters dated 18th October 2022, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments about the subject tender within 3 days from 18th October 2022.

On 24th March 2020, the Board issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic. Through this circular, the Board dispensed with

physical hearings and directed that all requests for review applications 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 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 Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as 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.

On 23rd October 2022, the 3rd Respondent filed a Notice of Appointment of Advocates dated 24th October 2022 and its Replying Affidavit sworn on 24th October 2022 by Christine Wanjiru Gaiti through the firm of Gerivia Advocates LLP.

On 31st October 2022, the Applicant filed its written submissions together with its list and bundle of authorities dated 28th October 2022. On 1st November 2022, the 3rd Respondent filed its written submissions together with its list of authorities dated 1st November 2022. The 1st and 2nd Respondents did not file any written submissions. The 4th and 5th Respondents did not file any response to the instant Request for Review.

APPLICANT'S CASE

The Applicant avers that the subject tender's procurement process violated Article 227 of the Constitution by failing to meet the requirements of fairness, equity, transparency, competitiveness, effectiveness and runs afoul of the guiding principles and values under Section 3(i) and (j) of the Act which stipulate that public entities shall promote local industry, sustainable development and promote citizen contractors respectively.

The Applicant states that it participated in the subject tender as a tenderer by requesting for the Tender Document from the 2nd Respondent on 24th May 2022. The Applicant avers that it wrote to the 2nd Respondent on 29th May 2022, seeking clarifications on the subject tender, *inter alia,* on letters from manufacturers of products such as artwork which had no specific manufacturers, on the currency and validity period of the prices, and the number of lots a tenderer was eligible for award. Further, the Applicant avers that it made several follow ups on the clarifications on 7th June 2022 but the 1st and 2nd Respondents remained unresponsive.

The Applicant avers that the Tender Document was subjected to amendments vide Addendum No. 1 dated 2nd June 2022, Addendum No. 2 dated 9th June 2022 and Addendum No. 3 dated 15th June 2022. The Applicant alleges that the 2nd Respondent issued Addendum No. 2 dated 7th June 2022 (*meant to be 9th June 2022*) on 28th May 2022 without communicating the changes and clarifications to it.

The Applicant avers that it submitted its duly filled and stamped tender on 22nd June 2022 and primarily submitted for (a) Lot 1 on Kenyan Tea & Coffee Shop with a proposed Minimum Annual Guarantee of USD 60,000; (b) Lot 5 on Beauty Store with a proposed Minimum Annual Guarantee of USD 65,000; (c) Lot 6 on Toy, Gift, and Souvenir indicated as a preferred bid as indicated at page 9 of the Tender Form with a proposed Minimum Annual Guarantee of USD 67,000; and (d) Bid Security for LOT 1, 5, and 6 of Kshs. 500,000/= dated 21st June 2022 valid for the entire period of the tender including 28 days after expiration of the validity of the tender.

The Applicant alleges that upon submitting its tender, on the advice of the 2nd Respondent, it amended its Bid Security to secure the preferred Lot No. 6 and submitted the Bid Security of Kshs. 500,000/= dated 22nd June 2022 online and physically before the closure and opening of the subject tender. That the said Bid Security was accepted and received as proper for its preferred bid. The Applicant also states that it requested for copies of the addendums that had been issued without its knowledge from the 2nd Respondent.

The Applicant avers that vide letter dated 3rd October 2022, it received a letter notifying it that its tender was unsuccessful for reasons that (a) it provided one Tender Security yet applied for three lots which was against the requirement of provision of Bid/Tender Security for each lot; and (b) it did not provide a letter from the specific brand manufacturers confirming

that it was a genuine and authorized reseller for its brands and/or letter from the Master Distributor for East Africa for Lot 5 as the letter provided did not state that the bidder was an exclusive reseller. Additionally, the Applicant avers that it was notified of award of the subject tender for Lot Nos. 1, 5, and 6 to the 3rd, 4th and 5th Respondents and that Lot Nos. 2,3, and 4 were unresponsive and earmarked for retendering.

The Applicant avers that it is aggrieved by the decision of the 1st and 2nd Respondents to award the subject tender to the 3rd, 4th, and 5th Respondent for reasons that (a) the outcome for Lot 1 in respect to the Applicant's tender was not communicated by the 1st and 2nd Respondents in totality; (b) addenda were uploaded on the 2nd Respondent's website without communication to the Applicant; (c) the Applicant made a bid for a Minimum Guarantee of USD 65,000 for Lot 5 and the tender was awarded to the 4th Respondent which made a lower bid of USD 60,000 ; (d) the Applicant provided for a Bid Security of Kshs. 500,000/= in respect to Lot 6 and indicated it as its preferred Lot providing a Minimum Guarantee of USD 67,000 yet the tender was awarded to the 5th Respondent which tendered for USD 65,000; and (e) in respect to Lot 5, the Applicant provided a letter from the specific brand manufacturers confirming that it was the genuine and authorized reseller for its brands which was among its tender documents but was informed that the same did not state that it was an exclusive reseller yet the said letter did.

The Applicant avers that the 1st and 2nd Respondents were mandated under Section 89 of the Act to demonstrate that there will not be effective competition for the supply of the tendered goods in order to resort to direct tendering.

The Applicant alleges that the procurement process violated Section 157 of the Act since the award criteria was skewed and marred with irregularities and secrecy to potentially allow certain bidders to be awarded all lots thus discriminating and edging out the Applicant who would otherwise benefit effective competition. Further, the Applicant alleges that the amendments vide Addendum No. 1,2, and 3 were skewed to give an unfair advantage to other tenderers as the same were not communicated to all tenderers, including the Applicant and as a result of the 1st and 2nd Respondent's breach of statutory duties, the Applicant risks suffering loss and damage which is wholly attributable to the said Respondents.

The Applicant admits to the jurisdiction of the Board and prays that the Board grants the orders sought in its Request for Review.

1ST AND 2ND RESPONDENTS' CASE

The 1st and 2nd Respondents contend that since the subject tender was a restricted tender, all communication including clarifications and Addenda were made through mails to the participating tenderers and not posted on their website. Additionally, the Tender Document provided that the 2nd

Respondent may make amendments to the Tender Document by issuing addenda prior to the deadline for submission of the subject tender in addition to extending the tender submission deadline.

The 1st and 2nd Respondents contend that they issued Addendum No. 2 dated 9th June 2022 responding to the issues raised by the Applicant and other tenderers pursuant to Section 75 of the Act and that this Addendum was sent on 9th June 2022 to the Applicant's email address cnectarproduce@yahoo.com on Thursday 09/06/2022 at 12:34 hrs. The 1st and 2nd Respondents further contend that tenderers were required to quote in US Dollars with a tender validity of 126 days from the closing/opening date. While Part I: Preliminary Evaluation Criteria, Mandatory requirements under criteria number 2 of the Tender Document provided that the Tender Security would be valid for 156 days from the opening/closing date at Kshs. 500,000/= for each lot, Addendum No. 2 confirmed the amount and currency of the Tender Security hence the Applicant misdirected itself as to the currency and validity of the Tender Security.

The 1st and 2nd Respondent contend that after a successful evaluation process, the tenderers awarded the subject tender in the different lots were the highest evaluated tenderers as per clause 34. 6 (f) Information to Tenderers (hereinafter referred to as "ITT") of the Tender Data Sheet (hereinafter referred to as "TDS") of the Tender Document. Further, the 1st

and 2nd Respondents confirm that the outcome of evaluation of the subject tender was communicated to all participating tenderers on 6th October 2022 pursuant to Section 87 (3) of the Act.

The 1st and 2nd Respondents contend that (a) the Applicant failed to provide a Tender Security for Lot Nos. 1 and 5 as required in Addendum No. 2 and was therefore non- responsive to the requirements of the subject tender; (b) the Addenda were communicated to individual tenderers via their official emails since the subject tender was a restricted tender; and (c) the letters submitted by the Applicant in regard to Lot 5 failed to satisfy the mandatory requirement of the specified brand manufacturer confirming it as an exclusive reseller for its brand as provided for in Addendum No. 2.

It is the 1st and 2nd Respondents case that all tenderers were subjected to the same evaluation process using the same evaluation criteria and subsequently the highest evaluated tenderers awarded the various lots. The 1st and 2nd Respondents aver that the award criteria as set out in the Tender Document was shared with respective tenderers and at no material time prior to the tender submission deadline did the Applicant raise any issue with the award criteria but submitted its tender and cannot claim mischief after such participation.

The 1st and 2nd Respondents contend that they are strangers to the Applicant's allegations that they were mandated under Section 89 of the Act

to demonstrate that there will not be effective competition for the supply of the tendered goods in order to resort to direct tendering.

In response to the allegation of breach of Section 3(i) and (j) of the Act, the 1st and 2nd Respondents contend that ITT clause 32.1 under Section I-Instructions to Tenderers at page 13 of the Tender Document provided that no margin of preference and reservation would be allowed in the subject tender and at no material time during the tendering process did the Applicant request for a waiver of this provision.

The 1st and 2nd Respondents state that they complied with the provisions of the Act, the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020"), the provisions of the Constitution and in particular Article 227 where fairness, equity, transparency, competitiveness and effectiveness were adhered to in the procurement process.

3RD RESPONDENT'S CASE

The 3rd Respondent contends that it participated in the subject tender as a tenderer by submitting its tender for Lot 1 in response to an invitation by the 2nd Respondent. Vide Notification of Intention to Enter into a Contract dated 3rd October 2022, received via email on 6th October 2022, the 1st Respondent informed it that its tender was found responsive for Lot 1 – Kenyan Tea & Coffee Shop at its proposed Minimum Annual Guarantee of USD 71,066.

In response to the Applicant's prayer (c) of the Request for Review, being a request for an order directing the 1st and 2nd Respondents to prepare another tender document in strict compliance with Article 10 and 227 of the Constitution and the Act, the 3rd Respondent contends that Section 167 (1) of the Act confers jurisdiction on the Board to hear applications of alleged breaches within 14 days of notification of award or the occurrence of the alleged breach. As such, the 3rd Respondent contends that prayer (c) has been raised after the lapse of the appeal window stipulated under Section 167 (1) of the Act and the jurisdiction of the Board to review any alleged breach by the 1st and 2nd Respondents in the preparation of the Tender Document and Addenda has been ousted. Further, the 3rd Respondent contends that the Applicant ought to have approached the Board within 14 days of receiving the Tender Document and Addenda if it opined that they were not prepared in compliance with the provisions of Articles 10 and 227 of the Constitution. It is the 3rd Respondent's contention that the Applicant cannot invoke Section 167(1) of the Act at this stage since 14 days from the date of alleged breach lapsed on the 14th day of issuance of the Tender Document and Addenda.

In response to the Applicant's prayer (d) of the Request for Review, being a request for an order cancelling the entire procurement process in the subject tender, the 3rd Respondent contends that this prayer is unmerited for reasons that (a) the Applicant did not submit a Tender Security for Kshs. 500,000/= for Lot 1 as stipulated in Addendum No. 2 failing to meet this mandatory requirement rendering its tender non-responsive pursuant to Section 79 of

the Act; (b) the Applicant failed to disclose any prejudice likely to be occasioned if the order sought is not granted.

The 3rd Respondent contends that the Applicant has approached the Board with unclean hands since, if indeed Addendum No. 2 was not communicated as alleged, it would have submitted its tender by the earlier closing date of 14th June 2022 and not the revised closing date of 22nd June 2022.

The 3rd Respondent states that the role of the 2nd Respondent was to consider only conforming, compliant and responsive tenders in accordance with provisions of Sections 70 and 80 of the Act. By the Applicant's admission at paragraph 13(d) and 17 of the Request for Review, the Applicant submitted one (1) Tender Security to secure three (3) Lots contrary to the requirement stipulated in Addendum No. 2 that a Tender Security of Kshs. 500,000/= be provided for each Lot. This requirement was given to ensure tenderers compete on an equal footing and it would beat the purpose of issuing clear instructions in the Tender Document and Addenda if some tenderers were allowed to circumvent such instructions by imposing their own interpretations on what amounts to responsiveness.

The 3rd Respondent contends that the award criteria was expressed in certain terms and was not marred with irregularities and secrecy as alleged by the Applicant and it was expressly stipulated that none of the tenderers would be awarded all Lots. It is the 3rd Respondent's contention that the Applicant has failed to demonstrate how the award criteria was discriminatory, edged

out or curtailed competition noting that it managed to submit its tender for Lot 1,5, & 6 and indicated Lot 6 as its preferred tender.

Regarding the Applicant's claim of having failed to be notified in totality of the award of Lot 1 by the 1st Respondent, the 3rd Respondent contends that by having been included in the subject Request for Review, the Applicant was aware that it was the successful tenderer and even if this information had not been communicated to the Applicant, it has not demonstrated any prejudice suffered by the alleged lack of communication since it managed to file the subject Request for Review within the appeal window.

The 3rd Respondent avers that with respect to Lot 1, its Minimum Annual Guarantee of USD 71,000 was more competitive than that of the Applicant of USD 60,000 hence even if the Applicant would have submitted a compliant tender that met the mandatory requirements and made it to the Financial Evaluation stage, it still would not have emerged as the successful tenderer as its Minimum Annual Guarantee was much lower than that of the 3rd Respondent.

The 3rd Respondent contends that the Applicant has not raised any specific issue with Lots 1 & 5 and has only made a general outcry of the conduct of the procurement proceedings under the subject tender based on its failure to submit mandatory requirements as provided for under the Tender Document. The 3rd Respondent further contends that the 2nd Respondent acted in line with provisions of Sections 3, 79 and 80 (2) of the Act, Articles

10 and 227(1) of the Constitution and provisions of the Tender Document including the Addenda.

BOARD'S DECISION

The Board has considered each of the parties' cases, documents, pleadings, written submissions, authorities together with confidential documents submitted to the Board by the 1st and 2nd Respondents pursuant to Section 67(3)(e) of the Act and finds that the following issues call for determination.

1. **Whether the allegations by the Applicant that Addendum No.2 dated 9th June 2022 was not communicated to it by the 2nd Respondent and the allegation that the award criteria and other provisions of the Tender Document are skewed and marred with irregularities and secrecy to potentially allow certain tenderers to be awarded all lots thus unfairly disadvantaging, discriminating and/or unfairly edging out the Applicant who would otherwise benefit from effective competition are time barred for having been raised outside the statutory period of 14 days of occurrence of alleged breach of duty imposed on the 1st and 2nd Respondents by the Act in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board;**

Depending on the outcome of the first issue;

2. **Whether the amendments to the Tender Document effected by Addendum No.2 dated 9th June 2022, that the Applicant alleges was not communicated to it, are skewed to unfairly give an unfair advantage to other tenderers;**
3. **Whether the award criteria and the Tender Document are skewed and marred with irregularities and secrecy to potentially allow certain tenderers to be awarded all lots thus unfairly disadvantaging, discriminating and/or unfairly edging out the Applicant who would otherwise benefit from effective competition;**
4. **Whether the Applicant's tender complied with the mandatory requirements of criteria No. 2 and 7 of Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria at page 20 and 21 of the Tender Document to proceed for evaluation at the Technical Requirements stage; and**
5. **What orders should the Board grant in the circumstances?**

Whether the allegations by the Applicant that Addendum No.2 dated 9th June 2022 was not communicated to it by the 2nd Respondent and the allegation that the award criteria and other provisions of the Tender Document are skewed and marred with irregularities and secrecy to potentially allow certain tenderers to

be awarded all lots thus unfairly disadvantaging, discriminating and/or unfairly edging out the Applicant who would otherwise benefit from effective competition are time barred for having been raised outside the statutory period of 14 days of occurrence of alleged breach of duty imposed on the 1st and 2nd Respondents by the Act in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.

The Applicant alleges that the 2nd Respondent failed to convey Addendum No. 2 dated 9th June 2022 to it and that the Tender Document and Addenda were not prepared in compliance with the provisions of the Act and Articles 10 and 227 of the Constitution. Further, the Applicant contends that the 2nd Respondent's actions of making amendments to the Tender Document was to intentionally lock out local manufacturers which is an open act of discrimination contrary to Article 27 of the Constitution and Section 3(i) and (j) of the Act.

The 3rd Respondent on the other hand contends that the Applicant's complaints relating to the alleged lack of communication of the Addenda has been filed out of time and the prayer by the Applicant seeking an order directing the 1st and 2nd Respondents to prepare another Tender Document in strict compliance with the provisions of Articles 10 and 227 of the Constitution and the Act have been raised outside the statutory period

stipulated in Section 167(1) of the Act. Further, the 3rd Respondent contends that it is clear from the Request for Review that the Applicant received the Tender Document in May 2022, from the 1st and 2nd Respondents' reply, all addenda were sent to the Applicant via the Applicant's email with the last Addendum being Addendum No.3 dated 15th June 2022.

The 3rd Respondent argues that if the Tender Document and any Addendum were not issued in compliance with the provisions of Articles 10 and 227 of the Constitution or the Act, the Applicant should approach the Board to challenge the same within 14 days of receiving the Tender Document or any of the Addendum and the Applicant can't now invoke the provisions of Section 167(1) of the Act since the 14 days from the date of alleged breach lapsed on the 14th day of issuance of the Tender document and/or Addenda. The 3rd Respondent argues that the Applicant is estopped from raising any issues regarding the preparation of the Tender Document and Addenda for the aforementioned reasons.

The 3rd Respondent contends that if Addendum No.2 dated 9th June 2022 was not communicated to the Applicant or if the Applicant did not get to know of the same by whatever means, the Applicant would have submitted its tender by the earlier closing date of 14th June 2022 and not the revised date of 22nd June 2022 as it admits to have submitted its tender. With this argument, the 3rd Respondent contends that the Applicant cannot approach the Board with unclean hands.

The Board notes it is trite law that courts and decision making bodies can only act in cases where they have jurisdiction and when a question arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

Black's Law Dictionary, *8th Edition,* defines jurisdiction as:

> ***"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."***

Jurisdiction is defined in Halsbury's Laws of England (4 th Ed.) Vol. 9 as:

> ***"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."***

In his book, "Words and Phrases Legally Defined", Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court [or other decision making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given." [Emphasis by the Board]

The *locus classicus* case on the question of jurisdiction is the celebrated case of **The Owners of the Motor Vessel "Lillians" -v- Caltex Oil Kenya Ltd (1989) KLR 1** where Nyarangi J.A. held:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more

step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

In the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR,** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR,** that:

"whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into

the interrogation of the merits of issues that may be in controversy in a matter."

It is therefore necessary for the Board to determine whether it has jurisdiction to entertain the aforementioned allegations raised by the Applicant in the instant Request for Review.

The Supreme Court in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others [2012] eKLR** pronounced itself regarding the source of jurisdiction of a court or any other decision making body as follows:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

> "**(1)** ***There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."***

Further, Section 28 of the Act provides for the functions of the Board as:

> ***(1) The functions of the Review Board shall be—***
>
> ***(a) reviewing, hearing and determining tendering and asset disposal disputes; and***
>
> ***(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific in Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

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

(2) .....

(3) .....

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

(a) the choice of a procurement method;

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

(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]

168. .....

169. .....

170. .....

171. .....

172. .....

172. Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act read with Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before the Board.

It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

PART XV – ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

203. Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a) .....;

(b) .....;

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) <u>the notification under section 87 of the Act;</u> or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

(d) .....

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

(4) .....

Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act will be by way of a request for review. Further, this request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification under Section 87 of the Act; or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer.

Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of

intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach.

We understand the Respondents contention to be that, by the Applicant's own admission the Applicant received the Tender Document on 25th May 2022 and the Addenda having been emailed to the Applicant's email address (cnectarproduce@yahoo.com) with the last Addendum being Addendum No.3 dated 15th June 2022, any contents in the aforementioned documents ought to have been challenged by the Applicant before the Board on or before the 8th of June 2022 with respect to the contents of the Tender Document and 29th June 2022 with respect to last Addendum No.3 dated 15th June 2022. However, the Applicant chose to participate in the tender process by submitting its tender and its only after its tender was found non responsive that it opted to challenge the contents of the Tender Document and Addendum No.2 as being skewed in the instant Request for Review which was filed on 12th October 2022.

The Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board

at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches.

There being an admission by the Applicant, specifically at paragraph 3 of its Request for Review, that it received the Tender Document from the 2nd Respondent on 25th May 2022, Regulation 203(2)(c)(i) of Regulations 2022 was the option available for the Applicant to challenge the contents or provisions of the Tender Document that the Applicant now seeks to challenge on allegations of being skewed and marred with irregularities and not meeting the provisions of the Act and the Constitution.

In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

57. Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this

section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

In computing time when the Applicant should have sought administrative review before the Board with respect to challenging the contents or provisions of the Tender Document on allegations of being skewed and marred with irregularities and not meeting the provisions of the Act and the Constitution, the 25th May 2022 is excluded pursuant to Section 57(a) of IGPA being the day which the Applicant learnt of the occurrence of such alleged breach when it received the Tender Document from the 2nd Respondent. This means, 14 days started running from 26th May 2022 and lapsed on 8th June 2022. In essence, the Applicant had between the 25th May 2022 and 8th June 2022 to seek administrative review before the Board with respect to challenging the contents or provisions of the Tender Document on allegation of being skewed and marred with irregularities and not meeting the provisions of the Act. However, the Applicant opted to raise the aforesaid

allegations in the instant Request for Review filed on 12th October 2022 which was the 140th day from the date of receipt of the Tender Document from the 2nd Respondent therefore time barred and contrary to Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020 in so far as the Applicant became aware of the alleged breach complained of with respect to the provisions of the Tender Document being skewed and marred with irregularities and not meeting the provisions of the Act.

With respect to Addenda No.2 dated 9th June 2022, the 1st and 2nd Respondents in their Reply contend that they furnished the Applicant with the Addendum No. 2 dated 9th June 2022 via email (cnectarproduce@yahoo.com) and the Applicant has not refuted this. In fact, the Applicant never filed a rejoinder following the filing of a Reply by the 1st and 2nd Respondents. To this end, the 1st and 2nd Respondents contention that the Applicant was furnished with Addendum No.2 dated 9th June 2022 on the same day via email remains uncontroverted.

It is important for the Board to determine whether the 2nd Respondent provided a copy of Addendum No. 2 dated 9th June 2022 to the Applicant in the subject tender before the tender submission deadline.

We have carefully studied the confidential documents submitted by the 1st Respondent pursuant to Section 67(3)(e) of the Act and note that an email was sent from the 2nd Respondent's email address indicated as ***Tenders 1***

on **Thursday, June 9, 2022 12.33 P.M** to various tenderers and included the Applicant's email address indicated as "cnectarproduce@yahoo.com" with the subject matter being ***ADDENDUM NO. 2 AND DRAWINGS KAA/RT/MBD/0210/2021-2022 MANAGEMENT OF SHOPS AT JKIA*** and Attachments being ***ADDENDUM NO 2 – KAA-RT-MBD-0210-2021-2022-.MANAGEMENT OF SHOPS AT JKIA.pdf; B 11 a.pdf; B11b.pdf; B10.pdf; B14.pdf; B15.pdf; B19.pdf*** which reads in part:

> ***"Greetings from Kenya Airports Authority.***
>
> ***Attached please fin Addendum No. 2 and drawings on the above tender for your action.***
>
> ***Kindly acknowledge receipt.***
>
> ***.....***"

The Board notes that the Applicant in its Affidavit in Support of the Request for Review sworn on 12th October 2022 availed to the Board as part of its annexures a thread of email messages exchanged between it and the 2nd Respondent which are marked as WNW-3 and include an email sent by the Applicant on 24th May 2022 11:42 A.M. from its email address cnectarproduce@yahoo.com addressed to the 2nd Respondent's email address Tenders@kaa.go.ke with the subject matter being : REQUEST FOR TENDER DOCUMENTS; TENDER NO. KAA/RT/MBD/0210/2021-2022 which reads in part:

"..... Nectar Produce Kenya Limited is an interesting bidder in the above mentioned tender. We are writing to request for the tender documents and/or further information/ guidelines on the requirements for the application of tender. Please find attached Tender Advertisement for your reference....."

The 2nd Respondent responded on 24th May 2022 1:19:03 P.M. to the Applicant's email requesting that the Applicant provides it with contact address with Name of Company, Box address, email and telephone number. Vide email dated 24th May 2022 5:20:47 P.M. the Applicant responded as follows:

"....

We can confirm receipt of your email. As requested please see below details:

NAME OF COMPANY: NECTAR PRODUCE (K) LIMITED

P.O. BOX : 17945-00500; NAIROBI, KENYA

EMAIL; cnectarproduce@yahoo.com

TEL; 0721667322

Kindly note we had done online registration.

....."

In light of the foregoing, it is evident to the Board that the Applicant's email address during the tendering process of the subject tender was ***cnectarproduce@yahoo.com*** as submitted to the 2nd Respondent by the Applicant and that the 2nd Respondent on Thursday, June 9th 2022 at 12:33 P.M. sent to the Applicant, amongst other tenderers, Addendum No. 2 dated 9th June 2022 as an attachment to the Applicant's confirmed email address: ***cnectarproduce@yahoo.com*** hence complied with provisions of Section 75 of the Act by promptly providing a copy of the addendum to each tenderer to whom it had provided with copies of the Tender Document in the subject tender.

We also note that the Applicant by its own admission at paragraph 13 of the Request for Review, submitted its tender on 22nd June 2022. If indeed the Applicant did not receive Addendum No.2 dated 9th June 2022, it ought to either have submitted its tender on the initial date of 7th June 2022 or 14th June 2022 as extended by Addendum No.1 dated 2nd June 2022 and not on 22nd June 2022 which was the final extended tender submission deadline pursuant to Addendum No.3 dated 15th June 2022. In the absence of a rebuttal by the Applicant and in the circumstances, we are convinced that the Applicant was furnished with Addendum No.2 dated 9th June 2022 on the same day of 9th June 2022.

In computing time when the Applicant should have sought administrative review before the Board with respect to challenging the contents or

provisions of Addendum No.2 dated 9th June 2022 on allegations of being skewed to unfairly give an unfair advantage to other tenderers, the 9th June 2022 is excluded pursuant to Section 57(a) of IGPA being the day which the Applicant received and learnt via email of the occurrence of such alleged breach when it received Addendum No.2 dated 9th June 2022 from the 1st and 2nd Respondents. This means, 14 days started running from 10th June 2022 and lapsed on 23rd June 2022. In essence, the Applicant had between the 10th June 2022 and 23rd June 2022 to seek administrative review before the Board with respect to challenging the contents or provisions of Addendum No.2 dated 9th June 2022 on allegation of being skewed to unfairly give an unfair advantage to other tenderers. However, the Applicant opted to raise the aforesaid allegations in the instant Request for Review filed on 12th October 2022 which was the 125th day from the date of receipt of the Addendum No.2 of 9th June 2022 from the 1st and 2nd Respondents therefore time barred and contrary to Section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020 in so far as the Applicant became aware of the alleged breach complained of with respect to the provisions of Addendum No.2 dated 9th June 2022 being skewed to unfairly give an unfair advantage to other tenderers.

To this end, we find and hold that the **allegations by the Applicant that Addendum No.2 dated 9th June 2022 was not communicated to it by the 2nd Respondent and the allegation that the award criteria and other provisions of the Tender Document are skewed and marred with irregularities and secrecy to potentially allow certain**

tenderers to be awarded all lots thus unfairly disadvantaging, discriminating and/or unfairly edging out the Applicant who would otherwise benefit from effective competition are time barred for having been raised outside the statutory period of 14 days of occurrence of alleged breach of duty imposed on the 1st and 2nd Respondents by the Act in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 thus ousting the jurisdiction of the Board only to this extent.

The upshot of our finding on the first issue framed for determination is that the Board will not address the second and third issues framed for determination.

Whether the Applicant's tender complied with the mandatory requirements of criteria No. 2 and 7 of Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria at page 20 and 21 of the Tender Document to proceed for evaluation at the Technical Requirements stage.

The Applicant avers that it tendered for Lots 1,5, and 6 of the subject tender and submitted a Tender Security dated 21st June 2022 for Lot 1, 5, and 6 of Kshs. 500,000/= valid for the entire period of the subject tender. On the advice of the 2nd Respondent, the Applicant states that it amended its Tender

Security to secure its preferred tender for Lot 6 submitting another Tender Security of Kshs. 500,000/= dated 22nd June 2022 before the closure and opening of the subject tender. Vide letter dated 3rd October 2022, the Applicant was notified that its tender was not successful because (a) it provided one Tender Security yet applied for three Lots which is against the requirement of provision of Tender Security for each Lot; and (b) the letter provided for Lot 5 did not state that it was an exclusive reseller.

The 1st and 2nd Respondents contend that at all material times during the procurement process they complied with the provisions of the Tender Document, the Act and Regulations 2020 and that the Applicant's tender failed to meet mandatory requirements under criteria No. 2 and 7 of Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria at page 20 and 21 of the Tender Document.

The Applicant now challenges the decision of the 1st and 2nd Respondent to disqualify it with respect to Lot 1, 5, and 6 of the subject tender.

The Board has carefully studied the Tender Document submitted by the 2nd Respondent as part of the confidential documents pursuant to Section 67(3)(e) of the Act and note that Section II- Tender Data Sheet (TDS) permitted tenderers to participate in more than one Lot and stated as follows:

"Section II- Tender Data Sheet

The following specific data shall complement, supplement, or amend the provisions in the Instructions to Tenderers (ITT). Wherever there is a conflict, the provisions herein shall prevail over those in ITT.

ITT Reference	*A. General*
ITT 1.1	*.....* *.....* *.....* *.....* *.....* *.....* *.....* *.....* *.....* *.....* *.....* *.....* *.....* *.....* ***Bidders who participate in more than one LOT should note that they will only be awarded one lot. Kindly indicate your preferred LOT. Successful tenderer shall be contracted for a***

	term of Seven (7) years with a review of terms at the end of the third (3) year
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Additionally, Clause 4 (i) & (ii) Multiple Contracts (ITT 34.4) N/A of Section III – Evaluation and Qualification Criteria at page 25 and 26 of the Tender Document provided as follows:

"4. Multiple Contracts (ITT 34.4) N/A

.....

OPTION 1

i. If a tenderer wins only one Lot, the tenderer will be awarded a contract for that Lot, provided the tenderer meets the Eligibility and Qualification Criteria for that Lot.

ii. If a tenderer wins more than one Lot, the tender will be awarded contracts for all won Lots, provided the tenderer meets the aggregate Eligibility and Qualification Criteria for all the Lots. The tenderer will be awarded the combination of Lots for which the tenderer qualifies and the others will be considered for award to second highest tenderers.

....."

The Board is cognizant of Article 227 of the Constitution which requires the 2nd Respondent to have a procurement system that is fair, equitable, transparent, competitive, and cost effective and provides for a legislation that governs public procurement and asset disposal framework as follows:

"227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –

a) .....

b) .....

c) ..... and

d) ....."

The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 (1) and (2) of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

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

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."

Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders using the procedures and criteria set out in the Tender Document.

The Board has carefully studied the Tender Document of the subject tender and notes that the criteria for evaluation of the subject tender was set out in Section III- Evaluation and Qualification Criteria at pages 20 to 27 of the Tender Document. Criteria No. 2 and 7 of Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria at page 20 and 21 of the Tender Document provides as follows:

" SECTION III- EVALAUTION AND QUALIFICATION CRITERIA

1. .....

1.1 .....

1.2 .....

1.3 .....

2. Preliminary Examination for Determination of Responsiveness

2.1 The Procuring Entity will start by examining all tenders to ensure they meet in all respects the eligibility criteria and other mandatory requirements in the ITT, and that the tender is complete in all aspects in meeting the requirements provided for in the preliminary evaluation criteria outlined below. The Standard Tender Evaluation Report Document for Goods and Works for evaluating Tenders provides very clear guide on how to deal with review of these requirements. Tenders that do not pass the Preliminary Examination will be considered non-responsive and will not be considered further. [Emphasis ours]

[The Procuring Entity will provide the preliminary evaluation criteria. To facilitate, a template may be attached or clearly described all information and list of documentation to be submitted by Tenderers to enable preliminary evaluation of the Tender]

Evaluation of duly submitted tenders will be conducted in three main parts as follows:

Part I: Preliminary Evaluation Criteria, Mandatory requirements

No.	*Requirement*	
1.	*.....*	*.....*
2.	*Tender Security amounting to Kenya Shillings Five Hundred Thousand (Kshs. 500,000.00) in the prescribed format valid for 156 days from the tender opening date. Bidders will be required to submit an original tender physically to the office of the General Manager, Procurement and Logistics department, KAA Headquarters on or before the closing/opening date and time. A copy of the tender security shall be*	*Must Meet*

	submitted online with the tender document.	
3.	***.....***	***.....***
4.	***.....***	***.....***
5.	***.....***	***.....***
6.	***.....***	***.....***
7.	***Letter from the specific brand manufacturers confirming that the bidder is a genuine and Authorized Reseller for its brands and/OR letter from the Master Distributor for East Africa- APPLICABLE FOR LOT 2,3,4,5, AND 6 only Additional requirement for Lot 5 – MUST be an exclusive reseller for the line of cosmetics. Letter from manufacturer stating that bidder is an EXCLUSIVE RESELLER of its line of cosmetic products.***	***Must Meet***

8.	***.....***	***.....***
9.	***.....***	***.....***
10.	***.....***	***.....***
11.	***.....***	***.....***
12.	***.....***	***.....***
13.	***.....***	***.....***
14.	***.....***	***.....***
15.	***.....***	***.....***

Bidders who do not meet any of the above requirements shall be disqualified and will not be evaluated further. [Emphasis ours]

Additionally, the Tender Document made provision for amendments to the tendering documents and issuance of clarifications to tenderers pursuant to Section 75 of the Act.

The Board notes that Section 75 of the Act authorizes the 2nd Respondent to make modifications to tender documents by issuing an addendum and gives it a responsibility to notify and avail a copy of the addendum to each of the tenderers it provided copies of the tender documents. This provision sates that:

"75. Modifications to tender documents

(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender.

(2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.

(3) A procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.

(4) The addendum shall be deemed to be part of the tender documents.

(5) If the tender documents are amended when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, or the time remaining is less than the period indicated in instructions to tenderers, the accounting officer of a procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders."

The Board has carefully studied the Tender Document submitted by the 2nd Respondent as part of the confidential documents pursuant to Section

67(3)(e) of the Act and notes that ITT 7 under Section I- Instructions to Tenderers at page 4 of the Tender Document provided for amendment of tendering documents as follows:

> ***"7 Amendment of Tendering Document***
>
> ***7.1 At any time prior to the deadline for submission of Tenders, the Procuring Entity may amend the tendering document by issuing addenda.***
>
> ***7.2 Any addendum issued shall be part of the tendering document and shall be communicated in writing to all who have obtained the tendering document from the Procuring Entity on accordance with ITT 6.3. The Procuring Entity shall also promptly publish the addendum on the Procuring Entity's webpage in accordance with ITT 7.1***
>
> ***7.3 To give prospective Tenderers reasonable time in which to take an addendum into account in preparing their Tenders, the Procuring Entity may, at its discretion, extend the deadline for the submission of Tenders, pursuant to ITT 22.2"***

The Board notes that vide Addendum No. 2 dated 9th June 2022, the 2nd Respondent issued several clarifications regarding the subject tender *inter alia* on Criteria No. 2 and 7 of Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria

at page 20 and 21 of the Tender Document, TDS ITT 1.1 at page 17 and Item 4 (ii) at page 26 of the Tender Document as follows:

"*.....*

Addendum No. 2

The following are tender clarifications/addendum issued regarding the above tender in accordance to instructions to tenderers clause 7.3 of the bidding document for the referenced tender.

No.	***INQUIRY***	***RESPONSE***
1.	***Page 21 item No 7 requires bidders to provide a letter from the manufacturer of the various items, Kindly clarify if this should be a mandatory requirement considering some of the LOTS include majorly of artwork and therefore have no specific manufacturers.***	***This is a mandatory requiremen as follows:*** ***a) Letter from the specific brand manufacturer confirming that the bidder is a genuine Authorized Reseller for its brands and / Confirmation from the Master Distributer- APPLICABLE LOT 2,3,4,5,and 6 only.*** ***b) Additional requirement for LOT 5- MUST be exclusive reseller for the line of cosmetic products from***

		manufacturer stating the bidder is the EXCLUSIVE RESELLER of its line of cosmetic products.
2.	*Page V Item 8 states that All prices must be in Kenya shillings and shall remain valid for 126 days from the closing date of Tender while Under Tender Data Sheet page 18, ITT 14.1 states that the prices should be in USD and should be fixed during the contract period. Kindly clarify* *a) Currency of prices* *b) Validity period of the prices*	*Bidder are to quote in US Dollars and valid for a period of 126 days from the closing/ opening date.*
3.	*Tender Data Sheet page 17 ITT 1.1 states that Bidders will be awarded only one lot while page 26 item ii indicates that a bidder may be awarded more than one LOT. Kindly clarify.*	*Bidders who participate in more than one LOT should note that they will only be awarded one lot. Please indicate your preferred Lot or order of preference.*
4.	.....	.....
5.	*Tender Security of Kshs 500,000, if the company is applying for more than lot, is the security*	*Yes*

	supposed to remain Kshs. 500,000/= for each lot?	
6.	.....	.....
7.	*Tender documents- are we supposed to submit any tender forms or documents physically at KAA, apart from tender security?* *Please see attached page 18(ITT 6 & ITT 24.6) and page 20 (Mandatory requirements number 2) which are giving conflicting information.*	*Bidders are hereby informed to submit their tenders online as per the invitation to tenderers clause No. 7 and ITT 1.2 (a).* *However, the bidders are hereby notified amendment of the statement under clause No. 2 mandatory evaluation criteria to read* *"Bidders will be required to submit an original Tender Security physically to the office of General Manager, Procurement and Logistics department, KAA Headquarters on or before the closing/opening date and time. A copy of the Tender Security shall be submitted online with the tender document."*
8.	.....	.....
9.	.....	.....

10.	***.....***	***.....***

The closing/opening date is hereby extended to 16th June, 2022 at 11.00 a.m. from 14th June, 2022 at 11.00 a.m.

Kindly ensure that your tender is valid for a period of 126 days and your tender security is valid for a period of 156 days from the NEW closing/opening date of 16th June, 2022 at 11.00 a.m.

This addendum forms part of the bidding document and is binding on all bidders. All other conditions remain the same.

....."

Addendum No. 2 dated 9th June 2022 in essence set out, *inter alia,* that tenderers in the subject tender were required to provide in their respective tenders (a) a Manufacturer's Authorization confirming the tenderer was a genuine authorized reseller for its brands for Lots 2,3,4,5, and 6 with tenderers for Lot 5 being required to avail a letter of the specific brand manufacturer confirming them as an Exclusive Reseller for its line of cosmetic products; (b) quoted prices to be in US Dollars; (c) a Tender Security of Kshs. 500,000/= for each lot applied for; and (d) to submit an original Tender Security physically to the office of the General Manager, Procurement and Logistics department of the 2nd Respondent on or before the closing/ opening date and time of the subject tender.

Criteria No. 2 and 7 of Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria at page 20 and 21 of the Tender Document were mandatory requirements in which tenderers were required to satisfy, failure to which, one's tender would be disqualified from proceeding to the Technical Requirements stage. The Board notes that Addendum No. 2 dictated that tenderers who participated in more than one lot in the subject tender would only be awarded one lot and were requested to indicate their preferred Lot or order of preference.

The Board has studied the Evaluation Report and observes that upon evaluation, the Applicant's tender was determined as non-responsive at the Preliminary Evaluation stage having failed to comply with mandatory requirements under criteria No. 2 and 7 of Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria at page 20 and 21 of the Tender Document.

We have studied the Applicant's tender submitted online in response to the subject tender and note the following with respect to the evaluation criteria that the 2nd Respondent's Evaluation Committee found the Applicant's tender non responsive:

No.	Requirement in the Tender Document as amended by Addendum No. 2 dated 9th June 2022	What the Applicant provided in its tender	Outcome of Evaluation of the Applicant's tender as captured in the Evaluation Report	Observation by the Board of the Applicant's tender
2	Tender Security amounting to Kenya Shillings Five Hundred Thousand (Kshs. 500,000.00) in the prescribed format valid for 156 days from the tender opening date for each lot where a tenderer has applied for	• Submitted a hard copy of Bid Bond No: BD0206225421 dated 21st June 2022 from NCBA Bank Kenya PLC in the sum of Kenya Shillings Five Hundred Thousand Only (Kshs. 500,000.00) for LOT 1: KENYAN TEA & COFFEE SHOP,	• No • At page 31 of 42 of the Evaluation Report, the reason for failing Preliminary/ Mandatory Evaluation was indicated to be that the tenderer did not provide one Bid/Tender Security yet	• There were no hard copies of the Tender Securities submitted to the Board as part of the confidential documents. However, we note that MIN/2/2022 at page 2 of 2 of the Tender Opening Minutes indicated that

	more than one lot. Bidders will be required to submit an original Tender Security physically to the office of General Manager, Procurement and Logistics department, KAA Headquarters on or before the closing/opening date and time. A copy of the Tender Security shall be submitted online with the	LOT 2: GOLD AND JEWELRY SHOP, LOT 3: WATCH & CLOCKS STORE, LOT 4: ELECTONICS & TECHNOLOGY STORE, LOT 5: BEAUTY STORE AND LOT 6: TOY, GIFT & SOUVENIOR STORE which was also attached at page 13 of the Applicant's tender submitted online. • Bid Bond No: BD0206225421 dated 22nd	applied for three Lots which is against the requirement of provision of Bid/Tender Security for each Lot.	the Applicant submitted only one Tender Security for one lot but it tendered for three lots as captured in the 2nd Respondent's Opening Register. • We note that the Applicant provided two Tender Securities. The first Bid Bond dated 21st June 2022 failed to categorize the lots tendered for by

	tender document.	June 2022 from NCBA Bank Kenya PLC in the sum of Kenya Shillings Five Hundred Thousand Only (Kshs. 500,000.00) for LOT 6: TOYS, GIFTS, & SOUVENIRS STORE • The Bid Bond dated 21st June 2022 and 22nd June 2022 both indicated that they were valid up to and including the date 28 days after the date of expiration of		indicating all the lots in the subject tender. The second Bid Bond dated 22nd June 2022 indicated that it was for the Applicant's preferred lot being LOT 6: TOYS, GIFTS, & SOUVENIRS STORE. It was also submitted online by the Applicant as an attachment in the email sent to the 2nd

		the Tender Validity.		Respondent on **22/06/2022 at 11:00:43 A.M after the tender submission deadline of 11:00 A.M.** • It is our finding that the Applicant provided only one Tender Security for Lot 6 in the subject tender yet it applied for three lots in the subject tender which is against Mandatory Requirement 2 of Part I:

				Preliminary Evaluation Criteria, Mandatory requirements at page 20 of the Tender Document and the provisions of Clause 5 in Addendum No. 2 dated 09/06/2022 requiring a tenderer to provide a Tender Security of Kshs. 500,000/- for each lot tendered for.

7	Letter from the specific brand manufacturers confirming that the bidder is a genuine and Authorized Reseller for its brands and/or letter from the Master Distributor for East Africa- APPLICABLE FOR LOT 2,3,4,5, AND 6 only Additional requirement for Lot 5 – MUST be an exclusive reseller for the line of cosmetics. Letter from	• Applicant submitted letters from the specific brand manufacturers confirming that it was a genuine and authorized reseller for its brands as follows: • At page 27 of its tender it submitted an Owner's Authorization from Fam Maza Curio Shop dated 07/06/2022 with respect to Lot 6 confirming	• Yes • Lot 5- NO • At page 31 of 42 of the Evaluation Report, the reason for failing Preliminary/ Mandatory Evaluation was indicated to be that the letter provided did not state that the tenderer is an EXCLUSIVE RESELLER	• We note that the Applicant partly complied with Mandatory requirement 7 of Part I: Preliminary Evaluation Criteria, Mandatory requirements at page 21 of the Tender Document and the provisions of Clause 1 in Addendum No. 2 dated 09/06/2022 by providing letters from specific brand manufacturers confirming

	manufacturer stating that bidder is an EXCLUSIVE RESELLER of its line of cosmetic products.	Applicant as a genuine and authorized reseller of its brand. • At page 28 of its tender it submitted an Owner's Authorization from Spin Africa dated 09/06/2022 with respect to Lot 6 confirming Applicant as a genuine and authorized reseller of its brand. • At page 29 of its tender it submitted a Manufacturer		that the Applicant was a genuine and authorized reseller of their brands for lots 1,5, and 6. • However, the Applicant **failed to comply with the additional requirement** for Lot 5 which required a tenderer to be an exclusive reseller for the line of cosmetics noting that the letters

		Authorization from L'oreal Middle East dated 14/06/2022 with respect to Lot 5 confirming that the Applicant is a genuine and authorized reseller and distributor of its brand. • At page 30 of its tender it submitted a Manufacturer Authorization from Madi International dated 16/06/2022 with respect to Lot 5		submitted by the Applicant from L'oreal Middle East dated 14/06/2022 and Madi International dated 16/06/2022 for Lot 5 did not indicate that the Applicant was an **EXCLUSIVE RESELLER** of their line of cosmetic products.

		confirming that the Applicant is a genuine and authorized reseller and distributor of its brand. • At page 31 of its tender it submitted an Owner's Authorization from Jowam Coffee Traders Co. Ltd dated 14/06/2022 with respect to Lot 1 confirming that the Applicant is a genuine and authorized reseller and distributor of its brand.		

		• At page 32 of its tender it submitted an Owner's Authorization from Dormans Coffee Limited with respect to Lot 1 confirming that the Applicant is a genuine and authorized reseller and distributor of its brand.		

From the analysis enumerated in the table above, it is clear that the Applicant's tender did not comply with mandatory requirements under criteria No. 2 and 7 of Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria at page 20 and 21 of the Tender Document and provisions of clause 1, 5, and 7 of Addendum No. 2 dated 9th June 2022 since the Applicant did not provide a Tender Security for each of the lots tendered for in good time as the soft

copy of the Bid Bond dated 22nd June 2022 was submitted after the stipulated tender submission deadline. Additionally, the Applicant failed to submit a hard copy of Tender Security for each of the lots tendered for since only one hard copy was captured in the Tender Opening Minutes. It is also clear that the Applicant failed to submit a letter from a manufacturer stating that it was an exclusive reseller of its line of cosmetic products for Lot 5 in the subject tender. These requirements were mandatory in nature and failure to comply will render a tender non-responsive and such tender would not proceed for further evaluation at Part II: Evaluation of Tenderer's Technical Requirement.

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 tender only qualifies as a responsive tender if it meets all requirements set out in the tender 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." [Emphasis ours].***

Further, in **Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR** Justice E.K. Ogola, held that;

> ***"...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities."***
> **[Emphasis ours]**

The import of the aforementioned cases is that mandatory requirements cannot be waived. In this instance therefore, the Evaluation Committee had no option but to find the Applicant's tender non-responsive at the Preliminary Evaluation stage, having failed to meet mandatory requirements under criteria No. 2 and 7 of Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria at page 20 and 21 of the Tender Document.

In the circumstances, we find that the Applicant's **tender did not comply with the mandatory requirements of criteria No. 2 and 7 of Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria at page 20 and 21 of the Tender Document to proceed for evaluation at the Technical Requirements stage.**

What orders should the Board grant in the circumstances?

We have found that the Applicant's tender **did not comply with the mandatory requirements of criteria No. 2 and 7 of Part I: Preliminary Evaluation Criteria, Mandatory requirements of Section III – Evaluation and Qualification Criteria at page 20 and 21 of the Tender Document to proceed for evaluation at the Technical Requirements stage. It therefore follows that the 2nd Respondent's Evaluation Committee was right in finding the Applicant's tender non-responsive for failure to comply with mandatory requirements of the Tender Document. Consequently, it is only just and fair that we dismiss, which we hereby do, the instant Request for Review for lacking in merit.**

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 12th October 2022:

1. The Request for Review filed on 12th October 2022 by the Applicant with respect to Tender No. KAA/RT/MBD/0210/2021-2022 Restricted Tender for Development and Management of: Lot 1: Kenyan Tea & Coffee Shop, Lot 2: Gold and Jewelry Shop, Lot 3: Watch & Clocks Store, Lot 4: Electronics & Technology Store, Lot 5: Beauty Store and Lot 6: Toy, Gift & Souvenir Store be and is hereby dismissed.

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

Dated at NAIROBI, this 2nd Day of November 2022.

.....	.....
CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**