

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 91/2022 OF 17th OCTOBER 2022

BETWEEN

NW REALITE LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

NATIONAL HOSPITAL INSURANCE FUND 1ST RESPONDENT

NATIONAL HOSPITAL INSURANCE FUND 2ND RESPONDENT

GIMCO LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer, National Hospital Insurance Fund in relation to Tender No. NHIF/001/2022-2023 Provision for Letting and Management Services for the NHIF Building, Carpark Complex and Contrust House

BOARD MEMBERS PRESENT

- | | |
|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Paul Jilani | -Member |
| 3. Mrs. Irene Kashindi | -Member |

IN ATTENDANCE

- 1. Ms. Sarah Ayoo - Holding brief for Acting Board Secretary

BACKGROUND OF THE DECISION

The Tendering Process

National Hospital Insurance Fund, the Procuring Entity and the 2nd Respondent herein, invited eligible tenderers to submit tenders in response to Tender No. NHIF/001/2022-2023 for Provision of Letting and Management Services for the NHIF Building, Carpark Complex and Contrust House (hereinafter referred to as the "subject tender") using an open national method of tendering and by way of an advertisement placed on the print media on 25th August 2022, on the 2nd Respondent's website (www.nhif.or.ke) and the Public Procurement Information Portal (PPIP) website (www.tenders.go.ke) with a submission deadline of 8th September 2022 on or before 10.00 a.m.

Tender Submission Deadline and Opening of Tenders

A total of six (6) tenderers submitted their tenders in response to the subject tender within the tender submission deadline and were recorded in the opening minutes for the subject tender dated 8th September 2022 (hereinafter referred to as "Tender Opening Minutes") as follows:

No	Name of Tenderer
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1.	NW Realite Valuers & Property
2.	Laser Property Services
3.	Regent Management Limited
4.	Gimco Limited
5.	Ebony Estates Limited
6.	Crystal Valuers Limited

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent was to first conduct a preliminary evaluation to determine whether (a) the tender has been submitted in the required format as per the invitation and tender instructions; (b) any Tender Security submitted is in the required form, amount, and validity period; (c) the tender has been signed by the lawfully authorized person; (d) the required number of copies of the tender have been submitted as per the invitation and tender instructions; and (d) the tender is valid for the required period as per the tender instructions.

The Evaluation Committee undertook evaluation of the six (6) tenders in the following four stages as recorded in an Evaluation Report signed by the Evaluation Committee members on 28th September 2022 (hereinafter referred to as the "Evaluation Report"):

- i. Mandatory/ Preliminary Requirements;
- ii. Technical Evaluation Requirements;
- iii. Financial Evaluation Requirements Criteria; and
- iv. Due Diligence Evaluation Requirements.

Mandatory/ Preliminary Requirements

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Mandatory Requirements of Section III – Evaluation and Qualification Criteria at page 39 to 40 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 14 mandatory requirements at this stage to qualify to proceed for evaluation at the Technical Evaluation Requirements stage. A failure to satisfy any one of the 14 mandatory requirements would render a tender non-responsive at this stage.

The Evaluation Committee deliberated about the requirement under Mandatory Requirement number 12 at page 40 of the Tender Document requiring a tenderer to demonstrate that they have experience and competence and are currently managing a similar portfolio of above 300,000 square feet (Commercial) and agreed to base its evaluation on an accumulative portfolio and not on one unit.

At the end of evaluation at this stage, all the six (6) tenders were found responsive and proceeded for evaluation at the Technical Evaluation Requirements stage.

Technical Evaluation Requirements

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Technical Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 40 and 41 of the Tender Document. Tenders were required to comply with the Technical Evaluation Requirements and attain a minimum technical score of 85% to proceed for evaluation at the Financial Evaluation stage.

At the end of evaluation at this stage, two (2) tenders were found to be non-responsive which, included the Applicant's tender, while four (4) tenders were found responsive which included the Interested Party's tender. Only the responsive tenders proceeded for evaluation at the Financial Evaluation stage.

Financial Evaluation Requirements Criteria

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Financial Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 43 of the Tender Document. All technically responsive tenderers were required to give a

quotation within the provisions of the Estate Agents Act. The Tender Financial Proposal was to be given within the rates as provided for by the Estate Agents Act and guidelines on fees as provided for by the said Act and industry best practices.

At the end of evaluation at this stage, three (3) of the aforementioned tenders were found responsive, including the Interested Party's tender, while one (1) tender was found non-responsive. The responsive tenders proceeded to the Due Diligence Evaluation Requirements stage.

Due Diligence Evaluation Requirements

At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out as Part B - Due Diligence 30% of Section III – Evaluation and Qualification Criteria at page 42 of the Tender Document. Tenders were required to comply with the Due Diligence Evaluation Requirements and attain a minimum score of 25%. Tenders were ranked as follows:

Due Diligence Evaluation Requirements Average Scores Table

No.	Bidders Names	1	2	3	4	5	6	Total Score 30%

4	Crystal Valuers Limited	1.7	1.9	2.5	1.7	2.4	3	13.2
5	Gimco Limited	5	4.7	4.7	4.9	3.6	4.1	27
6	Ebony Estates Limited	2	2.4	1.9	2	3.7	3.5	15.5

Evaluation Committee's Recommendation

The Evaluation Committee guided by the Real Estate Agent Act on remuneration for management and lettings for commercial buildings found the Interested Party to be the most suitable evaluated tenderer who had met all the required evaluation criteria and recommended it for award of the subject tender **at 2.9% Management Fee and Letting Fee at 4.35% respectively all inclusive of 16%.**

Professional Opinion

In a Professional Opinion dated 30th September 2022 (hereinafter referred to as the "Professional Opinion"), the Head of the Supply Chain Management Department, Ms. Rose Mugambi, 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.

Dr. Peter Kamunyo, the Chief Executive Officer of the 2nd Respondent and the 1st Respondent herein approved the Professional Opinion on the same day of 30th September 2022.

Notification to Tenderers

Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award Contract in the subject tender dated 3rd October 2022.

REQUEST FOR REVIEW

On 17th October 2022, the Applicant filed a Request for Review dated 17th October 2022 together with a Supporting Affidavit sworn by Nahashon Kuria Chege, its Chief Executive Officer, on 17th October, 2022 through the firm of Mutua-Waweru & Company Advocates, seeking the following orders verbatim:

- a) THAT the decision of the Respondent reflected in its letter dated 3rd October, 2022 effectively declaring the Interested Party as the successful bidder in relation to Tender Number NHIF/001/2022-2023 for the provision for letting and**

management services for the NHIF Building, Car Park Complex and Contrust House be and is hereby annulled and set aside in its entirety.

b) THAT the decision of the Respondent reflected in its letter dated 3rd October, 2022 effectively declaring the Applicant's bid in relation to Tender Number NHIF/001/2022-2023 for the provision for letting and management services for the NHIF Building, Car Park Complex and Contrust House as unsuccessful be and is hereby annulled and set aside in its entirety.

c) THAT upon grant of prayer (b) above, the Honourable Review Board be pleased to order that the Applicant's bid had passed the technical evaluation stage and direct the Respondent to evaluate the Applicant's financial bid and all subsequent stages to conclusion.

d) THAT in the alternative to prayer (c) above, the Respondent be and is hereby directed to within such period as the Honourable Review Board shall set reconsider the submitted tenders in relation to Tender Number NHIF/001/2022-2023 for the provision for letting and management services for the NHIF Building, Car Park Complex and Contrust House through a reconstituted tender evaluation committee.

e) THAT the Honourable Review Board be pleased to make such other or further orders as it may deem just and expedient.

f) THAT the costs of this Request for Review be borne by the Respondent.

In a Notification of Appeal and a letter dated 17th 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 17th October 2022.

In opposition to the Request for Review, the 1st and 2nd Respondents on 25th October 2022 filed through the firm of Kipkenda & Company Advocates, a Notice of Appointment of Advocates dated 24th October 2022, and a Statement of Reply sworn by Rose Mugambi on 25th October 2022.

Vide letters dated 25th 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 25th 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 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 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 1st November 2022, the Applicant filed a Supplementary Affidavit sworn by Nahashon Kuria Chege on 31st October 2022 together with its written submissions dated 1st November 2022.

APPLICANT'S CASE

The Applicant states that it participated in the subject tender as a tenderer and submitted its tender in strict compliance with the terms of the Tender Document.

The Applicant avers that vide a letter of Notification of Award of Contract in respect to the subject tender dated 3rd October 2022 and transmitted by the Respondents on 6th October 2022, it was notified that its tender was unsuccessful and rendered non-responsive at the mandatory stage for reasons that (a) it had attached contracts of less than three (3) years for a similar portfolio; and (b) upon technical evaluation, it had not attained the threshold mark of 85% since its average score was 82.9%.

The Applicant avers that the basis upon which the Respondents determined its tender unsuccessful was extraneous to the provisions of the Tender Document because (a) there was no mandatory stage in the tender evaluation criteria hence its tender if correctly evaluated in accordance with the terms of the Tender Document could not logically be said to have failed at a stage that was not provided for ; (b) if by mandatory stage the Respondents intended to refer to the Preliminary Examination for

Responsiveness provided for under Section III of the Tender Document, it is a contradiction to have indicated that its tender did not attain the threshold of 85% at the technical evaluation stage since had it failed at the Preliminary Examination stage it would not have been eligible for further consideration; (c) the fact that its tender was considered at the technical evaluation stage is explicit confirmation that it had been found responsive for meeting all the mandatory requirements under the Tender Document and ; (d) there was no requirement, mandatory or otherwise, in the Tender Document that tenderers had to attach contracts for three (3) years and above for similar portfolio.

The Applicant alleges that its tender was subjected to evaluation parameters that were outside the provisions of the Tender Document and cannot be said to have met the fairness test that underpins public procurement.

The Applicant avers the Notification of Intention to Award Contract addressed and seemingly transmitted to the Interested Party on email on 3rd October 2022 did not provide the same reasons as those conveyed to the Applicant, three (3) days later, as to why its bid was unsuccessful.

The Applicant alleges that the discordant Notification of Intention to Award Contract and the failure to transmit the same simultaneously to both the successful and unsuccessful tenderers is indicative of a lack of transparency in evaluation of the subject tender contrary to the provisions of Article 227(1)

of the Constitution and Regulation 82 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020").

The Applicant further alleges that its purported average rating of 82.9% at the Technical Evaluation Requirements stage when looked at in the context of the objective evaluation criteria and respective scores allocated for each sub-set in the Tender Document is indicative of possible use of individual and subjective discretion by members of the 2nd Respondent's Evaluation Committee in rating the Applicant's tender, which cannot have yielded a fair competition among the tenderers.

The Applicant avers that vide letter dated 14th October 2022 delivered to the Respondents on the same day, it sought for information relating to the rating/scoring matrix of the various tenders in order to understand the basis of its overall rating but its request was not attended to.

RESPONDENTS' CASE

In response, the Respondents contend that the subject tender was advertised through print media and on the 2nd Respondent's website on 25th August 2022 inviting eligible tenderers to download the Tender Document which set out, *inter alia*, the Tendering Procedure, the Instructions to Tenderers, the Description of Services, and the Evaluation and Qualification criteria. The Respondents further contend that on the tender submission deadline of 8th September 2022, a total of six (6) tenders were submitted

and that in compliance with Section 46 of the Act, the 1st Respondent appointed an Evaluation Committee to evaluate the tenders in accordance with the requirements of the Tender Document.

The Respondents contend that Section III of the Tender Document at pages 39 to 43 set out the Evaluation and Qualification criteria and that evaluation and comparison of the tenders was done using the set out criteria, was objective, and quantifiable as per statutory requirements.

The Respondents contend that the Evaluation Committee found that all six (6) tenders, including the Applicant's tender, met the Mandatory Preliminary Evaluation requirements set out at Clause 2 Evaluation and Contract Award criteria of Section III – Evaluation and Qualification criteria and were declared to be responsive to proceed to the Technical Evaluation Requirements stage.

The Respondents further contend that the Mandatory Requirement No. 12 at Clause 2 Evaluation and Contract Award criteria of Section III – Evaluation and Qualification criteria of the Tender Document specifically required that each tenderer must demonstrate that they have experience, competence, and are currently managing a similar portfolio of above 300,000 square feet (Commercial). Further, the Technical Evaluation criteria laid out under Section III – Evaluation and Qualification criteria of the Tender Document

explicitly stated that the minimum score was 85% and any tenderer who would score less than the set pass mark would be disqualified from proceeding to the Financial Evaluation stage.

The Respondents contend that scoring of all six (6) tenders at the Technical Evaluation Requirements stage was done by each member of the Evaluation Committee and upon aggregating, the average score on each requirement was given to the tender. The Applicant scored an aggregate of 82.9% on its tender which was below the threshold set in the Tender Document and thus could not proceed to the Financial Evaluation stage.

The Respondents contend that the Evaluation Committee observed the requirements provided for under the Technical Evaluation Criteria of Section III – Evaluation and Qualification criteria at pages 40 and 41 of the Tender Document. It is the Respondents case that (a) on Technical Requirement number 1 requiring a tenderer to submit evidence of having been in the specific business for 5 years and above experience with clients of a similar size to the 2nd Respondent, the Applicant scored an average of 14 out of 20 marks since the contracts attached to its tender were of less than three (3) years with similar portfolio; (b) on Technical Requirement number 2 requiring a tenderer to prove professional qualifications and relevant experience of six (6) technical personnel, the Applicant scored an average of 13.2 out of 15 marks since it did not provide details of a caretaker with five (5) years' experience and further, it did not provide details of a Mechanical

Technician; (c) on Technical Requirement number 3 that required each tenderer to demonstrate similar assignments from five (5) clients with portfolio in terms of assignment and size (provide evidence of similar work done through copies of contract documents), the Applicant scored an average of 16.8 out of 20 marks since it failed to attach contracts with similar portfolio assignment and size; (d) on Technical Requirement number 4 that required each tenderer to submit a draft Service Level Agreement for the applied tender covering all buildings to be managed with a marketing and letting plan, plan by the bidder to achieve maximum return on the lettable spaces, property management plan, and a plan to deal with rent arrears within 90 days, the Applicant scored an average of 4.4 out of 5 marks; (e) on Technical Requirement number 5 that required each tenderer to demonstrate that it has experience and competency to manage a commercial car automated parking facilities in Nairobi City County and provide an executed copy of the Service Level Agreement, the Applicant scored an average of 4.8 out of 5 marks ; (f) on Technical Requirement number 6 that required each tenderer to demonstrate the Size of its firm (number of employees supporting various functions of the assignment, the Applicant scored an average of 7.2 out of 10 marks since they failed to attach a payroll by-product to support the number of its employees; and (g) on Technical Requirement Number 8 that required each tenderer to demonstrate the use of property management software and where the software is not developed in-house, to provide necessary licenses by the supplier or the developer, the Applicant scored an average of 12.4 out of 15 marks. Consequently, the Applicant did not attain the 85% threshold of the

Technical Evaluation criteria and the decision of the 2nd Respondent was communicated to the Applicant vide letter dated 3rd October 2022 which was conveyed via email.

The Respondents contend that the letters of Notification of Award of Contract dated 3rd October 2022 were sent to all tenderers via email on 5th October 2022 and notified them to collect the said letters from the 2nd Respondent's offices. The 2nd Respondent concedes that it inadvertently informed the Applicant that its tender failed at the Mandatory Evaluation stage instead of the Technical Evaluation Stage which is an error of commission in typing the said notification letter and did not affect the fact that the Applicant's tender was found non-responsive. The 2nd Respondent further concedes that it only listed one specific reason for the Applicant's non-compliance at the Technical Evaluation Stage yet there were several reasons as to why its tender was non-responsive. The 2nd Respondent states that it is willing to re-issue a letter of Notification of Award of Contract to the Applicant giving detailed reasons why its tender fell below the minimum score of 85% set out in the Tender Document.

The Respondents contend that even if the Applicant's tender had been deemed to have complied with the Technical Evaluation requirements, its Financial Proposal would still not have been the lowest evaluated tender

among the responsive tenderers as evidenced by the detailed Price Schedule of the Applicant *vis-à-vis* that of the Interested Party.

APPLICANT'S REJOINDER

In its rejoinder, the Applicant avers that it has noted the concessions of the Respondents in their Statement of Reply regarding the letter of Notification of Award of Contract dated 3rd October 2022, and that the said notification did not conform with the requirements of the provisions of Section 87(3) of the Act thus renders the entire procurement process tainted. Further, that the Respondents have conveniently failed to disclose the date when the Interested Party was notified of award of the subject tender. The Applicant avers that the Respondents only sent to five (5) of the six (6) tenderers the email dated 5th October 2022 annexed to their Statement of Reply requesting the said tenderers to collect the notification letter which serves to confirm that the outcome of the procurement process was not communicated simultaneously to all evaluated tenderers contrary to the express provisions of Section 87(3) of the Act.

The Applicant avers that the demonstrated omissions by the Respondents were not innocent but rather the consequence of a process that was contrived to arrive at a pre-determined outcome in the procurement process since (a) the disclosure under oath at paragraph 39 of the Statement of Reply in relation to terms of the Applicant's Financial Proposal is shocking

when taken in the context of the requirements of the Tender Document pursuant to Section I, Clauses 26.5,26.6,27.1.27.4, and 35.1 whose the cumulative effect is that if indeed its tender failed at the Technical Evaluation stage, its Financial Proposal should never have been opened for any purpose whatsoever; (b) there can be no explanation other than for nefarious reasons that the 2nd Respondent considered itself entitled to unseal the Applicant's Financial Proposal yet it purports to have ascertained that its bid had failed at the Technical Evaluation stage; and (c) the financial rates and/or charges for all tenderers are regulated by the law under the Estate Agents Act, Cap. 533 Laws of Kenya, if in compliance with the provisions of Section 86(d) of the Act, the 2nd Respondent was to apply the minimum fees prescribed under the Estate Agents(Remuneration) Rules 1987 which is what incidentally the Applicant to the best of its knowledge had quoted in its Financial Proposal. It was not really expected that there was going to be any significant competition among the tenderers on pricing hence the contrived and nebulous design to lock out as many tenderers as possible before the Financial Evaluation stage in order to give a preferred and predetermined tenderer the edge over the rest.

The Applicant further avers that the depositions at paragraphs 19-26 of the Statement of Reply demonstrates that the evaluation and scoring of the subject tender did not comply with the provisions of Clause 3 Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 40 and 41 of the Tender Document but was instead influenced by the

subjective perspectives of the members of the Evaluation Committee because (a) the Respondents have not in their Statement of Reply adverted to the existence of individual score sheets for each member of the evaluation committee and therefore it is difficult to understand how and on what basis the scores allocated to the Applicant may be termed an aggregate average; (b) there is not a single reason advanced as to why the Applicant's tender did not muster the maximum scores under Technical Requirement numbers 4, 5 and 8. Seeing the scores allocated to the Applicant under these items, it is evident that without any justifiable reason whatsoever that it was denied not less than 3.4 marks it otherwise had attained; (c) The scoring criteria set out under Technical Requirement numbers 3, 4, 5, 6 and 8 did not have any room for awarding less than a whole mark and it therefore defies logic that the 2nd Respondent purports to have strictly applied the criteria yet the Applicant attained scores that have less than a whole mark under these 5 items indicating that the Applicant's marks were moderated to its disadvantage; (d) the Applicant's tender did demonstrate that it had experience with clients of similar size spanning well over 5 years with its engagement contracts being renewed from time to time and therefore the 2nd Respondent's reference to contracts of ongoing engagement was extraneous to the criteria set under Technical Requirement Number 1; (e) the Applicant's tender had in full compliance with Technical Requirement Number 5 provided under Sub divider UV Appendix XVII evidence of a contract with a 3rd party in connection with management of an automated car park facility in Nairobi City County and therefore it is difficult to understand how it was not awarded the full score allocated under this item;

(f) there was no requirement under Technical Requirement number 6 to provide a "payroll by-product". On its plain terms, the tenderers were required to provide acknowledgment of statutory deductions from NHIF, NSSF and KRA yet the Applicant in Sub divider S Appendix XV of its tender provided evidence of these acknowledgments including one from the 2nd Respondent itself which it would easily have verified hence the failure to award full marks to the Applicant under this item was unjustified and grossly unfair; and (g) at pages 23 and 24 of its tender, the Applicant in full compliance with Technical Requirement number 8 confirmed its use of an in-house developed property management software and therefore the denial of the full marks thereunder was unjustified and grossly unfair.

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 Respondent pursuant to Section 67(3)(e) of the Act and finds that the following issues calls for determination.

- 1. Whether the 1st Respondent letter of Notification of Award of Contract dated 3rd October 2022 notifying the Applicant of the outcome of evaluation of the subject tender was issued in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020;**

- 2. Whether the Applicant's tender satisfied the Technical Evaluation requirements of Clause 3 Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 40 and 41 of the Tender Document to proceed for evaluation at the Financial Evaluation stage.; and**

- 3. What orders should the Board grant in the circumstances?**

Whether the 1st Respondent letter of Notification of Award of Contract dated 3rd October 2022 notifying the Applicant of the outcome of evaluation of the subject tender was issued in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020;

The Applicant avers that the Respondents failed to transmit the Notification of Award of Contract dated 3rd October 2022 simultaneously to both the successful and unsuccessful tenderers and that the reasons advanced as to why its tender was non-responsive were not similar to those advanced in the Interested Party's notification letter which is indicative of a lack of transparency in evaluation of the subject tender contrary to the provisions of Article 227(1) of the Constitution and the provisions of Section 87(3) of the Act read with Regulation 82 of the Regulations 2020.

The Respondents contend that the letters of Notification of Intention to Award the Contract in the subject tender were collected on 5th October 2022 by all six (6) tenderers as evidenced by the signed copy of register marked as Exhibit RM4. The 2nd Respondent has conceded in its Statement of Reply at paragraph 31 that it inadvertently informed the Applicant that its tender failed at the Mandatory Evaluation stage instead of the Technical Evaluation Stage which is an error of commission in typing the said notification letter and this did not affect the fact that the Applicant's tender was found non-responsive. Further, the 2nd Respondent conceded at paragraph 32 of its Statement of Reply that it only listed one specific reason for the Applicant's non-compliance at the Technical Evaluation Stage yet there were several reasons as to why its tender was non-responsive and states that it is willing to re-issue a letter of Notification of Award of Contract to the Applicant giving detailed reasons why its tender fell below the minimum score of 85% set out in the Tender Document.

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 87 of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and 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."

Section 87 of the Act recognizes that notification of the outcome of evaluation of a tender is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation ought to be done simultaneously to the successful tenderer(s) and the unsuccessful tenderer(s). A disclosure of who is evaluated as the successful tenderer is made to the unsuccessful tenderer with reasons thereof in the same notification of the outcome of evaluation.

The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

"82. Notification of intention to enter into a contract

(1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

- (2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.**
- (3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act.”**

In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful must be conducted in a transparent manner.

The Board has perused the confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and notes the notification letter dated 3rd October 2022 issued by the 1st Respondent informed the Applicant that its tender was unsuccessful at the Mandatory stage and reads as follows:

".....

Your bid failure at the Mandatory stage. The reason for failure was

- 1. The Contracts attached are less than three (3) years with a similar portfolio.***
- 2. Did not attain the 85% threshold of the technical evaluation criteria but an average of 82.9%.***

The successful bidder was;

<i>Name:</i>	<i>Gimco Limited</i>
<i>Address:</i>	<i>P.O Box 61551-00200 Nairobi</i>
<i>Contract price:</i>	<i>As per the table below inclusive of all taxes</i>

<i>Building</i>	<i>Item</i>	<i>Fee in %</i>	<i>Item</i>	<i>Fee in %</i>
<i>NHIF Building</i>	<i>Management Fee</i>	<i>2.9%</i>	<i>Letting Fee</i>	<i>4.35%</i>
<i>Parking Complex</i>	<i>Management Fee</i>	<i>2.9%</i>	<i>Letting Fee</i>	<i>4.35%</i>
<i>Contrust House</i>	<i>Management Fee</i>	<i>2.9%</i>	<i>Letting Fee</i>	<i>4.35%</i>

.....”

The Board notes that the above notification letter issued by the 1st Respondent to the Applicant gives the reasons as to why the Applicant’s tender was not successful at the **Mandatory Stage** being that (a) the contracts attached are less than three (3) years with a similar portfolio; and (b) it did not attain the 85% threshold of the Technical Evaluation criteria but an average of 82.9%. We also note that the above notification letter disclosed that the Interested Party was the successful tenderer and how much the subject tender was awarded to the Interested Party but failed to disclose why the Interested Party was successful. Additionally, the 1st Respondent has conceded that it breached the provisions of Section 87(3) of the Act read with Regulation 82 of Regulations 2020 by failing to give several other reasons that led to the Applicant’s average score falling below the 85% threshold of Clause 3 of the Technical Evaluation criteria at page 40 of the Tender Document having scored an average of 82.9%.

The Board has perused the notification letters dated 3rd October 2022 issued to unsuccessful tenderers in the subject tender and notes that all the notification letters do not satisfy the threshold of Section 87(3) of the Act read with Regulation 82 of Regulations 2020 for failure to disclose the reasons why the Interested Party was successful in the subject tender.

The Board deems it fit to nullify the 1st Respondent's letter of Notification of Intention to Award Contract in the subject tender issued to the Interested Party dated 3rd October 2022 when nullifying the 1st Respondent's letters of Notification of Intention to Award Contract dated 3rd October 2022 issued to unsuccessful tenderers, including the Applicant herein, to enable all tenderers to be notified of the outcome of their tenders simultaneously with sufficient reasons as to why the successful tenderer was successful and at what amount, and for the Respondents to issue accurate information as to why the unsuccessful tenderer was unsuccessful in compliance with the provisions of Section 87(3) of the Act read with Regulation 82 of Regulations 2020.

Whether the Applicant's tender satisfied the Technical Evaluation requirements of Clause 3 Technical Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 40 and 41 of the Tender Document to proceed for evaluation at the Financial Evaluation stage.

The Applicant challenges the reasons advanced by the 1st and 2nd Respondent of having disqualified its tender at the mandatory stage of the subject tender because (a) it had attached contracts for less than three (3) years for similar portfolio; and (b) upon Technical Evaluation, it had not attained the threshold mark of 85% as its average score was 82.9%.

The Respondents at paragraphs 19 to 25 of their Statement of Reply enumerate why the Applicant's tender was deemed non-responsive having conceded that they inadvertently and erroneously informed the Applicant that its tender failed at the Mandatory stage instead of the Technical Evaluation stage.

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 blank tender document submitted by the 2nd Respondent as part of the confidential documents pursuant to Section 67(3)(e) of the Act to establish the criteria that the Evaluation Committee ought to have employed in evaluating the Applicant’s tender at Clause 3 Technical Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 40 and 41 of the Tender Document which provides as follows:

"3. Technical Evaluation Criteria

The Criteria, sub-criteria, and point system for the evaluation of the Technical Proposals:

<i>No.</i>	<i>Requirements</i>	<i>Scores</i>
<i>1.</i>	<p><i>Number of years the firm has been in a specific business (attach Contracts/Invoices) (Specific experience with clients of a similar size)</i></p> <ul style="list-style-type: none"> <i>• 5 years and above (20 marks)</i> <i>• 3 years and above (15 marks)</i> 	<i>20</i>

	<ul style="list-style-type: none"> • <i>Below 3 years (5 marks)</i> 	
2.	<p><i>Professional Qualification and relevant experience of six (6) technical personnel as outlined below (Key: team comprising varied level of expertise in the under listed areas)</i></p> <ul style="list-style-type: none"> • <i>Three managers for five (5) years – 2.5 Marks</i> • <i>Caretaker 5 years – 2.5 Marks</i> • <i>Electrical Technicians – 2.5 Marks</i> • <i>Mechanical Technicians – 2.5 Marks</i> • <i>Plumbing and Drainage experts – 2.5 Marks</i> • <i>Business Administrative and Management – 2.5 Marks</i> • <i>Other considerations as provided below points</i> <p><i>Key: Attach CV and copy of national ID. This information will be verified from relevant institutions.</i></p>	15

<p>3.</p>	<p>I. Experience in similar assignments Five (5) clients with portfolio in terms of assignment and size. (Provide evidence of similar work done i.e provide copies Contract documents)- 15</p> <p>II. Attach three (3) names of corporate clients as per the attached portfolio above, with clear addresses including the contact details (emails, telephone numbers) of the clients in a letter addressed to NHIF CEO using your letter head – 5 mks</p>	<p>20</p>
<p>4.</p>	<p>Bidder must submit Draft Service Level Agreement for the applied tender covering all building.</p> <ul style="list-style-type: none"> • Marketing and Letting Plan • Plan by the bidder to achieve maximum return on the lettable spaces • Property Management Plan 	<p>5</p>

	<ul style="list-style-type: none"> • <i>Plan to deal with Rent Arrears within 90 days</i> <p><i>5 marks</i></p>	
<i>5.</i>	<p><i>Must demonstrate that they have experience and competency to manage a (commercial) car automated parking facilities in Nairobi County. Provide an executed copy of service level agreement.</i></p>	<i>5</i>
<i>6.</i>	<p><i>Size of Firm, (Number of Employees supporting various functions of the assignment)</i></p> <ul style="list-style-type: none"> • <i>Over 30 Employees – 10 marks</i> • <i>20 employees and above – 5 marks</i> • <i>Below 20 employees – 3 marks</i> <p><i>Evidence in form of official statutory payroll deductions acknowledgements from NHIF, NSSF, KRA.</i></p>	<i>10</i>

7.	<i>Certified copy of a letter from the bank indicating their financial soundness for the past 5 years</i> <ul style="list-style-type: none"> • <i>10 marks for 5-year experience</i> • <i>6 marks for 3 years and above</i> • <i>1 mark for less than 3 years</i> 	10
8.	<i>Use of Property Management software. Where the software is not developed in-house, the bidder to provide necessary licenses by the supplier/ developer. (Several user option)</i>	15
	<i>Total Score</i>	<i>100 Marks</i>

Note: Minimum technical score is 85% to proceed to the next stage”

The Board further notes that Clause 34 of the Instructions to Tenderers set out in Section I – Instructions to Tenderers at page 29 of the Tender Document provided for Technical Proposal Evaluation as follows:

"34.1 For those Tenders that are found to be substantially responsive pursuant to ITT 32, the Fund shall

evaluate the Technical Proposals using the following evaluation methodology:

- a. The Fund shall score Technical Proposals by applying the point system specified in Section III for each evaluation criterion. Each proposal will be given an aggregate technical score (st) by adding the scores assigned under each evaluation criterion;***
- b. A proposal shall be rejected at this stage if it fails to achieve the minimum aggregate technical score specified in the TDS; and***
- c. The Fund will apply any additional steps to the evaluation methodology as may be indicated in the TDS.”***

The import of the above provisions of the Tender Document is that the Applicant's tender would be evaluated using the point system specified at Clause 3 Technical Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 40 and 41 of the Tender Document and that its Technical Proposal in the subject tender would be allocated an average aggregate technical score after adding the scores assigned under each of the Technical Evaluation Criteria.

The Board has studied the Evaluation Report and observes that the Evaluation Committee was composed of five (5) members and that each

member individually scored the Applicant's tender and an average aggregate technical score was then derived from the individual scores. The Board notes that the Evaluation Report indicates the Technical Requirement Evaluation Average Scores table as follows:

<i>N o.</i>	<i>Bidders Names</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>6</i>	<i>7</i>	<i>8</i>	<i>Total Score 100 %</i>
<i>1</i>	<i>NW Realite Valuers & Property</i>	<i>14</i>	<i>13.2</i>	<i>16.8</i>	<i>4.4</i>	<i>4.8</i>	<i>7.2</i>	<i>10</i>	<i>12.4</i>	<i>82.8</i>
<i>2</i>	<i>Laser Property Services</i>	<i>16</i>	<i>13.4</i>	<i>16</i>	<i>4.6</i>	<i>4.8</i>	<i>10</i>	<i>6</i>	<i>13.4</i>	<i>84.2</i>
<i>3</i>	<i>Regent Management Limited</i>	<i>18.4</i>	<i>12.8</i>	<i>14.6</i>	<i>5</i>	<i>4.4</i>	<i>10</i>	<i>9</i>	<i>11.6</i>	<i>85.8</i>
<i>4</i>	<i>Gimco Limited</i>	<i>19</i>	<i>16</i>	<i>17.4</i>	<i>5</i>	<i>2.2</i>	<i>10</i>	<i>10</i>	<i>12</i>	<i>91.6</i>
<i>5</i>	<i>Ebony Estates Limited</i>	<i>161</i>	<i>14.6</i>	<i>18</i>	<i>5</i>	<i>4.6</i>	<i>10</i>	<i>10</i>	<i>9.2</i>	<i>87.4</i>

6	<i>Crystal Valuers Limited</i>	<i>19.2</i>	<i>16</i>	<i>18</i>	<i>4.8</i>	<i>4</i>	<i>10</i>	<i>10</i>	<i>9.8</i>	<i>91.8</i>
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The Board observes that the Evaluation Committee in its Evaluation Report set the requirement for similar portfolio to be 300,000 square feet as indicated in Mandatory Requirement number 12. Upon evaluation at the Technical Evaluation Requirements stage, the Evaluation Committee concluded that the Applicant's tender did not demonstrate this requirement and did not meet the Technical Evaluation Criteria requirements since the contracts attached were less than the three (3) years with a similar portfolio and the Applicant did not attain the 85% threshold of the Technical Evaluation Criteria but an average score of 82.8%.

We have studied the Applicant's original tender submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act 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	What the Applicant provided in its original tender	Outcome of Evaluation of the Applicant's original tender as captured in the Evaluation Report and the 1st and 2nd Respondents Statement of Reply	Observation by the Board of the Applicant's original tender
1.	Number of years the firm has been in a specific business (attach Contracts/Invoices) (Specific experience	<ul style="list-style-type: none"> At pages 44 and 45 of its tender, the Applicant submitted a list with a selection of the properties it 	<ul style="list-style-type: none"> Average score of 14/20 marks indicated in the Evaluation Report. 	<ul style="list-style-type: none"> The Board notes that the Applicant submitted eighteen (18) Management Agreements at pages 237 to 285

<p>with clients of a similar size)</p> <ul style="list-style-type: none"> • 5 years and above (20 marks) • 3 years and above (15 marks) • Below 3 years (5 marks) 	<p>managed, the period of years managed from, and the measurement of the rental area in square feet with the highest ranging at 214,747 square feet and the lowest at 7,381 square feet.</p> <ul style="list-style-type: none"> • The Applicant submitted eighteen (18) Management Agreements at pages 237 to 285 of its tender 	<ul style="list-style-type: none"> • Paragraph 19 of the Statement of Reply indicated that the Applicant scored an average of 14 out of 20 since the contracts attached to its tender were of less than three (3) years with similar portfolio. 	<p>of its tender for various commercial properties.</p> <ul style="list-style-type: none"> • From the said Management Contracts, we note that the Applicant has demonstrated that it has experience and competence and is currently managing a similar portfolio of above 300,000 square feet (Commercial) from the combined list of premises under
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	<p>which include but are not limited to:</p> <ul style="list-style-type: none"> • a Management Agreement at page 262 to 264 of the tender dated 1/4/2016 between Machakos Ranching Co. Ltd and the Applicant for Mutungoini Plaza, Machakos for a term of 3 years from 1/4/2016; • a Management Agreement at page 		<p>management of the Applicant.</p> <ul style="list-style-type: none"> • We also note that the Applicant's submitted copies of contracts demonstrate that it has specific experience with clients of a similar size for 5 years and above. • The Board is of the considered view that the Applicant complied with Technical Evaluation Criteria
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	<p>276 to 278 of the tender dated 1/1/2018 between Archdiocese of Nairobi Kenya Registered Trustees and the Applicant in respect of Cardinal Otunga Plaza and Annex for a term of three years from 1/1/2018;</p> <ul style="list-style-type: none"> • an amendment relating to the Contract Agreement dated 3/7/2017 between 		<p>Number 1 at page 40 of the Tender Document and the aggregate score upon evaluation at the Technical Evaluation requirements stage ought to be 20 out of 20 marks.</p>

		<p>the Kenya Power & Lighting Company Limited Staff Retirement Benefits Scheme and the Applicant in respect of Bogani Park Estate extending the contract duration by a further period of 1 year starting 15/6/2020 to 15/6/2021;</p> <ul style="list-style-type: none">• a Management Agreement at page 273 to 275 of the tender dated	
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		<p>5/9/2018 between Mastermind Tobacco (K) Limited and the Applicant in respect of Kimathi House for a term of 3 years from 1/7/2018;</p> <ul style="list-style-type: none">• renewal of Property Management Contract at page 251 of the tender dated 4/9/2019 between Kenya Conference of Catholic Bishops		
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		<p>and the Applicant for a term of 3 years from 1/1/2019 to 31/12/2021 with respect to Catholic Centre and Catholic Centre Extension, Great Jubilee Centre and "The Well", Centenary House.</p>		
2	<p>Professional Qualification and relevant experience of six (6) technical personnel as outlined below (Key:</p>	<ul style="list-style-type: none"> • The Applicant submitted seventeen (17) CVs at pages 120 to 182 of its tender of its personnel being: 	<ul style="list-style-type: none"> • Average score of 13.2 /20 marks indicated in the Evaluation Report. 	<ul style="list-style-type: none"> • The Board notes that the Applicant submitted seventeen (17) CVs of its personnel at

<p>team comprising varied level of expertise in the under listed areas)</p> <ul style="list-style-type: none"> • Three managers for five (5) years – 2.5 Marks • Caretaker 5 years – 2.5 Marks • Electrical Technicians – 2.5 Marks • Mechanical Technicians – 2.5 Marks 	<ul style="list-style-type: none"> • A Valuer of 30 years with the Applicant at page 120; • A Registered Estate Agent of 10 years with the Applicant at page 124; • A Valuer of 5 years with the Applicant at page 129; • A Valuer/Property Manager of 1 month with the Applicant at page 133; 	<ul style="list-style-type: none"> • Paragraph 20 of the Statement of Reply indicated that the Applicant scored an average of 13.2 out of 20 marks since it did not provide details of a caretaker with five (5) years' experience and did not provide 	<p>pages 120 to 182 of its tender.</p> <ul style="list-style-type: none"> • We also note that the Applicant indicated at page 36 to 42 of its tender a list of proposed personnel under Form PER 1 and Form PER 2. • Though the Applicant indicated in Form PER -1- Proposed Personnel under number 5 at page 37 of the tender that the Caretaker was Mr.
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<ul style="list-style-type: none"> • Plumbing and Drainage experts – 2.5 Marks • Business Administrative and Management – 2.5 Marks • Other considerations as provided below points <p>Key: Attach CV and copy of national ID. This information will be verified from relevant institutions.</p>	<ul style="list-style-type: none"> • A Property Manager of 1 month with the Applicant at page 137; • A Senior Property Manager of 3 years with the Applicant at page 141; • A Property Manager of 3 years with the Applicant at page 144; • A Valuer/Property Research Officer of 1 year with the 	<p>details of a Mechanical Technician.</p>	<p>Eugene Asiligwa, it did not indicate under Form PER -2- Resume of Proposed Personnel at pages 37 to 42 any information on the said Caretaker and the CV attached for Eugene Asiligwa refers to him as a Property Officer at page 164 of the tender.</p> <ul style="list-style-type: none"> • It is the Board's considered view that the Applicant
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	<p>Applicant at page 147;</p> <ul style="list-style-type: none"> • A Property Manager of 3 years with the Applicant at page 151; • A Property Manager of 1 years with the Applicant at page 155; • A Property Manager of 1.5 years with the Applicant at page 158; 		<p>failed to provide in any of the submitted CVs details of a Caretaker with five (5) years' experience hence missing the 2.5 marks and also failed to provide details of a Mechanical Technician in any of the attached CVs hence missing the 2.5 marks under Technical Requirement</p>
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	<ul style="list-style-type: none"> • A Property Officer of 1 years with the Applicant at page 161; • A Property Officer by the name Eugene Asiligwa of 3 years with the Applicant at page 164 who has been described at page 37 of the tender as a Caretaker under Form PER -1- 		<p>number 2 at page 40 and 41 under Section III- Evaluation and Qualification Criteria of the Tender Document.</p> <ul style="list-style-type: none"> • Since the total score under the said Technical Requirement number 2 was 15 marks, the Applicant missed out on 5 marks and scored 10 out of 15 marks
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		<p>Proposed Personnel;</p> <ul style="list-style-type: none">• A Property Officer of 8 years with the Applicant at page 167;• A Repairs and Maintenance Manager by the name David Wainaina is listed in the CV as an Electrical Engineer of 1 year with the Applicant at page 169;		
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3	I. Experience in similar	Submitted five (5) recommendation	<ul style="list-style-type: none"> • An Electrician of 7 years with the Applicant at page 174; • A Plumber of 17 months with the Applicant at page 182; • Attached copies of Four (4) of its employees availed professional qualification documents at pages 185 to 193 without their CVs. 	<ul style="list-style-type: none"> • Average score of 16.8 /20 	<ul style="list-style-type: none"> • We have already established under
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<p>assignments</p> <p>Five (5) clients with portfolio in terms of assignment and size.</p> <p>(Provide evidence of similar work done i.e provide copies Contract documents)- 15</p> <p>II. Attach three (3) names of corporate clients as per</p>	<p>letters at pages 223 to 227 of its tender from:</p> <p>➤ Absa Bank Kenya PLC dated 29/08/2022</p> <p>confirming the Applicant has worked with it for the past (5) years;</p> <p>➤ Kenya Ports Authority Pension Scheme dated 31/08/2022</p> <p>confirming the Applicant has worked with it for</p>	<p>indicated in the Evaluation Report.</p> <p>• Paragraph 21 of the Statement of Reply</p> <p>indicated that the Applicant scored an average of 16.8 out of 20 marks since it failed to attach contract with similar portfolio</p>	<p>Technical Requirement number 1 at page 40 under Section III- Evaluation and Qualification Criteria of the Tender Document above that the Applicant submitted eighteen (18) Management Agreements at pages 237 to 285 of its tender for various commercial properties.</p>
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	<p>the attached portfolio above, with clear addresses including the contact details (emails, telephone numbers) of the clients in a letter addressed to NHIF CEO using your letter head – 5 mks</p>	<p>the past ten (10) years; ➤ Mastermind Tobacco (K) Limited dated 5th September 2022 confirming the Applicant has worked with it for the past four (4) years; ➤ National Council of Churches Kenya dated 31st August 2022 confirming the Applicant has worked with it for</p>	<p>assignment and size</p>	<ul style="list-style-type: none"> • We note that the Applicant has availed sufficient proof that it has experience in similar assignments as evidence by the recommendation letters of the five (5) clients submitted at pages 223 to 227 of its tender and has demonstrated that it is currently managing a similar portfolio of above 300,000 square
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		<p>the past 10 years; and</p> <ul style="list-style-type: none"> ➤ The Co-operative Bank of Kenya Limited dated 6th September 2022 confirming the Applicant has worked with it for the past ten (10) years. • Attached at page 228 of its tender a letter on its letterhead dated 7th September 2022 with a list of eleven (11) names, 		<p>feet (commercial). The Applicant has also availed on its letterhead dated 07/09/2022 and addressed to the 1st Respondent more than three (3) names of corporate clients with clear addresses including contact details of the said clients.</p> <ul style="list-style-type: none"> • It is the Board's considered view that the Applicant complied with Technical
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		<p>contact persons and addresses of corporate clients.</p>		<p>Evaluation Requirement number 3 at page 41 under Section III- Evaluation and Qualification Criteria of the Tender Document and ought to have scored an average of 20 out of 20 marks.</p>
4	<p>Bidder must submit Draft Service Level Agreement for the applied tender covering all building.</p>	<ul style="list-style-type: none"> Submitted at page 291 to 297 of its tender a draft Service Level Agreement between the 	<ul style="list-style-type: none"> Average score of 4.4 /5 marks indicated in the Evaluation Report. 	<ul style="list-style-type: none"> It is the Board's considered view that the Applicant complied with Technical Requirement

	<ul style="list-style-type: none"> Marketing and Letting Plan Plan by the bidder to achieve maximum return on the lettable spaces Property Management Plan Plan to deal with Rent Arrears within 90 days <p>5 marks</p>	<p>Applicant and NHIF;</p> <ul style="list-style-type: none"> 	<ul style="list-style-type: none"> Paragraph 22 of the Statement of Reply indicated that the Applicant scored an average of 4.4 out of 5 marks with no further explanation. 	<p>number 4 at page 41 under Section III- Evaluation and Qualification Criteria of the Tender Document by submitting at page 291 to 297 of its tender a draft Service Level Agreement for the subject tender which entailed a marketing and letting plan, plan by the tenderer to achieve maximum return on the</p>
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				<p>lettable space, property management plan and plan to deal with rent arrears within 90 days</p> <ul style="list-style-type: none"> It is our considered view that the Evaluation Committee ought to have awarded the Applicant an aggregate score of 5 out of 5 marks.
5	<p>Must demonstrate that they have experience and competency to</p>	<ul style="list-style-type: none"> Submitted at page 298 to 321 of its tender an undated copy of Car Park 	<ul style="list-style-type: none"> Average score of 4.8 out of 5 marks indicated in 	<ul style="list-style-type: none"> The Board observes that the copy of Car Park Management Agreement at

<p>manage a (commercial) car automated parking facilities in Nairobi County. Provide an executed copy of service level agreement.</p>	<p>Management Agreement at Hurlingham Court between KAPS Parking Limited and Kenya Ports Authority (KPA) Pension Scheme whereby the Applicant has signed the said Agreement on behalf of Kenya Ports Authority (KPA) Pension Schemr at page 313</p>	<p>the Evaluation Report.</p> <ul style="list-style-type: none"> • Paragraph 23 of the Statement of Reply indicated that the Applicant scored an average of 4.8 out of 5 marks with no further explanation. 	<p>Hurlingham Court between KAPS Parking Limited and Kenya Ports Authority (KPA) Pension Scheme was executed by the Applicant on behalf of KPA Pension Scheme.</p> <ul style="list-style-type: none"> • We are of the considered view that the Agreement availed by the Applicant in its tender at page 298 to 321 met the Technical
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				<p>Requirement number 5 at page 41 under Section III- Evaluation and Qualification Criteria of the Tender Document.</p> <ul style="list-style-type: none"> The Evaluation Committee ought to have score the Applicant an average of 5 out of 5 marks.
6	Size of Firm, (Number of Employees supporting various	<ul style="list-style-type: none"> Submitted at pages 287 and 288 NHIF Certificate of Compliance and 	<ul style="list-style-type: none"> Average score of 7.2 /10 indicated in the Evaluation Report. 	<ul style="list-style-type: none"> We have established under Technical Requirement number 2 at page

	<p>functions of the assignment)</p> <ul style="list-style-type: none"> Over 30 Employees – 10 marks 20 employees and above – 5 marks Below 20 employees – 3 marks <p>Evidence in form of official statutory payroll deductions acknowledgements from NHIF, NSSF, KRA.</p>	<p>NSSF Compliance Certificate.</p>	<ul style="list-style-type: none"> Paragraph 24 of the Statement of Reply indicated that the Applicant scored an average score of 7.2 out of 10 since it failed to attach a payroll by-product to support the number of its employees. 	<p>40 and 41 of the Tender of Section III- Evaluation and Qualification Criteria of the Tender Document that the Applicant submitted a total of seventeen (17) CVs of its personnel at pages 120 to 182 of its tender plus four (4) employees who availed professional qualification documents but</p>
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				<p>failed to avail copies of their CVs.</p> <ul style="list-style-type: none">• However, the Board notes that Technical Requirement number 6 required evidence in form of official statutory payroll deductions acknowledgements from NHIF, NSSF and KRA to confirm the size of the Applicant and the number of Employees supporting various
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				<p>functions of the assignment.</p> <ul style="list-style-type: none"> It is the Board's considered view that the Applicant failed to attach a payroll by-product to support the number of its employees as required under Technical Requirement number 6 at page 41 under Section III- Evaluation and Qualification Criteria of the
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				<p>Tender Document</p> <p>hence the allocated average score of 7.2 out of 10 marks was on the higher side without evidence of official statutory payroll deductions</p> <p>acknowledgements from NHIF, NSSF, and KRA.</p> <ul style="list-style-type: none">• Having considered that the Applicant submitted 17 CVs of its employees together with four (4) post
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7	Certified copy of a letter from the bank	Submitted at pages 230 to 236	Average score of 10/10	<p>qualification documents of its employees who did not avail their CVs, it is our considered view that the Applicant can be assessed to comprise of 20 employees and above, thus upon evaluation, the average score would be 5 out of 10 marks.</p> <ul style="list-style-type: none"> The Board notes that the Applicant
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<p>indicating their financial soundness for the past 5 years</p> <ul style="list-style-type: none"> • 10 marks for 5-year experience • 6 marks for 3 years and above • 1 mark for less than 3 years 	<p>of the tender document letters from:</p> <ul style="list-style-type: none"> ➤ Standard Chartered Bank Kenya Limited dated 07/09/2022 confirming Applicant has operated accounts with them since July 2012; ➤ KCB Bank Kenya 	<p>indicated in the Evaluation Report</p>	<p>scored the total marks of 10 out of 10 under Technical Requirement number 7 at page 41 under Section III- Evaluation and Qualification Criteria of the Tender Document</p>
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		<p>Limited dated 15/03/2022 confirming Applicant has operated a current account with them since 29/03/2006;</p> <ul style="list-style-type: none"> ➤ Equity Bank (Kenya) <p>Limited dated 10/12/2022;</p> <ul style="list-style-type: none"> ➤ Guaranty Trust Bank (Kenya) Ltd 		
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		<p>LLP dated 04/01/2021; ➤ Mazars dated 30/12/2020.</p>		
8	<p>Use of Property Management software. Where the software is not developed in-house, the bidder to provide necessary licenses by the supplier/ developer. (Several user option)</p>	<ul style="list-style-type: none"> Submits at page 23 and 24 of the tender document that it is currently on the Electronic Property Management Accounting System (EPMAS) The Applicant has indicated at page 36 of its tender that the said software is Leased. 	<ul style="list-style-type: none"> The Average score as per the Evaluation Report was 12.4 out of 15. Paragraph 25 of the Respondents' Statement of Reply indicate that the Applicant scored an 	<ul style="list-style-type: none"> The Board observes that the Applicant submitted a portfolio of Verus Epmas May 2019 Systems at page 332 of its tender and attached a testimonial at page 353 of its tender evidencing use of the said system. We note that the Applicant has

		<ul style="list-style-type: none"> It has submitted at page 332 to 355 of the tender a portfolio of Verus EPMAS Systems with a testimonial at page 353 of the tender by Collins Biwott, CFO of the Applicant. 	<p>average of 12.4 out of 15 with no further explanation.</p>	<p>ailed information on page 23 of its tender confirming use of an Electronic Property Management Accounting System (EPMAS) Software and at page 36 has indicated that the said software is Leased.</p> <ul style="list-style-type: none"> We have noted that the Respondents did not avail any explanation as to why the Evaluation Committee scored
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				<p>the Applicant an average score of 12.4 out of 15 marks.</p> <ul style="list-style-type: none"> • It is our considered view that the Applicant complied with Technical Requirement number 8 at page 41 of Section III- Evaluation and Qualification Criteria of the Tender Documents and ought to have scored the 15 out of 15 marks.
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From the analysis enumerated in the table above, it is the Board's considered view that the Evaluation Committee should have scored the Applicant's tender above the set minimum technical score at the Technical Requirement Evaluation stage rendering the Applicant's tender responsive to proceed for evaluation at the Financial Evaluation stage since under (a) Technical Requirement number 1 at page 40 of the Tender Document we have established that the Applicant's tender ought to have scored an aggregate of 20 out of 20 marks; (b) Technical Requirement number 2 at page 40 and 41 of the Tender Document we have established that the Applicant's tender ought to have scored an aggregate of 10 out of 15 marks; (c) Technical Requirement number 3 at page 41 of the Tender Document we have established that the Applicant's tender ought to have scored an aggregate of 20 out of 20 marks; (d) Technical Requirement number 4 at page 41 of the Tender Document we have established that the Applicant's tender ought to have scored an aggregate of 5 out of 5 marks; (e) Technical Requirement number 5 at page 41 of the Tender Document we have established that the Applicant's tender ought to have scored an aggregate of 5 out of 5 marks; (f) Technical Requirement number 6 at page 41 of the Tender Document we have established that the Applicant's tender ought to have scored an aggregate of 5 out of 10 marks; (g) Technical Requirement number 7 at page 41 of the Tender Document we have established that the Applicant's tender scored an aggregate of 10 out of 10 marks; and (h) Technical Requirement number 8 at page 41 of the Tender Document we have established that the Applicant's tender ought to have scored an aggregate of 15 out of 15 marks.

It is clear that the Applicant's tender attained the minimum technical score of 85% having complied with the Technical Evaluation Requirements under Clause 3 Technical Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 40 and 41 of the Tender Document. In view of the foregoing, the Board finds that the Evaluation Committee did not evaluate the Applicant's tender in accordance with the provisions of Clause 34 of the Instructions to Tenderers set out in Section I – Instructions to Tenderers at page 29 of the Tender Document and the criteria provided under Clause 3 Technical Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 40 and 41 of the Tender Document.

What orders should the Board grant in the circumstances?

We have found that the 1st Respondent's notification letters dated 3rd October 2022 failed to disclose the reasons why the Interested Party was successful in the subject tender and that the 1st Respondent breached the provisions of Section 87(3) of the Act read with Regulation 82 of Regulations 2020 by failing to give reasons in the notification letter as to why the Applicant's evaluated score fell below the minimum technical score of 85%.

We have also found that the Evaluation Committee did not evaluate the Applicant's tender in accordance with Clause 34 of the Instructions to Tenderers set out in Section I – Instructions to Tenderers at page 29 of the Tender Document read with the Clause 3 Technical Evaluation Criteria under

Section III- Evaluation and Qualification Criteria at page 40 and 41 of the Tender Document.

The Board deems it fit to order the 1st Respondent to direct the Evaluation Committee to re-admit the Applicant's tender at the Technical Evaluation Requirements stage and conduct a re-evaluation of the Applicant's tender at the Technical Evaluation Requirements stage together with all other tenders that made it to the Technical Evaluation Requirements stage taking into considerations the findings of this Board and the provisions of the Act and the Tender Document.

The upshot of our findings is that the instant Request for succeeds with respect to the following specific orders:

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 17th October 2022:

- 1. The Letter of Notification of Intention to Award Contract to the Interested Party dated 3rd October 2022 with respect to Tender No. NHIF/001/2022-2023 Provision for Letting and Management Services for the NHIF Building, Carpark Complex and Contrust House, be and is hereby nullified and set aside.**

- 2. The Letters of Notification of Intention to Award Contract addressed to all the unsuccessful tenderers including the Applicant dated 3rd October 2022 with respect to Tender No. NHIF/001/2022-2023 Provision for Letting and Management Services for the NHIF Building, Carpark Complex and Contrust House, be and are hereby nullified and set aside.**

- 3. The 1st Respondent is hereby ordered to direct the Evaluation Committee to re-admit the Applicant's tender at the Technical Evaluation Requirements stage and conduct a re-evaluation of the Applicant's tender at the Technical Evaluation Requirements stage together with all other tenders that made it to the Technical Evaluation Requirements stage in accordance with the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution while taking into consideration the Board's findings in this Request for Review.**

- 4. Further to Order No. 3 above, the Respondents are hereby directed to proceed with the procurement process to its logical conclusion including the making of an award to the successful tenderer within twenty one (21) days from the date of this decision.**

5. Given that the procurement process for the subject tender is not complete each party shall bear its own costs in the Request for Review

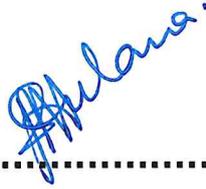
Dated at NAIROBI, this 7th Day of November 2022.



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CHAIRPERSON

PPARB



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SECRETARY

PPARB