

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 103/2022 OF 6TH DECEMBER 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. Mrs. Irene Kashindi | - Panel Chair |
| 2. Dr. Paul Gilani | - Member |
| 3. CPA Isabella Juma | - Member |

IN ATTENDANCE

- | | |
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| 1. Ms. Sarah Ayoo | - Holding brief for Acting Board Secretary |
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BACKGROUND OF THE DECISION

The Tendering Process

National Hospital Insurance Fund (herein after referred to as "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
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. In case of any discrepancy between the unit price and total, the unit price would prevail.

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% VAT.**

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

concluded 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 NO. 91 OF 2022

Aggrieved by the decision of the 1st Respondent, the Applicant filed before the Public Procurement and Administrative Review Board (hereinafter referred to as "the Board") Request for Review No. 91 of 2022 dated 17th October 2022 seeking the following orders:

- 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 its decision rendered on 7th November 2022, the Board issued the following orders:

- 1. The Letter of Notification of Intention to Award Contract to the Interested Party dated 3^d 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 3^d 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

Re-evaluation of the subject tender

Pursuant to Order No. 3 issued by the Board in the Request for Review No. 91 of 2022, the Evaluation Committee re-admitted the Applicant's tender at the Technical Evaluation Requirements stage and re-evaluated the Applicant's tender together with all other tenders that had been found responsive at the Mandatory /Preliminary Requirements stage to proceed for evaluation at the Technical Evaluation stage as recorded in a Re-evaluation Report signed by the Evaluation Committee members on 17th November 2022 (hereinafter referred to as the "Re-evaluation Report").

Second Technical Evaluation Requirements

Tenders were required to comply with the Technical Evaluation Requirements set out at page 40 and 41 of the Tender Document 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, one (1) tender was found to be non-responsive while five (5) tenders were found responsive which included the Applicant's and Interested Party's tenders. Only the responsive tenders proceeded for evaluation at the Financial Evaluation stage.

Second Financial 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. In case of any discrepancy between the unit price and total, the unit price would prevail.

At the end of evaluation at this stage, two (2) of the aforementioned tenders were found non-responsive, which included the Applicant's tender, while three (3) tenders were found responsive. The responsive tenders proceeded to the Due Diligence Evaluation Requirements stage.

Second 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

Three bidders moved to due diligence and The Interested Party had the highest score at this stage.

Second 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% VAT.**

Second Professional Opinion

In a Professional Opinion dated 21st November 2022 (hereinafter referred to as the "Professional Opinion"), the Head Supply Chain Management, Ms. Rose Mugambi, reviewed the manner in which the subject procurement process was undertaken including the re-evaluation of tenders pursuant to the Orders of the Board issued on 7th November 2022 in Request for Review No. 91 of 2022 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 21st November 2022.

Notification to Tenderers

Tenderers were notified of the outcome of the re-evaluation of the subject tender vide letters of Notification of Intention to Award Contract in the subject tender dated 21st November 2022.

REQUEST FOR REVIEW NO. 103 OF 2022

On 6th December 2022, the Applicant filed a Request for Review dated 6th December 2022 together with a Statement in Support of the Request for Review signed by Nahashon Kuria Chege on 6th December 2022 through the firm of Gerivia Advocates LLP seeking the following orders:

- a. The 1st Respondent's decision communicated in the letter dated 21st November 2022 in relation the Applicant's financial proposal being declared unsuccessful under Tender No. NHIF/001/2022-2023 Provision for Letting and Management Services for the NHIF Building, Car Park Complex and Contrust House be cancelled and set aside;***

- b. The 1st Respondent's decision to award Tender No. NHIF/001/2022-2023 Provision for Letting and Management Services for the NHIF Building, Car Park Complex and Contrust House to the Interested Party be cancelled and set aside;***

- c. The Respondents be directed to re-admit the Applicant's bid at Financial Evaluation Stage and to re-evaluate the Applicant's financial proposal in accordance with the criteria and procedures under the Tender Document in line with Section 80 (2) & (3) of the Act and as may be directed by the Board in exercise of its mandate under Section 173 of the Act;***

- d. Following conclusion of the re-evaluation at the Financial Evaluation Stage, the Respondents be ordered carry on with the procurement proceedings to their logical conclusion including making award in line with Section 86 of the Act;***
- e. The Board in exercise of its discretion, to give directions to the Respondents to redo or correct anything within the entire procurement process found to not have been done in compliance with the law; and***
- f. The Respondents be compelled to pay to the Applicant the costs arising from/and incidental to this Application.***

In a Notification of Appeal and a letter dated 6th December 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 6th December 2022.

In opposition to the Request for Review, the 1st and 2nd Respondents on 13th December 2022 filed through the firm of Kipkenda & Company Advocates, a Notice of Appointment of Advocates dated 13th December 2022, and subsequently on 15th December 2022 filed a Memorandum of Response sworn by Dr. Wasike Walubengo on 14th December 2022.

Vide letters dated 14th December 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 14th December 2022.

On 19th December 2022, Kembu-Gitura & Company Advocates on behalf of the Interested Party filed a Notice of Appointment of Advocates dated 16th December 2022 and together with the Interested Party's Response to the Request for Review dated 16th December 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 19th December 2022, the Applicant filed a Further Statement dated 19th December 2022 together with its submissions dated 19th December 2022. The 1st and 2nd Respondents filed written submissions on 21st December 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 the Respondents are in breach of Article 227 (1) of the Constitution, Sections 3, 44(2), 80(2), and 80(3) of the Public Procurement and Asset Disposal Act (herein after referred to as "the Act")

for failing to treat it fairly at the Financial Evaluation stage and failing to ensure that the Evaluation Committee evaluated its tender fairly in accordance with the criteria and procedures under the Tender Document.

The Applicant avers that vide a letter of Notification of Award of Contract in respect to the subject tender dated 21st November 2022 and collected by the Applicant from the 2nd Respondent's offices on 22nd November 2022, it was notified that its tender was unsuccessful and rendered non-responsive at the Financial Requirements Criteria stage. The reason given in the notification was that, despite conforming to the Estate Agents Act on remuneration for management and letting of commercial buildings at 2.9% on management and 4.35% on letting for NHIF Building, Parking Complex and Contrust House, the Applicant factored in additional staff costs at Kshs. 70,000/= for NHIF Building, Kshs. 50,000/= for Parking Complex, and Kshs. 40,000/= for Contrust House totaling to Kshs. 160,000/= per month which the 2nd Respondent found financially unviable.

The Applicant avers that the Evaluation Committee failed to draw the distinction between the Applicant's tender price (contractor's remuneration) and the Applicant's staff costs of executing the contract, if awarded. Hence, the Applicant avers that failure to draw a distinction during evaluation of its financial proposal was unfair, subjective, and a deliberate effort by the Respondents to ensure that it was not awarded the subject tender. The Applicant claims that this deliberate effort is evidenced by (a) failure by the

Evaluation Committee to apply the criteria and procedures under the Tender Document contrary to section 80(2) of the Act; (b) failure by the Evaluation Committee to objectively evaluate its tender contrary to section 80(3) of the Act; (c) failure by the Evaluation Committee to treat the Applicant fairly during evaluation of its financial proposal contrary to Article 227(1) of the Constitution and Section 3 of the Act.

The Applicant avers that the focus by the Evaluation Committee on the staff/professional costs and terming them as additional costs (as opposed to considering them as the Applicant's costs) was intended to unfairly reduce the Applicant's chance of being declared the successful tenderer.

The Applicant avers that it prepared its financial proposal in accordance with the instructions in the Tender Document and in doing so, submitted the Form of Tender - Financial Proposal Form, a detailed price schedule wherein it stipulated its remuneration in accordance with the Estate Agents Act and the Estate Agents (Remuneration) Rules and it itemized its costs (i.e the costs it would incur in executing the contract) and only included staff/professional costs.

The Applicant avers that it had separated its remuneration from the costs it would incur on its staff/professional and purposefully provided a table showing its detailed remuneration and another table showing the staff/personnel costs to enable the Evaluation Committee draw a distinction

between its remuneration and the costs it would incur in the execution of the contract, if awarded. Hence, despite the Evaluation Committee treating the staff/personnel costs as being part of the Applicant's tender price, the Applicant had no intention that its remuneration and the staff/professional costs to be incurred constituted the financial proposal, and if this was the intention, then it would have factored in the staff/professional costs in the same table where it had detailed its management and letting fees.

The Applicant avers that the staff costs are not included under the cost item titled "Reimbursable Costs" which is a clear indication that provision of these costs was only indicative and was provided to comply with the table in the Tender Document but were not to be claimed as part of reimbursable costs or the Applicant's remuneration. In support of this, the Applicant avers that at the time of quoting its remuneration, it was familiar with the provisions of the Tender Document and in particular clause 8.1 on page 97 of the Tender Document and clause 12 on pages 101-102 of the Tender Document which provided that the Contractor's remuneration was to be paid by the Fund and the costs of the tenderer's personnel were for the tenderer. In addition, the personnel costs would be paid by the successful tenderer from its own funds whether or not the remuneration was sufficient. The remuneration was to be quoted after taking into account all available data and understanding the services to be provided and it was for this reason that the Applicant did not include the personnel costs under reimbursable costs.

The Applicant avers that the Evaluation Committee subjectively evaluated its tender and arrived at an erroneous finding with regard to its financial proposal yet it had an option to use the provisions on clarification under Section 81 of the Act to assist it in conducting a fair evaluation and comparison of Tenders, which they failed to do to the detriment of the Applicant.

The Applicant avers that the Evaluation Committee acted unfairly by introducing a new criterion (additional costs) and using the new criterion to declare the Applicant's financial proposal unsuccessful even though the Applicant prepared its financial proposal in accordance with the instructions under the Tender Document and in compliance with the Estate Agents Act and the Estate Agents (Remuneration) Rules.

The Applicant avers that it had a legitimate expectation that the evaluation process would comply strictly with the Tender Document and that its tender would be evaluated fairly in accordance with Article 227 (1) of the Constitution, Sections 3, 80(2), and 80(3) of the Act. The Applicant prays for the Board's intervention in line with the mandate conferred upon it under section 173 of the Act to ensure adherence of the law and the provisions of the Tender Document is observed in evaluation of its financial proposal.

THE RESPONDENTS' CASE

In response, the Respondents contends that the Tender Document at clause 41 and 46 expressly provided that the 2nd Respondent would award the subject tender to the tenderer whose tender would have been determined to be substantially responsive after post qualification and determined as the lowest evaluated tender within the prevailing market rates.

The Applicant contends that the Applicant was deemed unsuccessful at the Financial Requirements Criteria stage and was notified of the same vide letter dated 21st November 2022. By this letter, the Applicant was informed that while its tender had conformed to the Real Estate Agent Act, 2012 on remuneration for management and letting of commercial buildings at 2.9% on Management and 4.35% on letting for NHIF Building, Parking Complex and Contrust House, it had factored in additional staff costs of Kshs. 160,000/= per month made up as (a) Kshs. 70,000/= for NHIF Building; (b) Kshs. 50,000/= for the Parking Complex; and (c) Kshs. 40,000/= for Contrust House.

The Respondents contend that the Evaluation Committee found the additional staff costs were not viable to the 2nd Respondent and disqualified the Applicant's tender from further consideration. In so doing, the Respondents contend that they were alive to the legal requirements to consider all other aspects of the tender as provided in the Tender Document

and where a tender did not comply with the conditions stipulated therein, it would be unlawful for the 2nd Respondent to award the subject tender simply on the basis that the tender is the lowest.

The Respondents contend that the letter of Notification of Regret dated 21st November 2022 informed the Applicant that the successful tenderer's financial proposal did not contain any additional costs yet the Applicant's financial proposal factored in additional staff costs of Kshs. 160,000/- per month. The Respondents contend that while the Applicant concedes that it included the additional staff costs in its detailed price schedule, it unconvincingly argues that these costs were not part of its tender price. The Respondents add that if the Applicant did not intend for these additional staff costs to form part of its financial proposal, it would have omitted them in entirety or would have expressly stated in its detailed price schedule that these costs would be borne by the Applicant and not the 2nd Respondent. The Respondents contend that the Applicant failed to indicate in its financial proposal that it would incur the additional staff costs or that the said costs were only indicative and would not be claimed as part of reimbursable costs of the Applicant's remuneration.

The Respondents contend that the Evaluation Committee's role was not to decipher the Applicant's intention in its financial proposal as doing so would be tantamount to correcting, amending or adjusting the tender sum

submitted, which sum was final and absolute, as per section 82 of the Act. Further, had the Evaluation Committee acted in line with the Applicant's suggestions, it would have been an illegality and extraneous to the express provisions of the law and the Tender Document.

The Respondents contend that there was no situation that warranted clarification from the 2nd Respondent in so far as the Applicant's financial proposal was concerned and in any event, Section 81(2) of the Act provides that a clarification shall not change the terms of the tender, which is what the Applicant seeks in this request for review.

The Respondents contend that the Applicant was not the lowest evaluated tenderer having been rendered non-responsive at the Financial Requirements Criteria stage and that it has not discharged its burden of proving breach of a duty imposed on the 2nd Respondent as envisaged under Section 167(1) of the Act. The Respondents pray that the Board dismisses the instant Request for Review with costs.

INTERESTED PARTY'S CASE

The Interested Party states that it participated in the subject tender and was issued with a Letter of Notification of Award dated 21st November 2022 having emerged the successful tenderer. The Interested Party further

contend that the subject tender was lawfully awarded to the successful tenderer who passed all the evaluation stages set out in the Tender Document and prays for the Board to dismiss the Request for Review with costs.

APPLICANT'S REJOINDER

In its rejoinder, the Applicant avers that the staff/personnel costs in question were not included under the cost item titled "Reimbursable Costs" which is a clear indication that provision of these costs were only indicative of the costs the Applicant would incur if awarded the Tender and were provided in order to fully comply with the table in the Tender Document. As such, these staff/personnel costs were not to be claimed as part of reimbursable costs or the Applicant's remuneration.

The Applicant avers that from the contents of its Financial Proposal, it is clear that there was no intention that the Applicant's remuneration and the staff/personnel costs to be incurred by the Applicant would constitute part of the Applicant's tender price. The Applicant states that if this was the intention, the Applicant would have factored in the staff/personnel costs in the same table where it has detailed its management and letting fees (contractor's remuneration).

The Applicant further avers that the fact that the personnel costs were not indicated in the table for reimbursable costs was sufficient indication that the

Applicant would not be seeking reimbursement for these costs. Hence, it is not correct for the Respondents to claim that it did not indicate anywhere in its Financial Proposal that it would not be seeking reimbursement for these costs yet the Tender Document had clauses indicating that the contractor's personnel costs were for the contractor.

The Applicant reiterates that the Respondents had an option to use the provisions on clarification under Section 81 of the Act to assist it in conducting a fair evaluation and comparison of tenders. The Applicant further states that: (a) instead of seeking clarification from the Applicant, the Evaluation Committee acted unfairly by introducing a new criterion (additional costs) and using the new criterion to declare the Applicant's Financial Proposal unsuccessful even though the Applicant prepared its Financial Proposal in accordance with the instructions under the Tender Document and in compliance with the Estate Agents Act and the Estate Agent (Remuneration) Rules; (b) as part of the industry practice, Estate Agents do not include staff/professional costs as part of their management and letting fees; (c) some tenderers may have excluded the staff/professional costs entirely but having noted that some tenderers had included staff/professional costs, the Respondents should have sought clarification from all tenderers who made it to the Financial Evaluation stage before making a decision to treat the staff/professional costs as "additional costs" and considering them as part of the tender price of any tenderer; (d) had the 2nd Respondent sought clarification from the Applicant, the Applicant would have clarified that the staff/professional costs were not part of its

tender price, did not amount to costs to be borne by the 2nd Respondent and were only provided to comply with the requirement to complete the price schedule on page 43 of the Tender Document and; (e) the 2nd Respondent had the option to seek clarification from the Applicant and any other tenderer that indicated the staff/professional costs without discrimination so as to clear any doubts regarding their implication on the tender price/remuneration of the tenderer.

The Applicant prays that the Board allows the Request for Review and takes steps to ensure the Applicant's Financial Proposal is evaluated in accordance with the criteria and procedures under the Tender Document as required by the Act under Section 80(2) and (3) of the Act.

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 Applicant's tender was evaluated in accordance with the requirements set out in the tender document as read with Sections 80(2) and (3) of the Act.**
- 2. What orders should the Board grant in the circumstances?**

Issue 1: Whether the Applicant's tender was evaluated in accordance with the requirements set out in the tender document as read with Sections 80(2) and (3) of the Act

The Applicant challenges the reasons advanced by the Respondents for disqualifying its tender at the Financial Requirements Criteria stage of the subject tender for having factored in additional staff costs of Kshs. 160,000/= per month made up as (a) Kshs. 70,000/= for NHIF Building; (b) Kshs. 50,000/= for the Parking Complex; and (c) Kshs. 40,000/= for Contrust House.

On the other hand, the Respondents contend that the Evaluation Committee found the additional staff costs included in the Applicant's tender not to be viable to the 2nd Respondent and disqualified the Applicant's tender from further consideration. The Respondents further argue that it was not the role of the Evaluation Committee to decipher the intention of the Applicant in its financial proposal as doing so would have been tantamount to correcting, amending or adjusting the tender sum submitted, which sum was final and absolute.

The Board notes that the bone of contention is whether the Applicant's financial proposal in the subject tender was evaluated in accordance to the evaluation criteria provided for in Section III – Evaluation and Qualification Criteria at page 43 of the Tender Document and also if the evaluation was in

accordance to the provisions of Article 227(1) of the Constitution as read with Section 80(2) of the Act.

Having carefully studied the blank Tender Document submitted by the 2nd Respondent as part of the confidential documents received from the Respondents, we note that clause 12.3 of Section I-Instructions to Tenderers at page 21 of the Tender Document provided for what was to be contained in the Financial Proposal as follows:

"12.3 *The Financial Proposal shall contain the following:*

- a. Form of Tender – Financial Proposal, prepared in accordance with ITT 14 and ITT 15;***
- b. Price Schedules: completed prepared in accordance with ITT 14 and ITT 15;***
- c. Any other document required in the TDS."***

We further note that clause 14 of Section I-Instructions To Tenderers at page 21 of the Tender provided for documents comprising the Financial Proposal as follows:

"14 Documents Comprising the Financial Proposal

14.1 The Financial Proposal shall consist of a completed and properly executed Tender Price Form. The Price Schedule is included in Section IV of this Tendering

Document. Tenderers shall complete the Price Schedule in full and shall not amend or change the form in any way. [Emphasis ours]

14.2 The Tenderer may quote its prices in accordance with ITT 19.

14.3 All duties, taxes, and other levies payable by the Contractor under the Contract, or for any other cause, as of the date 28 days prior to the deadline for submission of Tenders, shall be included in the rates and prices and the total Tender Price submitted by the Tenderer."

We note that clause 14.1 of Section I-Instructions To Tenderers at page 21 of the Tender Document explicitly stipulated that the Financial Proposal would consist of a completed and properly executed Tender Price Form. Tenderers were required to complete the Detailed Price Schedule provided at Section IV- Tendering Forms at page 74 of the Tender Document without making any change or amendment to the form. The Detailed Price Schedule is set out in the Tender Document as follows:

"19 Detailed Price Schedule

[Form provided as sample only – Fund may change as necessary]

Contractor's detailed Remuneration

	<i>COST ITEM</i>			
<i>1</i>	<i>Staff/personnel costs</i>			
<i>2</i>	<i>Reimbursable costs</i>			
<i>3</i>	<i>Equipment costs</i>			
<i>4</i>	<i>Insurance</i>			
<i>5</i>	<i>ETC</i>			
	<i>Total Cost of the Financial Proposal</i>			

In addition, the Board notes that the Tender Document provides for the evaluation criteria and tender under the Financial Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 43 of the Tender Document as follows: -

"

<i>1</i>	<i>FINANCIAL EVALAUTION CRITERIA</i> <i>The fund will award the contract to the successful tenderer whose tender will have been determined to be</i>
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	<p><i>substantially responsive after post qualification evaluation and have been determined to be the lowest evaluated tender within the prevailing market rates.</i></p> <p><i>All technically responsive bidders MUST give a quotation within the provisions of the Estate Agents Act.</i></p>
2	<p><i>NO CORRECTION OF ERRORS</i></p> <p><i>Pursuant to Section 82 of the Public Procurement and Asset Disposal Act, 2015. The Tender Sum as submitted and read out during the Tender Opening Shall be absolute and final and shall not be the subject of correction, adjustment of amendment in any way by the person or entity.</i></p>

Financial Proposal

The proposal will be given within the rates as provided for by the Estate Agents Act.

- ***Guidelines on fees provided by the Estate Agents Act Cap 533 Laws of Kenya and industry best practices.***
 - ***All applicable taxes***
- Signature and Stamp of tenderer_____***

Note: In case of discrepancy between the unit price and the total, the unit price shall prevail."

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 are 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 notes that Regulation 77

of Regulations 2022 dictate that the Evaluation Committee shall conduct a Financial Evaluation and comparison to determine the evaluated price of each tender. Regulation 77 states as follows:

"77. Financial evaluation

- (1) Upon completion of the technical evaluation under regulation 76 of these Regulations, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.***
- (2) The evaluated price for each bid shall be determined by—***
 - (a) taking the bid price in the tender form;***
 - (b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2)(a) of the Act;***
 - (c) where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date;***
 - (d) applying any margin of preference indicated in the tender document.***
- (3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act.***

The Board has studied the Re-Evaluation Report and observes that upon evaluation, the Evaluation Committee found that the Applicant included additional staff costs of Kshs. 160,000/= per month made up as (a) Kshs. 70,000/= for NHIF Building; (b) Kshs. 50,000/= for the Parking Complex; and (c) Kshs. 40,000/= for Contrust House despite having conformed to the Real Estate Agent Act, 2012 on remuneration for management and letting of commercial buildings at 2.9% on Management and 4.35% on letting for NHIF Building, Parking Complex and Contrust House.

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 that the Form of Tender- Financial Proposal Form and the Detailed Price Schedule submitted for evaluation by the Applicant was as follows:

" 19 DETAILED PRICE SCHEDULE

Contractor's detailed Remuneration

BUILDING	Item	Fee in %	Item	Fee in %	Item	Fee in %
Nhif Building	Management Fee	2.9%	Letting Fee	4.35%	Re-Letting	NIL
Parking Complex	Management Fee	2.9%	Letting Fee	4.35%	Re-Letting	NIL

Contrust House	Management Fee	2.9%	Letting Fee	4.35%	Re-Letting	NIL
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	<i>COST ITEM</i>	<i>NHIF BUILDING</i>	<i>PARKING COMPLEX</i>	<i>CONTRUST HOUSE</i>
1	<i>Staff/personnel costs</i>	<i>70,000</i>	<i>50,000</i>	<i>40,000</i>
2	<i>Reimbursable costs</i>	<i>N/A</i>	<i>N/A</i>	<i>N/A</i>
3	<i>Equipment costs</i>	<i>N/A</i>	<i>N/A</i>	<i>N/A</i>
4	<i>Insurance</i>	<i>N/A</i>	<i>N/A</i>	<i>N/A</i>
5	<i>ETC</i>	<i>N/A</i>	<i>N/A</i>	<i>N/A</i>
	<u>Total Cost of the Financial Proposal</u>	<i>Kes. 160,000</i>		

....." [Emphasis added]

The Board observes that despite providing a financial proposal that was within the rates of the Estates Agents Act, the Applicant made certain amendments to the form of the Detailed Price Schedule provided in the Tender Document by listing the Contractor's Detailed Remuneration under two separate forms which differed from what had been specifically provided

in the tender document. In addition, the Applicant tabulated and indicated the total cost of **the Financial Proposal** at Kshs. 160,000/= without any indication that the same was not part of the contractor's detailed remuneration in the Detailed Price Schedule.

It should be noted that the Price Schedule format in the Tender Document provided for "contractor's detailed remuneration", which is also set out in the Applicant's price schedule. The Applicant had a second table with costs which were not specified not to fall within the "contractor's detailed remuneration".

We note that the Applicant contends that the Respondents should have sought clarifications regarding the staff/personnel costs in line with Section 81 of the Act to assist it in conducting a fair evaluation and comparison of tenders. Section 81 of the Act provides that:

"81. Clarifications

- (1) A procuring entity may, in writing request a clarification of a tender from tenderer to assist in the evaluation and comparison of tenders.***
- (2) A clarification shall not change the terms of the tender."***

Further, Section 82 (1) of the Act provides for correction, revision, adjustment or amendment of tender as follows:

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

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

This provision was set out at page 43 of the Tender Document as reproduced above.

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

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

The Board is of the considered view that in any event, clarifications by the 2nd Respondent would not have cured the issue given the circumstances of the case.

Given that the Applicant's Price Schedule indicated that the total of the additional costs as "the total costs of the Financial Proposal", contending that it did not form part of reimbursable costs would amount to amending the tender sum contrary to section 82 of the Act.

The Board notes from the Re-evaluation Report that the Evaluation Committee also found another tenderer non-responsive on account of having factored in additional costs in the submitted Detailed Price Schedule which was noted not financially viable to the 2nd Respondent. We further note that failure to comply with the Financial Evaluation Criteria would render a tender non-responsive and the Applicant's would thus not have been subjected to due diligence.

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." [Emphasis by the Board]

The court the court's findings 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 cited by the Respondent in which 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].

In totality, given the above finding and analysis, the Board concludes that the 2nd Respondent evaluated the Applicant's bid in accordance with the provisions of the Tender Document as read with section 80(2) of the Act.

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

We have found that the Respondents complied with the Tender Document provisions as read with Sections 80(2) in evaluation of the Applicant's tender.

We have established that the Evaluation Committee evaluated the Applicant's tender in adherence with the requirements of the Financial Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 43 of the Tender Document and rendered the Applicant's tender non-responsive at the Financial Evaluation Requirement Criteria stage.


Consequently, we deem it fit to dismiss, which we hereby do, the Applicant's Request for Review for lacking in merit and make the final orders set out below. Each party shall bear its own costs.

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 6th December 2022:

1. The Request for Review filed on 6th December 2022 by the Applicant 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 dismissed.
2. Given the findings herein, each party shall bear its own costs in the Request for Review

Dated at NAIROBI, this 23rd Day of December 2022.



.....
CHAIRPERSON

PPARB



.....
SECRETARY

PPARB