

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 12/2023 OF 24TH FEBRUARY 2023

BETWEEN

ROYAL TASTE KITCHEN LIMITED APPLICANT

AND

MANAGING TRUSTEE/CEO,

NATIONAL SOCIAL SECURITY FUND 1ST RESPONDENT

NATIONAL SOCIAL SECURITY FUND 2ND RESPONDENT

AND

TOUCH GLOBAL LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer, National Social Security Fund in relation to Tender No. NSSF/SCM/C/2/3/14:2022/2023 for Provision of Staff Tea Services.

BOARD MEMBERS PRESENT

- | | | |
|-----------------------|---|-------------------|
| 1. Mrs. Njeri Onyango | - | Panel Chairperson |
| 2. CPA. Isabel Juma | - | Member |
| 3. Dr. Paul Jilani | - | Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Holding Brief for Acting Board Secretary

PRESENT BY INVITATION

APPLICANT - ROYAL TASTE KITCHEN LIMITED

Mr. Udoto - Udoto & Company Advocates

RESPONDENTS -MANAGING TRUSTEE/ CEO, NATIONAL SOCIAL SECURITY FUND

NATIONAL SOCIAL SECURITY FUND

1. Mr. Kelvin Mbogo -Advocate, Robson Harris Advocates LLP

2. Mr. Kiprotich - Advocate, Robson Harris Advocates LLP

THE INTERESTED PARTY- TOUCH GLOBAL LIMITED

Mr. Metto -Advocate, Metto & Company Advocates

BACKGROUND OF THE DECISION

The Tendering Process

National Social Security Fund, the Procuring Entity and the 2nd Respondent herein, invited sealed tenders in response Tender No.

NSSF/SCM/C/2/3/14:2022/S023 for Provision of Staff Tea Services (hereinafter referred to as the "subject tender") using an open competitive method of tendering and the subject tender was Reserved for Women. The invitation was by way of an advertisement on 3rd January 2023 on The Standard Newspaper and on the 2nd Respondent's website www.nssf.or.ke and <https://supplier.treasury.go.ke>. The subject tender's submission deadline was Thursday, 18th January 2023 at 11.00 a.m.

Submission of Tenders and Tender Opening

According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 20th January 2023, a total of seven (7) tenderers submitted their tenders. The said seven (7) tenders were opened in the presence of tenderers' representatives who attended the tender opening session and were recorded as having submitted their respective tenders in response to the subject tender within the tender submission deadline as follows:

No.	Name of Tenderer
1.	Vintage Vibrant Movers
2.	Royal Taste Kitchen
3.	Mlima View Gardens
4.	Meal Magic Caterers & Event Management
5.	African Eagle Restaurant
6.	Touch Global Limited
7.	Lesan Caterers Limited

Evaluation of Tenders

The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the seven (7) tenders in the following three stages as captured in an Evaluation Report signed by members of the Evaluation Committee on 3rd February 2023):

- i. Preliminary Evaluation
- ii. Technical Evaluation
- iii. Financial Evaluation

Preliminary and Mandatory Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out in Clause 2.1 Preliminary/ Mandatory examination for determination of responsiveness of Section III- Evaluation and Qualification Criteria at page 28 of the Tender Document.

At the end of the evaluation at this stage, three (3) tenders were found to be non-responsive while four (4) tenders which included the Interested Party's tender and Applicant's tender were found to be responsive. Only the responsive tenders proceeded for evaluation at the Technical Evaluation Stage.

Technical Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out under Technical Evaluation Criteria of Section III-Evaluation Qualification Criteria at pages 29 of the Tender Document and Stage II- Technical Evaluation of Section III-Evaluation Qualification Criteria at pages 30 of the Tender Document. Tenders were required to score YES in all the requirements at the technical evaluation stage to qualify to proceed for evaluation at the Financial Evaluation Stage.

At the end of evaluation at this stage, all the four (4) tenders were found responsive at the Technical Evaluation stage and according to the Evaluation Report, qualified to proceed for due diligence and financial evaluation.

Due Diligence

As part of the evaluation process, the Evaluation Committee was required to carry out due diligence on the tenderer's relevant experience in three (3) organizations submitted by a tenderer in compliance with Item 1 of Stage II- Technical Evaluation of Section III-Evaluation Qualification Criteria at page 30 of the Tender Document.

The Evaluation Committee conducted due diligence on the four (4) responsive tenderers by making calls and sending emails to the tenderers referees and also confirmed the status of the tenderers NSSF Compliance Certificate which was confirmed internally with Registration & Collection Department and Tourism Fund Compliance Certificate.

At the end of the due diligence exercise, the Evaluation Committee noted that the response was positive.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine the responsive tenders using the Criteria set out under Stage Three Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 31 of the Tender Document. The Evaluation Committee was required to conduct financial evaluation and comparison of tenders to determine the lowest evaluated price by (a) considering the eligibility for the specific category in a special group (AGPO-Women) (b) confirming tenderers signing Price schedule and transfer the figure to the form of tender (c) price comparison (d) ranking the responsive tenders according to their tendered price.

At the end of evaluation at this stage, the Interested Party was determined to have quoted the lowest amount compared to the other three (3) tenderers at its tender price of Kenya Shillings Ten Million, Four Hundred and Ninety-Eight Thousand, Two Hundred and Twenty-Four (Kshs. 10,498,224.00) only as indicated at page 5 of the Evaluation Report which forms part of the confidential documents submitted to the Public Procurement Administrative Board (hereinafter referred to as the 'Board') by the Respondents pursuant to Section 67(3)(e) of the Public Procurement Asset and Disposal Act, 2015 (hereinafter referred to as the 'Act').

Evaluation Committee's Recommendation

The Evaluation Committee recommended award of the subject tender to the Interested Party at its quoted tender price of Kenya Shillings Ten Million, Four Hundred and Ninety-Eight Thousand, Two Hundred and Twenty-Four (Kshs. 10,498,224.00) only total per annum inclusive of all taxes.

Professional Opinion

In a Professional Opinion dated 7th February 2023 (hereinafter referred to as the "Professional Opinion"), the Acting Procurement Manager, Ms. Rosemary Oluoch, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and recommended the award of the subject tender to the Interested Party as per the recommendations of the Evaluation Committee.

The award of the subject tender to the Interested Party was approved on 11th February 2023 via a signature scribbled on the top left of the first page of the Professional Opinion.

Notification to Tenderers

Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award dated 13th February 2023 signed by the 1st Respondent.

REQUEST FOR REVIEW

On 24th February 2023, the Applicant filed a Request for Review dated 24th February 2023 together with a Supporting Affidavit sworn on 24th February 2023 by Emily Kerubo Kamau through the firm of Udoto & Company Advocates seeking the following orders from the Board in verbatim:

- a) That notification of intention of award to the interested party Touch Global Limited be cancelled.***
- b) That the Procuring Entity be directed to carry due diligence as per section 83 of the Act and provision of tender documents.***
- c) That Procurement Entity to issue letters of notification to the applicant as per section 87.***
- d) That Touch Global Limited be debarred in accordance with PPADA 2015 section 41 from the re-evaluation and other proceedings for uttering false statements for a period determined by the board.***
- e) That the board finds action illegal and orders National Social Security Fund (NSSF) to recommend award to the applicant being the lowest evaluated bidder.***

f) That cost of review to be awarded to the Procuring entity.

In a Notification of Appeal and a letter dated 24th February 2023, Mr. James Kilaka, the Acting Board Secretary of the Public Procurement Administrative Review 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 24th February 2023.

On 1st March 2023, in opposition to the Request for Review, the Respondents, through the firm of Robson Harris Advocates LLP filed a Notice of Appointment of Advocates dated 1st March 2023, a Respondents' Memorandum of Response dated 1st March 2023 together with the Respondent's Replying Affidavit sworn on 1st March 2023 by Rosemary Oluoch, the Procurement Manager of the 2nd Respondent.

Vide letters dated 1st March 2023, 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 concerning the subject tender within 3 days from 1st March 2023.

On 3rd March 2023 the Interested Party through the firm of Metto & Company Advocates filed a Notice of Appointment of Advocates dated 3rd March 2023 together with an Interested Party's Replying Affidavit sworn on 3rd March 2023 by Sahara Mohamed Maalim, its Director.

On 24th March 2020, the Board had 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 it would strictly rely on the documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with Section 171 of the Act. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

However, vide a Hearing Notice dated 3rd March 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of online

hearing of the instant Request for Review slated for 9th March 2023 at 2:00 p.m. through the link availed in the said Hearing Notice.

On 7th March 2023 the Applicant filed a Further Affidavit sworn on 7th March 2023 by Emily Kerubo Kamau.

On 8th March 2023 the Applicant filed Written Submissions dated 8th March 2023 together with an authority in support of its arguments.

On 9th March 2023 the Respondents filed Written Submissions together with a list and bundle of authorities dated 9th March 2023.

On 9th March 2023 the Interested Party filed an Interested Party's Supplementary Affidavit sworn on 8th March 2023 by Sahara Maalim together with its Written Submissions dated 8th March 2023.

During the online hearing on 9th March 2023 2023, Counsel for the Applicant, Mr. Udoto, made an oral application seeking to expunge the Interested Party's Supplementary Affidavit sworn on 8th March 2023 by Sahara Maalim. Counsel argued that the rules of the Board did not require filing of a Supplementary Affidavit and that he would not have a chance to respond to the said Supplementary Affidavit unless he responded from the bar. He

nonetheless sought to be given an opportunity to comment on the said Supplementary Affidavit in the event it was not expunged.

In response, Counsel for the Interested Party, Mr. Metto, made an application to have the Interested Party's Supplementary Affidavit sworn on 8th March 2023 by Sahara Maalim be deemed as properly on record. Counsel argued that they had been served with a Further Affidavit by the Applicant on 8th March 2023 and found some important issues worth responding to hence their application for the Board to make an informed decision. In any event, Counsel was of the view that no prejudice would be visited on the parties and they could be afforded a chance to respond.

The Board having considered the application for expunging the Interested Party's Supplementary Affidavit sworn on 8th March 2023 by Sahara Maalim denied the same and directed that the same be deemed as properly on record allowing latitude to Counsel for the Applicant to comment on it but not raise matters of fact from the bar, that should otherwise be canvassed through statements by the parties. The Board in reaching this position took note that the Interested party had itself received the Applicant's further Affidavit late, barely 24 hours before the Hearing, thus had no time to seek leave to file. Further, the Applicant's Further Affidavit had raised substantial allegations against the Interested Party and it was only fair that their response be on record for the Board's consideration. The very tight Statutory time limit could not allow for any adjournment of the matter and therefore

the dictates of fairness would be to allow the said Affidavit on record and to grant latitude to the Applicant's counsel to make submissions on the same.

PARTIES' SUBMISSIONS

Applicant's Submissions

During the online hearing, Counsel for the Applicant, Mr. Udoto relied on the Applicant's Request for Review dated 24th February 2023 together with a Supporting Affidavit sworn on 24th February 2023 by Emily Kerubo Kamau, Further Affidavit sworn on 7th March 2023 by Emily Kerubo Kamau, and Written Submissions that were filed before the Board and prayed for the same to be allowed as prayed.

On the Interested Party's Supplementary Affidavit sworn on 8th March 2023 by Sahara Maalim, Mr. Udoto submitted that paragraphs 6,7,8, and 9 of the said affidavit confirmed that the Applicant had previously qualified and offered similar services to the Respondents. He further submitted that Paragraph 13 of the said affidavit did not dispute that the Interested Party is a construction company and is allowed per its Memorandum and Articles of Association to do any other business yet the constitutive documents having not been annexed, this cannot be verified. Counsel submitted that each company has a primary job that it is qualified at and that in the present case the Interested Party is a construction company.

Mr. Udoto then adverted to the Respondents submissions and indicated that a previous tender by the Respondents was terminated and that the bid prices in the said tender had been exposed to all tenderers. Further that upon retendering all the tenderers reduced their bid amounts save for the Applicant.

Counsel also submitted that the Applicant was denied an opportunity to challenge the termination of the previous tender as the communication for the cancellation of the tender was never made.

Mr. Udoto pressed on that due diligence is not just a formality and involves verification of information supplied and in this instance, there was need to verify that the Interested Party met the qualifications and had served other companies with 500 employees.

On pricing, Mr. Udoto submitted that the Applicant was the lowest responsive tenderer in the previously cancelled tender and that the bid prices were exposed to all strategically to afford the Interested Party an advantage once the tender was retendered.

He therefore submitted that the due diligence as conducted by the Respondents was not objective as it should have unearthed that the Interested Party operates from a 2-bedroom apartment in South C.

Mr. Udoto submitted that due diligence should be done on the lowest responsive tender and not all the tenderers. Counsel indicated that due diligence was done on the Applicant as two of its references were contacted and they gave positive feedback. He questioned why no explanation had been offered as to why it was done on only two references.

On the issue of notification of intention to award, Mr. Udoto decried that the 2nd Respondent communicated to the Applicant through an email indicated on the Applicant's CR12 document and not the email the Applicant filled out in the Confidential Business Questionnaire forming part of the tender documents.

He further submitted that the Applicant made follow ups on the award in the subject tender but the Respondents did not offer any reason in their notification as to why the Applicant or any other tenderer was unsuccessful contrary to the Act.

Mr. Udoto assailed the Interested Parties submissions stating that the Applicant had annexed a decision in its Further Affidavit demonstrating that the Interested Party had tendered for construction work in Tender No. IGEN/DCC/1/2019-2020 for Provision of Proposed Construction of the Deputy County Commissioner's Office Block at Igembe North Sub-County, Meru County but failed.

Respondents' submissions

Counsel for the Respondents, Mr. Kiprotich relied on the Respondent's Written Submissions filed before the Board and indicated that the tender before the Board was the current tender and had limited themselves, when framing issues, to the current tender.

On due diligence, Counsel submitted that due diligence is not necessarily conducted on the successful tenderer alone as at times it is done at the preliminary stage on all tenderers and had annexed case law to this effect. Counsel pointed out that in the present case, due diligence was conducted on all tenderers who passed the technical evaluation stage and was not done on two tenderers only.

Counsel further submitted that due diligence is not an indication of an intention to award a tender and as such a tenderer cannot claim that they are the successful tenderer just because they have been subjected to a due diligence exercise. He added that in the present Request for Review the Applicant was not the lowest tenderer.

Mr. Kiprotich added that due diligence has to have a limited defined scope restricted to the goods and services being procured. He submitted that the subject tender being a tender for provision of tea to staff, due diligence would be restricted to parameters that verify whether a tenderer can provide the goods and services under the subject tender and meet the Procuring entity's needs.

On the issue of notification, Counsel noted that despite the fact that the 2nd Respondent used an email address not approved by the Applicant though picked from the Applicant's CR12, the Applicants still received the notification in good time and that was why they filed the instant review within the statutory timeline.

Additionally, Mr. Kiprotich submitted that the reasons for the unsuccessful tender were contained in the notification of intention to award sent by the Respondents to the tenderers. He directed the Board to paragraph 42.1 of the Instructions To Tenderers in the Tender Document which indicated that the reasons for the unsuccessful tenders need not be communicated if this is apparent from the price information by the tenderers and submitted that from the amounts listed in the notification of intention to award, it was clear that the Applicant's bid was not the lowest bid.

Upon enquiry by the Board on the parameters of the Financial Evaluation, Counsel for the Respondents Mr. Mbogo took over from Mr. Kiprotich and submitted that Section III of the Tender Document provided that the parameter would be to establish the lowest evaluated responsive tender from the bid amounts by the tenderers.

The Board sought further clarification on the Respondents' conduct of due diligence and Mr. Mbogo submitted that Section 83 of the Act uses the words "may" suggesting that the timing of the due diligence under the provision is not mandatory but permissive. He relied on the case of *R v Public*

Procurement Administrative Review Board & another Ex-parte University of Eldoret [2017] eKLR and R v Public Procurement administrative Review Board & others Exparte Guardforce Group Limited [2021] eKLR for the proposition that due diligence could be conducted at any time before the award of a tender.

The Board inquired from Mr. Mbogo on the contents of the notification letter per section 87(3) of the Act to which he responded that he was in possession of the notification attached by the Applicant and the letters to the unsuccessful tenderers were forwarded to the Board.

Interested Party's Submissions

Counsel for the Interested Party, Mr. Metto relied on the Interested Party's Replying Affidavit sworn on 3rd March 2023 by Sahara Mohamed Maalim, its Director, Supplementary Affidavit sworn on 8th March 2023 by Sahara Maalim and Written Submissions dated 8th March 2023 that were filed before the Board and further associated himself with the submissions and documents filed by the Respondents.

Mr. Metto submitted that section 167 Act gives room for a party who risks to suffer loss from a tender process to approach the Board seeking reprieve and pointed out that the Applicant in the present case did not demonstrate the loss they stood to suffer.

He further submitted that the Applicant was not challenging the tender process but only the tender outcome and pointed out according to sections 80, 86, and 87 of the Act, the Interested Party had satisfied all requirements under the subject tender and was the lowest evaluated tender. Counsel reiterated that there was no breach by of law by the 2nd Respondent and that on the issue of notification, the Applicant had not demonstrated prejudice suffered.

Mr. Metto prayed that the Request for Review application be disallowed for being unmerited.

Applicant's Rejoinder

In a rejoinder, Mr. Udoto submitted that it was a specific requirement under the Tender Document that a tenderer demonstrates they could serve 500 persons and that the Interested Party is not capable of this.

Counsel further submitted that the notification letter dated 13th February 2023 was done to the Interested Party and not to any of the other tenderers and there was no proof that it was sent to any other tenderer.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 17th February 2023 was due to expire on 17th March 2023 and that the Board would communicate its decision on or before 17th March 2023 to all parties via email.

BOARD'S DECISION

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

- 1. Whether the 2nd Respondent's Evaluation Committee evaluated and compared tenders in the subject tender in accordance with section 80(2) of the Act read with Article 227(1) of the Constitution and the Tender Document.**
- 2. Whether the Procuring Entity conducted due diligence in the subject tender in accordance with section 83 of the Act read with Regulation 80 of the Regulations 2020 and the Tender Document.**
- 3. Whether the notification of the outcome of the evaluation of the subject tender was made to the successful tenderer and the unsuccessful tenderers in compliance with section 87 of the Act read with regulation 82 of Regulations 2020.**
- 4. What orders should the Board grant in the circumstances?**

Before addressing the issues framed for determination, the Board would like to dispense with a preliminary aspect arising from the proceedings before it.

During the online hearing, Counsel for the Applicant in his submissions made reference to a previous Tender No. NSSF/SCM/C/2/3/03:2022-2023 that the Respondents' terminated and was later on re-advertised as the subject tender under review in these proceedings.

Section 167(1) of the Act extends to tenderers that are aggrieved by a decision of a procuring entity the right to invoke the jurisdiction of this Board by way of a Request for Review and provides as follows:

"167. Request for a review

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

In essence, a tenderer that is aggrieved or dissatisfied with a decision of a procuring entity on its tender ought to seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process as in such manner as may be prescribed. The manner for seeking such an administrative review is by way of a Request for Review filed with the Review Board Secretary and is

prescribed in Regulation 203 (1), (2), (3), & (4) of Regulations 2020 as follows:

"203 Request for a review

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

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

(a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

(b) be accompanied by such statements as the applicant considers necessary in support of its request;

(c) be made within fourteen days of —

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

(ii) the notification under section 87 of the Act; or

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

(d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.

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

(4) The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.”

Regulation 203 of Regulations 2020 guides an aggrieved candidate or tenderer on the applicable Form for filing a Request for Review (i.e. Form set out in the Fourteenth Schedule of Regulations 2020) which is an application that should state the reasons for the complaint, including any alleged breach of the Act or the Regulations 2020.

Paragraph 8, 9 and 11 of the Applicant’s Supporting Affidavit sworn on 24th February 2023 by Emily Kerubo Kamau made reference to Tender No. NSSF/SCM/C/2/3/03:2022-2023 and complained that no reason was issued for its cancellation and that consequently, the Interested Party reduced its tender price to be the lowest after finding out the tender prices of other tenderers. We note that the Respondents in their written submissions at paragraphs 8, 9, 10, and 11 contend that Tender No. NSSF/SCM/C/2/3/03:2022-2023, which was terminated for non-responsiveness, is not subject to the instant review proceedings and that no

Request for Review application against the decision to terminate the said tender was made for the Board's determination in accordance with section 167 of the Act and Regulations 2020.

The Board finds that the complaints pertaining to Tender No. NSSF/SCM/C/2/3/03:2022-2023 cannot be entertained by the Board in the instant proceedings for having not been brought before the Board in accordance with Section 167(1) of the Act read with Regulation 203 of Regulations 2020.

Whether the 2nd Respondent's Evaluation Committee evaluated and compared tenders in the subject tender in accordance with Section 80(2) of the Act read with Article 227(1) of the Constitution and the Tender Document.

The Board notes that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides 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)"**

Further to the above provision, the national values and principles of governance under Article 10 of the Constitution apply to State organs and public entities contracting for goods and services. Article 10 provides as follows:

"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

- (a) applies or interprets this Constitution;**
- (b) enacts, applies or interprets any law; or**
- (c) makes or implements public policy decisions.**

(2) The national values and principles of governance include—

- (a)**
- (b)**

(c) good governance, integrity, transparency and accountability” [Emphasis ours].

Efficient good governance in public procurement proceedings provides tenderers with an assurance that Public Procurement and Asset Disposal processes are operating effectively and efficiently. Such processes are also underpinned by broader principles such as the rule of law, integrity, transparency and accountability amongst others.

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

"80. Evaluation of tenders

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

(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.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.

(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations.

(6) The evaluation shall be carried out within a maximum period of thirty days.

(7) The evaluation report shall be signed by each member of evaluation committee.”

Further Regulation 76 of Regulations 2020 also speaks to the evaluation process in the following terms:

"76. Technical evaluation

(1) Upon completion of the preliminary evaluation under regulation 74, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the goods, works or services in the tender document.

(2) The evaluation committee shall reject tenders which do not satisfy the technical requirements under paragraph (1).

Regulation 78 of Regulations 2020 envisages the preparation of an evaluation report in the following terms;

"78. Evaluation report and professional opinion

(1) An evaluation report prepared under section 80(4) of the Act shall include—

(a) a summary of all the tenders received from the head of the procurement function;

(b) the results of the preliminary evaluation;

(c) the results of the technical evaluation;

(d) reasons why any tenders were rejected;

(e) details of any minor deviations accepted under section 79(2)(a) of the Act and the way in which such deviations were

quantified and taken into account in the evaluation and comparison of the tenders;

(f) the evaluated price of each tender showing the price and any conversion to a common currency, if any;

(g) the ranking of the tenders each according to its total evaluated price;

(h) a recommendation to award the contract to the successful tenderer in accordance with section 86 of the Act; and

(i) any dissenting opinion and the reasons thereof and such other recommendation as may be deemed necessary by the evaluation committee.

The Applicant in the instant Request for Review is aggrieved by the Respondents' decision to award the subject tender to the Interested Party alleging that the Interested Party is a Construction company with no experience in catering.

We note that the Tender document provides for the evaluation process in the subject tender under Section III- Evaluation and Qualification Criteria at pages 28 to 31 of the Tender Document. We further note that evaluation of tenderers was to be conducted in three stages being the Preliminary/Mandatory Evaluation; Technical Evaluation and Financial Evaluation. As part of the evaluation, due diligence was to be undertaken on three organizations with more than 500 employees required to be availed by a tenderer to demonstrate its experience in undertaking similar nature of services as the subject tender.

Clause 2.1 Preliminary/ Mandatory examination for determination of responsiveness of Section III- Evaluation and Qualification Criteria at page 28 of the Tender Document provides for preliminary evaluation as follows:

The evaluation committee shall first conduct a preliminary examination to determine whether: -

- 1. The tender has been submitted in the required format as per the invitation and tender instructions***
- 2. The tender has been signed by the person lawfully authorized to do so;***
- 3. The required number of copies of the tender have been submitted as per the invitation and the tender instructions***
- 4. The tender is valid for the period required as per the invitation and tender instructions.***
- 5. All pages in the tender documents have been serialized (MUST)***

We note that the Tender Document at pages 29 to 31 further provides for Technical Evaluation as follows:

MANDATORY EVALUATION CRITERA (Documentary evidence MUST be attached)

TECHNICAL EVALUATION CRITERIA

Mandatory Business questionnaire. All sections of the questionnaire must be filled in, failure to duly complete the

confidential business questionnaire will automatically lead to disqualification.

Tenders which do not satisfy any of the above requirements in clause 2.1 shall be declared Non-responsive.

Mandatory Requirements

- 1. Certificate of Company Registration/Incorporation***
- 2. Valid Tax Compliance Certificate***
- 3. Valid NSSF Compliance Certificate***
- 4. Details of Directorship/Ownership (CR-12)***
- 5. All the pages of the tender document must be serialized/paginated/numbered chronologically.***
- 6. Valid AGPO Certificate (Women)***
- 7. Valid Current Statutory Public Health Certificate***
- 8. Valid Tourism Fund Compliance Certificate***
- 9. Letter from the Bank showing bidder's financial resource and access to lines of credit from the appointed bankers.***
- 10. A duly completed Tender Security Declaration Form***

Tenders which do not satisfy any of the above requirements shall be rejected at this stage

Stage II-Technical Evaluation

Documentary evidence must be provided for each requirement-non-compliance may lead to disqualification)

No.	CRITERIA	REQUIREMENTS	YES/NO
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<p>1.</p>	<p>Relevant experience Provide a minimum of Three (3) organisations with more than 500 employees in undertaking similar nature of services (Provision of Tea to staff/employees)</p>	<p>Submit copies of any two of the following documents Copies of signed contracts Copies of award letters Copies of purchase Orders</p>	
<p>2.</p>	<p>Personnel competence Provide two (2) key relevant professionals who will be in charge (Cook and FB Manager) Each will have a minimum Academic Qualifications of Form IV/ O Level</p>	<p>Copies of academic certificates Copies of professional certificates A certified copy of current Public Health Certificates issued by County Government Detailed CVs signed by the employer and the personnel in compliance with OSHA Act</p>	

	<p><i>Certificates with five (5) years' experience or a Diploma certificate with three (3) years' experience.</i></p> <p><i>All the proposed staff to be deployed MUST have current Public health certificate issued by the County Government (Attach)</i></p>		
<p><i>3.</i></p>	<p><i>Tools and equipment Proof from the company on availability of Kitchen equipment, Utensils and uniform for the</i></p>	<p><i>Evidence of ownership/certificate of lease for equipment Pictorial evidence</i></p>	

	staff to be deployed.		
4.	Business support Proof of financial resources/ access to lines of credit [attach evidence] Appointed bankers and bank reference	Letter from your principal bankers indicating access to lines of credit and authority for NSSF to seek reference.	
5.	Staffing Proposed number of staff to be deployed in each specific area of service as required Please enclose sample staff pay slips for a minimum of six (6) staff for the last three months to demonstrate compliance to the labour laws.	Staff deployment schedule Letter of commitment to adhere to the Ministry of Labour laws on minimum wages	

6.	<i>Work plan & Methodology Daily duty procedure charts showing the various timings from the start to end of service</i>	<i>A chat clearly indicating the timelines between each process</i>	
7.	<i>Three (3) reference letters from the clients mentioned above</i>	<i>Current reference letters addressed to the CEO/Managing Trustee NSSF on the Specific company's letterhead.</i>	
<p>NOTE: <i>NSSF shall carry out due diligence on the three (3) organizations mentioned above to ascertain the bidders' performance from 2019 to 2022. To be undertaken by the evaluation committee as part of the evaluation.</i></p>			

REMARKS

Bidders who score YES in all the requirements at the technical evaluation stage will qualify to the Financial Evaluation Stage. Bidders scoring No in any of the above shall stand disqualified.

Financial Evaluation has been provided for at page 31 of the Tender Document as follows:

STAGE THREE

FINANCIAL EVALUATION

The eligibility for the specific category in special group (AGPO-Women) will be considered.

Bidders should duly sign the Price Schedule and transfer the figure to the form of tender. Both the form of tender and Price schedule MUST be duly signed.

Price comparisons paying attention to ITT 37

Ranking

RECOMMENDATION

The bidder with the Lowest Evaluated Price will be recommended for award.

From the above provisions of the Tender Document, it is clear that an objective criterion of evaluation of tenders was provided for in compliance with section 80 of the Act read with Regulation 76 of Regulations 2020. Having carefully studied the Evaluation Report submitted as part of the confidential file by the 1st Respondent pursuant to section 67(3)(e) of the Act, there is no indication of bias or unfairness on the part of the Respondents in evaluating and comparing tenders in the subject tender. Both the Applicant's tender and the Interested Party's tender were

determined responsive at the Preliminary Evaluation stage and the Technical Evaluation stage and were ranked and their tender prices compared at the Financial Evaluation stage. As such, in our considered view, the evaluation criteria was fairly and equally applied by the Evaluation Committee when evaluating the Applicant's and Interested Party's tenders.

We note that the Stage Three Recommendation of Section III- Evaluation and Qualification Criteria at page 31 provided that the tenderer with the Lowest Evaluated Price would be recommended for award. From the Evaluation Report, the Interested Party's tender was recommended for award having been determined to be the lowest quoted tender price in the subject tender.

From the foregoing, we find that the 2nd Respondent's Evaluation Committee evaluated and compared tenders in the subject tender in a fair manner and in accordance with Section 80(2) of the Act read with Article 227(1) of the Constitution and the Tender Document.

Whether the Procuring Entity conducted due diligence in the subject tender in accordance with Section 83 of the Act read with Regulation 80 of the Regulations 2020 and the Tender Document.

The Applicant contends that the Respondents' Evaluation Committee conducted a due diligence exercise that was unimpressive citing at paragraph 6 of the Supporting Affidavit of Emily Kerubo Kamau sworn on 24th February 2023 that if a proper due diligence was conducted it would be discovered that the successful tenderer was a construction company inexperienced in providing catering services and that any services they offered so far in the industry would be as a result of manipulation and/or cohesion which would in turn deny rightful companies from being awarded tenders.

The Applicant further contends that there were glaring omissions and commissions by the Interested Party which the 2nd Respondent ought to have noted and not granted or cancelled the award to the interested party. Counsel for the Applicant pressed the argument that due diligence is only conducted on the successful tenderer and the Respondents having contacted two of its references, it was a clear indication that the Applicant was the lowest evaluated tenderer and it was erroneous to find the Applicant's tender non-responsive.

In opposition to the Applicant's argument, the Respondents contend that due diligence was conducted on all tenderers who had passed the Technical Evaluation stage without necessarily considering the tender sum and this was not an indication of intention to award the subject tender to the Applicant or signal that the Applicant had submitted the lowest evaluated responsive tender. Counsel for the Respondents submitted that the due diligence to be conducted on responsive tenderers was limited to establishing

whether a tenderer had the capacity to deliver on the subject tender and from the due diligence exercise, the tenderers determined as responsive including the Interested Party were capable of meeting the 2nd Respondent's procurement needs in the subject tender.

The Respondents further submitted that any communication of award would have to be in written format and expressly communicated to the successful tenderer. The Interested Part in support of the Respondents submission contends that the allegations by the Applicant against it are meant to mislead this Board and are utterly misplaced and unsubstantiated. Further, it is the Interested Party's case that it has the capacity to deliver on the subject tender having been found to be the successful tenderer in the subject tender.

The question we are now called upon to answer is whether the 2nd Respondent Evaluation Committee conducted due diligence in the subject tender in accordance with provisions of Section 83 of the Act read with Regulation 80 of Regulations 2020 and the provisions of the Tender Document.

Due diligence is provided for Section 83 of the Act which reads:

"83. Post-qualification

(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest

evaluated responsive tender to be awarded the contract in accordance with this Act.

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

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

(a) initial each page of the report; and

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

Further Regulation 80 of the 2020 Regulations provides as follows:

"80. Post-qualification

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

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

- (a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or*
- (b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method."*

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

This Board in **PPARB Application No. 158/ 2020 On the Mark Security Limited =Vs= The Accounting Officer, Kenya Revenue Authority and Another** established that a due diligence exercise is a fundamental element of a procurement process that assists a Procuring Entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.

However, an evaluation committee of a procuring entity has the discretion to conduct or not to conduct a post qualification evaluation or a due diligence exercise to confirm and verify the qualifications of a tenderer who submitted the lowest evaluated responsive tender to be awarded a contract. We say so because, a reading of Section 83 of the Act makes reference to the word

'may' as opposed to the word 'shall'. In our considered view where a tender document has not provided for post qualification evaluation or due diligence exercise, then a procuring entity is not under an obligation to conduct a due diligence exercise or a post qualification evaluation. Put differently, a Procuring Entity may elect to conduct or not to conduct a due diligence exercise or post qualification evaluation where a tender document does not provide for such due diligence exercise or post qualification evaluation. However, where a tender document has provided for a due diligence process to be conducted, then it is important that such due diligence is conducted.

Turning to the instant Request for Review, due diligence has been provided for at Stage II- Technical Evaluation of Section III- Evaluation and Qualification Criteria at page 30 of the Tender Document as follows:

ITEM	CRITERIA	REQUIREMENTS	YES/NO
1	Relevant Experience Provide a minimum of Three (3) organizations with more than 500 employees that can best demonstrate your experience in undertaking similar nature of services	Submit copies of any two of the following documents <ul style="list-style-type: none"> • Copies of signed contracts • Copies of award letters 	

	<i>(Provision of tea to staff/ employees)</i>	<i>• Copies of Purchase Orders</i>	
*****	*****	*****	*****
*****	*****	*****	*****
*****	*****	*****	*****
*****	*****	*****	*****
*****	*****	*****	*****
*****	*****	*****	*****

NOTE

NSSF shall carry out due diligence on the three (3) organizations mentioned above to ascertain the bidder performance from 2019 to 2022. To be undertaken by the evaluation committee as part of the evaluation process.

REMARKS

Bidders who score YES in all the requirements at the technical evaluation stage will qualify to the Financial Evaluation Stage. Bidder’s scoring NO in any of the requirements above shall be disqualified.”

The import of the above provision is that the 2nd Respondent was under an obligation to conduct due diligence on three organizations with more than 500 employees submitted by a tenderer who was responsive at the Technical Evaluation stage demonstrating the tenderer’s experience in undertaking similar nature of services as the subject tender. Only tenderers who scored

YES in all the requirements at the Technical Evaluation stage would qualify to proceed to the Financial Evaluation stage and any tenderer scoring NO in any of the requirements would be disqualified. However, there is no indication in the above provision that dictates that due diligence to be conducted on a tenderer's references meant that the said tenderer was the lowest responsive evaluated tenderer eligible for award of the subject tender. We understand the above provision to indicate that all responsive tenderers at the Technical Evaluation stage would undergo due diligence on references availed in proof of experience of undertaking similar nature of services as the subject tender.

This Board is cognizant of the fact that the obligation of conducting due diligence on tenderers is on the Evaluation Committee of a procuring entity. Neither this Board nor a participating tenderer can purport to convert themselves into a member of the Evaluation Committee. Thus, the allegations by the Applicant that the Interested Party is a Construction company and incapable of delivering on the subject tender does not help the Applicant's case as the Interested Party is providing the same service to the Respondent and due diligence is meant to ascertain the capability of a tenderer to meet the needs of the 2nd Respondent in the subject tender.

The Board has reviewed the Interested Party's Original tender document and established that the said tenderer submitted a valid Current Statutory Public Health Certificate and a Valid Tourism Fund Compliance Certificate. These are documents demonstrative of the Interested Party's involvement in the Catering sector. They are not documents ordinarily necessary for the

Construction Industry. The adverse claims made in the Further Affidavit of the Applicant, accusing the Interested Party of manipulation and Collusion have not been supported in any way. We thus will not go into them. However, should the Applicant have proof thereof, they are at liberty to use available channels in the Act to refer the same to the Director General PPRA for his action. We therefore decline the invite to issue an order to debar the Interested Party.

Having studied the Evaluation Report, we observe that due diligence was conducted on four tenderers who had been determined responsive at the Technical Evaluation stage which included the Applicant and Interested Party. We note that the 2nd Respondent's Report contained in the Confidential documents supplied to the Board, at page 4 indicates that the Evaluation Committee appear to have conducted due diligence via calls and email. The Interested Party's references being NSSF, Ismax Security Limited, Wajir County Department of Health and County Government of Mandera and noted that all referees responded positively. We also note that the 2nd Respondent's Evaluation Committee contacted via calls and email the Applicant's references being Kenya Examination Council, National Oil Corporation, and NSSF and noted that all referees responded positively.

The results of the Technical Evaluation as indicated at page 4 of the Evaluation Report reads:

Table 3: Results of the Technical Evaluation

<i>BID NO.</i>	<i>NAME OF BIDDER</i>	<i>Score</i>	<i>Remarks</i>
<i>1</i>	<i>Vintage Vibrant Movers</i>	<i>Yes</i>	<i>Qualified</i>
<i>2</i>	<i>Royal Taste Kitchen</i>	<i>Yes</i>	<i>Qualified</i>
<i>6</i>	<i>Touch Global Limited</i>	<i>Yes</i>	<i>Qualified</i>
<i>7</i>	<i>Lesan Caterers Limited</i>	<i>Yes</i>	<i>Qualified</i>

Having studied the Interested Party's 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, we observe that the Interested Party at page 191 to 225 of its tender provided purchase orders, award letters and signed contracts for (a)NSSF; (b) Ismax Security Limited; (c) County Government of Wajir; and (d) Mandera County Government.

Having carefully studied the confidential file we note that under the post qualification/due diligence responses from tenderer's references, **only two of the Interested Party's referees responded via email** with regard to the due diligence exercise conducted by the Evaluation Committee in compliance with the requirement for due diligence in Stage II- Technical Evaluation of Section III- Evaluation and Qualification Criteria at page 30 of the Tender Document. The Respondents have not availed any proof that calls were made and responded to by any other referee of the Interested Party to ascertain that the Interested Party had demonstrated its capacity in

undertaking similar nature of services in **three (3) organizations with more than 500 employees.** (emphasis ours) We say so because the Tender Document was clear that the scope of due diligence entailed ascertaining a tenderer's performance from 2019 to 2022 in three (3) organizations provided as references meaning there has to be proof of at **least three responses** by the Interested Party's references.

In our view, meaningful Due Diligence in view of the Tender document requirements, may as well call for physical verification of the requirements of the Tender document to confirm "a meet or not meet" comment on the Tenderer's References and its staff capacity.

From the foregoing, we find that the 2nd Respondent's Evaluation Committee failed to conduct due diligence in the subject tender in compliance with section 83 of the Act read with Regulation 80 of the Regulations 2020 and the Tender Document.

Whether the notification of the outcome of the evaluation of the subject tender was made to the successful tenderer and the unsuccessful tenderers in compliance with section 87 of the Act read with regulation 82 of Regulations 2020.

The Applicant at paragraph 1 of the Request for Review argues that the 2nd Respondent breached Section 87 of the Act by failing to notify it of the outcome of the procurement process and reasons thereof. The Applicant further took issue with the Notification of Intention To Award dated 13th

February 2023 addressed to the Interested Party with the rest of tenderers listed as other with no reason or regret and states that the said notification was sent to jikoni2030@gmail.com yet its inquiries and clarifications were sent to the 2nd Respondent via email address royalkitchen256@gmail.com and views this as a deliberate move to mislead and delay receipt of the said notification and deny it an opportunity to seek for review.

The Respondents submitted that the Applicant was duly notified of the outcome of the tendering process in line with provisions of section 87 of the Act and contends that the 2nd Respondent issued the Interested Party with a Notification of Intention to Award dated 13th February 2023 which was sent simultaneously with letters informing other tenderers that their tenders were unsuccessful and that the tender sum for each tenderer was expressly indicated to show the parties with the lowest evaluated price in line with Clause 42.1 and 43 of the Instructions to Tenderers. The Respondents further submitted that the email address of the Applicant jikoni2030@gmail.com was availed to the 2nd Respondent by the Applicant for communication and is in the Applicant's official documents including its CR12 at page 123 of its original tender.

The Board having carefully studied the confidential file submitted as part of the confidential documents notes that an email with the heading Notification of Intention to Award was sent by Curtis Odongoh on Wednesday, 15th February 2023 at 12:38 P.M to jikoni2030@gmail.com with three attachments and reads:

"

.....
Hi,

Please find the attached notification of intention to award Tender No: NSSF/SCM/2/3/14: Provision of Staff Tea Services.

Regards,

Curtis Odongoh."

The Interested Party at paragraph 9 of its Replying Affidavit sworn by Sahara Mohamed Maalim on 3rd March 2023 depones that it received a notification letter dated 13th February 2023 from the 2nd Respondent annexed and marked SMM1 which notified it that it was the successful tenderer in the subject tender.

We note that despite the allegations by the Applicant that the 2nd Respondent failed to notify it of the outcome of the subject tender using the email availed while making enquiries and clarifications, the Applicant still managed to file the instant Request for Review application within the statutory period of 14 days prescribed under the Act. We however note that it is not clear when the 2nd Respondent notified both the successful tenderer and unsuccessful tenderers of the outcome of the procurement process. Further to this, the Respondents have not adduced evidence in support of their allegations that they complied with provisions of Section 87 of the Act.

We further note that the Notification of Intention To Award dated 13th February 2023 and marked as Exhibit SMM1 reads as follows:

"NSSF/SCM/C/2/3/14:2022-2023 13th February 2023

***The Managing Director
Royal Taste Kitchen Limited
P.O. Box (details withheld)
NAIROBI***

***Tel: (details withheld)
Email:jikoni2030@gmail.com***

NOTIFICATION OF INTENTION TO AWARD

<i>This Notification is sent by:</i>	<i>Email on 14th February 2023 (2.00 p.m.)</i>
<i>Procuring Entity:</i>	<i>National Social Security Fund (NSSF)</i>
<i>Contract Title</i>	<i>Provision of Staff Tea Services</i>
<i>ITT No.</i>	<i>Tender No. NSSF/SCM/C/2/3/14:2022-2023</i>

This Notification of Intention to Award (Notification) notifies you of our decision to award the above contract. The transmission of this Notification begins the Standstill Period. During the Standstill Period you may:

e) Request a debriefing in relation to the evaluation of your Tender, and/or

f) Submit a Procurement-related Complaint in relation to the decision to award the contract

I) The successful Tenderer

<i>Name</i>	<i>TOUCH GLOBAL LIMITED</i>
<i>Address</i>	<i>P.O. BOX (details withheld)</i>
<i>Contract price</i>	<i>KSHS. 10,498,224.00</i>

II) Other Tenderers

<i>Name of Tenderer</i>	<i>Tender price</i>	<i>Evaluated Tender price (if applicable)</i>
<i>VINTAGE VIBRANT MOVERS</i>	<i>11,032,032.00</i>	<i>N/A</i>
<i>ROYAL TASTE KITCHEN</i>	<i>10,640,572.00</i>	<i>N/A</i>
<i>MLIMA VIEW GARDENS</i>	<i>8,896,576.00</i>	<i>N/A</i>
<i>MEAL MAGIC CATERERS & EVENT MANAGEMENT</i>	<i>20,640,576.00</i>	<i>N/A</i>
<i>AFRICAN EAGLE RESTAURANT</i>	<i>12,811,392.00</i>	<i>N/A</i>
<i>LESAN CATERERS</i>	<i>10,676,160.00</i>	<i>N/A</i>

III) How to request a debriefing?

DEADLINE The deadline to request a debriefing expires at midnight on 17th February, 2023 at 5.00 p.m.

You may request a debriefing in relation to the results of the evaluation of your Tender. If you decide to request a debriefing your written request must be made within three (3) Business Days of receipt of this Notification of Intention to Award.

Provide the contract name, reference number, name of the tenderer, contact details and address the request for debriefing as follows:

Attention [Insert full name of person, if applicable]

Title [Insert title/position]

Agency [Insert name of Procuring Entity]

Email address [Insert email address]

If your request for a debriefing is received within the 3 Business Days deadline, we will provide the debriefing within five (5) Business Days of receipt of your request. If we are unable to provide the debriefing within this period, the Standstill Period shall be extended by five (5) Business Days after the date that the debriefing is provided. If this happens, we will notify and confirm the date that the extended Standstill Period will end.

The debriefing may be in writing, by phone, video conference call or in person. We shall promptly advise you in writing how the debriefing will take place and confirm the date and time.

If the deadline to request a debriefing has expired, you may still request a debriefing. In this case, we will provide the debriefing as soon as practicable, and normally no later than fifteen (15) Business Days from the date of publication of the Contract Award Notice.

IV) How to make a complaint

Period: Procurement-related Complaint challenging the decision to award shall be submitted by 27th February at 5.00 p.m.

Provide the contract name, reference number, name of the tenderer, contract details and address of the Procurement-related Complaint as follows:

Attention [Insert full name of person, if applicable]

Title [Insert title/position]

Agency [Insert name of Procuring Entity]

Email address [Insert email address]

At this point in the procurement process, you may submit a Procurement-related Complaint challenging the decision to award the contract. You do not need to have requested, or received, a debriefing before making this complaint. Your

complaint must be submitted within the Standstill Period and received by us before the Standstill Period ends.

In summary, there are four essential requirements:

- 1. You must be an 'interested party'. In this case, that means a Tenderer who submitted a Tender in this tendering process, and is the recipient of a Notification of Intention to Award.***
- 2. The complaint can only challenge the decision to award the contract.***
- 3. You must submit the complaint within the period stated above.***
- 4. You must include, in your complaint, all the information required to support the complaint.***
- 5. The application must be accompanied by fees set out in the Procurement Regulations, which shall not be refundable (information available from the Public Procurement authority at complaints@ppra.go.ke or info@ppra.go.ke).***

V) Standstill Period

DEADLINE: The Standstill Period is due to end at midnight on 28th February 2023 at 5.00 p.m.

The Standstill Period may be extended as stated in Section 4 above. If you have any questions regarding this Notification do not hesitate to contact us.

On behalf of the Procuring Entity:

Signed

David Mwangangi

Ag. Managing Trustee/ CEO”

From the above notification letter, we note that it identifies the Interested Party as the successful tenderer but does not communicate the reasons why the Interested Party was the successful tenderer contrary to the express provisions of Section 87(3) of the Act and Regulation 82 (3) of Regulations 2020.

Section 87 of the Act prescribes the contents of the notification letter to bidders on the tender results in the following terms:

"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."

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 the successful tenderer was awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance as they speak to 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 tenderers must be conducted in a transparent manner.

Counsel for the Respondents argued that the reason for the Applicant's unsuccessful tender can be gleaned from the letter as the Applicant's tender price was clearly not the lowest. For this proposition, Counsel relied on Clause 42.1 under Section I-Instructions To Tenderers at page 22 of the tender document which reads:

42.1 Upon award of the contract and Prior to the expiry of the Tender Validity Period the Procuring Entity shall issue a Notification of Intention to Enter into a contract/Notification of award to all tenderers which shall contain at a minimum the following information:

- a) The name and address of the Tenderer submitting the successful tender;***
- b) The contract price of the successful tender***

- c) A statement of the reason(s) the tender of the unsuccessful tenderer to whom the letter was addressed was unsuccessful, unless the price information in (c) above already reveals the reason;***
- d) The expiry date of the Stand Still Period; and***
- e) Instructions on how to request a debriefing and/or submit a complaint during the standstill period.***

Having carefully studied the copies of the letters of Notification of Intention to Award dated 13th February 2023 and addressed to various tenderers in the confidential file, we have further noted that none of the letters indicated the reason(s) why a tenderer was rendered non-responsive in the subject tender which is contrary to provisions of Section 87 of the Act.

The rules of evidence require he who alleges must prove as provided for in Section 107 (1) of the Evidence Act Cap 80 Laws of Kenya which states as follows:

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

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

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

In the instant Request for Review, the evidential burden of proof shifted to the Respondents to prove if and when the Applicant and other unsuccessful tenderers received the complete Letter of Notification of Intention to Award dated 13th February 2023 informing it/them of the successful tenderer, the successful tenderer's tender price and why the said tenderer was successful and reasons for their unsuccessfulness in accordance with Section 86 of the Act and as provided in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

As regards the email address said to have been used by the Respondents to transmit the letter of Notification to the Applicant, again the burden of proof was on the Respondent to show that such email was remitted and received. The use of the address said to be contained in the CR 12 document is contested. The Board however notes that the Applicant in compliance with the Tender document had well filled out the Questioner and therein provided its appropriate current email address. In our view, such details are not

sought and provided for in vain. We find therefore that the appropriate email address for communication to the Applicant in respect of this Tender ought to have been that which was provided in the questioner. There can be no justification for the Respondent to pick any email address from the Applicant's tender documents unless such notice was available to the Tenderers within the instructions to tenderers in the Tender Document.

In the circumstances, the Board finds the Respondents did not comply with provisions of section 87 of the Act when notifying tenderers of the outcome of the procurement process of the subject tender and further find that the Letter of Notification of Intention to Award dated 13th February 2023 did not meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

What orders should the Board grant in the circumstances?

We have found that the 2nd Respondent's Evaluation Committee evaluated and compared tenders in the subject tender in a fair manner and in accordance with Section 80(2) of the Act read with Article 227(1) of the Constitution and the Tender Document.

We have however established that the 2nd Respondent's Evaluation Committee failed to conduct due diligence in the subject tender in accordance with Section 83 of the Act read with Regulation 80 of the Regulations 2020 and the Tender Document.

We have also established that the notification of the outcome of the evaluation of the subject tender was not made to the successful tenderer and the unsuccessful tenderers in compliance with Section 87 of the Act read with regulation 82 of Regulations 2020.

The upshot of our decision is that the instant Request for Review succeeds in terms of 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 24th February 2023:

- 1. The Letter of Notification of Intention to Award to the successful tenderer dated 13th February 2023 with respect to Tender No. NSSF/SCM/C/2/3/14:2022/S023 for Provision of Staff Tea Services, be and is hereby nullified and set aside.**

- 2. The Letters of Notification of Intention to Award to the Applicant and other unsuccessful tenderers dated 13th February 2023 with respect to Tender No. NSSF/SCM/C/2/3/14:2022/S023 for Provision of Staff Tea Services, be and are hereby nullified and set aside.**

3. The 1st Respondent is hereby ordered to reconvene and direct the Evaluation Committee to conduct due diligence on the Interested Party and all other responsive tenderers at the Technical Evaluation stage in accordance with section 83 the Act and the Tender Document, taking note of the Board's findings and comments above, within Fourteen (14) days from the date of this decision.

4. Further to Order 3, the 1st Respondent is hereby ordered to proceed with the procurement process of Tender No. NSSF/SCM/C/2/3/14:2022/S023 for Provision of Staff Tea to its logical conclusion within Twenty-One (21) days from the date of this decision while taking into consideration the findings of the Board in this decision.

5. Given the subject procurement proceedings are not complete, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 17th Day of March 2023.


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VICE CHAIRPERSON
PPARB


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SECRETARY
PPARB