

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 25/2023 OF 18TH APRIL 2023

BETWEEN

ROYAL TASTE KITCHEN LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

NATIONAL SOCIAL SECURITY FUND (NSSF).....1ST RESPONDENT

NATIONAL SOCIAL SECURITY FUND (NSSF).....2ND RESPONDENT

LESAN CATERERS 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, FCiarb | - | Chairperson |
| 2. Dr. Paul Jilani | - | Member |
| 3. CPA. Isabel Juma | - | Member |

IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

PRESENT BY INVITATION

APPLICANT - ROYAL TASTE KITCHEN LIMITED

Mr. Dennis Meso - Advocate, Caroline Oduor & Associates Advocates

Mr. Philip Simiyu -Representative, Royal Taste Kitchen Limited

Ms. Emily Kerubo -Representative, Royal Taste Kitchen Limited

RESPONDENTS -ACCOUNTING OFFICER, NATIONAL SOCIAL SECURITY FUND (NSSF)

NATIONAL SOCIAL SECURITY FUND (NSSF)

Mr. Kelvin Mbogo -Advocate, Robson Harris Advocates LLP

THE INTERESTED PARTY- LESAN CATERERS LIMITED

N/A

BACKGROUND OF THE DECISION

The Tendering Process

National Social Security Fund, the Procuring Entity and the 1st Respondent herein, invited sealed tenders in response Tender No. NSSF/SCM/C/2/3/14:2022/S023-PROVISION OF STAFF TEA SERVICES (hereinafter referred to as the "subject tender") using an open competitive method open tender (Reserved for Women) The invitation was by way of an advertisement on 3rd January 2023 on The Standard Newspaper

publication and the 2nd Respondent's website www.nssf.or.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 Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the criteria set out in clause 2 Preliminary examination and determination of responsiveness under 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, 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 as Clause MANDATORY EVALUATION CRITERIA under Section III-EVALUATION QUALIFICATION CRITERIA at pages 29 and 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 both found responsive having each scored YES in all the requirements at the technical stage and proceeded for due diligence and evaluation at the Financial Evaluation Stage.

1st Due Diligence

The Evaluation Committee conducted due diligence on the four (4) tenderers by making calls and sending emails on the tenderer's referees as well as confirming the status of the tenderer's NSSF and Tourism Fund compliance certificates.

1. For Vintage Vibrant Movers, calls and emails were sent to its referees but none responded.
2. For the Applicant herein, calls and emails were sent to its referees and all of them gave positive feedback.
3. For Touch Global Limited, calls and emails were sent to its referees and all of them gave positive feedback.
4. For Lesan Caterers Limited, calls and emails were sent to its referees who gave positive feedback in part. One gave positive feedback, another responded giving a figure of between 400 to 500 pax and the last 100 to 200 pax.

Financial Evaluation

At this stage of evaluation, the Evaluation Committee was required to examine tenders as outlined under the criteria set out as STAGE THREE FINANCIAL EVALUATION under 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, Touch Global Limited's tender was determined to be the lowest evaluated responsive tender 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

According to page 5 of the Evaluation Report, the Evaluation Committee determined the tender offered by Touch Global Limited as the lowest evaluated responsive tender that passed the due diligence test and recommended award of the subject tender to Touch Global Limited at the tender price of Kenya Shillings Ten Million, Four Hundred and Ninety-Eight Thousand, Two Hundred and Twenty-Four only (Kshs. 10,498,224.00).

1st Professional Opinion

In a Professional Opinion dated 7th February 2023 (hereinafter referred to as the "1st 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 Touch Global Limited as per the recommendations of the Evaluation Committee.

Thereafter, the Professional Opinion scribbled on its face as approved on 11th February 2023.

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 NO. 12 OF 2023

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

- a) That notification of award to the Interested Party Touch Global Limited be cancelled;***
- b) That the Procuring Entity be directed to carry out 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 bidder;***
- f) That cost of review to be awarded to the Procuring entity.***

The Board then formulated the following issues for determination in the Request:

- 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 and Regulation 82 of the Regulations 2020;***
- 4. What orders should the Board grant in the circumstances?***

On issue (1) above, the Board 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.

On issue (2) above, the Board found 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.

On issue (3) above, the Board found that the Respondents did not comply with the provisions of Section 87 of the Act when notifying tenderers of the outcome of the procurement process of the subject tender and further 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 the Regulations 2020.

In its decision dated 17th March 2023, the Board gave its final orders as follows: -

- 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/SO23 for Provision of Staff Tea Services, be and is hereby nullified and set aside.**
- 2. The Letter of Notification of Intention To Award to the Applicant and other unsuccessful 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.

- 3. The 1st Respondent is hereby ordered to reconvene and direct the Evaluation Committee to conduct due diligence on the Interested Party (Touch Global Limited) and all other responsive tenderers at the Technical Evaluation Stage in accordance with Section 83 of 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 in to 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.**

2nd Due diligence

According to an Evaluation Report dated and signed on 31st March 2023 by the Evaluation Committee members (hereinafter "2nd Evaluation and due diligence Report"), the Evaluation Committee conducted due diligence to

verify the qualification of Touch Global Limited and 3 other Tenderers who were successful at the Technical Evaluation Stage in line with the directions of the Board in Application No 12 of 2023. Page 4 and 5 of the Due Diligence Report which forms part of the confidential file reports provided to the Board indicates that the Evaluation Committee made calls and wrote emails to tenderer's referees. The Evaluation Committee also physically visited the referees and the sites given by Tenderers who were successful at the Technical Evaluation Stage. The said tenderers included Vintage Vibrant Movers, Royal Taste Kitchen, Touch Global Limited and Lesan Caterers Limited.

Page 10 of the Report indicates the findings of the Evaluation Committee as follows:

Vintage Vibrant Movers' referees were not up to the required capacity.

Royal Taste Kitchen referees did not meet the required threshold of the capacity as per the Tender Document

Touch Global Limited's staff interviews yielded contradictory information from what the Committee witnessed when they physically visited the Tenderer's establishment.

Lesan Caterers Limited's referees were found to meet the threshold under the Tender Document.

The Evaluation Committee therefore determined the tender offered by Lesan Caterers Limited as the lowest evaluated responsive tender that passed the due diligence test and recommended award of the subject tender to Lesan

Caterers Limited at the tender price of Kenya Shillings Ten Million, Six Hundred and Seventy-Six Thousand, One Hundred and Sixty only (Kshs. 10,676,160.00)

2nd Professional Opinion

In a professional opinion dated 31st March 2023 (hereinafter referred to as “the 2nd Professional Opinion”) the Acting Procurement Manager, Ms. Rosemary Oluoch, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

Notification to Tenderers

Tenderers were notified of the outcome of the evaluation of the subject tender vide letters of Notification of Intention to Award dated 4th April 2023.

REQUEST FOR REVIEW NO. 25 OF 2023

Royal Taste Kitchen Limited (hereinafter the Applicant) lodged the present Request for Review dated 18th April 2023 together with a statement in support of the Request for Review sworn on 18th April 2023 by Emily Kerubo Kamau seeking the following orders:

- 1. The Letter of Notification of Intention to Award to the Interested Party with respect to Tender No.***

NSSF/SCM/C/2/3/14:2022/S023 for Provision of Tea Services (Reserved for Women) be nullified and set aside.

2. The Letter of Notification of Intention to Award to the Applicant and other unsuccessful tenderers dated 4th April 2023 with respect to Tender No. NSSF/SCM/C/2/3/14:2022/S023 for provision Tea Services (Reserved for Women) be nullified and set aside.

3. The Honourable Board finds and holds that the 1st Respondent's due diligence exercise and findings against the Applicant forming basis of the notification letter dated 4th April 2023 was unfair, inequitable and not transparent contrary to the provisions of Article 227(1) of the Constitution of Kenya.

4. The Honourable Board to direct the 1st Respondent to award the Applicant Tender No. NSSF/SCM/C/2/3/14:2022-2023, Tender for Provision of staff tea services (Reserved for Women).

5. In the alternative, an order does issue directing the 2nd Respondent's Evaluation Committee to reinstate the

Applicant's tender at the Financial Evaluation Stage and to re-evaluate the Applicant's tender price in accordance with the set out award criteria of the tender document and the law.

6. The 1st Respondent to pay the cost of the Review.

7. Any other orders as necessary for the ends of justice.

In a Notification of Appeal and a letter dated 18th April 2023, Mr. James Kilaka, the Acting Board Secretary of 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 18th April 2023.

On 24th April 2023, in response to the Request for Review, the Respondents, through the law firm of Robson Harris Advocates LLP filed a Memorandum of Response dated 24th April 2023 and a Replying Affidavit sworn on 24th

April 2023 by Ms. Rosemary Oluoch, the 2nd Respondent's Acting Manager, Supply Chain Management. The Respondents also submitted to the Board a confidential file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 24th April 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 27th March 2023.

On 28th April 2023, the Applicant filed a Further Statement signed on 28th April 2023 by Emily Kerubo Kamau in reply to the Respondents' Memorandum of Response and Replying Affidavit.

None of the other tenderers who participated in the subject tender filed any document or made any representation in response to the Board's invitation for them to submit any information and arguments concerning the subject tender.

Vide a Hearing Notice dated 28th April 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender that the hearing of

the instant Request for Review will be by online hearing on 3rd May 2023 at 12:00 noon., through the link availed in the said Hearing Notice.

On 2nd May 2023 the Respondents filed a Notice of Cross-Examination of the Applicant's witnesses Alex Musungu and Samson Chira the deponents of affidavits sworn on 26th April 2023 which were annexed as Exhibits "EKK8" and "EKK9" under the Applicant's Further Statement in Reply to the Respondents' Memorandum of Response and Replying Affidavit.

During the online hearing on 3rd May 2023, only Counsel for the Applicant and Counsel for the Respondents were present. The Board satisfied itself that though the Secretariat sent out notices of the instant Request for Review on 24th April 2023 to all tenderers who had participated in the subject tender but none of them was present for the hearing.

The Board observed that the Respondents had filed a Notice of Cross-examination dated 2nd May 2023 and therefore sought parties' address on the same while also seeking to know the time allocation to be assigned to each of the parties during the hearing. It was agreed that the Applicant would take 10 minutes to highlight its case, the Respondents would then respond in 10 minutes and thereafter the Applicant would offer a rejoinder in 5 minutes. The Board also granted parties to file their Written Submissions within 24 hours from the conclusion of the hearing.

Counsel for the Respondents, Mr. Mbogo indicated that following the filing of the Notice of Cross-Examination, the Applicant had neither filed a response nor availed the witnesses for examination. Counsel prayed for the expunging of their Affidavits from the record.

The Board sought to understand the offending nature of the affidavits that warranted them to be expunged for which Mr. Mbogo indicated that the affidavits seek to invite the Board to conduct due diligence by itself and that the affidavits amount to perjury.

The Board also sought to know whether the Applicant's witnesses were present for cross-examination and if absent would be available for cross-examination on 4th May 2023. Mr. Meso indicated that the witnesses were not present and due to the short notice, the witnesses may not be available for cross-examination on 4th May 2023. Counsel objected to the notice citing that it had been filed too late in the day having been served upon the Applicant on morning of the hearing. Counsel also indicated that the Affidavits in question neither invite the Board to conduct due diligence nor constitute perjury as portrayed by Counsel for the Respondents but merely serve to corroborate that which is already on record.

Mr. Mbogo informed the Board that he was ready to proceed with the hearing in the absence of the deponents of the said affidavits as he would subsequently file Written Submissions in the matter.

In view of the development, the Board directed the hearing to proceed in as per the order of address it had previously issued:

PARTIES' SUBMISSIONS

Applicant's Submissions

During the online hearing, Counsel for the Applicant, Mr. Meso placed reliance on the filed documents i.e. Request for Review dated 18th April 2023, Statement in Support of the Request for Review sworn by Emily Kerubo Kamau on 18th April 2023 and a Further Statement of Emily Kerubo Kamau dated and signed on 26th April 2023.

Counsel contends that the Notification that was served upon the Applicant dated 21st April 2023 offends section 87(3) of the Act read with Regulation 82(3) of the Regulations 2020. Counsel referred to the Notification of Intention To Award annexed to the Statement in Support of the Request for Review sworn on 18th April 2023 and marked "EKK2". He submitted the notification does not reveal the reasons why the Interested Party herein was found to be the successful tenderer contrary to the mandatory requirement of Section 87(3) of the Act which requires an accounting officer of a PE to give reasons as to why the successful tenderer has been found successful. He added that the notification went against the findings and Order of this Board in Application No. 12 of 2023.

Counsel indicated that the Board made a finding that the provisions of Section 87(3) of the Act are mandatory, accounting officer must notify tenderers the successful tenderer and the reasons why the tenderer was successful. He therefore sought that the notification be set aside and nullified for violating the law.

Mr. Meso argued that the Decision to find its bid unsuccessful was unfair as the reasons given in the Notification of Intention to Award go against the initial positive evaluation of the Respondents. Counsel noted that previously, the Applicant had been positively evaluated on the same references which the Respondents have now deemed unsatisfactory.

It was Counsel's contention that the Applicant had tendered evidence demonstrating its capacity through the references it provided. Counsel directed the Board to annexure "EKK3" a reference letter from NSSF where the Respondents did a reference for the Applicant themselves to Kenya Revenue Authority demonstrating its capacity to offer such services. He noted that the letter confirms that the Applicant gave satisfactory services to NSSF.

Mr. Meso pointed out that the Respondent's Replying Affidavit, claims that the Procuring entity cannot use itself as a reference in evaluating the Applicant. Counsel submitted that nothing in the Tender Document precluded the Procuring Entity from being used as a reference for past work.

He argued that the Applicant having previously offered satisfactory services to the Procuring Entity, then they had demonstrated the relevant experience.

Counsel further referred to annexure "EKK 7" a reference from the Kenya National Examination Council by offering invoices and payment demonstrating that it served more than 500 persons as required under the Tender Document. He argued that this had been corroborated by an affidavit marked "EKK8" from the Procurement Manager at the Kenya National Examination Council that the Applicant offered services to approximately 520 staff members a day through 2 different servings. Counsel clarified that the affidavit confirms what has been produced as Due Diligence Report by the Respondents that the Applicant gave 300 cups per serving because the canteen used by Kenya National Examination Council could only accommodate 300 people at a time.

Respondents' Submissions

Counsel for the Respondents, Mr. Mbogo relied on the documents filed by the Respondents i.e. Respondents' Memorandum of Response dated 24th April 2023, Respondents' Replying Affidavit sworn on 24th April 2023 by Rosemary Oluoch.

He submitted that the Applicant's Counsel extensively submitted on the due diligence and posed the question to the Board whether the due diligence is a matter to be proved at the Board level or should be proved to the Procuring Entity through the Tendering documents. He indicated that the Applicant had

annexed so many invoices in the present Request for Review, a majority of which were not annexed in their submitted Tender Document.

Counsel faulted the Applicant for going outside the submitted tender documents to try proving compliance with the tender requirements. He referred the Board to its Decision in Request for Review No. 12 of 2023 and noted that the Board directed the Respondents to reconvene and direct the Evaluation Committee to conduct due diligence on the Interested Party (Touch Global Limited) and all other responsive tenderers at the Technical Evaluation Stage in accordance with Section 83 of the Act and Tender Document within 14 days, noting the findings of the Board in the Decision.

Mr. Mbogo referred to page 54 of the Decision where the Board warned itself that it is not its obligation or that of the Applicant to conduct due diligence but that of the Evaluation Committee. Counsel argued that the Respondents complied with the Board's Decision in Request for Review No. 12 of 2023.

Counsel referred to annexures 2,3,4,5 annexed to the Replying Affidavit of Rosemary Oluoch, and submitted that all of them show that in conducting due diligence the Respondents did not just make phone calls and write emails as had been done in the first instance. He submitted that this time the Respondents prepared a due diligence form. He referred the Board to annexure RO2 and noted that the due diligence form required among others: Bidder's name, item description (Yes/No) and remarks.

He referred to annexure "RO2" Edna Sawe, Head of Supply Chain at one of the referees from Kenya Literature Bureau states that the number of staff served was approximately 200.

Mr. Mbogo also submitted that Alex Musungu from National Oil Corporation of Kenya indicated that number of cups the Applicant served at the organization to be 300 per serving without any further explanation.

He argued that Samson Chira from Kenya National Examination Council indicated that the Applicant served 432 staff members at their organization without any further explanation.

Counsel contended that the due diligence form was also served on the Procuring Entity's procurement department which indicated the number of staff served and invited the Board to look at the confidential file.

Mr. Mbogo indicated that the requirement according to the Tender Document was for tenderers to demonstrate relevant experience by providing a minimum of 3 organizations with more than 500 employees in undertaking similar nature of services. Counsel referred to page 46 of the Boards Decision in Application No. 12 of 2023 and noted that the Board faulted the Respondents for only using emails and went ahead to advise the Respondents to conduct meaningful due diligence by conducting a physical verification of the tenderers' references. He argued that the Respondents took this advice and conducted a physical verification. He referred to annexure 6 and pointed out that that the Evaluation Committee even visited

the Kenya Revenue Authority Office in Oloitokitok after no response was received from them.

It was Counsel's submission that the Applicant gave 4 and out of which 3 of the references do not meet the requirements under the Tender Document and that only the National Social Security Fund met the criterion. He therefore argued that the due diligence was done in accordance with the law, decision of the board in Request for Review No. 12 of 2023 and in strict compliance with the tender document.

On the notification letters, Mr. Mbogo argued that section 87(3) of the Act requires the accounting officer to notify the successful tenderer and the unsuccessful tender and that while notifying the unsuccessful tenderers, they should give reasons. He argued that there is no strict legal requirement that the reason to be given is that of why one is successful but that there is a strict legal requirement that reason must be must be given why one was unsuccessful. He argued that in the present case, the Applicants and other tenderers were notified why their tenders were found unsuccessful. He submitted that a reading of the due diligence report would guide the Board in arriving at a concrete decision that of all tenderers that qualified at Technical Evaluation Stage upon due diligence, only the Interested Party was qualified as per the requirements of the Tender Document.

Counsel went on to indicate that though the Applicant's Counsel faulted the Respondents for going against the initial findings of the due diligence exercise, the said initial findings were challenged in Request for Review No.

12 of 2023 and set aside. Accordingly, reliance could not be placed on the said findings.

Counsel referred to annexure 6 and noted that during the procuring process a representative of the Applicant was contacting the Procuring Entity threatening them to move this Board should they not be successful.

He argued that due diligence should only be guided by the Tender Document and not an Applicant to tell a Procuring Entity what to do in due diligence. He submitted that the Board can advise but it is ultimately for the Evaluation Committee to conduct the due diligence.

Counsel also indicated that he was not certain that the deponents of the affidavits marked EKK8 and EKK9 were the same people who filled and signed the due diligence forms that were sent to the Applicant's referees.

Mr. Mbogo concluded citing that the Applicant had brought a frivolous application and thus should be penalized with costs.

Applicant's Rejoinder

In a rejoinder, Mr. Meso indicated that Counsel for the Respondents had made hefty accusations against the Applicant, procurement managers of 2 of the Applicant's referees and has been giving evidence from the bar including disputing affidavit evidence. He pointed out that Section 107 of the Evidence Act requires that whoever alleges must prove.

Counsel also informed the Board that he had conferred with the Applicant and that if it would help the Board, the two deponents would be available on 4th May 2023 for cross-examination.

Counsel went on and refuted the allegation that the Applicant was inviting the Board to conduct a due diligence exercise. He was in agreement that the Evaluation Committee is the body mandated to carry out due diligence and that the Applicant's contention was that that manner in which the second due diligence was conducted offends Article 227 (1) of the Constitution. He argued that the due diligence exercise was neither fair nor equitable.

He told the Board that the due diligence forms used by the Respondent did not provide sufficient information to reach the decision the Respondents have reached. He observed that the Respondents' annexure RO3 that the number of cups served is 300 cups per serving. Counsel indicated that the Applicant had annexed affidavits clarifying on information that was supplied to the Evaluation Committee.

Counsel submitted that if due diligence was correctly done the Evaluation Committee would have picked up that National Oil Corporation of Kenya's cafeteria could only host 300 people at a time and not that only 300 people were served. He referred the Board to annexure EKK7 an email from Alex Musungu, Procurement Manager from National Oil Corporation of Kenya confirming to the Respondents that the number of people being served tea are 520.

Mr. Meso restated that section 87(3) of the Act makes it mandatory for the accounting officer of a Procuring Entity to disclose reasons why a successful tenderer was found successful.

Counsel went on to question the criterion the Respondents used to establish that the National Social Security Fund was the only suitable referee that the Applicant submitted in its tender. The Applicant decried at paragraph 8(iii) of the Request for Review that the Procuring Entity knowingly failed to visit Africa Institute of Capacity Development (AICAD) where the Applicant serves tea to more than 500 people a day.

It was Counsel's submission that if consideration was made to National Social Security Fund, National Oil Corporation of Kenya and Kenya National Examination Council meets the criteria of at least 3 referees as per the tender.

At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 18th April 2023 had to be determined by 9th May 2023 and that the Board would communicate its decision on or before 9th May 2023 to all parties via email.

The Board also reminded Parties that they could file their Written Submissions within 24 hours from the conclusion of the hearing. On 4th May 2023 both the Applicant and Respondents filed their Written Submissions each dated 4th May 2023.

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:

- i. Whether the Respondents conducted due diligence in compliance with the Tender Document, Section 83 of the Act and this Board's finding in Request for Review No. 12 of 2023?***
- ii. Whether the Notification of Intention to Award dated 4th April 2023 meets the threshold prescribed under Section 87(3) of the Act read with Regulation 82 of the Regulations 2020?***
- iii. What orders should the Board grant in the circumstances?***

Whether the Respondents conducted due diligence in compliance with the Tender Document, Section 83 of the Act read with Regulation 80 and this Board's finding in Request for Review No. 12 of 2023?

The Applicant in its Request for Review faulted the Respondents in the manner in which it conducted the due diligence following this Board's decision in Request for Review No. 12 of 2023. Counsel for the Applicant, Mr. Meso submitted that despite re-admitting the Applicant's tender for re-evaluation at the due-diligence stage, the Respondents failed to implement

the findings, directions, and orders of the Board in the manner in which they re-evaluated the Applicant's tender at the due diligence stage in total disregard of the directions of the Board thus did not obey the clear findings, directions and orders of the Board. The Applicant alleges that the second due diligence exercise conducted by the Respondents was unfair and in contravention of Article 227 of the Constitution.

The Respondents took a different view. According to them, the Respondents complied with the orders of the Board as contained in the Board's Decision dated 17th March 2023 by re-admitting the Applicant's tender to the due diligence stage and undertaking due diligence as directed and with attention to all issues raised and directives of the Board. The Respondents contend that unlike in the earlier due diligence where they only made phone calls and wrote emails to references, they now prepared better due diligence forms and made physical visits to the references that tenderers had supplied in their tender documents. According to the Respondents, of all the tenderers who were re-admitted for purposes of the due-diligence exercise as directed by the Board, only the Interested Party passed the due diligence test.

At page 61 to 63 of the Board's Decision of 17th March 2023, the Board in exercise of the powers conferred upon it by Section 173 of the Act issued the following orders:

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 Letter of Notification of Intention To Award to the Applicant and other unsuccessful 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.***
- 3. The 1st Respondent is hereby ordered to reconvene and direct the Evaluation Committee to conduct due diligence on the Interested Party (Touch Global Limited) and all other responsive tenderers at the Technical Evaluation Stage in accordance with Section 83 of 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 in to 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.***

Order No. 3 in the Board's Decision dated 17th March 2023 required the 1st Respondent to direct the 2nd Respondent's Evaluation Committee to re-admit the Interested Party's tender and all other responsive tenders at the Technical Evaluation stage and to conduct due diligence to confirm and verify the qualifications of the said tenderers in accordance with the provisions of Section 83 of the Act and **the Tender Document**, within 14 days from 17th March 2023 while taking into consideration the Board's findings in Request for Review No.12 of 2023.

The Board's findings in Request for Review No. 12 of 2023 that the Respondents were required to take into consideration while conducting due diligence to confirm and verify the qualifications of the Applicant are contained at pages 37 to 47 of the Board's Decision dated 17th March 2023. The relevant pages are pages 46 to 47, on how due diligence should be conducted in accordance with Section 83 of the Act read with Regulation 80 of Regulations 2020:

Having carefully studied the confidential file we note that under the post qualification/due diligence responses from the tenderer's references, only two of the Interested Party's referees responded via email with regard to the due diligence conducted by the Evaluation Committee in compliance with the requirement for due diligence in Stage II-Technical 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 undertaking similar nature of services in three 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.

We have carefully studied the confidential documents submitted by the Respondents pursuant to Section 67(3)(e) of the Act and note from the Second Due Diligence Report that the Applicant's tender together with others that had qualified at the Technical stage were re-admitted as directed for Due Diligence stage for purposes of conducting a second due diligence on the Applicant and the other bidders post the Board's Decision dated 17th March 2023. To this extent only, the Respondents complied with the first part of Order No. 3 in the Board's Decision dated 17th March 2023.

However, the Applicant is aggrieved with the manner in which the second due diligence exercise was conducted on it and the application of the findings thereof by the Respondents, that led to the Applicant's tender being determined nonresponsive.

The Respondents annexed to the Respondents' Replying Affidavit Exhibits marked "RO2", "RO3" and "RO4" being copies of a due diligence form that was filled by the Applicant's references: Kenya Literature Bureau, National Oil Corporation of Kenya and Kenya National Examination Council which also formed part of the confidential documents submitted to the Board the subject of which was on due diligence on the Applicant. The said forms read as follows:

Annexure "RO2", the due diligence form filled by Kenya Literature Bureau as a reference of the Applicant provided in part as follows:

| BID NO | BIDDER NAME | ITEM DESCRIPTION | YES | NO | REMARKS |
|---------------|----------------------------|---|------------|-----------|---|
| | ROYAL TASTE KITCHEN | The Physical premises | | | Kenya Literature Bureau |
| | | Number of staff served | | | Staff Meetings Approximately 200 |
| | | Service equipment i.e. cooking utensils, serving cutlery etc | | | Available |

| | | | | | |
|--|--|---|--|--|---------------------------|
| | | <i>Kitchen maintenance and Hygiene</i> | | | <i>To standard</i> |
| | | <i>Quality of tea and snacks</i> | | | <i>To standard</i> |
| | | <i>Serving staff kitting (uniform)</i> | | | <i>Available</i> |
| | | <i>Licenses</i> | | | <i>Available</i> |

Note: if the respective bidder will be found to have provided false information in regards to the qualification will be disqualified.

REMARKS: ...

***Name: Edna Sawe (Tel details withheld)
of Supply chain***

***Designation: Head
Sign: Signed"***

Annexure "RO3", the due diligence form filled by the National Oil Corporation of Kenya as a reference of the Applicant provided in part as follows:

| <i>BID NO</i> | <i>BIDDER NAME</i> | <i>ITEM DESCRIPTION</i> | <i>YES</i> | <i>NO</i> | <i>REMARKS</i> |
|----------------------|---------------------------|--------------------------------------|-------------------|------------------|---|
| | <i>ROYAL TASTE</i> | <i>The Physical premises</i> | | | <i>Kawi House and National Oil Depot</i> |
| | | <i>Number of staff served</i> | | | <i>300 cups/serving</i> |

| | | | | | |
|--|--|--|--|--|--|
| | | <i>Service equipment i.e. cooking utensils, serving cutlery etc</i> | | | <i>Owned by the service provider</i> |
| | | <i>Kitchen maintenance and Hygiene</i> | | | <i>NOC & Service Provider</i> |
| | | <i>Quality of tea and snacks</i> | | | <i>Random sampling by HR Admin</i> |
| | | <i>Serving staff kitting (uniform)</i> | | | <i>Provided by service provider</i> |
| | | <i>Licenses</i> | | | <i>Responsibility of service provider</i> |

Note: if the respective bidder will be found to have provided false information in regards to the qualification will be disqualified.

REMARKS: The figure provided by email is for two servings (morning and afternoon)

***Name: Alex Musungu Designation: Manager Procurement
Signed***

Annexure "RO2", the due diligence form filled by the Kenya National Examination Council as a reference of the Applicant provided in part as follows:

| BID NO | BIDDER NAME | ITEM DESCRIPTION | YES | NO | REMARKS |
|---------------|--------------------|---|------------|-----------|---------------------------------|
| | ROYAL TASTE | The Physical premises | | | KNEC |
| | | Number of staff served | | | 432 during meetings |
| | | Service equipment i.e. cooking utensils, serving cutlery etc | | | Service was satisfactory |
| | | Kitchen maintenance and Hygiene | | | |
| | | Quality of tea and snacks | | | |
| | | Serving staff kitting (uniform) | | | |
| | | Licenses | | | |

Note: if the respective bidder will be found to have provided false information in regards to the qualification will be disqualified.

REMARKS: The service provider provided good services

Name: Samson Chira Designation: Chief Procurement Officer

Sign: Signed

The aforesaid due diligence forms by the Evaluation Committee sought to establish from the Applicant’s references: physical premises of the reference, number of staff served by the Applicant, Service equipment used by the Applicant, kitchen maintenance and hygiene of the Applicant, quality of the tea and snacks offered by the Applicant, whether the Applicant’s serving staff had uniform and whether the Applicant held any licenses.

The Board has also reviewed the comments the Evaluation Committee made at page 6 of the Evaluation Report dated 31st March 2023 in respect of the Applicant subsequent to the second due diligence exercise and the same is hereinafter reproduced:

| <i>BIDDER NAME</i> | <i>ORGANISATIONS OF REFERENCE</i> | <i>CONTACT PERSON</i> | <i>EMAIL RESPONSE</i> | <i>DUE DILIGENCE SITE VISIT NUMBER OF STAFF SERVED</i> | <i>REMARKS BY THE VENDOR</i> |
|-----------------------------------|--|---------------------------------|--|---|---|
| <i>Royal Taste Kitchen</i> | <i>Kenya Literature Bureau</i> | <i>Head Supply Chain</i> | <i>Did not respond to phone calls</i> | <i>200 staff members & ad hoc</i> | <i>Below the required Staff to be served</i> |

| | | | | | |
|--|---|--|------------------|---|--|
| | | | | Meetings | |
| | National Oil Corporation of Kenya | Manager Procurement | 520 pax | 190 staff at HQ & 110 staff at the Depot, hence a total of 300 | Below the required staff to be served |
| | Kenya National Examination Council | Chief Procurement Officer | 500-1000 | 432 staff and ad hoc meetings | Below the required staff to be served |
| | KRA Loitoktok | Administration facilitation Officer | 938 staff | 25 staff from our enquiries at the location and also given by | Contact person uncooperative Royal Taste staff member did not |

| | | | | | |
|--|--|--|--|--|--|
| | | | | <p><i>some of the KRA staff who were available at their offices</i></p> | <p><i>pick up calls from KRA staff that were present</i></p> <p><i>Below the required staff to be served</i></p> |
|--|--|--|--|--|--|

From the above, the Evaluation Committee found that the Applicant did not meet the requirement of providing 3 organizations where it had supplied staff tea to organizations with more than 500 employees as per the tender document. The site visits by the Evaluation Committee demonstrated that the Applicant’s references Kenya Literature Bureau, National Oil Corporation of Kenya and Kenya National Examination Council had a staff population of 200, 300 and 432 members respectively.

We have keenly studied the Tender Document and note that at page 30 it was a mandatory requirement for a tenderer to demonstrate relevant experience by providing a minimum of 3 organizations with more than 500 employees that a tenderer had served for the period between 2019 and 2022:

The Tender Document provided for due diligence at Stage II-Technical Evaluation of Section III-Evaluation and Qualification Criteria at page 30:

| 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 services (Provision of tea to staff/employees) | Submit copies of any two of the following documents <ul style="list-style-type: none"> • Copies of signed contracts • Copies of award letters • Copies of Purchase Orders | |
| | ... | ... | |
| | ... | ... | |
| | ... | ... | |
| 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. | | | |

From the above the Board finds that the Evaluation Committee had an obligation to conduct due diligence on only three (3) 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 serving tea to staff. We take 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. This in our view would entail verifying the tender support documents availed by a tenderer even after the said documents have been passed at the Preliminary evaluation stage. In fact the above tender provision states that the Due Diligence was "part of the evaluation process". At the Preliminary stage the Evaluation Committee simply notes that the required documents and information are available, that does not speak to the authenticity of the document or their contents, which is then the subject of a due diligence exercise. From the due diligence results above none of the Applicant's referees other than the National Social Security Fund met the prescribed threshold of 500 staff. Whereas the Respondents counsel has argued that the Respondent could not be a reference for the Applicant, we do not agree with that position. Nothing in the Tender Document precluded the Applicant from using the 2nd Respondent as a reference in the current tender. If that was intended to be the position, then a specific provision to that effect should have been provided in the Tender document.

The Applicant argued that the Evaluation Committee deliberately disregarded conducting due diligence on its referee, Africa Institute of Capacity Development (AICD). With respect, we find this position to be misplaced on account of the fact that the Tender Document called on tenderers to supply a minimum 3 references and that due diligence would

be conducted on 3 of the supplied references. In the present case, the Applicant provided 5 references and the Evaluation Committee conducted due diligence on 4 of them. At the point of providing the references, the Applicant knew or ought to have known that only 3 of its references could be contacted for purposes of due diligence. Accordingly, the Applicant should have strictly complied with that requirement and ensured that it supplied those references that adequately met the requirements under the tender document. We cannot fault the Evaluation Committee for picking any three of the references given. There is no claim or proof that the omission to conduct due diligence on this particular reference was either deliberate or mischievously executed to achieve the purpose of rendering the Applicant's tender nonresponsive.

Counsel for the Applicant submitted that the second due diligence was unfair as it yielded different results from the initial due diligence. The initial due diligence report which was the subject of challenge in Request for Review No. 12 of 2023 had yielded that the references supplied by the Applicant met the threshold of 500 people being served tea. The said due diligence was conducted by way of telephone calls and emails and because of the unsatisfactory way it was conducted, this Board directed a fresh due diligence exercise recommending preference for site visits as much as possible. The second due diligence exercise was carried out in time, due diligence forms were presented to the referees for filling and site visits were also conducted to verify the information that the tenderers had supplied. It was this second due diligence that the Evaluation Committee found out that the Applicant's references did not meet the requirement of the Tender

Document. In view of the obtaining facts, the Applicant who is the party that initiated Request for Review No. 12 of 2023 challenging the initial due diligence is estopped from relying on the findings of the initial due diligence. The same repeat exercise knocked out M/s Touch Global who had previously been awarded the tender leading to the complaint in Application No 12 of 2023. The extra invoices attached to the applicant's Application and the Affidavits attached as annexures in the further Affidavit filed by the Applicant's Director cannot help. Documents to guide the Evaluation Committee must be found in the Tender document submitted by the tenderer and information obtained at due diligence exercise and cannot be introduced at the Application for Review stage. As stated in our decision in Application No 12 of 2023, the duty to conduct Evaluation is the province of the Evaluation Committee. The Board's mandate would be to review and take note whether information and documents received have been properly interpreted and evaluated by the Evaluation Committee based on the tender document and the Law.

The information and explanations contained in the two Affidavits introduced in the present Application were not before the Evaluation committee. That Committee therefore made recommendations and evaluated bidder's responsiveness based on the contents of the form before it. Specifically, the form asked for Number of staff served. The answer given from the National Oil Corporation as cited above was "300 cups/serving". There was no explanation on the capacity of the Canteen now sought to be introduced. Neither has it been claimed in the Affidavit now relied upon, that the query in the Due diligence form was not understood or caused any misapprehension of the answer required from the deponent. The natural

interpretation of the contents from a plain reading of that form was, in our view the one taken by the Evaluation committee.

It therefore follows, the determination by the Evaluation Committee that the Applicant's tender was unsuccessful at the second due diligence exercise because it failed to supply three (3) references by organizations with a staff of 500 people was in line with the provision of the Tender Document. The fact that the due diligence forms were prepared and issued to all bidders' references gives a sense of a standardized way of collecting information in the due diligence exercise thus enhancing equity and transparency as required by law and specifically under Art 227 of the Constitution.

In the circumstances, we find that the Respondents conducted due diligence in compliance with the Tender Document, Section 83 of the Act as read together with Regulation 80 and this Board's finding in Request for Review No. 12 of 2023.

Whether the letter of Notification of Intention to Award dated 4th April 2023 and issued to parties was issued in compliance with Section 87(3) of the Act read with Regulation 82 of the Regulations 2020?

The Applicant assailed the Letter of Notification of Intention to Award dated 4th April 2023 citing that the letter was not in conformity with section 87(3)

of the Act. Counsel for the Applicant. Mr. Meso argued that the provisions of section 87 require a Procuring Entity to notify tenderers of the reasons as to why a successful tenderer was successful. He argued that the letter of notification issued by the Respondents was non-compliance as it did not disclose the reasons as to why the Interested Party's tender was the successful tender.

On the flip side, Counsel for the Respondents, Mr. Mbogo submitted that whereas section 87 of the Act makes a strict requirement for the Procuring Entity to give unsuccessful tenderers reasons why a tenderer was unsuccessful, it does not make it mandatory to give reasons as to why the successful tenderer was successful.

The Board has keenly studied the Letter of Notification of Intention To Award dated 4th April 2023 which is herein reproduced for completeness of the record:

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

The Managing Director

Royal Taste Kitchen Limited

P.O. Box (details withheld)

Nairobi

Tel: (details withheld)

Email: (details withheld)

NOTIFICATION OF INTENTION TO AWARD

This Notification is sent by: Email on 5th April, 2023 (4.00 p.m.)

Procuring Entity: National Social Security Fund (NSSF)

Contract Title: Provision of Staff Tea Services

ITT No: Tender No. NSSF/SCM/C/2/3/14:2022-2023

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:

- a) Request a debriefing in relation to the evaluation of your Tender, and/or**
- b) Submit a Procurement-related Complaint in relation to the decision to award the contract.**

I) The Successful Tenderer

| | |
|-----------------------|------------------------------------|
| Name | LESAN CATERERS LIMITED |
| Address | P.O. BOX (details withheld) |
| Contract Price | KSHS. 10,676,160.00 |

II) Other Tenderers

| Name of Tenderer | Tender Price | Evaluated Tender Price (if applicable) |
|-------------------------|---------------------|---|
| | | |

| | | | |
|---|----------------|----------------------|-----------------------|
| VINTAGE MOVERS | VIBRANT | 11,032,032.00 | Not Applicable |
| ROYAL TASTE KITCHEN | | 10,640,572.80 | Not Applicable |
| MLIMA VIEW GARDENS | | 8,896,576.00 | Not Applicable |
| MEAL CATERERS & MANAGEMENT | MAGIC | 20,640,576.00 | Not Applicable |
| AFRICAN RESTAURANT | EAGLES | 12,811,392.00 | Not Applicable |
| TOUCH LIMITED | GLOBAL | 10,498,224.00 | Not Applicable |

REASONS FOR FAILURE

The reason the tender for M/S Royal Taste Kitchen Limited was unsuccessful is because the references you submitted in your bid document could not be confirmed upon Physical visits to the said premises for due diligence. The testimonials were not verifiable. Three (3) of your reference sites did not demonstrate your capacity in undertaking similar nature of services in organizations with more than 500 employees from 2019 to 2022 as was required.

III) How to Request a Debriefing

...

IV) How to Make a Complaint

...

V) Standstill Period

...

On behalf of the Procuring Entity

Signed

David Mwangangi

AG. MANAGING TRUSTEE/CEO

The above notification identifies the successful tenderer and communicates to the Applicant the reasons as to why its tender was found unsuccessful. According to the notification, the Interested Party's tender was the successful tender and that the Applicant was found unsuccessful for reasons that references the Applicant submitted could not be verified and that 3 of the reference sites did not demonstrate the Applicant's capacity in undertaking similar services in organizations with more than 500 employees from 2019 to 2022as was required in the Tender Document.

Section 87 of the Act outlines the contents of the notification letter to tenderers 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.

Regulation 82 of the 2020 Regulations offers further clarity by explaining the procedure for notification under Section 87(3) of the Act in the following words:

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.* (emphasis ours)**

In view of the provisions of Section 87 of the Act read with Regulation 82 of the Regulations 2020, the Board observes that 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 as enshrined in Article 228 and 232 of the Constitution. This means all processes within a public procurement system, including the notification to unsuccessful tenderers must be conducted in a transparent manner. This we note was the same position taken by the Board in its decision in Application No 12 of 2023, which position was not challenged by any of the parties by way of Judicial Review as prescribed in the Act.

Having carefully studied the copies of the letters of Notification of Intention to Award dated 4th April 2023 and addressed to the various tenderers in the confidential file, we have further noted that none of the letters indicated the reason(s) why the Interested Party's tender was successful.

In the circumstances, the Board finds that the Respondents did not comply with the provisions of Section 87 of the Act read with Regulation 83 of the

Regulations 2020 when notifying the tenders of the outcome of the procurement process of the subject tender and further find that the Notification of Intention to Award dated 4th April 2023 did not meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of the Regulations 2020.

What orders should the Board grant in the circumstances?

We have found that the Respondents conducted due diligence in compliance with the Tender Document, Section 83 of the Act and this Board's finding in Application No. 12 of 2023

However, we have established that the Notifications of Intention to Award dated 4th April 2023 do not meet the threshold prescribed under Section 87(3) of the Act and Regulation 82(3) of the Regulations 2020.

The upshot of our decision is that the instant Request for Review partially succeeds with 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 18th April

- 1. The Letter of Notification of Intention to Award to the successful tenderer dated 4th April 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 unsuccessful tenderers dated 4th April 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 directed to issue fresh Letters of Notification within Seven (7) days in line with Section 87(3) of the Act read with Regulation 82(3) of the Regulations 2020 taking into account the findings of the Board in this decision**
- 4. Given our findings herein, each party shall bear its own costs in the Request for Review**

Dated at NAIROBI, this 9th Day of May 2023.



.....
CHAIRPERSON

PPARB



.....
SECRETARY

PPARB