

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 101/2023 OF 4TH DECEMBER 2023

BETWEEN

ROYAL TASTE KITCHEN LIMITED.....APPLICANT

AND

DIRECTOR GENERAL,

KENYA DEVELOPMENT CORPORATION.....1ST RESPONDENT

KENYA DEVELOPMENT CORPORAION.....2ND RESPONDENT

AZURI CAFÉ & RESTAURANT LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Development Corporation in relation to Tender No. ONT/KDC/26/2023-2024 for Provision of Office Tea and Outside Catering Services.

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb. - Chairperson
2. Ms. Alice Oeri - Member
3. CPA Alexander Musau - Member

IN ATTENDANCE

- Mr. James Kilaka - Acting Board Secretary
- Ms. Sarah Ayoo - Secretariat
- Mr. Anthony Simiyu - Secretariat



PRESENT BY INVITATION

APPLICANT

ROYAL TASTE KITCHEN LIMITED

Mr. Udoto

-Advocate, Udoto & Company Advocates

RESPONDENTS

**DIRECTOR GENERAL, KENYA
DEVELOPMENT CORPORATION**

KENYA DEVELOPMENT CORPORATION

Ms. Barbara Lunani

-Advocate, Kenya Development Corporation

INTERESTED PARTY

AZURI CAFÉ & RESTAURANT LIMITED

Mr. Outa

-Advocate, Humphrey & Company LLP

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Development Corporation, the Procuring Entity together with the 1st Respondent herein, invited submission of sealed tenders in response to Tender No. ONT/KDC/26/2023-2024 for Provision of Office Tea and Outside Catering Services using an open competitive tender method. The subject tender's submission deadline was Friday, 13th October 2023 at 10.00 a.m.

Submission of Tenders and Tender Opening

2. According to the signed Tender Opening Minutes dated 13th October 2023, submitted under the Confidential File submitted by the Procuring



Entity, the following 13 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

No.	Name of Tenderer
1.	Banki Kuu Sacco Limited
2.	Cascade Company Limited
3.	Royal Taste Kitchen Limited
4.	Sarova Hotels
5.	Netasam Enterprises
6.	Kipevu Restaurant Limited
7.	Petma Restaurant Limited
8.	Azuri Café & Restaurant Limited
9.	Uchumi Cooperative Savings Limited
10.	Kuleni Foods Limited
11.	Seven Star Cleaning and Interior Services
12.	Cater For You Limited
13.	Oliveira Restaurant

Evaluation of Tenders

3. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received tenders in the following 3 stages as captured in the Evaluation Report
- i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Financial Evaluation



Preliminary Evaluation

4. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Clause 2. Preliminary Evaluation for Determination of Responsiveness under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 27 to 29 of the Tender Document.
5. The evaluation was to be on a Yes/No basis and tenderers who failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
6. At the end of the evaluation at this stage, 7 tenders were found unresponsive with only 6 tenders including that of the Applicant and Interested Party qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

7. The Evaluation Committee was required at this stage to examine tenderers successful at the Preliminary Stage using the criteria set out as Technical Evaluation Criteria under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 29 to 30 of the Tender Document.
8. Tenderers were to be examined and scored against the weighted marks assigned to each criterion at this stage. In order to qualify for further evaluation, a tenderer was required to garner at least 80 marks at the Technical Evaluation Stage.

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9. At the end of the evaluation at this stage, all the 6 evaluated tenders garnered over 80 marks and thus all of them qualified for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

10. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Financial Schedule under Section III– EVALUATION AND QUALIFICATION CRITERIA on page 30 of the Tender Document.
11. The tenderers were to be evaluated based on their tender sum for the provision of office tea to be served up to a maximum of 128 cups per session for morning and evening. The lowest evaluated tenderer at this stage would be recommended for the award of the subject tender.
12. At the end of the evaluation at this stage, it was established that the Applicant and the Interested Party quoted the same tender price which also happened to be the lowest evaluated price.

Evaluation Committee's Recommendation

13. Accordingly, the Evaluation Committee in accordance with Section 133 of the Act, recommended that the Applicant and the Interested Party be invited to each submit their best and final offer to break the tie.
14. The Evaluation Committee also recommended the carrying out of due diligence on the two tenderers prior to the award of the subject tender.

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15. Vide a letter dated 7th November 2023, the Applicant and Interested Party were invited to submit their best and final offer by Tuesday, 14th November 2023. Each of the tenderers submitted their revised offers.
16. According to the signed but undated Evaluation Report the Applicant's tender was established as the lowest evaluated tender. The Report also captures that the Evaluation Committee conducted due diligence to establish if the two bidders were still compliant with the mandatory requirements and it is at this stage that the Committee noted that the Applicant's tax compliance certificate was withdrawn. The Interested Party's compliance status with the mandatory requirements remained unchanged.
17. In view of the foregoing, the Evaluation Committee recommended the award of the subject tender to the Interested Party at a cost of **Kenya Shillings Forty Only** (Kshs. 40.00) inclusive of taxes per cup.

Professional Opinion

18. In a Professional Opinion dated 20th November 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Manager, Supply Chain Management, Ms. Patricia Gachungi, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation for the award of the subject tender to the Interested Party.
19. On the same day, on 20th November 2023, the 1st Respondent concurred with the Professional Opinion.

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Notification to Tenderers

20. Accordingly, tenderers were notified of the outcome of the evaluation tenders submitted in response to the subject tender vide letters dated 22nd November 2023.

REQUEST FOR REVIEW

21. On 4th December 2023, the Applicant through the firm of Udoto & Company Advocates, filed a Request for Review dated 30th November 2023 supported by an Affidavit sworn on 30th November 2023 by Emily Kerubo Kamau, a Director at the Applicant, seeking the following orders from the Board in verbatim:

- 1. The letter of notification of intention to award to the Interested Party with respect to Tender No. ONT/KDC/26/2023-2024 for Provision of Tea and Outside Catering Services be nullified and set aside;***
- 2. This Honourable Board to direct the 1st Respondent to award the Applicant Tender No. ONT/KDC/26/2023-2024 for Provision of Tea and Outside Catering Services.***
- 3. The 1st Respondent to pay cost of the Review;***
- 4. Any other orders for the ends of justice***

22. In a Notification of Appeal and a letter dated 4th December 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent 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

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[Signature]

of COVID-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 4th December 2023.

23. In response to the Request for Review, on 7th December 2023, the Respondents through Barbara Lunani-Advocate a Notice of Appearance and Memorandum of Appearance, both dated 6th December 2023. The Respondents also submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.
24. Vide letters dated 8th December 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 8th December 2023.
25. On the same day, 8th December 2023, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 8th December 2023 notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 14th December 2023 at 12.00 noon through the link availed in the said Hearing Notice.
26. On 13th December 2023, the Respondents filed a Memorandum of Response of even date.

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27. On the same day, 13th December 2023, the Interested Party filed a Memorandum of Appearance and Memorandum of Response, both dated 11th December 2023.
28. On the morning of 14th December 2023, the Applicant filed a Supplementary Statement of even date. Later on the same day at 12 noon., parties through their respective Advocates joined the online hearing session.
29. The Board read out to the parties the documents that had been filed in the Request for Review and sought for parties' confirmation that those were the documents that had been filed and served upon them. Parties' Advocates confirmed having filed and been served with the said documents
30. The Board also gave hearing directions and set the order of address as follows:
 - i. The Applicant would have 10 minutes to argue its case;
 - ii. The Respondents would have 10 minutes to response;
 - iii. The Interested Party would equally then have 10 minutes to respond to the Request for Review; and
 - iv. The Applicant would then close with a rejoinder in 1 minute.

PARTIES SUBMISSIONS

Applicant's Submissions

31. Counsel for the Applicant, Mr. Udoto, indicated that the Applicant would be relying on its filed documents in the matter i.e. Request for Review

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dated 30th November 2023; Statement in Support of the Request for Review dated 30th November 2023 and Supplementary Statement dated 14th December 2023.

32. Mr. Udoto urged that the Notification of Intention to Award sent to the Applicant only indicated the successful tenderer but failed to give reasons as why they were the successful as well as the reasons why the Applicant was unsuccessful. Relying on **PPARB Application No. 82 of 2022**, Counsel argued that an Applicant is entitled to reasons why its tender had been found unresponsive.
33. Counsel expressed the Applicant's concern over the turn of events since the Procuring Entity had requested the Interested Party and the Applicant to submit a best and final offer and that the Applicant's offer was lower than that of the Interested Party.
34. Mr. Udoto contended that though the Respondents had through their response to the Request for Review indicated that the Applicant was disqualified on account of a withdrawn Tax Compliance Certificate, no evidence was tendered to this effect.
35. Counsel contended that any due diligence by the Procuring Entity ought to have been through a formal request to the authority from whom information on tenderers is sought. He argued that in the present case, there was no formal letter addressed to the Kenya Revenue Authority on the Tax Compliance Certificate status of the Applicant herein and neither was there any response from the revenue authority.



36. It was the Applicant's contention that it had annexed to its Supplementary Statement, a Tax Compliance Certificate which was valid up to 6th April 2024. Further due to time constraints, having been served with the Respondents' response on the eve of the hearing, it was unable to extract a subsequent Tax Compliance Certificate as the i-tax platform systems were down.
37. It was argued that the Applicant's Manager at the Kenya Revenue Authority had confirmed to the Applicant that its Tax Compliance Certificate had never been withdrawn.
38. Counsel further contended that a debrief session with the Procuring Entity could not resolve the Applicant's grievance of its disqualification from the subject tender.
39. It was argued that the Applicant had already marshalled resources in readiness to carry out the tender as it was the lowest evaluated tender in the subject tender.

Respondents' Submissions

40. Counsel for the Respondents; Ms. Lunani confirmed that following the evaluation of the tenders received in the subject tender, there was a tie in the Financial Evaluation of the tenders by Applicant and the Interested Party, who incidentally indicated the same tender sum in their respective tenders.
41. Ms. Lunani submitted that to break the tie, the Evaluation Committee recommended that the Applicant and the Interested Party to each submit

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their best and final offer and that the two tenderers be subjected to due diligence. According to Counsel, the two tenderers submitted their best and final offers and the Applicant's offer was found as the lower price but when subjected to due diligence on the basis of the mandatory requirements under the Preliminary Evaluation Stage, it was found that its Tax Compliance Certificate had been withdrawn. However, the Interested Party's documents were intact.

42. She argued that it was at this stage that the Evaluation Committee disqualified the Applicant from the subject tender and recommended the award of the tender to the Interested Party.
43. According to Counsel, the tender process was conducted in accordance with the law and as per the requirements under the Tender Document.

Interested Party's Submissions

44. Counsel for the Respondent, Mr. Outa, submitted that the Interested Party would be relying on its filed Memorandum of Response dated 11th December 2023.
45. Mr. Outa indicated that the Interested Party was a tenderer who emerged successful after a fair tender process and that the Evaluation Committee conducted Due Diligence in accordance with Section 83(1) of the Act.
46. He further argued that the Applicant was under strict proof to demonstrate compliance with the tender requirement on submitting a valid Tax Compliance Certificate, which they had failed to discharge.



47. It was contended that the Respondents had on the contrary tendered evidence that the Applicant's Tax Compliance Certificate had been withdrawn and thus the Applicant was unresponsive in respect of the mandatory requirements under the tender document.

Applicant's Rejoinder

48. In a brief rejoinder, Counsel for the Applicant, Mr. Udoto argued that there was no rebuttal on the part of the parties herein that the Notification of Intention to Award did not disclose reasons for the success of the Interested Party nor those for the unsuccessfulness of the Applicant.

CLARIFICATIONS

49. The Board sought clarity from the Applicant on whether it presented a valid Tax Compliance Certificate to which Mr. Udoto responded in the affirmative.
50. The Board sought clarity from the Respondents on whether it was aware that a Tax Compliance Certificate was a mandatory requirement in the subject tender and whether the Applicant was responsive to this requirement. Ms. Lunani confirmed it was indeed a mandatory requirement to supply a valid Tax Compliance Certificate and that the Applicant supplied one which was initially valid but as at the time of due diligence its status had been indicated as withdrawn.
51. The Board inquired on whether the Respondents had any document showing that the Applicant's Tax Compliance Certificate was withdrawn other than the i-tax screenshot. Ms. Lunani indicated that the Respondents did not have any such document.



52. The Board asked the Respondents to confirm whether the Notification of Intention to Award the subject tender contained reasons for the success of the Interested Party and the unsuccessfulness of the Applicant. Ms. Lunani indicated that the Notification did not contain the reasons but these were to be communicated in the debrief session which the Applicant skipped despite an invitation by the Respondents.
53. The Board sought the Respondents to clarify the point in the tender process that the Applicant's Tax Compliance Certificate was withdrawn to which Ms. Lunani confirmed that the withdrawal happened at the point of due diligence.
54. The Board sought to clarify if the Interested Party was equally subjected to due diligence to which Ms. Lunani responded in the affirmative.
55. The Board observed that the Preliminary Evaluation Stage had a mandatory requirement for the supply of a valid Tax Compliance Certificate. The Board was therefore curious to know the criteria that was used to establish the validity of the certificate at the Preliminary Evaluation Stage. Ms. Lunani informed the Board that the criteria used to conduct due diligence and the Preliminary Evaluation was the same i.e. checking the validity status on the i-tax platform.
56. The Board inquired from the Applicant the length of time it would take to ascertain the status of its Tax Compliance Certificate to which Mr. Udoto indicated a day.
57. The Board adjourned the session for 10 minutes and returned with the following Directions:

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- i. The Applicant had up until 6.00 p.m. on 14th December to file and serve a Further Affidavit attaching verifiable evidence that its Tax Compliance Certificate had not been withdrawn together with its Written Submissions.
 - ii. Thereafter, the Respondents had until 12 noon on 15th December 2023 to file and serve a Further Affidavit and Written Submissions in response to the Applicant's Further Affidavit alongside any Written Submissions.
 - iii. The Interested Party had until 2.00 p.m. to equally file and serve a Further Affidavit and Written Submissions in response to the Applicant's documents.
 - iv. Any document filed outside the stipulated timelines would be struck out and shall not be considered.
58. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 4th December 2023 had to be determined by 27th December 2023. Therefore, the Board would communicate its decision on or before 27th December 2023 to all parties via email.
59. On 14th December 2023, the Applicant filed a Further Affidavit sworn on 14th December 2023 by Emily Kerubo together with Written Submissions dated 14th December 2023.
60. On 15th December 2023 the Respondents filed Written Submissions dated 15th December 2023.

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61. On the same day, 15th December 2023, the Interested Party equally filed its Written Submissions of even date.

BOARD'S DECISION

62. The Board has considered all documents, oral submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

- I. ***Whether the Letters of Notification of Intention to award issued in the subject tender conform to the requirements under Section 87 and Regulation 82 of the Regulations 2020?***
- II. ***Whether the Procuring Entity's properly disqualified the Applicant from the subject tender?***
- III. ***What orders should the Board issue in the circumstance?***

Whether the Letters of Notification of Intention to award issued in the subject tender conform to the requirements under Section 87 and Regulation 82 of the Regulations 2020?

63. The Applicant herein assailed the contents of the letters of notification of intention to award issued in the subject tender. Counsel for the Applicant, Mr. Udoto argued that the said letters did not contain the reasons as to why the Interested Party's tender was the successful tender and equally why the Applicant's tender was the unsuccessful tender.

64. The Respondents took the view that the reasons would be subsequently be communicated to the tenderers. Counsel for the Respondents, Ms. Lunani submitted that these reasons were to be disclosed to the Applicant

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during the debrief session but the Applicant skipped this session despite invitation by the Procuring Entity.

65. This Board is therefore called upon to interrogate the contents of the letter of notification of intention of award as communicated to the Applicant on whether it conforms to the requirements of the law.

66. Section 87 of the Act prescribes the contents of the Notification of Intention of Award 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.

67. On its part Regulation 82 of the Regulations 2020 speaks to the procedure of notification in the following terms:

82. Notification of intention to enter into a contract

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(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

68. In ***PPARB Application No. 12 of 2023; Royal Taste Kitchen v CEO, National Social Security Fund & Anor*** this Board pronounced itself on Section 87 of the Act and Regulation 82 as follows:

"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 tenderer 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 87(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 with a public

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procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner."

69. From the above decision and provisions of the Act and Regulations, it is apparent that the law espouses as part of transparency and accountability for Procuring Entities to disclose in their Notifications to tenders as a bare minimum (i) the identity of the successful tenderer; (ii) the tender price at which the successful tenderer has been awarded the tender; (iii) reason why the successful tenderer's tender emerged successful; (iv) specific reason why an unsuccessful tenderer was found unsuccessful
70. Turning on to the subject tender, the Procuring Entity issued a Letter of Notification of Intention to Award dated 22nd November 2023. An excerpt of the letter is herein reproduced for ease of reference:

"Royal Taste Kitchen

P.O. Box (Details withheld

Nairobi

Tel (Details withheld)

Email: (Details withheld)

Dear Sir/Madam,

Re: NOTIFICATIN OF INTENTION TO AWARD- TENDER NO. ONT/KDC/26/2023-2024 PROVISION OF OFFICE TEA AND OUTSIDE CATERING SERVICES

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:

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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:	Azure Café & Restaurant
Address	P.O. Box (Details withheld)
Contract price	Kshs. 38.00 per cup per Session

ii. Other Tenderers

SNO	Name of Tenderer	Tender price	Evaluated Tender price (if applicable)
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Note

NR-Non Responsive

iii. How to request a debriefing

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iv. How to make a complaint

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v. Standstill Period

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Yours faithfully,

KENYA DEVELOPMENT CORPORATION



Signed

NORAH RATEMO

DIRECTOR GENERAL”

71. From the above, the Respondents’ Letter of Notification of Intention to Award dated 22nd November 2023, disclosed the identity of the successful tenderer as well as the identities of the other tenderers in the subject tender. However, the Letter neither discloses the reason as to why the Interested Party was the successful tenderer nor why the Applicant’s tender was unsuccessful in the subject tender, contrary to the express provisions of Section 87 of the Act and Regulation 82 of the Regulations 2020.
72. In light of the foregoing analysis the Board finds that the Letters of Notification of Intention to Award issued in the subject tender do not conform to the requirements under Section 87 and Regulation 82 of the Regulations 2020.

Whether the Procuring Entity’s Evaluation Committee properly disqualified the Applicant from the subject tender?

73. The Applicant instituted the instant Request for Review challenging its disqualification from the subject tender. Counsel for the Applicant, Mr. Udoto, argued that though the Respondents argued in their response to the Request for Review that the Applicant’s Tax Compliance Certificate had been withdrawn, no evidence was produced to this effect. According to the Applicant, they submitted as part of their tender a valid Tax

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Compliance Certificate that had not been withdrawn at any particular point.

74. Counsel expressed the Applicant's concern over the turn of events since the Procuring Entity had earlier requested the Interested Party and the Applicant to submit a best and final offer after it emerged at the Financial Evaluation Stage that the two tenderers had quoted the same tender price which also happened to be the lowest evaluated price. According to Counsel, from the new offers submitted by the two tenderers, the Applicant's tender price was the lower price and thus it qualified for the award of the subject tender.
75. Counsel for the Respondents, Ms. Lunani confirmed that following the evaluation of the tenders received in the subject tender, there was a tie at the Financial Evaluation Stage in the tenders by Applicant and the Interested Party, who incidentally indicated the same tender sum in their respective tenders.
76. Ms. Lunani submitted that to break the tie, the Evaluation Committee recommended that the Applicant and the Interested Party to each submit their best and final offer and that the two tenderers be subjected to due diligence. According to Counsel, the two tenderers submitted their best and final offers and the Applicant's offer was found as the lower price but when subjected to due diligence on the basis of the mandatory requirements under the Preliminary Evaluation Stage, it was found that its Tax Compliance Certificate had been withdrawn. However, the Interested Party's documents were intact.

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77. On their part, the Interested Party contended that they emerged successful after a fair tender process and that the Evaluation Committee properly conducted Due Diligence in accordance with Section 83(1) of the Act.
78. Counsel for the Interested Party argued that the Applicant was under strict proof to demonstrate compliance with the tender requirement on submitting a valid Tax Compliance Certificate, which they had failed to discharge.
79. This Board is therefore invited to interrogate whether the Applicant was justly disqualified from the subject tender.
80. The Board has keenly perused the Tender Document and noted that submission of a tax compliance certificate was a mandatory requirement at the Preliminary Stage of Evaluation. Clause 2 under Section III of the Tender Document provides as follows:

2.Preliminary examination for Determination of Responsiveness

The Procuring Entity will start by examining all tenders to ensure they meet in all respects the eligibility criteria and other mandatory requirements in the ITT, and the tender is complete in all aspects in meeting the requirements provided for in the preliminary evaluation criteria outlined below...Tenderers that do not pass the Preliminary Examination will be considered non-responsive and will not be considered further.

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MANDATORY REQUIREMENTS

	A. Mandatory Requirements	YES/NO
...	...	
MR 6	Valid KRA Tax Compliance Certificate	
...	...	

81. From the foregoing, it is apparent that Mandatory Requirement No. 6 under the Preliminary Evaluation Stage required tenderers to submit a valid Tax Compliance Certificate lest they risk disqualification.

82. In the present case, the Applicant submitted a Tax Compliance Certificate as part of its tender. Counsel for the Respondents, Ms. Lunani confirmed that the Applicant passed the Preliminary Evaluation Stage after a check of the of the Tax Certificate on the i-tax platform showed that the certificate was valid. She added that the Applicant’s Tax Compliance Certificate was withdrawn as at the time of carrying out due diligence, which was also done through a check on the i-tax platform.

83. Accordingly, it is not in dispute that the Applicant submitted a Tax Compliance Certificate and was responsive to the tender requirements from the Preliminary Evaluation Stage to the Financial Evaluation Stage.

84. In **PPARB Application No. 9 of 2023; Asal Frontiers Limited v Accounting Officer, Kenya National Highways Authority & Ors** this Board decreed that unless the tender document stipulates otherwise, the benchmark date for validity of documents submitted on an invitation to tender should be the tender submission deadline:

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"The above letter in addition to confirming that the Applicant's Tax Compliance Certificate was withdrawn on 31st January 2023 also affirms that the Applicant held a valid Tax Compliance Certificate between 8th November 2023 and 31st January 2023. The confirmation that the Applicant's Tax Compliance Certificate was valid for a given period then invites questions as to whether the timing by an Evaluation Committee of a due diligence exercise can impact its findings to the advantage of some tenderers and to the disadvantage of advantage of others.

We say so because had the Evaluation Committee, having concluded evaluation on 30th January 2023, carried out an online verification of the Applicant's Tax Compliance Certificate on 30th January 2023, the said online verification would have revealed that the Applicant held a valid Tax Compliance Certificate. Alternatively, had the Evaluation Committee, having prepared its Due Diligence Report on 10th February 2023 conducted an online verification on 13th February 2023 the said online verification would have revealed that the Applicant held a valid Tax Compliance Certificate.

It is our considered view that the cutoff point of when a procuring entity ought to consider documents submitted by tenderers is at the date of the tender submission deadline and not at the date of evaluation or conducting due diligence unless a tender document stipulates otherwise. The tender submission deadline is the day and time when prospective tenderers are required to submit their

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respective tenders in response to an invitation to tender by a procuring entity. After the tender submission deadline, tenderers are not required to submit further documentation even in cases where the validity of a document has expired. This is because evaluation procedures and due diligence exercise are under the control of a procuring entity and a procuring entity decides on when and how it carries out evaluation of tenders and when and how it conducts due diligence. In essence, it would only be fair for the material period of validity of a document during a tendering process to be at the time the said tender closes. If this is left as a moving target, the same is open to abuse in favour of certain tenderers to the disadvantage of others. For instance, in a case where tenderers submit valid Tax Compliance Certificates expiring on different dates, a procuring entity may simply opt to conduct due diligence on a date after expiry of the validity of Tax Compliance Certificates of undesired tenderers allowing a procuring entity to favour other tenderers.”

85. The above position was also endorsed by the High Court in ***Nairobi High Court Judicial Review Case No. E052 of 2023; R v PPARB Ex parte Aridlands Communication Limited***. In this case the Ex parte Applicant challenged a decision by the Board for the award of a tender to the least evaluated tenderer. The Ex parte Applicant had argued that the least evaluated tenderer’s Tax Compliance Certificate had been withdrawn subsequent to the close of the tender. In dismissing the judicial review application, the High Court agreed that the benchmark date for the

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validity of the Tax Compliance Certificate is the tender submission deadline:

"138 This court has noted from the second due diligence report that the Kenya Revenue Authority confirmed that the Interested Party's tax compliance certificate had been withdrawn on 31st January 2023 and later reinstated on 13th February 2023. It is this court's finding that although Kenya Revenue Authority initiated the Tax Compliance Certificate withdrawal process prior to the tender submission deadline of 12th January 2023, the Interested Party's tax compliance certificate was still valid as at 12th January 2023.

139. The only time the tax compliance certificate was withdrawn was between 31st January 2023 and 13th February 2023 when it was reinstated by the Kenya Revenue Authority. The initiation of the withdrawal process is not the same as the actual withdrawal. During the subsistence of the withdrawal process by the Kenya Revenue Authority, the Interested Party remained the holder of a valid tax compliance certificate with legal capacity to engage in the tendering process.

148. The upshot of the foregoing analysis is that the Ex parte Applicant has not made out a case that would warrant the interference with the finding of the review board and I so find."

86. From the above, unless a tender document provides otherwise, the validity of documents submitted in response to an invitation to tender should be gauged on their validity as at the tender submission deadline.

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87. Turning to the instant case, the tender submission deadline was 13th October 2023 and Counsel for the Respondents, Ms. Lunani confirmed during hearing that the Applicant's Tax Compliance Certificate was valid as at 27th October 2023 when the Evaluation Report was being prepared.
88. Guided by the cases mentioned above, it would follow that it was erroneous on the part of the Evaluation Committee to disqualify the Applicant on account of any withdrawal or otherwise that happened after 13th October 2023, which was the material date on which validity of documents should be checked against.
89. The Evaluation Committee ought to have in conducting its due diligence confirmed the status of the Applicant's Tax Compliance Certificate as at 13th October 2023 and not any other date. Ms. Lunani informed the Board that the Evaluation Committee used the i-tax platform to verify the validity of tenderers' Tax Compliance Certificate during both the Preliminary Evaluation Stage and the due diligence stage. During the Preliminary Evaluation Stage, the Evaluation Committee found the Applicant's submitted Tax Compliance Certificate valid. It would therefore follow that any subsequent check on the Applicant's Tax Compliance Certificate as at the tender submission deadline i.e. 13th October 2023 would also yield that the Applicant's Tax Compliance Certificate was valid.
90. In view of the foregoing, the Board finds that the Procuring Entity's Evaluation Committee improperly disqualified the Applicant from the subject tender.

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What orders the Board should grant in the circumstances?

91. The Board has found that the Letters of Notification of Intention to Award issued in the subject tender do not conform to the requirements under Section 87 and Regulation 82 of the Regulations 2020.
92. The Board has equally found that the Procuring Entity's Evaluation Committee improperly disqualified the Applicant from the subject tender.
93. The upshot of our finding is that the Request for Review dated 30th November 2023 in respect of Tender No. ONT/KDC/26/2023-2024 for Provision of Office Tea and Outside Catering Services succeeds in the following specific terms:

FINAL ORDERS

94. 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 30th November 2023:

- 1. The Letter of Notification of Intention to Award to the successful tenderer dated 22nd November 2023 with respect to Tender No. ONT/KDC/26/2023-2024 for Provision of Office Tea and Outside Catering Services, be and is hereby nullified and set aside.**
- 2. The Letter of Notification of Intention to Award to the Applicant and other unsuccessful tenderers dated 22nd November 2023 with respect to Tender No. ONT/KDC/26/2023-2024 for Provision of Office Tea and Outside Catering Services, be and is hereby nullified and set aside.**

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- 3. The 1st Respondent is hereby ordered to reconvene and direct the Evaluation Committee to make a fresh recommendation of award of the subject tender to the lowest evaluated tender, taking note of the Board’s findings above, within Seven (7) days from the date of this Decision.
- 4. Further to Order 3 above, the 1st Respondent is hereby directed to proceed with the procurement process of Tender No. ONT/KDC/26/2023-2024 for Provision of Office Tea and Outside Catering Services to its logical conclusion while taking into consideration the findings of the Board in this Decision and in accordance with the provisions of the Constitution, the Public Procurement and Asset Disposal Act, 2015 and Regulations 2020 made thereunder.
- 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 22nd Day of December 2023.


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CHAIRPERSON
PPARB


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SECRETARY
PPARB