

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 105/2023 OF 11TH DECEMBER 2023

BETWEEN

LOCIAFRICA LIMITED.....APPLICANT

AND

**ACCOUNTING OFFICER,
THE NATIONAL TREASURY
AND ECONOMIC PLANNING.....1ST RESPONDENT**

**THE NATIONAL TREASURY
AND ECONOMIC PLANNING.....2ND RESPONDENT**

AGILE BUSINESS SOLUTIONS LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer, The National Treasury and Economic Planning in relation to Tender No. TNT/018/2023-2024 for Development, Supply, Configuration, Installation, Testing, Implementation and Commissioning of an Online Pension Management Information System

BOARD MEMBERS PRESENT

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



IN ATTENDANCE

Mr. Philemon Kiprop - Secretariat

Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT

LOCI AFRICA LIMITED

Mr. Owang -Advocate, Owang & Associates Advocates

RESPONDENT

**ACCOUNTING OFFICER, THE NATIONAL
TREASURY AND ECONOMIC PLANNING**

**THE NATIONAL TREASURY AND
ECONOMIC PLANNING**

Mr. Caleb Ogot -Head of Supply Chain Management Services,
The National Treasury and Economic Planning

Mr, Ndekere -Representative ICT Department, The National
Treasury and Economic Planning

INTERESTED PARTY

AGILE BUSINESS SOLUTIONS LIMITED

Ms. Desma Nungo -Advocate, NOW Advocates LLP



BACKGROUND OF THE DECISION

The Tendering Process

1. The National Treasury and Economic Planning, the Procuring Entity together with the 1st Respondent herein, invited submission of sealed tenders in response to Tender No. TNT/018/2023-2024 for Development, Supply, Configuration, Installation, Testing, Implementation and Commissioning of an Online Pension Management Information System using an open competitive tender method (hereinafter referred to as the 'subject tender'. The subject tender's submission deadline was Tuesday, 26th September 2023 at 11.00 a.m.

Addenda

2. The Procuring Entity issued 3 Addenda in the subject tender offering clarification on various inquiries that had been made by interested candidates. Addendum I dated 22nd September 2023 extended the tender submission deadline to Tuesday, 10th October 2023 at 11:00a.m and thereafter, Addendum II dated 29th September 2023 extended the submission deadline to Wednesday, 11th October 2023.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Minutes for 11th October 2023, submitted under the Confidential File submitted by the Procuring Entity, the following 7 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.	Systech Limited
2.	Dhanush Kenya Limited
3.	EKV Consultant Limited
4.	Appkings Solutions
5.	Lase Infrastructure & Technology Solutions
6.	Auity Limited in joint venture with Ubora Systems & Solutions Limited and Sagitech Solutions LLC
7.	Agile Business Solutions Limited

Evaluation of Tenders

4. 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

5. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Clause 3. Preliminary Evaluation for Determination of Responsiveness under Section III – EVALUATION AND



QUALIFICATION CRITERIA on pages 37 to 40 of 250 of the Tender Document.

6. The evaluation was to be conducted on a Yes/No basis and tenderers who failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
7. At the end of the evaluation at this stage, 6 tenders were found non-responsive with only 1 tender i.e. the Interested Party's tender qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

8. The Evaluation Committee was required at this stage to examine tenders that were successful at the Preliminary Evaluation Stage using the criteria set out as Mandatory Technical Requirements under Section III – EVALUATION AND QUALIFICATION CRITERIA on pages 40 to 121 of 250 of the Tender Document.
9. Tenders at this stage were to be examined in 3 stages i.e. Mandatory Functional/Modules Requirements, General Technical Mandatory Requirements and the Detailed Technical Evaluation. Tenderers were required to meet all the requirements under the Mandatory Functional/Modules Requirements and the General Technical Mandatory Requirements before qualifying for evaluation at the Detailed Technical Evaluation.

10. At the Detailed Technical Evaluation 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 at the Financial Stage, a tenderer was required to garner at least 80% at this stage.
11. At the end of the evaluation at this stage, the Interested Party's tender met all the mandatory requirements and garnered over 80% at the Detailed Technical Evaluation Stage and thus qualified for further evaluation at the Financial Evaluation Stage.

Financial Evaluation

12. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as Tender Financial Evaluation (ITT 35.5) under Section III– EVALUATION AND QUALIFICATION CRITERIA on page 122 of 250 of the Tender Document.
13. Tenders were to be examined factoring in recurrent costs for the implementation phase as well as post services warranty period. A margin of preference was also to be applied to Kenyan Contractors.
14. At the end of evaluation at this stage, it was established that the Interested Party's tender, which was the only tenderer evaluated at this stage happened to have quoted a tender price within the Procuring Entity's budget for the subject tender.

Evaluation Committee's Recommendation

15. Accordingly, the Evaluation Committee recommended the award of the subject tender to the Interested Party at a cost of **Kenya Shillings Two Hundred and Ninety-One Million, Six Hundred Thousand (Kshs. 291,600,000.00)** only.

Professional Opinion

16. In a Professional Opinion dated 9th November 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Head of Supply Chain Management Services, Mr. Caleb Ogot, 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. The 1st Respondent concurred with the Professional Opinion.

Notification to Tenderers

17. Accordingly, tenderers were notified of the outcome of evaluation of tenders submitted in response to the subject tender vide letters dated 28th November 2023.

REQUEST FOR REVIEW

18. On 11th December 2023, the Applicant through the firm of Owang & Associates Advocates, filed a Request for Review dated 4th December 2023 supported by a Statement dated 4th December 2023 by Daniel Mwanzia Wambua, a Director of the Applicant, seeking the following orders from the Board in verbatim:

- 1. An order nullifying the decision of the Respondent to award Tender No. TNT/018/2023-2024 to the Interested Party**
- 2. The Board be pleased to review all records of the procurement process (particularly preliminary, the technical and financial evaluation thereof) relating to Tender No. TNT/018/2023-2024 do substitute the decision of the Review Board for the decision of the Respondent and award the Tender to the Applicant;**
- 3. The respondent be ordered to sign a contract with the Applicant in accordance with the Tender and decision of the Board;**
- 4. The Tender No. TNT/018/2023-2024 be awarded to the Applicant;**
- 5. The Respondent be and is hereby to pay cost of and incidental to these proceedings; and**
- 6. Such other of further relief or reliefs as this board shall deem just and expedient.**

19. In a Notification of Appeal and a letter dated 11th December 2023, Mr. James Kilaka, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') notified the Respondents 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 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 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 11th December 2023.

20. In response to the Request for Review, on 14th December 2023, the Respondents through Calleb O. Ogot filed a Statement of Response dated 14th December 2023. The Respondents also submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act').
21. Vide letters dated 15th 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 15th December 2023.
22. On 18th December 2023, the Interested Party through the firm of NOW Advocates LLP filed a Notice of Appointment of Advocates dated 18th December 2023 together with a Replying Affidavit sworn on 18th December 2023 by Anthony Kibet Komen a Director and Shareholder of the Interested Party.

23. On the same day, 18th December 2023, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 18th 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 20th December 2023 at 3.00 p.m. through the link availed in the said Hearing Notice.
24. On 19th December 2023, the Interested Party filed Written Submissions and Bundle of Authorities, both dated 19th December 2023.
25. On the morning of 20th December 2023, the Applicant filed Written Submissions and Bundle of Authorities, both dated 19th December 2023. Later on, the same day, 20th December 2023 at 3.00 p.m. parties joined the online hearing session.
26. 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.
27. Accordingly, the Board gave hearing directions allocating each party 10 minutes to highlight their case, with the Applicant going first followed by the Respondents and thereafter the Interested Party. The Board also directed that the Applicant would have 2 minutes to offer any rejoinder in the matter.



28. However, before the Applicant commenced its address, Counsel for the Interested Party, Ms. Nungo brought it to the attention of the Board that on the eve of the hearing the Applicant had served upon the Respondent an email attaching a copy of the Applicant's Manufacturer's Authorisation Certificate and a Microsoft Dynamic 365 Business Central document, which documents the Interested Party sought to be struck out for being filed after close of pleadings and parties exchange of Written Submissions.
29. Counsel for the Applicant, Mr. Owang submitted that the said documents were not prejudicial to the parties as they constituted part of the Applicant's tender document as submitted in response to the subject tender.
30. Mr. Ogot from the Respondent, chose to leave it to the Board as he indicated that the Respondents had not been served with the said documents.
31. Counsel for the Applicant, Mr. Owang thereafter orally withdrew the said two documents from the record in view of the fact that they formed part of the Applicant's tender and he invited the Board to consider the Applicant's submitted tender.

PARTIES SUBMISSIONS

Applicant's Submissions

32. Counsel for the Applicant, Mr. Owang placed reliance on the Applicant's filed documents in the matter i.e. Request for Review dated 4th December

2023 as well as the Written Submissions and Bundle of Authorities, both dated 19th December 2023.

33. Mr. Owang argued that the Applicant was disqualified at the Preliminary Stage of Evaluation for the reason that its Manufacturer's Authorization Form had a license that was proprietary. Counsel faulted the Procuring Entity for disqualifying the Applicant citing that its tender had the lowest tender price.
34. He argued that the Applicant held a perpetual license whose lifespan was indefinite and Counsel invited the Board to verify through the Microsoft link provided by the Respondents, the nature of the Applicant's license.
35. It was argued on behalf of the Applicant that the rejection of the Applicant's tender was in breach of Section 3 of the Act as this failed to promote competition by awarding the subject tender to the Interested Party who offered less commercial benefit.
36. Counsel submitted that the Applicant's failure to chronologically serialize some of the pages in its submitted tender was a minor deviation that could be excused under Section 79 of the Act.
37. Mr. Owang therefore urged the Board to allow the Request for Review.



Respondents' Submissions

38. The Respondents Head of Supply Chain Management Services, Mr. Ogot, submitted that the Evaluation Committee in the subject tender comprised of 5 members, 3 of whom were ICT Experts. He pointed out that the Applicant was disqualified at the Preliminary Evaluation Stage after failing to meet Mandatory Requirements Nos. 8 and 16 of the Tender Document.
39. Mandatory Requirement No. 8 required tenderers to submit original Manufacturer's Authorization Form in a designated format or evidence of ownership where copyright in the software was owned by the tenderer. The Respondents' ICT Expert, Mr. Ndekere informed the Board that the Procuring Entity contemplated a perpetual licensing regime i.e. a license paid on a one-time basis without any subscriptions; where it would as the client, own all the Intellectual Property Rights and expected limited support from the developer.
40. Mr. Ndekere informed the Board that the Manufacturer's Authorization Form supplied by the Applicant indicated that Microsoft did not grant any Intellectual Property Rights to a Third Party and that the license granted non-perpetual rights and therefore the Applicant's tender was properly found nonresponsive.
41. Mandatory Requirement No. 16 required chronological serialization of the pages in its submitted tender. According to Mr. Ogot, the Applicant failed to chronologically serialize the pages of its submitted tender.

42. He went on to give a historical basis for chronological serialization of the pages pointing out that in the olden days scrupulous Evaluation Committee members would pluck out certain pages of received tenders. He therefore indicated that to cure this, Section 74 of the Act made serialization of pages in a tender a mandatory requirement.
43. Mr. Ogot submitted that the Applicant was essentially seeking to be treated preferentially to the detriment of the rest of the tenderers who endeavored to comply with the requirement on serialization. Accordingly, he sought the dismissal of the Request for Review.

Interested Party's Submissions

44. Counsel for the Interested Party, Ms. Nungo submitted that the Interested Party would be relying on its filed Documents i.e. Replying Affidavit sworn on 18th December 2023 by Anthony Kibet Komen as well as Written Submissions and List and Bundle of Authorities dated 19th December 2023.
45. Counsel equally associated herself with the submissions made on behalf of the Respondents.
46. She submitted that Article 227(1) of the Constitution requires that public procurement processes should be fair, equitable competitive and cost-effective. Further, Section 79 and 80 speak to a responsive tender being one that meets all the eligibility and mandatory requirements under the Tender Document.



47. It was argued that the Applicant's tender was disqualified at the Preliminary Evaluation Stage and therefore its contention that its tender offered the best commercial benefit should be ignored.
48. Counsel invited the Board to make an observation that none of the reasons contained in the letter of regret to the Applicant had been denied in the Applicant's pleadings and that the Applicant's Counsel was only trying to give explanations on the shortcomings of the Applicant's tender.
49. Ms. Nungo indicated that Mandatory Requirement No. 8 at page 38 of the Tender Document required the supplied Manufacturer's Authorization Form to be in a stipulated format. She submitted that though the Interested Party had not seen the Applicant's Manufacturer's Authorization Form, if indeed it conformed to what the Respondents described in their Memorandum of Response, then it failed to indicate the manufacturer's full warranty.
50. Counsel further submitted that Mandatory requirement No. 16 at page 39 of the Tender Document made provision for serialization and that a table of contents could not stand in for the requirement for chronological serialization.
51. She submitted that this requirement was anchored on Section 74(1)(i) of the Act as well as Regulation 74(1)(i) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020'). The same was also provided for at ITT No. 6 at page 6 of the Tender Document.

52. According to Counsel, serialization was a mandatory requirement that could not be waived and thus failing to chronologically serialize the pages in a submitted tender could not be deemed a minor deviation as painted by the Applicant. For this she relied on the cases of ***Republic v Public Procurement Administrative Review Board & 20rs Ex parte Babs Security Services Limited [2018] eKLR; Republic v Public Procurement Administrative Review Board & 3 Ors Ex parte Saracen Media Limited [2018] eKLR; and Republic v Public Procurement Administrative Review Board; Nairobi City Water & Sewerage Company Limited & anor (Interested Parties) Ex parte Fourway Construction Company Limited [2019] eKLR.*** She therefore urged the Board to dismiss the Request for Review.

Applicant's Rejoinder

53. In a brief rejoinder, Counsel for the Applicant, Mr. Owang submitted that the Manufacturer's Authorization Form supplied by the Applicant was in the original format with its license over the software being perpetual. He argued that the license allowed the Procuring Entity a one-time fee without need for future subscriptions.
54. Further, the disclaimer on the face of the Manufacturers Authorization form did not arise.
55. Additionally, that any error on chronological serialization of the Applicant's tender could be cured by Section 79 of the Act as a minor deviation.



CLARIFICATIONS

56. The Board sought clarity from the Applicant whether the pages of its submitted tender were chronologically serialized to which Mr. Owang admitted that some pages were not chronologically serialised.
57. The Board also sought confirmation on whether the Applicant held Intellectual Property Rights over the software it was offering the Respondent. Mr. Owang indicated that the Applicant held a perpetual license over it and the question of the Intellectual Property Rights over the software could only be answered by the Manufacturer.
58. The Board inquired from the Respondents whether the disclaimer on the Applicant's submitted Manufacturer's Authorization Form impacted the evaluation of its tender. Mr. Ndekere pointed out that the disclaimer affected the Applicant's tender since the Procuring Entity wanted to procure software that it would fully own yet Microsoft did not offer any perpetual license to its licensees.
59. The Board asked the Interested Party to clarify on the element of the Manufacturer's Authorization Form it suspected the Applicant's format failed. Ms. Nungo indicated that the warranty would be missing.
60. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 11th December 2023 had to be determined by 2nd January 2024. Therefore, the Board would



communicate its decision on or before 2nd January 2024 to all parties via email.

BOARD'S DECISION

61. The Board has considered all documents, written and oral submissions, pleadings and list and bundle of authorities 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 Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document?***
 - II. ***What orders should the Board issue in the circumstance?***

Whether the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document?

62. The Applicant assailed the Procuring Entity's decision to disqualify its submitted tender at the Preliminary Evaluation Stage for the reason that its Manufacturer's Authorization Form had a license that was proprietary and did not support perpetual licensing as required under the Tender Document. Counsel for the Applicant, Mr. Owang cited that the Applicant's tender price was the lowest and that the Manufacturer's Authorization Form forming part of its tender indicated that it held a perpetual license



over the software it was offering the Procuring Entity and whose lifespan was indefinite.

63. Counsel submitted that the Applicant's failure to chronologically serialize some of the pages in its submitted tender was a minor deviation that could be excused under Section 79 of the Act.
64. On the other hand, the Respondents and the Interested Party took the view that the Applicant was properly disqualified from the subject tender. They submitted before the Board that the Applicant was disqualified at the Preliminary Evaluation Stage after being found nonresponsive to Mandatory Requirements Nos. 8 and 16 of the Tender Document.
65. The Respondents' ICT Expert, Mr. Ndekere informed the Board that the Procuring Entity contemplated a perpetual licensing regime i.e. a license paid on a one-time basis without any subscriptions; where it would as the client, own all the Intellectual Property Rights and expected limited support from the developer.
66. Mr. Ndekere informed the Board that the Manufacturer's Authorization Form supplied by the Applicant indicated that Microsoft did not grant any Intellectual Property Rights to a Third Party and that the license granted non-perpetual rights and therefore the Applicant's tender was properly found nonresponsive.

67. Mandatory Requirement No. 16 required chronological serialization of the pages in its submitted tender. According to Mr. Ogot, the Applicant failed to chronologically serialize the pages of its submitted tender.
68. Counsel for the Interested Party, Ms. Nungo, submitted that Section 79 and 80 speak to a responsive tender being one that meets all the eligibility requirements under the Tender Document. According to Counsel, serialization was a mandatory requirement that could not be waived and thus failing to chronologically serialize the pages in a submitted tender could not be deemed a minor deviation as painted by the Applicant.
69. Counsel invited the Board to make an observation that none of the reasons contained in the letter of regret to the Applicant had been denied in the Applicant's pleadings and that the Applicant's Counsel was only trying to give explanations on the shortcomings of the Applicant's tender.
70. Ms. Nungo indicated that Mandatory Requirement No. 8 at page 38 of the Tender Document required the supplied Manufacturer's Authorization Form to be in a stipulated format. She indicated that though the Interested Party had not seen the Applicant's Manufacturer's Authorization Form, if indeed it conformed to what the Respondents described in their Memorandum of Response, then it failed to indicate the manufacturer's full warranty.
71. The Board is therefore invited to interrogate the Evaluation Committee's evaluation process that culminated in the disqualification of the



Applicant's disqualification from the subject tender at the Preliminary Evaluation Stage.

72. Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of tenders in the following terms:

"80. Evaluation of tenders

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

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."

73. Additionally, Section 79 of the Act offers clarity on the responsiveness of tenders in the following terms:

"79. Responsiveness of tenders

(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

(2) A responsive tender shall not be affected by—

a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall—

a) be quantified to the extent possible; and

b) be taken into account in the evaluation and comparison of tenders.”

74. This Board is further guided by the dictum of the High Court in ***Republic v Public Procurement Administrative Review Board & 2 others Exparte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 of 2018*** where the court while considering a judicial review application against a decision of this Board illuminated on the responsiveness of a tender under section 79 of the Act:

“19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. [10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with

standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is

important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."

75. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.
76. Turning to the instant Request for Review, the Applicant was disqualified from the subject tender at the Preliminary Evaluation Stage on what the Respondents indicated as non-compliance with Mandatory Requirements No. 8 and 16 of the Tender Document. The Board shall now interrogate both requirements in turn with respect to the Applicant's level of compliance with them.
77. Mandatory Requirement Nos. 8 and 16 at pages 38 to 39 of 250 of the Tender Document reads:

a) Mandatory Preliminary Requirements

All Tenderers MUST meet the following mandatory Preliminary requirements. Tenderers that do not meet ALL the



mandatory Preliminary requirements will be considered non-responsive and will not be considered further:

...

MR	REQUIREMENT	YES/NO	REFERENCE IN DOCUMENT
1	...		
2	...		
..	...		
8	<p><u>Must have an Original Manufacturer's Authorization Form (MAF) as per given format provided.</u></p> <p><u>And if the bidder is the OEM then should provide evidence of ownership (e.g. copyright documents etc)</u></p> <p><u>Note: the MAFs must be specific for this tender</u></p>		
...	..		
16.	<p><i>The Tender Document must be a properly bound document/ well-presented document, tape bound and the bid document "Original" and "Copies" must be chronologically serialized on all pages of the tender documents submitted.</i></p>		
...	...		
21.	...		

AT THIS STAGE, TENDERERS SUBMISSION WILL EITHER BE RESPONSIVE OR NON-RESPNSIVE. THE NON RESPONSIVE SUBMISSIONS WILL BE ELIMINATED FROM THE ENTIRE EVALUATION PROCESS AND WILL NOT BE CONSIDERED FURTHER. TENDERERS WILL THEREFORE PROCEED TO THE TECHNICAL EVALUATION STAGE ONLY IF THEY ARE RESPONSIVE AT THIS STAGE.

78. From the above, in order for a tenderer to be responsive to Requirement No. 8, it ought to have either supplied an Original Manufacturer's Authorization Form (MAF) as per the given format or evidence of ownership. Any tenderer that neither provided an Original Manufacturer's Authorization Form nor evidence of ownership would be considered nonresponsive to Requirement No. 8 of the Tender Document and thus disqualified at the Preliminary Evaluation Stage.

79. ITT 13.1(k) as amended in the Tender Data Sheet made the following provision on the preparation of the tender.

C. Preparation of Tenders

The Tenderer shall submit with its Tender the following additional documents:

1. Provide a valid and duly filled, signed and stamped Original Manufacturer's Authorization Form (MAF) for the proposed solution and any other functional components that the tenderer will integrate to give the end to end solution. The solution and its components should be based on the open source platforms.

If the tenderer is the Original Equipment Manufacturer, of the proposed solution and its related components, the tenderer shall provide a letter signed by Authorized Signatory stating the same and that they are giving warranty and guarantee of the solution. The tenderer can also attach any document that shows the ownership i.e copyright/intellectual property and MUST be specific for this tender.

80. Page 160 of 250 of the blank Tender Document also gave further directions on the preparation of the Manufacturer's Authorization Form as well as the format it was to take:

(iv) Manufacturer's Authorization

Note: This authorization should be written on the Form head of the Manufacturer and be signed by a person with the proper authority to sign documents that are binding on the Manufacturer.

Invitation for Tenders Title and No.: _____ [Procuring Entity insert: **ITT Title and Number**]

To: _____ [Procuring Entity insert: **Procuring Entity's Officer to receive the Manufacture's Authorization**]

WHEREAS [insert: **Name of Manufacturer**] who are official producers of _____ [insert: **items of supply by Manufacturer**] and having production facilities at _____ [insert: **address of Manufacturer**] do here by authorize _____ [insert: **name of Tenderer or Joint Venture**] located at _____ [insert: **address of Tenderer or Joint Venture**] (hereinafter, the "Tenderer") **to submit a tender and subsequently negotiate and sign a Contract with you for resale of the following Products produced by us:**

We hereby confirm that, in case the tendering results in a Contract between you and the Tenderer, the above-listed products will come with our full standard warranty.

Name [insert: **Name of Officer**] in the capacity of [insert: **Title of Officer**] Signed _____

Duly authorized to sign the authorization for and on behalf of: _____ [insert: **Name of**

Manufacturer] Dated this _____ [insert: **ordinal**] day of

_____ [insert: **month**], [insert: **year**]. [add Corporate Seal (where appropriate)]

81. The Board has keenly studied the Applicant's original tender and considered its submitted Manufacturer's Authorization Form at page 00020 and the same is hereinafter reproduced for ease of reference:

"Microsoft Authorization Form

DEVELOPMENT, SUPPLY, CONFIGURATION, INSTALLATION, TESTING, IMPLEMENTATION AND COMMISSIONING OF AN ONLINE PENSION MANAGEMENT INFORMATION SYSTEM

TENDER NO. TNT/018/2023-2024

To: The Principal Secretary

The National Treasury

Treasury Building, Harambee Avenue

P.O. BOX 30007-00100

Nairobi, Kenya.

WHEREAS Microsoft Corporation, USA is a global producer of software and services and Microsoft Ireland Operations Limited having its principal place of business at South County Business Park, Leopardstown, Dublin 18, D18 P521, Ireland is an affiliate of Microsoft Corporation. Microsoft works with distributors, resellers and others ("business entities"), who carry out commercial transactions for Microsoft products and services, such as entering into contracts directly with customers, and are independent of Microsoft. Microsoft is the sole manufacturer of Microsoft products which can be procured through such business entities.

We confirm that LociAfrica Limited located at 2nd Floor, Mapera Court, Off Lang'ata Road is one such business entity, and can



procure the Microsoft products listed below and services in Kenya.

The products details contained herein are provided for informational purposes only and can change at any time until a final Microsoft agreement and any other necessary legal documentations are executed.

Microsoft Dynamics NAV (Dynamics 365 Business Central)

Microsoft Dynamics CRM

Microsoft Dynamics 365

Microsoft Dynamics Sharepoint

Microsoft SQL Server Licenses (MYSQL)

Microsoft Office 365 Licenses

Microsoft Dynamics 365 Finance and Operations

Microsoft Azure

Microsoft Power BI

Certified Cloud Solution Provider

We hereby inform you that Microsoft Lifecycle Policy offers consistent guidelines for the availability of support throughout the life of a product. Details of the Microsoft Lifecycle Policy are available at:<https://support.microsoft.com/lifecycle>

For hardware products, you may refer to the related hardware warranty terms here:<https://support.microsoft.com/en-us/help/4493926/warranties-extended-service-plans-and-terms-conditions-for-vour-device>

This letter is issued at the request of LociAfrica Limited and does not subject Microsoft Corporation or any of its affiliates to any liability for obligations that LociAfrica Limited assumed by itself and at its own risk with third parties and does not grant any Microsoft intellectual property rights to any party. We make no representation about the financial strength or capabilities of the above company and nothing in this letter is to be seen as a recommendation on the part of Microsoft to select a particular partner or that the partner named here is the only partner authorized to supply the foregoing Microsoft products.

Refer to Find a solution provider to self-serve additional information:

<https://www.microsoft.com/solution-providers/home>.

Best regards,

Arthur Boff

Ahur Do 5p 22,01:3GMT+1]

Arthur Boff

Authorized Signer

Sep 22,2023

Duly authorized,

Microsoft Ireland Operations Limited” Emphasis ours.

82. The Board has keenly studied the Applicant’s Manufacturer’s Authorization Form alongside the format provided for in the blank tender documents and noted some difference:

- i. The Applicant's Manufacturers Authorization Form adopts different wording from that prescribed in the blank Tender Document.
- ii. The Tender Document required tenderers to supply a Manufacturer's Authorization Form that the offered software solutions would come with the Manufacturer's full standard warranty. However, the Applicant's Manufacturer's Authorization Form offered a disclaimer that the Form does not subject Microsoft or any of its affiliates to any liability for obligations that the Applicant assumed by itself and at its own risk. In essence Microsoft gave no confirmation that it would issue a full standard warranty as required in the Manufacturer's Authorization form in case the tendering results in a Contract between the Respondents and the applicant as is plainly apparent in the applicants submitted Manufacturer's Authorization Form.
- iii. The Tender Document did not require tenderers to submit Manufacturer's Authorization Forms that spoke to the tenderer's financial standing. However, the Applicant's Manufacturer's Authorization Form offered a disclaimer that the form was not to be treated as an endorsement on the Applicant's financial standing.

83. From the above, it is clear that the Applicant's Manufacturers Authorization Form did not conform to the format prescribed in the Tender Document. The requirement for tenderers to supply a



Manufacturers Authorization Form in the prescribed format was a mandatory requirement, deviation from which would lead to disqualification of a tenderer at the Preliminary Evaluation Stage. The Applicant's submitted a Manufacturer's Authorization Form whose contents were different from those in the format prescribed in the blank Tender Document. Accordingly, we find no fault on the Procuring Entity's disqualification of the Applicant on this ground.

On the second ground of chronological serialization of the pages of the tender, Mandatory Requirement No. 16 as observed at paragraph 77 of this Decision required tenderers to chronologically serialize the pages of their tender to avert disqualification.

84. Further, section 74(1)(i) of the Act places an obligation on the part of the Accounting Officer of a Procuring Entity to ensure that in the preparation of an invitation to tender, there is requirement for the pages of a tender to be serialized before submission. The section reads

"74. Invitation to tender

(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...



(f) ...

(g) ...

(h) ...

(i) requirement of serialization of pages by the bidder for each bid submitted "

85. Additionally, Regulation 74(1)(b) of the Regulations requires the Evaluation Committee as part of the Preliminary Evaluation to verify that the pages of the received tenders have been serialized:

"74. Preliminary evaluation of open tender

(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—

(a) ...

(b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;

(c) ...

(d) ...

86. Additionally, there exists a body of case law affirming the importance of serialization of tenders as part of yardsticks against which tenders should be evaluated. In ***Nairobi High Court Judicial Review Application No. 312 of 2018; R v Public Procurement Administrative Review Board & Anor Ex parte Fourway Construction Company Limited*** the High Court was explicit in its Judgment that failure to serialize a tender could not be termed a minor deviation under Section 79 of the Act:

"49. The requirement of serialization was in the present case indicated to be a mandatory requirement in the 1st Interested Party's tender document, and it was indicated in tender document that a firm lacking in any of the requirements would be dropped at the preliminary stage and would not progress to the Technical evaluation stage. It is also a mandatory requirement under section 74 of the Act, and failure to serialize every page cannot therefore be interpreted as a minor deviation from the requirements set out in the tender documents, and cannot fall within the exceptions provided for in section 79. It is also evident that the discretion given by section 79 to waive a requirement that has not been conformed with only applies where that conformity can be corrected without causing prejudice to the other bidders, or is quantifiable, which is not the case with the requirement of serialization of every page because of the objective of the requirement and attendant risks of non-conformity that have been explained in the foregoing."

87. In yet another case, the High Court in ***Nairobi High Court Judicial Review Miscellaneous Civil Application No. 19 of 2020; Republic v Public Procurement Administrative Review Board & Anor Ex parte The Accounting Officer Kenya Ports Authority & Anor*** was explicit that serialization of tenders is a mandatory requirement in all tenders whether or not this is indicated as a requirement in the Tender Document since it is a statutory requirement under Section 74 of the Act:

"49. In light of the foregoing, it becomes apparent to this court that the aspect of serialization of each and every page of a bid document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with discrimination. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and it shall also encourage abuse of power and disregard of the law by not only bidders but also procuring entities.

50. I therefore find that despite the fact that serialization was not a mandatory requirement in the ex-parte applicants tender document, it is a mandatory requirement under section 74 of the PPAD Act of 2015 and all bidders ought to have fully complied.

52. That failure to serialize each and every page of a tender document cannot translate to a minor deviation from the laid down principles set down in law as explained hereinabove. It is my finding that the decision by the respondent directing the ex-parte applicants to re-admit non-responsive bids is in contravention with the provisions of sections 74 and 79 of the PPAD Act of 2015 and thus ultra vires."

88. From the above decisions, it is apparent that (i) serialization is a mandatory requirement under Section 74 of the Act; (ii) All tenders

submitted in response to a tender invitation should be serialized whether or not the tender document provides for serialization; (iii) Failure to serialize a tender cannot be termed a minor deviation under Section 79 of the Act; and (iv) Failure to enforce the mandatory requirement of serialization translates to unequal treatment and encourages abuse of power.

89. Turning to the instant case, in addition to Mandatory Requirement No. 16, Clause 6 of the Invitation to Tender at page 6 of 250 of the blank Tender Document made provision for serialization of tenders in response to the subject tender in the following terms:

"6. The Tenderer shall chronologically serialize all pages of the Tender documents submitted."

90. It is therefore apparent, that the Tender Document required tenders to be submitted in the subject tender to be paginated in chronological order of the numerical numbers 1 to the last page. Accordingly, any submitted tender that bore the above pagination in a chronological manner was compliant with the requirement for serialization. Conversely, any submitted tender that did not bear the above pagination in a chronological manner was non-compliant on the requirement for serialization.
91. During the hearing, Counsel for the Applicant made an admission that some of the pages of the Applicant's tender were not chronologically serialized, only that he prayed that this omission be cured as a minor deviation under Section 79 of the Act.

92. The Board has independently studied the Applicant's tender and observed that indeed some of the pages were not chronologically serialized. A few examples in the original tender document would suffice:
- i. Page 00566 was repeated on multiple pages
 - ii. Page 00019 was missing
 - iii. Page 00707 is followed by pages 00631 ,000708,000707,000720, 000719
 - iv. Last page in the Applicants tender is 000718
93. The requirement for chronological serialization of the pages of the tender was a mandatory requirement which if unmet under the Tender Document called for disqualification of the tenderer. Guided by the High Court decisions in ***R v Public Procurement Administrative Review Board & Anor Ex parte Fourway Construction Company Limited***, and ***Republic v Public Procurement Administrative Review Board & Anor Ex parte The Accounting Officer Kenya Ports Authority & Anor***, which decisions are binding on this Board, we find that the Applicant's failure to chronologically serialize its tender cannot be termed as a minor deviation under Section 79 of the Act. Accordingly, the Applicant was properly disqualified at the Preliminary Evaluation Stage on account of failure to chronologically serialize all the pages of its tender.
94. In view of the foregoing analysis, the Board finds that the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender

in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document.

What orders the Board should grant in the circumstances?

95. The Board has found that the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document.
96. The upshot of our finding is that the Request for Review dated 4th December 2023 in respect of Tender No. TNT/018/2023-2024 for Development, Supply, Configuration, Installation, Testing, Implementation and Commissioning of an Online Pension Management Information System fails in the following specific terms:

FINAL ORDERS

97. 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 4th December 2023:
- 1. The Request for Review dated 4th December 2023 be and is hereby dismissed for lacking in merit.**
 - 2. The 1st Respondent is hereby directed to proceed with the procurement process of Tender No. TNT/018/2023-2024 for Development, Supply, Configuration, Installation, Testing, Implementation and Commissioning of an Online Pension Management Information System to its logical conclusion.**



3. Given Board's finding above, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 29th Day of December 2023.


.....
CHAIRPERSON
PPARB

.....
SECRETARY
PPARB



in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document.

What orders the Board should grant in the circumstances?

95. The Board has found that the Procuring Entity's Evaluation Committee properly evaluated the Applicant's tender in accordance with Sections 79 and 80 of the Act as well as the provisions of the Tender Document.

96. The upshot of our finding is that the Request for Review dated 4th December 2023 in respect of Tender No. TNT/018/2023-2024 for Development, Supply, Configuration, Installation, Testing, Implementation and Commissioning of an Online Pension Management Information System fails in the following specific terms:

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3. Given Board's finding above, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 29th Day of December 2023.


.....
CHAIRPERSON
PPARB



SECRETARY
PPARB

