

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 114/2023 OF 28<sup>TH</sup> DECEMBER 2023**

**BETWEEN**

**MOTION INDUSTRIALS LIMITED ..... APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

**KENYA PIPELINE COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KENYA PIPELINE COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**MS. ZOCOM LIMITED ..... 1<sup>ST</sup> INTERESTED PARTY**

**MS. JEGOS ENTERPRISES LIMITED ..... 2<sup>ND</sup> INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Pipeline Company Limited in relation to Tender No. KPC/PU/FW-077 (HSE)NBI/23-24 for Framework Contract to Supply Safety Footwear and Snake Boots for Two (2) Years.

**BOARD MEMBERS PRESENT**

- |                        |   |                   |
|------------------------|---|-------------------|
| 1. Ms. Alice Oeri      | - | Panel Chairperson |
| 2. CPA Alexander Musau | - | Member            |
| 3. Eng. Lilian Ogombo  | - | Member            |

**IN ATTENDANCE**

- |                        |   |  |
|------------------------|---|--|
| 1. Mr. Philemon Kiprop | - | Holding Brief for Acting Board Secretary |
|------------------------|---|--|

2. Ms. Evelyn Weru

- Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT**

**MOTION INDUSTRIALS LIMITED**

Mr. Paul Kahangara

- Advocate, Kahangara & Associates

### **RESPONDENTS**

**ACCOUNTING OFFICER, KENYA PIPELINE  
COMPANY LIMITED &  
KENYA PIPELINE COMPANY LIMITED**

Ms. Karen Muriithi

-Advocate, Kenya Pipeline Company Limited

### **1<sup>ST</sup> INTERESTED PARTY ZOCOM LIMITED**

Ms. Veronica Maina

Advocate h/b for Mr. Kisilu, Kisilu Wandati &  
Co. Advocates

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenya Pipeline Company Limited the Procuring Entity and 2<sup>nd</sup> Respondent invited qualified and interested tenderers to submit sealed tenders from eligible candidates in response to Tender No. KPC/PU/FW-077 (HSE)NBI/23-24 for Framework Contract to Supply Safety Footwear and Snake Boots for Two (2) Years. (hereinafter

referred to as the "subject tender") which was in two lots. Tendering was conducted under open National Tendering Competitive method and the invitation was by way of an advertisement on 1<sup>st</sup> September 2023 in My Gov Publication, on the Procuring Entity's website [www.kpc.co.ke](http://www.kpc.co.ke) where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. The Procuring Entity used an electronic – procurement system to manage the tendering process in the subject tender and tenderers were required to upload completed tender documents in PDF format on the Supplier Relationship Management (SRM) Collaboration Folder on or before the scheduled initial tender submission deadline on 21<sup>st</sup> September 2023 at 10.00 a.m.

### **Addenda and Clarifications**

2. The Procuring Entity made several clarifications on bidders queries and extended the tender submission deadline to 24<sup>th</sup> October 2023 at 10.00 a.m.

### **Submission of Tenders and Tender Opening**

3. According to the Minutes of the subject tender's opening held on 24<sup>th</sup> October 2023 signed by members of the Tender Opening Committee on 24<sup>th</sup> October 2023 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Public

Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of twenty-one (21) tenders were submitted in response to the subject tender. The said twenty-one (21) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

<b>Bidder No.</b>	<b>Name</b>
1.	Zacom Limited
2.	Jedonai Enterprises Limited
3.	Motion Industrials
4.	Safex Africa
5.	Jegos Enterprise
6.	Vibrant Solutions
7.	Trapoz Contractors Limited
8.	Sadena Agencies Limited
9.	Kinstars Investments Limited
10.	Turk Tech Supplies Limited
11.	Equator Apparels Company Limited
12.	Finescope Systems Limited
13.	Lavington Hardware & Steelworks
14.	Twifix Suppliers
15.	Ashmere Solutions
16.	Ahadi General Hardware Membley
17.	Shadica Enterprises
18.	Breindel Company Limited

19.	Chase EA Limited
20.	Twinmaster Enterprises Limited
21.	Rohi Healthcare Solutions Limited

### **Evaluation of Tenders**

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1<sup>st</sup> Respondent undertook evaluation of the twenty-one (21) tenders as captured in an Evaluation Report for the subject tender signed by members of the Evaluation Committee on 28<sup>th</sup> November 2023 (hereinafter referred to as the "Evaluation Report") in the following stages:
- i Preliminary Evaluation;
  - ii Technical Evaluation; and
  - iii Financial Evaluation

### **Preliminary Evaluation**

5. The Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under ITT 10(j) of Section II- Tender Data Sheet (TDS) at page 32 of 127 of the Tender Document and Clause 2.2 Evaluation of Tenders Preliminary examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria at page 37 of 127 to page 40 of 127 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the Technical Evaluation stage.

6. At the end of evaluation at this stage (a) for Lot 1 of the subject tender, fourteen (14) tenders were determined non-responsive, while seven (7) tenders including the Applicant's tender, were determined responsive and proceeded to the Technical Evaluation stage and (b) for Lot 2 of the subject tender, nine (9) tenders were determined non-responsive, while twelve (12) tenders including the Applicant's tender, were determined responsive and proceeded to the Technical Evaluation stage.

### **Technical Evaluation**

7. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 2.2.1 Evaluation of Technical aspects of the Tender of Section III- Evaluation and Qualification Criteria at page 40 of 127 to page 45 of 127 of the Tender Document. Tenderers were required to comply with each criterion provided under the Evaluation of Technical aspects of the Tender to progress to Financial Evaluation.
8. At the end of evaluation at this stage, (a) for Lot 1 of the subject tender, six (6) tenders were determined non-responsive including the Applicant's tender while one (1) tender, being the 1<sup>st</sup> Interested Party's tender was determined responsive and proceeded to the Financial Evaluation stage and (b) for Lot 2 of the subject tender, eleven (11) tenders were determined non-responsive including the Applicant's tender, while one (1) tender, being the 2<sup>nd</sup> Interested Party's tender was determined responsive and proceeded to the Financial Evaluation stage.

## Financial Evaluation

9. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause 3.0 Price Evaluation Criteria of Section III- Evaluation and Qualification Criteria at page 46 of the Tender Document.
10. The Evaluation Committee was to determine whether tenders were substantially responsive to the Commercial and Contractual terms and conditions (e.g. Performance Securities, Payment and Delivery Schedules) in addition to the criteria listed in ITT 33.3, 29.3 and 34 of the Tender Document. The bidder with the lowest total cost who met the stipulated criteria would be considered for award.
11. Following the conclusion of evaluation at this stage, the Evaluation Committee found as follows:

Lot 1 - Executive men, Executive ladies Boot men and Boot ladies

**Table 7: Financial Schedule Lot 1**

<b>No</b>	<b>Description</b>	<b>Qty</b>	<b>Zocom Ltd</b>	
			<b>Ksh. (Exclusive of VAT)</b>	<b>Ksh. (Inclusive of VAT)</b>
<b>1.</b>	<b>Men- Executive</b>	<b>1</b>	<b>9,000</b>	<b>10,440</b>
<b>2.</b>	<b>Men- Boot</b>	<b>1</b>	<b>5,600</b>	<b>6,496</b>

<b>3.</b>	<b>Ladies Executive</b>	<b>– 1</b>	<b>9,000</b>	<b>10,440</b>
<b>4.</b>	<b>Ladies Boot</b>	<b>1</b>	<b>5,600</b>	<b>6,496</b>

Lot 2 – Snake Boots

**Table 8: Financial Schedule Lot 2**

			<b>Jegos Enterprises Ltd</b>	
<b>No</b>	<b>Description</b>	<b>Qty</b>	<b>Ksh. (Exclusive of VAT)</b>	<b>Ksh. (Inclusive of VAT)</b>
<b>1.</b>	<b>Snake boots</b>	<b>1</b>	<b>32,000</b>	<b>37,120</b>

### **Evaluation Committee’s Recommendation**

12. The Evaluation Committee recommended award of the subject tender for Lot 1 to M/s Zocom Limited and for Lot 2 to M/s Jegos Enterprises Ltd being the most responsive tenders at their quoted price as itemized in schedule of rates in table 7 and 8 of the Evaluation Report.

### **Professional Opinion**

13. In a Professional Opinion, dated 4<sup>th</sup> December 2023 (hereinafter referred to as the “Professional Opinion”), the General Manager Supply Chain, Ms. Maureen Mwenje, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of

the Evaluation Committee with respect to award of the subject tender for Lot 1 to M/s Zocom Limited and for Lot 2 to M/s Jegos Enterprises Ltd being the most responsive tenders at their quoted price as itemized in schedule of rates in the said Professional Opinion

14. Thereafter, the Professional Opinion was approved by the 1<sup>st</sup> Respondent on 13<sup>th</sup> December 2023.

### **Notification to Tenderers**

15. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 14<sup>th</sup> December 2023.

### **REQUEST FOR REVIEW NO. 114 OF 2023**

16. On 28<sup>th</sup> December 2023, Motion Industrials Limited, the Applicant herein, filed a Request for Review dated 21<sup>st</sup> December 2023 together with a Statement in Support of the Request for Review signed on 27<sup>th</sup> December 2023 by Brian Muchenditsi Mukolwe, its Director, (hereinafter referred to as the 'instant Request for Review') seeking the following orders from the Board in verbatim:

***The tender process to be annulled and the tender be re-advertised and bidders be called to submit their bids as required under the Public Procurement and Disposals Act, 2015***

17. In a Notification of Appeal and a letter dated 28<sup>th</sup> December 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1<sup>st</sup> and 2<sup>nd</sup> 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 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 28<sup>th</sup> December 2023.
  
18. *Vide* a Hearing Notice dated 9<sup>th</sup> January 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 11<sup>th</sup> January 2024 at 11.00 a.m., through the link availed in the said Hearing Notice.
  
19. On 10<sup>th</sup> December 2023, the Respondents filed through Karen Muriithi Advocate a Background to the Matter Under Review dated 10<sup>th</sup> January 2024 signed by Japheth Aseka, Ag. Chief Supply Chain Officer for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, a Replying Affidavit sworn on 10<sup>th</sup> January 2024 by Japheth Aseka together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

20. *Vide* email dated 10<sup>th</sup> 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 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days.

21. When the matter first came up for hearing on 11<sup>th</sup> January 2024 at 11.00 a.m., the Board read out pleadings filed by parties in the matter and counsel for the 1<sup>st</sup> Interested Party, Ms. Maina sought for an adjournment citing that she had just been instructed to come on record for the 1<sup>st</sup> Interested Party and requested for time to file and serve the 1<sup>st</sup> Interested Party's response. There being no objection to the application for adjournment, the Board allowed the same and directed (a) the Interested Party to file and serve its response to the instant Request for Review by close of business on Friday, 12<sup>th</sup> January 2024, (b) the Applicant be granted corresponding leave to file its rejoinder by close of business on Monday, 15<sup>th</sup> January 2024, (c) all parties to file and serve their respective submissions by close of business on Monday, 15<sup>th</sup> January 2024, and (d) hearing of the instant Request for Review to proceed on 16<sup>th</sup> January 2024 at 1.00 p.m. Parties were cautioned to adhere to the stipulated timelines.

22. On 12<sup>th</sup> January 2024, the 1<sup>st</sup> Interested Party filed through Kisilu Wandati & Co. Advocates a 1<sup>st</sup> Interested Party's Replying Affidavit sworn on 12<sup>th</sup> January 2024 by Mary Muriuki, its director.
23. On 15<sup>th</sup> January 2024, the Applicant filed through Kahangara & Associates an Applicant's Further Affidavit to Respondent's Memorandum of Response and Replying Affidavit dated 10<sup>th</sup> January 2023 sworn on 12<sup>th</sup> January 2024 by Brian Muchenditsi Mukolwe, an Applicant's Further Affidavit to 1<sup>st</sup> Interested Party's Replying Affidavit dated 12<sup>th</sup> January 2024 sworn on 13<sup>th</sup> January 2024 by Brian Muchenditsi Mukolwe and Written Submissions dated 15<sup>th</sup> January 2024.
24. On 16<sup>th</sup> January 2024, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed Written Submissions dated 15<sup>th</sup> January 2024.
25. On 16<sup>th</sup> January 2024, the 1<sup>st</sup> Interested Party filed Written Submissions dated 16<sup>th</sup> January 2024.
26. At the hearing of the instant Request for Review on 16<sup>th</sup> January 2024 at 2.00 p.m., parties confirmed compliance with the Board's directions issued on 11<sup>th</sup> January 2024 and the Board proceeded to allocate time within which parties were required to highlight their respective cases. Thus the matter proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Applicant's submissions.**

27. In his submissions, counsel for the Applicant, Mr. Kahangara, relied on the Request for Review dated 21<sup>st</sup> December 2023 together with a Statement in Support of the Request for Review signed on 27<sup>th</sup> December 2023 by Brian Muchenditsi Mukolwe, the Applicant's Further Affidavit to Respondent's Memorandum of Response and Replying Affidavit dated 10<sup>th</sup> January 2023 sworn on 12<sup>th</sup> January 2024 by Brian Muchenditsi Mukolwe, Applicant's Further Affidavit to 1<sup>st</sup> Interested Party's Replying Affidavit dated 12<sup>th</sup> January 2024 sworn on 13<sup>th</sup> January 2024 by Brian Muchenditsi Mukolwe and Written Submissions dated 15<sup>th</sup> January 2024 filed before the Board.
28. Mr. Kahangara submitted that the contention in the instant Request for Review is the process in which a decision was made to award the subject tender.
29. Counsel submitted that the Respondents were obligated to furnish the Applicant with the reason why its bid for Lot Two (2) was unsuccessful in its notification of intention to award. He pointed out that according to the Applicant, the fact that no reason was given proves that there was no transparency in the procurement process in the subject tender and relied on the provisions of Article 10 (2)(c), Article 47(2) and 227(1) of the Constitution read with Section 121 (1) of the Act.
30. Counsel submitted that the Respondents were under an obligation to disclose the 1<sup>st</sup> Interested Party's sample which scored higher

than the Applicant's own sample during the stakeholder participation for Lot 1 in line with the principle of transparency and pointed out that the Applicant requested for a debriefing session and this information was not disclosed leaving room for speculation that the winning bidder may have submitted similar samples as the Applicant.

31. On whether the stakeholder engagement was objective, quantifiable and transparent, Mr. Kahangara submitted that this criterion lacked objectivity and quantifiability contrary to Section 80 (2) of the Act. He pressed on that there was no specific, measurable and quantifiable metrics with regards to wearability, comfort, suitability for work and visual conformity to aesthetics and that in any event, the tendering process ought to have made provision for a sample viewing session, to invite tenders to view visual representation and aesthetics of what was expected of them.

32. Counsel submitted that the entire aspect of the stakeholder engagement and participation as part of technical evaluation was entirely subjective, unquantifiable and shrouded in mystery and it lacked transparency since up to date, the results score sheet were never shared with the Applicant and have only been stated in the pleadings in the instant Request for Review.

33. He further submitted that the Respondents rendered the entire tendering process non-competitive by eliminating the Applicant and preventing it from proceeding to the Financial evaluation stage.

34. Counsel prayed for the Request for Review be allowed.

### **Respondents' submissions**

35. In her submissions, counsel for the Respondents, Ms. Muriithi relied on a Background to the Matter Under Review dated 10<sup>th</sup> January 2024 signed by Japheth Aseka, Ag. Chief Supply Chain Officer for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, a Replying Affidavit sworn on 10<sup>th</sup> January 2024 by Japheth Aseka, confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act, and Written Submissions dated 15<sup>th</sup> January 2024 filed before the Board.

36. Ms. Muriithi submitted that the Stakeholder Participation under the Technical Evaluation criteria was couched in mandatory terms and was a criteria provided to bidders. She stated that stakeholders are people involved in a decision or affected by a decision hence the reason for introduction of the stakeholder participation in the procurement process of the subject tender.

37. Counsel pointed out that the stakeholder evaluation took place on 22<sup>nd</sup> November 2023 and twenty-five stakeholder gave their comments on samples submitted of the safety boots in the subject tender as further highlighted in the Written submissions at paragraphs 25 to 30 of the Respondents written submissions.

38. She submitted that during the stakeholder engagement and participation, it was determined that the Applicant's footwear had the least positive reviews scoring 13 points, Finescope Ltd scoring

16 points and the 1<sup>st</sup> Interested Party scoring 25 points. Counsel pressed on that the Applicant's shoe samples scored poorly on wearability, comfort, suitability for work, visual conformity to requirements and aesthetics thus did not proceed to the Financial evaluation stage.

39. With regard to the snake boots, counsel submitted that the Applicant was not responsive because it failed to submit a valid shoe test certificate and ISO/EN certificate for the product from the manufacturer as required under Lot 2.

40. Ms. Muriithi submitted that the 1<sup>st</sup> Interested Party was considered for award of Lot 1 of the subject tender while the 2<sup>nd</sup> Interested Party was considered for award of Lot 2 of the subject tender.

41. Counsel argued that if the Applicant felt that the stakeholder evaluation criteria was unfair, it ought to have challenged the same before the close of the subject tender or seek clarification on the same as provided for in the Tender Document. She further submitted that requiring the Procuring Entity to provide a sample of the footwear would lock out competition and that the Procuring Entity stood to lose out on new innovations that may be in the market.

42. Counsel conceded that the reasons for disqualification of the Applicant's bid under Lot 2 of the subject tender were not issued in the notification letter and stated that this was an oversight which

did not prejudice the Applicant and the reasons for disqualification was never challenged during the debriefing meeting held by the Applicant and the Respondents.

43. She urged the Board to dismiss the Request for Review as prayed.

44. When asked by the Board to clarify how the scores were awarded and the criteria used, Ms. Muriithi submitted that the criteria used was as provided for in the Tender Document and the stakeholders were required to give review of the samples submitted at the Stakeholders evaluation and this has been provided in the confidential file where names of participating stakeholders were indicated with their comments. She further clarified that it was an oversight on the part of the Respondent for failing to issue reasons for unsuccessfulness of the Applicant's bid in Lot 2 of the subject tender.

### **1<sup>st</sup> Interested Party's submissions**

45. In her submissions, counsel for the 1<sup>st</sup> Interested Party, Ms. Maina relied on the 1<sup>st</sup> Interested Party's Replying Affidavit sworn on 12<sup>th</sup> January 2024 by Mary Muriuki and Written Submissions dated 16<sup>th</sup> January 2024.

46. Ms. Maina submitted that the tendering process in the subject tender observed the due process per the Act. She pointed out that it was not in dispute that the Tender Document had been shared out to all prospective bidders prior of commencement of the

procurement proceedings and that the Applicant did not raise any issue with regard to the Stakeholder Engagement evaluation criteria.

47. She reiterated that the process adhered to the provisions of Article 227(1) of the Constitution with regard to fairness noting that the Applicant was aware of documents required to be submitted to the Procuring Entity.

48. Counsel further submitted that the Applicant did not expressly write to the Procuring Entity requesting to be supplied with samples of safety footwear and the 1<sup>st</sup> Respondent was not obligated to share what the 1<sup>st</sup> Interested Party had submitted.

49. In conclusion, she pointed out that though the Applicant had claimed loss and damages, it did not avail any evidence to show that the process led to stipulated loss and damage.

### **Applicant's Rejoinder**

50. In a rejoinder, Mr. Kahangara submitted that on the issue of stakeholder participation, it was discretionary and is equated to public participation and in this regard, what was supposed to be public participation was a charade.

51. Counsel submitted that the Respondents used employees in the stakeholder evaluation and is hiding behind confidentiality so as not to explain how the stakeholder evaluation was conducted.

52. He pointed out that the procurement process in the subject tender lacked openness and transparency which are core to a tendering process.

53. When asked by the Board to clarify at what stage the Applicant realized that the procurement process in the subject tender was not fair and whether any clarifications were sought, Mr. Kahangara submitted that no clarification were sought by the Applicant as they thought that the process was reasonable until they realized at the point of notification of award of the subject tender that the process was not transparent. He further submitted that bidders were left to their own devices in determining the footwear required to be submitted in the subject tender.

54. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 28<sup>th</sup> December 2023 was due to expire on 18<sup>th</sup> January 2024 and that the Board would communicate its decision on or before 18<sup>th</sup> January 2024 to all parties to the Request for Review via email.

### **BOARD'S DECISION**

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

**A. Whether the Applicant's tender satisfied the Technical Evaluation Criteria of Section III – Evaluation and Qualification Criteria of the Tender Document to proceed for evaluation at the Financial Evaluation stage;**

**B. Whether the 1<sup>st</sup> Respondent's Letter of Notification dated 14<sup>th</sup> December 2023 issued to the Applicant met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020;**

**C. What orders should the Board grant in the circumstances?**

**Whether the Applicant's tender satisfied the Technical Evaluation Criteria of Section III – Evaluation and Qualification Criteria of the Tender Document to proceed for evaluation at the Financial Evaluation stage;**

56. The Applicant challenges the reason advanced by the Respondents leading to disqualification of its tender at the Technical Evaluation stage being that it submitted Jogger Best Girl samples which scored poorly during the stakeholder participation and contends that the Respondents rendered the entire procurement process non-competitive by eliminating it and preventing it from proceeding to the Financial Evaluation stage. The Applicant submitted that its samples as submitted were compliant with all tender requirements provided under Section III- Evaluation and Qualification Criteria of

the Tender Document and that the criterion on stakeholder engagement and participation lacked objectivity and quantifiability. The Applicant further submitted that in the absence of objective and quantifiable metrics, the tendering process ought to have made provision for a sample viewing session to invite tenderers to view visual representation and aesthetics of what was expected of them and that the Respondents did not provide a threshold of scores that a bidder's samples ought to have attained to progress to the Financial Evaluation stage.

57. We understand the Respondents' response on this issue to be that at the Technical Evaluation stage, tenderers were required to provide *inter alia* valid shoe manufacturer ISO Certificate, valid shoe test certificates from the manufacturer and it was a requirement under the technical evaluation stage to involve stakeholder engagement and participation where wearability, comfort, suitability for work, visual conformity to requirements and aesthetics would form the basis of the stakeholder evaluation. The Respondents submitted that during the stakeholder engagement participation, it was determined that the Applicant's footwear had the least positive reviews scoring 13 points and that the Applicant's shoe samples scored poorly on wearability, comfort, suitability for work, visual conformity to requirements and aesthetics thus did not progress to the financial evaluation stage.

58. On its part, the 1<sup>st</sup> Interested Party aligned itself with the Respondents submissions and invited the Board to note that the

evaluation criteria in the subject tender was fair as it considered equal treatment of all tenders against a criteria that was known by all bidders and that was laid out in the Tender Document.

59. Having considered parties' submissions herein, we note that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

***"227. Procurement of public goods and services***

***(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.***

***(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –***

- a) .....***
- b) .....***
- c) ..... and***
- d) ....."***

60. Justice Mativo (as he then was) in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited**

**(Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR**  
(hereinafter referred to as "Misc. Application No. 60 of 2020") spoke to the principles under Article 227 of the Constitution as follows:

***"45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.***

***46. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The Evaluation Committee has a duty to act fairly. However, fairness must be decided on the circumstances of each case..."***

61. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information and provides as follows:

***"(1) An accounting officer of a procuring entity shall use a standard procurement and asset disposal***

***documents issued by the Authority in all procurement and asset disposal proceedings.***

***(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."***

62. Further Section 60() provides as follows:

***"(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings."***

63. In the same vein, section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

***"(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders."***

64. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

***"80. Evaluation of tender***

- (1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected.***
  
- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.***
  
- (3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-***

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

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

**(4) .....**

65. Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.

66. Turning to the circumstances in the instant Request for Review, we note that the Applicant was notified in a letter dated 14<sup>th</sup> December 2023 that its tender was unsuccessful in the subject tender as follows:

**"....."**

***Submitted Jogger Bestgirl samples which scored poorly during the stakeholder participation.”***

***.....”***

67. The Tender Document provided for the Technical Evaluation Criteria under Clause 2.2.1 Evaluation of Technical aspects of the Tender of Section III- Evaluation and Qualification Criteria at pages 40 of 127 to page 45 of 127 of the Tender Document. The Technical Evaluation Criteria provided for evaluation of (a) Executive Safety Shoe Specifications (Men and Women), (b) Safety Boots Specifications (Men and Women), and (c) Snake Boots which reads in part as follows:

***"Technical Evaluation Criteria***

***.....***

***SNAKE BOOTS***

	<b><i>Technical Specification</i></b>	<b><i>KPC Requirements</i></b>	<b><i>Sample Submitted as per KPC's Specifications</i></b>
<b><i>1.</i></b>	<b><i>.....</i></b>	<b><i>.....</i></b>	<b><i>.....</i></b>
<b><i>2.</i></b>	<b><i>Provide valid shoe test certificate from the manufacturer.</i></b>	<b><i>Mandatory</i></b>	
<b><i>3.</i></b>	<b><i>Bidders must provide ISO/EN</i></b>	<b><i>Mandatory</i></b>	

	<b><i>certificate for the product from the manufacturer</i></b>		
.....	.....	.....	.....

**Note:**

***KPC may confirm the authenticity of the following documents from the manufacturer:***

- 1. Shoe test certificate from the manufacturer.***
- 2. ISO/EN Certificate for the product from the manufacturer.***
- 3. Evaluation shall also involve stakeholder participation. Wearability, comfort, suitability for work, visual conformity to requirements and aesthetics will form basis of this stakeholder evaluation. This will form part of the final report and recommendation to award.***
- 4. This is one lot. Bidders must quote for all items.***
- 5. The successful bidder will be given the shoe size numbers upon contract signing.***
- 6. Where necessary the successful bidder will be required to exchange/replace unutilized/unused shoes upon request."***

68. In essence, bidders tendering for the snake boots were required to submit a valid shoe test certificate from the manufacturer and ISO/EN certificate for the product from the manufacturer.

69. Additionally, tenderers were required to note that in addition to the Procuring Entity confirming authenticity of certain documents from the manufacturer, the Technical Evaluation would also involve stakeholder participation and wearability, comfort, suitability for work, visual conformity to requirements and aesthetics would form the basis of the said stakeholder evaluation and would be part of the final report and recommendation to award.

70. It is therefore clear to the Board that bidders were well informed of that the Technical Evaluation Criteria would entail stakeholder participation and evaluation and this provision was clearly stipulated in the Tender Document.

71. We note that the Applicant contends that the requirement for stakeholder participation as provided above under the Technical Evaluation Criteria had no specific, measurable or quantifiable metrics with regard to wearability, comfort, suitability for work and visual conformity to aesthetics. However, it is our considered view that this line of argument cannot hold since if the Applicant was aware of the said requirement from the moment it acquired a copy of the Tender Document and at the time of submission of its tender and being dissatisfied with the same, it ought to have challenged the said requirement at the earliest opportune moment in line with provisions of Regulation 203(2)(c) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") so as not to be accused of laches.

72. We have studied the Evaluation Report submitted to the Board by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Act and observe that the Evaluation Committee noted as follows with regard to the Safety Foot Wear under Lot 1 in the subject tender:

***"2.3.3 Stakeholder Engagement and Participation for Lot 1 Stakeholder Evaluation as required in technical evaluation criteria Note 4 was carried out on all the 7 bidders to ascertain the wearability, comfort, suitability for work, visual conformity to requirements and aesthetics.***

***The evaluation was carried out in PS 10 Boardroom by a sample staff from different sections and the findings of 3 remaining bidders is analyzed below:***

- a) Some staff selected specific shoe type.***
- b) Some staff selected the whole lot.***
- c) Some staff preferred more than one brand.***
- d) Some staff disliked a specific shoe type.***

<b><i>Bidder</i></b>	<b><i>Description</i></b>	<b><i>Brand</i></b>	<b><i>No. of Positive Reviews</i></b>
<b><i>Zocom</i></b>	<b><i>Men Executive</i></b>	<b><i>Goliath</i></b>	<b><i>6</i></b>
	<b><i>Men Boot</i></b>	<b><i>Jogger Safetystar</i></b>	<b><i>5</i></b>
	<b><i>Ladies Executive</i></b>	<b><i>Sisi</i></b>	<b><i>9</i></b>
	<b><i>Ladies Shoes</i></b>	<b><i>Jogger Safetystar</i></b>	<b><i>5</i></b>

<b>Finescope</b>	<b>Men Executive</b>	<b>Jogger Manager</b>	<b>3</b>
	<b>Men Boot</b>	<b>Blackrock</b>	<b>11</b>
	<b>Ladies Executive</b>	<b>Jogger Bestgirl</b>	<b>1</b>
	<b>Ladies Shoes</b>	<b>Jogger Dolce81</b>	<b>1</b>
<b>Motion Industrials</b>	<b>Men Executive</b>	<b>Jogger Manager</b>	<b>4</b>
	<b>Men Boot</b>	<b>Jogger Bestboy</b>	<b>1</b>
	<b>Ladies Executive</b>	<b>Jogger Best girl</b>	<b>2</b>
	<b>Ladies Shoes</b>	<b>Jogger Bestrun</b>	<b>6</b>

*From the table above,*

- 1. Goliath Executive men, Sisi Executive ladies, Blackrock Men Boot and Jogger Bestrun were the most preferred safety footwear having met all the requirements of wearability, comfort, suitability for work, visual conformity to requirements and aesthetics during stakeholder evaluation.**
- 2. Jogger Bestgirl scored poorly on wearability, comfort, suitability for work, visual conformity to requirements and aesthetics during stakeholder evaluation.**

***M/s Finescope Ltd and M/s Motion Industrials submitted Jogger Bestgirl samples scored poorly during the stakeholder participation.***

***M/s Zocom Ltd samples had the overall best positive reviews from the stakeholder participation.***

***Below is a summary of the evaluation committee's analysis of the samples.***

	<b>Type</b>	<b>Bidder Response by Ranking</b>		
		<b>Zocom</b>	<b>Finescope</b>	<b>Motion Industrial</b>
<b>1.</b>	<b>Men Executive</b>	<b>1</b>	<b>3</b>	<b>2</b>
<b>2.</b>	<b>Men boot</b>	<b>2</b>	<b>1</b>	<b>3</b>
<b>3.</b>	<b>Ladies Executive</b>	<b>1</b>	<b>2</b>	<b>2</b>
<b>4.</b>	<b>Ladies Shoes</b>	<b>1</b>	<b>2</b>	<b>3</b>

***From the above, the Zocom Lot had the best overall level of sample compliance on wearability, comfort, suitability for work, visual conformity to requirements and aesthetics. Only all the shoes in Zocom's bid were acceptable. They therefore proceeded to the financial evaluation stage."***

73. Further, the Evaluation Committee noted as follows with regard to the Snake Boots Technical Evaluation under Lot 2 in the subject tender:

***"(c) M/s Motion Industrials Ltd did not submit valid shoe test certificate and ISO/EN certificate for the product from the manufacturer as required in technical evaluation criteria and thus was non responsive."***

74. We also note that the 1<sup>st</sup> Respondent submitted in the confidential file a Stakeholder Participation for Safety Footwear register which details names of twenty (25) stakeholders from various sections of the Procuring Entity who participated in the stakeholder evaluation and the same reads in part as follows:

***"Stakeholder Participation For Safety Footwear  
Safety Footwear Stakeholder Participation  
Date: 22/11/2023***

<b><i>No</i></b>	<b><i>Name</i></b>	<b><i>Section</i></b>	<b><i>Comments</i></b>	<b><i>Signature</i></b>
<b><i>1</i></b>	<b><i>XX</i></b>	<b><i>OTS</i></b>	<b><i>Option 1: Zocom Option 2: Finescope</i></b>	<b><i>signed</i></b>
<b><i>2</i></b>	<b><i>XX</i></b>	<b><i>Civil</i></b>	<b><i>Option 1: Finescope</i></b>	
<b><i>3</i></b>	<b><i>XX</i></b>	<b><i>PSIO</i></b>	<b><i>Option : Motion</i></b>	

<b>4</b>	<b>XX</b>	<b>PSIO</b>	<b>Option 1: Zocom</b>	
<b>5</b>	<b>XX</b>	<b>PSIO</b>	<b>Option 3: Black Rock</b>	
<b>6</b>	<b>XX</b>	<b>PSIO</b>	<b>Option 3: Black Rock</b>	
<b>.....</b>	<b>.....</b>	<b>.....</b>	<b>.....</b>	<b>.....</b>

75. Turning to the circumstances in instant Request for Review, the Applicant’s main contention is that the aspect of the stakeholder engagement and participation, which was the sole reason why its bid in Lot 1 of the subject tender was rejected and being part of the technical evaluation criteria was entirely subjective, unquantifiable and shrouded in mystery. The Applicant does not contest the samples submitted in its bid which were subjected to the stakeholder evaluation.

76. In their submissions, the Respondents submitted that at the stakeholder evaluation under the Technical Evaluation Criteria, the stakeholders were given random options categorized as Option 1 to Option 7 for ease of recording their preferences and were also afforded ample time to give their views and record their best option. The Respondents further submitted that the Evaluation Committee used the data from the stakeholders recordings to score bidders at the

Technical Evaluation stage based on the number of positive reviews and based subsequently, the 1<sup>st</sup> Interested Party scored 25 points while the Applicant scored 14 points being an indication that the Applicant's shoe sample scored poorly on wearability, comfort, suitability to work, visual conformity to requirements and aesthetics making the Applicant non-responsive at the Technical Evaluation stage.

77. Merriam-Webster Dictionary defines a stakeholder as '*one who is involved in or affected by a course of action*'. Investopedia defines a stakeholder as '*a party that has an interest in a company and can either affect or be affected by the business. The primary stakeholders in a typical corporation are its investors, employees, customers, and suppliers.*'

78. In view of the above definitions, it therefore follows that the Procuring had every right to engage, as part of the stakeholder evaluation under the Technical Evaluation Criteria of the Tender Document, its field technicians from different departments being the main users of the footwear in the subject tender to comment on the samples submitted by responsive bidders at the Technical evaluation stage and this would form part of the final report under the Technical Evaluation stage.

79. The Applicant challenges the stakeholder evaluation as being unfair and contends that award of the subject tender was made unfairly in

breach of the principle of fairness as espoused in Article 227(1) of the Constitution.

80. This Board is cognizant of the provisions of Article 47(1) of the Constitution on procedural fairness as follows:

***"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."***

81. We note that procedural fairness is a constitutional requirement in administrative action and goes beyond the traditional meaning of the duty to afford one an opportunity of being heard. Even in instances where there is no express requirement for a person to be heard before a decision is made, the authority entrusted with the mandate of making the decision must act fairly. In **Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**, the Court of Appeal held that:

***"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice,***

*good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”*

82. In **Judicial Review Miscellaneous Application No. 36 of 2016 Republic v National Police Service Commission Exparte Daniel Chacha Chacha [2016] eKLR** the court while addressing the elements of procedural fairness referred to the case by the Supreme Court in **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held that:

*"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.*

***53. The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given case, the court set out five factors to be considered: (1) The***

**nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker.**

83. In view of the above, it is our considered view that the Applicant was well aware as at the time of submitting its bid in the subject tender of the requirement of the stakeholder participation and evaluation under the Technical Evaluation Criteria of the Tender Document and cannot claim at this juncture that the said requirement was unfair, subjective, unquantifiable and shrouded in mystery.

84. Regulation 76 of Regulations 2020 provides for Technical Evaluation as follows:

***"76. Technical evaluation***

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

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

85. Considering the above, we are left with the inevitable conclusion that the Applicant's tender failed to satisfy the Technical Evaluation Criteria of Section III – Evaluation and Qualification Criteria of the Tender Document to proceed for evaluation at the Financial Evaluation stage. In the circumstances, the Board finds that the Evaluation Committee properly evaluated the Applicant's tender and disqualified the Applicant at the Technical Evaluation stage in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution.

**Whether the 1<sup>st</sup> Respondent's Letter of Notification dated 14<sup>th</sup> December 2023 issued to the Applicant met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020;**

86. It is the Applicant's case that the 1<sup>st</sup> Respondent was under an obligation to (a) furnish it with reasons why its bid for Lot 2 in the subject tender was disqualified and (b) disclose the 1<sup>st</sup> Interested Party's sample which scored higher than its sample in the letter of notification of the outcome of evaluation of the subject tender dated 14<sup>th</sup> December 2023.

87. During the hearing, counsel for the Respondents conceded that the Applicant was not notified of the reasons for disqualification of its bid in Lot – 2 in the subject tender due to an oversight.

88. It is therefore not in contest that the Applicant was not notified of the reasons why its tender for Lot 2 in the subject tender was rendered non-responsive. Section 87 of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and provides as follows:

***“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.”***

89. Section 87 of the Act recognizes that notification of the outcome of evaluation of a tender is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation ought to be done simultaneously to the successful tenderer(s) and the unsuccessful tenderer(s). A disclosure of who is evaluated as the successful tenderer is made to the unsuccessful tenderer with reasons thereof in the same notification of the outcome of evaluation.

90. The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

***"82. Notification of intention to enter into a contract***

***(1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.***

***(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.***

***(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act."***

91. In view of the provisions of Section 87 of the Act read with Regulation 82 of 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 is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

92. In **Judicial Review Miscellaneous Application No. 531 of 2015, Republic v Public Procurement Administrative Review Board & 2 others ExParte Akamai Creative Limited** (hereinafter referred to as “the Akamai Case”) the High Court held as follows:

***"In my view, Article 47 of the Constitution requires that parties to an administrative proceeding be furnished with the decision and the reasons therefor within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render***

***a decision but to also furnish the reasons for the same. Accordingly, where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid"***

93. From the above case, the Board observes that the High Court was basically expounding on one of the rules of natural justice as provided for in Article 47 (2) of the Constitution which provides:

***"If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"***

94. In essence, the rules of natural justice as provided for in Article 47 of the Constitution require that a procuring entity promptly notifies tenderers of the outcome of evaluation to afford an unsuccessful tenderer the opportunity to challenge such reasons if need be. Further, the Act does not require that an unsuccessful tenderer seeks clarification in order for the accounting officer to provide it with the outcome of evaluation or reasons leading to its disqualification in a tendering process.

95. Consequently, failure by the Respondents to give reasons why the Applicant's bid for Lot 2 in the subject tender was unsuccessful and

failure by the Respondents to give sufficient reasons on the outcome of the successful bidder's tender in Lot 1 and the reasons why the Applicant not successful Men Executive; Men boot and Ladies Shoes (save for lady's executive shoe) amounted to a breach of Section 87 of the Act read with Regulation 82 of Regulations 2020. As such, we find and hold that the letter of Notification of Award dated 14<sup>th</sup> December 2023 issued to the Applicant **did not** meet the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020.

### **What orders should the Board grant in the circumstances?**

96. We have established that the Applicant's tender failed to satisfy the Technical Evaluation Criteria of Section III – Evaluation and Qualification Criteria of the Tender Document to proceed for evaluation at the Financial Evaluation stage and that the Evaluation Committee properly evaluated the Applicant's tender and disqualified the Applicant at the Technical Evaluation stage in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution.

97. We have found that failure by the Respondents to give reasons why the Applicant's bid for Lot 2 in the subject tender was unsuccessful and failure by the Respondents to give sufficient reasons on the outcome of the successful bidder's tender in Lot 1 of the subject tender

98. Consequently, the Board deems it just and fit to nullify the Letters of Notification of Intention to Award Contract in the subject tender issued to all successful tenderers and unsuccessful tenderers dated 14<sup>th</sup> December 2023, to enable all tenderers be notified of the outcome of their tenders in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020.

99. The upshot of our findings is that the instant Request for Review dated 21<sup>st</sup> December 2023 and filed on 28<sup>th</sup> December 2023 succeeds only to the extent that the Letter of Notification dated 14<sup>th</sup> December 2023 issued to the Applicant did not meet the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020.

## **FINAL ORDERS**

100. 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 21<sup>st</sup> December 2023 and filed on 28<sup>th</sup> December 2023:

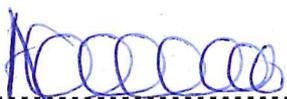
**A. The Letters of Notification of Intention to Award Contract to the successful tenderers dated 14<sup>th</sup> December 2023 with respect to Tender No. KPC/PU/FW-077 (HSE)NBI/23-24 for Framework Contract to Supply Safety Footwear and Snake Boots for Two (2) Years, be and are hereby nullified and set aside.**

**B. The Letters of Notification of Intention to Award Contract to the Applicant and other unsuccessful tenderers dated 14<sup>th</sup> December 2023 with respect to Tender No. KPC/PU/FW-077 (HSE)NBI/23-24 for Framework Contract to Supply Safety Footwear and Snake Boots for Two (2) Years, be and are hereby nullified and set aside.**

**C. The 1<sup>st</sup> Respondent is hereby directed to issue Notification of Intention to Enter into a Contract in Tender No. KPC/PU/FW-077 (HSE)NBI/23-24 for Framework Contract to Supply Safety Footwear and Snake Boots for Two (2) Years. in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 within seven (7) days from the date hereof taking into consideration the Board's findings herein.**

**D. Given our findings herein, each party shall bear its own costs in the Request for Review.**

**Dated at NAIROBI this 18<sup>th</sup> Day of January 2024.**

  
.....

**PANEL CHAIRPERSON**

**PPARB**

  
.....

**SECRETARY**

**PPARB**