

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 23/2024 OF 14TH MARCH 2024

BETWEEN

BIOMETRICS TECHNOLOGY LIMITED APPLICANT

AND

CHIEF REGISTRAR OF THE JUDICIARY 1ST RESPONDENT

Review against the decision of the Chief Registrar of the Judiciary in relation to Tender No. JUD/OT/047/2023-2024 for Supply, Installation, Training, Testing and Commissioning of Court Recording and Transcription System – Audio Visual Integrator at the Judiciary Law Courts under framework contract for a period of three (3) years.

BOARD MEMBERS PRESENT

- | | | |
|-------------------------|---|-------------------|
| 1. Ms. Alice Oeri | - | Panel Chairperson |
| 2. QS Hussein Were | - | Member |
| 3. Mr. Stanslaus Kimani | - | Member |

IN ATTENDANCE

- | | | |
|------------------------|---|------------------------|
| 1. Mr. James Kilaka | - | Acting Board Secretary |
| 2. Mr. Philemon Kiprop | - | Secretariat |
| 3. Ms. Evelyn Weru | - | Secretariat |

PRESENT BY INVITATION

APPLICANT

BIOMETRICS TECHNOLOGY LIMITED

1. Mr. Emmanuel Mumia - Advocate, Mwaniki Gachoka & Co. Advocates
2. Mr. Moses Kahoro - Advocate, Mwaniki Gachoka & Co. Advocates

RESPONDENTS

CHIEF REGISTRAR OF THE JUDICIARY, THE JUDICIARY

- Mr. Ken Ogutu - Advocate, The Judiciary

BACKGROUND OF THE DECISION

The Tendering Process

1. The Judiciary, the Procuring Entity herein, invited sealed bids from eligible tenderers in response to Tender No. JUD/OT/047/2023-2024 for Supply, Installation, Training, Testing and Commissioning of Court Recording and Transcription System – Audio Visual Integrator at the Judiciary Law Courts under framework contract for a period of three (3) years (hereinafter referred to as the “subject tender”) renewable annually subject to satisfactory performance through open tendering. The advertisement for the tender was made through the Procuring Entity’s website www.judiciary.go.ke and on the Public Procurement Information Portal (PIIP) website www.tenders.go.ke where the blank tender document for the subject tender (hereinafter referred to as the ‘Tender Document’) was available for download. The tender’s initial submission deadline scheduled on 7th March 2024 was extended to 12th March 2024 at 2.00 p.m.

Submission of Tenders and Tender Opening

2. According to 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 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 three (3) tenders were submitted in response to the subject tender and were recorded as follows:

Bidder No.	Name
1.	Circuit Business Systems Limited
2.	Proscene Systems Limited
3.	Comm Carrier Satellite Services

3. The Tender Opening Committee also observed as follows:

"MIN.3/2024: OBSERVATIONS

- ***All bidders submitted a copy of the original.***
- ***There was a bidder at the tender opening box whose tender document had been labelled JUD/OT/045/2023-2024 and the description was not of the tender that was being opened. The committee therefore unanimously agreed not to pick the bid document. However, the bidder insisted that it was only the numbering that was***

wrong but on further checking and with guidance from a previous PPRA advisory the case of a similar nature, the committee confirmed that both the numbering and the description of the tender document were wrong. The committee did not open the bid document....”

4. The procurement proceedings of the subject tender were suspended pursuant to Section 168 of the Act when Request for Review No. 23 of 2024 dated 14th March 2024 was filed on even date before the Board.

REQUEST FOR REVIEW NO. 23 OF 2024

5. Biometrics Technology Limited, the Applicant herein, filed a Request for Review together with a Supporting Affidavit sworn by Anthony Maina Mithanga, its Managing Director and a Supporting Affidavit sworn by Kellen Wanjira Muchira, its Key Accounts Manager through the firm of Mwaniki Gachoka & Co. Advocates, all dated, filed and sworn on 14th March 2024, seeking the following orders from the Board:

a) The Respondent’s decision to decline, refuse and/or fail to open the Applicants tender during the tender opening be and is hereby set aside and nullified.

b) The Board be pleased to review all records of the procurement process (particularly the tender opening thereof) relating to Tender No. JUD/OT/047/2023-2024 and substitute the decision of the Respondent for the decision of the Review Board and allow the tender by the Applicant to proceed to evaluation.

c) Further and in the alternative, the entire tender process be nullified and the Respondent be ordered to re-tender afresh.

d) The Respondent be and is hereby ordered to pay the costs of and incidental to these proceedings; and

e) Such other or further relief or reliefs as this board shall deem just and expedient

6. In a Notification of Appeal and a letter dated 14th March 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the 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 14th March 2024.

7. On 25th March 2024, the Respondent filed through Kennedy Ogutu Advocate a Memorandum of Appearance dated 20th March 2024, a Respondent's Response to the Request for Review dated 20th March 2024, a Respondent's Replying Affidavit sworn on 20th March 2024 by Jeremiah Nthusi, the Procuring Entity's Director of Supply Chain Management Services together with a file containing confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
8. *Vide* letters dated 26th March 2024, 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 three (3) days.
9. *Vide* a Hearing Notice dated 26th March 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 26th March 2024 at 11.00 a.m., through the link availed in the said Hearing Notice.

10. On 28th March 2024, the Applicant filed Written Submissions dated 28th March 2024 together with a List of Authorities dated 28th March 2024.
11. When the matter first came up for hearing on 28th March 2024 at 11.00a.m., the Board informed parties present that one of its Board members was indisposed and as such the panel as constituted was not quorate. Having failed to get consensus from parties to canvass the matter by way of written submissions, the Board directed that the matter would proceed for hearing on Tuesday, 2nd April 2024 at 11.00 a.m. The Respondent was granted leave to file and serve its written submissions by Tuesday, 2nd April 2024 at 9.00 a.m.
12. On 2nd April 2024, the Respondent filed its Written Submissions dated 2nd April 2024.
13. *Vide* a Further Hearing Notice dated 2nd April 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 2nd April 2024 at 11.00 a.m., through the link availed in the said Hearing Notice.
14. At the hearing on 2nd April 2024, the Board read out the pleadings filed by parties in the matter and allocated time for each party to proceed and highlight its case. Thus, the matter proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submissions

15. In his submissions, Mr. Mumia relied on the Request for Review dated 14th March 2024 together with Supporting Affidavits sworn on 14th March 2024 by Anthony Maina Mithanga and Kellen Wanjira Muchira, Written Submissions dated 28th March 2024 and List of Authorities dated 28th March 2024 that were filed before the Board.

16. Mr. Mumia submitted that on 22nd February 2024, the Procuring Entity publicly issued invitations for bids for the procurement of various goods and services namely (a) the supply, installation, training, testing and commissioning of court recording and transcription system *-audio visual installer* whose submission date was on 6th March 2024 at 10.00 a.m.; (b) supply and delivery of ICT equipment (desktops, laptops, tablets, and projectors) whose submission date was on 6th March 2024 at 2.00 p.m.; (c) the supply, installation, training, testing and commissioning of court recording and transcription system *-audio visual integrator* whose submission date was on 7th March 2024 at 10.00 a.m.; and (d) supply, delivery, testing and commissioning of Active Network Devices whose submission date was on 7th March 2024 at 2.00 p.m. The aforementioned closing dates were revised and the submission date extended to 12th March 2024 at 2.00 p.m.

17. Mr. Mumia further submitted that with regard to the subject tender, the Applicant prepared its bid for the supply, installation, training,

testing and commissioning of court recording and transcription system-*audio visual integrator*. However, on the outer envelope that contained the bid document, the Applicant inadvertently mislabeled the envelop contacting its bid which was dropped in the right tender box.

18. Mr. Mumia also submitted that at the time of tender opening whereas the Applicant's bid was in the right tender box, at the right time, the Respondent's tender opening committee declined to open the Applicant's bid for the reason that the description of the tender on the envelope was not of the tender being opened at 2.00 p.m. He pointed out that as a consequence of the inadvertent error in labelling, during the formal tender opening proceedings, the Respondent's Tender Opening Committee declined to open the Applicant's tender and returned the same to the tender box.

19. Counsel indicated that a representative of the Applicant and the 2nd deponent in the instant Request for Review was present at the tender opening and explained that the bid in the envelope was correct save for the mislabeling of the said envelope.

20. Counsel referred the Board to the provisions of ITT 24 of the Instructions to Tenderers of the Tender Document and argued that the Procuring Entity was obligated at the tender opening to publicly open and read out all tenders received by the deadline at the date, time and place specified in the Tender Document Schedule in the

presence of the tender's designated representatives who chose to attend.

21. He further referred the Board to the provisions of Section 78 of the Act on opening of tenders and argued that Section 78(3) of the Act stipulates that immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before the deadline whereas Section 78(7) of the Act explicitly states that no tender shall be disqualified by the procuring entity during opening of tender.

22. Counsel argued that the net effect of the actions of the Respondent was that it disqualified the Applicant at the Tender Opening stage yet there was no basis for refusing to open the Applicant's bid.

23. In support of his arguments, counsel relied on the Court of Appeal's decision in *Civil Appeal No. E012 of 2024 Sinopec International Petroleum Service Corporation v Public Procurement Administrative Review Board & 3 others* where the court held that during the tender opening proceedings, the tender opening committee is not permitted by law to reject tenders at this stage and rejection of tenders can only occur during determination of responsiveness of tenders.

24. He urged the Board to allow the Request for Review as prayed.

Respondents' Submissions

25. In his submissions, Mr. Ogutu relied on Respondent's Response to the Request for Review dated 20th March 2024, a Respondent's Replying Affidavit sworn on 20th March 2024 by Jeremiah Nthusi, the confidential documents submitted to the Board pursuant to Section 67(3)(e) of the Act and Written Submissions dated 2nd April 2024 that were filed before the Board.

26. Mr. Ogutu submitted that the facts leading to the dispute before the Board were not contested. He indicated that the Applicant had labelled its envelope with a tender number No. 45 which belonged to a separate tender which had earlier on closed at 10.00 a.m.

27. Mr. Ogutu further submitted that the Applicant was asking the Board to go against the law in granting the prayers sought since the bids in tender No. 45 had been opened and recorded in the tender opening register. He further submitted that the mandate of the tender opening committee was limited to the opening of the particular tender No. 47 which closed at 2.00 p.m. while a separate committee had been constituted to open tender number 45 which closed at 10.00 a.m. and that committee had discharged its mandate.

28. Mr. Ogutu also submitted that opening an envelope clearly marked as tender No. 45 when the tender had closed earlier in the day would be a breach of the tender documents and the law and would open both processes to review and cancellation.

29. Counsel made reference to the provisions of Section 77(2) of the Act which provides that a tender document and the envelope in which it is sealed in shall bear the tender number assigned to the procurement or asset disposal proceedings by the procuring entity and argued that there was no room for inadvertence. He also made reference to Section 2 of the Act on the meaning of a tender as an offer in writing by a candidate to supply goods, services or works at a price or to acquire or dispose stores, equipment or other assets at a price pursuant to an invitation to tender, request for quotation or proposal by a procuring entity.

30. Counsel argued that where there is an open call for a particular tender with a number and description, documents which may be submitted with a different number do not qualify as tender which must be opened. He argued that the law dictates that the envelopes ought to be labelled accordingly for them to progress to the next stage of the tender process.

31. Mr. Ogutu urged the Board not to lose sight of the fact that on the date of the tender opening, there was another tender which opened at 10.00 a.m. and the envelope in dispute was labelled as the tender which was opening at 10.00 a.m. and, as such, any person in the tender opening committee had a legitimate basis of saying that the Applicant's bid belonged to tender No. 45 and not to the subject tender and it was reasonable to conclude that this was a late submission. He pressed on that there was no blanket obligation to

open just any tender and that Section 77 of the Act placed an obligation on a bidder to label its bid document.

32. He urged the Board to dismiss the Request for Review with costs.

33. When asked by the Board to clarify on whether the Applicant had submitted a bid in tender no. 45, counsel submitted that the Applicant did not take part in tender No. 45. He further submitted that the situation in the current circumstances was quite unique since the Procuring Entity had earlier on opened tenders at 10.00 a.m. with regard to tender No. 45 and the Tender Opening Committee was right not to open the Applicant's bid. He pressed on that in view of Section 77(6) of the Act, the said provision only applied to a tender delivered by post.

34. Mr. Ogutu argued that the Constitution is supreme and in view of the provisions of Article 227(1) of the Constitution, tendering is highly competitive and technical and bidders have to tick all boxes since lack of one simple document knocks a tenderer out of the process and a bidder is bound by its documents. He further argued that the Procuring Entity adhered to the provisions of Article 227(1) of the Act.

35. Upon enquiry by the Board if the labelling and marking of tender documents was a mandatory requirement that tenderers were required to comply with, Mr. Ogutu submitted that the Tender Document required for tenders to be placed in a clear envelope and it

was an express requirement in the tendering process for envelopes to be clearly labelled. He further submitted that even if the same had not been expressly provided, the law is supreme and requires envelopes to be labeled and this applies to all bids. He argued that granting the Applicant's prayers would open a Pandora's box as the decision holds precedent in future and would render tender opening as a futile activity in future.

Applicant's Rejoinder

36. In a rejoinder, Ms. Mumia submitted that when Section 2 and 77 of the Act are read together, nothing in the said provisions gives the Procuring Entity power through the Tender Opening Committee to decline to open the Applicant's bid.

37. Counsel argued that the Tender Opening Committee conducted a mini evaluation at the tender opening contrary to the law by choosing what to admit and not what to admit. He referred the Board to the Affidavit sworn by Keilen Wanjira Muchira and indicated that the members of the tender opening committee consulted and made reference to a circular issued by the Public Procurement Regulatory Authority on rejecting tenders at tender opening.

38. Mr. Mumia submitted that Section 77 of the Act does not provide any consequences for mislabeling of an envelope and that the inescapable conclusion is for the Board to allow the Request for Review and for the Applicant's tender to progress for evaluation.

39. Upon enquiry by the Board on whether the Applicant had submitted a bid in tender No. 45, Mr. Mumia submitted that the Applicant did not participate in the other tender hence there had no representation and that it only participated in the subject tender. He further submitted that the Applicant's representative clarified to the Tender Opening Committee that the bid was meant for the subject tender and explained the error but the Tender Opening Committee having consulted referred a verdict that they would not open the Applicant's bid.

40. With regard to the provisions of Section 77(3) and (6) of the Act, Mr. Mumia submitted that correct labelling guards against loss, misplacement of a bid or a situation where the bid may be inadvertently opened.

41. Counsel argued that the Procuring Entity was bound by the provisions of ITT 24.1 and 24.5 of the Instructions to Tenders in the Tender Document and what would have been fair was for it to open the tender and deal with the contents therein after opening. He pointed out that failing to open the Applicant's bid was not in line with the provisions of Article 227(1) of the Constitution.

42. When asked by the Board to clarify if the labelling and marking of tender documents was a mandatory requirement that tenderers were required to comply with, Mr. Mumia submitted that this was not a

mandatory requirement since at that stage, there was no obligation and there were boxes that required to be ticked and all that the Tender Opening Committee was required to do was open submitted bids.

43. At the conclusion of the online hearing, the Board informed parties that it would communicate its decision on or before 4th April 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

44. The Board has considered each of the parties' submissions and documents submitted to it and finds the following issues call for determination:

a) Whether the Procuring Entity's Tender Opening Committee breached the provisions of Section 78 of the Act by refusing to open the Applicant's bid during tender opening;

b) What orders the Board should grant in the circumstances

As to whether the Procuring Entity's Tender Opening Committee breached the provisions of Section 78 of the Act by refusing to open the Applicant's bid during tender opening.

45. The Board understands the Applicant's case on this issue to be that the Procuring Entity's Tender Opening Committee's decision to decline to open the Applicant's tender amounted to disqualification of the Applicant's bid at tender opening.

46. On the other hand, it is the Respondents' case that it had no statutory obligation to open the envelope containing the Applicant's tender since to do so would amount to the opening of a late submission of a bid that had been opened earlier.

47. The Board, having considered parties' submissions herein, observes 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.

48. 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
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..."

49. The Board takes cognizance of Section 78 of the Act which provides as follows:

Section 78 - Opening of tenders:

(1) An accounting officer of a procuring entity shall appoint a tender opening committee specifically for the procurement in accordance with the following requirements and such other requirements as may be prescribed—

(a)

(b)

(2) Any bid withdrawn in writing shall not be eligible for evaluation or consideration in the tender process.

(3) Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline.

(4) Those submitting tenders or their representatives may attend the opening of tenders.

(5) The tender opening committee shall assign an identification number to each tender and record the number of pages received.

(6) As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register—

(a) the name of the person submitting the tender;

(b) the total price, where applicable including any modifications or discounts received before the deadline

***for submitting tenders except as may be prescribed;
and***

(c)

(7) No tenderer shall be disqualified by the procuring entity during opening of tenders.

....."

50. Interpretation of the above provisions of Section 78 of the Act is that (a) any withdrawn bid shall not be eligible for evaluation or consideration in the tender process, (b) immediately after the tender submission deadline, the tender opening committee shall open all tenders received before that deadline, (c) tenderers or their representatives may attend the opening of tenders, and (d) no tenderer shall be disqualified by the procuring entity during opening of tenders.

51. Section 77 of the Act makes provision for submission and receipt of tenders as follows:

Section 77 - Submission and receipt of tenders:

(1) Submission of tender documents whether in electronic or manual form, shall be in writing, signed and in the case of manual submission, they shall be sealed in an envelope.

(2) A tender document and the envelope, in which it is sealed in, shall bear the tender number assigned to the

procurement or asset disposal proceedings by the procuring entity.

(3) A tender shall be submitted before the deadline for submitting tenders and any tender submitted after the deadline shall not be accepted by the procuring entity.

(4)

(5) Each tender that is delivered shall be placed unopened in the tender box —

(a) if the tender is delivered by post, by the staff of the procuring entity immediately upon receipt; or

(b) if the tender is delivered otherwise than by post, by the person delivering the tender.

(6) If a tender that is delivered by post is inadvertently opened, the fact of that opening shall be recorded on the envelope by the person who opened the tender and the tender shall then be placed in the tender box.

(7)"

52. The import of the above provision is that (a) submission of tender documents shall be in writing, signed and manually submitted tenders shall be sealed in an envelope, (b) a tender document and the envelope in which it is sealed in shall bear the tender number assigned to the procurement proceedings by the procuring entity, (c) a tender must be submitted before the tender submission deadline and any tender submitted after the deadline shall not be accepted by the procuring entity, (d) the procuring entity has an obligation to

provide a tender box for purposes of submission of tenders that complies with Regulations 2020 and (e) where a tender delivered by post is inadvertently opened, the fact of the opening shall be recorded on the envelope by the person who opened the said tender and it shall be placed in the tender box.

53. The Board notes that ITT 24 of Section I Instructions to Tenderers of the Tender Document provides for Tender Opening as follows:

24. Tender Opening

24.1 Except as in the cases specified in ITT 23, the Procuring Entity shall, at the Tender opening, publicly open and read out all Tenders received by the deadline at the date, time and place specified in the TDS in the presence of Tenderers' designated representatives who choose to attend, including to attend any specific electronic tender opening procedures if electronic tendering is permitted in accordance with ITT 21.1, shall be as specified in the TDS. 13

24.2 First, envelopes marked "WITHDRAWAL" shall be opened and read out and the envelope with the corresponding Tender shall not be opened, but returned to the Tenderer. If the withdrawal envelope does not contain a copy of the "power of attorney" confirming the signature as a person duly authorized to sign on behalf of the Tenderer, the corresponding Tender will be opened. No Tender withdrawal shall be permitted unless the corresponding withdrawal

notice contains a valid authorization to request the withdrawal and is read out at Tender opening.

24.3 Next, envelopes marked "SUBSTITUTION" shall be opened and read out and exchanged with the corresponding Tender being substituted, and the substituted Tender shall not be opened, but returned to the Tenderer. No Tender substitution shall be permitted unless the corresponding substitution notice contains a valid authorization to request the substitution and is read out at Tender opening.

24.4 Next, envelopes marked "MODIFICATION" shall be opened and read out with the corresponding Tender. No Tender modification shall be permitted unless the corresponding modification notice contains a valid authorization to request the modification and is read out at Tender opening. 24.5 Next, all remaining envelopes shall be opened one at a time, reading out: the name of the Tenderer and whether there is a modification; the total Tender Prices, per lot (contract) if applicable, including any discounts and alternative Tenders; the presence or absence of a Tender Security, if required; and any other details as the Procuring Entity may consider appropriate.

24.6 Only Tenders, alternative Tenders and discounts that are opened and read out at Tender opening shall be considered further for evaluation. The Form of Tender and pages of the

Bills of Quantities are to be initialed by the members of the tender opening committee attending the opening. The number of representatives of the Procuring Entity to sign shall be specified in the TDS.

24.7 The Procuring Entity shall neither discuss the merits of any Tender nor reject any Tender (except for late Tenders, in accordance with ITT 22.1).

24.8 The Procuring Entity shall prepare a record of the Tender opening that shall include, as a minimum: a) the name of the Tenderer and whether there is a withdrawal, substitution, or modification; b) the Tender Price, per lot (contract) if applicable, including any discounts; c) any alternative Tenders; d) the presence or absence of a Tender Security or Tender-Securing Declaration, if one was required; e) number of pages of each tender document submitted.

24.9 The Tenderers' representatives who are present shall be requested to sign the record. The omission of a Tenderer signature on the record shall not invalidate the contents and effect of the record. A copy of the tender opening register shall be issued to a Tenderer upon request.

54. In essence, the Procuring Entity is obligated to publicly open and read out all tenders received by the tender submission deadline in the

presence of bidder's designated representatives who choose to attend the tender opening and the opening is to proceed by (a) firstly, opening and reading out envelopes marked withdrawal and the envelope with the corresponding tender shall not be opened but returned to the tenderer, (b) secondly, opening and reading out envelopes marked substitution and exchanging the corresponding tender being substituted and the substituted tender returned to the tenderer, (c) thirdly, opening and reading out envelopes marked modification with the corresponding tender and no tender modification is to be permitted unless the corresponding modification notice contains a valid authorization to request the modification and is read out at the tender opening, and (d) lastly, all remaining envelopes shall be opened one at a time reading out *inter alia*, the name of the tenderer, whether there is a modification, the total tender price, presence or absence of a tender security and any other details that the procuring entity may consider appropriate. Further, at the tender opening, the Procuring Entity shall neither discuss the merits of any Tender nor reject any Tender except for late tenders.

55. It is not in dispute that the Applicant's bid document was not opened at the tender opening due to an error in labelling the envelope containing its bid document, which was indicated as:

***JUD/OT/045/2023-2024 THE SUPPLY, INSTALLATION,
TRAINING, TESTING AND COMMISSIONING OF COURT
RECORDING AND TRANSCRIPTION SYSTEM-AUDIO***

VISUAL INSTALLER AT THE JUDICIARY LAW COURTS UNDER FRAMEWORK CONTRACT FOR A PERIOD OF THREE (3) YEARS (hereinafter referred to as "tender No. 45")

Instead of,

JUD/OT/047/2023-2024 THE SUPPLY, INSTALLATION, TRAINING, TESTING AND COMMISSIONING OF COURT RECORDING AND TRANSCRIPTION SYSTEM-AUDIO VISUAL INTEGRATOR AT THE JUDICIARY LAW COURTS UNDER FRAMEWORK CONTRACT FOR A PERIOD OF THREE (3) YEARS

56. During the hearing, Respondent submitted that tender No. 45 had closed and was opened earlier on at 10.00 a.m. on the same day that the subject tender was to be opened. Parties also submitted that the Tender Opening Committee proceeded to consult on whether or not to open the Applicant's bid and a decision was made not to open the Applicant's bid in view of an advisory issued by the Public Procurement Regulatory Authority dated 15th November 2022 to the Respondent which reads in part as follows:

".....

RE: GUIDANCE ON TENDER NO. JUD/OT/15/2022-2023 FOR PROVISION OF SECURITY SERVICES TO THE JUDICIARY

.....

4. That the tender opening committee observed that there were three (3 No) tenders in the tender box labelled JUD/OT/004/2022-2023: PROVISION OF SECURITY SERVICES TO THE JUDICIARY a reference number to a tender that had earlier been terminated and noted that these could not be processed for opening since they had a reference number that was not identified by the description of the tender which the opening committee was appointed to open.

5. That you received two letters dated 9th November 2022 from two different firms alleging to have submitted their tenders on the subject matter before the tender closed but were not read out during tender opening. One firm requests that their tender be considered alongside the other and the second firm requests for urgent intervention.

.....

8. That you reckon that section 77(2) of the Public Procurement and Assets Disposal Act, 2015 provides that " a tender document and the envelope in which it is sealed in, shall bear the tender number assigned to the procurement or asset disposal proceedings by the Procuring Entity."

9. That as you embark on evaluation and taking into consideration the issue highlighted above, you now seek our guidance on the manner in which to treat the requests from the two bidders.

Arising from the above, our comments are as follows:

10.

11. We refer you to Section 78(3) of the Public Procurement and Asset Disposal Act, 2015 (the Act) read together with the Information to Tenderers (ITT) Clause 27.1 of the tender document issued to bidders which states:

S.78 Opening of tenders

(3) Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline; and

ITT 27 Tender Opening

27.1 Except as in the cases specified in ITT 23 and ITT 25.2, the Procuring Entity shall at the Tender opening, publicly open and read out all Tenders received by the deadline at the date, time and place specified in the TDS.

.....

12. Based on the foregoing, our view is that the tender opening committee is by law obligated to open all tenders received before the deadline for tender submission. This view is buttressed by ITT 27.7 of the tender document which guides:

27 Tender Opening

27.7 The Procuring Entity shall neither discuss the merits of any Tender nor reject any Tender (except for late Tenders, in accordance with ITT 25.1).

In addition, ITT 27.5 of the bid document instructs that after opening the received tender documents marked 'Withdrawal', 'Substitution' and 'Modification' in that order, the tender opening committee shall proceed to open ALL remaining envelopes.

.....

14. Further, and based on your submission, we find that the tenderers erred in the tender reference number and not the tender description. Consequently, we find that the tender opening committee erred by not opening the three (3) tenders that were left in the tender box.

To this end, we advise that your procuring entity should proceed to open the three (3) tender documents that were not opened and subject them to evaluation alongside the other twenty-nine (29) tenders. However,

in doing this and in upholding the constitutional requirement of ensuring fairness in the procurement system as required under Article 227 of the Constitution of Kenya,

Further, you are required to invite all the participating bidders to the opening meeting and provide them with written explanation that you are undertaking this exercise after receiving this advisory.

.....”

57. It is clear from the above advisory that the Tender Opening Committee of the Respondent was obligated by law to open all the tenders received before the tender submission deadline and that from the Tender Document, after opening the received tender documents marked withdrawal, substitution and modification in that order, the tender opening committee shall proceed to open ALL remaining envelopes. The Authority advised the Respondent to proceed and open the three (3) tender documents that were not opened and subject them to evaluation alongside other bids.

58. The Board takes note that the evidence submitted by the Applicant in the Supporting Affidavit sworn on 14th March 2024 by Kellen Wanjira Muchira, its Key Accounts Manager stands uncontroverted and reads:

"4. THAT after compilation of the Tender Bid, I wish to state that on the 12th March 2024, I proceeded to the

Supreme Court Building to present the bid before the deadline and attend the tender opening on behalf of the Applicant.

5. THAT regrettably, during the preparation of the envelope, we mistakenly indicated the incorrect tender identification details as follows and thereafter deposited the bid in the tender box:

.....

6. THAT during the tender opening proceedings, I was informed by the Respondent's representative that they could not open the Applicant's bid as it contained the above mentioned error on the envelope and subsequently returned the envelope containing the bid document to the tender box.

.....

8. THAT the actions by the Respondent technically mean that the Applicant's tender was disqualified at the tender opening stage.

....."

59. Notably, the Tender Opening Minutes signed on 12th March 2024 by members of the Tender Opening Committee indicate at page 3 as follows:

"MIN.3/2024: OBSERVATIONS

- ***All bidders submitted a copy of the original.***

➤ *There was a bidder at the tender opening box whose tender document had been labelled JUD/OT/045/2023-2024 and the description was not of the tender that was being opened. The committee therefore unanimously agreed not to pick the bid document. However, the bidder insisted that it was only the numbering that was wrong but on further checking and with guidance from a previous PPRA advisory the case of a similar nature, the committee confirmed that both the numbering and the description of the tender document were wrong. The committee did not open the bid document....”*

60. In view of the foregoing, the emerging question is whether the Tender Opening Committee acted within the law in declining to open the Applicant’s bid document as submitted at the tender opening.

61. In **Civil Appeal No. E012 of 2024 Sinopec International Petroleum Service Corporation v The Public Procurement Administrative Review Board, Kenya Electricity Generating Company PLC and another**, the Court of Appeal stated at paragraph 37 of its decision that

‘Section 78 (7) bars the Tender Opening Committee from rejecting a bid’.

62. It is evident that no tenderer shall be disqualified by the procuring entity during the opening of tenders. Any disqualification of a tender is the mandate of the Evaluation Committee appointed by the accounting officer pursuant to Section 46 of the Act following evaluation of the said tender against an evaluation criteria stipulated in the Tender Document. It is clear that immediately after the tender submission deadline, all tenders received by the Procuring Entity in the designated tender box before the stipulated deadline shall be opened and tenderers or their representative may attend the tender opening.

63. From the readings of the provisions of the Tender Document, the Act, previous rulings of the courts and the Board's past decisions, the discernible position is that a tender opening committee can refuse to open a tender under certain circumstances: If the tender has been withdrawn, substituted, modified or is submitted late. The apparent error with regard to the Applicant's tender was on the labeling of the envelope containing its bid document. This though was cleared by the Applicant's representative who was present at the tender opening and who clarified that the bid was the correct one.

64. The Applicant's bid in the tender subject of this Request for Review was neither withdrawn, nor substituted, nor modified, nor submitted late. In a sum, the Applicant's tender does not fall under any of the categories that would lent itself open for refusal to be opened by the Respondent's tender opening committee. To paraphrase Justice

Mativo in Miscellaneous Application No. 60 of 2020, '***a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document. 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 a tender.***' In the tender subject of this review, the Board holds a considered opinion that the Tender Opening Committee of the Procuring Entity elevated a matter of subsidiary importance to a level which seemed to seal the fate of the Applicant's tender, by refusing to open it on account of the mislabeling of the bid envelope.

65. Considering all of the above, the Board is left with only one course of action, and that it is only fair that the Applicant's tender be opened and made available for evaluation together with other tenders. The Board is of the firm view that the opening of the Applicant's tender will not occasion prejudice to other bidders but will instead be in accordance with the provisions of Article 227 (1) of the Constitution that seeks to promote fairness, equity and competitiveness in public procurement.

66. In the circumstances, the Board finds that the Procuring Entity's Tender Opening Committee failed to comply with the provisions of the Act and the Tender Document by rejecting the Applicant's bid at the subject tender's opening. This ground of review therefore succeeds and is allowed.

As to what orders the Board should grant in the circumstances:

67. The Board has established that the Tender Opening Committee of the Procuring Entity failed to comply with the provisions of the Constitution, the Act and the Tender Document by rejecting the Applicant's bid at the tender opening stage. It is only just and fair that the Procuring Entity invites participating tenderers to a tender opening meeting of the subject tender and proceed to open the Applicant's tender and subject it to evaluation alongside other tenders in line with the evaluation criteria stipulated in the Tender Document.

68. The upshot of the Board's findings is that the instant Request for Review succeeds in terms of the following final orders:

FINAL ORDERS

69. 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 this Request for Review:

A. The Applicant's Request for Review dated and filed on 14th March, 2024 in respect of Tender No. JUD/OT/047/2023-2024 for The Supply, Installation, Training, Testing And Commissioning of Court Recording and Transcription System-Audio Visual Integrator at The Judiciary Law Courts

Under Framework Contract for a period of Three (3) Years be and is hereby allowed.

B. The Respondent is hereby ordered to invite all participating bidders in the subject tender to a tender opening meeting within seven (7) days of this decision and to direct the Tender Opening Committee in the subject tender to proceed with opening of the Applicant's tender document and evaluate it alongside other tenders received in line with the evaluation criteria stipulated in the Tender Document.

C. Considering that the procurement process is not complete each party shall bear its own costs in this Request for Review.

Dated at NAIROBI this 4th Day of April 2024.


.....

PANEL CHAIRPERSON

PPARB


.....

SECRETARY

PPARB