

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 25/2024 OF 21ST MARCH 2024

BETWEEN

CDMS RESEARCH & CONSULTANCY SERVICES.....APPLICANT

AND

PRINCIPAL SECRETARY

MINISTRY OF INVESTMENT,

TRADE AND INDUSTRY.....RESPONDENT

ANJARWALLA & KHANNA (ALN KENYA).....INTERESTED PARTY

Review against the decision of the Accounting Officer, Ministry of Investment, Trade and Industry in relation to Tender No. MITI/SDT/REOI/002/2023-2024 for Consulting for Technical Advisory Services on Trade Negotiations-STIP.

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb - Chairperson
2. Ms. Jessica M'mbetsa - Member
3. Mr. Daniel Langat - Member

IN ATTENDANCE

Mr. James Kilaka - Ag. Board Secretary

Ms. Sarah Ayoo - Secretariat



PRESENT BY INVITATION

APPLICANT	CDMS RESEARCH & CONSULTANCY SERVICES
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Mr. Alex Oduol	Advocate, TLO Advocates LLP
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RESPONDENT	PRINCIPAL SECRETARY MINISTRY OF INVESTMENT, TRADE AND INDUSTRY
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Mr. Emmanuel Kieti	State Counsel, Office of the Attorney General
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INTERESTED PARTY	ANJARWALLA & KHANNA (ALN KENYA)
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Ms. Faith Macharia	Advocate, Anjarwalla &Khanna Advocates
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Mr. Daniel Ngumy	Advocate, Anjarwalla &Khanna Advocates
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BACKGROUND OF THE DECISION

The Tendering Process

1. The Ministry of Investment, Trade and Industry, the Procuring Entity together with the Respondent herein, invited submission of tenders in the form of Expressions of Interest in response to Tender No MITI/SDT/REOI for Consulting for Technical Advisory Services on Trade Negotiations-STIP using the open tender method. The subject tender's submission deadline was Friday, 22nd December 2023 at 11:00 a.m.

Submission of Tenders and Tender Opening

2. According to the signed Tender Opening Minutes for 22nd December 2023, submitted under the Confidential File submitted by the Procuring Entity, the following 8 tenderers were recorded as having submitted their respective tenders in response to the subject tender by the tender submission deadline:

No.	Name of Tenderer
1.	CDMS Research and Consultancy Services
2.	Global Standard Resource Certification USA and Kenya
3.	One Voice Consortium
4.	Anjarwalla & Khanna
5.	Integrated Development Consultants Limited
6.	Trade Hub East Africa
7.	Spantrack Consultants
8.	AMG/Jillo/Mahmoud Gitau Jillo LLP

Evaluation of Tenders

3. The Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") which was to undertake an evaluation of the received tenders in accordance with the criteria outlined at page 2 of the Tender Document.

Preliminary Evaluation Stage

4. The Procuring Entity's Evaluation Committee Report dated 5th February 2024 (hereinafter "the Evaluation Report") observes that at this stage, the tenders were checked for responsiveness on 2 parameters i.e. submission of a Valid Certificate of Registration and a Tax Compliance Certificate.

5. The evaluation was conducted on a Yes/No basis and tenders that failed to meet any of the parameters aforesaid would be disqualified from further evaluation.
6. At the end of evaluation at this stage 5 tenders were found unresponsive with only 3 tenders including that of the Interested Party qualifying for evaluation at the Technical Evaluation Stage.

Technical Evaluation Stage

7. The Evaluation Report notes that at this stage tenders, were examined on the basis of the 7-point criteria outlined under page 2 of the Tender Document. Each of the criteria in the Tender Document was assigned a weighted score.
8. The Report equally notes that tenderers had to garner a minimum score of 75 marks to qualify for further consideration.
9. At the end of evaluation at this stage only the Interested Party's and AMG/Jillo/Mahmoud Gitau Jillo LLP's tenders surpassed the 75 marks pass mark. The Interested Party's tender was ranked 1st with 90.8 marks against AMG/Jillo/Mahmoud Gitau Jillo LLP's tender that was ranked 2nd with 83.6 marks.

Evaluation Committee's Recommendation

10. Accordingly, the Evaluation Committee recommended the Interested Party as the tenderer with the appropriate qualifications, references and experience in trade capacity to support African governments on trade policy.

Professional Opinion

11. In a signed Professional Opinion dated 8th February 2024 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Head of Supply Chain Management Services, Ms. Mercy Wachira reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation of the Interested Party.
12. Thereafter on 15th February 2024, the Accounting Officer, Alfred O. K'Ombudo, expressed his concurrence with the Professional Opinion.

Notification to Tenderers

13. Accordingly, tenderers were notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 7th March 2024.

REQUEST FOR REVIEW

14. On 21st March 2024, the Applicant through the firm of TLO Advocates LLP, filed a Request for Review dated 21st March 2024 supported by an Affidavit sworn on 21st March 2024 by Samuel O. Agutu, the Applicant's Managing Director, seeking the following orders from the Board in verbatim:

a) That the proceedings of the Respondent's procurement and anything done or intended to be done pursuant thereto be annulled in entirety.

b) The Decision of the Respondent awarding the Tender to a single entity the Interested party be set aside and in place the successful bidders be substituted with the Applicant amongst other qualified bidders.

- c) That in the alternative, the Respondent be and is hereby directed to re-admit the Applicant's bid for fresh evaluation in accordance with the criteria contained in the tender document;***
- d) That the Respondent be ordered to pay costs of this Application.; and***
- e) Any other relief that the Board may deem fit to grant in the interest of justice.***

15. In a Notification of Appeal and a letter dated 21st March 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 21st March 2024.
16. On 2nd April 2024, the Respondent filed a Memorandum of Response in form of an Affidavit by Alfred O. K'Ombudo. The Respondent also forwarded to the Board the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.
17. Vide letters dated 2nd April 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.

18. On the same day, 2nd April 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 20th March 2024 notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 4th April 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
19. On 3rd March 2024, the Interested Party through Anjarwalla & Khanna LLP filed a Replying Affidavit sworn on 2nd April 2024 by Daniel Ngumy, the Interested Party's Co-Managing Partner.
20. On 4th April 2024 at 11:00 a.m., the parties through their respective Advocates joined the scheduled online hearing session.
21. The Board read out to the parties the documents that had been filed in the Request for Review and sought for each party to confirm that each of the said documents had been served upon them. Parties' Advocates confirmed having filed and been served with each of the documents in the Request for Review.
22. However, Counsel for the Applicant, Mr. Oduol, took issue with what he termed as late service of the responses by the parties herein. He contended that the Respondent and Interested Party took longer than the statutory-ordained timelines to file their responses and urged the Board to strike out the lately-filed documents. Nonetheless, Counsel indicated that he was ready for the hearing as earlier scheduled.

23. The Board then gave hearing directions on the order of address being that the Applicant would go first, thereafter the Respondents and Interested Parties would offer submissions in response with the Applicant closing with a rejoinder on the Respondents' and Interested Parties' submissions.

PARTIES SUBMISSIONS

Applicant's Submissions

24. Counsel for the Applicant, Mr. Oduol, argued that the Applicant was aggrieved by the decision to disqualify it from the subject tender for not supplying a Tax Compliance Certificate. He urged that a Tax Compliance Certificate was not among the mandatory requirements outlined in the Tender Document.
25. Counsel contended that in as much as Section 55(1)(f) of the Act requires a tenderer to demonstrate compliance with its tax obligations, the section ought to be read alongside Section 55(4) of the Act which requires the Procuring Entity to request for such information from tenderers. Further, that the unilateral introduction of this requirement at the evaluation stage of the subject when this was not provided for in the Tender Document made the tender process invalid for lack of transparency.
26. Mr. Oduol argued that the Procuring Entity also awarded the subject tender to a single tenderer in disregard of the fact that the subject tender was in the form of an Expression of Interest that ordinarily has 2 stages i.e. Expression of Interest Stage followed by the Proposal Stage.

27. He urged that the procedure under Part X of the Act on Procuring of Services was applicable. Under Section 121(3) of the Act a minimum of 6 proposals should have been shortlisted but the Respondent had only shortlisted the Interested Party herein in contravention of the Act. Counsel took the view that in doing so, the Procuring Entity had pre-empted the Interested Party as the successful tenderer before getting to the Proposal Stage. He therefore urged the Board to allow the Request for Review.

Respondent's Submission

28. Counsel for the Respondent, Mr. Kieti, indicated that the Respondent would be placing reliance on their filed documents i.e. Memorandum of Response and documents constituting the Confidential File under Section 67(3) of the Act.
29. Counsel argued that Section 55(1)(f) of the Act sets out the criterion of demonstrating fulfillment of tax obligations and that this is demonstrated by a tenderer submitting a Tax Compliance Certificate.
30. He equally contended that the Tender Document made reference to a requirement for valid statutory documents. According to Counsel, the statutory documents in question included a Tax Compliance Certificate.
31. Relying on ***PPARB Application No. 15 of 2024; Nash Eq Inc v Accounting Officer Sacco Societies Regulatory Authority & Ors***, Counsel argued that Section 79(1) of the Act provides that a tender is responsive if only it complies with eligibility and mandatory requirements.
32. Counsel argued that the evaluation process had to be done in compliance with the Constitution of Kenya, 2010 as well as statute. Further, that the

requirement for a Tax Compliance Certificate was required of all tenderers and not just the Applicant.

33. He argued that the Procuring Entity used the Consultants' Qualification Selection method as set out under Regulation 126 of the Regulations 2020. Further, that an award was yet to be made in respect of the subject tender and that only the selected firms would receive the Terms of Reference which would constitute the 2nd stage of the tender process. Accordingly, the procedure adopted by the Procuring Entity was compliant with the law.

Interested Party's Submissions

34. Counsel for the Interested Party, Ms. Macharia indicated that the Interested Party would be relying on their filed Replying Affidavit and would equally associate themselves with the submissions made on behalf of the Respondent.
35. Counsel referred the Board to the bottom of page 3 of its Annexure i.e. the Tender Document and pointed out that only the selected firm would receive the final Terms of Reference and be invited to submit a Technical and Financial proposal and therefore no tender had been awarded as at the time of filing the Request for Review.
36. She refuted the allegation that the Procuring Entity had adopted a single sourcing process in shortlisting the Interested Party.
37. Ms. Macharia contended that section 121 of the Act applies to framework agreements and that that the Tender in question is not in respect of framework agreements by Request for Proposals.

38. Counsel pointed out that one of the shortlisting criterion was technological and managerial capacity supported by any valid statutory document. She argued that the Interested Party interpreted this to mean legal and official documents that would confirm registration and compliance with various laws including tax laws and therefore it attached its Tax Compliance Certificate as part of the valid statutory documents.
39. It was Counsel's submission that the Tender Document indicated that the tender process would be subject to the Act and Section 55(1)(f) of the Act requires a tenderer to demonstrate it had satisfied its tax obligations. According to Counsel, it was therefore mandatory for tenderers to submit a valid Tax Compliance Certificate.
40. Ms. Macharia equally pointed out that the Interested Party did not participate in the decision making of the Respondent in respect of the evaluation of the tenders received in the subject tender.
41. She further indicated that the Interested Party filed its response in a timely manner having been served on 2nd April 2024, it put in its response on 3rd April 2024.
42. She argued that even assuming the service was made 28th March 2024, computing days with the guidance of Section 57 of the Interpretation and General provisions Act would yield that the Interested Party filed its response on the 2nd day.

Applicant's Rejoinder

43. In a brief rejoinder, Counsel for the Applicant, Mr. Oduol, differed with the Interested Party's suggestion that Section 121 of the Act was inapplicable. According to Counsel, Part X of the Act related to Consultancy Services.

44. He argued that under the subject procurement process, the Procuring Entity appeared to presuppose that it would only receive a single proposal i.e. from the Interested Party for determination of the successful tenderer.
45. He stated that the Interested party was first served on email on 22nd March 2024 but they chose to ignore the email and thus owing to the time-sensitive nature of procurement disputes, he sought for the response to be expunged from the record.

CLARIFICATIONS

46. The Board sought parties comment on Section 55 (1)(f) of the Act and 55(4) of the Act. Counsel for the Respondent indicated that the Respondent's decision to disqualify the Applicant was informed by the specific criteria under the Tender Document that included statutory documents as part of the requirements.
47. Counsel for the Interested Party, Ms. Macharia, indicated that section 55(1)(f) lists a Tax Compliance Certificate as an eligibility requirement and under Section 55(4) all provisions of the Act became applicable including the provision on tax compliance.
48. The Board sought clarity from the Applicant on the documents it provided as its valid statutory document to which Counsel for the Applicant Mr. Oduol, indicated that they provided a Certificate of Incorporation.
49. The Board equally sought to know from the Applicant whether it had participated in other tenders and if yes, whether it submitted a valid Tax Compliance Certificate as part of its tender in the said tenders. Counsel

for the Applicant, Mr. Oduol answered in the affirmative citing that the Applicant had previously submitted its Tax Compliance Certificate in tenders that explicitly called for the document.

50. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 21st March 2024 the same had to be determined by 11th April 2024. Therefore, the Board would communicate its decision on or before 11th April 2024 to all parties via email.

BOARD'S DECISION

51. The Board has considered all documents, oral submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:
- I. ***Whether the Board should strike out the responses by the Respondent and Interested Party to the instant Request for Review?***
 - II. ***Whether the Applicant was properly disqualified from the subject tender ?***
 - III. ***Whether the Procuring Entity properly processed the he Expression of Interest received in the subject tender?***
 - IV. ***What orders should the Board issue in the circumstance?***

Whether the Board should strike out the responses by the Respondent and Interested Party to the instant Request for Review?

52. At the commencement of the hearing of the instant Request for Review, Counsel for the Applicant, Mr. Oduol, urged the Board to strike out the

responses filed to the Request for Review on account of them being filed outside time.

53. Counsel for the Interested Party, Ms. Macharia, refuted the allegation that the Interested Party's response to the Request for Review was filed outside the statutory timeline. She argued that the Interested Party filed its response in a timely manner since having been served with the Request for Review on 2nd April 2024, it put in its response on 3rd April 2024.
54. She argued that even assuming the Request for Review was served upon the Interested Party on 28th March 2024, computing days with the guidance of Section 57 of the Interpretation and General provisions Act would yield that the Interested Party filed its response on the 2nd day from the date of service.
55. Section 168 of the Act places an obligation on the Board Secretary to notify the Accounting Officer of the pendency of a Request for Review in respect of their Procuring Entity's tender process in the following terms:
- 168. Notification of review and suspension of proceedings***
Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed.
56. Regulation 205 of the Regulations 2020 on its part specifies sequence of events and timelines of the handling of the notification:

205. Notification of the review and suspension of procurement proceedings

(1) The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.

(2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the Review Board Secretary.

(3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified.

(4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.

(5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3).

57. From Regulation 205 above, (i) the Board Secretary is mandated the role of serving a notice of the filing of a Request for Review upon the Accounting Officer of a Procuring Entity whose procurement process is being challenged; (ii) an Accounting Officer who is served upon with such

notice is expected to file a Memorandum of Response to the Request for Review within 5 days or such lesser period as will be specified in the notice; and (iii) the Board Secretary notifies the tenderers in the impugned tender process, of the filing of the Request for Review upon receipt of the Accounting Officer's Memorandum of Response.

58. The Board has confirmed from its records that:

- i. The Request for Review was filed on 21st March 2024 at around 3:15 p.m.
- ii. The Board Secretary sent out a Notification of Appeal dated 21st March 2024 ,a letter of even date and a copy of the filed Request for Review via email on 21st March 2024 at 6.55 p.m. In the Notification, the Respondent was given 5 days to submit its Memorandum of Response to the Request for Review.
- iii. The Respondent filed its Memorandum of Response to the Request for Review on 2nd April 2024 at around 12:15 p.m.
- iv. The Board Secretary sent out a notification to the Interested Party herein and the rest of the tenderers in the subject tender on 2nd April 2024 the Notification required the Interested to file their response within 3 days.
- v. The Interested Party filed their Replying Affidavit in response to the Request for Review on 3rd April 2024 at around 3:15 p.m.

59. From the above, the Board notes that the Respondent had 5 days from 21st March 2024 when they were served with the Request for Review to file their Memorandum of Response. Computing 5 days from the date of service lands 26th March 2024 as the last day to file the Memorandum of Response. The Respondent having filed their Memorandum of Response on 2nd April 2024 was 7 days late and therefore outside time.

60. The Board has equally noted that the Interested Party herein had 3 days from 2nd March 2024 when they were served with the Request for Review to file a response. Computing 3 days from the date of service lands 5th March 2024 as the last day of filing a response. The Interested Party having their Replying Affidavit on 3rd April 2024 were therefore within the timelines afforded to them.
61. At this juncture the Board is confronted with the question on what it is to make of the Respondent's and Interested Party's responses to the Request for Review. For the Interested Party's Replying Affidavit, the same having been filed within the stipulated timelines is properly on record and this Board holds as such. It is the fate of the Respondent's Memorandum of Response that was filed outside time that the Board has to determine.
62. Regulation 205 of the Regulations 2020 gives an Accounting Officer whose Procuring Entity's procurement process is under challenge 5 days or such lesser period to file their Memorandum of Response to a Request for Review. The same Regulation creates criminal sanctions against an Accounting Officer who fails to comply with the timelines for filing of the Memorandum Response.
63. Article 159 of the Constitution of Kenya, 2010 equally enjoins judicial bodies when exercising judicial authority to overlook procedural technicalities.
64. Balancing the above provisions of the law with the right to access justice and fair hearing by parties, the Board is duty-bound to examine the prejudice suffered, if any, for the Respondent's delay in filing of their Memorandum of Response.

65. During the hearing of the instant Request for Review, Counsel for the Applicant, Mr. Oduol, despite complaining of the late filing of responses by the parties, did not indicate the prejudice that it stood to suffer on account of the late filing. In fact, Counsel for the Applicant indicated that he was ready to proceed with the hearing as earlier scheduled. Further, parties to the Request for Review, including the Applicant, made extensive and elaborate submissions on the merits of the Request for Review. It would therefore suffice, that though the Respondent was late in filing their Memorandum of Response, no prejudice was occasioned to any of the parties herein.
66. In view of the foregoing the Board shall not strike out the responses by the Respondent and Interested Party to the instant Request for Review. The Interested Party's Replying Affidavit was timeously filed and the Respondent's Memorandum of Response albeit filed outside time, did not occasion any prejudice to the parties herein.

Whether the Respondent's Evaluation Committee properly disqualified the Applicant from the subject tender?

67. The Applicant took issue with its disqualification from the subject tender on account of failing to submit a Tax Compliance Certificate. According to Counsel for the Applicant, Mr. Oduol, a Tax Compliance Certificate was not among the mandatory requirements outlined in the Tender Document and thus this could not constitute a valid ground for the Applicant's disqualification.

68. Mr. Oduol argued that the Procuring Entity also awarded the subject tender to a single tenderer in disregard of the fact that the subject tender was in the form of an Expression of Interest that ordinarily has 2 stages i.e. Expression of Interest Stage followed by the Proposal Stage. Further that this was in breach of Section 121(3) of the Act since the Procuring Entity's Evaluation Committee was required to shortlist a minimum of 6 tenderers at the first stage.
69. On the flip side, the Respondent refuted any breach on the part of the Procuring Entity in the subject tender and that the Applicant was properly disqualified for failure to include as part of its tender, a Tax Compliance Certificate. Counsel for the Respondent, Mr. Kieti, argued that Section 55(1)(f) of the Act enlisted fulfillment of tax obligations as an eligibility requirement for tenderers in any tender. Further that the Tender Document made reference to a requirement for valid statutory documents which according to Counsel, included a Tax Compliance Certificate.
70. He argued that the Procuring Entity used the Consultants' Qualification Selection method as set out under Regulation 126 of the Regulations 2020. Further, that an award was yet to be made in respect of the subject tender and that only the selected firms would receive the Terms of Reference which would constitute the 2nd stage of the tender process. Accordingly, the procedure adopted by the Procuring Entity was compliant with the law.
71. The Interested Party, while clarifying that they were not involved in the evaluation of the tenders received in the subject tender, supported the position of the Respondent on the disqualification of the Applicant. Counsel for the Interested Party, Ms. Macharia, submitted that under

Tender Document there would be 2 levels of evaluation and that only tenderers successful at the first level would receive the final Terms of Reference and be invited to submit a Technical and Financial proposal. She was therefore of the view that no tender had been awarded as at the time of filing the Request for Review.

72. Ms. Macharia contended that section 121 of the Act applies to Framework Agreements and that that the Tender in question is not in respect of framework agreements by Request for Proposals.
73. Counsel pointed out that one of the shortlisting criterion was technological and managerial capacity supported by any valid statutory document. She argued that the Interested Party interpreted this to mean legal and official documents that would confirm registration and compliance with various laws including tax laws and therefore it attached its Tax Compliance Certificate as part of the valid statutory documents. Further, that the Tender Document indicated that the tender process would be subject to the Act and Section 55(1)(f) of the Act requires a tenderer to demonstrate it had satisfied its tax obligations. According to Counsel, it was therefore mandatory for tenderers to submit a valid Tax Compliance Certificate.
74. The Board is therefore at this stage invited to interrogate the Procuring Entity's Evaluation Committee's evaluation process that culminated in the disqualification of the Applicant's tender .
75. Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of tenders in the following terms:

"80. Evaluation of tenders

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

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

"79. Responsiveness of tenders

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

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

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

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

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

a) be quantified to the extent possible; and

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

77. This Board is further guided by the dictum of the High Court in ***Republic v Public Procurement Administrative Review Board & 2 others Ex parte BABS Security Services Limited [2018] eKLR; Nairobi***

Miscellaneous Application No. 122 of 2018 where the court while considering a judicial review application against a decision of this Board illuminated on the responsiveness of a tender under section 79 of the Act:

"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be

non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.”

See also ***Nairobi High Court Judicial Review Misc. Application No. 407 of 2018; Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR and PPARB Application No. 15 of 2024; Nash Eq Inc v Accounting Officer Sacco Societies Regulatory Authority & Ors***

78. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.
79. Turning to the Tender Document, the entire evaluation criteria is set out at pages 2 to 3 of the Document in the following terms:

Interested Consultants should provide information demonstrating that they have the required qualifications and relevant experience to perform the Services. The shortlisting criteria are:

- A track record of providing trade capacity building to support African governments on trade policy for a period of at least 5 years.***
- Access to a team that possesses the requisite professional and academic qualifications and relevant experience in both United States and Kenyan trade policy***
- Team Leader should possess a Master degree in Economic, International Trade, Development Economics, Law or any other relevant qualification; and not less than 10 years' experience in trade capacity building, of which 5 includes advisory support for trade negotiations.***
- Agriculture and Sanitary and Phyto-Sanitary (SPS) Expert should possess a Masters or Bachelor Degree in a field related to Agriculture, Agricultural Economics, Food Safety, Animal Health, Plant Health or Public Health and***

understand geo-politics shaping global trade and international relations that may impact the negotiations;

- ***Further, experts will be required for the following areas: Services Domestic Regulation; Digital Trade; Environment and Climate Action; Promoting Workers Rights and Protections; Supporting Participation of Women, Youth and Others in Trade.***
- ***Technical and managerial capability of the consulting firm which should be supported by detailed company profiles, organogram and any valid statutory and supporting documents.***
- ***The consulting firm must be legally registered and established in Kenya.***

80. From the above, it is apparent that the tenderers in the subject tender were to be evaluated on the basis of the 7 criteria above which the included technical and managerial capability criterion as outlined above.

81. Under the technical and managerial criterion above, tenderers were to demonstrate technical and managerial capability by providing detailed company profiles, organogram and **any valid statutory and supporting documents.** It would therefore follow that any tenderer who provided a combination of a detailed company profile, organogram and any valid statutory and supporting documents would be responsive to the technical and managerial criterion. Conversely, any tenderer who failed to provide a combination of a detailed company profile, organogram and any valid statutory and supporting documents would be unresponsive to this criterion.

82. The Board shall now interrogate the Applicant's compliance with this requirement under the Tender Document.
83. It is not in dispute that the Applicant supplied its detailed Company Profile, Organogram as well as Certificate of Registration. However, the Applicant was disqualified on account of not submitting a Tax Compliance Certificate.
84. From the Board's reading of the technical and managerial criterion above, the same does not specifically mention that tenderers were to supply their Tax Compliance Certificates. The criterion only mentions "any valid statutory and supporting documents" for purposes of establishing the technical and managerial capability of the consulting firm.
85. The Board is mindful to Section 55(1) of the Act which spells out the eligibility requirements of tenderers in the following terms:

5. Eligibility to bid

(1) A person is eligible to bid for a contract in procurement or an asset being disposed, only if the person satisfies the following criteria—

(a) the person has the legal capacity to enter into a contract for procurement or asset disposal;

(b) the person is not insolvent, in receivership, bankrupt or in the process of being wound up;

(c) the person, if a member of a regulated profession, has satisfied all the professional requirements;

(d) the procuring entity is not precluded from entering into the contract with the person under section 38 of this Act;

(e) the person and his or her sub-contractor, if any, is not debarred from participating in procurement proceedings under Part IV of this Act;

(f) the person has fulfilled tax obligations;

(g) the person has not been convicted of corrupt or fraudulent practices; and

(h) is not guilty of any serious violation of fair employment laws and practices.

(2) A person or consortium shall be considered ineligible to bid, where in case of a corporation, private company, partnership or other body, the person or consortium, their spouse, child or sub-contractor has substantial or controlling interest and is found to be in contravention of the provisions of subsection (1) (e), (f), (g) and (h).

(3) Despite the provisions of subsection (2), a person or other body having a substantial or controlling interest shall be eligible to bid where—

(a) such person has declared any conflict of interest; and

(b) performance and price competition for that good, work or service is not available or can only be sourced from that person or consortium.

(4) A State organ or public entity shall require a person to provide evidence or information to establish that the criteria under subsection (1) are satisfied.

(5) A State organ or public entity shall consider as ineligible a person for submitting false, inaccurate or incomplete information about his or her qualifications.

86. From Section 55(1) above, for a tenderer to be eligible to participate in a public procurement or asset disposal process, they ought to meet the eligibility criteria in the sub-section, which includes fulfilment of tax obligations. Further, **Section 55(4) of the Act places an obligation on the part of the Procuring Entity to require interested participants in public procurement and asset disposal processes to provide evidence or information on satisfying the eligibility criteria under Section 55(1) of the Act.(emphasis ours)**
87. Additionally, Section 74 of the Act places an obligation on the part of the Accounting Officer of a Procuring Entity to oversee the preparation of the invitation to tender:

"74. Invitation to tender

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

- (a) the name and address of the procuring entity;***
- (b) the tender number assigned to the procurement proceedings by the procuring entity;***
- (c) a brief description of the goods, works or services being procured including the time limit for delivery or completion;***
- (d) an explanation of how to obtain the tender documents, including the amount of any fee, if any;***
- (e) an explanation of where and when tenders shall be submitted and where and when the tenders shall be opened;***
- (f) a statement that those submitting tenders or their representatives may attend the opening of tenders;***

(g) applicable preferences and reservations pursuant to this Act;

(h) a declaration that the tender is only open to those who meet the requirements for eligibility;

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

(j) any other requirement as may be prescribed.

(2) All tender documents shall be sent out to eligible bidders by recorded delivery."

88. Section 74(1)(h) above, requires that the Accounting Officer should ensure that an Invitation to Tender should spell out a declaration that the tender is only open to the participants meeting the eligibility requirements.

89. From the above provisions of the Act:

- i. Section 55(1)(f) sets fulfilment of tax obligations as an eligibility requirement for a tenderer to participate in a public procurement or asset disposal process. Compliance with tax obligations is usually by way of presenting a Tax Compliance Certificate.
- ii. Section 55(4) obligates the Procuring Entity to require participants in a public procurement or asset disposal process to demonstrate by evidence or information compliance with the eligibility requirements under Section 55(1) which include fulfilment of tax obligations. Ideally, the Procuring should request tenderers to supply a Tax Compliance Certificate.
- iii. Section 74(1)(h) obligates the Accounting Officer to oversee the preparation of an Invitation to Tender which should expressly indicate that the tender in question is only open to the participants meeting the eligibility requirements. In the subject tender, the

Respondent was bound to communicate in the Invitation to Tender that the subject tender was only open to the participants meeting the eligibility requirements in Section 55 of the Act.

90. The Board has already observed that there was no express requirement in the Tender Document for a tenderer to provide a Tax Compliance Certificate. The Tender Document made reference to “any valid statutory and supporting document”, which in the Board’s view could be any document provided for under statute and this includes but is not limited to a Certificate of Registration, PIN Certificate, Tax Compliance Certificate, NSSF Certificate etc.
91. We are unable to agree with the Respondent’s and Interested Party’s argument that the Tax Compliance Certificate was a mandatory requirement in the subject tender since Section 55(1)(f) enlists fulfilment of tax obligations as an eligibility requirement for tenders participating in public tenders. We say so because Section 55(1)(f) of the Act cannot be read in isolation of Section 55(4) which places an obligation on the Procuring Entity to require tenderers to supply evidence or information on meeting the eligibility requirements under Section 55(1) of the Act. In the present case, the Respondent did not adduce any evidence that it at any point requested the Applicant to supply its Tax Compliance Certificate. Further, a Tax Compliance Certificate was also not expressed as a requirement in the Tender Document.
92. The Act recognizes the place of taxation in the development of country and that why Procuring Entities are mandated to require participants in its tender processes to provide evidence or information on compliance with the eligibility requirements which include fulfilment of tax obligations. The Procuring Entity failed to request the Applicant to confirm its

fulfilment of its tax obligations and its Tender Document equally did not specify a Tax Compliance Certificate as part of its evaluation criteria in the subject tender. It would therefore follow that disqualifying the Applicant on account of not submitting a Tax Compliance Certificate was erroneous.

93. The Board therefore finds that the Respondent's Evaluation Committee did not properly evaluate and disqualify the Applicant from the subject tender .
94. That from the foregoing, the criteria for evaluation seems to be a moving target for lack of certainty and therefore lacks the essential ingredients of fairness, equitableness, transparency, competitiveness and cost-effectiveness.

Whether the Procuring Entity properly processed the Expressions of Interest it received in the subject tender?

95. During the hearing of the Request of Review, parties took different views on the manner in which the Procuring Entity processed the Expressions of Interest they received in the subject tender. The Applicant took the view that the Procuring Entity processed the Expressions of Interest in breach of Section 121 of the Act by only shortlisting the Interested Party herein. Counsel for the Applicant Mr. Oduol, argued that the Procuring Entity ought to have shortlisted at least 6 tenderers who would then be invited to offer both technical and financial proposals. It was his argument, that shortlisting the Interested Party alone amounted to single sourcing.

96. On the flip side, the Respondent and the Interested Party took the view that the Procuring Entity properly processed the Expressions of Interest in the subject tender. Specifically, Counsel for the Respondent, Mr. Kieti argued that the shortlisting of the Interested Party only constituted the first stage of the subject tender and that it was premature to say that the Interested Party had been awarded the subject tender.
97. Counsel for the Interested Party, Ms. Macharia, supporting the Respondent's position argued that the tender involved two stages and that the Tender Document spelt out that only shortlisted tenderers would be granted the Terms of References for purposes of submission of their technical and financial offers. She equally argued that Section 121 of the Act was inapplicable to the subject tender since the tender in question was not that of a Framework Agreement.
98. This Board is therefore invited at this Stage to interrogate the processing of the Expressions of Interest received in the subject tender.
99. For starters, the Tender Document expresses itself to invite tenderers to submit their tenders in the form of Expressions of Interest. Accordingly, the applicable laws and processes are those that govern the evaluation of Expressions of Interest.
100. Section 121 of the Act provides for the evaluation and shortlisting of Expressions of Interest in the following terms:

121. Evaluation and shortlisting

(1) The evaluation committee shall, in writing, record the results of its evaluation of applications for expression of interest using the evaluation criteria in the expression of interest notice and documents and shall state which

candidates were found to be qualified and the reasons why any candidates were not qualified.

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the expression of interest documents and shall, in the case of expression of interest for professional services, 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) Subject to total proposals received, a minimum of six proposals shall be shortlisted, but where less than six proposals have been received, a minimum of three proposals shall be shortlisted.

(4) The record of results prepared under subsection (1) shall be submitted to the accounting officer for review and approval.

(5) Notwithstanding provisions of subsection (3), where a repeat process fails to yield the requisite numbers of qualified candidates, the procuring entity shall proceed with the subject procurement and make a report to the Authority.

101. From Section 121(2) and (3) above, the Evaluation Committee is obligated to compare the tenders received in accordance with the procedures and criteria set out in the Expression of Interest Document. Further, the Evaluation Committee is expected subject to the tenders received to shortlist a minimum of 6 tenders but where less than 6 tenders are received, shortlist a minimum of 3 tenders. Section 121(5) of the Act contemplates a repeat of the tender process where it impossible to shortlist the minimum contemplated minimum number of 6 or 3 tenders,

as the case may be, in the first round. However, where the repeat process fails to yield the required number of shortlisted tenders, the Procuring Entity is at liberty to proceed with its fewer shortlisted tenders but it should make a Report on this to the Public Procurement Regulatory Authority.

102. In the subject tender, the Procuring Entity received a total of 8 tenders in response to the tender invitation and therefore it was expected that at least 6 tenderers would be shortlisted. However, from the Evaluation Report forming part of the Confidential File, only the Interested Party herein was shortlisted as the successful tenderer at the Expression of Interest Stage. During the hearing, the Procuring Entity did not indicate to the Board whether it attempted to make a fresh invitation in attempt to meet the minimum threshold of shortlisted tenderers. The Board finds no difficulty in holding the Evaluation Committee fell in error in only shortlisting the Interested Party as the successful tenderer at the Expression of Interest Stage.
103. We are unable to follow through the argument raised by the Counsel for the Interested Party, Ms. Macharia, that Section 121 of the Act was inapplicable. We say so because there is nothing in Section 121 of the Act makes reference to Framework Agreements as alleged by Counsel. On the contrary, the section addresses itself to Expressions of Interest just like the one forming the subject of this Request for Review.
104. In view of the foregoing, the Board finds that the Procuring Entity did not properly process the Expressions of Interest it received in the subject tender.

What orders the Board should grant in the circumstances?

105. The Board has found that it shall not strike out the responses by the Respondent and Interested Party to the instant Request for Review. The Interested Party's Replying Affidavit was timeously filed and the Respondent's Memorandum of Response albeit filed outside time, did not occasion any prejudice to the parties herein.
106. The Board has equally found that the Respondent's Evaluation Committee did not properly evaluate and disqualify the Applicant from the subject tender.
107. In ordinary circumstances where the Board establishes that a tenderer was unfairly disqualified from a tender process, the appropriate relief is usually for the tenderer to be evaluated afresh at the material stage. However, the unique circumstances of this case make such a remedy impractical:
- i. The Tender Document contains vague statements and equally vague evaluation criteria. The technical and managerial criterion makes reference to "any valid statutory and supporting documents" which wording lacks specificity on the nature of documents the Procuring Entity seeks from tenderer.
 - ii. The Tender Document equally does not list the applicable eligibility requirements under Section 55(1) of the Act as part of its evaluation criteria.
 - iii. The Tender Document does not provide for a scoring mechanism to establish how the different evaluation criteria are weighted. This

undermines competition as one cannot objectively review the manner in which different tenders are scored.

108. In view of the foregoing, the Evaluation Criteria as set out in the Tender Document in the subject tender cannot guarantee a tender process that is fair, equitable, transparent, competitive and cost effective and is violative of Article 227 of the Constitution, and section 55(4),74(1)(h),79(1),80(2),(3) and 121 of the Act addressed hereinabove. The document as is makes it impossible for one to objectively compare the qualifications of one tenderer against the next. Accordingly, it would be in the interest of justice that the subject tender be terminated and fresh one conducted with a Tender Document that clearly sets out the evaluation criteria in keeping with the Act and the Constitution.

109. The upshot of our finding is that the Request for Review dated 21st March 2024 in respect of Tender No. MITI/SDT/REOI/002/2023-2024 for Consulting for Technical Advisory Services on Trade Negotiations-STIP succeeds in so far as in the following specific terms:

FINAL ORDERS

110. 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 21st March 2024:

1. The Letters of Notification dated 7th March 2024 addressed to the successful and unsuccessful tenderers in Tender No. MITI/SDT/REOI/002/2023-2024 for Consulting for Technical


Advisory Services on Trade Negotiations-STIP be and are hereby cancelled and set aside.

2. Tender No. MITI/SDT/REOI/002/2023-2024 for Consulting for Technical Advisory Services on Trade Negotiations-STIP be and is hereby annulled in its entirety.

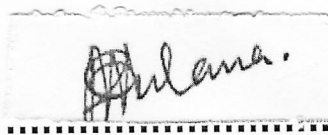
3. The Respondent is at liberty to seek the technical assistance of the Public Procurement Regulatory Authority in its preparation of a new Tender Document having regard to the findings of the Board in this Decision.

4. Each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 11th Day of April 2024.


.....
CHAIRPERSON

PPARB


.....
SECRETARY

PPARB