REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 29/2024 OF 9TH APRIL 2024

BETWEEN

SIPCA SA ..... APPLICANT

AND

THE ACCOUNTING OFFICER,
KENYA BUREAU OF STANDARDS ..... 1ST RESPONDENT
KENYA BUREAU OF STANDARDS ..... 2ND RESPONDENT

Review against the decision of the Accounting Officer, Kenya Bureau of Standards in relation to Tender No. KEBS/T029/2023/2024 for Provision of Printing KEBS Standardization Mark Stickers

BOARD MEMBERS PRESENT

1. Mr. George Murugu FCIArb - Chairperson
2. QS Hussein Were - Member
3. Dr. Susan Mambo - Member

IN ATTENDANCE

Mr. James Kilaka - Ag. Board Secretary

Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT	**SICPA SA**
Mr. Kithinji Marete	Advocate, Kithinji Marete & Co. Advocates
RESPONDENTS	**THE ACCOUNTING OFFICER, KENYA BUREAU OF STANDARDS** **KENYA BUREAU OF STANDARDS**
Ms. Beatrice Maina	Advocate, Kenya Bureau of Standards

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Bureau of Standards, the Procuring Entity together with the 1st Respondent herein, invited submission of tenders in response to Tender No. KEBS/T029/2023/2024 for the Provision of Printing KEBS Standardization Mark Stickers using the open international tender method. The tender submission deadline was set as Tuesday, 16th April 2024at 1000 hours.

Submission of Tenders and Tender Opening

2. However, before the tender closing deadline the Applicant instituted the instant proceedings challenging the procurement process in respect of the subject tender.

REQUEST FOR REVIEW

3. On 9th April 2024, the Applicant through the firm of Kithinji Marete Advocates, filed a Request for Review dated 9th April 2024 supported by

an Affidavit sworn on 9th April 2024 by Lilian Atogo, a General Manager at Sicpa Kenya Limited and a donee of a Power of attorney by the Applicant, seeking the following orders from the Board in verbatim:

a) The Procuring Entity expunges from the Tender Document for KEBS/T029/2023/2024 being a Tender for Provision of Printing KEBS Standardization Stickers, at Section III-Evaluation and Qualification Criteria-Tenderers Eligibility and Qualification Documents the following Clauses of therein:

i. ***Clause 1 on Eligibility Sub-Clause 1(xii):***

ii. ***Clause 2 Mandatory Requirements, Sub-Clause 11(VIII) to wit***

"The tenderer or of its associates (sic) must not have been convicted or paid any fines anywhere in the world, directly or indirectly for any irregularities regarding Government Contracts such as bribery or organizational deficiency" (hereinafter referred to as "offending clause")

b) In the alternative or in addition to Prayer a) above, the Procuring Entity's Tender Document for KEBS/TO29/2023/2024 Tender for the Provision of Printing KEBS Standardization Mark Stickers be and is hereby nullified and set aside;

c) The Procuring Entity be directed to prepare a new Tender Document for the Tender for the Provision of Printing KEBS Standardization Mark Stickers within such time as the Honourable Board shall determine which Tender Document shall exclude the offending clause;

d) The Procuring Entity be directed to re-tender for the Provision of Printing KEBS Standardization Mark Stickers in compliance with foregoing Orders, within such time as the Honourable Board shall determine;

e) The costs of this Review for Request (sic) be awarded to the Applicant;

f) Such other or further relief or reliefs as this Board shall deem just and expedient.

4. In a Notification of Appeal and a letter dated 9th April 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said 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 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 9th April 2024.

5. On 12th April 2024, the Respondents, through Beatrice Maina-Advocate filed a Memorandum of Response dated 12th April 2024. The Respondents also forwarded to the Board the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.

6. On 18th April 2024, the Applicant filed a Supplementary Statement in the form of an Affidavit sworn on 18th April 2024 by Lilian Atogo.

7. On 19th April 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 19th April 2024 notifying parties that the hearing of the instant Request for Review would be by online hearing on 23rd April 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.

8. On 22nd April 2024, the Acting Board Secretary, sent out to the parties a new Hearing Notice dated 22nd April 2024 rescheduling the hearing of the instant Request for Review to 24th April 2024 at 2:30 p.m.

9. On 23rd April 2024, the Respondents filed Written Submissions of even date.

10. On 24th April 2024 at 2:30 p.m., the parties joined the scheduled online hearing session through their respective Advocates.

11. 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. Counsel for the respective advocates acknowledged filing and receipt of service of the documents filed in the matter.

12. The Board then gave hearing directions on the order of address being that the Applicant would go first, thereafter the Respondents with the Applicant closing with a rejoinder on the Respondents' submissions.

PARTIES SUBMISSIONS

Applicant's Submissions

13. Counsel for the Applicant, Mr. Marete, indicated that the Applicant would be relying on its filed documents i.e. Request for Review, Further Statement, Written Submissions and Bundle of Authorities.

14. Mr. Marete argued that upon purchasing the Tender Document, the Applicant realized that it contained flaws and that took this up with the Respondents to no avail. Relying ***on PPARB Application No. 6 of 2018; Epco Builders Limited v Kenya Medical Supplies Authority***, the Applicant argued that the appropriate time to challenge a tender process with a faulty Tender Document is when a party first gains knowledge of the fault in the document.

15. He argued that the Applicant took issue with Clause 1 on Eligibility Sub-Clause 1(xiii) and Clause 2 of the Mandatory Requirements, Sub-Clause 11(VIII) for non-conformity with the Constitution of Kenya, 2010, the Act and Regulations 2020. He argued that Sections 58 and 70 of the Act and Regulation 68 of the Regulations 2020 required an Accounting Officer to use Standard Procurement and Asset Disposal Documents from the Public Procurement Regulatory Authority (hereinafter "the Authority"). Further the Tender Document should contain enough information to allow fairness, equitability, transparency, cost-effectiveness and competition.

16. Counsel argued that the 1st Respondent departed from Tender Document No. 7 as uploaded on the Authority's website citing the Standard Tender Document by the Authority does not mention "organizational deficiency" unlike the Tender Document used in the subject tender. Further, that the

Applicant had participated in the Procuring Entity's past tenders which did not include the words "organizational deficiency".

17. Mr. Marete argued that the Procuring Entity resorted to use of subjective words contrary to Regulation 68(4) that requires an Accounting Officer to prepare a Tender Document that clearly indicates the technical and financial evaluation criteria that is quantifiable , measurable and objective. Further that Section 80(3) of the Act required the evaluation criteria to be objective.

18. He contended that the Respondents attempted to offer a definition of "organizational deficiency" without offering a basis of the definition. That the Respondents equated organizational deficiency to bribery in the Tender Document yet bribery is contemplated in the law while referring to the Anti-Corruption and Economic Crimes Act which defines corruption to include bribery. Counsel was emphatic that "organizational deficiency" was not anchored in any law.

19. Mr. Marete questioned the legal basis for the inclusion of "organizational deficiency", the body of law offering its definition and the extent of the verifying of the phenomena constituting organization deficiency. While referring to Section 62 of the Act, Regulation 47 of the Regulations 2020 and Clause 3 under Section I-Instructions To Tenderers, he argued that the words "organizational deficiency" would not be taken as addressing the vices of fraud and corruption as these are addressed in the Act, Regulations and the Tender Document.

20. Counsel pointed out that Clause 2 of the Guidelines for Preparation of Tender Documents requires Procuring Entities to seek clarity from the

Authority on provisions they do not understand. Therefore, in including "organizational deficiency" in the Tender Document, the Accounting Officer exceeded its scope under Section 62 and 47 of the Act by misconstruing the law on debarment as set out under Section 47 of the Act.

21. It was Mr. Marete's contention that debarment under Section 41 of the Act is a proceed with in-built safeguards and this cannot be done through a Tender Document. Further, that in order to form a basis for debarment, "organizational deficiency" must constitute an offence relating to procurement.

22. Counsel argued that the Tender Document use of "organizational deficiency" was targeted at the Applicant when the same did not constitute an offence related to procurement in Kenya or any other jurisdiction. It was the Applicant's contention that the Tender Document offended Article 27 of the Constitution of Kenya, 2010 by depriving the Applicant the protection and benefit of the law by locking it out of the procurement process to the advantage of other tenderers. Further, that it was effectively being debarred without a hearing in contravention of Article 50 of the Constitution of Kenya, 2010. Accordingly, Counsel prayed for the Board to allow the Request for Review.

Respondents' Submissions

23. Counsel for the Respondents, Ms. Maina, indicated that the Applicant would be placing reliance on the Respondents' filed documents i.e. Memorandum of Response, Written Submissions and Confidential Documents.

24. Ms. Maina contested any breach on the part of the Respondents arguing that the Procuring Entity in all its procurement processes has been using the Tender Document approved by the Authority pursuant to Section 58 of the Act and Regulations 68(1) and (2) of the Regulations 2020. Specifically, for the subject tender, Counsel argued that the Procuring Entity used Tender Document No. 7.

25. She argued that the Procuring Entity was not in breach of the Constitution of Kenya, 2010, the Act and Regulations 2020 as the Applicant has not substantiated any breach on the part of the Respondents.

26. Ms. Maina equally contested the allegation that the Tender Document is unfair, discriminatory, uncompetitive. Counsel argued that ITT 8.1 and Tender Data Sheet ITT 7.2 provide for an opportunity. She argued that the Tender Document was not prepared with the view of disqualifying the Applicant or any other tenderer but was consistent with the requirements with the Act and Regulations 2020. She insisted that the requirements were simply speaking to the suitability of tenderers offered contracts by public entities.

27. Counsel contended the requirement demands that the tenderer must not have been convicted or paid fines for any irregularity on government contracts was in tandem with Section of the Act which requires that any tenderer that has committed an offence under the Act or committed an offence relating to procurement in any other jurisdiction is in fact supposed to be debarred from public procurement in Kenya.

28. She pressed on that Sections 66(2) and (3)(a) and (b) of the Act provides that a tenderer who engages in corruption, coercive obstructive, collusive

or fraudulent practices ought to be disqualified from entering into a contract and where entered into , such contract is voidable.

29. Ms. Maina indicated that the Applicant had through the Request for Review disclosed that in April 2023 it entered into a settlement with the Office of the Attorney General in Switzerland on organizational deficiency and the Respondent would assess the same during evaluation to establish if the Applicant satisfied the eligibility and mandatory requirements.

30. Ms. Maina contended that organizational deficiencies are problems, misconfigurations or instances of internal controls within an organization that if unchecked could lead to non-compliance, inefficiency, misalignment and misreporting over time including procurement contracts which the Procuring Entity intends to prevent from occurring in the subject tender.

31. Counsel argued that contrary to the Applicant's submission that organizational deficiency is provided for in our local law, section 41(1)(h) provides that a company can be debarred for procurement offences committed anywhere in the world. Further, that organizational deficiency may include bribery, provision of misleading information, misreporting or any form of corruption which are all fraudulent practices under the Act and Regulations 2020.

32. She contended that organizational deficiency was not aimed at locking out the Applicant from the subject tender and that the Tender Document did not create a nexus between bribery and organizational deficiency.

33. She also indicated that the Applicant's complaint on the inclusion of clauses XIII and 11(VIII) on the eligibility and mandatory requirements was elaborately responded to. It was her argument that in including the said clauses the Procuring Entity was simply reminding tenderers that pursuant to Section 72 of the Act, they had to comply with provisions of the Act and Regulations 2020. Accordingly, Counsel sought for the Request to be dismissed.

Applicant's Rejoinder

34. In his brief rejoinder, Counsel for the Applicant, Mr. Marete reiterated that the Tender Document was prepared in a manner aimed to disqualifying it and that the Respondents were purporting to debar the Applicant from participating in the subject tender without following the channel provided for under Section 41 of the Act.

BOARD'S DECISION

35. The Board has considered all documents, 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 a Procuring Entity has discretion to customize the Standard Procurement and Asset Disposal Tender Document supplied by the Public Procurement Regulatory Authority?***

    II. ***What orders should the Board issue in the circumstance?***

Whether a Procuring Entity has discretion to customize the Standard Procurement and Asset Disposal Tender Document supplied by the Public Procurement Regulatory Authority?

36. The Applicant commenced the instant proceedings challenging 2 clauses in the Tender Document issued by the Respondents in respect of the subject tender. According to Counsel for the Applicant, Mr. Marete, Clause 1 on Eligibility Sub-Clause 1(xii) and Clause 2 Mandatory Requirements, Sub-Clause 11 (VIII) offended various provisions of the Constitution of Kenya, 2010, the Act and Regulations 2020.

37. The Applicant argued that the impugned clauses constituted a deviation from the Standard Procurement and Asset Disposal Tender Document issued by the Authority as well as the Procuring Entity's past tender documents and were targeted at locking out the Applicant from participating in the subject tender. It was its contention that the Respondents were in effect debarring the Applicant from the subject tender without following the channel set out under Section 41 of the Act.

38. On the flip side, the Respondents argued that the Tender Document was not prepared with the view of locking out any tenderer including the Applicant from the subject tender. Counsel for the Respondents, Ms. Maina, indicated that the clauses were simply a restatement of the laws on procurement. Further, that the Applicant were free to participate in the subject tender where their tender would be subjected to evaluation in accordance with the evaluation criteria set out in the Tender Document.

39. Drawing from the above, the Board is at this stage invited to interrogate the latitude of a Procuring Entity customizing tender documents and whether the Procuring Entity in the subject tender fell afoul the provisions of the Act in including the impugned clauses in the Tender Document.

40. For starters, Sections 9, 58 and 70 of the Act provide for the use of a Standard Procurement and Asset Disposal Document in public procurements processes in the following terms.

> ***9. Functions of Authority***
>
> ***(1) The functions of the Authority shall be to—***
>
> ***(a) ...***
>
> ***(b) ...***
>
> ***(f) prepare, issue and publicise standard public procurement and asset disposal documents and formats to be used by public entities and other stakeholders;***
>
> ***(g) ..***
>
> ***(h)...***
>
> ***58. Standard procurement and asset disposal documents***
>
> ***(1) An accounting officer of a procuring entity shall use standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.***
>
> ***(2) The tender documents used by a procuring entity under subsection (1). shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications.***

70. Standard tender documents

(1) The Authority shall issue standard procurement and asset disposal documents and formats as prescribed for use by procuring entities.

(2) A procuring entity shall use standard procurement and asset disposal documents prescribed under subsection (1), in all procurement and asset disposal proceedings.

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

(4) An accounting officer of a procuring entity shall be responsible for preparation of tender documents in consultation with the user and other relevant departments.

(5) A procuring entity may charge a fee for obtaining tender documents as prescribed by regulations and stated in the tender documents.

(6) The tender documents shall set out the following—

(a) the specific requirements prepared under section 60 relating to the goods, works or services being procured and the time limit for delivery or completion;

(b) if works are being procured, relevant drawings and bills of quantities shall be disclosed and the projects total estimated cost evaluated only on the basis of criteria disclosed, but a person shall not be disqualified on the basis that a bidder quoted above or below a certain percentage of engineer's estimates;

(c) the general and specific conditions to which the contract will be subject, including any requirement that performance security be provided before the contract is entered into;

(d) the tender number assigned to the procurement proceedings by the procuring entity;

(e) instructions for the preparation and submission of tenders including—

(i) the forms for tenders;

(ii) the number of copies to be submitted with the original tender;

(iii) any requirement that tender security be provided and the form and amount of any such security;

(iv) any requirement that evidence be provided of the qualifications of the person submitting the tender;

(v) the procuring entity facilitation and the submission of tender documents by the tenderer through either soft or hard copy, but it will be the onus of the tenderer to ensure the adequate submission of said documents;

(vi) the procurement function ensuring that where necessary, the preferences and reservations of the tender are clearly spelt out in the bidding documents;

(f) an explanation of where and when tenders shall be submitted, a statement that the tenders will be opened immediately after the deadline for submitting them and an explanation of where the tenders will be opened;

(g) a statement that those submitting tenders or their representatives may attend the opening of tenders;

(h) a statement of the period during which tenders must remain valid;

(i) the procedures and criteria to be used to evaluate and compare the tenders;

(j) a statement that the accounting officer of a procuring entity may, at any time terminate the procurement proceedings without entering into a contract in accordance with section 63 of the Act;

(k) a provision for providing details of sub-contractors for the bidder, where applicable, and a declaration that the sub-contractors have complied with this Act; and

(l) anything else required, under this Act or the regulations, to be set out in the tender document

41. From the above Sections of the Act, (i) the Authority is tasked with various responsibilities including the preparation and publication of various public procurement and disposal documents; (ii) the Accounting Officer of a Procuring Entity shall be responsible for the preparation of the Tender Document and that this shall be done in consultation with the relevant user department within the Procuring Entity; (iii) the Tender Document should allow for fair competition among the tenderers; and (iv) the Tender Document should spell out various matters including the procedures and criteria to be used to evaluate and compare tenders as well as anything required under the Act or Regulations 2020.

42. On its part, Regulation 68 of the Regulations 2020 provides as follows:

68. Standard tender documents and formats

(1) Standard tender documents envisaged under sections 9(1)(f) and 70(1) of the Act, shall be developed by the Authority for use by all procuring entities as set out in the Eighth Schedule.

(2) The Authority shall issue and publicize the format of procurement documents to be used and issue standard forms by which a procuring entity shall carry out specific procurement procedures.

(3) The documents used by a procuring entity shall be clear and bear references to the procurement requirement, provision for dates and signatures of authorizing officers.

(4) Pursuant to section 70(4) of the Act, the accounting officer of a procuring entity shall prepare the tender document clearly indicating the technical and financial evaluation criteria to be applied which shall be quantifiable, measurable and objective in line with the provisions of section 80(3) of the Act in consultation with the user department and other relevant departments.

(5) The Authority may, from time to time, issue circulars and guidelines only on the content of procurement and disposal documentation.

(6) A procuring entity may, under section 70(5) of the Act, charge a fee not exceeding one thousand shillings for hard copies of a tender document or as may be set by the Cabinet Secretary from time to time.

(7) In determining the fee payable under paragraph (6) above, a procuring entity shall only have regard to the costs related to printing, copying, and distributing.

(8) A procuring entity shall not charge a fee under paragraph (6) above, where the tender document is—

(a) obtained electronically;

(b) an invitation for expression of interest;

(c) a registration of suppliers; or

(d) a pre-qualification document.

(9) Where a procuring entity charges a fee for a tender document, the procuring entity shall permit potential tenderers to inspect the document, prior to paying the fee for the document.

43. Regulation 68 above, restates the responsibility of the Accounting Officer of a Procuring Entity in preparing a Tender Document in accordance with Standard Procurement and Asset Disposal Documents issued by the Authority.

44. The Authority publishes various Standard Tender Documents on its website and specific for tenders of the kind of the subject tender, it has published Standard Tender Document for Non-Consulting Services, Document No. 7 whose Preface provides as follows:

....."This document will be customized to suit the needs of the Procuring Entity. No changes should be made to Instructions to Tenderers (ITT) and to the General Conditions of Contract (GCC). These two sections will be modified to suit the

Procuring Entity's requirement in the Tender Data Sheets (TDS) and in the Special Conditions of Contract (SCC), respectively"

45. Page 33 of the Standard Tender Document for Non-Consulting Services, Document No. 7 also provides Guidelines on the preparation of the Preliminary Evaluation Criteria in the following words:

    "***The Procuring Entity will provide the preliminary evaluation criteria. To facilitate this, a template may be attached or clearly described information and list of documentation to be submitted by Tenderers to enable preliminary evaluation of the Tender."***

46. From the above, an Accounting Officer of a Procuring Entity bears the responsibility of preparing Tender Documents to be used in a tender process while consulting the relevant user department. Consequently, it would follow that different user departments will come up with different requirements unique to their functions with the result that the Standard Procurement and Asset Disposal Tender Documents for different departments will bear some variations.

47. From page 33 of the Standard Tender Document for Non-Consulting Services above it is also apparent that the Authority does not in its Standard Tender Document stipulate any of the evaluation criteria to be used at the Preliminary Evaluation Stage. Accordingly, it is the responsibility of the Accounting Officer of a Procuring Entity and the relevant user department in the Procuring Entity to populate the evaluation criteria.

48. The Board therefore finds that Accounting Officer has latitude to customize the Standard Procurement and Asset Disposal Tender Document to suit the needs of the relevant department of a Procuring Entity. However, this is not to state that the Accounting Officer's discretion to customize the Standard Procurement and Asset Disposal Tender Document is unchecked, as the width and breadth of any such latitude must be subject to the law.

49. The Board shall now examine whether the Accounting Officer in the present case went outside the law in customizing the Standard Procurement and Asset Disposal Tender Document supplied by the Authority. For this, the Board shall review the impugned clauses of the Tender Document in the subject tender.

50. The first impugned tender provision is Clause 1(XII) under the Eligibility Criteria under Section III- Evaluation and Qualification Criteria and at page 33 of the Blank Tender Document which provides as follows:

1)Eligibility

Each tenderer proposing in this Tender shall fulfill the following requirements:

...

xii. The tenderer or any of its associates must not have been convicted or paid any fines anywhere in the world, directly or indirectly for any irregularities regarding Government contracts such as bribery or organizational deficiency.

51. Next is Clause 11(VIII) under the Mandatory Requirements under Section III- Evaluation and Qualification Criteria and at page 34 of the Tender Document which provides as follows:

11. The tenderer shall also include a sworn statement made before a commissioner for oaths for the following:

I)...

II)...

VIII) The tenderer or of its associates must not have been convicted or paid any fines anywhere in the world or indirectly for any irregularities regarding Government contracts such as bribery or organizational deficiency.

52. The above Clauses speak to an eligibility requirement calling on a tenderer to ensure that neither itself nor associates have been convicted or paid any fines in the world in relation to Government contracts such as bribery or organizational deficiency.

53. The Board has already pointed out that the Standard Tender Document for Procurement of Non-Consulting Services- Document No. 7 does not prescribe the evaluation criteria to be included in a Tender Document but it is the responsibility of the Accounting Officer with the consultation of the user department within the Procuring Entity to populate the evaluation criteria for its Tender Document. This Board should therefore exercise great caution as not to substitute itself for a Procuring Entity which is best suited to determine the evaluation criteria for determining the suitability of suppliers of goods and services intended to be procured.

54. It would therefore follow that the Accounting Officer should in preparation of the evaluation criteria in any tender find guidance in among others the Act and the peculiarity of the goods and services being procured.

55. Section 55 of the Act provides guidance on the eligibility criteria for public procurement processes:

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

56. From the above, the Act enlists at least 7 eligibility requirements for a tenderer participating in a public tender.

57. We wish to point out that we do not interpret Section 55 of the Act to mean that a candidate who thinks they fail to meet any of the above eligibility requirements cannot submit their tender as suggested by the Applicant. Our reading of the said Section 55 of the Act alongside Regulation 74 of the Regulations 2020 is that such a candidate can submit their tender, however, the question as to whether they meet the requirements under the Tender Document and the Act will be answered

at the evaluation Stage subsequent to the opening of the tenders. The Procuring Entity cannot purport to decline receiving any tender submitted by a candidate whether or not the candidate thinks they fall short on any of the eligibility requirements . A Procuring Entity bears the responsibility of receiving all tenders submitted before the tender submission deadline for purposes of evaluation and it is only during evaluation that a non-compliant tender can be disqualified.

58. Regulation 74 of the Regulations 2020 provides that it is during the Preliminary Evaluation Stage that the Procuring Entity checks for tenderer's compliance with eligibility requirements:

74. Preliminary evaluation of open tender

(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation

committee shall first conduct a preliminary evaluation to determine whether—

(a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;

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

(c) any tender security submitted is in the required form, amount and validity period, where applicable;

(d) the tender has been duly signed by the person lawfully authorised to do so

through the power of attorney;

(e) the required number of copies of the tender have been submitted;

(f) the tender is valid for the period required;

(g) any required samples have been submitted; and

(h) all required documents and information have been submitted.

59. The Board equally agrees with the Applicant's submission that the Procuring Entity cannot debar any tenderer through its Tender Document since the Act provides an elaborate debarment process at Section 41 of the Act:

41. Debarment

(1) The Board shall debar a person from participating in procurement or asset disposal proceedings on the ground that the person—

(a) has committed an offence under this Act;

(b) has committed an offence relating to procurement under any other Act or Law of Kenya or any other jurisdiction;

(c) has breached a contract for a procurement by a public entity including poor performance;

(d) has, in procurement or asset disposal proceedings, given false information about his or her qualifications;

(e) has refused to enter into a written contract as required under section 135 of this Act;

(f) has breached a code of ethics issued by the Authority pursuant to section 181 of this Act or the code of ethics of the relevant profession regulated by an Act of Parliament;

(g) has defaulted on his or her tax obligations;

(h) is guilty of corrupt or fraudulent practices;

(i) is guilty of a serious violation of fair employment laws and practices; or

(j) is determined by the Review Board to have filed a request that is frivolous or vexatious or was made solely for the purpose of delaying the procurement proceeding or a performance of a contract.

(2) Without limiting the generality of subsection (1) the Board may debar a person from participating in any procurement process if that person—

(a) has breached the requirements of the tender securing declaration form in the tender documents; or

(b) has not performed according to professionally regulated procedures.

(3) The Authority, may also debar a person from participating in procurement or asset disposal proceedings—

(a) on the recommendation of a law enforcement organ with an investigative mandate;

(b) on grounds prescribed by the Authority in Regulations.

(4) A debarment under this section shall be for a specified period of time of not less than three years.

(5) The procedure for debarment shall be prescribed by Regulations.

60. However, can the Procuring Entity in the subject tender be deemed to have gone outside the Act and the Regulations 2020 in as far the

preparation of the Tender Document is concerned? We think not. The Applicant has not led any evidence to demonstrate that the Respondents prepared a Tender Document that was at variance with the Standard Document for Procurement of Non-Consulting Services- Document No. 7. The Applicant has equally not demonstrated the provisions of law violated by the Respondents in including the impugned clauses as part of the Tender Document.

61. Article 227 of the Constitution of Kenya,2010 espouses the principles of fairness, equitableness, transparency, competitiveness, and cost effectiveness in public procurement processes. On its part, Article 10 of the Constitution of Kenya, 2010 entrenches the national values and principles of good governance, integrity, transparency and countability as binding on all state organs, public officers and all persons in the making or implementation of public policy decisions

62. It is also not lost on the Board that the subject tender was an international tender attracting participants from across the globe and thus norms under international law apply by virtue of Section 3 of the Act.

63. Guided by the above provisions of law, together with the fact that this tender is still at its initial stages it would be inappropriate for the Board to make comments on the impugned clauses with respect to the eligibility of the Applicant to participate in the subject tender. We noted that during the hearing it came out that the Applicant entered into a Settlement Agreement with the Office of the Attorney General of Switzerland. We find it would be inappropriate on the part of the Board to make any comments

on the same when the evaluation process is yet to commence. Accordingly, the Board will rest this at that.

64. The Board therefore finds that a Procuring Entity has discretion to customize the Standard Procurement and Asset Disposal Tender Document supplied by the Public Procurement Regulatory Authority save that such customization must be in accordance with the law.

What orders the Board should grant in the circumstances?

65. The Board has found that a Procuring Entity has discretion to customize the Standard Procurement and Asset Disposal Tender Document supplied by the Public Procurement Regulatory Authority, save that such customization must be within the law.

66. The upshot of our finding is that the Request for Review dated 9th April 2024 in respect of Tender No. KEBS/T029/2023/2024 for the Provision of Printing KEBS Standardization Mark Stickers fails in the following specific terms:

FINAL ORDERS

67. 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 9th April 2024:

1. **The Request for Review dated 9th April 2024 be and is hereby dismissed.**

2. **The Respondent be and is hereby directed to proceed with Tender No. KEBS/T029/2023/2024 for the Provision of Printing KEBS Standardization Mark Stickers to it's lawful and logical conclusion.**

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

Dated at NAIROBI, this 30th Day of April 2024.

.....	.....
CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**