

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 42/2024 OF 9<sup>TH</sup> MAY 2024**

**BETWEEN**

**SPECICOM TECHNOLOGIES LIMITED ..... APPLICANT**

**AND**

**ACCOUNTING OFFICER OF THE JUDICIARY..... 1<sup>ST</sup> RESPONDENT**

**THE JUDICIARY ..... 2<sup>ND</sup> RESPONDENT**

**INCREATE TECHNOLOGIES LIMITED ..... 1<sup>ST</sup> INTERESTED PARTY**

**INTEGRATED SUPPLIES & CONSULTANCY ..... 2<sup>ND</sup> INTERESTED PARTY**

Review against the decision of the Accounting Officer, The Judiciary in relation to Tender No. JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance.

**BOARD MEMBERS PRESENT**

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

**IN ATTENDANCE**

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



2. Ms. Evelyn Weru

- Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT**

**SPECICOM TECHNOLOGIES LIMITED**

Mr. Mwirigi h/b for Mr. Masinde - Advocate, Boniface Masinde & Co.  
Advocates

### **RESPONDENTS**

**ACCOUNTING OFFICER, THE JUDICIARY &  
THE JUDICIARY**

Mr. Ken Ogutu

- Advocate, The Judiciary

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

**INCREATE TECHNOLOGIES LIMITED**

Mr. Eric Omondi

- Director

### **2<sup>ND</sup> INTERESTED PARTY**

**INTEGRATED SUPPLIES &  
CONSULTANCY**

Mr. Moses Mbogo

- Director

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. The Judiciary, the Procuring Entity and 2<sup>nd</sup> Respondent herein, invited sealed tenders in response to Tender No. JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to

satisfactory performance (hereinafter referred to as the "subject tender"). The invitation was by way of an advertisement on 22<sup>nd</sup> February 2024 on both the Standard Newspaper and the Daily Nation Newspapers, the Procuring Entity's website [www.judiciary.go.ke](http://www.judiciary.go.ke) and on the Public Procurement Information Portal (PIIP) website [www.tenders.go.ke](http://www.tenders.go.ke) where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. The tender's submission deadline was scheduled on 7<sup>th</sup> March 2024 at 2.00 p.m.

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

2. According to the Minutes of the subject tender's opening held on 7<sup>th</sup> March 2024 signed by members of the Tender Opening Committee (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1<sup>st</sup> Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of fifteen (15) tenders were submitted in response to the subject tender. The fifteen (15) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

| <b>Bidder No.</b> | <b>Name</b>                           |
|-------------------|---------------------------------------|
| 1.                | Fortune Bestbuys Africa Ltd           |
| 2.                | CBM International Ltd                 |
| 3.                | Increate Technologies Ltd             |
| 4.                | Double Net Technologies Ltd           |
| 5.                | Biometrics Technology Ltd             |
| 6.                | Powerware Systems Ltd                 |
| 7.                | Agile Business Technologies           |
| 8.                | Novel Technologies E.A. Ltd           |
| 9.                | Integrated Supplies & Consultancy Ltd |
| 10.               | Specicom Technologies Ltd             |
| 11.               | Optimax Group Ltd                     |
| 12.               | Techsource Point Ltd                  |
| 13.               | Xtranet Coomunication Ltd             |
| 14.               | Tritel Technologies Ltd               |
| 15.               | Procom Networking Solutions Ltd       |

### **Evaluation of Tenders**

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1<sup>st</sup> Respondent undertook evaluation of the fifteen (15) tenders as captured in an Evaluation Report for the subject tender dated 27<sup>th</sup> March 2024 and signed by



members of the Evaluation Committee (hereinafter referred to as the "Evaluation Report") in the following stage:

- i Preliminary Evaluation;
- ii Technical Evaluation;
- iii Financial Evaluation

### **Preliminary Evaluation**

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 1: Preliminary Examination of Tender of Section III – Evaluation and Qualification Criteria at page 28 to 29 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for registration and prequalification of the subject tender.
5. At the end of evaluation at this stage eleven (11) tenders were determined non-responsive, including the Applicant's tender, while four (4) tenders were determined responsive and proceeded for evaluation at the Technical Evaluation stage.

### **Technical Evaluation**

6. At this stage of evaluation, tenders would be evaluated as follows:
  - i Technical Evaluation of the Technical Solution**
  - a) The Evaluation Committee was required to evaluate tenders using the criteria provided under Stage 2A: Technical Evaluation of the Technical Solution of Stage III – Evaluation and Qualification Criteria at page 29 of the Tender Document. Bidders

were required to meet all the requirements so as to progress further. At the end of evaluation at this stage, one (1) tender was rendered non-responsive while three (3) tenders were determined responsive and proceeded for evaluation at the Technical Evaluation Score Sheet stage.

## **ii Technical Evaluation Score Sheet**

- a) The Evaluation Committee was required to evaluate tenders using the criteria provided under Stage 2: Technical Evaluation Score Sheet of Stage III – Evaluation and Qualification Criteria at page 29 to 31 of the Tender Document. Bidders were required to score 75% and above to proceed to the next phase and be considered for any further evaluation. At the end of evaluation at this stage, all three tenders were determined responsive having met the cut-off points and proceeded to the Financial Evaluation stage.

## **Financial Evaluation**

7. The Evaluation Committee was required to examine tenders using the criteria set out under Stage 3. Financial Evaluation of Section III – Evaluation and Qualification Criteria at page 31 of the Tender Document. Tenders would be ranked according to their bid process and the bidder with the lowest evaluated price would be considered for award per lot.

8. Following conclusion of evaluation of bids at this stage, bids were ranked as follows:

**RANKING OF BIDDERS TOTAL UNIT PRICE LOT 1**

| <b>S. No</b> | <b>BIDDER</b>   | <b>TOTAL UNIT PRICE<br/>LOT 1 (Ksh)</b> | <b>Ranking</b> |
|--------------|---|---|----------------|
| <b>1.</b>    | <b>B3-M/s Increate<br/>Technologies Ltd</b>                     | <b>4,884,789.00</b>                     | <b>1</b>       |
| <b>2.</b>    | <b>B5-M/s Biometrics<br/>Technology Ltd</b>                     | <b>6,272,639.10</b>                     | <b>2</b>       |
| <b>3.</b>    | <b>B9-M/s Integrated<br/>Supplies &amp;<br/>Consultancy Ltd</b> | <b>8,929,896.06</b>                     | <b>3</b>       |

**RANKING OF BIDDERS TOTAL UNIT PRICE LOT 2**

| <b>S. No</b> | <b>BIDDER</b>   | <b>TOTAL UNIT<br/>PRICE LOT 1<br/>(Ksh)</b> | <b>Ranking</b> |
|--------------|---|---|----------------|
| <b>1.</b>    | <b>B3-M/s Increate<br/>Technologies Ltd</b>                     | <b>NIL</b>                                  | <b>NIL</b>     |
| <b>2.</b>    | <b>B5-M/s Biometrics<br/>Technology Ltd</b>                     | <b>635,395.80</b>                           | <b>2</b>       |
| <b>3.</b>    | <b>B9-M/s Integrated<br/>Supplies &amp;<br/>Consultancy Ltd</b> | <b>491,687.81</b>                           | <b>1</b>       |

## **Due Diligence**

9. The Procuring Entity was required under Stage 3(b) Due Diligence of Section III – Evaluation and Qualification Criteria at page 31 of the Tender Document to carry out due diligence to verify the accuracy of the information provided and past performance of the lowest evaluated bidder.
  
10. The Evaluation Committee conducted due diligence on tax obligations, reference letters and CA license of the lowest evaluated bidders so as to ascertain their experience and reported as being satisfied with the bidders submitted information as can be discerned from pages 17 to 19 of the Evaluation Report.

## **Evaluation Committee's Recommendation**

11. The Evaluation Committee recommended award of the subject tender to the 1<sup>st</sup> Interested Party, M/s Increate Technologies Ltd for Lot 1 and the 2<sup>nd</sup> Interested Party M/s Integrated Supplies & Consultancy Ltd for Lot 2 on as and when required basis as per the unit prices stipulated at pages 20 to 21 of the Evaluation Report as follows:



**LOT 1: M/S INCREASE TECHNOLOGIES LTD PRICE SCHEDULE**

|                  |                                     |                      | <b>PRICE SCHEDULE: LOT 1 :</b>                           |                          |                   |                         |   |
|------------------|-------------------------------------|----------------------|--|--------------------------|-------------------|-------------------------|---|
|                  |                                     |                      | <b>SWITCHES AND ACCESS POINTS</b>                        |                          |                   |                         |   |
| <b>1</b>         | <b>2</b>                            | <b>3</b>             | <b>4</b>   | <b>5</b>                 | <b>6</b>          | <b>7</b>                | <b>8</b>                                |
| <i>Line Item</i> | <i>Description of Goods</i>         | <i>Unit of Issue</i> | <i>Quantity and physical unit (As and when required)</i> | <i>Country of Origin</i> | <i>Brand/Make</i> | <i>Model No.</i>        | <i>Unit Price (VAT Inclusive) Kshs.</i> |
| 1                | Type 1 switch with 1 year warranty) | No                   | AWR  | Netherlands              | Cisco/Catalyst    | C9200L-48P-4X-E         | 904,365.00                              |
| 2                | Type 2 switch with 1 year warranty) | No                   | AWR  | Netherlands              | Cisco/Catalyst    | C9200L-24P-4X           | 1,256,062.52                            |
| 3                | Type 3 switch with 1 year warranty) | No                   | AWR  | Netherlands              | Cisco/Catalyst    | C9500-24Y4C             | 2,612,610.00                            |
| 4                | TYPE 1 ACCESS POINT                 | No                   | AWR  | USA                      | Ubiquiti/Unifi    | UAP-AC-PRO              | 44,457.00                               |
| 5                | TYPE 2 ACCESS POINT                 | No                   | AWR  | USA                      | Ubiquiti/Unifi    | UAP-AC-EDU              | 67,294.50                               |
|                  |                                     |                      |  |                          |                   | <b>TOTAL UNIT PRICE</b> | <b>4,884,789.00</b>                     |

**LOT 2: M/S INTEGRATED SUPPLIES & CONSULTANCY LTD PRICE SCHEDULE**

| <b>PRICE SCHEDULE LOT 2:</b> |                             |                      |  |                          |                    |                         |  |
|------------------------------|-----------------------------|----------------------|--|--------------------------|--------------------|-------------------------|--|
| <b>IP PHONES</b>             |                             |                      |  |                          |                    |                         |  |
| <b>1</b>                     | <b>2</b>                    | <b>3</b>             | <b>4</b>   | <b>5</b>                 | <b>6</b>           | <b>7</b>                | <b>8</b>                               |
| <i>Line Item</i>             | <i>Description of Goods</i> | <i>Unit of Issue</i> | <i>Quantity and physical unit (As and when required)</i> | <i>Country of Origin</i> | <i>Brand /Make</i> | <i>Model No.</i>        | <i>Unit Price (VAT Inclusive Ksh.)</i> |
| 1                            | TYPE 1 IP PHONE             | No                   | AWR  | USA                      | CISCO              | CP-7821-K9=             | 38,296.70                              |
| 2                            | TYPE 2 IP PHONE             | No                   | AWR  | USA                      |                    | CP-8841-K9=             | 76,000.97                              |
| 3                            | TYPE 3 IP PHONE             | No                   | AWR  | USA                      |                    | CP-8865-K9=             | 120,257.66                             |
| 4                            | TYPE 4 IP PHONE             | No                   | AWR  | USA                      |                    | CP-8832-EU-K9=          | 257,132.47                             |
|                              |                             |                      |  |                          |                    | <b>TOTAL UNIT PRICE</b> | <b>491,687.81</b>                      |

**Professional Opinion**

12. In a Professional Opinion dated 8<sup>th</sup> April 2024 (hereinafter referred to as the "Professional Opinion"), the Director, Supply Chain Management Services, Mr. Jeremiah K. Nthusi, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.

13. Thereafter the Professional Opinion was approved by the Chief Registrar of the Judiciary, the 1<sup>st</sup> Respondent herein, on 9<sup>th</sup> April 2024.

## **Notification to Tenderers**

14. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 23<sup>rd</sup> April 2024.

## **REQUEST FOR REVIEW NO. 42 OF 2024**

15. On 9<sup>th</sup> May 2024, Specicom Technologies Limited, the Applicant herein filed a Request for Review dated 9<sup>th</sup> May 2024 together with an Applicant's Statement in Support of the Request for Review dated 9<sup>th</sup> May 2024 and signed by Henry Mbugua Kamau, its Managing Director (hereinafter referred to as the 'instant Request for Review') through Boniface Masinde & Co. Advocates seeking the following orders from the Board in verbatim:

***A. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' decisions awarding Lot 1 and Lot 2 of Tender No:JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance to the 1<sup>st</sup> Interested Party and 2<sup>nd</sup> Interested Party respectively, be annulled and set aside in their entirety.***

***B. The 1<sup>st</sup> Respondent's letter dated 23<sup>rd</sup> April 2024 notifying the 1<sup>st</sup> Interested Party of its successfulness***

***in Lot 1 of Tender No: JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance (if any) be annulled and set aside.***

***C. The 1<sup>st</sup> Respondent's letter dated 23<sup>rd</sup> April 2024 notifying the 2<sup>nd</sup> Interested Party of its successfulness in Lot 2 of Tender No: JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance (if any) be annulled and set aside.***

***D. The 1<sup>st</sup> Respondent's letter dated 23<sup>rd</sup> April 2024 notifying the Applicant of its unsuccessfulness in Lot 1 and Lot 2 of Tender No: JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance be annulled and set aside.***

***E. Any procurement contract with respect to Tender No: JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance that the Respondents may have entered into with the 1<sup>st</sup> Interested Party and the 2<sup>nd</sup> Interested Party in breach of Section 135(3) of the Act read with Sections 167(1), 168 of the Act and Regulation 203(2)(c)(ii) of Regulations 2020 be annulled and set aside.***

***F. The Respondents be directed to award Lot 1 and Lot 2 of Tender No: JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance to the Applicant as the bidder who submitted the bid with the lowest evaluated price in Lot 1 and Lot 2 of Tender No: JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance.***

***G. In the alternative, the 1<sup>st</sup> Respondent be directed to re-admit the Applicant's bid, back into the evaluation process and specifically at Stage 2A:Technical Evaluation of the Technical Solution of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document for re-evaluation together with all other bids that made it to Stage 2A:Technical Evaluation of the Technical Solution of Section III – Evaluation and Qualification Criteria at page 29 of the Tender Document in accordance with the Constitution, the Act and the Tender Document.***

***H. Further to order G above, the 1<sup>st</sup> Respondent be directed to proceed with the procurement proceedings of Tender No: JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance to its logical conclusion including the making of an award with respect to Lot 1 and Lot 2 of the subject tender in line with the provisions of the Constitution, the Act and Regulations 2020, within fourteen (14) days from the date of the determination of the instant review.***

***I. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents be compelled to pay to the Applicant, the costs arising from, and incidental to, this Request for Review; and***

***J. The Public Procurement Administrative Review Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***

16. In a Notification of Appeal and a letter dated 9<sup>th</sup> May 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 9<sup>th</sup> May 2024.

17. On 16<sup>th</sup> May 2024, the Respondents filed through Kennedy Ogutu Advocate a Memorandum of Appearance dated 14<sup>th</sup> May 2024, a

Respondent's Response to the Request for Review dated 14<sup>th</sup> May 2024, a 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying Affidavit sworn on 14<sup>th</sup> May by Jeremiah Nthusi the Procuring Entity's Director of Supply Chain Management together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

18. *Vide* email dated 17<sup>th</sup> May 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 24<sup>th</sup> March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days.

19. *Vide* a Hearing Notice dated 17<sup>th</sup> May 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 24<sup>th</sup> May 2024 at 2.30 p.m., through the link availed in the said Hearing Notice.

20. On 21<sup>st</sup> May 2024, the Applicant filed through its advocates an Applicant's Further Statement in Support of the Request for Review dated 21<sup>st</sup> May 2024 and signed by Henry Mbugua Kamau.

21. On 24<sup>th</sup> May 2024, the Applicant filed Written Submissions dated 23<sup>rd</sup> May 2024.

22. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties did not file any documents in response to the instant Request for Review.

23. At the hearing of the instant Request for Review on 24<sup>th</sup> May 2024, the Board read out the pleadings filed by parties in the matter and allocated time for parties to highlight their respective cases. Thus the instant Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

24. In his submissions, counsel for the Applicant, Mr. Mwirigi, relied on the Request for Review dated 9<sup>th</sup> May 2024 together with an Applicant's Statement in Support of the Request for Review dated 9<sup>th</sup> May 2024 and signed by Henry Mbugua Kamau, Applicant's Further Statement in Support of the Request for Review dated 21<sup>st</sup> May 2024 and signed by Henry Mbugua Kamau and Written Submissions dated 23<sup>rd</sup> May 2024 filed before the Board.

25. Mr. Mwirigi submitted that the Applicant was notified vide letter dated 23<sup>rd</sup> April 2024 of its unsuccessfulness in the subject tender for the reason that form SD1 and SD2 were not signed by a person with the power of attorney. Counsel referred the Board to its notification letter marked as exhibit HMK-8 in its bundle of documents being the letter of notification containing reasons for the Applicant's disqualification in

the subject tender which prompted the Applicant to request for a debriefing vide letter dated 30<sup>th</sup> April 2024 which was not responded to by the Respondents.

26. Mr. Mwirigi submitted that the Evaluation Committee failed to evaluate the Applicant's tender in accordance with the provisions of the Tender Document, the Constitution, the Act, and Regulations 2020 and referred the Board to paragraphs 15 to 19 of the Applicant's Written Submissions.

27. Counsel further submitted that it is the duty of an Evaluation Committee to ensure during evaluation that a bidder conforms to all eligibility and mandatory requirements of a tender document in line with the principles stipulated under Article 227 of the Constitution.

28. Counsel referred the Board to Mandatory Requirements Nos. 9 and 10 (MR 9 and 10) of the Tender Document and pointed out that the said requirements only required a bidder to fill the self-declaration forms SD1 and SD2 as compared to Mandatory Requirements Nos. 4, 5, and 7 of the Tender Document which required a bidder to sign the same and as such, there was a clear distinction between a bidder being required to sign as compared to when the bidder is required to fill in a form.

29. Mr. Mwirigi invited the Board to look at page 38 and 39 of the Applicant's original bid submitted in response to the subject tender

and pointed out that the Applicant submitted a duly filled Form SD1 and Form SD2 made by Henry Kamau in his capacity as the Applicant's Managing Director who was duly authorized and competent to make the said forms in addition to being duly signed by Tabitha Mwangi, an employee of the Applicant who had a duly executed Power of Attorney to sign on behalf of the Applicant and the Managing Director. Counsel referred the Board to page 61 of the Applicant's bid document where it submitted a duly executed power of attorney and as such, Tabitha Mwangi was duly authorized to sign forms SD1 and SD2 despite the fact that MR9 and 10 did not require the same forms to be signed.

30. In response to the issue raised by the Respondent's in their response to the instant Request for Review that the Applicant's Forms SD1 and SD2 were made and signed by different persons, counsel submitted that the standard forms SD1 and SD2 were standard forms which were not to be altered in any way and the person who ought to have made them was either a Company Secretary, Chief Executive, Managing Director, Principal Officer or Director of a bidder and such person ought to have been duly authorized and competent to do so. He pointed out that forms SD1 and SD2 in the Applicant's bid were made by the Applicant's Managing Director, Henry Kamau and that Tabitha Mwangi was duly authorized by the said director to sign forms SD1 and SD2 on his behalf and on behalf of the Applicant and as such the forms were valid and compliant to MR 9 and 10.

31. Counsel pressed on that the Procuring Entity was introducing extrinsic criteria by requiring forms SD1 and SD2 to be made and signed by the same person as this evaluation criterion was not disclosed to bidders prior to the tender submission deadline.

32. Counsel indicated that there was no requirement for a bidder's power of attorney to be registered and that the Applicant's power of attorney was valid having been duly executed and not being made with regard to immovable property. He made reference to the provisions of Section 4 and 5 of the Registration of Documents Act and the holding in *PPARB Application No. 71 of 2023 Frejed Engineering Services Limited v The Director, Kenya Maritime Authority and another*.

33. Mr. Mwirigi submitted that should the Board be of the view that forms SD1 and SD2 ought to have been made and signed by the same person, then the same ought to be considered as a minor deviation that does not materially depart from the requirements of the tender document. Counsel further submitted that the Applicant's bid was the lowest in price compared to prices quoted by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Party and as such, the Applicant ought to be awarded the subject tender.

34. It is also the Applicant's case that the letter of notification dated 23<sup>rd</sup> April 2024 was issued contrary to Section 87(3) of the Act read with Regulation 82 of Regulations 2020 since it failed to disclose the names of the successful bidders and reasons why they were rendered successful and that though the Respondents tried to rectify the error

by re-issuing a two page document backdated to 23<sup>rd</sup> April 2024 via email of 29<sup>th</sup> April 2024, the supposed rectification neither had details of its author nor was it signed contrary to the principles of transparency under Article 227 of the Constitution.

35. Mr. Mwirigi urged the Board to allow the instant Request for Review as prayed.

### **Respondents' submissions**

36. In his submissions, counsel for the Respondents, Mr. Ogutu relied on the Memorandum of Appearance dated 14<sup>th</sup> May 2024, Respondent's Response to the Request for Review dated 14<sup>th</sup> May 2024, 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying Affidavit sworn on 14<sup>th</sup> May, 2024 by Jeremiah Nthusi, the Procuring Entity's Director of Supply Chain Management together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act filed before the Board.

37. Mr. Ogutu submitted that MR 9 & 10 of the Tender Document required the self-declaration forms to be filled and this requirement was anchored under Section 62 of the Act and Regulation 46 and 47 of Regulations 2020 which dictate that a bidder must submit the declaration forms. He indicated that both forms were provided in the 5<sup>th</sup> Schedule and the said template provides that the persons indicated were to fill in the declaration in addition to signing the same.

38. Counsel argued that where the template provided for signing, there was no need for a procuring entity to tell bidders to sign the same under the mandatory requirements. He further argued that a declarant of a declaration is someone making a commitment and the same ought to be signed per the law for it to be authentic as it holds the person making the said declaration accountable in the event they make a false declaration and should not only be filled but signed.

39. Mr. Ogutu submitted that the declaration forms were to be made only by specified persons who are required to fill and sign the template provided in the Regulations 2020. Further that the person making the declarations must also be the same person signing it so as to be legally binding.

40. Counsel further submitted that a bidder was required to comply with all mandatory requirements in the Tender Document so as to be rendered responsive and that all bidders in the subject tender were subjected to the same evaluation criteria. He pointed out that there cannot be a minor deviation with regard to a mandatory requirement of the Tender Document and that where a bidder is required under the law to make a declaration, non-compliance cannot be declared as minor.

41. Mr. Ogutu indicated that it is immaterial whether the Applicant's bid price was the lowest in the subject tender since it was declared non-



responsive at the preliminary evaluation stage and did not progress further.

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

### **Applicant's Rejoinder**

43. In a rejoinder, Mr. Mwirigi submitted that the person who had made the declaration under Forms SD1 and SD2 was Henry Kamau and as such, he was the person to be held accountable. Counsel further submitted that Tabitha Mwangi signed the declaration forms on behalf of Henry Kamau pursuant to the authority donated to her by Henry Kamau in the submitted power of attorney.

44. Counsel argued that Regulation 74 of Regulations 2020 provides for circumstances that can count as minor deviations and the signing on the Applicant's forms SD1 and SD2 ought to be considered as a minor deviation as it doesn't materially deviate from the substance of the Applicant's bid document.

45. The Board informed parties that the instant Request for Review having been filed on 9<sup>th</sup> May 2024 was due to expire on 30<sup>th</sup> May 2024 and the Board would communicate its decision on or before 30<sup>th</sup> May 2024 to all parties to the Request for Review via email.



## **BOARD'S DECISION**

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

**A. Whether the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document as read with provisions of the Constitution, the Act and Regulations 2020;**

**B. Whether the Letter of Notification of Intention to Award the subject tender dated 23<sup>rd</sup> April 2024 issued to the Applicant in the subject tender met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020.**

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

**Whether the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender**



**Document as read with provisions of the Constitution, the Act and Regulations 2020;**

47. The Applicant contends that its bid document complied with Mandatory Requirement No. 9 and 10 at Stage 1: Preliminary Examination of Tender of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document (hereinafter referred to as “Mandatory Requirements No. 9 and 10 of the Tender Document”) and that the Evaluation Committee applied an extrinsic criterion in disqualifying its bid document contrary to the provisions of the Tender Document read with the Constitution, the Act and Regulations 2020.

48. On its part, the Respondents contend that the Evaluation Committee complied with provisions of the Constitution, the Act, Regulations 2020 and the Tender Document in evaluation of the Applicant’s bid submitted in the subject tender and that the Applicant was rightfully disqualified having failed to meet Mandatory Requirements No. 9 and 10 of the Tender Document.

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

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



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

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

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

50. Justice Mativo (as he then was) in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** (hereinafter referred to as "Misc. Application No. 60 of 2020") spoke to the principles under Article 227 of the Constitution as follows:

**"45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness.**



***For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.***

***46. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The evaluation Committee has a duty to act fairly..."***

51. The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information and provides as follows:

***"(1) An accounting officer of a procuring entity shall use a standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.***

***(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-***

***effectiveness and competition among those who may wish to submit their applications."***

52. Further Section 60(1) provides:

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

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

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

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

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

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

  - (a) the criteria shall, to the extent possible, be objective and quantifiable;**
  - (b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time**

*and service for the purpose of  
evaluation; and*

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

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

56. Section 79 of the Act provides for responsiveness of tenders as follows:

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

57. Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Miscellaneous Civil**



Application No. 85 of 2018, Republic V Public Procurement Administrative Review Board Ex Parte Meru University of Science & Technology; M/S AAKI Consultants Architects and Urban Designers (Interested Party) [2019] eKLR, (hereinafter referred to as "Application No. 85 of 2018") the High Court held that:

***"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."***

58. We note that Regulation 74(1) of Regulations 2020 provides for preliminary evaluation of tender as follows:

***"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 authorized 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 import of the aforementioned provisions of the Act and case law is that mandatory requirements cannot be waived. In this instance, the Evaluation Committee was mandated to evaluate the Applicant's tender together with all other tenders submitted in the subject tender using the procedures and criteria set out in the Tender Document having regard to provisions of the Act and the Constitution.

60. Turning to the circumstances in the instant Request for Review, we note that the Applicant's bid was disqualified at the preliminary evaluation stage for reasons indicated in its letter of Notification of Intention to Award dated 23<sup>rd</sup> April 2024 as follows:

"....."

- ***The SD1 is not signed by the person with the power of attorney***
- ***The SD2 is not signed by the person with the power of attorney***

....."

61. During the hearing, counsel for the Applicant, Mr. Mwirigi submitted that there was no requirement for the Self-Declaration forms SD1 and SD2 to be signed and that the only requirement was for the said forms to be filled. Counsel pointed out to the Board that the person who made the declaration under forms SD1 and SD2 and who was to be held accountable was the Applicant's Managing Director, Mr. Henry Kamau and that the said forms were signed on his behalf by Ms.



Tabitha Mwangi by virtue of the authority donated to her in a power of attorney submitted in the bid document.

62. We note that the parameters of evaluation of tenders in the subject tender is set out under Section III – Evaluation and Qualification Criteria of the Tender Document. Mandatory Requirement 9 and 10 of the Tender Document provides as follows:

| <b><i>SN</i></b> | <b><i>Required Items</i></b>   | <b><i>Y/N</i></b> |
|------------------|--|-------------------|
| .....            | .....  | .....             |
| <b>9</b>         | <b><i>Must fill Self declaration forms SD1:<br/>- self-declaration that the person/Tenderer is not debarred in the matter of the Public Procurement and Asset Disposal Act, 2015</i></b> |                   |
| <b>10</b>        | <b><i>Must fill Self declaration forms SD2:<br/>- self-declaration that the person/Tenderer will not engage in any corrupt or fraudulent practice</i></b>                                |                   |
| ....             | .....  | .....             |

63. The standard templates for the Self-Declaration Forms SD 1 and SD 2 were provided at pages 43 and 44 of the Tender Document as follows:

***"iii) SELF-DECLARATION FORMS***

**FORM SD1**

**SELF DECLARATION THAT THE PERSON/TENDERER IS NOT DEBARRED IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASEET DISPOSAL ACT 2015**

*I, ..... of Post Office Box ..... being a resident of ..... in the Republic of ..... do hereby make a statement as follows:-*

- 1. THAT I am the Company Secretary/Chief Executive/Managing Director/Principal Officer/Director of .....(insert name of the Company) who is a Bidder in respect of Tender No. .... for .....(insert tender title/description) for..... (insert name of the Procuring entity) and duly authorized and competent to make this statement.*
- 2. THAT the aforesaid Bidder, its Directors and subcontractors have not been debarred from participating in procurement proceeding under Part IV of the Act.*
- 3. THAT what is deponed to herein above is true to the best of my knowledge, information and belief.*

.....  
*(Title) (Signature) (Date)*

**Bidder Official Stamp**



**FORM SD2**

**SELF DECLARATION THAT THE PERSON/TENDERER  
WILL NOT ENGAGE IN ANY CORRUPTION OR  
FRAUDULENT PRACTICE**

**I, ..... of Post Office Box .....  
being a resident of ..... in the Republic of .....  
do hereby make a statement as follows:-**

- 1. THAT I am the Chief Executive/Managing  
Director/Principal Officer/Director of .....(insert  
name of the Company) who is a Bidder in respect of  
Tender No. .... for .....(insert tender  
title/description) for..... (insert name of the Procuring  
entity) and duly authorized and competent to make this  
statement.**
- 2. THAT the aforesaid Bidder, its servants and/or  
agents/subcontractors will not engage in any corrupt or  
fraudulent practice and has not been requested to pay  
any inducement to any member of the board,  
Management, Staff and/or employees and/or agents of  
.....(insert name of the Procuring entity) which  
is the procuring entity.**
- 3. THAT the aforesaid Bidder, its servants and/or agents /  
subcontractors have not offered any inducement to any  
member of the Board, Management, Staff and /or**



*employees and / or agents of ..... (name of the procuring entity)*

**4. THAT the aforesaid Bidder will not engage/has not engaged in any corrosive practice with other bidders participating in the subject tender.**

**5. THAT what is deponed to herein above is true to the best of my knowledge information and belief.**

.....

**(Title)**

.....

**(Signature)**

.....

**(Date)**

***Bidder Official Stamp"***

64. In essence, Form SD1 and SD2 required a bidder to declare that it was not debarred under the Act and that it would not engage in any corrupt or fraudulent practice and the said declarations were required to be deponed by either the bidder's (a) Company Secretary, or (b) Chief Executive Office, or (c) Managing Director, or (d) Principal Officer, or (e) Director who was duly authorized and competent to do so. We note that the deponent was required to then fill in his/her title, sign and date the said declarations.

65. According to the Evaluation Report submitted to the Board by the 1<sup>st</sup> Respondent as part of the confidential documents, we note that the reasons indicated for disqualification of the Applicant's bid at the Preliminary/Mandatory Evaluation were indicated as follows:

| <b>S/NO</b> | <b>BIDDER NO</b> | <b>REQUIREMENT/PARAMETER</b>   | <b>REASON/S</b>   |
|-------------|------------------|--|---|
| 7           | B10              | <p><i>Must fill Self declaration forms SD1: - self-declaration that the person/Tenderer is not debarred in the matter of the Public Procurement and Asset Disposal Act, 2015</i></p> <p><i>Must fill Self declaration forms SD2: - self-declaration that the person/Tenderer will not engage in any corrupt or fraudulent practice</i></p> | <p><i>The person signing the declaration is different from the person making the declaration</i></p> <p><i>The person signing the declaration is different from the person making the declaration</i></p> |
| ****        | *****            | *****  | *****   |

66. Having carefully studied the Applicant’s original bid document submitted by the 1<sup>st</sup> Respondent to the Board pursuant to Section 67(3) of the Act, the Board notes that in response to Mandatory

Requirements No. 9 and 10 of the Tender Document, the Applicant submitted at pages 38 and 39 of its bid Forms SD1 and SD2 made by Henry Kamau as the deponent but signed on his behalf by Tabitha Mwangi, the Applicant's Sales Executive. We do also note that the Applicant submitted at page 61 a Power of Attorney delegating authority to Tabitha Mwangi, Sales Manager and to Solomon Njihia, ICT Manager. The power of attorney reads in part as follows:

" **POWER OF ATTORNEY**

***Specicom Technologies Limited is a company registered under the laws of the republic of Kenya and operating in Kenya, located in Corner House 7<sup>th</sup> floor Mama Ngina Street, P.O. Box 4428-00100, Nairobi Kenya represented by its Managing Director – Henry Kamau in accordance with the by-laws of the company***

***The Managing Director is authorized to:***

- 1. Sign and submit bids on behalf of the company.***
- 2. Sign contracts awarded to the company.***
- 3. Act on behalf of the company as may be delegated by the board of Directors.***
- 4. Delegate some of the responsibilities to the staff and employees of the company to act on behalf of the company in submitting tenders, proposals, quotations, Expression of Interests, prequalification and other bids.***
- 5. To sign contracts awarded to the company on behalf of the company***



**6. To act on behalf of the company as may be delegated by the Managing Director or other directors from time to time.**

**Consequently, in this bid, the Managing Director has fully delegated authority as above to the persons named below**

**Sample signature of managing Director (Delegating authority)**

**Henry Kamau .....(Signed) & (Stamped)**

**Name of delegated person(s): Solomon Njihia -- ICT Manager**

**Sample signature 2 .....(signed).....**

**Name of delegated person(s): Mwangi Tabitha – Sales executive**

**Sample signature 1 .....(signed).....**

**In the Presence of Commissioner for Oaths ...(Signed & Stamped)...**

67. From the above Power of Attorney, it is evident that the Applicant's Director, Mr. Henry Kamau, fully delegated authority to Ms. Tabitha Mwangi and Mr. Solomon Njihia to undertake the roles stipulated therein with regard to the subject tender. It is our considered opinion therefore that in reference to Forms SD1 and SD 2 of the subject tender, Mr. Henry Kamau having delegated his authority as per the above power of attorney, ought not to have filled his name as the deponent of the declarations made in Forms SD1 and SD 2 on behalf of the Applicant. Ms. Tabitha Mwangi was better placed to make the declarations under Forms SD 1 and SD2 on behalf of the Applicant and sign the same as the deponent in view of being the donee authorized



in the power of attorney to, *inter alia*, sign and submit bids on behalf of the Applicant, sign contracts awarded to the Applicant and more importantly, sign the Applicant's bid document submitted in the subject tender.

68. It was irregular and contrary to Mandatory Requirements No. 9 and 10 of the Tender Document as read with Section 62 of the Act, Regulation 47 of Regulations 2020 and the Fifth Schedule of Regulations 2020 for the Applicant's Forms SD1 and SD2 to be made in the name of Henry Kamau as the deponent and signed by another individual on account of the existing delegated authority to Tabitha Mwangi. We say so because the purpose of a deponent executing a self-declaration by himself or herself is to bind him or her to the declarations made. Forms SD1 and SD2 of the Tender Document are statutory forms and the persons listed therein are required to not only sign but to also disclose their titles as they are the ones responsible for making the declarations on behalf of the tenderer. Failure to do so amounts to non-compliance and cannot be deemed as a minor deviation as argued by the Applicant.

69. We note that Section 79 (2) and (3) of the Act provides as follows with respect to minor deviations:

***"(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 document; 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."*

70. The import of the above provision is that responsiveness of a tender shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document and that do not affect the substance of a tender. This provision details a minor deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

71. In **Application No. 85 of 2018** the High Court considered what amounts to a minor deviation and held as follows:

*The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible,*

**and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable....**

**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."**

72. It is evident that a procuring entity cannot waive a mandatory requirement or term it as a "minor deviation" since a mandatory requirement is instrumental in determining the responsiveness of a tender and is a first hurdle that a tender must overcome in order to be

considered for further evaluation. From the foregoing case above, a minor deviation (a) does not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents; (b) may be an error or oversight that can be corrected without touching on the substance of the tender; and (c) can be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

73. In **Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR** Justice E.K. Ogola, held that;

***"...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities."***



74. Considering the above, we are left with the inevitable conclusion that the Applicant failed to comply with Mandatory Requirement No. 9 and 10 at Stage 1: Preliminary Examination of Tender of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document.

75. In the circumstances, the Board finds that the 2<sup>nd</sup> Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document as read with provisions of the Constitution, the Act and Regulations 2020.

**Whether the Letter of Notification of Intention to Award the subject tender dated 23<sup>rd</sup> April 2024 issued to the Applicant in the subject tender met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020.**

76. The Applicant contends that the notification letter dated 23<sup>rd</sup> April 2024 sent vide email on 25<sup>th</sup> April was issued contrary to Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020 since (a) it did not disclose the successful bidder in Lot 1 though the Respondents tried to rectify the error by reissuing a two page document that was backdated to 23<sup>rd</sup> April 2024 vide email of 29<sup>th</sup> April 2024 but the rectification was neither signed nor had details of its author contrary to Article 227 of the Constitution, and (b) the Respondents did not disclose reasons why the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were successful.

77. We note that Section 87 of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and provides as follows:

***“87. Notification of intention to enter into a contract***

***(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.***

***(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.***

***(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.***

***(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.”***

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

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

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

- (1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.***
- (2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.***
- (3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act."***



80. In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

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

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

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

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

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

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

84. We note that the Applicant has annexed as Exhibit marked HMK-8 a letter of Notification of Intention to Award the subject tender dated



23<sup>rd</sup> April 2024 where the name of the successful tenderer in lot one has not been indicated nor reason as to why the said tenderers were rendered successful. We also note that the reasons issue for disqualification of the Applicant's tender differ from the reasons indicated in the Evaluation Report in that the notification letter indicates that the Applicant was unsuccessful because:

" .....

- ***The SD1 is not signed by the person with the power of attorney***
- ***The SD2 is not signed by the person with the power of attorney***

....."

While the Evaluation Report indicated that the Applicant was unsuccessful since:

" .....

***The person signing the declaration is different from the person making the declaration.***

....."

85. Having carefully perused the confidential file, we also noted that the letter of Notification of Intention to Award dated 23<sup>rd</sup> April 2024 addressed to the Applicant in the subject tender is incomplete as only page 1 and 2 are available.

86. As such, it is quite clear to the Board that the Respondents failed to inform the Applicant of the name of the successful bidder in lot 1 of



the subject tender in addition to reasons why they were successful in addition to failure to coherently inform the Applicant of the reason for disqualification of its tender as indicated in the Evaluation Report contrary to the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020.

87. In the circumstances, we find that the Respondents Letter of Notification of Intention to Award the subject tender dated 23<sup>rd</sup> April 2024 issued to the Applicant in the subject tender did not meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

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

88. We have found that the Applicant's tender was evaluated in accordance with provisions of Section 80(2) of the Act read with Article 227(1) of the Constitution and the Tender Document.

89. We have also found that the Applicant's letter of Notification of Intention to Award the subject tender dated 23<sup>rd</sup> April 2024 failed to disclose the name of the successful bidder in lot 1 of the subject tender, reasons why the said tenderer was successful in addition to failing to consistently provide the Applicant with reasons for its disqualification as indicated in the Evaluation Report by the Evaluation Committee.

90. Consequently, the Board deems it fit to nullify the Applicant's Letter of Notification of Intention to Award the subject tender dated 23<sup>rd</sup> April 2024 to enable the 1<sup>st</sup> Respondent to notify the Applicant of the outcome of evaluation of its bid document and the subject tender in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020.

91. The upshot of our findings is that the instant Request for Review dated 9<sup>th</sup> May 2024 and filed on even date succeeds only to the extent that the Letter of Notification of Intention to Award the subject tender dated 23<sup>rd</sup> April 2024 issued to the Applicant did not meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

### **FINAL ORDERS**

92. 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 9<sup>th</sup> May 2024 and filed on even date:

**A. The Letters of Notification of Intention to Award dated 23<sup>rd</sup> April 2024 addressed to the Applicant with respect to Tender No. JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable**



annually (once) subject to satisfactory performance, be and is hereby nullified and set aside.

**B. The 1<sup>st</sup> Respondent is hereby directed to issue the Applicant with a fresh letter of Notification of Intention to Award with respect to Tender No. JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance disclosing reasons for its disqualification as captured in the Evaluation report in addition to the name of the successful bidder in Lot 1 in the subject tender and reasons why the said bidder was rendered successful in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 within two (2) day from the date hereof taking into consideration the Board's findings herein.**

**C. Further to Order B above, the Respondents are hereby directed to proceed with the procurement proceedings for Tender No. JUD/OT/048/2023-2024 for Supply, Delivery, Testing and Commissioning of Active Network Devices (Switches and Access Points) Under Framework**

**Contract for a Period of Two (2) Years, renewable annually (once) subject to satisfactory performance in accordance with provisions of the Act to its lawful and logical conclusion while strictly adhering to the Constitution, the Tender Document, the Act, Regulations 2020 and taking into consideration the findings of this Board in this Request for Review.**

**D. In view of our findings above, each party shall bear its own costs in the Request for Review.**

**Dated at NAIROBI this 30<sup>th</sup> Day of May 2024.**

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

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

