

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 46/2024 OF 31ST MAY 2024

BETWEEN

ROYAL TASTE KITCHEN LIMITED APPLICANT

AND

ACCOUNTING OFFICER

KENYA NATIONAL EXAMINATIONS COUNCIL 1ST RESPONDENT

KENYA NATIONAL EXAMINATIONS COUNCIL 2ND RESPONDENT

URTH CAFFE LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer Kenya National Examination Council in relation to Tender No. KNEC/ONT/2023-2024/07 for Provision of Catering and Events Set Up Services on a Two Year Contract Basis.

BOARD MEMBERS PRESENT

- | | | |
|-------------------------|---|-------------------|
| 1. QS Hussein Were | - | Panel Chairperson |
| 2. Ms. Jessica M'mbetsa | - | Member |
| 3. Mr. Daniel Lang'at | - | Member |



IN ATTENDANCE

- 1. Ms. Sarah Ayoo - Holding Brief for Acting Board Secretary
- 2. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT

ROYAL TASTE KITCHEN LIMITED

- Mr. Edward Ratemo - Advocate, ROM Law Advocates LLP
- Ms. Emily Kerubo - Director, Royal Taste Kitchen Ltd

RESPONDENTS

**THE ACCOUNTING OFFICER, KENYA
NATIONAL EXAMINATIONS COUNCIL &
KENYA NATIONAL EXAMINATIONS
COUNCIL**

- 1. Ms. Befly Bisem -Advocate, Kenya National Examinations Council (KNEC)
- 2. Mr. Nicholas Mang'ata - Deputy Director SCM, KNEC

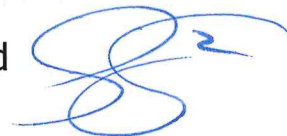
INTERESTED PARTY

URTH CAFFE LIMITED

- 1. Mr. Omollo - Advocate, Sigano & Omollo LLP Advocates
- 2. Mr. Joe - Director, Urth Caffè Limited

OTHER PARTIES

- 1. Ms Joan - Cascade Company Ltd
- 2. Ms. Laura - Cascade Company Ltd



BACKGROUND OF THE DECISION

The Tendering Process

1. The Kenya National Examinations Council (the Procuring Entity) invited sealed bids from tenderers registered under AGPO (Women) in response to Tender No. KNEC/ONT/2023-2024/07 for Provision of Catering and Events Set Up Services on a Two Year Contract Basis (hereinafter referred to as the "subject tender"). Tendering was conducted under open competitive method (National) and the invitation was by way of an advertisement on 13th February 2024 published in *MyGov* publication, on the Procuring Entity's website www.tenders.go.ke and on the Public Procurement Information Portal (PPIP) website www.tenders.go.ke where the blank tender document issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. The tender's submission deadline was on 23rd February 2024 at 10.00 a.m.

Submission of Tenders and Tender Opening

2. According to the Minutes of the tender opening held on 23rd February 2024 and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board by the Procuring Entity pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of ten (10) tenders were submitted in



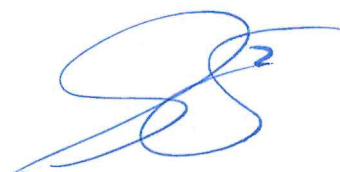
response to the tender. The tenders were opened in the presence of tenderers' representatives present, and were recorded as follows:

Bidder No.	Name
1.	The Viands Limited
2.	Urth Caffe Limited
3.	Royal Taste Kitchen Ltd
4.	Maco the Bigfish
5.	Lesan Caterers Ltd
6.	Netasam Enterprises Ltd
7.	Cascade Company Ltd
8.	Meal Magic Caterers & Event Management
9.	Capital Cube Restaurant Ltd
10.	Kipevu Restaurant Ltd

Evaluation of Tenders

3. A Tender Evaluation Committee appointed by the 1st Respondent undertook evaluation of the ten tenders as captured in the Evaluation Report. The evaluation was done in the following stages:

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



Preliminary Evaluation

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage 1: Mandatory Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the technical evaluation stage.
5. At the end of evaluation at this stage two tenders were determined non-responsive while eight tenders were determined responsive. The responsive tenders proceeded for Technical Evaluation.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Technical Evaluation of Section III- Evaluation and Qualification Criteria of the Tender Document. Tenderers were required to score 70% and above to proceed to the financial evaluation stage.
7. One (1) tender was determined non-responsive while seven (7) tenders were determined responsive at this stage. The responsive tenders proceeded for evaluation at the Financial Evaluation stage.

Financial Evaluation



8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Financial Evaluation of Section III- Evaluation and Qualification Criteria at page 30 of the Tender Document. Prices quoted by bidders were required to be inclusive of all applicable taxes and the subject tender would be awarded to the bidder with the least cost.

9. The Evaluation Committee undertook a comparison of the quoted rates as submitted by the seven responsive bidders as follows:

QUOTED RATES FOR THE SEVEN FIRMS

		Bidder No.						
S/No	Description	02	03	05	06	07	08	10
	Total (Kes)	72,374	37,540	283,265	141,300	83,720	73,885	136,980

11. Based on the above quoted rates, the Evaluation Committee recommended for due diligence to be carried out on the following two bidders:

Bidder 02: Urth Caffe Limited

Bidder 03: Royal Taste Kitchen Limited

Due Diligence

10. The Evaluation Committee was required to carry out due diligence as provided under stage 4: Due Diligence of Section III- Evaluation and Qualification Criteria at page 30 of the Tender Document. Due



diligence was to be done to the successful bidder, that is, the most responsive evaluated bidder and a recommendation made for possible award.

11. According to the Due Diligence report dated 20th March 2024, the two (2) bidders were found to have adequate capacity to provide catering and event set-up as per the Procuring Entity's specifications.

Evaluation Committee's Recommendation

12. The Evaluation Committee gave the bidders' quoted rates projected quantities as follows:

S/N	Item Description	Bidder 2 Urth Caffe Limited	Bidder 3 Royal Taste Kitchen Ltd	Bidder 5 Lesan Caterers Ltd	Bidder 6 Brinks Netasam	Bidder 7 Meal Magic Caterers&	Bidder 8 Cascade Company Ltd	Bidder 10 Kipevu Restaurant Ltd
1.	Event Set Up	178,229	207,000	472,000	326,500	202,500	185,100	298,600
2.	Snacks	214,000	224,000	299,000	332,000	360,000	263,000	440,000
3.	Break fast	1,812,000	2,446,000	2,522,000	3,313,000	2,322,000	1,798,000	2,890,000
4.	Main Meal	704,000	622,000	650,000	840,000	714,000	666,000	746,000
Total (Kes.)		2,908,229	3,499,000	3,943,000	4,811,500	3,598,500	2,912,100	4,374,600

13. Based on the foregoing projection analysis, the Evaluation Committee noted that the lowest bid was that of M/s Urth Caffè Limited. It further subjected the bidders quoted rates to the actual quantities for the year 2023 to determine the lowest evaluated bid as follows:

S/N	Item Description	Bidder 2 Urth Caffè Limited	Bidder 3 Royal Taste Kitchen	Bidder 5 Lesan Caterers Ltd	Bidder 6 Brinks Nefasam	Bidder 7 Meal Magic	Bidder 8 Cascade	Bidder 10 Kipevu
1.	Event Set Up	1,315,900	978,000	4,245,600	2,089,000	1,068,600	1,358,400	1,772,600
2.	Snacks	1,070	1,120	1,495	1,660	1,800	945	2,200
3.	Break fast/Lunch and Supper	55,740,890	68,540,830	91,081,775	104,794,600	61,024,820	57,108,760	74,582,040
4.	Main Meal	3,520	3,110	3,250	4,200	3,570	3,330	3,730
	Total (Kes.)	57,056,790	69,518,830	95,327,375	106,883,600	62,093,420	58,467,160	76,354,640

14. Based on the foregoing 2023 actual quantities projection analysis, it was noted that the lowest bid was that of M/s Urth Caffè Limited.

15. In view of the foregoing analysis, the Evaluation Committee recommended award of the tender to the Interested Party, M/s Urth

Caffe Limited, being the lowest evaluated bidder at their quoted rates totaling to Kenya Shillings Seventy-Two Thousand Three Hundred and Seventy-Four only (Kshs. 72,374.00) inclusive of 16% VAT.

Professional Opinion

16. In a Professional Opinion dated 30th April 2024, the Deputy Director SCM, Mr. Nicholas O. Mang'ata, 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 M/s Urth Caffe Limited, being the lowest evaluated bidder at its quoted total per unit rates of Kenya Shillings Seventy-Two Thousand Three Hundred and Seventy-Four only (Kshs. 72,374.00), inclusive of 16% VAT.

17. The Professional Opinion was approved by the Chief Executive Officer of the Procuring Entity, Dr. David Njengere, on 30th April 2024.

Notification to Tenderers

18. Tenderers were notified of the outcome of evaluation process *vide* letters dated 27th May 2024.



REQUEST FOR REVIEW NO. 46 OF 2024

19. On 31st May 2024, Royal Taste Kitchen Limited hereinafter referred to as "the Applicant"), filed a Request for Review dated 30th May 2024 together with Supporting Affidavit sworn on 30th May 2024 by Emily Kerubo Kamau, its Director through ROM Law Advocates LLP seeking the following orders from the Board:

- a. The 1st and 2nd Respondent's decision contained in the letter of notification dated 28th May, 2024 disqualifying the Applicant's bid with respect to Tender No. KNEC/ONT/2023-2024/07 for Provision of Catering and Event Set Up Services be and is hereby nullified and/or set aside.***

- b. The 1st and 2nd Respondent's decision contained in the Letter of Notification dated 28th May, 2024 awarding the Tender No. KNEC/ONT/2023-2024/07 for Provision of Catering and Event Set Up Services to the Interested Party be and is hereby nullified and/or set aside.***

- c. An Order be and is hereby issued directing the 1st and 2nd Respondents to award the Applicant Tender No. KNEC/ONT/2023-2024/07 for Provision of Catering and Event Set Up Services as***



the validly established lowest and most responsive evaluated bidder.

d. An Order be and is hereby issued extending the tender validity period for a further Thirty (30) Days.

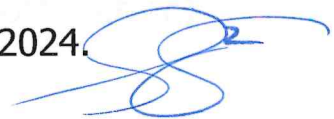
e. The Respondents be and is hereby ordered to pay the costs of and incidental to these proceedings; and

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

20. In a Notification of Appeal and a letter dated 31st May 2024, Mr. James Kilaka, the Acting 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 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 31st May 2024.



21. The Respondents filed, through Befly Bisem Advocate, a Notice of Appointment of Advocate dated 7th June 2024, a 1st and 2nd Respondents' Memorandum of Response dated 6th June 2024, together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act, all filed on 7th June 2024,.
22. *Vide* email dated 7th June 2024, the Acting Board Secretary notified all tenderers in the subject tender, of the existence of the Request for Review while forwarding to them the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers were invited to submit to the Board any information and arguments concerning the tender within three (3) days.
23. *Vide* a Hearing Notice dated 7th June 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 12th June 2024 at 11.00 a.m. through the link availed in the said Hearing Notice.
24. On 12th June 2024, the Applicant filed through its advocates a Further Affidavit sworn on 11th June 2024 by Emily Kerubo Kamau, its Director.
25. On 12th June 2024, the Interested Party filed through Sigano & Omollo LLP Advocates a Notice of Appointment of Advocates and a Memorandum of Response both dated 12th June 2024.



26. When the matter first came up for hearing on 12th June 2024, Counsel for the Applicant, Ms. Michira indicated that she was yet to be served with the Interested Party's pleadings as filed before the Board. Counsel for the Respondent, Ms. Bisem, and counsel for the Interested Party, Mr. Omollo, also indicated that they were yet to be served with the Applicant's Further Affidavit.


APPLICATION FOR RECUSAL

27. Before the commencement of the hearing Mr. Omollo, for the Interested Party, asked that Ms. Michira recuses herself from the hearing of the Request for Review on account of there being a likelihood of conflict of Interest.

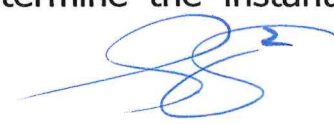
28. Counsel stated that Ms. Michira was a partner at the law firm of C & K Advocates together with Mr. Joshua Kiptoo, a Board Member at the Public Procurement Administrative Review Board.

29. In addition, Mr. Omollo stated that Ms. Michira was a spouse of Mr. Joshua Kiptoo and that her law firm authored the demand letter which gave rise to the Request for Review.

30. Ms. Michira, in response, confirmed that her law firm, C & K Advocates authored the demand letter dated 20th May 2024 addressed to the Procuring Entity and that she was both a spouse and Partner of Mr. Joshua Kiptoo, a Board Member.



31. She however argued that there was no conflict of interest and that she had notified the Applicant's advocate on record of those facts and forwarded the matter to him to deal further and that she only appeared on his behalf for the hearing since he was indisposed.
32. She further argued that Mr. Joshua Kiptoo was not sitting as a panel member in the instant Request for Review and, as such, there was no conflict of interest and that she ought not to be condemned from appearing before the Board.
33. Ms. Bisem aligned herself with the submissions of Mr. Omollo. In a rejoinder, Mr. Omollo submitted that Ms. Michira had not been candid with the Board in disclosing the likelihood of a conflict of interest since she had to wait for him to raise the issue before making the disclosure voluntarily. He argued that conflict of interest is not just actual but also apparent where there is a likelihood and ought not to be allowed since if that was the case then Board members would be issuing demand notices to procuring entities and when the matter comes up for hearing, they would then divert it to other law firms. He indicated that likelihood of conflict still existed whether or not the Board member was sitting in the panel.
34. Having considered parties' submissions on the application for recusal of Ms. Michira, the Board found that the panel as constituted was not conflicted and was competent to hear and determine the instant



Request for Review. However, to avoid perception of bias and in the interest of justice, the Board directed as follows:

- (a) The Applicant should get separate representation in the matter in view of the perceived conflict of interest arising in Ms. Michira appearing for the Applicant,
- (b) The parties to exchange their respective pleadings as filed before the next hearing, and
- (c) That the matter would proceed for hearing on Thursday, 13th June 2024 at 3.30 p.m.

35. At the hearing on 13th June 2024, the Board directed that, in order to save time, the preliminary objections raised by the Respondents would be heard together with the substantive Request for Review in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of the substantive request for review and deliver one decision. Subsequently, parties were allocated time to highlight their respective cases and the Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's case

36. The Applicant, led by Mr. Ratemo, relied on its documents filed before the Board and went on to aver that it submitted a bid for



consideration by the Procuring Entity in the subject tender and that as per the evaluation stages laid out in the Tender Document, the last step of evaluation was for due diligence to be done on the successful bidder who was to be the most responsive evaluated bidder and a recommendation would be made thereafter for possible award.

37. It averred further that on 20th March 2024, officers of the Procuring Entity carried out a post-qualification/due diligence exercise and that this was a clear indication that the Applicant's bid was responsive under the Preliminary, Technical and Financial stages of evaluation hence the need for the post qualification/due diligence exercise. The Applicant was therefore justifiably expecting to be awarded the tender.

38. The Applicant also averred that the purpose of conducting a due diligence exercise is to check for accuracy of submitted documentation, experience and references capacity and capability arguing that following the due diligence exercise of 20th March 2024, there was no further communication from the Procuring Entity for over two months which prompted the Applicant to write a letter dated 20th May 2024 seeking to establish the status of the tendering proceedings.

39. The Applicant submitted that it received a response from the Procuring Entity vide letter dated 23rd May 2024 stating that the



Procuring Entity can make a decision on the successful bidder and from the said response, one can discern a complete disregard of statutory timelines or strict procurement planning envisaged under the provisions of Sections 41 and 53 of the Act.

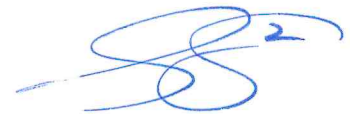
40. It submitted further that the Applicant was notified of the outcome of evaluation of the subject tender on 27th May 2024 informing it that the tender had been awarded to the Interested Party herein and that the Applicant's bid was unsuccessful purely on price consideration.
41. Noting that the Interested Party's bid price was Kshs. 72,374.00 compared to the Applicant's price of Kshs. 37,540.00, it was the Applicant's contention that its bid was the lowest evaluated tender and that, as such, it ought to have been awarded the tender in accordance with the provisions of the Tender Document and the Act.
42. Making reference to reasons as to why its tender was disqualified, the Applicant argued that if the prices of the Applicant and the Interested Party were compared on the same parameters the result would have been different from the outcome of projected cost of the tender during the contract period that showed the Interested Party's projected cost at Kshs. 57,056,790.00 and the Applicant's projected costs at Kshs. 69,518,830.00.
43. On the preliminary issue that the Request for Review was not executed, the Applicant submitted that the Request for Review was



accompanied by a supporting affidavit that was deponed, signed and commissioned by an Advocate of the High Court of Kenya. It stated that advocates are agents of their clients and that the law firm of ROM Law Advocates LLP represented the Applicant and relied on the holding in ***PPARB Application No. 9 of 2023*** where the Board, seized with a similar issue, dismissed the objection raised as there was no prejudice to be suffered. It submitted further that whatever had been deponed by the Applicant on oath had been captured in the supporting affidavit annexed to the Request for Review and went on to make reference to the holding by the Board in ***PPARB Application No. 158 of 2020***.

44. With regard to the objection raised by the Respondent's pertaining to unsolicited communication vide letter dated 20th May 2024, the Applicant averred that the inquiry made by the Applicant was in line with Section 64 of the Act and did not purport to influence the award of the tender.

45. On the issue of whether the Request for Review as filed was time barred, the Applicant argued that the instant Request for Review was filed within the statutory timelines of 14 days stipulated under Section 167(1) of the Act having been filed on 31st May 2024 which was barely three days after receipt of the notification of intention to award dated 27th May 2024.



46. The Applicant urged the Board to allow the Request for Review as prayed.

Respondents' case

47. The Respondents, led by Ms. Bisem, equally relied on the documents that they filed before the Board, together with confidential documents concerning the tender pursuant to Section 67(3)(e) of the Act.

48. The Respondents submitted that the instant Request for Review having not been signed by the Applicant as stipulated under Section 167(1) of the Act read with Regulation 203 (1) of Regulations 2020 and the form provided under the Fourteenth Schedule was fatally incompetent and defective since it was the Applicant who ought to have signed the Request for Review and not its agent.

49. They submitted further that the Supporting Affidavit sworn on 30th May 2024 accompanying the Request for Review did not indicate that the Applicant was authorized to sign the Request for Review on behalf of the Applicant.

50. On the issue of unsolicited communication by the Applicant as seen from the letter dated 20th May 2024, the Respondents submitted that Section 35 (3) of the Act stipulates that a bidder may communicate with the Procuring Entity on completion of the procurement proceedings and as such, it was only upon completion of the



procurement proceedings that the Applicant ought to have engaged the Procuring Entity. They pressed on that the communication vide letter dated 20th May 2024 by the Applicant was an attempt to influence the procurement process as seen from the various paragraphs in the letter authored by C & K Advocates in addition to being an attempt to threaten the Procuring Entity and force it to award the tender to the Applicant contrary to Section 65(3) of the Act.

51. They submitted that the validity period in the subject tender was 120 days from 23rd February 2024 which was due to lapse on 24th June 2024 yet the Applicant was already writing to the Procuring entity demanding to be awarded.

52. As to whether the Request for Review as filed was time-barred, the Respondents submitted that the Applicant had claimed a breach of duty by the Procuring Entity under Section 80(6) of the Act on the evaluation period that allegedly lapsed on 24th March 2024. If that were the case, then the Request for Review ought to have been raised within 14 days of occurrence of the said breach and as such, the Applicant ought to have instituted a Request for Review within 14 days from the 24th March 2024 and not on 31st May 2024 making it time barred.

53. On the substantive issue of the Request for Review, the Respondents argued that conduct of the due diligence exercise by



the Evaluation Committee was meant to confirm that the Applicant had met the requirements stipulated in the Tender Document but could not be construed to mean that the Applicant was the successful bidder.

54. They indicated that the Applicant had not specified in what way the Procuring Entity had breached the guiding principles under Articles 10 and 227 of the Constitution and Section 3 of the Act, nor availed evidence of breach of the same. It was the Respondents' further submission that the Board was being invited to go on a fishing expedition contrary to Section 167(1) of the Act where the Applicant ought to have stipulated the risk or loss suffered and as such, there was no competent Request for Review before the Board.
55. The Respondents pointed to the prayers sought by the Applicant and urged the Board to note that there was no notification letter dated 28th May 2024 as alleged by the Applicant and that as such, the orders sought could not be granted.
56. The Respondents urged the Board to dismiss the Request for Review with costs.
57. In response to clarifications sought by the Board, Mr. Nicholas Mang'ata, Deputy Director in charge of Supply Chain Management of the Procuring Entity stated from the Financial Evaluation stage, the Evaluation Committee looked at the price schedules as submitted by

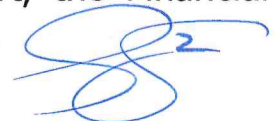


bidders which were required to be subjected to analysis as provided at page 30 of the Tender Document. He pointed out that under the said criteria, tenderers ought to have scored a minimum of 70% and above at technical evaluation stage and would then progress to the financial evaluation stage based on their respective price schedules.

58. He indicated that the Evaluation Committee looked at the rates provided and subjected them to an analysis which was then applied to the consumption patterns to project and show the implication of recommending a particular bidder based on the rates quoted. He pointed out that the Applicant's rates totaled Kshs. 37540 and when subjected to the projections, it gave the implication that it was the lowest evaluated bid.

59. Mr. Mang'ata submitted that at the point of financial evaluation, the Evaluation Committee subjected both the Applicant's and Interested party's price schedules to the evaluation criteria which informed the recommendation for award. Ms. Bisem for the Respondents added by way of example, that where a bidder had listed tea, lunch, supper, tents and events, based on consumption trends in the past year, the Procuring Entity would spend more on teas and less on lunch which fed into the listed figures.

60. As to what was the last stage of the evaluation process, Mr. Mang'ata indicated that, from the Evaluation Report, the Financial



Evaluation was the last stage of evaluation followed up with recommendation for award of the subject tender.

61. He stated that due diligence was conducted after the price analysis since there was need to confirm if the lowest total rate quoted was the least evaluated price.
62. Mr. Mang'ata clarified that it was a requirement for bidders to fill their forms of tender and the amounts stated therein were noted at tender opening. He indicated that the four categories in the price schedules formed what was to be transferred in the form of tender. He further indicated that the subject tender was to be awarded as a single tender and not in lots.
63. On the issue of price schedule and analysis done, Mr. Mang'ata referred the Board to page 10 of the Evaluation Report and stated that it would appear that the Applicant was the lowest bidder but according to the requirements under the Tender Document, responsive bidders at the Financial Evaluation stage were to be subjected to financial evaluation based on their price schedule reason being there were different items that were consumed at different times and it would be necessary for the Procuring Entity to determine whom amongst the bidders gave the least cost. He further submitted that by subjecting the price schedule on the rate quoted in what was referred to as a projected cost based on the quoted rate, this would give the least cost bidder which was how the recommendation for



the Interested Party to be awarded was made being the lowest evaluated bidder.

64. He averred that due diligence was carried out on the Applicant since they seemed to be the lowest according to their Form of Tender at the financial evaluation stage but when projections were applied, the Interested Party's bid was the lowest evaluated thus informing the decision to carry out due diligence on both bidders.

65. As to what amount the successful bidder would be paid upon performance, Mr. Mang'ata stated that the rates in the Form of Tender would not necessarily apply but the rates quoted would apply for each item that would be ordered.

66. When walking the Board through the rates for the various items quoted in the schedule as contained at page 12 of the Evaluation Report, Mr. Mang'ata confirmed that (a) the Applicant had quoted the lowest under the Event Set Up category, (b) Bidder No. 8 had quoted the lowest under the Snacks category, (c) the Interested Party had quoted the lowest under the Breakfast/Lunch and Supper category, and (d) the Applicant had quoted the lowest under the Main Meal category. He confirmed that in all categories, there was no single bidder who gave the lowest price.

67. Mr. Mang'ata clarified that the first category on events set up as contained in the schedule as items like seats and tents were not



items ordered in large volumes and as such if the Procuring Entity went with the lowest bidder per category that criteria would apply but in the instant circumstances, as a bidder provides the tents and seats, it was also required to give meals to participants in a particular event which was why the Procuring entity could not separate the four categories. He pointed out that the volume of the subject tender was under the Breakfast, Lunch and Supper category and that the Financial evaluation gave the projection that was able to show that the Applicant had quoted less rates under the Events Set Up category and had eroded the Breakfast, Lunch and Supper category and as such, its quote appeared to be the lowest but when it came to implementation of the resulting contract based on its rates, it would cost more money.

68. When asked whether the bidders were aware that the Procuring Entity would use certain projected quantities in the evaluation of tenders and if this was provided for in the Tender Document, Mr. Mang'ata said that this approach had not been provided for to which Ms. Bisem added that if the same were stipulated, it would seem as if the Procuring Entity was obligated to be tied down to those quantities.

69. As to what informed the Procuring Entity's decision to apply the quantities for the year 2023 in the evaluation and whether the same was indicated in the Tender Document, Mr. Mang'ata stated that the Evaluation Committee did projections as seen at page 11 of the



Evaluation Report but it became clear that the said projections would not give an objective picture if the contract was awarded to a certain bidder. As such the Committee used the volumes for the year 2023 with the trend for one year as a better way of analyzing rates quoted to give the costs implication of awarding the tender. He confirmed that this was not stated anywhere in the Tender Document. He further pointed to Annexures one and two in the Evaluation Report that were used to inform the said projections but indicated that the actual invoices and delivery notes used to generate the quantities for the year 2023 had not been provided to the Board.

70. Asked why the Procuring Entity did not take action on the issue of unsolicited communication Ms. Bisem argued that the import of Section 65(3) of the Act is to discourage tenderers from communicating with procuring entities during procurement proceedings and as such the Procuring Entity had all the right to disqualify the Applicant on the basis of Section 65 of the Act but since the procurement process was being completed, the same was not done as the process had reached its logical conclusion.

Interested Party's case

71. In its submissions, the Interested Party's counsel Mr. Omollo relied on its Response dated 12th June 2024.

72. The Interested Party fully associated itself with the Respondents submissions adding that the Request for Review as filed was fatally



defective having been signed by the Applicant's Advocate in breach of Section 167(1) of the Act read with Regulation 203 (1) of Regulations 2020 and the form provided under the Fourteenth Schedule and ought to be struck out. It submitted that the Applicant was a body corporate acting through its directors and had not demonstrated by way of a power of attorney authorizing its advocates on record to sign the request for review on its behalf. It referred to the holding in ***PPARB Application No. 41 of 2015*** and ***PPARB Application No. 55 of 2014***.

73. Pointing out that the demand letter issued to the Procuring Entity *vide* letter dated 20th May 2024 was authored by a different firm from the one that instituted the instant Request for Review, the Interested Party further submitted that the deponent in the affidavit in support of the request for review had not demonstrated that she was duly authorized by the Applicant to make the statements therein on its behalf.

74. It argued that the instant Request for Review was replete of factual narrations without any indication of any breach of duty imposed upon the Procuring Entity which was a threshold issue under Section 167(1) of the Act. In support of its arguments, it referred the Board to the holding in *Mombasa Civil Appeal No. 131 of 2018 James Oyondi t/a Betoyo Contractors & Another v Elroba Enterprises Limited and Others (2019) Eklr* and submitted that the Applicant did not have *locus standi* to lodge the instant Request for Review.



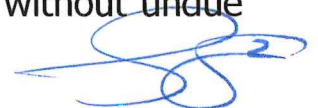
75. Further, the Interested Party stated, from the prayers sought to be granted, the Applicant made reference to a notification letter dated 28th May 2024 which was non-existent in contrast to the letter dated 27th May 2024 referred to in both the request for review and supporting affidavit.

76. It submitted that there was no indication by the Applicant in the Request for Review that award of the subject tender to the Interested Party was illegal and that it was only contesting its disqualification. It further submitted that in view of the letter of 20th May 2024, the Applicant ought to have been disqualified for breach of Section 65 of the Act as this was an attempt to influence the procurement process.

77. The Interested Party also pointed out that parties are bound by their pleadings and that it had not seen any provision in the instant Request for Review regarding non-compliance with the evaluation criteria and urged the Board to dismiss the Request for Review with costs.

Applicant's Rejoinder

78. In a rejoinder, Mr. Ratemo submitted that the Board being a quasi-judicial tribunal was bound by pronouncements made in its previous holdings, and by the Honourable courts under Article 159 of the Constitution in that justice shall be administered to all without undue



regard to procedural technicalities and in as much as rules are the handmaidens of justice, the Board ought not to pay attention to procedural technicalities at the expense of substantive justice.

79. Counsel argued that the Request for Review was supported by an affidavit sworn by the Applicant's director who was well conversant with the facts of the case and was duly authorized to make statements on behalf of the Applicant. He reiterated that the Request for Review as filed was competent.
80. Counsel pointed out that the Respondents were quiet on the aspect of how the lowest evaluated bidder being the Applicant was rendered unsuccessful on a criteria referred to as projected actual costs of the tender and how the amount of Kshs. 69,518,830.00 was arrived at by the Procuring Entity.
81. Mr. Ratemo asked the Board to take note of the typographical error on the date indicated in the prayers sought as 28th May 2024 as the notification letter was dated 27th May 2024 and transmitted on 28th May 2024 and the same ought not to be a ground to disqualify the contents of the notification of award referred to by the Applicant.
82. When asked to expound on the contents of the letter dated 20th May 2024 in view of the Respondents allegations that the evaluation process had not been completed, Mr. Ratemo submitted that the nature of the letter of 20th May 2024 was only to inquire as to the



status of the procurement proceedings as they had a legitimate expectation that having undergone the due diligence exercise, it would be awarded the subject tender. He further submitted that the letter did not come before the due diligence exercise and that the Applicant was not seeking to exercise undue influence over the Respondent noting its legitimate expectation, delay in evaluating bids in the subject tender and the fast approaching lapse of the tender validity period.

83. As to whether ROM Law Advocates LLP lacked capacity to represent the Applicant in view of the demand letter of 20th May 2024 by C&K Advocates, Mr. Ratemo submitted that a person has a right to legal representation and that issuance of the demand letter does not automatically disqualify any other advocate from representing a client. He indicated that the pleadings before the Board had been drafted by a qualified and competent Advocate.

84. At the conclusion of the hearing, the Board informed parties that the instant Request for Review having been filed on 31st May 2024 was due to expire on 21st June 2024 and the Board would communicate its decision on or before 21st June 2024 to all parties to the Request for Review via email.



BOARD'S DECISION

85. The Board has considered each of the parties' submissions and documents placed before it and finds the following issues call for determination.

A. Whether the Board has jurisdiction to hear and determine the instant Request for Review;

In determining the first issue, the Board will make a determination on:

- i Whether the Request for Review was filed within the statutory period of 14 days in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.*
- ii Whether failure by the Applicant to sign the Request for Review renders it fatally defective and bad in law as to divest the Board of its jurisdiction.*
- iii Whether the communication by the Applicant to the Procuring Entity dated 20th May 2024 was in breach of Section 65 of the Act as to divest the Board of its jurisdiction to hear and determine the Request for Review.*

Depending on the outcome of Issue A;



B. Whether the Procuring Entity carried out due diligence on the Applicant without following the Tender Document, in breach of the provisions of Section 83 of the Act.

C. Whether the Procuring Entity applied criteria not in the Tender Document in the evaluation of the Applicant's tender at the Financial Evaluation stage, in violation of the provisions of Section 80(2) of the Act.

D. What orders the Board should grant in the circumstances

As to whether the Board has jurisdiction to hear and determine the Request for Review:

86. It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before taking any further steps in the matter.

87. Black's Law Dictionary, *8th Edition*, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make



decisions and declare judgment; The legal rights by which judges exercise their authority."

88. The celebrated Court of Appeal decision in **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989]eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

89. The Supreme Court added its voice on the source of jurisdiction of a court or other decision making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;



"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

90. The jurisdiction of the Board is provided for and also limited under Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

Section 167 - Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the



procurement process, or disposal process as in such manner as may be prescribed. [Emphasis by the Board]

(2)

(3)

.....

Section 173 - Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

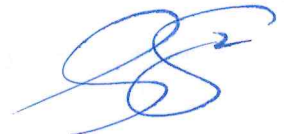
(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

91. Given the forgoing provisions of the Act, the jurisdiction of the Board flows from and is circumscribed under section 167 of the Act. Section



167(1) of the Act allows an aggrieved candidate or tenderer to seek administrative review within 14 days of (i) notification of award or (ii) date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

92. Regulation 203 of Regulations 2020 read with the Fourteenth Schedule of Regulations 2020 prescribes the format of the request for review as follows:

Regulation 203 - Request for a review

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(a)

(b)

(c) be made within fourteen days of —

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or



(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

(d)

(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.

(4)

93. Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

Section 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

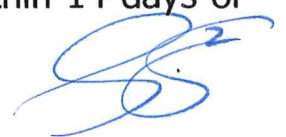


the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(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.

94. A reading of the above provisions shows that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made.

95. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach.



96. The Board now turns to look at the three limbs of preliminary objection raised in this Request for Review.

- i **As to whether the Request for Review was filed within the statutory period of 14 days in accordance with Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board.**

97. The Respondents sought for this Request for Review to be struck out on the ground that it is time barred having been filed outside the statutory period of 14 days contrary to Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020.

98. The Respondents argued that the Applicant complained of a breach of duty by the Procuring Entity under Section 80(6) of the Act on the evaluation period that allegedly lapsed on 24th March 2024 and as such, ought to have raised this complaint within 14 days of occurrence of the said breach and instituted the Request for Review within 14 days from the 24th March 2024 and not on 31st May 2024. This argument was supported by the Interested Party.

99. The Applicant on its part contended that the Request for Review was filed within the prescribed timelines under Section 167(1) of the Act having been notified of the outcome of evaluation of the subject tender vide the notification letter dated 27th May 2024.



100. The Board notes that it is not in contest that the Applicant was served with its Notification of Intention to Award on 27th May 2024 when learnt of the disqualification of its bid in the subject tender. As such, at the time the Applicant was addressing the Procuring Entity following the due diligence exercise vide letter dated 20th May 2024, it was not aware that its bid was unsuccessful.

101. In computing time when the Applicant ought to have lodged the instant Request for Review, regard is given to Section 57 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya (hereinafter the IGPA) which provides as follows:

"57. Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.”

102. In computing time when the Applicant ought to have sought administrative review before the Board having been aggrieved by the decision of the Procuring Entity communicated on 27th May 2024, the 27th of May 2024 is excluded pursuant to Section 57(a) of the IGPA being the date the Applicant learnt of the outcome of evaluation of its tender. This means that 14 days started running on 28th May 2024 and lapsed on 10th June 2024. In essence, the Applicant had between 28th May 2024 and 10th June 2024 to seek administrative review before the Board.

103. The Board observes that the instant Request for Review was filed on 31st May 2024. In the circumstances, the Board finds and holds that the Request for Review was filed within the statutory timelines

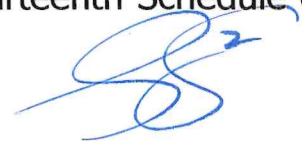


of 14 days prescribed under Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020. Accordingly, this ground of objection fails.

ii As to whether failure by the Applicant to sign the Request for Review renders it fatally defective and bad in law as to divest the Board of its jurisdiction

104. The Respondents contend that the Request for Review is fatally incompetent and defective having not been signed by the Applicant contrary to Regulation 203(1) of Regulations 2020 as read with the Fourteenth Schedule of Regulations 2020. This contention is shared and supported by the Interested Party which itself argued that the Applicant did not demonstrate by way of a power of attorney authorizing its advocates on record to sign the request for review on its behalf and that the deponent in the affidavit in support of the request for review had not demonstrated that she was duly authorized by the Applicant to make the statements therein on its behalf.

105. The Applicant, on the other hand, argues that the Request for Review as filed is competent and in compliance with Regulation 203(1) of Regulations 2020 as read with the Fourteenth Schedule of Regulations 2020.



106. The Board takes cognizance of the provisions of Regulation 203(1) of Regulations 2020 which states as follows:

"(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations"

107. Further, the format prescribed in the Fourteenth Schedule of Regulations 2020 appears as follows:

(r 203(1))

FORM FOR REVIEW

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

Application No.....OF 20.....

BETWEEN

.....APPLICANT (Review Board)

AND

.....RESPONDENT (Procuring Entity)

Request for Review of the decision of the(Name of the Procuring Entity ofdated theday of20 in the matter of Tender Noof20for(Tender description)



REQUEST FOR REVIEW

I/We.....the above named Applicant (s) of address.....physical address.....P.O Box No.....Tel No..... Email hereby Request the Public Procurement Administrative Review Board to review the whole/part of the above mentioned decision on the following grounds namely

- 1.**
- 2.**

By this memorandum, the Applicant requests the Board for an order/orders that:

- 1.**
- 2.**

SIGNED.....(APPLICANT)

DATED onday of...../20

FOR OFFICIAL USE ONLY

Lodged with the Secretary,

**Public Procurement Administrative Review Board on....
Day of20...**

SIGNED



Board Secretary

108. From the format provided above, it is evident that when lodging a request for review, the Applicant is required to (a) indicate the parties to a request for review (b) indicate its name, address, telephone number and email address under paragraph 1 of the said request for review; (c) set out the impugned decision while laying out the grounds and orders prayed for in the request for review; (d) sign off the request for review; (e) date the request for review; and (f) upon lodging the request for review with the Board Secretary, the Board Secretary signs and indicates the date it was filed.

109. However, Regulation 208 permits a party to a request for review to be represented by an advocate or a representative of his choice at the hearing of a request for review and provides:

"Reg. 208 Representation by person of own choice

Any party to a request for review filed under regulation 203 shall, at the hearing thereof, be entitled to be represented by an advocate or a representative of his choice."

110. Further, Order 9 of the Civil Procedure Rules, 2010 provides for recognized agents and advocates who are duly appointed to act on behalf of others in court proceedings. Order 9 rule 7 provides for a Notice of appointment of advocate as follows:



"Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications."

111. Also at Section 26(2) of the Statutory Instruments Act:

"Where any form has been prescribed by or under any legislation, a document or statutory instrument which purports to be in such form shall not be void by reason of any deviation therefrom which does not affect the substance thereof or which is not calculated to mislead."

112. In the same breadth, Section 72 of the Interpretation and General Provisions Act provides that:

"Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead."



113. In essence, where a form has been prescribed by a written law, a document or statutory instrument which purports to be in such form shall not be void due to a deviation which is not calculated to mislead or which subsequently does not affect the substance of that document or statutory instrument.

114. The Supreme Court weighed in on the import of the above provisions when faced with a question of non-conformity with a statutory form (*form 37C prescribed by the Election (General) Regulations, 2012*) in declaring results of a gubernatorial election in the case of **Alfred Nganga Mutua & 2 others v Wavinya Ndeti & another [2018] eKLR** (hereinafter referred to as "the Alfred Mutua case") where it held:

"In the light of the provisions of Section 72 of Interpretation and General Provisions Act and Section 26 of the Statutory Instruments Act, and in the absence of any challenge to the results posited on it, even if Regulation 87(2)(b)(iii) were not ultra vires, we agree with counsel for the appellants that the variation on Form 37C in this case was minor and inconsequential. Section 72 of the interpretation and General Provisions Act and Section 26(2) of the Statutory Instruments Act, 2013, provide that "an instrument or document ... shall not be void by reason of a deviation" from the prescribed form if the deviation



"... does not affect the substance of the instrument or document thereof or ... is not calculated to mislead."

115. Turning to the circumstances in the instant Request for Review, the Board notes that the Applicant filed, on 31st May 2024, a Request for Review dated 30th May 2024 as follows:

**"REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO.....OF2024
BETWEEN
ROYAL TASTE KITCHEN LIMITEDAPPLICANT
AND
ACCOUNTING OFFICER KENYA NATIONAL
EXAMINATIONS COUNCIL (KNEC)1ST RESPONDENT
KENYA NATIONAL EXAMINATIONS
COUNCIL 2ND RESPONDENT
AND
URTH CAFFE LTD INTERESTED
PARTY
(Request for Review of the decision of 1st and 2nd
Respondents contained in the Letter of Notification dated
27th day of May 2024 in the matter of Tender No;
KNEC/ONT/2023-2024/07 for TENDER FOR PROVISION OF
CATERING AND EVENT SET UP SERVICES ON TWO-YEAR**



CONTRACT) where the Applicant was declared unsuccessful "purely on price consideration")

REQUEST FOR REVIEW

We, Royal Taste Kitchen Limited, the above-named Applicant whose address of service for purposes of this Request for Review shall be care of ROM Law Advocates LLP, Tetezi Towers, 6th Floor, P.O. Box 58018-00100 Nairobi, Kenya (254) 733236659 and of email info@romlawadvocates.co.ke hereby requests the Public Procurement Administrative Review Board (hereunder referred to as "Review Board") to review the whole of the 1st and 2nd Respondents' decision as contained in the letter of Notification of Intention to Award dated 27th May 2024 in relation to Tender No. KNEC/ONT/2023-2024/07 for Tender for Provision of Catering and Event Set Up Services awarded to the Interested Party on the following grounds:-

.....

BY THIS MEMORANDUM, the Applicant requests the Honourable Board for orders THAT:

.....

The Request for Review is supported by the Applicant's Director/Shareholder, EMILY KERUBO KAMAU, the



documents annexed herewith and on further grounds to be adduced at the hearing hereof.

***Dated at NAIROBI this30th day of
.....MAY.....2024***

.....(signed).....

**ROM LAW ADVOCATES, LLP
ADVOCATES FOR THE APPLICANT**

.....”

116. From the above, it is noted that the instant Request for Review (a) is made in the name of the Applicant and not its Advocates, (b) indicates that the Applicant’s address of service for purposes of the Request for Review shall be its advocates, ROM Law Advocates LLP, whose address is also provided as Tetezi Towers, 6th Floor, P.O. Box 58018-00100 Nairobi, Kenya (254) 733236659 and of email info@romlawadvocates.co.ke, (c) sets out the request to review the decision of the Respondents with regard to the subject tender as contained in a letter dated 27th May 2024, while laying out the grounds and prayers sought, (d) has been supported by the Supporting Affidavit of its Director, Emily Kerubo who has sworn under oath as being duly authorized to make the said affidavit in support of the request for review, (e) has been signed off by the Applicant’s Advocates on record, ROM Law Advocates LLP, (f) was lodged and received by the Board’s Secretary on 31st May 2024 as evidenced by the signature endorsed by the Board Secretary.

117. In the Board's considered view, the import of the words '*whose address of service for purpose of this Request for Review shall be care of ROM Law Advocates LLP*' in the Applicant's Request for Review dated 30th May 2024 and filed on 31st May 2024 connote that any document or information delivered to the Applicant's Advocates address indicated in the Request for Review is considered to have been delivered to the Applicant itself and is binding on the Applicant.

118. Mr. Omollo, counsel for the Interested Party, took issue with Ms. Emily Kerubo Kamau swearing the aforementioned Supporting Affidavit on behalf of the Applicant without demonstrating that she was duly authorized to do so. Having carefully studied the Applicant's original tender submitted to the Board as part of the confidential documents by the 1st Respondent pursuant to Section 67(3)(e) of the Act, the Board notes that the Applicant submitted at page 104 of its tender a Power of Attorney appointing Ms. Emily Kerubo Kamau, the Applicant's Director/Shareholder as its Attorney with regard to matters concerning the subject tender. This is in itself enough evidence that Ms. Emily Kerubo Kamau was a duly authorized signatory of the Applicant and she had authority to swear the Supporting Affidavit accompanying the Request for Review dated 30th May 2024.

119. Being guided by the Supreme Court's holding in the Alfred Mutua case, it is the Board's considered view that the deviation by the




Applicant in signing the instant Request for Review is not substantive and neither does it mislead any party in the proceedings as to the person making the Request for Review.

120. This is further buttressed by evidence supplied to the Board as seen from paragraph 46 of the Supporting Affidavit sworn on 30th May 2024 by Emily Kerubo Kamau, the Applicant's Director which reads:

"46. THAT I am advised by the Applicant's Advocates on record, which advise I verily believe to be true that pursuant to Sections 173 of the PPADA and Regulation 204 of the PPADR, this Honourable Board is conferred with wide jurisdiction and mandate to review tender processes and decisions made therein and address grievances. The Applicant invites this Board to exercise this powers."

121. In the circumstances, the Board finds that failure by the Applicant to sign the instant Request for Review does not render it fatally defective and bad in law thus the Request for Review is competent. Accordingly, this ground of objection fails.

iii As to whether the communication by the Applicant to the Procuring Entity dated 20th May 2024 was in breach of Section 65 of the Act as to divest the Board of its



jurisdiction to hear and determine the Request for Review.

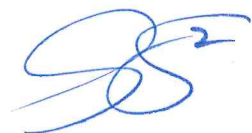
122. The Respondents contend that the Applicant was liable for disqualification pursuant to Section 65(2) of the Act due to an unsolicited communication addressed to the Procuring Entity *vide* letter dated 20th May 2024. The Interested Party aligned itself with the submissions of the Respondents in support of the objection raised.

123. The Applicant, on the other hand, was of the contrary view arguing that the enquiry made *vide* letter dated 20th May 2024 was in line with Section 64 of the Act and therefore lawful and did not in any way purport to influence the award of the subject tender.

124. The Board makes reference to Section 65 (1) and (2) of the Act which reads:

"(1) After the deadline for the submission of tenders, proposals or quotations—

(a) A person who submitted a tender shall not make any unsolicited communications to the procuring entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence the evaluation and comparison of tenders; and



(b) A person shall not attempt, in any way, to influence that evaluation and comparison.

(2) A person who contravenes the provisions of subsection (1) commits an offence and shall lead to the tenderer being disqualified and the public officer facing disciplinary action in addition to any other action under this Act."

125. In essence, a tenderer should not make any unsolicited communications to a procuring entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence evaluation of bids. A tenderer in contravention of this provision commits an offence and shall be disqualified from the procurement process.

126. The Board has carefully studied the instant Request for Review and notes that the Applicant depones at paragraphs 12, 13, and 14 of the Supporting Affidavit sworn on 30th May 2024 by Emily Kerubo Kamau, its Director as follows:

"12. THAT following the post-qualification visit on 20th March 2024, there was no communication from the Respondents for a period of two (2) months prompting the Applicant to follow up to establish the status.

13. THAT pursuant to PPADA 2025 Sec. 64 which requires that communication and enquiries on



procurement and asset disposal proceedings shall be in writing, vide a letter dated 20th May, 2024, the Applicant sought to know the status of the subject procurement proceedings whose inordinate delay was racing towards expiration of the validity period in addition to the already lapsed evaluation period in accordance with PPADA 2015 Sec. 80(6) which requires that the evaluation shall be carried out within a maximum period of 30 days. (Annexed herewith and marked "EKK- 3" is a true copy of the Applicant's erstwhile Advocates dated 20th May, 2024)

14. THAT the 1st and 2nd Respondents in a letter dated 23rd May 2024 responded in what appeared to be a threatening tone in a manner implying an inquiry under PPADA 2015 Sec. 64 is illegal and that Procuring Entities can make decisions on whims in complete disregard of statutory timelines and or strict procurement planning as envisaged under PPADA 2015 Section 53 and PPADR 2020 Sec. 41 which are replete with detailed breakdown of scheduled delivery, implementation or completion dates including timelines, values and even methods of procurement approved at Board level alongside annual budgets. (Annexed herewith and marked "EKK-4" is a true copy of the Respondents' letter dated 23rd May, 2024)"



127. From the above, the Applicant contends that (a) there was no communication from the Respondent for a period of two (2) months following the post-qualification visit on 20th March 2024 which prompted it to follow up on the status of the procurement proceedings in the subject tender, (b) the communication done vide letter dated 20th May 2024 was in line with Section 64 of the Act, (c) it was apprehensive about the inordinate delay in the subject tender's procurement proceedings which was racing towards expiration of the tender validity period and the lapsed evaluation period stipulated under Section 80(6) of the Act requiring evaluation to be carried out within 30 days, (d) it received a response from the Procuring Entity on 23rd May 2024 which implied that its inquiry was illegal.

128. We note that the Applicant's exhibit marked "EKK-3" is the letter dated 20th March 2024 addressed to the 1st Respondent and reads:

"....."

RE: INORDINATE DELAY IN THE CONCLUSION OF TENDER NO. KNEC/ONT/2023-2024/07 FOR PROVISION OF CATERING AND EVENTS SET UP SERVICES

Reference is made to the above noted matter.

We act for M/s Royal Taste Kitchen Limited (hereinafter "our client"). On the above subject which is within your purview as the Accounting Officer for the Kenya National Examinations Council (hereinafter "KNEC") and therefore



responsible for the strict compliance with the Public Procurement and Asset Disposal Act, 2015 (the PPADA 2015) Sec. 44 and Public Procurement and Asset Disposal Regulations, 2020 (the PPADR 2020) Reg. 23 and other related statutes, we wish to address you as follows;

- a) That KNEC floated a tender No. KNEC/ONT/2023-2024/07 for Provision of Catering and Events Set Up Services on A Two Year Contract Basis.***
- b) That the tender was reserved for women who are under AGPO.***
- c) That being eligible to bid as per the requirements of the tender and under PPADA 2015 Sec.55, our Client indeed participated and is a candidate in the subject Tender.***
- d) That the subject tender was issued on 13th February 2024 and closed/opened on 23 February 2024 at 10.00 a.m.***
- e) That the validity of the tender was 120 days whose validity is therefore approaching expiry.***
- f) That pursuant to the PPADA 2015 Sec. 46(4)(b), evaluation is supposed to be within reasonable time.***
- g) That PPADA 2015 Sec. 80(6) states that evaluation must be within a maximum period of 30 days.***
- h) That the Evaluation Committee of the subject Tender conducted a post-qualification (due diligence) visit upon our Client pursuant to the PPADA 2015 Sec. 83 on 20th March 2024 at our Client's Kenya Literature Bureau***



Canteen premises following an email to our Client on the same on 19th March 2024. It is our Client's belief that this was in an effort to meet the 30-day maximum evaluation period which was lapsing on 23rd March 2024.

- i) That pursuant to the subject tender, due diligence was to be done on the successful bidder, i.e MOST responsive evaluated bidder and thereafter recommendation would be made for further possible award.***
- j) That the conduct of due diligence on our Client on 20th March 2024 is evidence that our Client had met all the requirements under PPADA 2015 Sections 55 and 79 on eligibility and responsiveness respectfully.***
- k) That our client has served KNEC before for two years (2019-2021) and has letters of recommendation confirming good and satisfactory service.***
- l) That our Client only lost to the current service provider on account of price.***
- m) That consequently, absent of any reasons, our Client legitimately expected that it would be awarded the Tender.***
- n) That in the absence of clarifications under PPADA 2015 Sec. 81 or termination with reasons under PPADA 2015 Sec. 63 or extension of validity under PPADA 2015 Sec. 88, our client may suffer loss of business opportunity***



after going through the rigorous tendering process in which our Client was the lowest on face value.

o) That by the sheer breach of maximum 30 days evaluation as provided under PPADA 2015 Sec. 80, clarifications, termination et al is rendered null and void.

p) That following the post-qualification due diligence visit it is clear that that our Client was the lowest evaluated bidder and therefore merit the award within the law under PPADA 2015 Sec. 86 and in accordance with the requirements of the tender document.

In light of the foregoing, kindly let us have your response within 7 days hereof concluding the subject tender proceedings within the law. Please note that should we fail to receive your response within the period aforesated, we have firm instructions to pursue the necessary legal action at your own peril as to costs and other incidentals.

We look forward to your positive conclusion of the matter.

....."

129. The Board further notes that the Procuring Entity in response addressed the Applicant vide letter dated 23rd May 2024 as follows:

"....."



RE: COMPLAINT ON TENDER NO. KNEC/ONT/2023-2024/07 FOR PROVISION OF CATERING AND EVENTS SET UP SERVICES

Reference is made to your letter on the above subject matter dated 20th May 2024 which is acknowledged.

The Council has reviewed the content of your letter and notes the complaints raised on behalf of your client M/s Royal Taste Kitchen Limited.

The Council's response is to advise that processing of the tender is in progress and once concluded within the tender validity period, your client and all the other bidders who participated shall be notified of the outcome.

Please note that the Council reserves the right to accept or reject any tender, and to annul the tendering process and reject all tenders at any time prior to contract award, without there by incurring any liability to the tenderers.

The Council is committed to ensuring that its procurement processes are in line with Article 227 of the Constitution of Kenya 2010 and further as provided for in the Public Procurement and Asset Disposal Act, 2015 and its attendant Regulations.



.....”

130. It is clear from the contents of the above letters that the Applicant took it upon itself to follow up on the status of the procurement proceedings in the subject tender having not received any communication on the said status following the post-qualification exercise conducted by the Procuring Entity’s Evaluation Committee on 20th March 2024.

131. In view of the provisions stipulated under Section 65(1) and (2) of the Act, it is the Board’s considered view that nothing from the above communication between the Applicant and the Procuring Entity can be construed as an attempt by the Applicant to influence evaluation of bids as the said communication was occasioned by the Applicant’s expectation that having undergone the due diligence exercise which it presumed was the last evaluation process in the subject tender, it was the successful and/or lowest evaluated bidder and as such, it ought to have received communication on the outcome of evaluation of the tender in view of lapse of the 30 days stipulated evaluation period and the approaching expiry of the tender validity period.

132. In the circumstances, the Board finds and holds that the Applicant did not breach the provisions of Section 65(1) & (2) of the Act. Accordingly, this ground of objection by the Respondents fails.

133. In totality of the foregoing, the Respondents’ Preliminary Objections as raised at paragraphs 24, 25, and 26 of the 1st and 2nd



Respondents' Memorandum of Response dated 6th June 2024 fail. consequently, the Board has jurisdiction to hear and determine the Request for Review and now proceeds to address the substantive issues framed for determination.

As to whether the Procuring Entity carried out due diligence on the Applicant without following the Tender Document, in breach of the provisions of Section 83 of the Act

134. It is a fact of this case that both the Applicant and Interested Party submitted bids in response to Tender No. KNEC/ONT/2023-2024/07 for Provision of Catering and Events Set Up Services on a Two Year Contract Basis for the Kenya National Examinations Council. The tender was closed and opened on 23rd February 2024 at 10.00 a.m whereupon ten tenderers submitted tenders.

135. It is also a fact that the Procuring Entity formed an Evaluation Committee to evaluate the received tenders. The evaluation committee evaluated the tenders through the stages of preliminary, technical and financial.

136. It is further not in contention that the Evaluation Committee of the Procuring Entity carried out due diligence post-qualification due diligence on the Applicant and Interested Party with a view to determining possible award.



137. The Diligence Report dated 20th March 2024 and submitted to the Board by the 1st Respondent as part of the confidential documents pursuant to Section 67(3)(e) of the Act evidences the post-qualification due diligence exercise carried out by the Procuring Entity.

138. Following the due diligence exercise on the Applicant and Interested Party, both bidders have laid claim on the subject tender with each claiming to be the lowest evaluated bidder.

139. The question which arises for the determination of the Board is whether the aforementioned due diligence was conducted in accordance with the provisions of the Tender Document as read with the Act.

140. Section 83 of the Act is instructive on conduct of due diligence and provides as follows:

"83. Post-qualification

(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.



(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.”

141. Further Regulation 80 of the 2020 Regulations provides as follows:

"80. Post-qualification

(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.

(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—



(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or

(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method."

142. Black's Law Dictionary, Ninth Edition at page 523 defines "due diligence" as

"the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation" with the term diligence meaning *"the attention and care required from a person in a given situation"*

143. This Board in **PPARB Application No. 158/ 2020 On the Mark Security Limited V The Accounting Officer, Kenya Revenue Authority and Another** established that a due diligence exercise is a fundamental element of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender.



144. The Board notes that an evaluation committee of a procuring entity has the discretion to conduct or not to conduct post-qualification evaluation or a due diligence exercise to confirm and verify the qualifications of a tenderer who submitted the lowest evaluated responsive tender to be awarded a contract. This is so stated because a reading of Section 83 of the Act makes reference to the word 'may' which implies discretion as opposed to the word 'shall' that would otherwise make conduct of the exercise an obligation.

145. In our considered view where a tender document has not provided for post qualification evaluation or due diligence exercise, then a procuring entity is not under an obligation to conduct a due diligence exercise or a post qualification evaluation.

146. Turning to the instant Request for Review, the Board notes that the Tender Document provided for Due Diligence at Stage 4: Due diligence of Section III-Evaluation and Qualification Criteria at page 30 of the Tender Document as follows:

Stage 4: Due diligence

"Due diligence will only be done to the successful bidder i.e MOST responsive evaluated bidder and thereafter recommendation will be made for further possible award."



147. In essence, due diligence would only be conducted by the Evaluation Committee on the successful bidder in the subject tender being the most responsive evaluated bidder and once done, a recommendation would be made for further possible award of the subject tender.

148. We note that the Applicant contends that the due diligence exercise was the last stage of evaluation in the subject tender and was only to be done on the successful tenderer who had submitted the lowest evaluated responsive tender. The Applicant, having undergone the due diligence exercise on 20th March 2024, had a legitimate expectation that its bid would be recommended for award of the tender.

149. By the Procuring Entity's own admission, its Evaluation Committee carried out due diligence exercise on both the Applicant and the Interested Party and afterwards subjected both bidders to Financial Evaluation. This action was contrary to the clear provisions of the Tender Document which stipulated that the final stage of evaluation prior to recommendation for award of the tender would be the due diligence exercise conducted on the lowest evaluated bidder being the successful bidder.

150. It is our considered view that the due diligence conducted by the Evaluation Committee on 20th March 2024 was an anomaly and not proper since the same was not conducted in accordance with Section



83 of the Act read with Regulation 80 of Regulations 2020 and Stage 4: Due diligence of Section III-Evaluation and Qualification Criteria at page 30 of the Tender Document.

151. In the circumstances, we find that the 2nd Respondent's Evaluation Committee failed to conduct due diligence in the subject tender in accordance with the provisions of Section 83 of the Act as read with Regulation 80 of Regulations 2020 and Stage 4: Due diligence of Section III-Evaluation and Qualification Criteria at page 30 of the Tender Document.

152. Accordingly, this ground of review succeeds and is allowed.

As to whether the Procuring Entity applied criteria not in the Tender Document in the evaluation of the Applicant's tender at the Financial Evaluation stage in violation of the provisions of Section 80(2) of the Act

153. It has been determined elsewhere in this decision that both the Applicant and Interested Party were evaluated through all the stages of evaluation including post-qualification due diligence. The Applicant was disqualified on account of price.

154. It is the Applicant's case that the Evaluation Committee applied an extrinsic criterion in disqualifying its bid document at the Financial



Evaluation stage contrary to the provisions of the Tender Document read with the Constitution, the Act and Regulations 2020. The Applicant contends that the reason given for its disqualification is unlawful, opaque, not objective and lacks quantifiable reason.

155. 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 at the Financial Evaluation Stage and that the Applicant was rightfully disqualified on account of not having been the lowest evaluated bidder and that the decision to award the subject tender to the Interested Party was in line with Section 86(1) of the Act.

156. On its part, the Interested Party associated itself with the Respondent's submissions and submitted that the Applicant failed to meet the threshold on the requirements set out in the Tender Document to warrant it being issued the orders sought in the instant Request for Review.

157. The Board is alive to the objective of public procurement which 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:

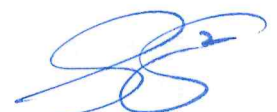
"227. Procurement of public goods and services



- (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)d)”**

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

“45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation



documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

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

159. 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."



160. Further Section 60(1) provides as follows:

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

161. 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."

162. 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,*

(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) *.....*"

163. Section 80(2) of the Act is clear on the requirement for 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. The Board's interpretation of a system that is fair is one that considers equal treatment of all tenders against criteria of evaluation known by all tenderers having been well laid out in the tender document issued by the 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 the tender document.

164. The Board further takes note of Section 86 of the Act that provides for the successful tender as follows:

"(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

(c) the tender with the lowest evaluated total cost of ownership; or (d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges:

Provided that the provisions of this subsection shall not apply to section 141 of this Act.



(2) For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score."

165. Regulation 77 of Regulations 2020 provides for Financial Evaluation as follows:

"77. Financial evaluation

(1) Upon completion of the technical evaluation under regulation 76 of these Regulations, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

(2) The evaluated price for each bid shall be determined by—

(a) taking the bid price in the tender form;

(b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2)(a) of the Act;

(c) where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date;



(d) applying any margin of preference indicated in the tender document.

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act."

166. From the aforementioned provisions, an evaluation committee while evaluating tenders at the financial evaluation stage is required *inter alia* to rank tenders according to their evaluated bid price and the successful tender shall be determined in accordance with the provisions of Section 86 of the Act.

167. Turning to the instant Request for Review, we note that the Applicant was notified in a letter of Notification of Intention to Award dated 27th May 2024 that its tender was unsuccessful in the subject tender as follows:

".....
1. The successful Bidder is as follows:

S/No	Successful Bidder	P.O. Box	Tender Sum (Kes.)
1.1	Urth Caffè Limited	9818-00100 NAIROBI	72,374.00

2. Other Bidders:

S/No	Name of Bidder	Bid Price as read out (Kshs)	Evaluated Bid Price (if applicable)
2.1	The Viands Ltd	249,630.00	-
2.2	Royal Taste Kitchen Ltd	37,540.00	37,540.00
2.3	Maco The Big Fish	84,520.00	84,520.00
2.4	Lesan Cateres Ltd	283,265.00	283,265.00
2.5	Netasam Enterprises Ltd	141,300.00	141,300.00

2.6	Meal Magic Caterers & Event Management	73,885.00	73,885.00
2.7	Cascade Company Ltd	83,720.00	83,720.00
2.8	Capital Cube Restaurant	78,300.00	-
2.9	Kipevu Restaurant Ltd	136,980.00	136,980.00

3. We wish to advise that your firm was unsuccessful purely on price consideration.

....."

168. From the above notification letter, it is clear that the Applicant's tender was disqualified at the Financial Evaluation stage.

169. Having carefully studied the Tender Document submitted by the 1st Respondent as part of the confidential documents pursuant to Section 67(3)(e) of the Act the Board notes that the evaluation procedure and criteria for the tender subject of this Request for Review is set out at Section III- Evaluation and Qualification Criteria at page 27 to 33 of the Tender Document. Financial Evaluation was provided for at page 30 of the Tender Document as follows:

"

NOTE:

Evaluation of tenders will be conducted based on the tenders' response to the mandatory requirements and their compliance to the evaluation criteria. Tenders scoring 70% and above on technical evaluation will be subjected to financial evaluation based on their price schedule.

KNEC may after Tender evaluation but prior to award of tender, conduct post-qualification due diligence.

i) Financial Evaluation

1. The financial evaluation shall be undertaken for bidders meeting the preliminary and technical requirement.

2. Prices must be inclusive of all applicable taxes.

3. The bidder meeting the tender conditions with the least cost shall be awarded.

....."

170. In essence, tenders that attained a score of 70% and above would progress to the financial evaluation stage where the financial evaluation would be based on their price schedules and the tender with the least cost would be awarded the subject tender.

171. The issue in contention herein relates to the question of whether the Applicant was the most responsive evaluated bidder with the least cost bid price.

172. According to the Evaluation Report submitted to the Board as part of the confidential documents by the 1st Respondent, the Evaluation Committee noted as follows at page 10 of 13 of the said Evaluation report:

"8.0 ANALYSIS OF THE FINANCIAL PROPOSAL



The Committee undertook a comparison of the Quoted Rates as submitted by the Seven (7) responsive bidders as shown below:

QUOTED RATES FOR THE SEVEN FIRMS

S/No	Description	Bidder No.						
		02	03	05	06	07	08	10
	Total (Kes)	72,374	37,540	283,265	141,300	83,720	73,885	136,980

8.1 Observation

Based on the above quoted rates, the evaluation Committee recommends for due diligence on the following two bidders:

8.1.1 Bidder 2: Urth Caffé Limited

8.1.2 Bidder 3: Royal Taste Kitchen Limited

173. In further financial evaluation of bids, the Evaluation Committee carried out a projection analysis of the rates quoted in the responsive bids at this stage as seen at page 11 of 13 of the Evaluation Report as follows:

"....."

10.0 PROJECTED COST BASED ON THE QUOTED RATES

The Evaluation Committee made reference to the Financial Evaluation Criteria requirement which had provided that bidders were to be subjected to financial evaluation based in their price schedule. The quoted rates were given projected quantities as per the schedule Annex II Summarized below.

S/N	Item Description	Bidder 2 Urth Caffe Limited	Bidder 3 Royal Taste Kitchen Ltd	Bidder 5 Lesan Caterers Ltd	Bidder 6 Brinks Netasam	Bidder 7 Meal Magic Caterers&	Bidder 8 Cascade Company Ltd	Bidder 10 Kipevu Restaurant Ltd
1.	Event Set Up	178,229	207,000	472,000	326,500	202,500	185,100	298,600
2.	Snacks	214,000	224,000	299,000	332,000	360,000	263,000	440,000
3.	Break fast	1,812,000	2,446,000	2,522,000	3,313,000	2,322,000	1,798,000	2,890,000
4.	Main Meal	704,000	622,000	650,000	840,000	714,000	666,000	746,000
Total (Kes.)		2,908,229	3,499,000	3,943,000	4,811,500	3,598,500	2,912,100	4,374,600

Based on the foregoing projection analysis, it was noted that the lowest bid was that of bidder 2, M/s Urth Caffe Limited.

11.0 PROJECTED COST BASED ON THE ACTUAL QUANTITIES FOR THE YEAR 2023

The Evaluation Committee further subjected the quoted rates to the actual quantities for the year 2023 to determine the lowest evaluated bid (See Annex II). The outcome of the analysis was as follows:

Based on the foregoing 2023 actual quantities projection analysis, it was noted that the lowest bid was that of bidder 2, M/s Urth Caffe Limited.

....."

174. From the above contents of the Evaluation Report, it is clear that the Evaluation Committee determined the Interested Party's bid to be the lowest bid based on a projected analysis whereby the quoted rates by the seven (7) responsive bids at the Financial Evaluation stage were subjected to projected quantities on the four (4) categories of items in the tender in addition to the bidders quoted rates being subjected to what was referred to as the actual quantities for the year 2023.

175. During the hearing, when the Board sought to know whether bidders in the subject tender were aware that the Procuring Entity would use certain projected quantities in evaluation of bids and if the same was provided for in the Tender Document, Mr. Mang'ata, the procuring Entity's Deputy Director Supply Chain Management stated that this approach had not been provided for in the Tender Document and that bidders were not aware of the said criteria. He further stated that the Evaluation Committee used the volumes for the year 2023 which was considered as a better way of analyzing the rates quoted by bidders to give the costs implication of awarding the subject tender. Mr. Mang'ata confirmed that this criterion was however not provided for in the Tender Document.

176. It is the Board's observation that the projection analysis carried out by the Evaluation Committee was derived from extraneous criteria that did not form part of the procedures and criteria in the Tender Document. Further, no compelling reason was provided for the



choice of the volumes for the year 2023 by the evaluation committee as a basis of analyzing the rates quoted by the bidders.

177. The Evaluation Committee is under a duty to confine itself to the procedures and criteria set out in the Tender Document when evaluating bids.

178. In view of the foregoing, this Board is left with the inevitable conclusion that the Evaluation Committee introduced extraneous criteria at the Financial Evaluation stage and therefore the Procuring Entity failed to evaluate the Applicant's bid at the Financial Evaluation stage in accordance with the procedures and criteria set out in the Tender Document.

179. In the circumstances, the Board finds that the Procuring Entity's Evaluation Committee went outside the evaluation criteria contained in its own Tender Document in the evaluation of the Applicant's tender at the Financial Evaluation stage and holds the Procuring Entity in breach of the provisions of Section 80(2) of the Act. Accordingly, this ground of review succeeds and is allowed.

What orders the Board should grant in the circumstances:

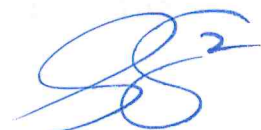
180. The Board has found that the preliminary objections raised by the Respondents are devoid of merit and the same are dismissed. Accordingly, the Board has jurisdiction to hear and determine the Request for Review.



181. The Board has also found that the Respondents' Evaluation Committee did not carry out due diligence on the Applicant and the Interested Party in accordance with Stage 4: Due Diligence of Section III – Evaluation and Qualification Criteria of the Tender Document and thus violated Section 83 of the Act as read with Regulation 80 of Regulations 2020.

182. The Board has further found that the Applicant's tender was not evaluated at the Financial Evaluation stage in accordance with provisions of Section 80(2) of the Act.

183. In determining the appropriate orders to grant in the circumstances, the Board observes that evaluation of bids is a role given to an evaluation committee established under Section 46 of the Act. Section 173(b) of the Act gives the Board a discretionary power to *"give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings."* As such, the Board deems it just and fair to order the 1st Respondent to direct the Evaluation Committee to re-admit the Applicant's tender and the Interested Party's tender for evaluation at the Financial Evaluation stage and to proceed with financial evaluation of both the Applicant's tender and the Interested Party's tender while taking into consideration the findings of the Board in this decision, the provisions of the Tender Document, the Constitution, the Act and Regulations 2020.



184. The upshot of the findings is that the Request for Review filed on 31st May 2024 succeeds in terms of the following specific orders:

FINAL ORDERS

185. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in this Request for Review:

- A. The preliminary objections raised at paragraphs 24, 25 and 26 of the 1st and 2nd Respondents' Memorandum of Response dated 6th June 2024 be and are hereby dismissed.**

- B. The due diligence report dated 20th March 2024 and signed by members of the Procuring Entity's Evaluation Committee with respect to Tender No. KNEC/ONT/2023-2024/07 for Provision of Catering and Events Set Up Services on a Two Year Contract Basis for the Kenya National Examinations Council be and is hereby cancelled and set aside.**

- C. The letters of Notification of Intention to Award dated 27th May 2024 issued by the 1st Respondent to the Interested Party, the Applicant and all other unsuccessful bidders in regard to the subject tender be and are hereby nullified and set aside.**



D. The 1st Respondent is hereby ordered to direct the Evaluation Committee of the Procuring Entity to admit the Applicant and the Interested Party back into the procurement process and re-evaluate their tenders from the Financial Evaluation stage and proceed with the procurement process to its logical conclusion in accordance with the law and taking into account the findings of the Board in this decision.

E. For certainty, the re-evaluation ordered at D above shall be carried out and completed within 14 days from the date of this decision.

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

Dated at NAIROBI this 21st Day of June 2024.



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PANEL CHAIRPERSON

PPARB



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SECRETARY

PPARB

