

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 57/2024 OF 27TH JUNE 2024

BETWEEN

FAST CHOICE LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA MEDICAL SUPPLIES AUTHORITY.....1ST RESPONDENT

KENYA MEDICAL SUPPLIES AUTHORITY.....2ND RESPONDENT

BEVAJ FURNITURE LIMITED.....1ST INTERESTED PARTY

DIGNITY COLLECTIONS LIMITED.....2ND INTRESTED PARTY

LIKWOON INVESTMENT LIMITED.....3RD INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Medical Supplies Authority in respect of Tender No. KEMSA/ONT30/2023-2024 for Procurement of Furniture and Fittings for Embakasi Supply Chain Center Office Block.

BOARD MEMBERS PRESENT

1. Ms. Alice Oeri - Vice-Chairperson & Panel Chair
2. CPA Alexander Musau - Member
3. Mr. Daniel Langat - Member

IN ATTENDANCE

Mr. James Kilaka - Ag. Board Secretary

Mr. Philemon Kiprop - Secretariat

Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT

FAST CHOICE LIMITED

Mr. Moses Muchiri

Advocate, G.K.Muturi & Company Advocates

RESPONDENTS

THE ACCOUNTING OFFICER, KENYA MEDICAL SUPPLIES AUTHORITY

KENYA MEDICAL SUPPLIES AUTHORITY

Mr. Momanyi

Advocate, Momanyi & Associates Advocates

1ST INTERESTED PARTY

BEVAJ FURNITURE LIMITED

Mr. Kiriimi

Advocate, Kinyanjui Kiriimi & Company
Advocates

Ms. Tuwei

Advocate, Kinyanjui Kiriimi & Company
Advocates

2ND INTERESTED PARTY

DIGNITY COLLECTIONS LIMITED

Mr. Eddie Omondi

Advocate, Humphrey & Company LLP

3RD INTERESTED PARTY

LIKWOON INVESTMENT LIMITED

N/A

N/A

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Medical Supplies Authority, the Procuring Entity together with the 1st Respondent herein, invited submission of tenders in response to Tender No. KEMSA/ONT30/2023-2024 for Procurement of Furniture and Fittings for Embakasi Supply Chain Center Office Block (herein "subject tender) under an open tender while setting the tender submission deadline as Thursday, 23rd May 2024 at 10:00 a.m.

Addendum 1

2. On 20th May 2024, the Procuring Entity issued an addendum offering various clarifications on inquiries made by suppliers interested in participating in the subject tender. The tender submission deadline was retained as 23rd May 2024.

Submission of Tenders and Tender Opening

3. According to the signed Tender Opening Minutes dated 23rd May 2024, submitted under the Confidential File submitted by the Procuring Entity, the following twenty-seven (27) tenderers were recorded as having submitted in response to the subject tender by the tender submission deadline:

#	Name of Tenderer
1.	Likwoon Investments Limited
2.	Furniture Elegance
3.	Borderland System Company Limited
4.	Pepeta Holdings Limited

5.	Wisetech Enterprises Limited
6.	Vithek Enterprise Limited
7.	Maxpower Logistics
8.	Je Decoma Enterprises Limited
9.	Kyonde Holdings Limited
10.	Jumpag Investments Limited
11.	TX Landbrug Limited
12.	Ticho Gates Engineering Limited
13.	Kericon East Africa Limited
14.	Branold Enterprises Limited
15.	Bevaj Furniture Limited
16.	Swiss Grade Consult Limited
17.	Royal Furnishers & Fittings Company Limited
18.	Sumerian Investment Group Limited
19.	Tum Company Limited
20.	Fursy's Kenya Limited
21.	Tinglinks Enterprise Limited
22.	Dignity Collections Limited
23.	Mibm Limited
24.	Ascint Limited
25.	Fast Choice Limited
26.	Glam Global Enterprises
27.	Apicah Furniture Limited

Evaluation of Tenders

4. The 1st Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received tenders in the following 3 stages as captured in the Evaluation Report
 - i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Financial Evaluation

Preliminary Evaluation

5. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as Preliminary examination for Determination of Responsiveness under Section IIII-Evaluation and Qualification Criteria at page 42 of 128 of the Tender Document.
6. The evaluation was to be on a Yes/No basis and tenders that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
7. At the end of the evaluation at this stage, 24 tenders were found non-responsive, with only 3 tenders being those of the Interested Parties qualifying for further evaluation at the Technical Evaluation Stage.

Technical Evaluation

8. The Evaluation Committee was required at this stage to examine tenders successful at the Preliminary Stage using the criteria set out as Clause 2.2.1 Evaluation of the Technical aspects of the Tender under Section

IIII-Evaluation and Qualification Criteria at pages 42 to 43 of 128 of the Tender Document.

9. The evaluation was on the basis of a tender meeting the requirements inherent in the individual line items forming the subject of the tender. The Interested Parties variously met these requirements with some failing to meet the requirements under different line items under the subject tender.

Financial Evaluation

10. The Evaluation Committee was required at this stage to examine tenders successful at the Technical Evaluation Stage using the criteria set out as Financial Evaluation Criteria under Section III Evaluation and Qualification Criteria of the Tender Document.
11. The Evaluation Committee was to compare the tender prices indicated in the various tenders to identify the lowest evaluated tender. The successful tender would be one that would be established as the lowest evaluated tender.
12. At the end of the evaluation at this stage the Interested Parties were established as having the lowest evaluated tenders in the various line items in the subject tender.

Evaluation Committee's Recommendation

13. The Evaluation Report dated 28th May 2024 forming part of the Confidential File indicates that the Evaluation Committee recommended

the award of various line items in the subject tender to the Interested Parties herein at their tendered prices for the items.

Professional Opinion

14. In a Professional Opinion dated 11th June 2024 (hereinafter referred to as the "Professional Opinion") the Procuring Entity's Director Procurement, Mr. Moses Sudi, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and recommended the award of the various line items in subject tender to the Interested Parties.
15. Subsequently on 12th June 2024, the 1st Respondent concurred with the Professional Opinion.

Notification to Tenderers

16. Accordingly, the tenderers was notified of the outcome of the evaluation of the tenders in the subject tender vide letters dated 14th June 2024.

REQUEST FOR REVIEW

17. On 27th June 2024, the Applicant through the firm of G.K. Muturi & Company Advocates, filed a Request for Review dated 28th June 2024 supported by a Statement sworn on 26th June 2024 by Wilson Mungai , the Applicant's General Manager, seeking the following orders from the Board in verbatim:

a) The Respondents' decision vide the letter of 14th June 2024 awarding Tender No. KEMSA/NT30/2023-2024 for Procurement of Furniture for Embakasi Supply Chain Centre Office Back to the Interested Parties be and is

hereby set aside and nullified;

- b) The Letter of notification dated 14th June 2024 and received on 14th June issued to the Applicant in respect of Tender No. KEMSA/NT30/2023-2024 for Procurement of Furniture for Embakasi Supply Chain Centre Office Bock be set aside;*
- c) The Respondents be ordered to re-admit the Applicant's tender and proceed to evaluate it in compliance with the tender documents, the Public Procurement and Asset Disposal Act and the Constitution;*
- d) In the alternative to prayer (c) above, the Honourable Board be pleased to review all the records of the procurement process relating to Tender No. KEMSA/NT30/2023-2024 for Procurement of Furniture for Embakasi Supply Chain Centre Office Bock do substitute the decision of the Respondent with an order for an award of the Tender to the Applicant;*
- e) Such other or further relief or reliefs as this Board shall deem just and expedient.*
- f) Any other relief that the Request for Review deems fit to grant under the circumstances.*

18. In a Notification of Appeal and a letter dated 27th June 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said 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 said 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 27th June 2024.

19. On 4th July 2024, the Board received a letter of even date from the firm of Momanyi & Associates Advocates, requesting for more time to file the Respondents' response citing receipt of incomplete documents from the Procuring Entity.
20. On 8th July 2024, the Respondents through the firm of Momanyi & Associates Advocates filed a Notice of Appointment of Advocates and Memorandum of Response dated 4th July 2024 and 5th July 2024 respectively. They equally forwarded the documents constituting the Confidential File under Section 67 of the Act.
21. Vide letters dated 8th July 2024, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 8th July 2024.
22. On 9th July 2024, the 2nd Interested Party through the firm of Humphrey & Company Advocates LLP, filed a Memorandum of Appearance and a Memorandum of Response, both dated 8th July 2024.

23. On the same day, 8th July 2024, the Acting Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 12th July 2024 at 11:00 a.m. through the link availed in the said Hearing Notice.
24. On 11th July 2024, the Applicant filed Written Submissions dated 10th July 2024.
25. On the morning of 12th July 2024, the Respondents filed Written Submissions dated 11th July 2024.
26. Later on the same day, 12th July 2024 at 11:00 a.m., when the Board convened for the online hearing, all the parties were represented by their respective Advocates. The Board read out to the parties the documents filed by the parties and requested them to confirm if the same had been served upon them of which all responded in the affirmative.
27. Thereafter and with the concurrence of the parties' Advocates, the Board gave the following hearing directions:
 - i. The Applicant would argue their Request for Review in 10 minutes
 - ii. The Respondents would offer a response within 10 minutes
 - iii. Each of the Interested Parties would have 5 minutes to offer their responses.
 - iv. Lastly, the Applicant would close with a rejoinder

PARTIES SUBMISSIONS

Applicant's Submissions

28. Counsel for the Applicant, Mr. Muchiri, indicated that he would be relying on the Applicant's documents as filed in the matter.
29. Counsel argued that the Applicant's tender was unreasonably and unjustifiably disqualified at the Preliminary Evaluation Stage of the subject tender. According to Counsel, page 42 of the Tender Document contained a requirement for tenderers to provide a certificate that the chair mechanism, gas spring/lift, locking mechanisms, chair mechanisms, foam mesh, nylon base castors meet BIFMA ISO 9001, ISO 14001: 2025 or in the alternative an equivalent Kenya Bureau of Standards for Office Chairs with relevant test reports.
30. He maintained that the Applicant supplied a BIFMA Certificate, an ISO 9001 certificate and an ISO 14001:2025 Certificate was thus compliant with the requirement in the Tender Document. Mr. Muchiri therefore contended that the Respondents fell in error when they notified the Applicant of its disqualification from the subject tender on account of failing to provide relevant test reports.
31. Counsel argued that the requirement under the Tender Document provided for alternatives i.e. BIFMA Certificate, an ISO 9001 certificate and an ISO 14001:2025 Certificate or alternatively equivalent Kenya Bureau of Standards with test reports. It was Counsel's contention that the Applicant complied with the first option and thus its tender was responsive in the circumstance.
32. Mr. Muchiri while relying on the cases of ***Republic v Kenya School of Law[2019]eKLR; Robert Uri Dabaly Jimma v Kenya School of***

Law & Kenya National Qualifications Authority and Raila Amolo Odinga v Independent Electoral and Boundaries Commission [2017]eKLR argued that the word “or” is a disjunctive word that connotes alternatives and corresponds to the word “either”. He argued that if the Respondents desired tenderers to submit all the documents nothing would have been easier than for this to be spelt out in the Tender Document.

33. Mr. Muchiri argued that BIFMA (Business and Industrial Furniture Manufacturers Association) certificate is a recognized standard on the safety, durability and sustainability requirements of office furniture. Further, that ISO 9001 and ISO 14001: 2025 were international standards on quality management and environment management standards. He maintained that collectively, the above certificates demonstrate a commitment to high quality manufacturing process and environmental responsibility.
34. Counsel argued that the Applicant went over and above the 1st option as it equally supplied a Kenya Bureau of Standards certificate.
35. Counsel equally faulted the Notification Letter dated 14th June 2024 sent to the Applicant arguing it was signed by Mr. Moses Sudi, the Director of Procurement on behalf of the Accounting Officer without written delegation contrary to Section 69(4) of the Act. For this proposition reliance was placed on this Board’s Decisions in **PPARB Application No. 65 of 2023; Central Electricals International Limited v The CEO of East African Portland Cement Plc** and **PPARB Application No. 9**

of 2020; Internet Solutions (K) Limited v Kenya Airports Authority.

36. Counsel argued the absence of a written delegation undermined accountability of the public procurement process.

Respondents' Submissions

37. Counsel for the Respondents, Mr. Momanyi, indicated that he would be relying on the Respondents' filed documents in the matter.
38. Counsel argued that Section 79 of the Act defined a responsive tender as one that conforms to all the eligibility and other mandatory requirements and that this definition was affirmed in ***Republic v Public Procurement Administrative Review Board, Kenya Bureau of Standards; JR Application No. 60 of 2020.***
39. Counsel argued that Requirement No. (P) on page 42 of the Tender Document required a tenderer to submit a BIFMA Certificate, an ISO 9001 Certificate, an ISO 14001:2025 Certificate and test reports for them to be considered responsive.
40. He argued that the Applicant through paragraphs 10 to 13 of its Request for Review admitted to not providing the test reports and thus the Applicant's tender was not responsive to the Requirement No. (P) at page 42 of the Tender Document. Counsel argued that the non-compliance with the mandatory requirement by the Applicant warranted its disqualification at the Preliminary Evaluation Stage.

41. On the compliance of the Notification Letter dated 14th June 2024 sent to the Applicant, Mr. Momanyi contended that the Applicant should have resolved this through requesting for a debrief or filing a procurement-related complaint.
42. He contended that Section 69(4) of the Act signified that the Head of Procurement Function had residual authority and power to delegate. Further, that either the Accounting Officer or Head of the Procurement Function had power to approve a procurement process and thus Mr. Sudi properly approved the procurement process.
43. It was argued that the procurement process in the subject tender was undertaken in compliance with the law. Accordingly, the Board was urged to dismiss the Request for Review.

1st Interested Party's Submission

44. Counsel for the 1st Interested Party, Ms. Tuwei, indicated that she was relying on the 1st Interested Party's filed documents.
45. Ms. Tuwei argued that the 1st Interested Party submitted a responsive tender meeting all the requirements in the subject tender. She argued that clause 26.6 on page 105 of the Tender Document required that a supplier should provide the Procuring Entity with a report on any such test and inspection. According to Counsel, the test reports were mandatory.
46. She contended that the Tender Document made provisions for interested suppliers to seek clarifications on the requirements in the subject tender.

47. She argued that the instant challenge of the award was baseless as the tender process was in accordance with the law. Therefore, the 1st Interested Party urged the Board to dismiss the Request for Review.

2nd Interested Party's Submissions

48. Counsel for the 2nd Interested Party, Mr. Omondi, indicated that he was relying on the 2nd Interested Party's filed Memorandum of Response.

49. Counsel maintained that the 2nd Interested Party was a tenderer in the subject tender and was in the circumstance not involved in the evaluation of the tenders received in response to the invitation to tender in the subject tender.

Applicant's Rejoinder

50. In his rejoinder, Counsel for the Applicant, Mr. Muchiri, reiterated that the Applicant submitted a tender that was responsive to Requirement No. (P) having submitted a BIFMA Certificate together with the required ISO Certificates.

51. Further, that Sections 69(1),(4) and 87 of the Act place the obligation of issuing Notification Letters on an Accounting Officer and not the Head of the Procurement Function.

52. Counsel faulted the argument on behalf of the 1st Interested Party that Clause 26.6 at page 105 of the Tender Document contemplated the test reports to be supplied arguing that the said clause was not part of the evaluation criteria but was instead a contractual term binding on the supplier that would emerge successful in the subject tender

CLARIFICATIONS

53. The Board inquired from the Respondents on whether the test reports were a mandatory requirement to which Mr. Momanyi responded in the affirmative. Counsel contended that these reports were to be obtained from the manufacturers of the goods under procurement.
54. The Board sought for the Respondents to confirm what the Applicant submitted as part of its tender in respect of the Requirement No. (p). Counsel for the Respondent, Mr. Momanyi, indicated that the Applicant supplied a BIFMA Certificate, ISO Certificates and a Kenya Bureau of Standards Certificate but failed to provide test reports.
55. The Board asked the Applicant to address it on the use of the word “or” in Requirement No. (P) to which Counsel for the Applicant, Mr. Muchiri indicated it connotes an alternative. Counsel for the Respondents, Mr. Momanyi argued that a reading of the requirement required test reports to be availed.
56. The Board asked the Respondents to confirm whether the Tender Document made provision for interested suppliers to seek clarification to which Counsel for the Respondents, Mr. Momanyi responded in the affirmative. Counsel for the Applicant, Mr. Muchiri argued that he was not aware of any such provision in the Tender Document.
57. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 27th June 2024 had to be determined by 18th July 2024. Therefore, the Board would communicate its decision on or before 18th July 2024 to all parties via email.

BOARD'S DECISION

58. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:

- I. ***Whether the Procuring Entity's Evaluation Committee's disqualification of the Applicant from the subject tender was in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document?***
- II. ***Whether the Procuring Entity issued Notification Letters compliant with Sections 87 and 69 of the Act?***
- III. ***What orders should the Board issue in the circumstance?***

Whether the Procuring Entity's Evaluation Committee's disqualification of the Applicant from the subject tender was in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document?

59. The Applicant instituted the instant Request for Review taking issue with its disqualification from the subject tender on what was termed as being non-responsive to Requirement No. (p) at page 42 of the Tender Document. Counsel for the Applicant, Mr. Muchiri, contended that the Applicant was responsive to this requirement as it submitted a BIFMA Certificate, ISO 9001 certificate and ISO 14001: 2025, which combination satisfied the first option of compliance under Requirement No. (P).

60. Counsel went on to argue that Requirement No. (P) had two options for compliance, with second option requiring provision of a Kenya Bureau of

Standards Certificate accompanied by test reports of the goods in the subject tender. According to Counsel, though the Applicant supplied a Kenya Bureau of Standard Certificate, it did not supply the test reports but was nonetheless responsive to the requirement on the basis of the first option of compliance.

61. The Respondents took a different view, arguing that the Applicant's tender was properly disqualified for failing to satisfy a mandatory requirement in the Tender Document. Counsel for the Respondents, Mr. Momanyi contended that Requirement No. (P) required tenderers to submit test reports in addition to any BIFMA and ISO Certificate or Kenya Bureau of Standards Certificate. The 1st Interested Party was supportive of this position.
62. The Board is therefore at this stage called upon to interrogate the circumstances surrounding the evaluation process that culminated in the disqualification of the Applicant from the subject tender.
63. For starters, Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of tenders in the following terms:

"80. Evaluation of tenders

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the

provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.”

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

“79. Responsiveness of tenders

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

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

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

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

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

a) be quantified to the extent possible; and

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

65. This Board takes further guidance from the dictum of the High Court in ***Republic v Public Procurement Administrative Review Board & 2 others Ex parte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 of 2018*** where the court while considering a judicial review application against a decision of this Board illuminated on the responsiveness of a tender under section 79 of the Act:

“19. It is a universally accepted principle of public procurement that bids which do not meet the minimum

requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

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

See also ***Nairobi High Court Judicial Review Misc. Application No. 407 of 2018; Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR.*** and ***Nairobi High Court Misc. Civil Application No. 60 of 2020; Republic v Public Procurement Administrative Review Board & Ors Ex parte Tuv Austria Turk,***

66. Drawing from the above, the Tender Document is the key guide in the evaluation of tenders submitted in response to any tender invitation. Further, for a tender to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.
67. Turning to the instant Request for Review, the Applicant is challenging its disqualification from the subject tender as communicated to it through a Notification Letter dated 14th June 2024. Below is an excerpt of the said letter:

Fast Choice Ltd

(Address details withheld)

NOTIFICATION OF INTENTION TO AWARD

***RE: KEMSA/ONT30/2023-2024-PROCUREMENT OF
FURNITURE AND FITTINGS FOR EMBAKASI SUPPLY CHAIN
CENTER OFFICE BLOCK***

...

Reason/s why your bid was unsuccessful

- You did not provide relevant test reports-testing the smolder resistance of materials used in upholstered furniture, textile evaluation for antibacterial activity and general purpose office chairs instead they only attached test certificate.***

...

Signed

Moses Sudi

Director Procurement

FOR: CHIEF EXECUTIVE OFFICER

68. From the above it is apparent that the Applicant was disqualified for what was described as a failure to provide relevant test reports-testing the smolder resistance of materials used in upholstered furniture, textile evaluation for antibacterial activity and general purpose office chairs instead they only attached test certificate.
69. The Board has keenly studied the Tender Document and spotted Requirement No. (P) at page 42 of 128 of the Tender Document and the same is reproduced for ease of reference:

A. PRELIMINARY EXAMINATION

Requirements

I...

J...

...

P. Bidders must provide a certificate issued by the manufacturer that their chair mechanisms, gas spring/lift, locking mechanisms, chair mechanism, foam, mesh, nylon base castors meet BIFMA (Business and Institutional Furniture Association) Standard, ISO 9001 ISO 14001:2025 or equivalent Kenya Bureau of Standards Quality for Office chairs (Provide relevant test reports-Testing the smolder resistance of materials used in upholstered furniture, textile evaluation for antibacterial activity and General Purpose office chairs.

...

NOTE: Failure to comply with Mandatory Requirements will lead to disqualification. Only bidders who are successful at this stage will proceed to the next stage of evaluation.

70. The use of the word "or" in the above Requirement appears to have attracted divergent opinion on what the requirement required of tenderers. It was argued on behalf of the Applicant that the use of the word "or" created an alternatives of compliance with the requirement i.e. a tender containing a BIFMA Certificate, ISO 9001 and ISO 14001:2025 Certificates would be responsive to the requirement as an alternative to Kenya Bureau of Standards Certificate with test reports. It was equally argued by the Respondents and 1st Interested Party that the test reports were a mandatory requirement regardless of whether one provided BIFMA Certificate and ISO Certificates or Kenya Bureau of Standards Certificate.
71. Recently, this Board in ***PPARB Application No. 53 of Tradewinds Aviation services Limited v Accounting Officer Kenya Airports Authority and Others*** made a pronouncement on the use of the word "or" in the following terms:

75. In interpreting the above provisions under Clause 1 of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document we deem it fit to understand the meaning of the word 'OR' as used between Clause 1(i)(a) and Clause 1(i)(b) above and the meaning of the word 'ambiguous' as used by the Applicant in advancing its case in the instant Request for Review.

76. Oxford Dictionary, Eight Edition defines the word 'or' as disjunctive in that it is used to introduce another possibility. The aforesaid Oxford Dictionary defines the word 'ambiguous' to mean one that can be understood in more than one way; having different meanings.

77. With the foregoing definitions in mind, our interpretation of the above provisions pertaining the requirement for Experience under Clause 1 of Part II: Evaluation of Tenderer's Technical Requirements at page 22 to 23 of the Tender Document is that it was a mandatory requirement for a bidder to demonstrate that it had been providing meet and assist services at an international airport which would be evidenced by (a) documentary evidence such as copies of at least five (5) valid meet and assist airport passes for its own personnel for operations at Jomo Kenyatta International Airport or at least two (2) valid meet and assist contracts/ licenses/agreements signed between the bidder or its subsidiary company with an international airport showing a minimum 5 years' experience in providing meet and assist services, and (b) Recommendation letters from at least three (3) meet and assist corporate clients addressed to the MD/CEO KAA and specific to the subject tender.

78. In our considered view, the requirement for 'at least two (2) valid meet and assist contracts/ licenses/agreements signed between the bidder or its subsidiary company with an

international airport showing a minimum 5 years' experience in providing meet and assist services' was provided as another possible way for a bidder to demonstrate its documentary evidence other than having the 'five (5) valid meet and assist airport passes for its own personnel for operations at Jomo Kenyatta International Airport' and a bidder who met this criteria would be scored 50 marks as seen from Addendum 1 which clearly set out that the experience under Clause 1(i) would score 50 marks while the experience under Clause 1(ii) would score 30 marks. As such, the criteria under Clause 1(ii) for 'recommendation letters from at least three (3) meet and assist corporate clients addressed to the MD/CEO KAA and specific to the subject tender' was distinct and independent of the criteria mentioned above under Clause 1(i) of the Tender Document. The above evaluation criteria were therefore not ambiguous as alleged by the Applicant and had only one interpretation.

72. The above position mirrors that taken by the High Court in ***Republic v Kenya School of Law [2020]eKLR; Nairobi High Judicial Review Application No. 21 of 20 Consolidated with Judicial Review Application No. 13 of 2020 and Judicial Review Application No. 13 of 2020*** and ***Robert Uri Dabaly Jimma v Kenya School of Law & Kenya National Qualifications Authority***.
73. Turning to the instant Request for Review, the Board takes the view that Requirement No. (P) provided for at least 2 ways in which a tenderer would comply:

- i. A tender would be compliant with Requirement No. (P) if contained a Certificate issued by a manufacturer that the chair mechanisms, gas spring/lift, locking mechanisms, chair mechanism, foam, mesh, nylon base castor meet BIFMA Standard, ISO 9001 and ISO 14001:2025.
- ii. A tender would equally be compliant with Requirement No. (P) if it contained an equivalent Kenya Bureau of Standards Quality for office chairs accompanied by a test reports.

74. It is not in dispute that the Applicant's tender contained a Certificate issued by a manufacturer that the chair mechanisms, gas spring/lift, locking mechanisms, chair mechanism, foam, mesh, nylon base castor meet BIFMA Standard, ISO 9001 and ISO 14001:2025. The Board has independently reviewed the Applicant's original tender document as forwarded to it in accordance with Section 67 of the Act and noted that the said Certificates were supplied as part of the Applicant's tender.

75. It's the Board's understanding that for a manufacturer to be ISO certified means that the manufacturing plant has been certified, and their products quality are in compliance with internationally required or acceptable standards.

76. The Board further notes that the Applicant has also attached BIFMA/TEST certificate by SGS to confirm that the respective Executive High Back leather Chairs ,Five Seater Sofa set ,High Back Orthopaedic Mesh Chair ,High Back Mesh Chair ,leather visitors chairs and Three Seater three sofa Set supplied by Dawon Chairs Co.ltd ;has been tested at SGS-GSTC standards Technical Services Co. Ltd Shunde Lab and successfully satisfied the Applicable Test Requirements from:

ANSI/BIFMA X5.1:2024(Type I,II), ANSI/BIFMA X5.1:2024(Type I,II), ANSI/BIFMA X5.1:2024(Type I,III), ANSI/BIFMA X5.1:2024(Type I,III), ANSI/BIFMA X5.1:2024(Type I,III) and ANSI/BIFMA X5.1:2024(Type I,III),respectively at pages 171 to 183 of the Applicant bid .

77. From the foregoing, the Board finds that the Applicant satisfied one of the options of compliance with Requirement No. (P) above. Accordingly, it would follow that the Applicant's disqualification on account on non-conformity with Requirement No.(P) above was not in accordance with the Tender Document since it met that specific Requirement .
78. In view of the foregoing, we find that the Procuring Entity's Evaluation Committee's disqualification of the Applicant from the subject tender was not in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document.

Whether the Procuring Entity issued Notification Letters compliant with Sections 87 and 69 of the Act ?

79. The Applicant equally assailed the Notification Letters dated 14th June 2024 for being signed by the Head of the Procurement Function in the absence of delegation in writing. Counsel for the Applicant Mr. Muchiri maintained that under Sections 69 and 87 of the Act, the Accounting Officer and not the Head of Procurement is the one responsible for issuance of Notification Letters.
80. The Respondents argued that the Notification was proper and further that under Section 62 of the Act, the head of Procurement Function and

the Accounting Officer have residual power which they can delegate to other officers.

81. Section 87 of the Act provides for the issuance of Notifications of intention to enter in to a contract in the following terms:

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.

82. From Section 87 above, the role of sending out Notification Letters to both the successful and unsuccessful tenderers vests in the Accounting Officer.

83. On its part Section 69 of the Act provides for procurement approvals and delegation in the following terms :

69. Procurement approvals and delegation of responsibility

(1) All approvals relating to any procedures in procurement shall be in writing and properly dated, documented and filed.

(2) No procurement approval shall be made to operate retrospectively to any date earlier than the date on which it is made except on procurements in response to an urgent need.

(3) In approving procurements relating to an urgent need, the accounting officer shall be furnished with adequate evidence to verify the emergency.

(4) No procurement approval shall be made by a person exercising delegated authority as an accounting officer or head of the procurement function unless such delegation has been approved in writing by the accounting officer or the head of the procurement unit, respectively.

(5) An accounting officer of a procuring entity shall maintain specimen

signatures of all persons authorised to make approvals within the procurement process and these signatures shall be availed to all staff and members where applicable.

(6) Responsibility for each approval made in the procurement procedure shall rest with the individual signatories and accounting officer, whether he or she delegated the authority or not.

84. Basically, Section 69 demands that (i) approvals in respect of procurement processes should be in writing, documented and filed; (ii) Any delegation of procurement approval by the Accounting Officer or Head of Procurement should be in writing; (iii) Procurement approvals should as a matter of practice not be issued retrospectively except in instances of emergencies (iv) The responsibility of the approvals rests in the Accounting Officer and the officers making the approval whether the authority was delegated or otherwise.
85. The Board's side by side reading of Sections 69 and 87 of the Act yields that the Accounting Officer and not the Head of the Procurement function is the officer responsible for the issuance of Notification Letters to both the successful and unsuccessful tenderers. Further, where the function is delegated, such delegation should be in writing, documented and filed.
86. Turning to the instant case, it has not been contested that the Notification Letter dated 14th June 2024, sent to the Applicant, was signed by one Mr. Moses Sudi, the Head of Procurement Function on behalf of the Accounting Officer. The Head of Procurement was basically exercising a delegated function which under section 69 of the Act should be supported by a written delegation that should be equally filed as part of the records of the relevant procurement process.
87. During the hearing, despite the Applicant's claim that there was no proof of the delegation of role of Notification to successful and unsuccessful tender, the Respondents did not point the Board to any evidence of such delegation. The Board has independently reviewed the Confidential File to check if there was filed in it any instrument denoting the delegation of the role to Mr. Sudi as required under Section 69 of the Act but has not spotted any such instrument.

88. This Board in **PPARB Application No. 65 of 2023; Central Electricals International Limited v The General Manager, East African Portland Cement Plc** cancelled notification letters that were signed by the Head of Procurement function in the absence of an instrument demonstrating the delegation of the role:

125. Moreover, in order to ensure that any delegated authority is not exercised in order to undermine an accounting officer, it is necessary for the delegated authority to be in writing and specific, in that the accounting officer should specify the tender for which delegated authority is given and the exact acts to be undertaken, as such delegated authority may be prone to abuse and exercised contrary to the manner in which the accounting officer specified.

126. In the circumstances, the Respondents failed to demonstrate that the 1st Respondent expressly delegated his authority in writing, to sign and issue notification letters as provided under Section 87 of the Act to Mr. Moses Sudi, Head of Supply Chain. It is therefore our finding that Mr. Moses Sudi who signed the notification letters on behalf of the 1st Respondent acted without authority, since there is no evidence before the Board demonstrating that the 1st Respondent expressly delegated such authority to him.

127. As such, the letters of notification of the outcome of the subject tender dated 11th September 2023 issued to tenderers in the subject tender did not meet the threshold required in

Section 126(4) and 87(3) of the Act read with Regulation 82(3) of the Regulations 2020 and are hereby null and void.

89. The circumstances of the instant case are similar since the Board was not pointed to any such instrument of the delegation of the role of signing notification letters. Further, during the Board's independent review of the Confidential File, it did not come across any such instrument of delegation. Accordingly, the notification was in the circumstances irregular.

90. In view of the foregoing, the Board finds that the Procuring Entity issued Notification Letters that were not compliant with Sections 87 and 69 of the Act .

What orders the Board should grant in the circumstances?

91. The Board has found that the Procuring Entity's Evaluation Committee's disqualification of the Applicant from the subject tender was not in line with the provisions of the Constitution of Kenya, 2010, the Act, the Regulations 2020 and the Tender Document.

92. The Board has equally found that the Procuring Entity issued Notification Letters that was not compliant with Sections 87 and 69 of the Act .

93. The upshot of our finding is that the Request for Review dated 26th June 2024 and filed on the 27th June,2024 with respect to Tender No. KEMSA/ONT30/2023-2024 for Procurement of Furniture and Fittings for Embakasi Supply Chain Center Office Block succeeds in the following specific terms:

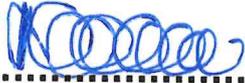
FINAL ORDERS

94. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 26th June 2024:

- 1. The Request for Review dated 26th June 2024 be and is hereby allowed.**
- 2. The Notification Letters dated 14th June 2024 addressed to the Applicant and all other unsuccessful tenderers in Tender No. KEMSA/ONT30/2023-2024 for Procurement of Furniture and Fittings for Embakasi Supply Chain Center Office Block, be and are hereby cancelled and set aside.**
- 3. The Notification Letters dated 14th June 2024 addressed to the Interested Parties as the successful tenderers in Tender No. KEMSA/ONT30/2023-2024 for Procurement of Furniture and Fittings for Embakasi Supply Chain Center Office Block, be and are hereby cancelled and set aside.**
- 4. The 1st Respondent be and is hereby ordered to direct the evaluation committee to re-admit the Applicant tender at preliminary evaluation stage and re-evaluate its bid at Preliminary Examination stage with respect to Requirement "P" and thereafter after to proceed with procurement process to its logical conclusion in accordance with the law and taking into account the findings of the Boards in this decision.**
- 5. For certainty, the re-evaluation ordered at 4 above shall be carried out and completed within 14 days from the date of this decision.**

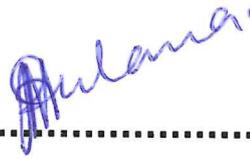
6. Each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 18th Day of July 2024.



.....
CHAIRPERSON

PPARB



.....
SECRETARY

PPARB

