

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 65/2024 OF 12<sup>TH</sup> JULY 2024**

**BETWEEN**

**ROYAL TASTE KITCHEN LIMITED ..... APPLICANT**

**AND**

**ACCOUNTING OFFICER**

**KENYA NATIONAL EXAMINATIONS COUNCIL ..... 1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL EXAMINATIONS COUNCIL ..... 2<sup>ND</sup> 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. Ms. Alice Oeri     | - | Vice Chair & Panel Chairperson |
| 2. Eng. Lilian Ogombo | - | 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

## **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 13<sup>th</sup> February 2024 published in *MyGov* publication, on the Procuring Entity's website [www.tenders.go.ke](http://www.tenders.go.ke) and on the Public Procurement Information Portal (PPIP) website [www.tenders.go.ke](http://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 23<sup>rd</sup> February 2024 at 10.00 a.m.

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

2. According to the Minutes of the tender opening held on 23<sup>rd</sup> 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:

<b>Bidder No.</b>	<b>Name</b>
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1.	The Viands Limited
2.	Urth Caffé 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 1<sup>st</sup> 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**

S/N	Description	Bidder No.						
		02	03	05	06	07	08	10
	<b>Total (Kes)</b>	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 Caffé 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 20<sup>th</sup> 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 Caffé 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 Caffé 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/ No	Item Description	Bidder 2 Urth Caffe Limited	Bidder 3 Royal Taste Kitchen	Bidder 5 Lesan Caterers Ltd	Bidder 6 Brinks Natacam	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/Lu nch 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 Caffé Limited.

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

### **First Professional Opinion**

16. In a Professional Opinion dated 30<sup>th</sup> April 2024 (hereinafter referred to as "the First Professional Opinion"), 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 Caffè 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 30<sup>th</sup> April 2024.

### **Notification to Tenderers**

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

### **REQUEST FOR REVIEW NO. 46 OF 2024**

19. On 31<sup>st</sup> May 2024, Royal Taste Kitchen Limited hereinafter referred to as "the Applicant"), filed a Request for Review dated 30<sup>th</sup> May 2024

together with Supporting Affidavit sworn on 30<sup>th</sup> May 2024 by Emily Kerubo Kamau, its Director through ROM Law Advocates LLP (hereinafter referred to as "Request for Review No. 46 of 2024") seeking the following orders from the Board:

- a. The 1<sup>st</sup> and 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> 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. The Board considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and found the following issues arose 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 20<sup>th</sup> 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*

21. On the first issue framed for determination, the Board found it had jurisdiction to hear and determine the Request for Review.

22. On the second issue framed for determination, the Board found and held that the 2<sup>nd</sup> 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.
23. On the third issue framed for determination, the Board found and held 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.
24. 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 issued the following orders in its Decision dated 21<sup>st</sup> June 2024 in Request for Review No. 46 of 2024:
- A. The preliminary objections raised at paragraphs 24, 25 and 26 of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response dated 6<sup>th</sup> June 2024 be and are hereby dismissed.*
- B. The due diligence report dated 20<sup>th</sup> 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 27<sup>th</sup> May 2024 issued by the 1<sup>st</sup> 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 1<sup>st</sup> 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.*

## **RE-EVALUATION OF THE SUBJECT TENDER**

25. According to the Evaluation Report signed by members of the Evaluation Committee on 5<sup>th</sup> July 2024, the Evaluation Committee reconvened on 2<sup>nd</sup> July 2024 to re-evaluate the financial proposals as ordered by the Board in its Decision dated 21<sup>st</sup> June 2024 and re-admitted both the Applicant and Interested Party's tenders at the Financial Evaluation stage for re-evaluation.

26. At the conclusion of the Financial Evaluation, bidders were ranked as follows:

<b><i>Rank</i></b>	<b><i>Name of Bidder</i></b>	<b><i>Tender Sum (Kes)</i></b>
<b><i>1.</i></b>	<b><i>Bidder 3: Royal Taste Kitchen Ltd</i></b>	<b><i>37,540.00</i></b>
<b><i>2.</i></b>	<b><i>Bidder 2: Urth Caffe Limited</i></b>	<b><i>72,374.00</i></b>
	<b><i>Others</i></b>	
<b><i>3.</i></b>	<b><i>Bidder 8: Cascade Company Limited</i></b>	<b><i>73,885.00</i></b>
<b><i>4.</i></b>	<b><i>Bidder 7: Meal Magic Caterers &amp; Event Management</i></b>	<b><i>83,720.00</i></b>
<b><i>5.</i></b>	<b><i>Bidder 10: Kipevu Restaurant Ltd</i></b>	<b><i>136,980.00</i></b>

<b>6.</b>	<b>Bidder 6: Brinks Netasam Enterprises Ltd</b>	<b>141,300.00</b>
<b>7.</b>	<b>Bidder 5: Lesan Caterers Ltd</b>	<b>283,265.00</b>

27. According to a Due Diligence Report signed by members of the Evaluation Committee on 5<sup>th</sup> July 2024, the Evaluation Committee noted that the lowest Evaluated bidder was the Applicant and therefore proceeded with conducting post qualification due diligence on the Applicant. The Evaluation Committee noted that it was not able to rely on the Financial Statements submitted by the Applicant so as to confirm that the Applicant was not insolvent, in receivership, bankrupt or in the process of being wound up. Based on its findings, the Evaluation Committee disqualified the Applicant from further evaluation and proceeded to undertake due diligence on the second lowest evaluated bidder being the Interested Party herein.

28. Based on the due diligence findings, the Evaluation Committee found the Interested Party's tender as responsive and proceeded to recommend award of the subject tender to the Interested Party being the lowest evaluated bidder at its quoted price totaling to Kenya Shillings Seventy-Two Thousand Three Hundred and Seventy-Four only (Kshs. 72,374.00) inclusive of 16% VAT.

29. Vide a Professional Opinion dated 5<sup>th</sup> July 2024 (hereinafter referred to as “the Second Professional Opinion”), the Deputy Director SCM, Mr. Nicholas O. Mang’ata, reviewed the manner in which the subject procurement process was undertaken including re-evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to M/s Urth Caffé 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.
30. The Professional Opinion was approved by the Chief Executive Officer of the Procuring Entity, Dr. David Njengere, on 5<sup>th</sup> July 2024.

### **Notification to Tenderers**

31. Tenderers were notified of the outcome of evaluation process *vide* letters dated 5<sup>th</sup> July 2024.

### **REQUEST FOR REVIEW NO. 65 OF 2024**

32. On 12<sup>th</sup> July 2024, Royal Taste Kitchen Limited, the Applicant herein, filed a Request for Review dated 11<sup>th</sup> July 2024 together with an Authority to Swear Affidavit dated 11<sup>th</sup> July 2024, Verifying Affidavit sworn by Emily Kerubo Kamau on 11<sup>th</sup> July 2024, Supporting Affidavit sworn on 11<sup>th</sup> July 2024 by Emily Kerubo Kamau, its Director through

ROM Law Advocates LLP (hereinafter referred to as "instant Request for Review") seeking the following orders from the Board:

- A. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent's decision contained in the letter of notification dated 5<sup>th</sup> July, 2024 disqualifying the Applicant's bid with respect to Tender No. KNEC/ONT/2023-2024/07 Tender for Provision of Catering and Event Set Up Services be and is hereby nullified and/or set aside.***
- B. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent's decision contained in the Letter of Notification dated 5<sup>th</sup> July, 2024 awarding the Tender No. KNEC/ONT/2023-2024/07 Tender 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 1<sup>st</sup> and 2<sup>nd</sup> Respondents to award the Applicant Tender No. KNEC/ONT/2023-2024/07 Tender 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***

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

33. In a Notification of Appeal and a letter dated 12<sup>th</sup> July 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 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 12<sup>th</sup> July 2024.
34. The Respondents filed, through Befly Bisem Advocate, a Notice of Appointment of Advocate dated 17<sup>th</sup> July 2024, a 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Memorandum of Response dated 17<sup>th</sup> July 2024, together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act, all filed on 19<sup>th</sup> July 2024.
35. *Vide* email dated 22<sup>nd</sup> July 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 24<sup>th</sup> March 2020. All tenderers

were invited to submit to the Board any information and arguments concerning the tender within three (3) days.

36. *Vide* a Hearing Notice dated 19<sup>th</sup> July 2024, the Acting Board Secretary, notified parties and all tenderers of an online hearing of the instant Request for Review slated for 26<sup>th</sup> July 2024 at 11.00 a.m. through the link availed in the said Hearing Notice.
37. On 26<sup>th</sup> July 2024, the Interested Party filed through Sigano & Omollo LLP Advocates a Notice of Appointment of Advocates and a Memorandum of Response both dated 25<sup>th</sup> July 2024.
38. On 26<sup>th</sup> July 2024, the Respondents filed Written Submissions dated 25<sup>th</sup> July 2024.
39. When the matter first came up for hearing on 26<sup>th</sup> July 2024, the Board read out the pleadings filed by parties in the matter and counsel for the Applicant indicated that he had just been served with the Interested Party's response in the instant Request for Review and would require time to respond to issues raised by the Interested Party. Having considered clarifications made by parties on when the Applicant was served with the Interested Party's response in the instant Request for Review, the Board adjourned the matter and directed the Applicant to file and serve its rejoinder and submissions on or before 12.00 noon on 29<sup>th</sup> July 2024 and the Interested Party to also file and serve its written submissions. The Board also directed that

the matter would proceed for Hearing on Tuesday, 30<sup>th</sup> July 2024 at 2.00 p.m.

40. On 29<sup>th</sup> July 2024, the Applicant filed through its advocates a Further Affidavit sworn on 29<sup>th</sup> July 2024 by Emily Kerubo Kamau, its Director together with Applicant's Written Submissions dated 29<sup>th</sup> July 2024.

41. On 30<sup>th</sup> July 2024, the Interested Party filed Written Submissions dated 30<sup>th</sup> July 2024.

42. At the hearing on 30<sup>th</sup> July 2024 at 2.00 p.m., the Board read out the pleadings filed by parties in the matter and allocated time for parties to highlight their respective cases. Thus the instant Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Applicant's case**

43. In his submissions, counsel for the Applicant, Mr. Ratemo, placed reliance on the Applicant's documents filed before the Board in the instant Request for Review.

44. Mr. Ratemo indicated that this was the second time that parties were before the Board on the same tender. As a brief background, he indicated that the Board issued its Decision on 21<sup>st</sup> June 2024 in Request for Review No. 46 of 2024 where it rightfully found that (a) the Procuring Entity's Evaluation Committee had failed to conduct due

diligence in the subject tender in accordance with Section 83 of the Act read with Regulation 80 of Regulations 2020, and (b) the Evaluation Committee introduced extraneous criteria at the Financial Evaluation stage and failed to evaluate the Applicant's bid at the Financial Evaluation stage in accordance with the procedure and criteria set out in the Tender Document. He submitted that the Board ordered the Evaluation Committee to admit the Applicant and the Interested Party to the procurement process and re-evaluate their bids at the Financial Evaluation stage and proceed with the procurement process within 14 days to its logical conclusion in accordance with the law while taking into consideration the Board's findings.

45. Counsel indicated that the Procuring Entity in compliance with the Board's orders re-evaluated the bids as directed and issued the Applicant with a letter of notification of intention to award the subject tender dated 5<sup>th</sup> July 2024 informing the Applicant of the Procuring Entity's decision to award the subject tender to the Interested Party at its quoted tender price of Kshs. 72,374.00.

46. Counsel submitted that the Applicant's bid was disqualified since after being subjected to a due diligence process, it was found that the Applicant's financial statements submitted in its bid document for the years ended 31<sup>st</sup> December 2022 and 31<sup>st</sup> December 2023 had not been audited by Wamutu & Associates and based on these findings, the Procuring Entity resulted to disqualify the Applicant's bid from further evaluation pursuant to Section 55(5) of the Act.

47. Being aggrieved by the aforementioned decision by the Procuring Entity, counsel informed the Board that the Applicant resulted to file the instant Request for Review.
48. On the issue of whether the Applicant supplied Audited Financial Statements as stipulated in the Tender Document, Mr. Ratemo submitted that pursuant to the Tender Document, the requirement for audited accounts is a technical requirement attracting a score of only 10 marks and did not stipulate anything more in relation to the audited accounts other than simply that the tenderer provides audited accounts. He further submitted that the Tender document did not in any way require for certification of the same neither did its specify the usage to determine financial strength like providing financial ratios, turnover, equity, profits etc.
49. Counsel referred the Board to the provisions of Section 70 of the Act and indicated that the Applicant supplied its audited accounts for the year ending 2022 as well as the audited accounts for the year ending 2023 and that the Accounts were duly prepared by one Wilson Kiume Ngare an Associate at Wamutu & Associates. Counsel pointed to the Applicant's Exhibit marked EKK-4" being an Affidavit sworn by Wilson Kiume Ngare confirming this position which he indicated that it remains uncontroverted or unchallenged to date.

50. Mr. Ratemo submitted that in order for a bidder to qualify to the next stage, the Tender Document provided that only bidders who scored 70% and above would progress for Financial Evaluation and those who would not meet this score would be disqualified and not considered any further. He pointed out that the Applicant having attained the requisite score in the Technical Evaluation progressed for Financial Evaluation and ultimately to the due diligence stage and as such, the Applicant duly complied with the requirements of the subject tender and supplied the audited accounts as stipulated under the Technical Evaluation stage.
51. On the issue of whether the Applicant was lawfully disqualified from the subject tender proceedings, counsel submitted that the Respondents in reaching the decision to disqualify the Applicant's bid relied on a letter from the firm of Wamutu and Associates dated 3<sup>rd</sup> July 2024 wherein the said Wamutu Wachira CPA(K) allegedly denied that they were not the Applicant's auditors and that they did not sign the copy of accounts forwarded to them.
52. Mr. Ratemo submitted that this reason for disqualification was not only false but malicious and discriminatory and that the Applicant through its Supporting Affidavit sworn on 11<sup>th</sup> July 2024 produced the sworn affidavit of one Wilson Kiume Ngare in which the said deponent swore on oath that he is an Associate at Wamutu & Associates and that he audited and prepared the purported impugned Audited Accounts of the Applicant for the years 2021/2022 and 2022/2023.

53. Mr. Ratemo reiterated that the aforementioned Affidavit evidence has not been controverted by any such Affidavit from the Firm of Wamutu & Associates and therefore remains unchallenged. He pressed on that the Respondents place reliance on the purported letter dated 3<sup>rd</sup> July 2024 which has no probative value *vis a vis* the Affidavit provided by the Applicant.
54. Counsel drew the Board's attention to Clause 29.1 of the Tender Document which provided that to assist in the examination, evaluation and comparison of tenders, the Procuring Entity may ask any tenderer for clarification of its bid including the breakdown of any prices and that this was further buttressed under Clause 31.6 of the Tender Document which provided that the Procuring Entity may request a tenderer to submit any necessary information and documentation within a reasonable period of time to rectify non-material nonconformities or omissions in the subject tender related to documentation requirements.
55. Mr. Ratemo submitted that the Respondents' actions of seeking confirmation from the Firm of Wamutu and Associates on the audited accounts of the Applicant and taking the drastic action of disqualifying the Applicant without seeking any clarifications from the Tenderer went against the rules of natural justice as the Applicant was condemned unheard. He further submitted that due diligence is a process undertaken to confirm the capacity and capabilities of the

bidder in reference to the information provided in the tender document and is not an investigative process or a probe into the Applicant's documentation

56. Counsel submitted that any purported deviation on the Applicant's audited accounts was not a material deviation to warrant disqualification of the Applicant's bid and in the event that the Respondents found the audited accounts to be incomplete as alleged or at all, the only recourse available to the Respondents was to deny the Applicant the 10 marks provided under the Technical Evaluation stage.

57. Counsel made reference to the provisions under Section 79 of the Act and submitted that the Applicant's bid was responsive and its disqualification was unlawful and illegal contrary to the provisions of the Tender Document and the Act.

58. On the issue of whether the Procuring Entity complied with orders of the Board issued on 21<sup>st</sup> June 2024 in Request for Review No. 46 of 2024, counsel submitted that the directions of the Board issued in Request for Review No. 46 of 2024 were issued in light of failure on the part of the Procuring Entity to apply the evaluation criteria set out in the Tender Document in terms of the Financial Evaluation. Counsel pointed to the Financial Evaluation criteria provided at page 30 of the Tender Document which indicated that tenders scoring 70% and above on technical evaluation would be subjected to financial evaluation based on their price schedule. He further pointed out that

it was a requirement for bidder's prices to be inclusive of all applicable taxes and the bidder meeting the tender conditions with the least cost would be subjected to due diligence and thereafter a recommendation would be made by the Evaluation Committee for possible award.

59. It is the Applicant's case that the Applicant was the lowest evaluated responsive bidder and that it had a legitimate expectation that the Respondents would conduct due diligence in accordance with the criteria laid out during the previous due diligence undertaken by the Procuring Entity. The Applicant pointed out that during the first due diligence exercise, the Respondents did not find any issues relating to the Applicant's bid and only disqualified the Applicant's bid on account of price evaluation.

60. Mr. Ratemo made reference to the provisions stipulated under Section 83 (1) and (2) of the Act on post qualification and submitted that due diligence entailed obtaining confidential references from persons who the tenderer had prior engagement and does not require the Procuring Entity to go into a fact finding mission with third parties. He argued that the Respondents have developed a new criterion for the post qualification due diligence exercise which was different from the first post qualification due diligence and proceeded to disqualify the Applicant on account of alleged false, inaccurate or incomplete information about the Applicant's qualifications yet the said qualifications, i.e Audited Accounts have since been confirmed by an

Associate of Wamutu & Associates as true and accurate and duly prepared by the said Firm.

61. Counsel submitted that the Respondents failed to comply with the orders of the Board issued on 21<sup>st</sup> June 2024 and went on an expedition to find a reason to maliciously disqualify the Applicant contrary to the provisions of the Tender Document and Section 80 of the Act. In support of his argument, counsel referred to the holding in PPARB Application No. 21 and 22 of 2021 and urged the Board to exercise its powers under Section 173(c) of the Act and award the subject tender to the Applicant in light of the highlighted circumstances.

62. Mr. Ratemo urged the Board to allow the Request for Review as prayed.

### **Respondents' case**

63. In her submissions, counsel for the Respondents, Ms. Bisem placed reliance on the Respondents' documents filed before the Board in the instant Request for Review including the confidential documents concerning the tender submitted pursuant to Section 67(3)(e) of the Act.

64. Ms. Bisem submitted that in compliance with the Board orders of 21<sup>st</sup> June 2024 in Request for Review No. 46 of 2024, the Procuring Entity readmitted both the Applicant's and Interested Party's bids to the Financial Evaluation stage and based on the ranking, the Applicant

emerged as the lowest evaluated bidder. Counsel further submitted that in compliance with the evaluation criteria, the Evaluation Committee proceeded with a post qualification due diligence exercise in line with Section 83 of the Act read with Regulation 80 of Regulations 2020 and Sections 55 and 86 of the Act.

65. Counsel pointed out that as part of the due diligence exercise, the Evaluation Committee verified the qualifications of the Applicant with regard to its submitted audited accounts with the aim of confirming the qualification of the Applicant as provided under Section 83 of the Act. Counsel further pointed out that Section 83 of the Act provides that an Evaluation Committee may prior to award conduct due diligence which may include obtaining confidential references for persons with whom the tenderer has had prior engagements.
66. Ms. Bisem submitted that in compliance with the aforementioned legal provisions, the Evaluation Committee looked at the Applicant's submitted Audited Accounts and it was notable that the same were not signed by the auditor at the page where the opinion of the auditor is stated which only bore a stamp but no signature or name from Murugu Wamutu Advocates. Counsel pressed on that pursuant to Regulation 80 of Regulations 2020 as read with Section 55(5) of the Act, the Procuring Entity sought confidential reference from the Auditor named in audited accounts to confirm their accuracy, authenticity and completeness.

67. On the question of what constitutes audited accounts, counsel drew the Board's attention to the requirements under Section 19, 20, 21 and 22 of the Accountants Act No. 15 of 2008 which dictates that for a person to practice as an accountant, they are required to be a member of the Institute for Certified Professional Accountants of Kenya (ICPAK) and have a current practicing certificate.
68. Counsel also drew the Board's attention to Section 735, 736 and 773 of the Companies Act which dictates that for one is only eligible for appointment as a statutory auditor be it a natural person or firm if the person is a holder of a practicing certificate and has a valid license. Counsel pressed on that an auditor must sign and date the Auditor's report and ensure that the auditor's name is prominently displayed in the Report Section. She further indicated that a company should not publish a copy of the Auditor's report that relates to the company unless the copy states the name of the auditor and if the auditor is a firm, the name of the person who signed the report. Counsel indicated that a company is deemed as having published the report if it issues or circulates or makes available for public inspection in a manner that provides members to look at it.
69. In view of the foregoing, Ms. Bisem submitted that the Audited Accounts submitted by the Applicant in its bid document did not comply with the provisions of the Companies Act in what constitutes Audited Accounts and as such, the Procuring Entity wrote to the firm of Wamutu and Associates to ascertain this position.

70. Ms. Bisem further submitted that the Procuring Entity received a letter dated 2<sup>nd</sup> July 2024 from Wamutu and Associates which disowned the Audited Accounts submitted by the Procuring Entity and stated that (a) they were not the auditors of Royal Taste Kitchen, (b) the stated postal address being P. O. Box 50183-00200, Nairobi, differed from their official address which is P. O. Box 30686-00100, (c) the attached copy of accounts was not signed by them, (d) the customer, Royal Taste Kitchen, had misused their certificate, and (e) it was a professional requirement that the audited report should come from an authorized practitioner in good standing with ICPAK.
71. Counsel reiterated that the Applicant supplied audited accounts that were false, inaccurate and incomplete and based on the due diligence findings, the Evaluation Committee disqualified the Applicant's tender from further Evaluation in line with Section 55(5) of the Act.
72. Counsel submitted that the Applicant has averred by way of Affidavit dated 11<sup>th</sup> July 2024 that its accounts were audited by one Wilson Kiume Ngare who was allegedly an associate of Wamutu & Associate and indicated that the Respondent had supplied evidence to the Board proving that Wilson Kiume Ngare is neither a member of ICPAK nor a holder of a practising certificate in line with Sections 21 and 22 of the Accountants Act via a search of the ICPAK membership database and therefore had no lawful authority to audit the accounts of the Applicant proving that the audited accounts submitted by the Applicant were

false, inaccurate and incomplete. Ms. Bisem also pointed out that no pay slip or staff card had been provided to show that he was an associate

73. Ms. Bisem made reference to Section 18 of the Accountants Act and submitted that no person shall practice as an accountant unless he is a holder of a practicing certificate and a license to practice and that for accountants just like advocates, it doesn't necessarily mean that anyone can sign documents on behalf of the firm since the person signing documents must be a member of a professional body holding a valid practicing certificate.

74. Counsel submitted that the Respondents' position that Wilson Kiume Ngare is not a member of ICPAK has not been controverted by the Applicant.

75. Ms. Bisem referred the Board to Clause 35 at page 20 of the Tender Document and submitted that the best evaluated tender is one that meets the qualifications criteria and which has been determined to be substantially responsive to the tendering documents and the lowest evaluated bid. Counsel further referred to Clause 3 on Capacity under Section III: Evaluation and Qualification Criteria, Technical Evaluation Table at page 30 of the Tender Document which required a bidder to prove financial strength by providing audited accounts for the last two years and argued that since the Applicant's audited accounts were found to be false inaccurate and incomplete, the Procuring Entity

lawfully exercised its mandate under Section 55(5) of the Act to disqualify its tender as being ineligible.

76. On the issue of whether the Respondents lawfully awarded the Interested Party the subject tender, counsel submitted that based on the due diligence findings and disqualification of the Applicant, the Evaluation Committee proceeded to undertake a similar confirmation of qualifications of the second lowest evaluated bidder, being the Interested Party herein, and verified its audited accounts by writing a letter to Wamutu & Associates on 3<sup>rd</sup> July 2024 which was responded to on 4<sup>th</sup> July 2024 confirming that the Interested Party had been its client for the last three years and that its financial statements and audit reports had been audited by them.

77. Counsel submitted that the firm of Wamutu & Associates is a validly registered firm under CPA Wamutu John Wachira (P/1507) as indicated on the ICPAK 2024 List of Approved Firm Applicants as at 2024-06-24 and the Approved Audit Firms for the year 2023 provided by the Ministry of Cooperatives and Micro, Small and Medium Enterprise Development, State Department for Cooperatives. She indicated that the Board ought to note that the firms official address as stated in its letter is not the one referenced by the Applicant and that based on this due diligence exercise, the Evaluation Committee noted that the Interested Party satisfied the award criteria and recommended award of the subject tender in line with the law.

78. She indicated that a Professional Opinion was done by the Head of Procurement and notification letters issued to bidders on the outcome of evaluation of the subject tender on 5<sup>th</sup> July 2024 indicating the successful bidder as the Interested Party, being the second most responsive and lowest evaluated bidder.

79. Counsel indicated that the reasons for disqualification of the Applicant were clear, fair, and just in line with Article 227 of the Constitution and not discriminatory as alleged. She submitted that a responsive tender shall not be affected by minor deviations and the discrepancies in the Applicant's submitted audited accounts cannot be termed as minor deviations.

80. Counsel argued that the Board is required to uphold professional standards across all professional associations including accountants including taking cognizance of the provisions of the Companies Act and Accountants Act on what constitutes audited accounts. In support of her argument, counsel referred to the holding in *PPARB Application No. 15 of 2024* and *PPARB Application No. 109 of 2021*.

81. She urged the Board to dismiss the Request for Review with costs.

### **Interested Party's case**

82. In his submissions, counsel for the Interested Party's counsel Mr. Omollo relied on the Interested Party's documents filed before the Board in the instant Request for Review.

83. Before delving into his submissions, Mr. Omollo referred the Board to the provisions of Regulation 203 of Regulations 2020 and drew the Board's attention to the form of the instant Request for Review as drafted and submitted that the same was seeking to review the decision contained in the letter dated 27<sup>th</sup> May 2024 which was overtaken by events following hearing and determination of Request for Review No. 46 of 2024 yet the instant Request for Review is seeking to review the decision communicated in the letter dated 5<sup>th</sup> July 2024 thus rendering the application as fatally defective.
84. With regard to the Affidavit sworn by Mr. Wilson Kiume Ngare produced by the Applicant, counsel submitted that the postal address indicated in the said affidavit appears to be the same erroneous postal address indicated in the Applicant's financial statements contrary to confirmation made by Mr. Wamutu of his firm's correct postal address as submitted by the Respondents. Counsel indicated that Mr. Wilson Kiume had not deponed his qualifications nor his capacity and eligibility to enter into the arena of auditing.
85. Mr. Omollo argued that the accountants profession is a regulated profession just like the legal profession and that a random quack on the streets can write an affidavit claiming to be an associate but the word of the firm's proprietor who is duly authorized overrides whatever the alleged associate claims and as such, the position communicated by Mr. Wamutu gives the correct position of the facts in issue having clarified that they are not the Applicant's Auditors as alleged.

86. Counsel submitted that the Applicant's financial statements were unsigned contrary to the provisions of the Companies Act which require the documents to be signed and it was critical to note that Mr. Wamutu had indicated that the Applicant had misused his certificate.
87. Mr. Omollo further submitted that it was within the Respondents right to carry out investigations while conducting due diligence pursuant to Section 83 of the Act read with Regulation 80 of Regulations 2020 and that the purpose of this provision is to allow the procuring entity to confirm the qualifications of the bidder in view of the eligibility requirements stipulated under Section 55 of the Act.
88. Counsel reiterated that Regulation 80 of Regulations 2020 allows the procuring entity to confirm if the bidder is qualified to be awarded in accordance with Section 5 and 86 of the Act and one of the requirements under Section 55 is for the procuring entity to confirm if the information provided by the bidder pertaining to its qualifications is correct. He pointed out that the information provided by the bidder should not be false, untrue, and incomplete and as such the Respondents herein cannot be faulted for having noted that the Applicant's audited accounts had not been signed nor did they bear the correct postal address and having gotten confirmation from the auditor that he did not prepare the said accounts.

89. In expounding further, counsel submitted by way of example that where an affidavit may have been prepared by a quack, upon discovery it can be impeached and expunged from record and in the circumstances in the instant Request for Review, an unqualified person had prepared accounts without the mandate to do so committed a material misrepresentation which ought to be frowned upon for being fraudulent practice.

90. Counsel argued that pursuant to Section 55 of the Act, recourse would not be to award or not score such a bidder but to reject the bidder as being ineligible. Counsel made further reference to Section 66(3) of the Act pointing out that falsification of documents is a serious offence in public procurement.

91. Mr. Omollo submitted that the justification by the Applicant of its falsified audited accounts amounts to obstructive practice which attracts the same punishment as fraudulent practice. He further submitted that what had been presented as an immaterial deviation was a grave issue which justifies disqualification and even if the Applicant was the successful bidder, it would still be disqualified under Section 66(3) of the Act from entering into a procurement contract.

92. Counsel submitted that pursuant to Regulation 218 of Regulations 2020, the Board shall not be bound to observe the rules of evidence in hearing of a request for review and as such, the Applicant cannot

wave the Affidavit by Wilson Kiume Ngare and allege that it has a higher probative value than the letter from Wamutu & Associates.

93. Counsel further submitted that this was a classical case where the Applicant ought to be subjected to debarment proceedings for engaging in fraudulent practice.

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

### **Applicant's Rejoinder**

95. In a rejoinder, Mr. Ratemo submitted that no evidence had been placed before the Board to prove the allegation that the Applicant had engaged in fraudulent practice with regard to preparation of its documents in the subject tender. He further submitted that no affidavit had been submitted deponing the allegation that the Applicant's audited accounts had been prepared by an unqualified person. Counsel pointed out that since the audited accounts had been prepared by a third party, the least that the Respondents could have done was present an affidavit in support of their claim.

96. Counsel reiterated that the Applicant had not falsified any document as alleged and urged the Board to note that no clarification was sought from the Applicant pertaining its audited accounts despite this being a provision under the Tender Document and the Act. Mr. Ratemo pointed out that the audited accounts did not affect the Applicant's tender price and as such, its tender was responsive.

97. Counsel urged the Board to note that in PPARB Application No. 21 and 22 of 2021, the Board found that certain oversights and errors can be corrected without affecting the substance of the tender and the issue in dispute being signing of the Applicant's audited accounts cannot render the Applicant's tender as non-responsive and the Applicant ought to be considered as the successful bidder in the subject tender.

### **CLARIFICATIONS**

98. When asked by the Board to clarify on who prepared the Applicant's Audited Accounts, Mr. Ratemo submitted that the same were prepared by Wamutu & Associates. Counsel stated that Mr. Wamutu works with other associates and that this is what transpired when the Applicant went to have its accounts audited and the person who audited the same works with Mr. Wamutu. Counsel submitted that a similar situation can occur within a law firm where as a managing partner, one may not have a grasp of all files handled by a particular associate in the firm and this does not disqualify the fact that a client was actually attended to by the said firm.

99. On his part, Mr. Omollo submitted that the intrigues of accountancy are probably distinct with how law firms work noting that where a person commissions a document, they are required to be qualified while for accounting, preparation of documents of accounts is vigorous and one cannot just walk in as in the office of an advocate to have the same prepared. Counsel pointed out that in the current situation, even

the address was wrong and that the Companies Act provides sanctions against an auditor who does not provide information that he is aware is the accurate position on the company's financial statements. Counsel pointed out that the main issue herein was whether or not the said Wilson was qualified to prepare the Applicant's audited accounts and this was not an evidential burden to be bore by the Respondent in view of the fact that it was making a decision based on a decision vailed to it by the proprietor of the audit firm. He reiterated that the evidential burden was upon the Applicant to prove that Wilson was qualified as alleged and was an associate of Wamutu & Associates.

100. When the Board sought to know why the proprietor of Wamutu & Associates did not come out strongly and contest knowing the said Wilson, Mr. Omollo submitted that Mr. Wamutu is not a party to the instant proceedings and may not even be aware that Wilson had sworn an affidavit in support of the application herein and this raised the question as to if Mr. Wilson ought to be called to the hearing for cross-examination on the contents of his affidavit in view of the fact that the Board does not take evidence. Mr. Omollo questioned if anyone had notified Mr. Wamutu of the instant proceedings.

101. At this juncture, Mr. Ratemo submitted that the Board has power to summon Mr. Wamutu so as to clarify on the issues raised.

102. In response, Mr. Omollo submitted that the clarification referred to by the Applicant had been surpassed by time as the proceedings were

at an advanced stage following evaluation and post qualification was being carried out when an anomaly was identified. He indicated that the clarification would have sufficed if the proceedings were at evaluation and comparison stage and not at due diligence.

103. On her part, Ms. Bisem submitted that there being no name or signature on the Applicant's financial statement, there would be no basis for Mr. Wamutu to know that the same had been prepared by Mr. Wilson since they did not bear any indication of who the auditor was and as such, Mr. Wamutu could not clarify that they were prepared by an associate at his firm. Counsel reiterated that the Applicant was not on the list of clients at Mr. Wamutu's firm.

104. When asked to expound on why a different reason for disqualification of the Applicant had been issued yet from the first due diligence the same had not been raised, counsel submitted that the Procuring Entity complied with the Board's orders of 21<sup>st</sup> June 2024 in Request for Review No. 46 of 2024 where it emerged that the Applicant was the lowest evaluated bidder and as such, it was progressed for post qualification whereby the evaluation Committee went back to its documents in line with Sections 83 and 55 of the Act read with Regulation 80 of Regulations 2020 and one of the things that emerged was that the audited accounts supplied were not signed and in an attempt to authenticate the same, they wrote to Wamuti & Associates forwarding the copies of the said accounts and in response, the firm denied preparing the same leading to the decision to disqualify

the Applicant as its submitted audited accounts could not be ascertained leading to the same process being conducted on the Interested Party who emerged successful.

105. When asked if the Applicant appreciates the need for an address and stamping in financial audit reports, Mr. Ratemo submitted that he does appreciate the need for the same as professional and the main question would be what would happen if the said audited accounts had not been provided at the Technical Evaluation stage. Counsel submitted that the Applicant would have lost out on the 10 marks and if they progressed to the Financial Evaluation stage having scored the minimum score of 70%, it would still have emerged as the lowest evaluated bidder. He urged the Board to examine the legal threshold of the matter and reiterated that there was no fraud on the part of the Applicant.

106. Counsel for the Respondents Ms. Bisem submitted that pursuant to Section 55 of the Act on eligibility to bid, a person is eligible where the person is not insolvent, in receivership, bankrupt or in the process of being wound up and so the question before the Board ought to be how would the Procuring Entity establish any of these provisions in view of the fact that one of the requirements to do so are the audited accounts.

107. At the conclusion of the hearing, the Board informed parties that the instant Request for Review having been filed on 12<sup>th</sup> July 2024 was

due to expire on 2<sup>nd</sup> August 2024 and the Board would communicate its decision on or before 2<sup>nd</sup> August 2024 to all parties to the Request for Review via email.

### **BOARD'S DECISION**

108. 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 Applicant's tender was lawfully disqualified from the subject tender following the Post Qualification/Due Diligence exercise in accordance with the provisions of the Constitution, the Act, Regulations 2020 and the Tender Document.**

**B. What orders the Board should grant in the circumstances**

**Whether the Applicant's tender was lawfully disqualified from the subject tender following the Post Qualification/Due Diligence exercise in accordance with the provisions of the Constitution, the Act, Regulations 2020 and the Tender Document**

109. We understand the Applicant's case on this issue to be that the reason issued by the Procuring Entity for disqualification of its tender is false, malicious and discriminatory and that the actions of the

Procuring Entity in the subject tender went against the rules of natural justice since it failed to seek a clarification from the Applicant on the allegations made against its audited accounts. Counsel for the Applicant submitted that any purported deviation on the Applicant's audited accounts was not a material deviation to warrant disqualification of the Applicant's bid and the only recourse available to the Procuring Entity was to deny the Applicant the 10 marks as provided under the Technical Evaluation stage. Counsel further submitted that disqualification of the Applicant following the due diligence exercise conducted by the Applicant was unlawful and illegal given that the Applicant's tender in the subject tender is materially responsive.

110. We understand the Respondents' case on this issue to be that in compliance with the Board's directions issued on 21<sup>st</sup> June 2024 in Request for Review No. 46 of 2024, the Evaluation Committee re-admitted both the Applicant's and Interested Party's bids to the Financial Evaluation stage whereby base on the ranking, the Applicant's bid emerged as the lowest evaluated bid and proceeded stage four of evaluation being Due Diligence. The Respondents submitted that as part of the due diligence exercise, the Evaluation Committee verified the qualifications of the Applicant with regard to its submitted audited accounts which were not signed by the auditor and part of the verification exercise entailed seeking a confidential reference from the auditor named in the Applicant's accounts to confirm their accuracy, authenticity, and completeness.

111. Counsel for the Respondents, Ms. Bisem, submitted that the firm of auditors indicated in the Applicant's submitted audited accounts disowned the said accounts and noting that these audited accounts had neither been signed, named or dated, they failed to meet the requirements under Section 735 and 736 of the Companies Act read with Section 21 and 22 of the Accountants Act and were therefore false, inaccurate and incomplete. She further submitted that based on the due diligence findings, the Evaluation Committee disqualified the Applicant from further evaluation in line with Section 55(5) of the Act.

112. On its part, the Interested Party submitted that the purported Applicant's audited accounts submitted in the subject tender constituted false, inaccurate and incomplete information about the Applicant's qualifications since it was confirmed that they were not audited by their alleged auditor and were instead audited by an unqualified person under Section 21 and 22 of the Accountants Act and not duly signed as stipulated under Section 735 and 736 of the Companies Act. Counsel for the Interested Party, Mr. Omollo submitted that the Applicant was lawfully and validly disqualified by the Respondents in exercise of the mandate under Section 55(5) of the Act following the due diligence exercise conducted by the Evaluation Committee in accordance with Section 83 of the Act read with Regulation 80 of Regulations 2020.

113. Having considered parties' submissions and pleadings herein, we note that the bone of contention is on eligibility of the Applicant to participate in the tendering process of the subject tender based on its submitted Audited Accounts. Section 55 of the Act provides for eligibility of a person to tender and sets out the criteria required to be satisfied for a person to be considered eligible to tender for a contract in procurement or an asset being disposed under Section 55(1) of the Act as follows:

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

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

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

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

***(d) the procuring entity is not precluded from entering into the contract with the person under section 38 of this Act; (e) the person and his or her sub-contractor, if any, is not debarred from participating in procurement proceedings under Part IV of this Act;***

***(f) the person has fulfilled tax obligations;***

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

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

114. In essence, to be considered eligible to tender it is necessary to satisfy that (a) you have the legal capacity to enter into a procurement or asset disposal contract, (b) you are not insolvent, bankrupt, in receivership or in the process of being wound up, (c) if a member of a regulated profession, have satisfied all professional requirements, (d) the procuring entity is not precluded from entering into a contract with you pursuant to Section 38 of the Act, (e) you or your sub-contractor are not debarred, (f) you have fulfilled your tax obligations, (g) you have not been convicted of corrupt or fraudulent practices, and (h) you are not guilty of any serious violation of fair employment laws and practices.

115. Further, Section 55(5) of the Act provides that:

***“State organ or public entity shall consider as ineligible a person for submitting false, inaccurate or incomplete information about his or her qualifications”***

116. The import of the above provision is that the moment a procuring entity discovers a person submitted false, inaccurate or incomplete

information about his or her qualifications, such person is considered ineligible to tender.

117. The Respondents relied on the provisions of Section 55(1)(b) and (5) of the Act as read with Sections 735 and 736 of the Companies Act and Section 19, 20, 21, and 22 of the Accountants Act in support of their allegations that the Applicant was an ineligible bidder in the subject tender. This was following a due diligence exercise conducted by the Procuring Entity's Evaluation Committee in the course of verifying the Applicant's submitted Audited Accounts which it found to not have been signed by the Applicant's auditor therein.

118. Having carefully studied the confidential documents submitted by the 1<sup>st</sup> Respondent to the Board pursuant to Section 67(3)(e) of the Act, we note that vide letter dated 2<sup>nd</sup> July 2024, the 1<sup>st</sup> Respondent wrote to the firm of Wamutu and Associates, the Auditors indicated in the Applicant's audited accounts as follows:

".....  
***SUBJECT: DUE DILIGENCE ON M/S ROYAL TASTE KITCHEN LIMITED***  
***1.0 The above-mentioned firm submitted a tender to KNEC for Provision of Catering and Events Set Up Services (Tender Number KNEC/ONT/2023-2024/07). The firm has provided Financial Statements prepared by Wamutu & Associates for the***

**years ended 31<sup>st</sup> December 2022 and 31<sup>st</sup> December 2023.**

**2.0 As part of the tender evaluation process, KNEC Tender Evaluation Committee is conducting a due diligence on M/s Royal Taste Kitchen Limited to confirm that the firm is not insolvent, in receivership, bankrupt or in the process of being wound up as per Section 55(1) (b) of the Public Procurement and Asset Disposal Act, 2015.**

**3.0 Consequently, we wish to request that you confirm authenticity of the financial statements for M/s Royal Taste Kitchen Limited as soon as possible to enable us complete the evaluation.**

**4.0 Attached please find copies of the Report on independent auditors to the members of Royal Taste Kitchen Limited prepared by yourselves as submitted in their tender documents for ease of your reference.**

**5.0 The information provided will be treated as confidential and will be used for the due diligence reference purposes. Looking forward to receiving your feedback by Wednesday 3<sup>rd</sup> July 2024. Your response can send via email to: [procurement@knec.ac.ke](mailto:procurement@knec.ac.ke)**

**....."**

119. In an interesting turn of events, Wamutu & Associates respondent to the Procuring Entity vide letter dated 3<sup>rd</sup> July 2024 wherein they denied being the Applicant's Auditors as follows:

"....."

**REF: DUE DILIGENCE ON M/S ROYAL TASTE KITCHEN LTD**

***In reference to your letter and email dated 02<sup>nd</sup> July 2024 in relation to the stated matter above, we wish to confirm the following ;-***

- i We are not the auditors of Royal Taste Kitchen Ltd***
- ii The stated postal address is different from ours, where as our address is 30686-00100 for your information***
- iii The attached copy of accounts is not signed***
- iv The above customer misused our certificate and we shall make a decision on what action to take on them.***

***As a professional requirement it is expected that the audited report should come from an authorized practitioner in good standing with ICPAK.***

***We look forward to a good working relationship.***

....."

120. Subsequently, following the information received by the firm of Wamutu & Associates, the Evaluation Committee disqualified the Applicant's bid in line with Section 55(1)(b) and (5) of the Act as read

with Sections 735 and 736 of the Companies Act and Section 19, 20, 21, and 22 of the Accountants Act.

121. We note that Section 735 and 736 of the Companies Act provide as follows:

**735. (1) Subject to subsection (2), an auditor shall—**  
**(a) sign and date the auditor's report; and**  
**(b) ensure that the auditor's name is prominently displayed in the report.**

.....

**736. (1) A company shall not publish a copy of an auditor's report that relates to the company unless the copy—**

**(a) state the name of the auditor and, if the auditor is a firm, the name of the person who signed the report as senior statutory auditor; or**

.....

**(2) For the purposes of this section, a company is regarded as publishing the report if it publishes, issues or circulates it or otherwise makes it available for public inspection in a manner that invites members of the public generally, or any class of members of the public, to read it.**

**(3) If a copy of the auditor's report is published without the statement required by this section, the company, and each officer of the company who is in**

***default, commit an offence and on conviction are each liable to a fine not exceeding five hundred thousand shillings.***

122. Further, we note that Section 19 of the Accountants Act provides for a person practicing as an accountant as follows:

***(1) Subject to this section, a person practices as an accountant for the purposes of this Act if, in consideration of remuneration or other benefits received or to be received, and whether by himself or in partnership with any other person, such person—***

***(a) engages in the practice of accountancy or holds himself out to the public as a person entitled to do so;***

***(b) offers to perform or performs services involving the auditing or verification of financial transactions, books, accounts or records;***

***(c) offers to perform or performs services involving the verification or certification of financial accounts and related statements; or***

***(d) engages in any practice, or performs or offers to perform any services, which may be prescribed.***

123. The Applicant in contention to the allegations made by the Respondents pertaining to the maker of its Audited Accounts deponed at paragraph 16 of the Supporting Affidavit sworn by Emily Kerubo Kamau on 11<sup>th</sup> July 2024 as follows:

***"THAT for the avoidance of doubt, the Applicant's Audited Accounts were indeed prepared by an Associate at Wamutu & Associates; (Annexed herewith and marked "EKK-4" is a true copy of the sworn Affidavit of Wilson Kiume Ngare confirming the said position)."***

124. It is the Applicant's case that its submitted Audited Accounts in the subject tender are not false and that the same were prepared by an Associate at the firm of Wamutu & Associates by the name Wilson Kiume Ngare. We note that the affidavit sworn on 11<sup>th</sup> July 2024 by Wilson Kiume Ngare reads as follows:

".....

***AFFIDAVIT***

***I WILSON KIUME NGARE a resident of Nairobi County within the Republic of Kenya and of ID No. 24040383 Post Office Box Number 30686-00100 NAIROBI, do hereby make oath and state as follows:***

- 1. THAT I am an adult male of sound mind and an Associate with Wamutu John Wachira P/1507 under Wamutu & Associates, Certified Public Accountants (K) of Post Office Box 50183-00200 Nairobi (Annexed Copy of Annual Practising Licence- 2024)***
- 2. THAT I can confirm that I audited and prepared Books of Accounts for Royal Taste Kitchen Limited for the years 2021/2022 and 2022/2023.***

**3. THAT I make this affidavit conscientiously believing the same to be true to the best of my personal knowledge, belief and information.**

.....”

125. In essence, Wilson Kiume Ngare swore under oath that he is an Associate at the Firm of Wamutu & Associates, Certified Public Accountants (K) and that he audited and prepared the Applicant’s Books of Accounts for the years 2021/2022 and 2022/2023.

126. Cambridge Dictionary defines “audited accounts” as ‘*a company’s financial records that have been officially examined to check that they are accurate.*’ In this regard, Wilson Kiume Ngare swore on 11<sup>th</sup> July 2024 that he checked that the Applicant’s books of accounts for the years 2021/2022 and 2022/2023 were accurate and he did so as an associate of the firm of Wamutu & Associates. We note that no evidence has been availed by the Respondent contradicting the sworn deposition of Mr. Wilson Kiume Ngare as being an Associate of the firm of Wamutu & Associates. What has been availed is the letter dated 3<sup>rd</sup> July 2024 issued by Wamutu & Associates in response to the enquiry by the Evaluation Committee during the due diligence exercise indicating that they are not the Applicant’s auditors. They however do not address whether or not Mr. Wilson Kiume Ngare is an associate at their firm and as such, the sworn evidence produced by the Applicant in the form of the Affidavit sworn on 11<sup>th</sup> July 2024 by Mr. Wilson Kiume Ngare remains uncontroverted.

127. It is not lost to us that both the Respondents and Interested Party submitted that they had established that Mr. Wilson Kiume Ngare does not hold a practicing license issued under Section 21 of the Accountants Act nor an annual license issued under Section 22 of the Accountants Act and is therefore unqualified to practice as an accountant. However, the issue herein is not whether the Audited Accounts as submitted by the Applicant were prepared by the firm of Wilson Kiume Ngare. The firm that is said by the Applicant to have prepared its audited accounts is the firm of Wamutu & Associates which has not availed any sworn evidence to contradict the depositions made by Mr. Wilson Kiume Ngare in these proceedings. We say so because nothing in the letter by Wamutu & Associates dated 3<sup>rd</sup> July 2024 address the depositions made by Mr. Wilson Kiume Ngare pertaining to preparation and auditing of the Applicant's accounts at the said firm of auditors.

128. In our considered view, if the Respondents and Interested Party disputed the averments made in the Affidavit by Mr. Wilson Kiume Ngare, they ought to have summoned him for cross-examination in order to challenge the averments made therein. In saying so, we are guided by the holding by this Board in **PPARB Application No. 3 of 2023 Harleys Limited v The Accounting Officer, Kenya Ports Authority & Another** where the Board issued directions on cross-examination of Mr. Daniel Amuyunzu at the hearing of the Request for Review application on contents of his Affidavit in Support of the Memorandum of Response field therein. As such, nothing prevented the Respondents and Interested Party from seeking a similar

application for cross-examination of Mr. Wilson Kiume Ngare on the contents of his affidavit sworn on 11<sup>th</sup> July 2024. Such has been a similar position held by the Board in **PPARB Application No. 58 of 2024 Kenyan Alliance Insurance Co. Limited v Accounting Officer Moi Teaching & Referral Hospital & Another** where the Board found that it could not access whether or not the evidential burden of proof had shifted to the Applicant therein for it to disprove the allegations made by the 3<sup>rd</sup> Respondent therein.

129. Turning to the instant Request for Review, we find that the Respondents and Interested Party merely disputed the averments made in the Affidavit sworn by Mr. Wilson Kiume Ngare in support of the Applicant's case but took no steps to test its veracity or truthfulness for the evidential burden of proof to shift. In **Civil Appeal No. E056 of 2020 In re MWO(Minor)(2021)eKLR**, the High Court held as follows with regard to affidavits:

***"38. ....An Affidavit is a sworn statement which contains matters of evidence deponed on oath and as such legal consequences such as perjury would attend if one is found to have sworn a false affidavit. Therefore, an Affidavit must be executed on oath by the deponent. An affidavit which has not been properly commissioned is at best a mere signed statement of facts.***

***39. It is the commissioning of the Affidavit by an authorized officer which elevates the signed statement to the status of an Affidavit. Therefore the***

***commissioning of the document is a crucial step without which the statement cannot be deemed to be an Affidavit.....”***

130. In the circumstances, we find that the 2<sup>nd</sup> Respondent’s Evaluation Committee unlawfully disqualified the Applicant’s tender from the subject tender following the Post Qualification/Due Diligence exercise contrary to the provisions of the Constitution, the Act, Regulations 2020 and the Tender Document.

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

130. The Board has found that the Applicant’s tender in the subject tender was unlawfully disqualified following the post qualification/due diligence exercise contrary to the provisions of the Constitution, the Act, Regulations 2020 and the Tender Document.

131. In determining the appropriate orders to grant in the circumstances, the Board observes that 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."*

132. As such, the Board deems it just and fair to order the 1<sup>st</sup> Respondent to proceed an issue a letter of notification of intention to award the

subject tender to the Applicant in view of the fact that it was the lowest evaluated bidder and was unlawfully disqualified in the subject tender.

133. The upshot of the findings is that the Request for Review dated 11<sup>th</sup> July 2024 and filed on 12<sup>th</sup> July 2024 succeeds in terms of the following specific orders:

### **FINAL ORDERS**

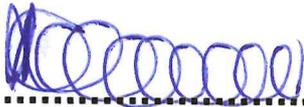
134. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders the Request for Review dated 11<sup>th</sup> July 2024 and filed on 12<sup>th</sup> July 2024 for Review:

- A. The letter of Notification of Intention to Award dated 5<sup>th</sup> July 2024 issued by the 1<sup>st</sup> Respondent to the Interested Party, 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 be and are hereby nullified and set aside.**
  
- B. The letters of Notification of Intention to Award dated 5<sup>th</sup> July 2024 issued by the 1<sup>st</sup> Respondent to the Applicant and all other unsuccessful bidders in regard to Tender No. KNEC/ONT/2023-2024/07 for Provision of Catering and Events Set Up Services on a Two Year Contract Basis be and are hereby nullified and set aside.**

**C. The 1<sup>st</sup> Respondent is hereby ordered to proceed and issue the Applicant with a letter of notification of intention to award Tender No. KNEC/ONT/2023-2024/07 for Provision of Catering and Events Set Up Services on a Two Year Contract Basis within 5 days from the date of this decision and to 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.**

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

**Dated at NAIROBI this 2<sup>nd</sup> Day of August 2024.**



**PANEL CHAIRPERSON**

**PPARB**



**SECRETARY**

**PPARB**

