

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 73/2024 OF 2ND AUGUST 2024

BETWEEN

REGENT VALUERS INTERNATIONAL (K) LIMITED APPLICANT

AND

MANAGING DIRECTOR/ACCOUNTING OFFICER

KENYA PORTS AUTHORITY 1ST RESPONDENT

KENYA PORTS AUTHORITY 2ND RESPONDENT

CRYSTAL VALUERS LTD 1ST INTERESTED PARTY

SEC & M CO. LIMITED2ND INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Ports Authority in relation to Tender No. KPA/082/2023-24/AM for Consultancy Services for Revaluation of KPA Assets.

BOARD MEMBERS PRESENT

- | | | |
|-------------------------|---|-------------------|
| 1. Mr. Joshua Kiptoo | - | Panel Chairperson |
| 2. Eng. Lilian Ogombo | - | Member |
| 3. Ms. Jessica M'mbetsa | - | Member |

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT REGENT VALUERS INTERNATIONAL (K) LIMITED

Mr. Gaita - Advocate, Gaita & Co. Advocates

RESPONDENTS MANAGING DIRECTOR/ACCOUNTING OFFICER KENYA PORTS AUTHORITY & KENYA PORTS AUTHORITY

Ms. Mburu -Advocate, Kimondo Gachoka & Company Advocates

1ST INTERESTED PARTY CRYSTAL VALUERS LTD

Mr. J. M. Mugo - J. M. Mugo & Company Advocates

2ND INTERESTED PARTY SEC & M CO. LIMITED

Mr. Omemo - Misiko Advocates

3RD INTERESTED PARTY GIMCO LIMITED

Mr. David Muiru Valuer, Gimco Limited

BACKGROUND OF THE DECISION

The Tendering Process

1. The Kenya Ports Authority, the 2nd Respondent and Procuring Entity herein, invited proposals to provide consulting services in response to Tender No. KPA/082/2023-24/AM for Consultancy Services for Revaluation of KPA Assets (hereinafter referred to as the "subject tender"). Tendering was conducted through open tender method and the invitation of the subject tender was on the Procuring Entity's website www.kpa.co.ke and on the Public Procurement Information Portal (PPIP) website www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. The tender's submission deadline was scheduled for 30th April 2024 at 1000 hours.

Addendum

2. Vide Addendum No. 1 dated 23rd April 2024, the Procuring Entity issued several clarifications pertaining to Clause 13.1 of the Tender Document.

Submission of Tenders and Tender Opening

3. According to the Minutes of the subject tender's opening signed by members of the Tender Opening Committee on 30th April 2024 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents

furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of seven (7) tenders were submitted in response to the subject tender. The seven (7) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1.	M/s Iceberg International Limited
2.	M/s Sec & M Co. Limited
3.	M/s Legend Valuers Limited
4.	M/s Crystal Valuers Limited
5.	M/s Regeant Valuers International (K) Limited
6.	M/s Tysons Ltd
7.	M/s Gimco Ltd

Evaluation of Tenders

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 2nd Respondent undertook evaluation of the seven (7) tenders as captured in a Technical Evaluation Report for the subject tender signed by members of the Evaluation Committee on 30th May 2024 and a Financial Evaluation

Report signed by members of the Evaluation Committee on 14th June 2024 in the following stages:

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

Preliminary Evaluation

5. At this stage of evaluation, the Evaluation Committee was required to examine tenders for responsiveness to statutory and mandatory requirements as per the requirements of ITC Clause 10.1 of Section 2 (B)– Data Sheet at page 26 to 30 of the Tender Document. All bids were required to meet all the mandatory requirements to qualify for further evaluation at the technical evaluation stage.

6. At the end of evaluation at this stage three (3) tenders were determined non-responsive including the Applicant’s bid while four (4) tenders were determined responsive, and the responsive tenders proceeded for further evaluation at the Technical Evaluation stage.

Technical Evaluation

7. At this stage of evaluation, the Evaluation Committee was required to examine tenders as per the requirements under ITC Clause 22.2 of Section 2 (B)– Data Sheet at page 32 to 33 of the Tender Document.

8. At the end of evaluation at this stage, the four (3) bids were scored and ranked as follows:

No.	FIRM NAME	EV.1	EV.2	EV.3	EV.4	Average	Ranking
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1.	<i>M/s Sec & M Co. Limited</i>	94	95	96	95	95	2
2.	<i>M/s Legend Valuers Limited</i>	93	92	90	93	92	3
3.	<i>M/s Crystal Valuers Ltd</i>	98	97	97	96	97	1
4.	<i>M/s Tyson Limited</i>	90	91	91	89	90.25	4

9. The Evaluation Committee recommended for the four firms to proceed for further evaluation at the Financial Evaluation stage.

Opening of Financial Proposals

10. According to the Minutes of Financial Bids Opening for the subject tender held on 10th June 2024, the four (4) bids that were determined responsive to proceed for financial evaluation were opened and recorded as follows:

No.	Name of Firm	No. of Copies	Soft Copy	Amount Quoted (Kshs.)
1.	<i>M/s. Sec & M.Co.Ltd</i>	2	✓	<i>129,878,000.50 VAT Inclusive</i>
2.	<i>M/s. Legend Valuers Ltd</i>	2	✓	<i>158,924,640.00VAT Inclusive</i>
3.	<i>M/s. Crystal Valuers Limited</i>	2	✓	<i>159,964,000.00 VAT Exclusive</i>

4.	<i>M/s. Tysons Ltd</i>	2	✓	<i>157,760,000.00 VAT Inclusive</i>
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Financial Evaluation

11. At this stage of evaluation, the Evaluation Committee was required to examine bids as per the requirements under ITC Clause 29.2 of Section 2 (B)– Data Sheet at page 33 to 34 of the Tender Document. The Evaluation Committee would confirm that the amount quoted by the bidder conforms to the provisions of the Valuers Act and attendant regulations. Additionally, the proposals that exceeded the indicated budget would be rejected and the bidder with the highest ranked technical proposal would be selected and invited to negotiate the contract in the subject tender.

12. At the end of evaluation at this stage, the following was recorded as can be discerned at page 44 to 45 of the Financial Evaluation Report:

FINANCIAL EVALUATION SUMMARY (BUDGET AMOUNT Kshs.160 MILLION VAT EXCLUSIVE).

No.	Description	Sec & M Co. Limited	Legend Valuers Limited	Crystal Valuers Limited	Tyson Limited
1.	Average Technical Score	95	92	97	90.25
2.	Ranking	2	3	1	4
3.	Fin 1: Financial Proposal	Provided	Provided	Provided	Provided

	Submission Form				
4.	Fin 2: Summary of Costs	Provided	Provided	Provided	Provided
5.	Fin 3: Breakdown of Remuneration	Provided	Provided	N/A	N/A
6.	Fin 4: Breakdown of Reimbursable Expenses	Provided	Provided	N/A	N/A
6.	Total Amount Quoted	119,491,250.00	137,004,000.00	159,964,000.00	136,000,000.00
7.	Total Taxes @16% VAT	10,386,800.00	21,920,640.00	25,594,240.00	21,760,000.00
8.	Total Amount Inclusive of 16% VAT	129,878,050.00	158,924,640.00	185,558,240.00	157,760,000.00

Evaluation Committee's Recommendation

13. Based on the aforementioned financial evaluation summary and pursuant to Section 124 (11) of the Act and Regulation 124 (10) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020"), the Evaluation Committee recommended award of the subject tender to the 1st Interested Party, M/s Crystal Valuers Ltd, being the bidder that submitted the highest ranked technical proposal of bids submitted within the budget subject to negotiations.

Negotiations

14. The Evaluation Committee was required to carry out negotiations as per the requirements under ITC Clause 32.1 of Section 2 (B)– Data Sheet at page 34 of the Tender Document. The aim of the negotiations was to reach an agreement on all points and sign a contract.

15. According to the Negotiation Report for the subject tender signed by members of the Evaluation Committee on 1st July 2024, the negotiation was carried out in an amicable manner and both the Procuring Entity and the 1st Interested Party agreed on a 4% discount of the subtotal as provided in the Summary of Costs submitted by the 1st Interested Party.

16. The Evaluation Committee proceeded to recommend award of the subject tender to the 1st Interested Party, M/s Crystal Valuers Limited, at a discounted rate of Kshs. 178,135,910.40 VAT Inclusive for a contractual period of twelve (12) months.

Professional Opinion

17. In a Professional Opinion, as a Memo, dated 10th July 2024, the Principal Supply Chain Management Officer (Tenders), Mr. Daniel Amuyunzu, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to the 1st Interested Party.

18. Thereafter, the Professional Opinion was approved by the Managing Director, Captain William K. Ruto AFNI, MBS and the 2nd Respondent herein on 10th July 2024.

Notification to Tenderers

19. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 16th July 2024.

REQUEST FOR REVIEW NO. 73 OF 2024

20. On 2nd August 2024, Regent Valuers International (K) Limited, the Applicant herein filed a Request for Review dated 2nd August 2024 together with a Supporting Affidavit sworn by Stephen Rotich, its Director (hereinafter referred to as the 'instant Request for Review') through Gaita & Company Advocates seeking the following orders from the Board in verbatim:

a) The 1st and 2nd Respondent's decisions contained in the letter of notification dated 16th July 2024 declaring the Applicant's bid with respect to Tender No. KPA/082\2023-24/AM– consultancy services for revaluation of Kenya Ports Authority assets unsuccessful be and is hereby nullified and\or set aside.

b) The 1st and 2nd Respondent's decision contained in the Letter of Notification dated 16th July 2024 awarding Tender No. KPA/082\2023-24/AM Tender for Provision of revaluation of Kenya Ports Authority assets to the Interested Party be and is hereby nullified and / or set aside.

c) An Order be and is hereby issued directing the 1st and 2nd Respondents to award the Applicant Tender No. KPA/082\2023-24/AM - consultancy services for revaluation of Kenya Ports Authority assets to the applicant as the most responsive evaluated bidder.

d) The Respondents be ordered to pay the costs of an incidental to these proceedings.

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

21. In a Notification of Appeal and a letter dated 2nd August 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 2nd August 2024.

22. *Vide* email dated 6th August 2024, the Acting Board Secretary notified all tenderers in the subject tender, 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 three (3) days.
23. On 6th August 2024, the 1st Interested Party filed through JM Mugo & Company Advocates a Notice of Appointment of Advocates and a Replying Affidavit sworn by Edwin Macharia Mukira on 5th August 2024.
24. On 7th August 2024, the Respondent filed through Kimondo Gachoka & Company Advocates a Notice of Appointment of Advocates dated 7th August 2024, a 1st and 2nd Respondents' Memorandum of Response dated 7th August 2024, an Affidavit in Support of the Respondents' Memorandum of Response sworn on 7th August 2024 by Daniel Amuyunzu together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
25. *Vide* a Hearing Notice dated 9th August 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 15th August 2024 at 11.00 a.m., through the link availed in the said Hearing Notice.

26. On 13th August 2024, SEC & M Co. Ltd filed an Information and Arguments for Review dated 7th August 2024.
27. Vide email of 14th August 2024, the Acting Board Secretary notified parties that the hearing slated for 15th August 2024 at 11.00 a.m. had been rescheduled to Friday, 16th August 2024 at 12.00 noon due to unforeseen circumstances.
28. On 15th August 2024, the 2nd Interested Party filed through Misiko Advocates a Notice of Appointment dated 15th August 2024 together with a Notice of Motion Application dated 15th August 2024.
29. On 16th August 2024, the Applicant filed Written Submissions dated 16th August 2024.
30. The 3rd Interested Party did not file any documents in the matter.
31. On 16th August 2024, the 1st Interested Party filed through its advocates a Notice of Intention to Raise a Preliminary Objection dated 16th August 2024.
32. At the hearing of the instant Request for Review on 16th August 2024, the Board read out the pleadings filed by parties in the matter. Counsel for the 2nd Interested Party. Mr. Omemo indicated that he had filed an application seeking leave for the 2nd Interested Party to be joined in the proceedings in view of the fact that it was served with its

notification letter on 2nd August 2024 curtailing its right to appeal the decision of the Procuring Entity and that it had a personal stake in the matter in view of information supplied to the Board on 7th August 2024 as requested by the Board Secretary vide letter dated 6th August 2024. Counsel submitted that the 2nd Interested Party was the second lowest evaluated bidder and the determination of the instant Request for Review would have an impact on the 2nd Interested Party and that it would suffer prejudice if not allowed to join the proceedings. On his part, counsel for the Applicant, Mr. Gaita indicated that he was not opposed to the Application made by Mr. Omemo in view of provisions of Section 170 of the Act. On her part, counsel for the Respondents Ms. Mburu submitted that by operation of the law, the 2nd Interested Party was already a party to the proceedings and the Notice of Motion as filed was unnecessary. Ms. Mburu further submitted that the 2nd Interested Party ought to have actually filed an affidavit either in support of the Request for Review or in opposition of the Request for Review and if it wanted to raise different grounds, it ought to have filed its own Request for Review. On the part of the 1st Interested Party, Mr. Mugo indicated that he had filed a Notice of Preliminary Objection which was in regard to the application by the 2nd Interested Party. Mr. Mugo submitted that the 2nd Interested Party was not supposed to participate in the instant proceedings in view of provisions under Section 170 of the Act which stipulates the parties to a review. Mr. Mugo further submitted that the 2nd Interested Party was in fact filing a review out of time in view of the orders being sought and it cannot be allowed to use Section 170(d) of the Act to join the

proceedings and by allowing it to participate would be elongating it to a party seeking a review. In a rejoinder, Mr. Omamo submitted that the timelines to file a review were spent and it could not come on board as an Applicant. He pointed out that the Application being made was the Notice of Motion dated 15th August 2024 and having just come on record, any other matter presented to the Board did not suffice.

33. Upon hearing parties, the Board directed that the 2nd Interested Party could participate in the instant Request for Review only to the extent that it was addressing issues of law raised in the review in support of the Applicant's case and would not raise any new grounds of review pertaining to disqualification of its bid document. This was in view of the fact that any complaints touching on disqualification of its bid in the subject tender ought to have been brought before the Board in accordance with Section 167(1) of the Act read with Regulation 203 of Regulations 2020.

34. Subsequently, parties were allocated time to highlight their respective cases and the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicants' submissions

35. In its submissions, the Applicant relied on documents filed before the Board in the instant Request for Review. Mr. Gaita, counsel for the Applicant, submitted that the subject tender had a fixed budget for

Kshs. 160,000,000.00 yet the award to the 1st Interested Party was made at Kshs. 178,000,000.00 which was in excess of the budget hence an illegality occasioned by the Procuring Entity. Counsel referred the Board to Section 124(10) of the Act and ITC 2.1 of Section 2(B) Data Sheet at page 26 of the Applicant's Bundle of Documents which provided the budget for the assignment at Kshs. 160 Million. He indicated that pursuant to Section 124(11) of the Act proposals under the fixed budget selection method that exceed the indicated budget shall be rejected and the consultant who has submitted the highest ranked technical proposal among the rest shall be selected and invited to negotiate a contract.

36. Counsel while relying on the case of *Leina Konchellah & others v Chief Justice and President of Supreme Court of Kenya & others; Speaker of National Assembly & others (Interested Parties) [2021] eKLR* argued that the most important rule in legal text interpretation is the rule of plain language interpretation and it was illegal for the Respondent to proceed and make an award to the 1st Interested Party beyond the budget amount.

37. Mr. Gaita pointed to paragraphs 3 & 4 of the 1st Interested Party's Replying Affidavit sworn by Edwin Macharia on 5th August 2024 where it is deponed that the Procuring Entity made clarifications that the amount of Kshs. 160 Million was not inclusive of taxes and argued that this letter of clarification and addendum has not been exhibited and neither is it available in the Procuring Entity's website which begs the

question of why it was only shared with the 1st Interested Party if it did indeed exist. Mr. Gaita pointed the Board to Section 129(1) of the Act and submitted that the contract may not vary from the requirements of the terms of reference except in certain circumstances provided therein.

38. Mr. Gaita submitted that the fact that the Procuring Entity does not point to any addendum in their response simply confirms that there was no addendum and from the figures cited, it is quite obvious that the 1st Interested Party surpassed the allocated fixed budget price. Counsel further referred the Board to ITC 16.3 at page 17 of the Tender Document providing for who was responsible for meeting all tax liabilities.

39. Mr. Gaita submitted that the reasons why the Applicant was not successful was as contained in the notification letter dated 16th July 2024 received by the Applicant on 20th July 2024 being that the Applicant's bid document was not sequentially paginated, it did not provide experience in valuation work performed in the last 15 years and that it did not provide evidence of financial capacity to undertake the project.

40. Counsel while contesting the above reasons for disqualification invited the Board to confirm from the Applicant's bid document that it was properly paginated, had provided documentary evidence of 3

corporate clients whom it had performed valuation work for and as such the disqualification of the Applicant's tender was illegal.

41. He indicated that the requirement for a bidder to provide evidence of financial capacity to undertake the project was not a mandatory requirement and the Applicant could only have lost a score of 2 marks under this requirement and as such, this could not have been a reason for its disqualification.
42. Counsel argued that if for any reason it was found that there was any minor deviation in the Applicant's bid document, this did not materially affect the substance of the Applicant's bid and cannot be a ground for rejection of the Applicant's tender as stipulated under Section 79(2) of the Act as the said minor deviations and errors could be corrected without affecting the substance of the tender.
43. He further argued that if the law would have been observed, the Applicant would have emerged as the most successful bidder in the subject tender and that the Applicant has suffered prejudice due to the illegalities committed by the Respondents.
44. Counsel urged the Board to allow the instant Request for Review as prayed.

Respondents' submissions

45. In their submissions, the Respondents relied on documents filed before the Board in opposition of the instant Request for Review together with the confidential documents concerning the subject tender submitted to the Board pursuant to Section 67(3)(e) of the Act.
46. Ms. Mburu, counsel for the Respondents, submitted that the Applicant's bid was found to be non-responsive for failure to comply with 3 mandatory requirements in the Tender Document being (a) failure to paginate its bid sequentially, (b) failure to provide documentary evidence of having at least Kshs. 5 Million in the bank and (c) failure to provide 3 reference letters.
47. Ms. Mburu indicated that it is incorrect for the Applicant to allege that provision of evidence of financial ability was not a mandatory requirement and referred to page 26 and 27 of the Tender Document where it was clearly set out as a mandatory requirement. She pointed out that failure to comply with mandatory requirements set out in a tender renders a bid non-responsive as stipulated under Section 79 of the Act and that once found to be non-responsive, a bidder cannot progress for further evaluation.
48. Ms. Mburu submitted that allowing the instant Request for Review in view of the omission by the Applicant would be a violation of the principle of fairness provided under Article 227 of the Constitution as this would subject the Applicant's bid to different terms other than

those set out in the Tender Document hence according it preferential treatment.

49. With regard to the allegation that the 1st Interested Party's tender price exceeded the set out budget price counsel referred to ITC 24.3 at page 21 of the Tender Document providing for the price and argued that the total price was net of taxes specified in the financial proposal and this would be considered to be the offered price. She indicated that the Kshs. 160 Million provided was exclusive of taxes and that this can be confirmed from the confidential documents submitted to the Board which contain an Addendum dated 23rd April 2024 where a clarification was made that the sum of Kshs. 160M was VAT exclusive.
50. On the allegation made by the Applicant that it was not invited for the public opening of the financial proposal, counsel referred the Board to Clause 23.3 at page 20 of the Tender Document and submitted that only the bidders considered responsive following the ranking of the Technical Proposals would be invited for the opening of the financial proposals and the Applicant's bid having been found non-responsive did not proceed for further evaluation and could therefore not be invited for opening of the financial proposals.
51. Counsel submitted that the Applicant had raised a new ground that was not raised in the instant Request for Review pertaining to the Respondent's non-compliance with ITC 23.1 of the Tender Document and that the Board ought not to consider the same since it was not

pleaded and was a backhand attempt at introducing new matters that were not captured in the Request for Review.

52. Ms. Mburu further submitted that the Respondents acted in compliance with the Tender Document and urged the Board to dismiss the instant Request for Review with costs.

1st Interested Party's submissions

53. In his submissions, the 1st Interested Party relied on its documents filed before the Board in opposition of the instant Request for Review. Mr. Mugo, counsel for the 1st Interested Party fully associated himself with submissions made by the Respondents in the instant Request for Review.

54. Counsel submitted that it is not in dispute that the Interested Party's score in the subject tender was merited and the only issue that seems to be contested is the amount awarded to the Interested Party in the subject tender which had been addressed by the Respondents in their submissions.

55. Counsel indicated that the Data Sheet only provided for the budget at Kshs. 160 Million without indicating whether that amount was inclusive or exclusive of taxes. He referred the Board to ITC 2.1 and 24.3 of the Tender Document and indicated that the total price was net of the taxes which meant that it was exclusive of the taxes. He further

reiterated that the Interested Party had sight of the Addendum issued by the Procuring Entity.

56. Mr. Mugo submitted that pagination of the bidder's bid document was mandatory and this cannot be cured as a minor deviation in view of the provisions of the Tender Document and the Act. He further submitted that it was also a mandatory requirement for a bidder to provide evidence of financial capacity to undertake the project contrary to the assertions by the Applicant. On the issue of experience, Mr. Mugo referred to ITC 10.1 (xviii) at page 28 of the Tender Document and argued that this was also a mandatory requirement and no evidence had been availed by the Applicant to show that the 3 reference letters were provided.

57. Counsel referred to paragraph 4 of the Applicant's annexure SK-4 being a letter dated 20th July 2024 addressed to the Procuring Entity where the Applicant opines that the Interested Party was non-responsive just like its bid and argued that if the Applicant was of the opinion that its bid was non-responsive, this was a clear admission that its bid was non-responsive and in seeking the orders herein, it was approbating and reprobating.

58. He urged the Board to dismiss the instant Request for Review for lacking merit with costs.

2nd Interested Party's submissions

59. Counsel for the 2nd Interested Party, Mr. Mumo aligned himself with submissions made by the Applicant in the instant Request for Review. He indicated that the Tender Document provided that the fixed budget amount was Kshs. 160 Million with no indication of whether it was vatable hence the clarifications being made by the 1st Interested Party. He further indicated that the 2nd Interested Party had not seen the alleged Addendum to date and that the same is not available on the Procuring entity's website which defeats the ethics and morals governing public procurement.
60. Counsel pointed to paragraph 15 of the Affidavit sworn by Daniel Amuyunzu denoting the results at Financial Evaluation and argued that the award of the subject tender was made to the 1st Interested Party yet it had quoted the highest price which was outside the set out budget for the assignment. He further pointed out that the said affidavit ought to be expunged from record since it is indicated that Mr. Daniel Amuyunzu swore the same in Mombasa yet it is commissioned in Nairobi making it a defective affidavit. He referred to the holding in *Mary Gathoni & Another v Fridah Ariri Otololo & Another (2020) eKLR*.
61. Counsel pointed to page 55 of the Tender Document providing for Form Fin -2 Summary of Costs and ITC 24 which was relied upon by the Interested Party in its submissions and argued that this was providing for correction of errors yet what he was referring to was the lump sum contract and indicated that the subject tender was

ambiguous and parties ought not to be blamed for not having presented the values in the instance that the Kshs. 160 Million was net.

62. He reiterated that the procurement process in the subject tender was flawed and urged the Board to allow the instant Request for Review.

Applicant's Rejoinder

63. In a rejoinder, Mr. Gaita reiterated the provisions under Section 124 (10) & (11) of the Act and argued that the law ought to take precedence hence the same ought to be have adhered to by the Respondents in ensuring transparency in deployment of public resources. He further pointed to ITC 16.3 of the Tender Document and indicated that nothing was provided to the contrary in the Data Sheet hence the budget remained fixed at Kshs. 160 Million and there was no justification to surpass this amount.

64. Counsel submitted that there was no admission by the Applicant in its letter dated 20th July 2024 that its bid was non-responsive as alleged by the Interested Party and that it was only seeking clarifications from the Procuring Entity with regard to award of the subject tender while pointing out that the amount awarded had exceeded the set out budget.

65. Counsel invited the Board to look at pages 30 to 33 of the Tender Document and admitted that pagination and requirement for reference were mandatory that the Applicant met. On the issue of financial capability provided at page 27 of the Tender Document, counsel indicated that this was not a mandatory requirement and that this only carried a score of 2 marks. He indicated that the Applicant provided evidence of financial capacity and in the event that this was found to be insufficient, it could only lead to non-award of the 2 marks and not a ground for disqualification of the Applicant's bid. He also invited the Board to look at clause 23 of the Tender Document on communication to unsuccessful bidders and reiterated that this was not adhered to.

66. He urged the Board to allow the Request for Review as filed.

CLARIFICATIONS

67. When asked to clarify whether the Addendum was shared with all bidders in the subject tender, Ms. Mburu submitted that the Addendum was published on the website and thus shared to prospective bidders.

68. When asked to also clarify the exact pages that the Applicant's bid was not chronologically paginated, Ms. Mburu submitted that this was structured in the notification letter and the table of contents did not marry with the pages in the bid document such that what was indicated therein was not aligned with the exact page in the bid document. She invited the Board to scrutinize the Applicant's original bid document on the same.

69. When asked to expound on the provision that the wording in the Tender Document indicated that the fixed budget was exclusive of taxes, Mr. Mugo submitted that the Data Sheet stated that the amount was Kshs. 160 Million without stating if the same was inclusive or exclusive of taxes. He indicated that the 1st Interested Party was guided by Clause 24.3 of the Tender Document which indicated that the total price was net of taxes and this has no other interpretation and means that Kshs. 160 Million was not inclusive of taxes.

70. On his part, Mr. Omemo submitted that the Data sheet did not indicate if the amount of Kshs. 160 Million was vatable or not. He further submitted that ITC 24.3 as relied upon by the Interested Party was incomplete as it referred to ITC 24 below which does not exist. He indicated that if the Tender Document was water tight there would be no need of an Addendum and reiterated that the 2nd Interested Party did not receive the said Addendum.

71. On his part Mr. Gaita made reference to ITC 16.4 of the Tender document which provides that the consultant and its sub consultants and experts are responsible for meeting all tax liabilities arising out of the contract unless stated otherwise in the Data Sheet and that no such information to the contrary was stated in the Data Sheet. He pointed out that ITC 24 was on correction of errors and argued that Section 124 (10) & (11) must prevail. He further indicated that neither

the clarification sought by the Interested Party or Addendum referred to by the Interested Party was produced in evidence.

72. When asked how the 1st Interested Party got receipt of the Addendum, Mr. Mugo submitted that the 1st Interested Party got hold of the Addendum from the Procuring Entity's website.

73. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 2nd August 2024 was due to expire on 23rd August 2024 and that the Board would communicate its decision on or before the 23rd August 2024 to all parties to the Request for Review via email.

74. On 19th August 2024, the Interested Party filed via email an Authority in support of its arguments in the instant Request for Review.

BOARD'S DECISION

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

- A. Whether the Procuring Entity issued Addendum No. 1 dated 23rd April 2024 clarifying on the budget provision in the subject tender?**
- B. Whether the Applicant's tender submitted in the subject tender was disqualified by the Evaluation Committee in accordance with the Tender Document read with Section 80 of the Act and Article 227(1) of the Constitution.**
- C. Whether award of the subject tender to the 1st Interested Party was within the budget stipulated in the Tender Document.**
- D. What orders should the Board grant in the circumstances?**

76. Before delving into the issues framed for determination, the Board would like to dispense with a preliminary aspect arising from the proceedings before it. During the online hearing, counsel for the Interested Party, Mr. Omemo submitted that the Respondents' Affidavit in Support of the Respondents' Memorandum of Response sworn on 7th August 2024 by Mr. Daniel Amuyunzu was defective for having been sworn at Mombasa yet it was made before a Commissioner of Oaths in Nairobi. In support of his argument, counsel referred to the holding in the case of *Mary Gathoni & Another v Fridah Ariri Otolu & Another (2020) eKLR*.

77. The Respondents did not address the allegation raised by Mr. Omemo pertaining to the defectiveness of the Affidavit in Support of the Respondents' Memorandum of Response sworn on 7th August 2024 by Mr. Daniel Amuyunzu.

78. This Board has had a chance to scrutinize the Respondents' Affidavit in Support of the Respondents' Memorandum of Response sworn on 7th August 2024 by Mr. Daniel Amuyunzu and notes that the same reads at the jurat as follows:

"

SWORN by the said ***DANIEL AMUYUNZU***]
AT Mombasa on the 7th day of August 2024]
]] (signed)
Before Me]
]]
(Stamped by Gregory M. Makambo
Advocate & Commissioner For Oaths
P.O. Box 22186-00100
NAIROBI)]
COMMISSIONER FOR OATHS]
....."

79. The law on commissioning of affidavits is the Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya, which, at section 5, states as follows:

'Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or

attestation at what place and on what date the oath or affidavit is taken or made.'

80. In essence, any oath or affidavit must be taken or made in the presence of a Commissioner of Oaths who shall honestly state the place and date the oath or affidavit was taken. From the Affidavit sworn by Mr. Amuyunzu in support of the Respondents' Memorandum of Response, it indicates that the same was sworn at Mombasa on the 7th August 2024 yet it has been commissioned before Gregory M. Makambo Advocate and Commissioner of Oaths in Nairobi. This raises doubts as to the place where the said affidavit was taken under oath in view of the fact that the jurat indicates that the same was sworn at Mombasa yet commissioned in Nairobi. In our opinion, this Affidavit was not properly commissioned and as such, the depositions therein were not sworn under oath pursuant to Section 5 of the Oaths and Statutory Declarations Act.

81. Having disposed of the above preliminary aspect, the Board now proceeds to address the substantive issues framed for determination in the instant Request for Review.

Whether the Procuring Entity issued Addendum No. 1 dated 23rd April 2024 clarifying on the budget provision in the subject tender?

82. It is the Respondents' case that they published Addendum No. 1 dated 23rd April 2024 clarifying on the budget provision in the subject tender

on the Procuring Entity's website and that the same had been supplied to the Board as part of the confidential documents submitted to the Board pursuant to Section 67(3)(e) of the Act. On its part, the 1st Interested Party submitted during the online hearing that it obtained the said Addendum to the subject tender from the Procuring Entity's website. However, both the Applicant and 2nd Interested Party allege that the Procuring Entity did not issue bidders in the subject tender with the said Addendum No. 1 dated 23rd April 2024 and that the said Addendum has never been published on the Procuring Entity's website for their information.

83. Having perused the confidential documents submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act, we note that the Respondent issued an addendum to the Tender Document on 23rd April 2024 which reads as follows:

"PSM/CTC/1/01 (082) VOL.1

23rd April, 2024

Dear Bidders,

RE: ADDENDUM NO. 1

***TENDER NO. KPA/082/2023-24/AM-CONSULTANCY
SERVICES FOR VALUATION OF KPA ASSETS.***

***Pursuant to clause 13.1 of the tender document, the
Authority hereby issues the following clarifications: -***

1. Bid Security is not required

2. The budget of Kshs. 160m is VAT Exclusive

3. The Bid Validity is 210 days.

All other conditions of the tender remain the same.

.....”

84. We also note that the 1st Interested Party deponed at paragraph 4 of its Replying Affidavit sworn on 5th August 2024 by Edwin Macharia Mukira as follows:

"4. THAT on 23rd April 2024, the 2nd Respondent issued an addendum offering three (3) clarifications on various inquiries made by interested bidders. The 2nd Respondent in particular clarified that the amount of Kshs. 160,000,000/= was not inclusive of taxes."

85. In view of the foregoing, it is apparent to the Board that the Procuring entity did issue Addendum No. 1 dated 23rd April 2024 in the subject tender and this has been supported by the Procuring Entity availing the said Addendum as part of the confidential documents submitted to the Board pertaining the subject tender and also by the 1st Interested Party sworn statement in the form of the Replying Affidavit sworn on 5th August 2024 by Edwin Macharia Mukira which contains matters of evidence deponed on oath as to issuance of Addendum No. 1 dated 23rd April 2024 by the Procuring Entity.

86. Absent any evidence by the Applicant and 2nd Interested Party of their allegations, the Board finds that the Procuring Entity issued Addendum No. 1 dated 23rd April 2024 clarifying on the budget provision in the subject tender.

Whether the Applicant’s tender submitted in the subject tender was disqualified by the Evaluation Committee in accordance with the Tender Document read with Section 80 of the Act and Article 227(1) of the Constitution.

87. The objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

"227. Procurement of public goods and services

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

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

a)

b)

- c) and
- d)"

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

"80. Evaluation of tender

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

- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.**

- (3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-**

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4)"

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

90. We note that the Applicant was notified of its disqualification of its bid in the subject tender vide letter dated 16th July 2024 which reads in part as follows:

"....."

Further, we wish to inform you that Pursuant to section 87(3) of the Public Procurement & Asset Disposal Act, 2015, your bid was not successful because of the following reasons.

- i Your bid document did not have pages in the whole document from the table of contents page numbered in the correct sequence including all appendices and attachments.***
- ii You did not provide evidence of financial capacity to undertake the project (The consultant did not show evidence of having at least Ksh.5 million and above in the bank or a letter of credit guarantee from a reputable bank in Kenya.***
- iii You did not provide experience in valuation work performed in the last fifteen (15) years with at least three (3) Corporate clients with documentary evidence. (Provided for one firm only M/s East African Portland Cement.)***

91. According to the Evaluation Report submitted to the Board by the 1st Respondent as part of the confidential documents pursuant to Section 67(3)(e) of the Act, we note that the Applicant's bid was found non-responsive at the Preliminary Evaluation stage as follows:

"3.2 Non-Responsive Firms

3.2.1 The following three firms (3) did not comply with mandatory requirements provided in the tender document therefore were non-responsive as indicated below and therefore did not proceed for technical evaluation: -

.....

2. REGENT VALUERS INTERNATIONAL

- **The Bidder's document did not have pages in the whole document from the table of contents page numbered in the correct sequence including all appendices and attachments (Pages not sequential with the table of contents)**
- **The Bidder did not provide evidence of financial capacity to undertake the project (The consultant did not show evidence of having at least Ksh.5 million and above in the bank or a letter of credit guarantee from a reputable bank in Kenya.**
- **The Bidder did not provide experience in valuation work performed in the last fifteen (15) years with at least three (3) Corporate clients with documentary evidence. (Provided for one firm only M/s East African Portland Cement.)**

92. We have perused the Tender Document for the subject tender and note that the same provided for mandatory requirements at ITC Clause 10.1 of Section 2 (B)– Data Sheet at page 26 to 30 of the Tender

Document. All bids were required to meet all the mandatory requirements to qualify for further evaluation at the technical evaluation stage.

93. ITC 10.1 (i) & (ii) of Section 2 (B)– Data Sheet at page 26 of the Tender Document provided as follows:

- i Shall have a table contents page clearly indicating Sections and Page Numbers (Mandatory)*
- ii Shall have pages in the whole document from the table of contents page numbered in the correct sequence (i.e in the format 1,2,3,4,5,...n (where n is the last numerical page number)) including all appendixes and attachments (Mandatory)*

94. Further, ITC 10.1 (xvi) of Section 2 (B)– Data Sheet at page 27 of the Tender Document provided as follows:

"xvi) Evidence of financial capacity to undertake the project; the consultant must have at least KES5million and above in the bank or a letter of credit guarantee from a reputable bank in Kenya."

95. Additionally, ITC 10.1 (xviii) of Section 2 (B)– Data Sheet at page 28 of the Tender Document provided as follows:

" xvii) Firm's experience in valuation work performed in the last fifteen (15) years with at least three (3)

Corporate Clients with documentary evidence e.g certified copies of Purchase Orders and/or Contracts. At least two of the three projects must be for valuation of an asset base of at least KES 5billion each.

xviii) Reference letters from three (3) corporate clients, addressed to Kenya Ports Authority confirming that the revaluation assignment was carried out satisfactorily; this assignment must have been carried out within the last fifteen years – Mandatory.”

96. In essence, a bidder was required to (a) have a table of contents that clearly indicated the sections and page numbers and paginate its bid document in the correct sequence, (b) submit evidence of financial capacity to undertake the project in the subject tender in the form of proving it had at least KES5million and above in the bank or a letter of credit guarantee from a reputable bank in Kenya and (c) submit reference letters from three (3) corporate clients, addressed to Kenya Ports Authority confirming a revaluation assignment carried out satisfactorily within the last fifteen years.

97. We have studied the Applicant’s original tender submitted to the Board by the 1st respondent as part of the confidential documents in respect to the subject tender and note as follows:

No.	Mandatory Requirement	Board’s observation
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1.	<p>ITC 10.1 (i) & (ii) of Section 2 (B)– Data Sheet:</p> <p><i>i Shall have a table contents page clearly indicating Sections and Page Numbers (Mandatory)</i></p> <p><i>ii Shall have pages in the whole document from the table of contents page numbered in the correct sequence (i.e in the format 1,2,3,4,5,...n (where n is the last numerical page number)) including all appendixes and attachments (Mandatory)</i></p>	<ul style="list-style-type: none"> • Non-compliant to this mandatory requirement. • The Page numbers as indicated in the Table of Contents do not tally with the contents of the specific pages. i.e In the Table of Contents, page 175 is indicated to contain the Form Tech – 9: Tender – Securing Declaration Form (r 46 and 155 (2) yet what is at page 175 of the Bid document is the Applicant’s Notes to the Financial Statements for the year ended 31st December 2020. • As such, the Applicant did not have a table of contents which was clearly indicating the correct sections and page numbers.
	ITC 10.1 (xvi) of Section 2 (B)– Data Sheet	<ul style="list-style-type: none"> • Non-compliant to this mandatory requirement.

	<p><i>Evidence of financial capacity to undertake the project; the consultant must have at least KES5million and above in the bank or a letter of credit guarantee from a reputable bank in Kenya</i></p>	<ul style="list-style-type: none"> • Submitted at page 205 of the Applicant’s bid document a letter dated 29th April 2024 from Absa Bank Kenya PLC which does not entail a guarantee nor have any indication of any credit limit. • No evidence of financial capacity to undertake the project in the subject tender has been submitted in the Applicant’s bid document.
	<p>ITC 10.1 (xvii) & (xviii) of Section 2 (B)– Data Sheet</p> <p><i>xvii) Firm’s experience in valuation work performed in the last fifteen (15) years with at least three (3) Corporate Clients with documentary evidence e.g certified copies of Purchase Orders and/or Contracts. At least two of the three projects must be for</i></p>	<ul style="list-style-type: none"> • Non-compliant to this mandatory requirement. • The applicant indicated at pages 13 to 15 of its bid document that it has work experience from: <ul style="list-style-type: none"> • Kwale international Sugar Company Ltd and SBM Mauritius- Approximate Value- 36.2 Billion • KCB Bank and Kibos Sugar and Allied Industries Limited -

	<p><i>valuation of an asset base of at least KES 5billion each.</i></p> <p><i>xviii) Reference letters from three (3) corporate clients, addressed to Kenya Ports Authority confirming that the revaluation assignment was carried out satisfactorily; this assignment must have been carried out within the last fifteen years – Mandatory.</i></p>	<p>Approximate Value-7.963 Billion</p> <ul style="list-style-type: none"> • East Africa Portland Cement PLC- Approximate Value-5.855 Billion • However, no certified evidence of Purchase Orders and/or Contracts were submitted demonstrating valuation of an asset base of at least KES5billion each
--	--	--

98. In view of the foregoing observations, the Applicant’s bid as submitted in the subject tender was non-responsive to the abovementioned mandatory requirements. Section 79(1) of the Act provides for responsiveness of tenders as follows:

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

99. Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Republic v Public Procurement Administrative Review Board & another;**

Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR the High Court stated that:

“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.”

100. The Board notes that Regulation 74(1) of Regulations 2020 provides that:

"74. Preliminary evaluation of open tender

- (1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—***
- (a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;***
 - (b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;***
 - (c) any tender security submitted is in the required form, amount and validity period, where applicable;***
 - (d) the tender has been duly signed by the person lawfully authorized to do so through the power of attorney;***
 - (e) the required number of copies of the tender have been submitted;***
 - (f) the tender is valid for the period required;***
 - (g) any required samples have been submitted; and***
 - (h) all required documents and information have been submitted.***

101. The import of the aforementioned provisions of the Act and case law is that mandatory requirements cannot be waived. In this instance, the Evaluation Committee was under an obligation to evaluate the Applicant's tender using the procedures and criteria set out in the

Tender Document having regard to provisions of the Act and the Constitution. A laid out evaluation criteria must, to the extent possible, be objective and quantifiable. Notably, Section 79 (2) and (3) of the Act provides as follows with regard to minor deviations:

"(2) A responsive tender shall not be affected by-
(a) minor deviations that do not materially depart from the requirements set out in the tender document; or
(b) errors or oversights that can be corrected without affecting the substance of the tender.
(3) A deviation described in subsection (2)(a) shall-
(a) be quantified to the extent possible; and
(b) be taken into account in the evaluation and comparison of tenders."

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

103. In **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested**

Party) [2019] eKLR the High Court considered what amounts to a minor deviation and determined as follows:

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

In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent

tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.”

104. It is evident that a procuring entity cannot waive a mandatory requirement or term it as a “minor deviation” since a mandatory requirement is instrumental in determining the responsiveness of a tender and is a first hurdle that a tender must overcome in order to be considered for further evaluation. It is clear from the foregoing case that a minor deviation (a) does not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents; (b) may be an error or oversight that can be corrected without touching on the substance of the tender; and (c) can be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

105. Considering the above, the Board is left with the inevitable conclusion that the Applicant’s bid was non-responsive as it failed to comply with the aforementioned mandatory requirements as set out under ITC 10.1 of Section 2 (B) Data sheet at pages 26 to 30 of the Tender Document.

106. In the circumstances, the Board finds that the Evaluation Committee properly evaluated the Applicant's tender and disqualified the Applicant at the Preliminary Examination stage in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution.

Whether award of the subject tender to the 1st Interested Party was within the budget stipulated in the Tender Document.

107. It is the Applicant's case that the Respondent is in breach of Section 124 (10) & (11) of the Act for failing to reject the Interested Party's bid submitted in the subject tender for exceeding the stipulated budget amount of Kshs. 160 Million. The Applicant submitted that since the fixed budget selection method would be applied in award of the subject tender, the Procuring Entity erred in making an award of the subject tender to the Interested Party at its total quoted price of Kshs. 178,135,910.40 since it was in excess of the budget amount of Kshs. 160 Million stipulated under ITC 2.1 of Section 2 (B) Data Sheet at page 26 of the Tender Document.

108. The Applicant further submitted that ITC 16.3 of Section 2 Instructions to Consultants and Data Sheet at page 17 of the Tender Document stipulated that the consultant and sub-consultants and experts were responsible for meeting all tax liabilities arising out of the contract in the subject tender unless otherwise stipulated in the Data

Sheet and that no such information on taxes was provided in the Data Sheet.

109. In response, the Respondents submitted that ITC 24.3 of Section 2 Instructions to Consultants and Data Sheet at page 21 of the Tender Document provided that the total price submitted by a bidder was net of taxes specified in its Financial Proposal and that this is what would be considered to be the offered price. The Respondents further submitted that the budget amount of Kshs. 160 Million stipulated under ITC 2.1 of Section 2 (B) Data Sheet at page 26 of the Tender Document was exclusive of taxes and this is confirmed by Addendum No. 1 dated 23rd April 2024 which clarified that the sum of Kshs. 160 Million was exclusive of VAT.

110. On its part, the 1st Interested Party submitted that ITC 2.1 of Section 2 (B) Data Sheet at page 26 of the Tender Document only provided for the budget at Kshs. 160 Million without indicating whether that amount was inclusive or exclusive of taxes. It made reference to Section 2 Instructions to Consultants and Data Sheet at page 21 of the Tender Document and indicated that a bidder's total price was net of the taxes which meant that it was exclusive of the taxes and that this had been clarified by the Procuring Entity in Addendum No. 1 dated 23rd April 2024.

111. On the part of the 2nd Interested Party, Mr. Omamo submitted that the Data sheet did not indicate if the amount of Kshs. 160 Million was vatable or not.

112. ITC 16 of Section 2 Instructions to Consultants and Data Sheet at pages 16 and 17 of the Tender Document provide for preparation of the Financial Proposal and ITC 16.3 reads as follows:

16.1 The Consultant and its Subconsultants and Experts are responsible for meeting all tax liabilities arising out of the Contract unless stated otherwise in the Data Sheet. Information on taxes in Kenya is provided in the Data Sheet.

113. ITC 24.3 of Section 2 Instructions to Consultants and Data Sheet at page 21 of the Tender Document provides for Lump Sum Contracts and reads as follows:

24.1 Lump-Sum Contracts - If a Lump-Sum contract form is included in the RFP, the Consultant is deemed to have included all prices in the Financial Proposal, so neither arithmetical correction nor price adjustments shall be made. The total price, net of taxes understood as per ITC 24 below, specified in the Financial Proposal (Form FIN-1) shall be considered as the offered price.

114. ITC 2.1 of Section 2 (B) Data Sheet at page 26 of the Tender Document provides for the consultant selection method as follows:

The consultant selection method is: Fixed Budget Selection. The Budget for the assignment is Kshs. 160 million.

115. Additionally, we note that Addendum No. 1 dated 23rd April 2024 clarified the issue of the subject tender's budget as follows:

"The budget of Kshs. 160m is VAT Exclusive"

116. Section 124 (9), (10) & (11) of the Act provides that:

"(9) Fixed Budget Selection as a request form for proposal under subsection (6) (e) shall indicate the available budget and request the consultants to provide their best technical and financial proposals in separate envelopes, within the budget.

(10) Fixed budget selection method is appropriate only when the assignment is simple and can be precisely defined and when the budget is fixed.

(11) Proposals under Fixed Budget selection method that exceed the indicated budget shall be rejected and the consultant who has submitted the highest ranked technical proposal among the rest shall be selected and invited to negotiate a contract."

117. Our understanding of the above provisions of the Act and the Tender Document is that (a) the consultant in the subject tender would be selected using the Fixed Budget Selection method, (b) a proposal

exceeding the stipulated budget in the subject tender would be rejected, (c) the total price net of taxes as specified in the Financial Proposal would be considered as the offered price and (d) the indicated budget in the subject tender was Kshs. 160 M exclusive of VAT. In essence a bidder's total amount quoted in its Financial Proposal net of taxes was required to be below the stipulated budget price of Kshs. 160 M so as not to be rejected.

118. According to the 1st Interested Party's Financial Proposal submitted to the Board, its total quoted price was Kshs. 159,964,000.00 exclusive of taxes and Kshs. 185,558,240.00 inclusive of taxes. Being the highest ranked technical proposal, the 1st Interested Party proceeded for negotiations where it was recommended for award of the subject tender at Kshs. 178,135,910.40 inclusive of tax and an extract of the breakdown of the award sum is as follows:

SUBTOTAL	159,964,000.00
4% DISCOUNT	6,398,560.00
Discounted price	153,565,440.00
16%VAT	24,570,470.40
TOTAL	178,135,910.40

119. In the circumstances, the Board finds that award of the subject tender to the 1st Interested Party was within the budget stipulated in the Tender Document as read with Addendum No. 1 dated 23rd April 2024.

What orders should the Board grant in the circumstances?

120. We have established that the Evaluation Committee evaluated the Applicant's tender in accordance with the provisions of the Tender Document, Section 80(2) of the Act and Article 227(1) of the Constitution. Consequently, it is only just and fair that we dismiss, which we hereby do, the instant Request for Review for lacking in merit.

121. The upshot of our findings is that the instant Request for Review fails.

FINAL ORDERS

122. 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 2nd August 2024 and filed on even date:

- A. The Request for Review dated 2nd August 2024 and filed on even date be and is hereby dismissed.**
- B. The Respondent is hereby directed to proceed with the procurement proceedings of Tender No. KPA/082/2023-24/AM for Consultancy Services for Revaluation of KPA Assets to its logical conclusion in accordance with the Tender Document, the Act, and the Constitution.**

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

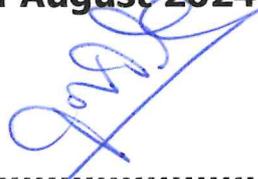
Dated at NAIROBI this 23rd Day of August 2024.



.....

PANEL CHAIRPERSON

PPARB



.....

SECRETARY

PPARB