

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 121/2024 OF 6TH DECEMBER 2024

BETWEEN

TANO DIGITAL KENYA LIMITED.....APPLICANT

AND

THE MANAGING TRUSTEE/ CHIEF EXECUTIVE OFFICER,

NATIONAL SOCIAL SECURITY FUND.....1ST RESPONDENT

NATIONAL SOCIAL SECURITY FUND.....2ND RESPONDENT

Review against the decision of the Accounting Officer, National Social Security Fund in respect of Tender No. NSSF/ONT/ERP/04/2024/25 for Provision of Implementation Services for SAP ERP Optimization Upgrade to S/4 HANA and Supply, Installation, Testing and Commissioning of Additional SAP Modules and Provisions of Software Licences.

BOARD MEMBERS PRESENT

Mr. George Murugu, FCI Arb & IP Chairperson

Mr. Joshua Kiptoo Member

Mr. Stanslaus Kimani Member



IN ATTENDANCE

Mr. Philemon Kiprop

Secretariat

Mr. Anthony Simiyu

Secretariat

PRESENT BY INVITATION

APPLICANT

TANO DIGITAL KENYA LIMITED

Mr. Gideon Muturi

Advocate, G.K. Muturi & Co. Advocates

Ms. Amy Maina

Legal Assistant, G.K Muturi & Co. Advocates

RESPONDENTS

**THE MANAGING TRUSTEE/ CHIEF
EXECUTIVE OFFICER, NATIONAL SOCIAL
SECURITY FUND**

NATIONAL SOCIAL SECURITY FUND

Ms. Desma Nungo

Advocate, NOW Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

1. The National Social Security Fund, the Procuring Entity together with the 1st Respondent herein, invited interested suppliers to submit their bid in response to Tender No. NSSF/ONT/ERP/04/2024/25 for Provision of Implementation Services for SAP ERP Optimization Upgrade to S/4 HANA



and Supply, Installation, Testing and Commissioning of Additional SAP Modules and Provisions of Software Licences through the Open (National) tender method. The tender submission deadline was set as 22nd October 2024 at 11:00 a.m.

Submission of Bids and Tender Opening

2. According to the Tender Opening Minutes dated 22nd October 2024 under the Confidential File submitted by the Procuring Entity, the following three (3) bidders were recorded as having submitted their bids in response to the subject tender by the tender submission deadline.

| # | Bidder |
|----|----------------------------|
| 1. | Seidor Kenya Limited |
| 2. | Tano Digital Kenya Limited |
| 3. | Deloitte & Touche LLP |

Evaluation of the Applicant's Bid

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



Preliminary Evaluation

4. At this stage of the evaluation, the submitted bids were to be examined using the criteria set out as Preliminary/Mandatory Requirements under Section III- Evaluation and Qualification Criteria at pages 38 to 39 of the blank Tender Document.
5. The evaluation was to be on a Yes/No basis and any bid that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
6. At the end of the evaluation at this stage, all the submitted bids were found unresponsive to the mandatory requirements and thus disqualified from further evaluation at the Technical and Financial Evaluation Stages.

Evaluation Committee's Recommendation

7. Satisfied that none of the bids was responsive at the Preliminary Evaluation Stage, the Evaluation Committee in the Evaluation Report dated 22nd November 2024 recommended termination of the subject tender under Section 63(1)(f) of the Public Procurement and Asset Disposal Act (hereinafter "the Act").

Professional Opinion

8. In a Professional Opinion dated 22nd November 2024 (hereinafter referred to as the "the Professional Opinion") the Procuring Entity's Head of Supply Chain Management , Bethuel B. Chemitei, reviewed the manner in which



the subject procurement process was undertaken and recommended the termination of the subject tender as per the Evaluation Committee's Report.

9. The Professional Opinion was subsequently approved by the 1st Respondent, on the same day, 22nd November 2024.

Notification to the bidders

10. Accordingly, the bidders were notified of the outcome of the evaluation process in the subject tender vide letters dated 22nd November 2024.

REQUEST FOR REVIEW

11. On 6th December 2024, the Applicant herein through the firm GK Muturi & Company Advocates filed a Request for Review of even date supported by an affidavit sworn on 5th December 2024 by Jane Wanja Muriithi, the Applicant's Country General Manager, seeking the following orders:

a) The Respondents' decision vide the letter of 22nd November 2024 disqualifying the Applicant's bid with respect to TENDER REF: NSSF/ONT/ERP/04/2024/25 for the provision of implementation services for SAP ERP Optimisation Upgrade to SAPs/4 HANA and supply, Installation, Testing, Training And Commissioning of Additional SAP Modules and provision of software licences to be set aside.



- b) The Respondent's Notification be set aside for failure to disclose the winning bidder as required under section 87 of the Public Procurement and Asset Disposal Act, 2015;**
- c) The Respondents be ordered to re-admit the Applicant's bid and proceed and evaluate it in compliance with the tender documents, the Public Procurement and Asser Disposal Act and the Constitution.**
- d) In the alternative to prayer (b) above the Honourable Board be pleased to review all records of the procurement process relating to TENDER REF: NSSF/ONT/ERP/04/2024/25 for the provision of implementation services for SAP ERP Optimisation Upgrade to SAPs/4 HANA and supply, Installation, Testing, Training And Commissioning of Additional SAP Modules and provision of software licences do substitute the decision of the Respondent with an order for an award of the Tender to the Applicant.**
- e) Such other or further relief or reliefs as this Board shall deem just and expedient.**

12. On the same day, 6th December 2024, the Applicant filed a Further Affidavit sworn on even day by Jane Wanjia Muriithi.

13. In a Notification of Appeal and a letter dated 6th December 2024, Mr. James Kilaka, the Ag. Board Secretary of the Board notified the Respondents of the filing of the instant Request for Review and the



suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the said Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 6th December 2024.

14. On 11th December 2024, the Ag. Board Secretary, sent out to the parties a Hearing Notice notifying parties that the hearing of the instant Request for Review would be by online hearing on 17th December 2024 at 11:00 a.m. through the link availed in the said Hearing Notice. This date was subsequently changed to 19th December 2024 at 11:00 a.m.
15. On 13th December 2024, the Respondents through the firm of NOW Advocates LLP filed a Notice of Appointment of Advocates. Thereafter on 16th December 2024, the Respondents filed their Memorandum of Response of even date and equally forwarded to the Board the Confidential Documents under Section 67(3) the Act.
16. On 19th December 2024, the Applicant filed Written Submissions and a Bundle of Authorities, both dated 19th December 2024.



17. Later on the same day, 19th December 2024, at 10:29 a.m. the Applicant filed a Further Affidavit sworn on even date by Jane Wanja Muriithi.
18. On 19th December 2024 at 10:50 a.m. Counsel for the Applicant, Mr. Muturi sent an email to the Board Secretary seeking for the hearing of the Request for Review to be rescheduled to 2:00 or 3:00 p.m. on the same day to allow him attend to a hearing before Hon. Mutegi.
19. When the Board convened on 19th December 2024 at 12:00 noon, Counsel for the Respondent, Ms. Nungo and Ms. Wanja were present. The Board notified the parties present of the its receipt of the email from Counsel for the Applicant, Mr. Muturi seeking an adjournment of the Request for Review to 2:00 pm or 3:00 pm that day and invited the Respondents respond to the request for an adjournment. Counsel for the Respondents, Ms. Nungo, indicated she had been copied in the email making the adjournment request. Further that the Respondents were agreeable to accommodating the request for an adjournment to 3:00 pm to allow them file Written Submissions in response to the Applicant's Written Submissions and Further Affidavit that were filed moments before the 12 noon hearing time.
20. Accordingly, the Board adjourned the hearing of the Request for Review to 3 pm with leave being extended to the Respondents to file their Written Submissions before then.



21. Later on the same day at 12:17 p.m. the Applicant filed another Further Affidavit sworn by Jane Wanja Muriithi and equally sent an email to the Board Secretary withdrawing the earlier Further Affidavit by the same deponent filed on the same day. The Applicant filed a Supplementary Bundle of Authorities of even date.
22. Later on the same day, 19th December 2024, the Respondents filed their Written Submissions and Bundle of Authorities of even date.
23. Thereafter on 19th December 2024 at 3:00 p.m. when the Board convened for the hearing, the parties were represented by their various Advocates. Counsel for the Applicant, Mr. Muturi was now present. The Board therefore read through a list of the documents filed in the matter and asked parties to confirm having filed and been served the said documents, to which Counsel responded in the affirmative. Counsel present equally confirmed their readiness to proceed with the online hearing.
24. Accordingly, the Board gave the following directions on the order of address:
 - i. The Applicant would start by arguing the Request for Review within 10 minutes.
 - ii. The Respondents would then offer a response within 10 minutes;
 - iii. Thereafter, the Applicant would close by way of rejoinder in a minute.



PARTIES SUBMISSIONS

Applicant's Submissions

25. Counsel for the Applicant, Mr. Muturi, indicated that he was placing reliance on the Applicant's filed documents in the matter. According to Counsel, the Applicant submitted a responsive bid only to receive a Notification that its bid was unsuccessful for (i) Not submitting the platinum of gold SAP partnership certification (ii) Not having completed 3 projects as the lead quality assurance partner; and (iii) Having not previously implemented at least 2 successful factors to SAO ERP/S4HANA. The Respondents attributed the documents submitted to Tano Digital Solutions (Private Limited) Zimbabwe and not the Applicant.
26. Mr. Muturi faulted the Evaluation Committee for failing to take cognizance of the parent-subsidary relationship between the Applicant and Tano Digital Solutions (Private) Limited Zimbabwe. Counsel contended this relationship was comprehensively documented through the Applicant's CR12 Form, Group Company Organogram, Firm Profile of the Group Company as well as the Confirmation Letter from SAP East Africa confirming the Applicant's status as an authorized distributor and channel partner of SAP solutions.
27. According to Counsel, it was a well-established principle in procurement law and corporate practice that a subsidiary or a related company within a group may rely upon the resources, certifications and experience of its



parent company to satisfy tender requirement provided the relationship is properly documented and verifiable. Further that this was anticipated under ITT 4.1 under Section I of the Tender Document.

28. Mr. Muturi argued that though Clause ITT 4.1 under Section II Tender Data Sheet specified that JV shall not apply, this did not affect other combinations such as related entities or subsidiaries.
29. Reliance was made on **Gatuma v Kenya Breweries Ltd & 3 others (Petition E023 of 2023) [2024] KECA 52; PPARB Application No. 82 of 2020 GE East Africa Services Limited v Kenyatta University Teaching referral and Research Hospital & another** and Article 63 of the European Union's Directive 2014/24/EU on public procurement for the proposition that the capabilities of a parent company can be considered for purposes of evaluating the qualifications of a subsidiary company.
30. According to Counsel, the Tender Document did not expressly prohibit a subsidiary company from leveraging its parent company's qualifications, resources or certifications and thus the Applicant's bid was erroneously disqualified. Counsel posited that the Procuring Entity failed to exercise its discretion under Section 81 of the Act as it did not seek any clarification from the Applicant regarding its relationship with the parent company.



31. Mr. Muturi equally faulted the Notification Letter sent to the Applicant citing that it failed to disclose the successful bidder as contemplated under Section 87(3) of the Act. For this reliance was placed on **Republic v Procurement Administrative Review Board & Another; Wodex Technologies Ltd (Exparte Applicant) & Tana Solutions Limited (Interested Party) [2023] KEHC 24930 (KLR)**.
32. Accordingly, the Applicant invited the Board to allow the Request for Review.

Respondents' Submissions

33. Counsel for the Respondents, Ms. Nungo, indicated that the Respondents were placing reliance on their filed documents together with the documents constituting the Confidential File.
34. She submitted that under Section 79(1) of the Act, a bid is only responsive if it complies with all eligibility and other mandatory requirements. Further Section 80(2) of the Act evaluation of bids should only be conducted in accordance with the evaluation criteria set out in the Tender Document.
35. Counsel contended that ITT 4.1 at page 33 of the Tender Document expressly prohibited Joint Ventures and thus it bidders could not seek to rely on documentation and expertise of companies outside themselves.



36. She contended that the Applicant's bid was established as non-responsive to Mandatory Requirements No. 7, 11 and 12 set out at page 38 of the Tender Document as the bid contained documentation for Tano Digital Solution (Private) Limited Zimbabwe in place of the Applicant.
37. Reliance was made on **Republic v Public Procurement Administrative Review Board, Mombasa Water Supplies & Sanitation Co. Ltd & deans Security Limited Ex parte Babs Security Services Limited [2018] KEHC 9447 (KLR)** for the proposition that bidders should compete on a equal footing and that Procuring Entities should only consider responsive bids. According to Counsel the Applicant's bid was properly disqualified for being non-responsive to Mandatory requirements under the Tender Document.
38. Ms. Nungo submitted that the Respondents properly informed the Applicant of the outcome of the subject tender by issuing it a written notification which outlined the reasons why the Applicant's bid was unsuccessful. Further that since all the bids in the subject tender were disqualified, there was no successful bidder to disclose in the Notification Letters sent to the bidders. She therefore urged the Board to find that the Respondents complied with Section 87 of the Act.
39. Further that the clarifications contemplated under the Tender Document was discretionary and only applicable in unclear situations. According to Counsel, the Applicant's reliance on documents of different entity was a



straight forward on that did not warrant the seeking of any clarification. She therefore urged the Board to dismiss the Request for Review.

Applicant's Rejoinder

40. In a brief rejoinder, Counsel for the Applicant, Mr. Muturi. Submitted that the Notification Letter was lacking in clarity in terms of whether there was a successful bidder as required under Section 87(3) of the Act.
41. Further that though the Respondents ought to have sought clarity from the Applicant with its relationship with Tano Digital Solutions (Private) Limited, Zimbabwe.
42. Additionally that the Respondents had confirmed that the Procuring Entity applied the literal approach in processing the Applicant's bid as opposed to a wholesome interrogation of the Applicant's bid. According to Counsel, had the Respondents properly evaluated the Applicant's bid, the Applicant would have been established as responsive to the requirements under the Tender Document.

CLARIFICATIONS

43. The Board sought clarity from the Respondents on whether the documents contained in the Applicant's Further Affidavit were also part of its original bid. Counsel for the Respondents, Ms. Nungo indicated that they could not verify this since the Further Affidavit was served on them



on the material hearing date and by which time they had already forwarded to the Board, the Applicant's original bid.

44. The Board asked the Applicant to clarify on the relationship between the Applicant, Tano Digital Solutions (Private) Limited Zimbabwe and TWM Digital Solutions (Private) Limited. Counsel for the Applicant, Mr. Muturi referred to the Tano Digital Solutions (Private) Limited, Zimbabwe's Company Profile highlighting that Tawanda Wallen Mangare is the CEO. Further, that the said CEO is also named as Director in the Applicant's CR12 Form. Additionally, that TWM Digital Solutions (Private) Limited is the only shareholder in the Applicant and also doubles up as the majority shareholder in the Tano Digital Solutions (Private) Limited, Zimbabwe.
45. The Board asked the Applicant to confirm if there was any official records held by a public authority confirming the relationship among the 3 companies. Counsel for the Applicant Mr. Muturi, indicated that there was no such record but invited the Board to adopt the position that in procurement proceedings the Board should not concern itself with the clear relationship among companies as per the rule in *Salomon v Salomon* but should give effect to indirectly owned companies in terms of control.
46. The Board asked the Applicant to confirm if the documents contained in its Further Affidavit were also part of its original bid in the subject tender. Counsel for the Applicant, Mr. Muturi indicated that from the information



received from his client, the said documents constituted part of the Applicant's original bid.

47. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 6th December 2024 had to be determined by 27th December 2024. Therefore, the Board would communicate its decision on or before 27th December 2024 to all parties via email.

BOARD'S DECISION

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

- I. **Whether the Applicant's bid was disqualified from the subject tender in accordance with the provisions of the Act and the Tender Document?**
- II. **Whether the Respondents' Letter of Notification addressed to the Applicant satisfies the requirements under Section 87(3) of the Act and Regulation 82 of the Regulations 2020?**
- III. **What orders should the Board issue in the circumstance?**



Whether the Applicant's bid was disqualified from the subject tender in accordance with the provisions of the Act and the Tender Document?

49. The Applicant instituted the present Request for Review taking issue with the disqualification of its bid in what was termed as reliance on documents belonging to other entities. Counsel for the Applicant, Mr. Muturi made the argument that in procurement it was permissible for a bidder to place reliance on the documents of its parent company or other related company for purposes of meeting a requirement in the Tender Document. It was therefore the Applicant's position that it was an error on the part of the Respondents to disqualify it for using documents from its parent company Tana Digital Solutions (Private) Limited, Zimbabwe.
50. On the flip side, the Respondents maintained that the Applicant's bid was disqualified for being non-responsive to Mandatory Requirements No. 7, 11 and 12 as set out in the Tender Document. According to Counsel for the Respondents, Ms. Nungo, the Applicant submitted documents belonging to Tano Digital Solutions (Private) Limited, Zimbabwe instead of submitting its own documents. She contended that since ITT 4.1 under Section II -Tender Data Sheet prohibited joint ventures in the subject tender, it was not open for the Applicant to submit documents belonging to other companies as part of its bid.
51. Drawing from the above divergent positions, this Board is invited to pronounce itself on the correctness of the evaluation process culminating



in the disqualification of the Applicant's bid. Specifically, the Board is called upon to address the adequacy of the Applicant's bid in compliance with Mandatory Requirement No. 7, 11 and 12 under the Tender Document.

52. For starters, Section 80 of the Act offers guidance on how an Evaluation Committee should proceed with the evaluation of bids in the following terms:

"80. Evaluation of tenders

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

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

53. On its part Section 79 of the Act speaks to the responsiveness of a bid in the following terms:

79. Responsiveness of tenders

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

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



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

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

"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration.[9] Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or



functionality/technical, pricing and empowerment requirements.[10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

20. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents.



Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."

See also **Nairobi High Court Judicial Review Misc. Application No. 407 of 2018; Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR; Republic v Public Procurement Administrative Review Board & anor; Ex parte Wilis Protocol & Concierge Services Limited [2021]eKLR; Republic v Public Procurement Administrative Review Board & Ors Ex parte Roben Aberdare (K) Limited [2019]eKLR; Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk 2020 eKLR**



55. Drawing from the above, the Tender Document is the key guide in the evaluation of bids submitted in response to any tender invitation. Further, for a bid to be deemed responsive in respect of any requirement, it must comply with the specification of the actual requirement as set out in the Tender Document.
56. Turning to the present Request for Review, whereas the Applicant contends that it submitted a responsive bid, the Respondents counter this by arguing that the Applicant's bid was nonresponsive to Mandatory Requirements No. 7, 11 and 12.
57. The Board has keenly studied the blank Tender Document and noted that Mandatory Requirements No. 7, 11 and 12 are traceable under Section III- Evaluation and Qualification Criteria at page 38 of the Tender Document:

PRELIMINARY/MANDATORY REQUIREMENTS

| No. | Mandatory Criteria |
|------------|--|
| 1. | .. |
| .. | ... |
| 7 | Must be a Platinum or Gold SAP Partner (provide partnership status) |
| ... | ... |



| | |
|-----------|--|
| 11 | Services Provider for LOT I (Quality Assurance) to have completed a minimum of three S/4 HANA implementation projects as the Lead Quality Assurance Partner, no JV's allowed in this case (Provide Reference Letters) |
| 12 | For LOT II, the tenderer must have implemented and integrated success factors to SAP ERP/S4 HANA and implemented SAP Analytics in at least 2 public sector organization in Kenya |
| .. | ... |

58. Equally relevant to these proceedings is ITT 4.1 under Section II- Tender Data Sheet (TDS) at page 33 of the Tender Document which reads:

| Reference to ITC Clause | PARTICULARS OF APPENDIX TO INSTRUCTIONS TO TENDERS |
|--------------------------------|---|
| ... | ... |
| ITT 4.1 | JV shall not be applicable The tenderer may choose to participate in either provision of software licenses and subscription or provision of implementation services for SAP ERP UPGRADE to S4HANA or both. |

59. From the foregoing it is apparent that:

- i. The Tender Document prohibited bidders from submitting their bids as part of joint ventures.



- ii. For a bid to be responsive to Mandatory Requirement No. 7 it must contain evidence of partnership status as a Platinum or Gold SAP Partner. Absent the evidence of a bidder's partnership status as a Platinum or Gold SAP Partner would lead to their bid being deemed as unresponsive to Mandatory Requirement No. 7.
- iii. For a bid to be responsive to Mandatory Requirement No. 11 it must contain a Reference Letter showing that the bidder has a completed a minimum of 3 S/4 HANA implementation projects as the Lead Quality Assurance partner. Absent the minimum number of 3 Reference letters showing that a bidder has a completed a minimum of 3 S/4 HANA implementation projects as the Lead Quality Assurance partner would lead to their bid being deemed unresponsive to Mandatory Requirement No. 11.
- iv. For a bid to be responsive to Mandatory Requirement No. 12 it must have contained evidence that the bidder had implemented and integrated success factors to SAP ERP/S4HANA and implemented SAP Analytics in at least 2 public sector organizations in Kenya. Absent evidence of a bidder having implemented and integrated success factors to SAP ERP/S4HANA and implemented SAP Analytics in at least 2 public sector organizations in Kenya would lead to their bid being deemed unresponsive to Mandatory Requirement No. 12.

60. It is equally not in dispute that the Applicant submitted the relevant documents to demonstrate compliance with Mandatory Requirements No. 7, 11 and 12, only that the submitted documents were not in its name



but that of Tano Digital Solutions (Private) Limited Zimbabwe. Therefore, the question before the Board is whether the Respondents correctly disqualified the Applicant's bid for submitting documents belonging to Tano Digital Solutions (Private) Limited Zimbabwe to demonstrate responsiveness to Mandatory Requirements No. 7, 11 and 12.

61. In order for the Board to determine the appropriateness of the Applicant's use of documents belonging to Tano Digital Solutions (Private) Limited Zimbabwe, it would be important to have regard to the eligible bidders in the tender. For this Clause 4.1 under Section I-Instruction To Tenderers at page 7 of the Tender Document is instructive in the following terms:

4.1 A Tenderer may be a firm that is a private entity, a state-owned enterprise or institution subject to ITT 4.6, ...

62. On its part ITT 4.6 under Section I-Instruction To Tenderers at page 8 of the Tender Document provides as follows:

4.6 A Tenderer that has been debarred from participating in public procurement shall be ineligible to tender or be awarded a contract. The list of debarred firms and individuals is available

63. From the above it is apparent that the subject tender was open to eligible bidders who could either be private or state-owned enterprises. ITT 4.1 under Section II offered further guidance that none of the eligible bidders could get into a joint venture.



64. The Cambridge Online Dictionary defines a joint venture as **“a business or business activity that two or more people or companies work on together”**
65. On its part the Black’s Law Dictionary (8th Edition) defines a joint venture in the following terms:
“A business undertaking by two or more persons engaged in a single defined project. • The necessary elements are: (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member's equal voice in controlling the project. — Also termed joint adventure; joint enterprise. Cf. PARTNERSHIP; STRATEGIC ALLIANCE.
66. From the above definitions, it would appear that a joint venture involves an agreement between two or more people or entities to collaborate in a business undertaking for mutual gain.
67. Turning to the present case, ITT 4.1 under the Tender Data Sheet prohibited any such agreement among bidders to collaborate with respect to the submission of their bids. Counsel for the Applicant, Mr. Muturi, attempted to argue that the prohibition of the joint ventures did not affect the Applicant’s bid but we find great difficulty with this argument for the following reasons:



- i. Whereas the Tender Document expressly prohibited the formation of alliances for purposes submission of bids, the Applicant opted to use documents belonging to Tano Digital Solutions (Private) Limited, Zimbabwe, a company the Applicant posited was related to the Applicant. Essentially, what the Applicant did was to attempt to circumvent the prohibition of a joint venture by purporting to collaborate with and demonstrate that Tano Digital Solutions (Private) Limited, Zimbabwe and itself were related companies under the guise that it was a wholly owned subsidiary of Tano Digital Solutions(Private) limited Zimbabwe whereas at paragraph 8 of the Request for Review, the applicant refers the board to a cr12 certificate(annexture jwm 3) Which illustrates that the applicant is wholly owned by TWM Digital Solutions(Private) Limited, Zimbabwe. Accordingly, it was not open for the Applicant to purport to use the documents of another entity.
- ii. The separate legal personality principle as understood in company law and as established in the leading authority of **Salomon v Salomon Co. Limited [1897] AC 22** is to the effect that a company is at law a separate legal entity from its shareholders and directors. It is therefore not open for the Applicant to suggest that it bears some relationship with Tano Digital Solutions (Private) Limited, Zimbabwe by virtue of having a common shareholding or directorship to justify any such use of its documents. Therefore, for purposes of the subject tender the Applicant was required to submit



documents that belonged to it and not any of its related companies if such relationship even exists herein.

- iii. The Tender Document in the subject tender is clear on the eligible bidders and joint ventures are expressly prohibited. In the present case the Tender Document expressly prohibits joint ventures and thus the Applicant herein cannot purport to rely on documents by other entities including Tano digital solutions(private) Limited, Zimbabwe which is pleaded at paragraph 7 and 8 of the request for review to wholly own the applicant, which we find rather perplexing as the evidence produced at JwM 3 to the supporting affidavit of Jane Wanja Muriithi, is a CR12 demonstrating the Applicant as being wholly owned by TWM Digital Solutions (private) Limited and no other legal (Kenya or Zimbabwe) company registry Documentation or registration was produced to demonstrate the alleged parent -subsidiary Company status between Tano Digital Solutions (private) Limited, Zimbabwe and Tano Digital Kenya Limited. Equally, the purported Group Company Organogram (annexture jwm4), Group Company profile (annexture jwm6) did not demonstrate or in anyway support the allegations of the purported parent and subsidiary relationship as averred in paragraph 7 and 8 of the Request for review.

68. The Applicant equally relied on **Gatuma v Kenya Breweries Ltd & 3 others (Petition E023 of 2023) [2024] KECA 52; PPARB Application No. 82 of 2020 GE East Africa Services Limited v**



Kenyatta University Teaching referral and Research Hospital & another and Article 63 of the European Union's Directive 2014/24/EU for the proposition that in procurement a subsidiary company participating in a bid can place reliance on the expertise and qualifications of its parent or related company. The Board finds that none of the above authorities is applicable in the present case as shall become apparent in the ensuing paragraphs:

69. **Gatuma v Kenya Breweries Ltd & 3 others (Petition E023 of 2023) [2024] KECA 52** was an appeal to the Supreme Court on a labour dispute with respect to change of remuneration of an employee in the context of a parent company and subsidiary company. The apex court affirmed the applicability of the separate legal personality principle as follows:

69. From the above authorities the principles of Salomon vs Salomon (supra) are applicable in the context where corporates are involved. The prima facie position reached by applying the principle in Salomon in corporate groups is that each member company or corporate group is a separate legal entity. Liability will generally fall on the member and the group can structure itself so that liability from its activities will fall on a particular member and that member only. The corporate veil can only be pierced or lifted in exceptional circumstances, such as when the court is construing a statute, contract or other document which requires the veil to be



lifted; when it can be shown that the company is being used as a mere façade or sham to perpetrate fraud, avoid legal obligations, or achieve some other improper purpose and, when it can be established that the company is an authorised agent of its controllers or its members, corporate or human.

70. On its part, **PPARB Application No. 82 of 2020 GE East Africa Services Limited v Kenyatta University Teaching referral and Research Hospital & another**, was a decision of this Board in a Request for Review in which the Applicant therein challenged the termination of a tender on construction, equipping, training and operationalization of an integrated molecular imaging centre subsequent to an award being made to it. One of the issues before the Board was whether a bidder that is part of a conglomerate could rely on the technical expertise of its parent company within the context of Tender Document that did not specify who was an eligible bidder. In finding the affirmative, the Board variously pronounced itself thus:

Having considered the foregoing submissions, the Board observes that the Procuring Entity's Advertisement Notice dated 3rd March 2020 did not specify who an eligible tenderer is....(page 32)

...

...It is the Board's considered finding that the Applicant being an indirect wholly owned subsidiary of General Electric



Company (the Parent Company and conglomerate) can rely on the technical expertise of its parent company (Page 45)

...

The Board studied the Procuring Entity's Board Paper on the Proposed Integrated Molecular Imaging Centre dated December 2019, which forms part of the confidential file submitted to the Board pursuant to section 67 (3) (e) of the Act and notes that the Procuring Entity was alive to the urgent need of a Cancer Centre that would be accessible to all Kenyans and facilitate detection of cancer disease at its early stages. (Page 49)

...

From the foregoing, the Board is convinced that a delay by way of terminating the subject procurement proceedings and starting afresh will delay the promotion of the socio-economic right under Article 43 (1) (a) of the Constitution to the detriment of the people of Kenya. In the circumstances, the Board finds that the subject procurement process should proceed to its logical conclusion as long as the contract to be executed with respect to this procurement process is signed by the Procuring Entity, the Applicant and the designated Original Cyclotron Equipment Manufacturer/parent company of the Applicant (Pages 52 to 53)



71. The Supreme Court in **SGS Kenya Limited v Energy Regulatory Commission & Others; Petition No. 2 of 219** considered an appeal in which the apex court was called upon to determine whether tribunals and more specifically this Board, was bound by its past decisions. In dismissing the appeal, the superior court held:

[43] Such a variegated range of implementation scenarios, it is apparent to us, calls for flexibility in the regulatory scheme. In principle, matters on the agenda of an administrative tribunal will merit determination on the basis of the claims of each case, and will depend on the special factual dynamics. The relevant factors of materiality, and of urgency, will require individualised response in many cases: and in these circumstances, a strict application of standard rules of procedure or evidence may negate the fundamental policy-object. On this account, the specialized tribunal should have the capacity to identify relevant factors of merit; be able to apply pertinent skills; and have the liberty to prescribe solutions, depending on the facts of each case. Such a tribunal should fully take into account any factors of change, in relation to different cases occurring at different times: without being bound by some particular determination of the past.

[44] We would agree with the 1st respondent, that administrative decision-makers should have significant flexibility, in responding to changes that affect the subject-



matter before them. Matters before an administrative tribunal should be determined on a case-to-case basis, depending on the facts in place.

72. From the above decision by the Supreme Court this Board is called upon to adjudicate disputes before it on a case by case basis having in mind the unique circumstances that each case turns upon. Its worthy to note that in the GE case above, at page 613 of its bid, the applicant attached a certificate of attestation registered with our Kenya companies registry certifying the subsidiary status of the Applicant therein, which fact is captured at page 37 of the subject decision.
73. Turning to the instant case, this Board's decision in **PPARB Application No. 82 of 2020 GE East Africa Services Limited v Kenyatta University Teaching referral and Research Hospital & another** is inapplicable as the facts in the present case are distinguishable:
- i. Unlike in PPARB Application 82 of 2020 where the Tender Document was not clear on the eligible bidders, the Tender Document in the subject tender is clear on the eligible bidders and joint ventures are expressly excluded. Accordingly, it was permissible for the Applicant in Application 82 of 2020 to rely on the documents of its related companies. However in the present case the Tender Document expressly prohibits joint ventures and thus the Applicant herein cannot purport to rely on documents by other entities including Tano digital solutions(private) Limited, Zimbabwe which is pleaded



at paragraph 7 and 8 of the request for review to wholly own the applicant, which we find rather perplexing as the evidence produced at JwM3 to the supporting affidavit of Jane Wanja Muriithi, is a CR12 demonstrating the Applicant as being wholly owned by TWM Digital Solutions (private)Limited and no other legal (Kenya or Zimbabwe) company registry Documentation or registration was produced to demonstrate the alleged parent -subsidiary Company status between Tano Digital Solutions(private) Limited, Zimbabwe and Tano Digital Kenya Limited.

- ii. The procurement process in PPARB Application 82 of 2020 was unique as there was a sense of urgency in the setting up of a cancer centre and the Applicant, who was the only bidder in the subject tender had already been awarded the tender. The Board was therefore of the view that starting the procurement process afresh would delay the matter. Such urgency and uniqueness does not obtain in the subject tender involving software licenses and where there were 3 participating bidders, none of whom was successful in the bid.

- 74. Additionally, Article 63 of the European Union's Directive 2014/24/EU, which was also relied upon by the Applicant is inapplicable. The said article is a legislative act meant to guide European Union member states on their approach to procurement matters. Therefore, the same does not find mandatory application in this country as it is not a European Union



member state and can only be of persuasive value. In the present case no such persuasive value derives from the article noting that the Tender Document expressly prohibited Joint ventures among the bidders.

75. The Board therefore finds no fault on the part of the Evaluation Committee for disqualifying the Applicant's bid on account of being non-responsive to Mandatory Requirements No. 7, 11 and 12.
76. In view of the foregoing, the Board finds that the Applicant's bid was disqualified from the subject tender in accordance with the provisions of the Act and the Tender Document. The Applicant's bid was unresponsive for failing to submit its own documents in response to Mandatory Requirements No. 7, 11 and 12 of the Tender Document as its bid instead contained documents belonging to a separate entity, Tano Digital Solutions (Private) Limited Zimbabwe.

Whether the Respondents' Letter of Notification addressed to the Applicant satisfies the requirements under Section 87(3) of the Act and Regulation 82 of the Regulations 2020?

77. In addition to challenging its disqualification from the subject tender, the Applicant assailed the Notification Letter addressed to it citing that it failed to disclose the identity of the successful bidder as contemplated under Section 87(3) of the Act. According to Counsel for the Applicant, Mr. Muturi, the Respondents were under an obligation to disclose the identity



of the successful bidder and having failed to do so, they breached Section 87 of the Act.

78. The Respondents took a somewhat different position. They were of the view that the Notification Letter sent to the Applicant complied with the requirements of Section 87 of the Act. According to Counsel for the Respondents, Ms. Nungo, the Notification Letter was in writing, detailed the reasons for Applicant's disqualification and was sent to the Applicant simultaneously with those sent to the other bidders. Counsel explained that there was no successful bidder as all bids were disqualified at the Preliminary Evaluation Stage.
79. The Board is therefore invited to pronounce itself on whether the Notification Letter addressed to the Applicant in respect of the subject tender complied with the provisions of the Act and Regulations 2020.
80. Section 87 of the Act stipulates the contents of the notification letter to tenderers on the tender results in the following terms:

87. Notification of intention to enter into a contract

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



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

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

81. Regulation 82 of the Regulations 2020 offers further clarity by explaining the procedure for notification under Section 87(3) of the Act in the following words:

Notification of intention to enter into a contract

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



82. In view of the provisions of Section 87 of the Act read with Regulation 82 of the Regulations 2020, the Board observes that:

- i. An Accounting Officer of a Procuring Entity must notify, in writing, the bidder who submitted the successful bid that its bid was successful before the expiry of the tender validity period.
- ii. Simultaneously, while notifying the successful bidder, an Accounting Officer of a Procuring Entity notifies other unsuccessful bidders of their unsuccessfulness.
- iii. The Notification Letters must give reasons to the unsuccessful bidders as to why their bids were unsuccessful;
- iv. The Notification Letters should disclose the identity of the successful bidders and why such bidders were successful as well as the tender price at which the successful bidders were awarded a tender.

83. The above reasons and disclosures are central to the principles of public procurement and public finance as they speak to transparency and accountability as enshrined in Article 228 and 232 of the Constitution. This means all processes within a public procurement system, including the notification to unsuccessful tenderers must be conducted in a transparent manner.



84. In **Republic v Procurement Administrative Review Board & another; Woodex Technologies Ltd (Exparte Applicant); Tana Solutions Limited (Interested Party) (Judicial Review Miscellaneous Application E104 of 2023) [2023] KEHC 24930 (KLR)** the High Court pronounced itself on the importance of notification under Section 87 of the Act in the following terms:

106. A lot goes on behind the scene in the preparation to bid for all the tenderers. A lot of resources are channeled and expended towards securing or winning the bid. Tenderers put in a lot of time into the procurement preparation because it is a very competitive and tedious rigorous process. It is usually a delicate yet lucrative capital investment project for those who venture into the tender industry. The importance of notifying a tenderer who was not successful cannot be gain said. The notification is at the heart of the principle of fair hearing.

107. Public procurement involves the procurement of goods and services for the government departments and for the benefit of the public and it calls for a lot of transparency that goes hand in hand with the call for quality and value for money for the procurement entities. The statutory notification that is issued at the tail end, helps the tenderer who was not successful to decide whether or not to pursue administrative action to challenge the manner in which the successful candidate was awarded the tender. It also helps bring closure.



85. From the foregoing, the place of the Notification Letter within the context of a public tender cannot be gainsaid as it informs the cause of action a bidder in just concluded public procurement process can take towards the procurement decision conveyed through the said notification letter.
86. Turning to the present case, the Board has sighted the Notification Letter addressed to the Applicant as part of the Confidential Documents. The letter is identical to Annexure JWM-2 annexed to the sworn Affidavit of Jane Wanja Muriithi and is also reproduced herein for completeness of the record:

22nd November 2024

**The Managing Director
Tano Digital Kenya Limited
(Address details withheld)**

Dear Sir/Madam,

**TENDER NSSF/ONT/ERP/04/2024/25 PROVISION OF
IMPLEMENTATION SERVICES FOR SAP ERP OPTIMIZATION
UPGRADE TO SAP S/4 HANA AND SUPPLY, INSTALLATION,
TESTING, TRAINING AND COMMISSIONING OF ADDITIONAL
SAP MODULES**

**Further to your response to the above referenced tender
submitted on 22nd October 2024, the National Security Fund**



wishes to inform you that you were not successful because of the following reasons:

You did not meet the requirement for submitting the platinum or gold SAP partnership Certification. The attached certificates belong to Tano Digital Solutions (Private) Limited, Zimbabwe.

You have not completed a minimum of three projects as the lead quality assurance partner, instead, the attached completed projects were carried out by Tano Digital Solutions (Private) Limited, Zimbabwe.

You have not implemented and integrated at least two success factors to SAP ERO/S4HANA. The attached implementation was carried out by Tano Digital Solutions (Private) Limited, Zimbabwe.

How to Request Debriefing

...

How to make a Complaint

...

We thank you for having shown an interest in working with the Fund and wish you well in your business endeavours.

Yours faithfully,

Signed

David Koross

MANAGING TRUSTEE/CEO



87. From the said letter it is apparent that:
- i. The Applicant was informed in writing that its bid was unsuccessful.
 - ii. The Notification Letter outlines 3 reasons for which its bid was disqualified in the subject tender.
 - iii. The Notification Letter is however silent on the identity of the successful bidder.
88. The Respondents indicated that there was no successful bidder and that is why there was no disclosure of any bidder as the successful bidder. The Board has perused the Confidential File which confirms the position of the Respondents. There were 3 bids received in the subject tender and all the 3 bids were established as unresponsive at the Preliminary Evaluation Stage and thus disqualified from further evaluation.
89. Noting that there was no successful bidder in the subject tender, the Board finds that the Respondents' Notification Letter satisfied the requirements of Section 87 of the Act and Regulation 82 of the Regulations 2020. We cannot expect the Respondents to disclose the successful bidder in the subject tender when in fact none of the participating bidders emerged successful.
90. Therefore, the Board finds that the Respondents' Letter of Notification addressed to the Applicant satisfies the requirements under Section 87(3) of the Act and Regulation 82 of the Regulations 2020.



What orders the Board should grant in the circumstances?

91. The Board has found that the Applicant's bid was disqualified from the subject tender in accordance with the provisions of the Act and the Tender Document.
92. The Board equally found that the Respondents' Letter of Notification addressed to the Applicant satisfied the requirements under Section 87(3) of the Act and Regulation 82 of the Regulations 2020.
93. The upshot of our finding is that the Request for Review dated 5th December 2024 in respect of Tender No. NSSF/ONT/ERP/04/2024/25 for Provision of Implementation Services for SAP ERP Optimization Upgrade to S/4 HANA and Supply, Installation, Testing and Commissioning of Additional SAP Modules and Provisions of Software Licences fails in the following specific terms:

FINAL ORDERS

94. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2025, the Board makes the following orders in the Request for Review dated 5th December 2024:


1. The Request for Review dated 5th December 2024 in respect of Tender No. NSSF/ONT/ERP/04/2024/25 for Provision of Implementation Services for SAP ERP Optimization Upgrade



to S/4 HANA and Supply, Installation, Testing and Commissioning of Additional SAP Modules and Provisions of Software Licences be and is hereby dismissed.

2. Each party shall bear its own costs.

Dated at NAIROBI, this 27th day of December 2024.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB

