

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 11/2025 OF 4<sup>TH</sup> FEBRUARY 2025**

**BETWEEN**

**LOTUS ANALYTICAL LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**KENYA MEDICAL SUPPLIES AUTHORITY .....1<sup>ST</sup> RESPONDENT**

**KENYA MEDICAL SUPPLIES AUTHORITY .....2<sup>ND</sup> RESPONDENT**

**ULTRALAB E.A. LIMITED.....INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Medical Supplies Authority in respect of Tender No. GF ATM HIV GC7/OIT013/2024-2025 for Supply of CrAg and HIV Rapid Test Kit.

**BOARD MEMBERS PRESENT**

Ms. Jessica M'mbetsa                      Panel Chairperson

CPA Alexander Musau                      Member

Mr. Stanslaus Kimani                      Member

**IN ATTENDANCE**

Ms. Sarah Ayoo                              Secretariat

Mr. Anthony Simiyu                         Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT**

**LOTUS ANALYTICAL LIMITED**

Mr. Hasea

Advocate, Michael Daud & Associates Advocates

### **RESPONDENTS**

**THE ACCOUNTING OFFICER, KENYA  
MEDICAL SUPPLIES AUTHORITY**

**KENYA MEDICAL SUPPLIES AUTHORITY**

Ms. Noor

Advocate, Wetang'ula Adan & Company  
Advocates

### **INTERESTED PARTY**

**ULTRALAB E.A. LIMITED**

Ms. Mwangi

Advocate, AW Mwangi & Company Advocates

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenya Medical Supplies Authority (the Procuring Entity), together with the 1<sup>st</sup> Respondent herein, invited interested suppliers to submit their bids in response to Tender No. GF ATM HIV GC7/OIT013/2024-2025 for Supply of Crag and HIV Rapid Test Kit. It was an Open International Tender and the tender submission deadline was set as 8<sup>th</sup> October 2024 at 10:00 a.m.

### **Addendum**



2. On 19<sup>th</sup> September 2024, the Procuring Entity issued an Addendum offering clarification to various enquiries that had been made by interested suppliers.

### **Submission of Bids and Tender Opening**

3. According to the Tender Opening Minutes dated 8<sup>th</sup> October 2024 under the Confidential File submitted by the Procuring Entity, the following nine (9) bidders were recorded as having submitted their bids in response to the subject tender by the tender submission deadline.

#	Bidder
1.	Queseven Limited
2.	Ultralab E.A. Limited
3.	Umulqula Agencies Limited
4.	Hasscon Pharmaceutical Limited
5.	Questcare Limited
6.	Lotus Analytical Limited
7.	Jos Hansen East Africa Limited
8.	Lued Chemical Limited
9.	Medionics Healthcare Limited

### **Evaluation of Bids**

4. The 1<sup>st</sup> Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an

evaluation of the submitted bids in the following 5 stages in the subject tender as captured in the Evaluation Report

- i. Preliminary Evaluation
- ii. Technical Evaluation
- iii. Product Evaluation
- iv. Financial Evaluation
- v. Post qualification

### **Preliminary Evaluation**

5. At this stage of the evaluation, all the submitted bids were to be examined using the criteria set out as Clause A) Preliminary Examination under Section III- Evaluation and Qualification Criteria at page 38 of the blank Tender Document.
6. 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.
7. At the end of the evaluation at this stage, 3 of the submitted bids, including that of the Applicant, were found unresponsive to the mandatory requirements and thus disqualified from further evaluation. Only 6 bids, which included that of the Interested Party were responsive to the mandatory requirements and thus qualified for further evaluation.



## **Technical Evaluation**

8. At this stage of the evaluation, the bids successful at the Preliminary Evaluation Stage were to be examined using the criteria set out as Clause B) Technical Evaluation under Section III- Evaluation and Qualification Criteria at pages 38 to 39 of the blank Tender Document.
9. Bidders were to express interest in the supply of either or both Item 1 (Cryptococcal Antigen (CrAg) Lateral Flow Test Kits) and Item 2 (Blood Based HIVST). Each Item had its separate set of requirements, all of which were mandatory with the result that any bid that failed to meet any criterion outlined at this Stage would be disqualified from further evaluation.
10. In respect of Item 1, there were 3 bids that were evaluated at this stage and all of them, including that of the Interested Party, were established as responsive and thus qualified for further evaluation.
11. In respect of Item 2, there were 5 bids that were evaluated at this stage and 3 of them, including that of the Interested Party, were established as responsive and thus qualified for further evaluation. The other 2 unresponsive bids were disqualified at this stage.

## **Product Evaluation**

12. At this stage of the evaluation, the bids successful at the Technical Evaluation Stage were to be examined using the criteria set out as Clause

C) Product Evaluation under Section III- Evaluation and Qualification Criteria at page 39 of the blank Tender Document.

13. The evaluation was to be on a Yes/No basis with separate requirements being outlined for Items 1 and 2. Any bid that failed to meet any criterion under the relevant Item as outlined at this Stage would be disqualified from further evaluation.
14. In respect of Item 1, there were 3 bids that were evaluated at this stage and 2 of them were established as non - responsive and thus disqualified at this stage. The Interested Party's bid was the only bid that was found responsive at this stage and thus qualified for further evaluation.
15. In respect of Item 2, there were 3 bids that were evaluated at this stage and 2 of them were established as non-responsive and thus disqualified at this stage. The Interested Party's bid was the only bid that was found responsive at this stage and thus qualified for further evaluation.

### **Financial Evaluation**

16. At this stage of the evaluation, the bids successful at the Technical Evaluation Stage were to be examined using the criteria set out as Clause 2. Financial Evaluation at page 40 of the blank Tender Document.
17. Bids were to be evaluated through a comparison of their tender prices under each item. The successful bid for each item would be that offering

the lowest tender price for the relevant item among the bids that qualified for evaluation at the Financial Evaluation Stage.

18. At the end of the evaluation at this stage, the Interested Party's bid was established as the bid offering the lowest tender price for both items, being that it was the only bid that was evaluated at this stage. The Interested Party's tender prices for Items 1 and 2 were **United States Dollars One Hundred Thousand, Nine Hundred and Seventy-Five (USD 100,975)** and **United States Dollars Six Hundred and Twenty-Five, Eight Hundred and Four and Ninety-Two Cents (USD 625,804.92)** respectively.

#### **Evaluation Committee's Recommendation**

19. The Evaluation Committee vide its Evaluation Report recommended the award of Items 1 and 2 of the subject tender to the Interested Party at its tendered prices of **United States Dollars One Hundred Thousand, Nine Hundred and Seventy-Five (USD 100,975)** and **United States Dollars Six Hundred and Twenty-Five, Eight Hundred and Four and Ninety-Two Cents (USD 625,804.92)** respectively.

#### **Post qualification**

20. The Evaluation Report records that the Evaluation Committee conducted due-diligence on the Interested Party verifying whether:

- i. The Interested Party had submitted evidence of at least 3 supply contracts for health products and technologies within the previous 3 years equivalent to the contract sum;
  - ii. The Interested Party had submitted evidence of average turnover for the previous 3 years equivalent to the contract sum;
  - iii. The Interested Party had submitted a statement of annual production capacity of the manufacturer which ought to have been thrice the quantities specified in the subject tender.
21. The Evaluation Committee found the Interested Party was responsive to the post-qualification criteria and therefore qualified for award of the subject tender.

### **Professional Opinion**

22. In a Professional Opinion dated 16<sup>th</sup> January 2025 (hereinafter referred to as the "the Professional Opinion") the Procuring Entity's Procurement Director, Mr. Moses Sudi, reviewed the manner in which the subject procurement process was undertaken and recommended that the subject tender be awarded to the Interested Party as per the recommendations of the Evaluation Committee.
23. On the same day, 16<sup>th</sup> January 2025, the Accounting Officer approved the Professional Opinion.

## **Notification to the bidders**

24. Accordingly, the bidders were notified of the intention to award Tender No.GF ATM HIV GC/OIT013/2024-2025 for Supply of Graig and HIV Rapid Test Kit vide letters dated 23<sup>rd</sup> January 2025.

## **REQUEST FOR REVIEW**

25. On 4<sup>th</sup> February 2025, the Applicant herein through the firm Michael Daud & Associates Advocates filed a Request for Review dated 30<sup>th</sup> January 2025 supported by Statement of even date by Mugo Kimani, a Director at the Applicant, seeking the following orders:

- a) The procuring entity's decision made on 23<sup>rd</sup> January 2025 declaring the Interested Party the successful bidder and granting the notification of award for Tender No. GF ATM HIV GC&/OIT13/2024-2025- Request for supply of CRAG AND HIV rapid test kit be and is hereby set aside;***
- b) An order be and is hereby made putting to a halt and or suspending the execution of contract for supply of CRAG AND HIV rapid test kit for tender number GF ATM HIV GC&/OIT13/2024-2025;***
- c) An order be and is hereby issued to the effect that the Applicant's bid be re-admitted to the mandatory stage assessment and if found responsive, the evaluation processed to be undertaken to its logical conclusion;***
- d) WITHOUT PREJUDICE TO THE ABOVE, an order be and is hereby issued to the 1<sup>st</sup> Respondent to undertake fresh***

***evaluation of all bids received in strict adherence to the tender, the Act and Regulations and award tender no. GF ATM HIV GC&/OIT13/2024-2025 for supply of CRAG AND HIV rapid test kit***

26. In a Notification of Appeal and a letter dated 4<sup>th</sup> February 2025, 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 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 4<sup>th</sup> February 2025.
27. On 10<sup>th</sup> February 2025, the Respondents through the firm of Wetang'ula Adan & Company Advocates, filed a Notice of Appointment and Memorandum of Response, both dated 7<sup>th</sup> February 2025. The Respondents equally forwarded to the Board the Confidential Documents under Section 67(3) the Act.
28. Vide letters dated 12<sup>th</sup> February 2025, the Acting Board Secretary notified all bidders in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the

Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> March 2020. All bidders in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within 3 days from 12<sup>th</sup> February 2025.

29. Subsequently, on 13<sup>th</sup> February 2025, 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 18<sup>th</sup> February 2025 at 2:00 p.m. through the link availed in the said Hearing Notice.
30. On 14<sup>th</sup> February 2025, the Interested Party through the firm of AW Mwangi & Company Advocates filed a Notice of Appointment.
31. On 17<sup>th</sup> February 2025, the Interested Party filed a Response to the Request for Review and Bundle of Documents, both dated 14<sup>th</sup> February 2025.
32. On the morning of 18<sup>th</sup> February 2025, the Interested Party filed Written Submissions and a Bundle of Authorities, both dated 18<sup>th</sup> February 2025.
33. When the Board convened for hearing on the same day, 18<sup>th</sup> February 2025 at 2:00 p.m. the parties were represented by their various Advocates. The Board asked parties to confirm documents filed and served amongst them in the instant Request for Review and having

established that pleadings had been exchanged, with the concurrence of Counsel appearing for the parties, it gave the following directions:

- i. The Applicant would start by arguing its Request for Review in 15 minutes;
- ii. Next, the Respondents would offer a response to the Request for Review in 15 minutes;
- iii. Thereafter, the Interested Party would address the Board on the Request for Review in 15 minutes; and
- iv. Lastly, the Applicant would close by way of rejoinder in 2 minutes.

34. Below is a summary of parties submissions before the Board:

### **PARTIES SUBMISSIONS**

#### **Applicant' Submissions**

35. Counsel for the Applicant, Mr. Hasea, indicated that the Applicant would be relying on its filed documents. According to Counsel, the Applicant submitted a bid that was responsive to the eligibility as well as the Mandatory Requirements under the subject tender.
36. He referred to Clause 29 and 30.1 under the Invitation To Tender on what constituted a responsive bid and substantial compliance to the requirements under the subject tender.
37. Mr. Hasea highlighted that the Applicant received a Regret Letter notifying it that its bid had been disqualified for the reason of not being sequentially

paginated. He contended that the Tender Document did not specify what constituted proper pagination and further, that in any event the Applicant's bid was properly paginated. Counsel was therefore of the view that the Applicant was erroneously denied an opportunity for further evaluation in the subject tender, noting that its bid was disqualified at the Preliminary Evaluation Stage.

38. Counsel argued that Section 79 of the Act offers a cure for minor deviations as they are exempted. Relying on Article 47 of the Constitution of Kenya, 2010, Sections 7(2) and 11(1)(e) of the Fair Administrative Action Act he argued that this Board has power to quash a decision that is unreasonable, not proportional, arrived at for an improper purpose, is irrelevant, lacks rationality and that is issued in breach of legitimate expectation.
39. Mr. Hasea concluded by indicating that the reasons introduced in the Regret Letter sent to the Applicant were fictitious and therefore urged the Board to allow the Request for Review.

### **Respondents' Submissions**

40. Counsel for the Respondents, Ms. Noor, indicated that the Respondents would be placing reliance on the documents they had filed in the matter. According to Counsel, the matter before the Board was not a refusal to award the subject tender to the Applicant but instead the Applicant's compliance with the requirements under the Preliminary Evaluation Stage of the subject tender.

41. Ms. Noor confirmed that the Applicant's bid was timeously submitted but was subsequently disqualified at the Preliminary Evaluation Stage for failing to meet the mandatory requirement on sequential pagination of bids. She highlighted that there were various cases of the Applicant's bid not being sequentially paginated:
- i. Page 78 was followed by page 81
  - ii. Page 79 was followed by page 80 and thereafter page 82
  - iii. Page 158 was followed by page 161 and thereafter page 159
42. She indicated that page 38 of the Tender Document outlined it as a mandatory requirement for bids to be serialized in a continuous manner 1,2,3,... n. This she argued was in compliance with Section 74 of the Act which requires an Accounting Officer to ensure that bid documents spell out that bidders are required to serialize their bids. She argued that there was a reason why serialization was made a mandatory requirement which was to avoid situations in which pages are inserted or plucked out of Tender documents.
43. Ms. Noor highlighted that the Tender Document made pagination a mandatory requirement, non-compliance with which led to disqualification of a bid. She contended that the Respondents observed Section 80(2) of the Act as the disqualification of the Applicant's bid was based on the non-responsiveness to the Tender Document's mandatory requirement on serialization.

44. Counsel concluded by arguing that the present Request for Review was frivolous and was unnecessarily stalling the procurement of HIV test kits that were in short supply in the country. She therefore urged the Board to dismiss the Request for Review and costs be awarded to the Respondents.

### **Interested Party's Submissions**

45. Counsel for the Interested Party, Ms. Mwangi, indicated that the Interested Party would be relying on their filed documents in the matter. She submitted that the Interested Party duly submitted its bid in the subject tender and that the bid was subjected to the various evaluation stages, before emerging as the successful bid.
46. Ms. Mwangi contended that the Request for Review was frivolous as it did not raise a genuine grievance. According to the Interested Party, if the Applicant had a genuine grievance, they would not have sought a relief on a without prejudice basis.
47. She further argued that even though Ultra E.A. Limited was pleaded as the Interested Party in the subject tender, the said company was not a proper party as it never took part in the subject tender. According to Counsel, the Interested Party was Ultralab E.A. Limited and not Ultra E.A. Limited and therefore relying on Section 170 of the Act, the Request for Review was defective.

48. Ms. Mwangi contended that the Tender Document was clear on the mandatory requirements which included sequential serialization of bids. She argued that this was in compliance with Section 74 of the Act which commands the Accounting officer to specify in any Invitation To Tender that bids should be serialized. Further, that the Tender Document specified that failure to comply with mandatory requirements would lead to automatic disqualification from further evaluation.
49. Relying on *Republic v PPARB & Others Ex parte Babs Security [2018]eKLR*, the Interested Party argued that the Applicant's bid was unresponsive to a mandatory requirement and was thus properly disqualified.

### **CLARIFICATIONS**

50. The Board called on the Applicant to offer clarity on whether its bid was sequentially paginated. Counsel for the Applicant, Mr. Hasea, indicated that the Applicant's bid was sequentially paginated and that in the event it was not, this was curable under Section 79 of the Act as a minor deviation.
51. The Board also sought clarification from the Applicant on whether it was aware that pagination was a mandatory requirement in the subject tender. Counsel for the Applicant, Mr. Hasea, confirmed that the Applicant was aware as much.

52. The Board underscoring that it had observed that part of the Interested Party's address centered on joinder of parties, asked the Interested Party to confirm whether they had filed a Preliminary Objection on the matter. Counsel for the Interested Party, Ms. Mwangi confirmed that none had been filed, attributing this to late instructions to her by the Interested Party.
53. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 4<sup>th</sup> February 2025 had to be determined by 25<sup>th</sup> February 2025. Therefore, the Board would communicate its decision on or before 25<sup>th</sup> February 2025 to all parties via email.

### **BOARD'S DECISION**

54. The Board has considered all documents, submissions and pleadings together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination:
- I. ***Whether the Procuring Entity's Evaluation Committee properly evaluated the Applicant's bid in accordance with the provisions of the Act, Regulations and Tender Document?***
  - II. ***What orders should the Board issue in the circumstance?***
- Whether the Procuring Entity's Evaluation Committee properly evaluated the Applicant's bid in accordance with the provisions of the Act, Regulations 2020 and Tender Document?**

55. Before addressing this issue as framed for determination, the Board wishes to dispense with the Interested Party's contention that the Applicant had joined Ultra E.A. Limited as a party in place of Ultralab E.A. Limited in breach of Section 170 of the Act. This Board is alive to Regulation 209 of the Regulations 2020 which addresses the filing of Preliminary Objections before it:

***209. Preliminary objections***

***(1) A party notified under regulation 206 may file a preliminary objection to the hearing of the request for review to the Secretary of the Review Board within three days from the date of notification.***

***(2) A preliminary objection filed under paragraph (1) shall set out the grounds upon which it is based on and shall be served to the applicant at least one day before the hearing.***

***(3) The applicant may file a reply to the preliminary objection before the time of the hearing of the request.***

***(4) The Review Board may hear the preliminary objection either separately or as part of the substantive request for review and give a separate or one decision.***

***(5) The fees chargeable for filing a preliminary objection shall be as set out in the Fifteenth Schedule of these Regulations.***

56. Regulation 209 above, grants parties 3 days from the date of receipt of a Hearing Notice to present their Preliminary Objection together with the accompanying filing fees, which is presently set at Kshs. 5,000.

Additionally, the Applicant is usually afforded room to offer response to the said Preliminary Objection.

57. In the present case, no formal Preliminary Objection was presented to this Honourable Board and as such no filing fees was chargeable. Counsel for the Interested Party's Ms. Mwangi only raised the Objection in her oral address with the result that it constituted an ambush on the parties herein. For that reason, the Board shall not consider the Objection raised by the Interested Party, noting that the Objection was not raised in the manner contemplated under Regulation 209 of the Regulations 2020.
58. Turning back to the first issue for determination as framed above, the Applicant received a letter of regret notifying it that its bid was disqualified for being unresponsive to a mandatory requirement on pagination of its bid. According to the Applicant, it had submitted a responsive bid, which was erroneously disqualified in the circumstance.
59. Counsel for the Applicant, Mr. Hasea, maintained that the Applicant submitted a bid that was properly paginated and therefore it was erroneously denied an opportunity for further evaluation in the subject tender, noting that its bid was disqualified at the Preliminary Evaluation Stage. He argued that Section 79 of the Act offered a cure for minor deviations, in the event there was a defect in the pagination.

60. On the flip side, both the Respondents and the Interested Party argued that the Tender Document spelt it as a mandatory requirement for bids to be sequentially paginated.
61. Counsel for the Respondents, Ms. Noor, confirmed that the Applicant's bid was disqualified at the Preliminary Evaluation Stage for not being paginated in a continuous manner 1,2,34, n.
62. Counsel for the Interested Party, Ms. Mwangi, indicated that the Tender Document was clear on the mandatory requirements which included a sequential serialization of bids. She argued if the Applicant failed to properly paginate its bid then it was properly disqualified from further evaluation in the subject tender.
63. From the above divergent positions by the parties, this Board is therefore called upon at this stage to interrogate the evaluation process leading to the disqualification of the Applicant's bids.
64. For starters, this Board takes guidance from Section 80 of the Act which prescribes how a bid should be subjected to evaluation in a public procurement process. The said section reads:

***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.***

***(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) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.***

***(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection***

***(4), submit such report to the accounting officer for approval as may be prescribed in regulations.***

***(6) The evaluation shall be carried out within a maximum period of thirty days.***

***(7) The evaluation report shall be signed by each member of evaluation committee.***

65. Additionally, Section 79 of the Act offers clarity on the responsiveness of bids 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—***

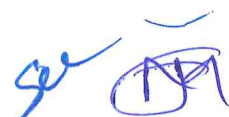
***a) be quantified to the extent possible; and***

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

66. This Board is further guided by the dictum of the High Court in ***Republic v Public Procurement Administrative Review Board & 2 others Ex parte BABS Security Services Limited [2018] eKLR; Nairobi Miscellaneous Application No. 122 of 2018*** where the court while

considering a judicial review application against a decision of this Board illuminated on the responsiveness of a 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 and PPARB Application No. 15 of 2024; Nash Eq Inc v Accounting Officer Sacco Societies Regulatory Authority & Ors***

67. Specific to serialization of bids, Section 74(1)(i) of the Act places an obligation on the part of the Accounting Officer of a Procuring Entity to ensure that in the preparation of an invitation to tender, there is a requirement for the pages of a bid to be serialized before submission. The said section reads:

***74. Invitation to tender***

***(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—***

***(a) ...***

***(b) ...***

***(c) ...***

***(d) ...***

***(e) ...***

***(f) ...***

***(g) ...***

***(h) ...***

***(i) requirement of serialisation of pages by the bidder for each bid submitted***

68. Further, Regulation 74(1)(b) of the Regulations requires the Evaluation Committee as part of the Preliminary Evaluation, to verify that the pages of the received bids have been serialized:

***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) ...***

***(b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;***

***(c) ...***

***(d) ...***

69. Additionally, there exists a body of case law affirming the importance of serialization of bids as part of yardsticks against which tenders should be evaluated. In ***Nairobi High Court Judicial Review Application No. 312 of 2018; R v Public Procurement Administrative Review Board & Anor Ex parte Fourway Construction Company Limited*** the High Court was explicit in its Judgment that failure to serialize a bid could not be termed a minor deviation under Section 79 of the Act:

***"49. The requirement of serialization was in the present case indicated to be a mandatory requirement in the 1st Interested Party's tender document, and it was indicated in tender document that a firm lacking in any of the requirements would be dropped at the preliminary stage and would not progress***



**to the Technical evaluation stage. It is also a mandatory requirement under section 74 of the Act, and failure to serialise every page cannot therefore be interpreted as a minor deviation from the requirements set out in the tender documents, and cannot fall within the exceptions provided for in section 79. It is also evident that the discretion given by section 79 to waive a requirement that has not been conformed with only applies where that conformity can be corrected without causing prejudice to the other bidders, or is quantifiable, which is not the case with the requirement of serialization of every page because of the objective of the requirement and attendant risks of non-conformity that have been explained in the foregoing."**

70. In yet another case, the High Court in ***Nairobi High Court Judicial Review Miscellaneous Civil Application No. 19 of 2020; Republic v Public Procurement Administrative Review Board & Anor Ex parte The Accounting Officer Kenya Ports Authority & Anor*** was explicit that serialization of tenders is a mandatory requirement in all bids whether or not this is indicated as a requirement in the Tender Document since it is a statutory requirement under Section 74 of the Act:

***"49. In light of the foregoing, it becomes apparent to this court that the aspect of serialisation of each and every page of a bid document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do***

*away with discrimination. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and it shall also encourage abuse of power and disregard of the law by not only bidders but also procuring entities.*

**50. I therefore find that despite the fact that serialisation was not a mandatory requirement in the ex-parte applicants tender document, it is a mandatory requirement under section 74 of the PPAD Act of 2015 and all bidders ought to have fully complied.**

***52. That failure to serialise each and every page of a tender document cannot translate to a minor deviation from the laid down principles set down in law as explained hereinabove. It is my finding that the decision by the respondent directing the ex-parte applicants' to re-admit non-responsive bids is in contravention with the provisions of sections 74 and 79 of the PPAD Act of 2015 and thus ultra vires."***

See also this Board's Decision in ***PPARB Application No. 72 of 2024; Circuit Business Systems Limited v The Accounting Officer, Kenya Ports Authority & Anor.***

71. Drawing from the above decisions, it is apparent that:

- i. The Tender Document is the key guide in the evaluation of bids submitted in response to any tender invitation.
- ii. 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;
- iii. Serialization is a mandatory requirement under Section 74 of the Act;
- iv. All tenders submitted in response to a tender invitation should be serialized whether or not the tender document provides for serialization;
- v. Failure to serialize a tender cannot be termed a minor deviation under Section 79 of the Act; and
- vi. Failure to enforce the mandatory requirement of serialization translates to unequal treatment and encourages abuse of power.

72. Turning to the subject tender, Clause 7 under the Invitation to Tender at page 4 of the Tender Document contained instructions on serialization in the following terms:

***7. Completed serialized/paginated Bidding documents shall be submitted accompanied with a signed declaration of the number of pages.***

73. The above requirement on serialization was also reproduced as Mandatory Requirement No.1 at the Preliminary Evaluation Stage under



Section III- Evaluation and Qualification Criteria at page 38 of the Tender Document:

***A) Preliminary Examination***

***Requirements***

**1. Tender documents must be paginated/serialized. All bidders are required to submit their documents paginated in a continuous ascending order from the first page to the last page in this format; (i.e. 1,2,3....n where n is the last page (MANDATORY))**

.....

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

74. Mandatory Requirement No. 1 above, required bidders to submit bids that were paginated in a continuous ascending order from the first page to the last in the order of 1,2,3...n. It would therefore follow that a bid would be responsive to this requirement if it was paginated in a continuous ascending order from the first page to the last in the order of 1,2,3...n. Conversely, any bid that was not paginated in a continuous ascending order from the first page to the last in the order of 1,2,3...n would be deemed unresponsive to the requirement.



75. Guided by the above, the Board has keenly studied the Applicant's bid as submitted by the Respondents as part of the Confidential File and observed as follows:

- i. The Applicant submitted a 355-page bid. The 1<sup>st</sup> page on the Applicant's bid is serialized as 00000001 and is serialized as 00000355.
- ii. Page 00000078 of the Applicant's bid is followed by page 00000081
- iii. Page 00000081 of the Applicant's bid is followed by page 00000079
- iv. Page 00000080 of the Applicant's bid is followed by page 00000082
- v. Page 00000078 of the Applicants bid bears the 1<sup>st</sup> page of the Applicant's Form PER-1
- vi. Page 00000081 is a page separator marked "Price Schedule"
- vii. Page 00000079 is the 2<sup>nd</sup> page of the Form PER-1.
- viii. Page 00000080 is the 1<sup>st</sup> page of the Applicant's price schedule
- ix. Page 00000082 is the 2<sup>nd</sup> page of the Applicant's price schedule
- x. Page 00000158 of the Applicant's bid is followed by page 00000161
- xi. Page 00000161 of the Applicant's bid if followed by page 00000159.
- xii. Page 00000158 is the Applicant's Statement of Nominal Capital
- xiii. Page 00000161 is a page separator marked "Pharmacy and Poison Board Certificate"
- xiv. Page 00000159 is the Applicant's Pharmacy and Poison Board Certificate.

76. From the above it is apparent that the Applicant's bid was not sequentially paginated between pages 78 to 82 as well as between pages 158 to 161. The identified pages of the Applicant's bid were not paginated in a

continuous ascending order and thus rendered the Applicant's bid unresponsive to Mandatory Requirement No. 1.

77. Page 38 of the Tender Document was explicit that the failure to comply with any of the Mandatory Requirements at the Preliminary Evaluation Stage would lead to disqualification of a bid. The Evaluation Committee picked up on the Applicant's bid's failure to comply with Mandatory Requirement No. 1 at the Preliminary Evaluation Stage and disqualified it from further evaluation. We find no fault in such action as it was in strict compliance with the Tender Document's prescription for disqualifying bids that failed to comply with the Mandatory Requirements at the Preliminary Evaluation Stage.

78. In view of the foregoing, the Board finds that the Procuring Entity's Evaluation Committee's disqualification of the Applicant from the subject tender was in line with the provisions of the Act, Regulations 2020 and the Tender Document.

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

79. The Board has found that the Procuring Entity's Evaluation Committee properly evaluated the Applicant's bid in accordance with the provisions of the Act, Regulations 2020 and Tender Document.

80. The upshot of our finding is that the Request for Review dated 30th January 2025 but filed on 4th February 2025 in respect of Tender No. GF



ATM HIV GC7/OIT013/2024-2025 for Supply of CrAg and HIV Rapid Test Kit fails in the following specific terms:

**FINAL ORDERS**

81. 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 30<sup>th</sup> January 2025:

**A. The Request for Review dated 30<sup>th</sup> January 2025 be and is hereby dismissed.**

**B. The Respondents are at liberty to proceed with the procurement proceedings with respect to Tender No. GF ATM HIV GC7/OIT013/2024-2025 for Supply of Crag and HIV Rapid Test Kit to its lawful and logical conclusion taking into consideration the provisions of the Tender Document, the Act and the Constitution.**

**C. Each party shall bear its own costs.**

**Dated at NAIROBI, this 25<sup>th</sup> February 2025.**

.....  
**PANEL CHAIRPERSON**  
**PPARB**

.....  
**SECRETARY**  
**PPARB**

