REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 1/2021 OF 5TH JANUARY 2021
BETWEEN
CRYSTAL VALUERS LIMITED........................................APPLICANT
AND
VICE CHANCELLOR, JOMO KENYATTA
UNIVERSITY OF AGRICULTURE
AND TECHNOLOGY (JCUAT)..............................1ST RESPONDENT
PRO. VICTORIA WANGUI NGUMI, PHD...........2ND RESPONDENT

Review against the decision of the Accounting Officer of the Jomo Kenyatta University of Agriculture and Technology (JCUAT) as set out in the letter dated 22nd December 2020 in the matter of Tender No. JCUAT/57/2020-2022 Provision of Property Letting and Management Services at JCUAT Towers (Two Years Contract).

BOARD MEMBERS
1. Ms. Faith Waigwa -Chairperson
2. Qs. Hussein Were -Member
3. Dr. Joseph Gitari -Member
4. Ms. Njeri Onyango -Member
5. Dr. Paul Jilani -Member
IN ATTENDANCE

1. Mr. Philip Okumu - Acting Board Secretary

REQUEST FOR REVIEW NO. 1 OF 2021

Crystal Valuers Limited (hereinafter referred to as “the Applicant”), lodged a Request for Review dated and filed on 5th January 2021 together with a Supporting Affidavit sworn and filed on even date and a Further Affidavit sworn and filed on 20th January 2021 through the firm of Migos-Ogamba & Waudo Advocates, seeking the following orders:

a. An order nullifying the decision by the Procuring Entity disqualifying the Applicant in Tender No. JKUAT/57/2020-2022 Provision of Property Letting and Management Services at JKUAT Towers (Two Years Contract) by a letter dated 22nd December 2020;

b. An order directing the Procuring Entity to re-evaluate the Applicant’s bid in Tender No. JKUAT/57/2020-2022 Provision of Property Letting and Management Services at JKUAT Towers (Two Years Contract) in accordance to the provisions of the Public Procurement and Asset Disposal Act, 2015 to its logical conclusion

c. An order for costs of this Request for Review be awarded to the Applicant.

The 1st and 2nd Respondent were notified of the existence of the Request for Review vide a letter from the Board Secretary dated 5th
January 2021 on 7th January 2021. Thereafter, the 1st and 2nd Respondent submitted confidential documents to the Board relevant to the subject tender in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as “the Act”) which were delivered to the Board Secretariat on 14th January 2021.

Further, the 1st and 2nd Respondent lodged a ‘1st and 2nd Respondent’s Memorandum of Response to the Request for Review’ dated 20th January 2021 on 21st January 2021 through the firm of Ashitiva Advocates LLP.


Legend Management Limited, acting in person, lodged a letter dated 15th January 2021 on even date, addressed to the Acting Board Secretary in response to the Acting Board Secretary’s notification of the pending Request for Review dated 14th January 2021.
Villa Care Management Limited, acting in person, lodged a letter dated 15th January 2021 on 18th January 2021, addressed to the Acting Board Secretary, in response to the Acting Board Secretary’s notification of the pending Request for Review dated 14th January 2021.

Tysons Limited, acting in person, lodged a letter dated 15th January 2021 on even date, addressed to the Acting Board Secretary in response to the Acting Board Secretary’s notification of the pending Request for Review dated 14th January 2021.

Alliance Realtors Limited, acting in person, sent a letter dated 19th January 2021 via email on 20th January 2021, addressed to the Acting Board Secretary in response to the Acting Board Secretary’s notification of the pending Request for Review dated 14th January 2021.

On 24th March 2020, the Board issued Circular No. 2/2020 detailing the Board’s administrative and contingency management plan to mitigate COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions.

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on documentation filed before it within the timelines specified to render its
decision within twenty-one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as “the Act”).

The Applicant lodged written submissions dated 22nd January 2021 on even date. The 1st and 2nd Respondent, Murage Estate Agents Limited, Legend Management Limited, Villa Care Management Limited, Alliance Realtors Limited and Tysons Limited did not file written submissions.

**BOARD’S DECISION**

The Board has considered each of the parties’ cases, the documents filed before it, including the Applicant’s written submissions and finds that the following issues call for determination: -

I. **Whether the Applicant’s bid was found non-responsive in accordance with section 80 (2) of the Act read together with Article 227 (1) of the Constitution;**

II. **Whether the 1st & 2nd Respondent issued the Applicant with Letters of Notification that meet the threshold under section 87 (3) of the Act read together with Regulation 82 (1) and (3) of the 2020 Regulations.**

Before the Board put its mind to the two issues framed for determination, the Board would like to address the following preliminary issue: -
Murage Estate Agents Limited lodged a ‘Response to Notification for Review of Tender No. JKUAT/57/2020-2022 Provision of Property Letting and Management Services at JKUAT Towers (Two Years Contract)’ in form of a letter addressed to the acting Board Secretary dated 15th January 2021 and filed on 18th January 2021 whereby it raised the following ground for review and sought the following orders therein: -

"We also note the Procuring Entity did not invite the technically qualified bidders for the bids opening and confirmation of the quotes as per the form of tender. ....

We therefore seek the Board’s indulgence on the following issues: -

a) The Procuring Entity proceeded to financial opening without inviting the qualified bidders to witness the financial bids and confirmation of the bid prices as per the form of tender;

b) ..............................................;

c) The Procuring Entity should be ordered by this Honourable Board to re-evaluate the financial proposals of all the qualified bidders as per the Public Procurement and Asset Disposal Act, 2015.”

It also lodged a ‘Response to the Request for Review of Tender No. JKUAT/57/2020-2022 Provision of Property Letting and Management Services at JKUAT Towers (Two Years Contract)’ dated 18th January 2021 on even date in support of the Request for Review whereby it
raised the following ground for review and sought the following orders therein: -

"3. THAT we quoted what we believe to have been the lowest bid for the performance of the contract in the market as was laid as per the financial proposal we prepared and served the Procuring Entity....

5. THAT the Procuring Entity did not explain how uncompetitive the bid price was and neither did it disclose the bid price quoted by the bidder who was awarded the tender for the reasons to make any sense.

WITH THE FOREGOING we request the Board to quash the Procuring Entity's decision to award tender JKUAT /57/2020 FOR PROVISION OF PROPERTY LETTING AND MANAGEMENT SERVICES AT JKUAT TOWERS (TWO YEARS CONTRACT) TO GIMCO LTD and allow our bid to be evaluated afresh in full compliance of the law."

Further, Legend Management Limited lodged a letter addressed to the Acting Board Secretary dated 15th January 2021 on even date whereby it raised the following ground for review: -

"Legend Management Limited considering itself technically and financially capable of offering the services to the procuring entity submitted a fully compliant bid document to the procurement entity. However, through a letter dated 22nd December 2020 Ref No. JKW-2-75-2-1,
the procuring entity informed us that our bid was not successful due to the fact that we had not met the basic preliminary requirements for the tender.

We would therefore like the Procuring Entity to highlight the basic preliminary requirements which were not met by the bid document submitted by us.”

Villa Care Management Limited also lodged a letter addressed to the Acting Board Secretary dated 15\textsuperscript{th} January 2021 on 18\textsuperscript{th} January 2021, whereby it raised the following ground for review: -

"...The subject letter alluded that our bid did not meet the basic preliminary requirements. However, the letter failed to detail which specific basic requirements were not met seeing as we provided all the mandatory documents specified in the Tender Document.

We thereafter requested for the said clarification through our letter Ref: VCML/JKU-2-75-2-1 dated 6\textsuperscript{th} January 2021, copy attached whose response has never been issued to us by JKUAT to date.”

From the foregoing excerpts, the Board observes that Murage Estate Agents Limited, Legend Management Limited and Villa Care Management Limited raised grounds for review which were not canvassed in the instant Request for Review and further sought orders specific to their respective bid documents.
The Board further observes that Murage Estate Agents Limited, Legend Management Limited and Villa Care Management Limited were tenderers who participated in a procurement process that is the subject of review proceedings before this Board.

It is important to note that once the Applicant filed the Request for Review, all tenderers who participated in the subject tender were notified of the existence of the request for review application by the Acting Board Secretary and were invited to submit any information with respect to the request for review application within three (3) days from the date of notification, failure to which the review proceedings would proceed in their absence.

Such information may be presented before the Board in the form of pleadings which will be served to all parties who choose to participate in the request for review proceedings.

It is the Board’s considered view that the grounds for review raised by Murage Estate Agents Limited, Legend Management Limited and Villa Care Management Limited which as mentioned hereinbefore were not raised by the Applicant in its Request for Review Application, touches on an interest specific to the three aforementioned tenderers and would ordinarily be canvassed by an aggrieved tenderer, in a request for review application pursuant to Section 167 of the Act but in this instance have been raised through the ‘back door’ by Murage Estate Agents
Limited, Legend Management Limited and Villa Care Management Limited.

In doing so, Murage Estate Agents Limited, Legend Management Limited and Villa Care Management Limited have advanced their case without filing a request for review application and intentionally or not, avoided the responsibility of filing a request for review application and paying the requisite filing costs which would be incurred in this respect.

The Board notes, Murage Estate Agents Limited, Legend Management Limited and Villa Care Management Limited are at liberty to file a request for review application and approach this Board as applicants pursuant to section 167 (1) of the Act. If the three aforementioned tenderers had moved the Board as applicants, the Board would exercise its discretion to consolidate their respective request for review applications with that of the Applicant pursuant to Regulation 215 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as “the 2020 Regulations”) which provides as follows: -

"Where two or more requests for review are instituted arising from the same tender or procurement proceeding, the Review Board may consolidate the requests and hear them as if they were one request for review."

Accordingly, the Board finds that the grounds for review raised by Murage Estate Agents Limited, Legend Management Limited and Villa Care Management Limited were not properly filed before this Board and
are hereby stricken out forthwith from the record of these review proceedings.

Notably, Tysons Limited lodged a letter dated 15th January 2021 on even date, addressed to the Acting Board Secretary whereby it stated as follows:

"..*Please note that we are not aware that the tender has been awarded and/or the entity that the tender was awarded to.*

*In the circumstances, we are unable to raise any objection to the same unless the details of the award are communicated to us.*"

Evidently, Tysons Limited did not raise any objection with respect to the Request for Review, since it alleged it was not aware of the award of the subject tender.

Further, Alliance Realtors Limited, who is also a tenderer who participated in the subject procurement process, sent a letter dated 19th January 2021 via email on 20th January 2021, addressed to the Acting Board Secretary, which the Board observes was not stamped in receipt with the Board’s official stamp and thus was not properly filed before this Board in compliance with the Board’s directives as specified in its Circular No. 2/2020 dated 24th March 2020. In this regard therefore, the Board finds that the said letter was not properly filed before this Board.
and thus will not be considered by it in its determination of the Request for Review.

In addressing the first issue framed for determination, the Board observes that the Applicant filed the Request for Review on 5th January 2021. Thereafter, the 1st and 2nd Respondent were notified of the existence of the Request for Review Application vide a letter dated 5th January 2021, which was served on the 1st and 2nd Respondent on 7th January 2021, together with a copy of the Request for Review and Circular No. 2/2020 dated 24th March 2020 specifying the timelines for filing a response.

Notably, the 1st and 2nd Respondent submitted confidential documents to the Board relevant to the subject tender in accordance with section 67 (3) (e) of the Act which were delivered to the Board Secretariat on 14th January 2021 by a representative of the 1st and 2nd Respondent, but failed at that time to file a response to the Request for Review.

However, on 14th January 2021, Ashitiva Advocates LLP lodged a notice of appointment and came on record for Jomo Kenyatta University of Agriculture and Technology, whom the Board notes was not a party to the Request for Review.

The 1st and 2nd Respondent only lodged their response to the Request for Review on 21st January 2021, fourteen (14) days after it was served
with a notice of the Request for Review which was outside the five (5) days’ timeline stipulated in the Board’s Circular No. 2/2020 and Regulation 205 (3) of the 2020 Regulations. Notably, the Applicant in paragraph 4 of its Further Affidavit avers that at the time of filing its Further Affidavit, it had not received a response from the 1st and 2nd Respondent and in paragraph 15 thereof that it reserves the right to challenge any response filed out of time as being inadmissible.

Article 50 (1) of the Constitution states that: -

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

[Emphasis by the Board]

The right to a fair hearing is a fundamental human right recognized in our Constitution, which guarantees every person the opportunity to be heard before an independent and impartial decision-making body.

The Court of Appeal expounded on the right to a fair hearing in Civil Application Nai. 224 of 2006 Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others [2016] eKLR as follows: -
“Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal declaration of Human rights (UDHR), and Article 6 of the International Convention on Civil and Political Rights (ICCPR) among other International conventions, which this country has ratified. Article 25 (c) of the Constitution 2010 elevates it to an inderogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the rule of Law and public faith in the justice system would inevitably collapse. A fair trial has many facets, and includes the right to have one’s case heard by an independent, impartial and unbiased arbiter or judge.”

Further, the High Court in its interpretation of Article 50 of the Constitution opined as follows in Civil Case No. 21 of 2017 Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another [2019] eKLR: -

"While the wording of Article 50 of the Constitution on the right to a fair hearing prima facie seems to focus on criminal trials it’s not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent, independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the
suit is filed, the right to a public hearing and the right to be heard within a reasonable time.

From these specific precepts born out of criminal procedure protections account for guarantees to due process and right to a fair hearing in Civil administration of justice. The doctrine of fairness of the procedure ultimately shall as the case may be the precise architect implied under Order 3, 7 and 11 of the Civil Procedure rules.

Deriving support from the leading principles of criminal justice on disclosure in the case of Dennis Edmond Apaa and 2 Others v Ethics and Anti-Corruption Commission and another Petition No. 317 of 2012 the court observed as follows:

"The Cholmondeley case does not support the proposition that all the witnesses and evidence must be disclosed in advance of the trial. The case of Republic v Word cited by the Court of Appeal is clear on the duty of disclosure is a continuing one throughout the trial. Furthermore, the words of Article 50(2) (j) that guarantees the right to be informed in advance cannot be read restrictedly to mean in advance of the trial, the duty imposed on the court is to ensure a fair trial for the accused or a party in a civil proceeding and the right of disclosure is protected by the accused or adverse
party in a civil case being influenced of the evidence having reasonable access to it. Their right is to be read together with other rights that constitute the right to a fair trial."

From the above discourse the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 50 of the Constitution would not correspond with the purposeful interpretation of the aforesaid Article on the concepts of the right to a fair hearing which it was designed to protect. The aim of the right is to ensure the fair administration of justice and adherence for one to be given an opportunity to be heard by an independent tribunal without any obstacles laid on the way. As a minimum guarantee the right to a fair trial includes fair trial rights in civil cases."

According to the High Court, the right to a fair hearing as espoused under Article 50 of the Constitution applies in civil proceedings and interalia ensures a person is granted the opportunity to be heard by an impartial and independent decision making body and the right to adduce and challenge evidence.

Due to the late filing of the '1st and 2nd Respondent’s Memorandum of Response to the Request for Review' by the 1st and 2nd Respondent in which it is in breach of Regulation 205 (3) of the Regulations 2020, the Applicant being constrained for time to respond to the 1st and 2nd Respondent’s response was in effect denied the opportunity to prepare a rejoinder to the 1st and 2nd Respondent’s response, if it chose to do so,
in violation of its right to a fair hearing as espoused under Article 50 (1) of the Constitution. It is not lost to the Board that the Applicant filed a Further Affidavit dated 20\(^{th}\) January 2021 on even date and written submissions dated 22\(^{nd}\) January 2021 on even date and in essence closed its case in these review proceedings, prior to the 1\(^{st}\) and 2\(^{nd}\) Respondent filing their response to the Request for Review on 21\(^{st}\) January 2021.

As explained by the Court of Appeal in Evans Thiga Gaturu & another v Naiposha Company Ltd & 13 others [2017] eKLR: -

"...It cannot be overemphasized that Article 50 of the Constitution guarantees every party to a dispute that can be resolved by the application of law a fair and public hearing by a court or other independent and impartial tribunal or body. Implicit in the fair hearing guaranteed by the Constitution is the right of a party to know in advance the allegations against him and a reasonable opportunity for rebuttal."

Additionally, the Board is required to hear and determine a request for review application within twenty-one (21) days of filing pursuant to section 171 of the Act. Due to this statutory timeline, the Board strictly relies on documentation filed before it within the timelines specified in Circular No. 2/2020 in order to render its decision within twenty-one (21) days.
In the case of **Petition 5, 3 & 4 of 2013 Raila Odinga & 5 Others v Independent Electoral Boundaries Commission and 3 Others [2013] eKLR** the Supreme Court stated as follows on the correct legal position where the court has to consider whether to admit or reject evidence and/or pleadings filed outside the stipulated statutory timelines:

"The parties have a duty to ensure they comply with their respective time lines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party or the court as a result of omissions or characteristics which were foreseeable or could have been avoided. The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, context of the new material intended to be provided and relied upon. If it is small or limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and or admissions of additional evidence."
In the Supreme Court’s view, parties have a duty to ensure they comply with their respective time lines which duty must also be adhered to by the court or decision making body in question. It therefore follows that there must be a fair and level playing field so that neither the party nor the court or decision making body loses the time entitled to, and further no extra burden should be imposed on any party or on the court or decision making body in question as a result of omissions or characteristics which were foreseeable or could have been avoided.

In the instant case, the Applicant lodged the Request for Review on 5th January 2021. In this regard therefore, the Board is required to render a decision in the said review application on or before 26th January 2021. Since the 1st and 2nd Respondent filed their response to the Request for Review fourteen (14) days after it was notified of the filing of the instant Request for Review on 21st January 2021, leaving only two official working days prior to the expiry of the twenty-one (21) days within which the Board has to render a decision in the instant Request for Review, noting that 23rd and 24th January 2021 are non-working days, that is, Saturday and Sunday respectively. The Applicant is therefore constrained for time to put in a rejoinder, if it chooses to do so, posing an extra burden on the Applicant due to the late filing by the 1st and 2nd Respondent.

Accordingly, the Board finds that the 1st and 2nd Respondent’s Memorandum of Response to the Request for Review dated 20th January
2021 and filed on 21\textsuperscript{st} January 2021 is filed out of time and is hereby struck out from the record of these proceedings.

In view of the above finding, it therefore follows that the Applicant’s Request for Review Application remains undefended and the issues therein uncontroverted. This notwithstanding, the Board still has a duty to determine the Request for Review Application and establish whether or not the Applicant has proven its case in this respect.

The Applicant avers in paragraph 2 and 4 of its Request for Review that it submitted a bid in response to the subject tender and thereafter on 24\textsuperscript{th} of December 2020, it received from the 1\textsuperscript{st} and 2\textsuperscript{nd} Respondent a letter of notification of dated 22\textsuperscript{nd} December 2020 informing the Applicant that its bid was unsuccessful for the following reason: -

"The confidential business questionnaire not dully signed"

Aggrieved by the 1\textsuperscript{st} and 2\textsuperscript{nd} Respondent’s decision, the Applicant avers in paragraph 8 of its Request for Review that it wrote to the 1\textsuperscript{st} and 2\textsuperscript{nd} Respondent disputing the reason why its bid was found unsuccessful but received no response thereto and thus filed the instant Request for Review.

However, in paragraph 5 of its Further Affidavit, the Applicant avers that it received another letter of notification from the 1\textsuperscript{st} and 2\textsuperscript{nd} Respondent
dated 6\textsuperscript{th} January 2021 giving a different reason why its bid was unsuccessful, which letter reads as follows: -

"Reference is made to the regret letter on the above mentioned subject that was sent on 24\textsuperscript{th} December 2020 to you via email.

...The regret letter read "Confidential Business Questionnaire not duly signed and stamped" instead of "Form of Tender attached was not signed and stamped" as indicated in the mandatory requirement of this tender, page 34, No. 10.

Kindly note that you will be allowed to access the document submitted to the University for verification."

In determining this issue for determination, the Board observes that the Applicant received two letters of notification. According to the Applicant, it received its first letter of notification via email on 24\textsuperscript{th} December 2020 and its second letter of notification on 6\textsuperscript{th} January 2021, after it filed the Request for Review on 5\textsuperscript{th} January 2021.

The Board considered the letter of notification dated 24\textsuperscript{th} December 2020 which stated that the Applicant's bid was unsuccessful since its confidential business questionnaire was not duly signed and stamped.
The Board examined the Tender Document and observes Mandatory Requirement No. 4 of the Tender Evaluation Criteria on page 34 of the Tender Document which provides as follows:

"Completed and signed Confidential Business Questionnaire indicating the names and ownership of all the Directors as appropriate"

Accordingly, bidders were required to complete and sign a confidential business questionnaire indicating the names and ownership of all the directors of the bidder as appropriate.

The Board studied the Applicant’s original bid document submitted to the Board pursuant to section 67 (3) (e) of the Act and observes on pages 13 and 14 thereof that the Applicant submitted a completed confidential business questionnaire dated and signed on 7th December 2020.

From an examination of the Procuring Entity’s Evaluation Report signed on 18th December 2020, the Board observes on page 7 thereof, that the Applicant’s bid was not found non-responsive on the basis that its confidential business questionnaire was not signed and thus it is not clear why the Applicant’s letter of notification of unsuccessful bid dated 22nd December 2020 indicated as much.
In this regard therefore, the Board finds that the Applicant satisfied Mandatory Requirement No. 4 of the Tender Evaluation Criteria on page 34 of the Tender Document.

However, as mentioned hereinbefore, the Applicant avers that it received a second letter of notification dated 6th January 2021 from the 1st and 2nd Respondent whereby the Applicant was informed that the reason why its bid was unsuccessful was not that its confidential business questionnaire was not duly signed and stamped but because its Form of Tender was not signed and stamped. Notably, the Applicant in its Further Affidavit and written submissions did not challenge the reason why its bid was found non-responsive as indicated in its letter of notification dated 6th January 2021, but avers that the said letter, which allegedly purports to change the reasons why its bid was found unsuccessful, should not be considered by this Board in its determination of the Request for Review on the basis that the said letter was transmitted to the Applicant after the filing of its Request for Review and the reasons therein as proffered by the 1st and 2nd Respondent are now a moot issue.

In view of the fact that the Applicant’s second letter of notification dated 6th January 2021 was brought to the attention of this Board and introduced to these review proceedings by the Applicant in its Further Affidavit filed on 21st January 2021 and also in its written submissions filed on 22nd January 2021, it is evident that the Applicant has had an opportunity to consider and address the issues as raised in the said
letter of notification and it therefore behooves upon this Board to address the Applicant’s letter of notification dated 6th January 2021 in its determination of the Request for Review.

The Board studied the Applicant’s letter of notification dated 6th January 2021 attached to the Applicant’s Further Affidavit and marked as Exhibit ‘TN2’, which is cited hereinbefore and observes that according to the 1st and 2nd Respondent, the Applicant was found non-responsive in the subject tender on the basis that its Form of Tender was not signed and stamped.

The Board examined the Tender Document and observes Mandatory Requirement No. 10 of the Tender Evaluation Criteria on page 34 of the Tender Document which provides as follows:

"Bidders must fill, sign and stamp their form of tenders"

Accordingly, bidders were required to submit a complete, signed and stamped form of tender.

The Board studied the Applicant’s original bid document and observes on page 11 thereof that the Applicant’s Form of Tender was neither signed nor stamped by the Applicant. In view of this finding, the Board examined the Procuring Entity’s Evaluation Report signed on 18th December 2020, and confirms on page 7 thereof, that the Applicant’s bid was found non-responsive and disqualified from further evaluation on the basis that its form of tender was not signed or stamped.
In this regard therefore, the Board finds that the Applicant did not satisfy Mandatory Requirement No. 10 of the Tender Evaluation Criteria on page 34 of the Tender Document.

Accordingly, it is the finding of this Board that the Applicant’s bid was found non-responsive in accordance with section 80 (2) of the Act read together with Article 227 (1) of the Constitution with respect to Mandatory Requirement No. 10 of the Tender Evaluation Criteria on page 34 of the Tender Document as stipulated in the Applicant’s letter of notification dated 6th January 2021.

With respect to the second issue framed for determination, the Applicant contends on paragraph 7 of its Request for Review and paragraph 17 of its written submissions that the 1st and 2nd Respondent did not disclose the successful tender and the reasons thereof in its letter of notification dated 22nd December 2020 contrary to section 87 (3) of the Act read together with Regulation 82 (1) and (3) of the 2020 Regulations.

The Board is cognizant of section 87 of the Act and Regulation 82 of the 2020 Regulations which provisions provide as follows: -

Section 87 of the Act: -

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

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

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

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.” [Emphasis by Board]

Further, Regulation 82 of the 2020 Regulations provides as follows: -

“(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.” [Emphasis by Board]

On the other hand, Section 86 (1) of the Act referred to in Regulation 82 of the 2020 Regulations provides as follows:

"The successful tender shall be the one who meets any one of the following specified in the tender documents-

(a) the tender with the lowest evaluated price;

(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

(c) the tender with the lowest evaluated total cost of ownership; or

(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which
provides guidelines for arriving at applicable professional charges."

In view of the foregoing provisions, the Board observes that a procuring entity must notify, in writing, the bidder who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. This section further requires that in the same breath, a procuring entity must also notify other bidders who participated in the subject tender that their respective bids were not successful.

Moreover, a procuring entity’s notification of unsuccessful bid to a bidder should disclose the reason(s) why its bid was unsuccessful which reason(s) shall relate to the respective bidder’s specific bid. Further, a procuring entity should disclose the successful tenderer in the procurement process therein, who is determined at the conclusion of an evaluation process, including the successful bidder’s tender price and the reason why the successful bidder’s tender was found successful. The reasons to be given why the successful bidder was found successful should be that the tender of the successful bidder met any of the following (a) was the lowest evaluated price, (b) was the responsive proposal with the highest score determined by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals the scores assigned to the technical and financial proposal, (c) was the tender with the lowest evaluated total cost of ownership or (d) was the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of
Parliament which provides guidelines for arriving at applicable professional charges.

The Board notes that the requirement to disclose the successful bidder of a subject tender as stipulated under section 87 (3) of the Act read together with Regulation 82 (3) of the 2020 Regulations, affords unsuccessful bidders the opportunity to challenge the successful bidder’s eligibility to participate and qualify for an award in a tender if need be.

The obligation of a procuring entity to disclose the identity of a successful bidder in addition to the amount the tender was awarded is central to the principle of transparency as outlined in Article 227 of the Constitution which provides that:

"When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective." [Emphasis by the Board]

This means that all processes within a procurement system, including notification of unsuccessful bid, must be conducted in a fair, equitable and transparent manner.

It is evident from an examination of the contents of the Applicant’s letter of notification dated 22\textsuperscript{nd} December 2020, that the 1\textsuperscript{st} and 2\textsuperscript{nd} Respondent did not disclose the successful tenderer of the subject tender including the successful bidder’s tender price and the reason why
the successful bidder's tender was found successful. The Board also examined the contents of the Applicant's letter of notification dated 6th January 2021 and observes that the said letter was not issued simultaneously with other letters issued to all bidders who participated in the subject tender and also did not disclose the successful tenderer of the subject tender including the successful bidder's tender price and the reason why the successful bidder's tender was found successful.

The Board therefore finds that the 1st and 2nd Respondent did not issue the Applicant with letters of notification which meet the threshold of section 87 (3) of the Act read together with Regulation 82 (1) and (3) of the 2020 Regulations and thus the letters of notification issued by the 1st and 2nd Respondent and addressed to the Applicant dated 22nd December 2020 and 6th January 2021 are null and void.

In conclusion, the Board has established that the Applicant's bid was found non-responsive in accordance with section 80 (2) of the Act read together with Article 227 (1) of the Constitution with respect to Mandatory Requirement No. 10 of the Tender Evaluation Criteria on page 34 of the Tender Document as stipulated in its letter of notification dated 6th January 2021. Further, the Board has established that the 1st and 2nd Respondent did not issue the Applicant with letters of notification which meet the threshold of section 87 (3) of the Act read together with Regulation 82 (1) and (3) of the 2020 Regulations. In view of these findings, the Board deems it necessary to direct the 1st and 2nd Respondent to issue fresh letters of notification to all bidders of the
outcome of the evaluation in the subject tender, in accordance with section 87 of the Act read together with Regulation 82 of the 2020 Regulations, taking into consideration the Board’s findings in this review.

In totality, the Board finds that the Request for Review succeeds in respect to the following specific orders: -

**FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, the Board makes the following orders in the Request for Review: -

1. **The 1st and 2nd Respondent’s Letters of Notification dated 22nd December 2020 with respect to Tender No. JKUAT/57/2020-2022 Provision of Property Letting and Management Services at JKUAT Towers (Two Years Contract) addressed to all bidders, including the Applicant herein, be and are hereby cancelled and set aside.**

2. **The 1st and 2nd Respondent’s Letter of Notification dated 6th January 2021 with respect to Tender No. JKUAT/57/2020-2022 Provision of Property Letting and Management Services at JKUAT Towers (Two Years Contract) addressed to the Applicant herein, be and is hereby cancelled and set aside.**
3. The 1st and 2nd Respondent is hereby directed to issue fresh letters of notification informing all bidders of the outcome of the evaluation in Tender No. JKUAT/57/2020-2022 Provision of Property Letting and Management Services at JKUAT Towers (Two Years Contract), in accordance with section 87 of the Act read together with Regulation 82 of the Public Procurement and Asset Disposal Regulations, 2020, taking into consideration the Board’s findings in this Review.

4. Further to Order No. 3 above, the 1st and 2nd Respondent is hereby directed to conclude the subject procurement within fourteen (14) days from the date of this decision.

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

Dated at Nairobi this 24th Day of January 2021

[Signatures]
CHAIRPERSON

SECRETARY

PPARB

PPARB