

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 13/2021 OF 2ND FEBRUARY 2021

BETWEEN

FIVE BLOCKS ENTERPRISES LIMITED..... APPLICANT

AND

MANAGING DIRECTOR, KEBS..... ACCOUNTING OFFICER

KENYA BUREAU OF STANDARDS (KEBS)..... PROCURING ENTITY

Review of International Tender No. KEBS/T013/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services.

BOARD MEMBERS

- | | |
|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Paul Jilani | -Member |
| 3. Dr. Joseph Gitari | -Member |
| 4. Ms. Phyllis Chepkemboi | -Member |
| 5. Mr Ambrose Ngare | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Phillip Okumu | -The Acting Board Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Kenya Bureau of Standards (hereinafter referred to as “the Procuring Entity”) invited interested and eligible bidders to submit bids in response to International Tender No. KEBS/T013/2020-2023 for Provision of Pre-export Verification of Conformity (PVOC) to Standards Services (hereinafter referred to as “the subject tender”) via an advertisement in the Daily Nation Newspaper published on Tuesday, 19th January 2021 as well as publication in the Procuring Entity’s website www.kebs.org.

Bid Submission Deadline

Upon issuance of an Addendum on 3rd February 2021, the bid submission deadline was extended to 25th February 2021 at 11:00 am.

REQUEST FOR REVIEW NO. 13 OF 2021

Five Blocks Enterprises Limited (hereinafter referred to as “the Applicant”), lodged a Request for Review dated and filed on 2nd February 2021 together with a Statement of Support dated and filed on even date and a Reply to the Respondents’ Memorandum of Response dated and filed on 12th February 2021 through the firm of Momanyi & Associates Advocates, seeking the following orders: -

- i. An order annulling the tender in its entirety and terminating/cancelling the procurement process.***
- ii. An order directing the Procuring Entity to initiate a new procurement process for the subject services that comply***

with the requirements of the Public Procurement and Asset Disposal Act, 2015 and its attendant Regulations, 2020.

iii. An order awarding costs of this Request for Review to the Applicant which was necessitated by the incompetence of the Procuring Entity.

In response, the Procuring Entity lodged a 'Respondents' Memorandum of Response' dated 8th February 2021 and filed on 9th February 2021, through its advocate, Ms. Caroline Mokeira.

M/s Niavana Agencies Limited lodged a letter addressed to the Acting Board Secretary dated 15th February 2021 and filed on 17th February 2021 requesting to be joined as an Interested Party to the Request for Review.

Pursuant to the Board Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic, 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").

Parties to the Request for Review did not file written submissions.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, confidential documents filed in accordance with section 67 (3) (e) of the Act and finds that the following issues call for determination: -

- I. Whether the Request for Review requires this Board to review the Procuring Entity's choice of procurement method thereby ousting the jurisdiction of this Board by dint of section 167 (4) (a) of the Act.**

Depending on the outcome of the first issue: -

- II. Whether the Procuring Entity's Tender Document provides for preference and reservation schemes applicable to the subject tender.**

In its determination of the second issue framed for determination, the Board will address the following sub-issues: -

- a) Whether the Procuring Entity breached the provisions of section 157 (9) of the Act read together with Regulation 165 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter "Regulations 2020") and section 155 (2) of the Act for failure to*

provide for a mandatory preliminary evaluation criterion in the Tender Document requiring all foreign tenderers to source at least forty percent of their supplies from citizen contractors prior to submitting their tenders.

b) Whether the Procuring Entity breached the provisions of section 158 of the Act read together with section 157 (8) (a) of the Act and Regulation 163 of Regulations, 2020 for failure to provide for exclusive preference to citizen contractors in the Tender Document;

c) Whether the Procuring Entity breached the provisions of section 158 of the Act read together with section 157 (8) (b) of the Act and Regulation 164 of Regulations, 2020 for failure to provide for a margin of preference in the Tender Document.

III. Whether the Procuring Entity's Tender Document provides for financial evaluation criteria in compliance with Regulation 77 of Regulations 2020.

IV. Whether the award criteria of the subject tender as provided in Clause 2.22.3 of the Tender Document complies with section 86 (1) of the Act.

Before the Board puts its mind to the issues as framed for determination, it would like to make the following observation: -

M/s Niavana Agencies Limited through the law firm of Adrian Kamotho Njenga & Company Advocates, lodged a letter addressed to the Acting Board Secretary dated 15th February 2021 on 17th February 2021 seeking to be enjoined as an Interested Party to the Request for Review and requesting to be supplied with the pleadings lodged by parties in the said review proceedings.

In a letter dated 18th February 2021, the Acting Board Secretary responded as follows: -

"We wish to inform you that you are at liberty to file your response in support or in opposition to the subject Request for Review noting that the Review Board is scheduled to deliver its decision on or before 22nd February 2021 in accordance with section 171 of the Public Procurement & Asset Disposal Act, 2015.

Copies of the Request for Review, the Respondents' Memorandum of Response and the PPARB Circular No. 02/2020 of 24th March 2020 are attached hereto for your reference."

However, M/s Niavana Agencies Limited did not file pleadings in response to the Request for Review Application for consideration by this Board.

The Board will now proceed to address the first issue for determination as follows: -

It has well been an enunciated principle that jurisdiction is everything, following the decision in **The Owners of Motor Vessel 'Lillian 'S' vs Caltex Oil Kenya Ltd 1989 K.L.R 1**, where Justice Nyarangi opined as follows: -

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Further in **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011**, the court had occasion to interrogate the instruments that arrogate jurisdiction to courts and other decision making bodies. The court held as follows: -

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other

written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. "

This Board is a creature of statute owing to the provision of Section 27 (1) of the Act which provides that: -

"27. Establishment of the Public Procurement Administrative Review Board

(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

Further, Section 28 of the Act provides as follows: -

"28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

The jurisdiction of this Board flows from Section 167 of the Act, which provides as follows: -

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed...

(2).....;

(3).....;

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b); and

(c)

Section 167 (4) (a) of the Act expressly stipulates that the jurisdiction of this Board is ousted in instances where the choice of a procurement method is the subject of review proceedings before this Board.

In its pleadings before the Board, the Procuring Entity in paragraph 5 and 9 of its Memorandum of Response contends that the choice of a procurement method is the responsibility of the Procuring Entity and

shall not be subject to review as stipulated under section 167 (4) (a) of the Act. The Procuring Entity takes the view that it may enter into a framework agreement through open tender pursuant to section 114 (1) of the Act and avers that the subject tender duly satisfies the requirements for use of framework agreements through use of open international tenders.

On its part, the Applicant argues in paragraph 3 of its 'Reply to the Respondents' Memorandum of Response' that it is not seeking a review of the choice of procurement method but the failure by the Procuring Entity to comply with the Act and its attendant regulations.

In order to establish whether the instant Request for Review requires this Board to review the Procuring Entity's choice of procurement method, the Board examined the Applicant's Request for Review Application and observes that the Applicant raised the following five (5) grounds for review with respect to the subject tender as follows: -

- a) **Ground No. 1:** The Procuring Entity (PE) breached the provisions of section 157 (9) of the Public Procurement and Asset Disposal Act, 2015 and Regulation 165 of the Public Procurement and Asset Disposal Regulations, 2020 because the PE (KEBS) did not include as a mandatory requirement in the preliminary evaluation criteria in the tender document that all foreign tenderers source at least forty percent of their supplies from citizen contractors as required by this provision.

- b) **Ground No. 2:** The Procuring Entity breached the requirements of section 158 of the Act and Regulation 163 and 164 of the Public Procurement and Asset Disposal Regulations, 2020 because the Procuring Entity did not specify in the Tender Document how exclusive preference shall be given to citizen contractors or how the margin of preferences shall be implemented to firms where Kenyan citizens hold shares as prescribed in Regulation 163 and 164 of the Regulations, 2020.
- c) **Ground No. 3:** The Procuring Entity breached the requirements of Regulation 77 of the Public Procurement and Asset Disposal Regulations, 2020 because the Tender Document does not provide financial evaluation criteria that shall ensure that the requirement of this Regulation 77 are satisfied.
- d) **Ground No. 4:** The Procuring Entity (KEBS) breached the provisions of section 86 (1) of Public Procurement and Asset Disposal Act, 2015, because the mode of award of contract stated in the Tender Document on Clause 2.22.3 on pages 18 and 19 of 109 go against the requirements of section 86 (1) of the Act given that all the award options (a, b, c and d) prescribed in this section 86 (1) of the Act state that the successful tender or the proposal shall be ONE not many (eight) as suggested by the Procuring Entity (KEBS).
- e) **Ground No. 5:** In view of the breaches in points No. 1, 2, 3 and 4 above, the Procuring Entity has breached the requirements of Section 53 (1) of the Public Procurement and Asset Disposal Act, 2015 which prescribes that all procurements undertaken by public entities are subject to the rules and principles of this Act.

From a cursory examination of the above grounds for review, the Board notes that the instant Request for Review raises issues touching on the contents of the Tender Document, specifically compliance of provisions of the Tender Document to the Act and its attendant Regulations. Further, no ground was raised by the Applicant challenging the Procuring Entity's choice of procurement method in the subject tender.

This was confirmed by the Applicant in paragraph 3 of its 'Reply to the Respondents' Memorandum of Response' whereby it states as follows: -

"In response to paragraph 5 of the Memorandum of Response, the Applicant states that it is not seeking a review of the choice of a procurement method but the failure by the Respondents to comply with the Act and its attendant Regulations."

Evidently, as noted from the foregoing averment and as confirmed from the Applicant's Request for Review, the Applicant is not seeking a review of the Procuring Entity's choice of a procurement method through its Request for Review.

It is therefore the finding of this Board that the Request for Review does not require this Board to review the Procuring Entity's choice of procurement method. The effect of this finding is that the Board has jurisdiction to entertain the Request for Review and shall now address the second issue framed for determination.

On the first sub-issue of the second issue framed for determination, the Board observes Article 227 (2) (a) of the Constitution provides as follows: -

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

(a) categories of preference in the allocation of contracts.

(b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination."

The law contemplated under Article 227 (2) is the Act, which outlines the preference and reservation schemes that may be applicable in a public procurement under Part XII thereof.

The interpretation section of the Act defines the term 'preference' as follows: -

"the right or opportunity to select a tenderer from an identified target group that is considered more desirable than another"

Preference is therefore the right or opportunity for a procuring entity to select a tenderer from a defined target group in procurement proceedings.

The Board notes, the subject tender is an international tender for the procurement of services as indicated in its title thereof which reads: -

"International Tender for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services."

In so far as international tenders are concerned, section 157 (9) of the Act provides as follows: -

"For the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender"

Further, Regulation 165 of the Regulations 2020 provides as follows: -

"For greater certainty, supplies under section 157 (9) of the Act shall include goods, works, non-consulting and consulting services"

Moreover, section 2 of the Act defines a citizen contractor as: -

"a person or a firm wholly owned and controlled by persons who are citizens of Kenya"

Having considered the foregoing provisions, a procuring entity is required to make provision in its tender document as a mandatory requirement forming part of preliminary evaluation criteria, for all foreign tenderers participating in international tenders to source at least forty percent of their supplies, which includes non-consulting services, from persons or firms wholly owned and controlled by persons who are citizens of Kenya, prior to submitting a tender.

Further to this, section 89 (f) of the Act provides that in international tendering and competition: -

"If there will not be effective competition for a procurement unless foreign tenderers participate, the following shall apply—"

(f) where local or citizen contractors participate they shall be entitled to preferences and reservations as set out in section 155

It is worth noting that section 89 (f) of the Act expressly states that the provisions of section 155 of the Act will apply in the case of international tendering and competition in order to afford local and citizen contractors the preferences and reservations set out in section 155 of the Act.

Section 89 (f) read together with section 157 (9) of the Act gives the impression that it is necessary (rather than discretionary) in international tendering and competition for a procuring entity to make provision in its tender document as a mandatory requirement forming part of preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender.

In the instant case, the Applicant avers in paragraph 1 of its Statement of Support that as a citizen firm registered in Kenya, it is entitled to the benefits resulting from the implementation of section 157 (9) of the Act by the Procuring Entity pursuant to Regulation 147 (1) (b) of the Act. It is the Applicant's contention that the failure by the Procuring Entity to implement section 157 (9) of the Act which is a necessary obligation under law has denied the Applicant the rightful potential benefits from the subject tender.

The Procuring Entity disputes the Applicant's allegation and contends in paragraph 6 of its response that the subject services are to be carried out in foreign countries thus it was not possible for the Procuring Entity to implement section 157 (9) of the Act in the subject tender.

It is not in dispute that the Procuring Entity did not make provision in its tender document as a mandatory requirement forming part of preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies

from citizen contractors prior to submitting a tender in accordance with section 157 (9) of the Act read together with Regulation 165 of the Regulations 2020. However, it is the Procuring Entity's contention that the said provision was not applicable in the subject tender noting that the subject services were to be implemented in foreign countries.

As mentioned hereinbefore, the subject tender is an international tender for procurement of services described under Clause 6.1.1 of Section VI Description of Services on page 41 of the Tender Document as follows: -

"Pre-Export Verification of Conformity (PVoC) is a conformity assessment programme to certify that products imported into Kenya comply with the applicable Kenya Standards, approved specifications and/or technical regulations before shipment. Under PVoC regime, products to be imported shall undergo verification and/or testing at country of supply (Exporting) and a Certificate of Conformity or Certificate of Inspection (CoC or CoI) issued demonstrating that the products meet the applicable standards and regulations. Where the products fail to meet the approved specifications, a Nonconformity Report (NCR) shall be issued and such goods shall not be allowed for importation into Kenya. The conformity assessment elements undertaken in PVoC include but are not limited to physical inspection prior to shipment, sampling, testing and analysis in accredited or approved laboratories, audit of production processes and systems, and documentary check of conformity to regulations and overall assessment

of conformity to specifications. The purpose of this tender is to recruit qualified companies (—Contractors) to provide Pre-Export Verification of Conformity to Standards on behalf of the Kenya Bureau of Standards (—The Client)."

The services to be procured under the subject tender are referred to as Pre-Export Verification of Conformity to Standards which is a conformity assessment programme to certify that products imported into Kenya comply with the applicable Kenya Standards, approved specifications and/or technical regulations before shipment. The subject services are to be provided by qualified companies on behalf of the Procuring Entity and they include but are not limited to physical inspection prior to shipment, sampling, testing and analysis in accredited or approved laboratories, audit of production processes and systems, and documentary check of conformity to regulations and overall assessment of conformity to specifications.

The Procuring Entity thus identified what it refers to as 'routes' of certification and verification in Clause 6.2.3 of Section VI Description of Services on page 41 and 42 of the Tender Document as follows: -

"The Kenya Bureau of Standards has determined four routes that shall be applied as appropriate conformity assessment procedures for product subject to PVoC, according to type, risk and effect on the health and safety, and environmental protection. The routes are:

Route A: (Inspection and testing) this is for high-risk products.

Route B: (product registration and surveillance) This is based on supplier's ability to consistently meet the quality requirements.

Route C: (Licensing and surveillance) This route is open for manufacturers at the country of supply

Route D: (Inspection and verification of consolidated goods). This route is strictly for KEBS registered consolidators.

The four routes of certification/ verification are part and parcel of this tender and are appended as Annex 1, Annex 2, Annex 3 and Annex 4 respectively."

Clause 2.1.1 of Section II Instructions to Tenderers of the Tender Document provides that the tender is open to: -

"...all tenderers eligible as described in the Instructions to Tenderers."

ITT Reference Clause 2.1 of the Appendix: Instructions to the Tenderers on page 15 of the Tender Document describes 'Eligible Tenderers' in the subject tender as follows: -

"I. The tenderer must demonstrate existence and physical presence and must have the technical infrastructure and qualified personnel required for performing the required service.

II. The tenderer must demonstrate existence of operational ICT infrastructure that can integrate with KEBS ICT Systems for seamless operations.

III. The tenderer must be a legally registered company...

Further, Clause 2.1 of the Appendix: Instructions to the Tenderers on page 19 of the Tender Document provides as follows as regards 'Eligible Tenderers': -

"I. The tenderer must demonstrate existence and physical presence and must have the technical infrastructure and qualified personnel required for performing the required service.

II. The tenderer must demonstrate existence of operational ICT infrastructure that can integrate with KEBS ICT Systems for seamless operations.

III. The tenderer must be a legally registered company.

IV. The tenderer shall have the financial capability to perform the contract and shall not have filed for bankruptcy or be under receivership.

V. The tenderer shall be accredited to ISO/IEC 17020:2012 standard for inspection services."

The foregoing provisions of the Tender Document reveal that eligible tenderers in the subject tender must be legally registered companies and must demonstrate existence and physical presence with the technical infrastructure and qualified personnel required for performing

the subject services. Further, they must demonstrate existence of operational ICT infrastructure that can integrate with KEBS ICT Systems for seamless operations.

The list of countries that a bidder may elect to tender for and in doing so, must demonstrate its existence and physical presence are outlined in Annex 6 of the Tender Document as follows: -

No.	Country	No.	Country	No.	Country
1.	Angola	21.	Hungary	41.	Pakistan
2.	Argentina	22.	India	42.	Poland
3.	Australia	23.	Indonesia	43.	Portugal
4.	Austria	24.	Iran	44.	Qatar
5.	Belgium	25.	Israel	45.	Russia
6.	Brazil	26.	Italy	46.	Saudi Arabia
7.	Bulgaria	27.	Japan	47.	Singapore
8.	Canada	28.	Jordan	48.	South Africa
9.	China Mainland	29.	Latvia	49.	South Korea
10.	Cote D'Voire	30.	Lithuania	50.	Spain
11.	Czech Republic	31.	Malaysia	51.	Sweden
12.	Denmark	32.	Mauritius	52.	Switzerland
13.	Egypt	33.	Mexico	53.	Taiwan
14.	Estonia	34.	Morocco	54.	Thailand
15.	Ethiopia	35.	Mozambique	55.	Turkey
16.	Finland	36.	Netherlands	56.	Ukraine
17.	France	37.	New Zealand	57.	United Arab Emirates
18.	Germany	38.	Nigeria	58.	United Kingdom
19.	Ghana	39.	Norway	59.	United States
20.	Hong Kong	40.	Oman	60.	Zambia

It is therefore clear that not only are the subject services to be performed/implemented in foreign countries but the technical infrastructure and the qualified personnel required to perform the subject services would also be located in a foreign country. This means that the Procuring Entity in the subject services is in essence 'outsourcing' the subject services to tenderers who have the infrastructure and qualified personnel in place to perform/implement the said services in a foreign country, that is, outside Kenya, on its behalf.

This therefore leads the Board to determine whether it is possible for the Procuring Entity in the subject tender to require all foreign tenderers to source at least forty percent of their supplies, from citizen contractors.

In essence, this requirement as encapsulated under section 157 (9) of the Act is designed to encourage participation by citizen contractors in public procurement, with a view to improving local economic growth and ensuring sustainable promotion of local industry.

The Asian Development Bank in its booklet titled 'Domestic Preference Guidance Note on Procurement' [2018] explained the rationale behind domestic preference as it applies specifically in developing countries as follows: -

"The main argument supporting the use of domestic preference is that businesses in lower-income countries are at a disadvantage when competing with foreign firms, given that there may be an asymmetry of information between local and foreign firms. Foreign firms may have better access to technology, finance, and infrastructure to increase productivity and lower production costs. Among other things, foreign firms may benefit from economies of scale. Thus, local firms in lower-income countries may need preference to be able to compete with foreign firms in terms of price and/or other protective measures.

Awarding contracts to local firms is deemed to give greater social and economic benefit to local communities, in the form of increased employment, incomes, and tax revenues, compared to contracts awarded to foreign firms that produce, employ staff, and pay taxes offshore. By granting domestic preference, it is assumed that local benefits incurred by awarding a contract to a local firm outweigh the potential for higher financial costs to the executing agency compared to a situation where the contract was awarded to a foreign firm.”

Domestic preference is lauded for enabling local firms to compete with foreign firms and is credited for according greater social and economic benefits to local communities, in the form of increased employment, incomes, and tax revenues.

However, it is not lost to this Board that the subject tender is an international tender which in essence allows the Procuring Entity access to international markets and suppliers. Further, the Board has established that the subject services are intended to be performed/implemented outside the country and will largely depend on infrastructure and qualified personnel that is situate in foreign countries. It is therefore possible to assume that placing a requirement for all foreign tenderers to source 40% of their supplies from citizen contractors would not be practical, when the tender and its implementation thereof is largely dependent on infrastructure and qualified personnel situate outside the country.

Moreover, in the subject tender, the requirement under section 157 (9) of the Act presupposes that a foreign tenderer (who is based in a foreign country) must export from Kenya 40% of the services to be supplied under the subject tender to one of the sixty (60) countries it elects to provide the subject services, for the sole purpose of implementing/performing the subject tender. In the Board's considered view, this is not only impractical but also unreasonable.

Notably, Section 155 (2) of the Act does envisage a limitation to the application of preferential treatment as provided for under the Act as it categorically states: -

"Subject to availability and realisation of the applicable international or local standards, only such manufactured articles, materials or supplies wholly mined and produced in Kenya shall be subject to preferential procurement"

Noting that supplies in this instance includes services, it therefore follows that the subject services which are to be performed/implemented outside the country may not be subject to preferential treatment in so far as section 157 (9) of the Act read together with Regulation 165 of the Regulations 2020 is concerned, noting that preferential treatment may only be applied with respect to services wholly produced/provided in Kenya.

This notwithstanding, the Board studied the Procuring Entity's confidential file and observes therein a document titled 'Approved

Procurement Plan for the Financial Year 2020-2021' and on page 4 thereof the following provision: -

"Total proposed procurement budget	2,073,782,509
Total committed amount	1,728,070,704
Available budget	345,711,805
30% of 325,491,805 special group (AGPO)	103,713,542
2% PWD	2,074,271
<u>40% of 345,711,805 Buy Kenya Build Kenya</u>	138,284,722"

Notably, out of Kshs. 345,711,805.00 of its available procurement budget, the Procuring Entity has allocated 40%, that is, Kshs 138,284,722.00 to what it refers to as 'Buy Kenya Build Kenya' which in essence involves purchase of supplies made in Kenya, demonstrating its commitment to promote local industry in other tenders to be undertaken in the financial year 2020-2021.

It is therefore the finding of this Board that the Procuring Entity did not breach the provisions of section 157 (9) of the Act read together with Regulation 165 of Regulations 2020 for failure to provide for a mandatory preliminary evaluation criterion in the Tender Document requiring all foreign tenderers to source at least forty percent of their supplies from citizen contractors prior to submitting their tenders, noting that the said provisions may not be applicable in the subject tender and

further may be construed as a limitation to the application of preferential treatment envisaged under section 155 (2) of the Act.

As pertains to the second sub-issue of the second issue framed for determination, the Applicant contends that the Procuring Entity breached the requirements of section 158 of the Act read together with Regulation 163 of the Regulations 2020 since the Procuring Entity did not specify in the Tender Document how exclusive preference shall be accorded to citizen contractors.

In response, the Procuring Entity contends in paragraph 7 of its response that it prepared an annual procurement plan approved by the national standards council and a copy sent to the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") in accordance with the Act, clearly demonstrating the application of preference and reservations in its procurements.

In addressing this issue, the Board observes that Part XII of the Act not only provides for preferences applicable in public procurement but also reservations, which term is defined under section 2 of the Act to mean: -

"exclusive preference to procure goods, works, and services set aside to a defined target group of tenderers within a specified threshold or region"

Exclusive preference or reservations so to speak involves the setting aside of procurement of *interalia* services to a defined target group of tenderers within a specified threshold or region.

The Board is cognizant of section 158 of the Act which provides as follows: -

"(1) The procuring entities shall integrate preferences and reservations in their procurement plans.

(2) The procuring entity shall submit to the Authority the part in its procurement plan demonstrating application of preference and reservation schemes in relation to procurement budget within sixty days after commencement of the financial year.

(3) All procurement awards by procuring entities where a preference or reservation scheme was applied shall be reported with disaggregated data to the Authority on a quarterly basis."

Section 158 of the Act bestows an obligation on a procuring entity to integrate preferences and reservations in its annual procurement plan. Further a procuring entity is required to submit to the Authority the part of its procurement plan demonstrating application of preference and reservation schemes in relation to its annual budget, within sixty days after commencement of the financial year, and moreover, report all procurement awards where a preference of reservation scheme was applied to the Authority on a quarterly basis.

As concerns 'exclusive preference' the Board studied the provisions on preference and reservation schemes under Part XII of the Act, specifically, section 157 (8) (a) of the Act which provides guidance on the application of exclusive preference as follows: -

"Section 157 (8) In applying the preferences and reservations under this section—

(a) exclusive preferences shall be given to citizens of Kenya where—

(i) the funding is 100% from the national government or county government or a Kenyan body; and

(ii) the amounts are below the prescribed threshold;

(iii) the prescribed threshold for exclusive preference shall be above five hundred million shillings

Further, Regulation 163 of the Regulations 2020 prescribes the threshold for exclusive preference as follows: -

"For the purpose of section 157(8)(a)(ii) and (iii) of the Act, the threshold which exclusive preference shall be given to citizen contractors shall be—

(a) one billion shillings for procurements in respect of works, construction materials and other materials which are made in Kenya; and

(b) five hundred million shillings for procurements in respect of goods and services.”

From the foregoing provisions, for exclusive preference (that is given to citizens of Kenya) to apply, firstly, the funding must be 100% from the National Government or County Government or a Kenyan body. Secondly, the amounts must be below the prescribed threshold, as stipulated in Regulation 163 of the Regulation 2020.

The Board has established that the subject tender is an international tender which is in essence a tender that is floated inviting bids from not only domestic bidders but also foreign bidders and allows procuring entities to enter international markets and source for *interalia* goods or services that may or may not be easily accessible or available in the domestic markets. In the Board's considered view, to apply exclusive preference in an international tender would beat the very objective of an international tender as explained hereinbefore.

Further, exclusive preference as envisaged under section 157 (8) (a) of the Act read together with Regulation 163 of the Regulations 2020, requires certain conditions to be fulfilled, that is, funding for the subject tender must be 100% from the National Government or County Government or a Kenyan body and further, the amounts must be below

the prescribed threshold, as stipulated in Regulation 163 of the Regulations 2020.

Upon further scrutiny of the subject Tender Document, the Board observes the following provisions therein:

Clause 2.9.1 and 2.9.2 of Section II Instructions to Tenderers on page 8 of the Tender Document provides as follows: -

"2.9.1. The tenderer shall indicate on the Financial Proposal the royalty fees to be paid to KEBS.

2.9.2. Prices indicated on the Financial Proposal shall include the cost of the services quoted and all the royalty fees to be paid to KEBS. This excludes taxes applicable in the countries bidden for.

Clause 2.11.2 (c) Financial Evaluation of Section 2.0 Appendix: Instructions to the Tenderers on page 24 of the Tender Document provides as follows: -

"For the financial evaluation, the tenderer shall clearly state the following:

1. The inspection fee for Routes A, B, C and D as a percentage of the FOB value of the goods is as follows: 0.6%, 0.55%, 0.5% and 0.6% for routes A, B C and D respectively. These fees shall include the cost of

inspection; sampling, container sealing and any other overheads related these aspects of inspection.

All the above inspection fees are subject to a minimum of two hundred and sixty-five United States Dollars (USD 265) and a maximum of two thousand seven hundred United States Dollars (USD 2700) exclusive of all applicable taxes.

2. The royalty fee the tenderer proposes to remit to the Client on a monthly basis subject to a minimum of 35% of income obtained from the inspection activities.”

Clause 2.22.2 'Criteria for Evaluation of Financial Proposals' of Section 2.0 Appendix: Instructions to the Tenderers on page 28 of the Tender Document provides as follows: -

"The financial evaluation will be based on the royalty fees as per clause 2.11.2 (c) above under Financial Evaluation

Note 1: Any percentage inspection fee below or above the allowable for routes A, B, C and D shall be deemed nonresponsive.

Note 2: Any Percentage royalty fee below the minimum of 35% shall be deemed nonresponsive.

Note 3: Any non-responsiveness in either the inspection and/or royalty fees shall render the entire financial bid nonresponsive.”

Clause 2.22.3 'Determination of Successful tenderers' of Section 2.0 Appendix: Instructions to the Tenderers on page 28 of the Tender Document: -

"KEBS shall award the tender to the tenderer(s) that is (are) responsive to Technical and Financial bids with the highest royalty fee offer subject to a minimum of eight (8) tenderers."

From the foregoing provisions, it is evident that the subject tender did not require allocation of a budgetary amount by the Procuring Entity, noting that successful tenderers would charge for provision of the subject services and thereafter, remit royalties to the Procuring Entity on a monthly basis. This means that in view of section 157 (8) (a) of the Act read together with Regulation 163 of the Regulations 2020, there was no funding for the subject tender from the National Government or County Government or from the Procuring Entity itself and further, the Procuring Entity would not expend money in its performance of the subject tender but would instead earn royalties from its implementation thereof.

The Board therefore finds that the Procuring Entity is not in breach of section 158 of the Act read together with section 157 (8) (a) of the Act and Regulation 163 of Regulations 2020 for failure to provide for exclusive preference to citizen contractors in the Tender Document,

noting that the said provisions may not be applicable in the subject tender.

With respect to the third sub-issue of the second issue framed for determination, the Board has established hereinbefore the meaning of preference and observes that section 157 (8) (b) of the Act provides guidance on the application of preference schemes as follows: -

"In applying the preferences and reservations under this section—

b) prescribed margin of preference shall be given—

(i) in the evaluation of tenders to candidates offering goods manufactured, assembled, mined, extracted or grown in Kenya; or

(ii) works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed."

Further, Regulation 164 of the 2020 Regulations prescribes as follows :-

"For purposes of section 157(8) (b) of the Act, the margin of preference for international tendering and competition pursuant to section 89 of the Act shall be—

(a) twenty percent (20%) margin of preference of the evaluated price of the tender given to candidates

offering goods manufactured, mined, extracted, grown, assembled or semi-processed in Kenya and the percentage of shareholding of Kenyan citizens is more than fifty percent (50%);

(b) fifteen percent (15%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi-processed in Kenya;

(c) ten percent (10%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is more than fifty percent (50%);

(d) eight percent (8%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is less than fifty percent (50%) but above twenty percent (20%); and

(e) six percent (6%) margin of preference of the evaluated price of the tender, where percentage of shareholding of Kenyan citizens is above five percent (5%) and less than twenty percent (20%)."

Having considered the foregoing provisions, the Board observes that one of the preference schemes provided under the Act is what is referred to as a margin of preference.

Budget Transparency Network in its book 'Critical Issues in Public Expenditure Management' [2006] provides a definition for the term 'margin of preference' as follows: -

"the extra mark up on price allowed any domestic contractor or supplier bidding under International Competitive Bidding without being otherwise disadvantageous to the bid in terms of price"

A margin of preference is therefore the extra mark-up allowed to a domestic contractor in for example an international competitive bidding process without being disadvantageous to the said bid in terms of price.

According to section 157 (8) (b) of the Act read together with Regulation 164 of the Regulations 2020, a margin of preference of the evaluated price of the tender shall be accorded to bidders in two ways: (i) to bidders offering goods manufactured, assembled, mined, extracted or grown in Kenya; or (ii) to bidders offering works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed in the said Regulation.

As concerns the first option, the Board has established that the subject tender is an international tender for the procurement of services intended to be performed/implemented outside the country and will largely depend on infrastructure and qualified personnel situated in foreign countries. It is therefore possible to conclude that it would not be necessary to place a margin of preference of the evaluated price of

the tender for bidders offering goods manufactured, assembled, mined, extracted or grown in Kenya as the subject tender is for the procurement of services and not goods.

With respect to the second option, the Board observes that it is possible that a margin of preference may be applied to a prospective bidder's evaluated tender price if it meets the percentage shareholding of Kenyan citizens as prescribed under Regulation 164 of the Regulations 2020. Such a provision would ensure that any bidders with a percentage shareholding of Kenyan citizens would benefit from a prescribed margin of preference and thus have a better chance to participate in the subject tender.

Notably, Regulation 147 (2) of the Regulations 2020 provides as follows:

-

"A citizen contractor registered outside Kenya shall only be eligible to benefit from the preferences and reservations scheme when bidding in international tendering and competition"

According to the above regulation, a citizen contractor registered outside Kenya shall only be eligible to benefit from preferences when bidding in an international tender. This provision envisages a scenario whereby a firm is registered in a foreign country but may be fully owned and controlled by persons who are Kenyan citizens. Such a firm would be entitled to a margin of preference whilst participating in an international

tender in accordance with section 157 (8) (b) (ii) of the Act read together with Regulation 164 of the Regulations 2020.

Notably, section 157 (8) (b) (ii) of the Act categorically states that a prescribed margin of preference 'shall' be applied in the procurement of *interalia* services depending on the percentage of shareholding of the locals on a graduating scale as prescribed in Regulation 164 of the Regulations 2020, giving the impression that it is necessary (rather than discretionary) in international tendering and competition for the Procuring Entity to provide for a margin of preference in the subject tender, if applicable, and failure to do so would amount to breach on the part of the Procuring Entity.

In this regard therefore, the Board finds that the Procuring Entity breached the provisions of section 158 of the Act read together with section 157 (8) (b) (ii) of the Act and Regulation 164 of the Regulations 2020 for failure to provide for a margin of preference in the Tender Document.

With respect to the third issue framed for determination, the Board observes the Applicant's allegation in paragraph 3 of its Request for Review, that the Procuring Entity breached the requirements of Regulation 77 of the Regulations 2020 since the Tender Document did not provide for financial evaluation criteria. The Procuring Entity disputes this allegation in paragraph 8 of its Response and contends that the financial evaluation criteria applicable in the subject tender has been

clearly spelt out in the Tender Document, which provides that responsive bidders shall be ranked according to their proposed royalties to the Procuring Entity subject to meeting the other requirements in the Tender Document.

In addressing this issue, the Board studied Regulation 77 of the Regulations 2020 which provides as follows: -

"(1) Upon completion of the technical evaluation under regulation 76 of these Regulations, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

(2) The evaluated price for each bid shall be determined by—

(a) taking the bid price in the tender form;

(b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79 (2) (a) of the Act;

(c) where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date;

(d) applying any margin of preference indicated in the tender document.

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act.”

This Regulation provides that following completion of evaluation of bids at the Technical Evaluation Stage, a procuring entity’s evaluation committee shall conduct a financial evaluation and comparison of tenders to determine the evaluated price of each tender, which shall be determined by *interalia* applying any margin of preference indicated in the Tender Document.

The Board scrutinised the Tender Document relevant to the subject tender and observes Clause 2.11.2 ‘Evaluation’ of Section 2.0 Appendix: Instructions to the Tenderers which provides as follows: -

The tenderer’s tender evaluation shall consist of three parts: a) Preliminary evaluation, b) Technical evaluation and c) Financial evaluation.

a) Preliminary Evaluation

.....

b) The Technical Evaluation

.....

c) Financial Evaluation

For the financial evaluation, the tenderer shall clearly state the following:

1. The inspection fee for Routes A, B, C and D as a percentage of the FOB value of the goods is as follows:

0.6%, 0.55%, 0.5% and 0.6% for routes A, B C and D respectively. These fees shall include the cost of inspection; sampling, container sealing and any other overheads related these aspects of inspection.

All the above inspection fees are subject to a minimum of two hundred and sixty-five United States Dollars (USD 265) and a maximum of two thousand seven hundred United States Dollars (USD 2700) exclusive of all applicable taxes.

2. The royalty fee the tenderer proposes to remit to the Client on a monthly basis subject to a minimum of 35% of income obtained from the inspection activities."

Further, Clause 2.22.3 'Determination of Successful tenderers' of Section 2.0 Appendix: Instructions to the Tenderers on page 28 of the Tender Document: -

"KEBS shall award the tender to the tenderer(s) that is (are) responsive to Technical and Financial bids with the highest royalty fee offer subject to a minimum of eight (8) tenderers."

From the foregoing clauses in the Tender Document, it is evident that the Procuring Entity outlined in its Tender Document financial evaluation

criteria applicable in the subject tender, whereby bidder's tender prices would be assessed based on their proposed inspection fees and their proposed royalties for remittance to the Procuring Entity, and the tender would be awarded to the tenderer (s) with the highest quoted royalty fee. However, the Procuring Entity did not provide in its financial evaluation criteria how it shall apply any margin of preference in the subject tender in accordance with Regulation 77 (2) (d) of the 2020 Regulations, noting our finding in sub-issue three of the second issue framed for determination, that the Procuring Entity is in breach of the provision of section 158 of the Act read together with section 157 (8) (b) (ii) of the Act and Regulation 164 of the Regulations 2020 for failure to provide for a margin of preference in the Tender Document.

It is therefore the finding of this Board that the Tender Document does not provide for financial evaluation criteria in compliance with Regulation 77 of Regulations 2020, noting the Procuring Entity's failure to provide in its financial evaluation criteria how it shall apply any margin of preference in the subject tender in accordance with Regulation 77 (2) (d) of the 2020 Regulations.

With respect to the fourth issue for determination, it is the Applicant's contention that the mode of award as stated in the Tender Document contravenes section 86 (1) of the Act, since all the award options as provided under the said section of the Act provide that the successful tenderer shall be one and not many, as provided for by the Procuring Entity in its Tender Document. In paragraph 3 of its Reply to the

Respondents' Memorandum of Response', the Applicant argues that the Procuring Entity's Invitation to Tender does not specify that the subject tender is a framework agreement where an award of contract shall be done through call of orders or through inviting a mini-competition among seven (7) vendors pursuant to section 114 (3) of the Act and Regulation 103 (2) of the Regulations 2020 thereof and thus for all intents and purposes the Tender Document is not compliant with section 86 (1) of the Act.

The Procuring Entity on its part contends that the subject tender satisfies the requirement for use of framework agreements through use of open international tenders as provided under section 114 (1) of the Act.

Section 2 of the Act assigns the following meaning to 'framework agreement': -

"a pact between a procuring entity and a selected supplier (or suppliers) or contractor (or contractors) identified for a definite term to supply goods works or services whose quantities and delivery schedules are not definable or determinable at the beginning"

A framework agreement is therefore a pact between a procuring entity and a selected contractor or contractors identified to *interalia* supply services for a certain period of time, whose quantities and delivery schedules are not determinable at the onset.

Notably, a framework agreement is identified under section 92 of the Act as one of the methods of procurement that may be utilized by a procuring entity to procure services in procurement proceedings.

Section 114 of the Act provides as follows with respect to framework agreements: -

"(1) A procuring entity may enter into a framework agreement open tender if—

(a) the procurement value is within the thresholds prescribed under Regulations to this Act;

(b) the required quantity of goods, works or non-consultancy services cannot be determined at the time of entering into the agreement; and

(c) a minimum of seven alternative vendors are included for each category.

(2) The maximum term for the framework agreement shall be three years and, for agreements exceeding one year, a value for money assessment undertaken annually to determine whether the terms designated in the framework agreement remain competitive.

(3) When implementing a framework agreement, a procuring entity may—

(a) procure through call-offs order when necessary;
or

(b) invite mini-competition among persons that have entered into the framework agreement in the respective category.

(4) For the purposes of subsection (3)(a), "call-offs order" means an order made using a framework agreement with one or more contractors, suppliers or consultants for a defined quantity of works, goods, consultancy covering terms and conditions including price that users require to meet the immediate requirements.

(5) Evaluation of bids under category specified by subsection (3)(b) shall be undertaken by an evaluation committee as provided for under this Act.

(6) A procurement management unit shall prepare and submit to the accounting officer with a copy to the internal auditor quarterly reports detailing an analysis of items procured through framework agreements and these reports shall include, an analysis of pattern of usage, procurement costs in relation to the prevailing market rates and any recommendations.

(7) For greater certainty procurements undertaken through framework agreements may be subject to preferences and reservations as provided for in this Act

From the above provision, a procuring entity may enter into a framework agreement through **an open tender** for a maximum period of three (3) years if: (i) the procurement value is within the thresholds prescribed under Regulations to this Act, (ii) the required quantity of

goods, works or non-consultancy services cannot be determined at the time of entering into the agreement; and (iii) a minimum of seven alternative vendors are included for each category. Further, in its implementation of a framework agreement, a procuring entity may procure through call offs (placing an order made using a framework agreement with one or more contractors, suppliers or consultants for a defined quantity of *interalia* services) or through mini-competition among persons who have entered into the framework agreement in the respective category.

Regulation 104 of the 2020 Regulations provides that the threshold for framework agreements shall be as specified in the Second Schedule to the Regulations 2020, the latter of which stipulates that with respect to services in an international open tender, under section 89 of the Act, there shall be no minimum amount and the '***maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement.***'

Conditions for entering into a framework agreement through open tender are outlined under Regulation 101 of Regulations 2020 as follows: -

"(1) A procuring entity may enter into a framework agreement through open tender in accordance with section 114 for the supply of goods, works or services where—

(a) the quantities and delivery schedules are not definable or determinable at the beginning; and

(b) the need for the subject procurement is expected to arise on a repeated basis over a definite period of time.

(2) A procuring entity shall not use a framework agreement in such a way as to prevent, restrict or distort competition.

(3) A procuring entity shall not award a contract under the framework agreement where there is evidence demonstrating that—

(a) the prices of goods, works or services are above the indicative market prices; or

(b) material corporate governance issues have been detected.

(4) A procuring entity shall not procure using a framework agreement of another procuring entity except for those concluded under institutional frameworks prescribed in the Act and these Regulations.”

In addition to the instances listed hereinbefore where a procuring entity may enter into a framework agreement through open tender in accordance with section 114 of the Act, a procuring entity may enter into a framework agreement where the need for the subject procurement is expected to arise on a repeated basis over a definite period of time.

The procedure for entering into a framework agreement is outlined in Regulation 102 (1) of Regulations 2020 as follows: -

"Subject to section 114 of the Act, a procuring entity may enter into a framework agreement through open tender using an invitation to tender which shall specify—

(a) that the procuring entity intends to establish a framework agreement;

(b) the number of suppliers or contractors which shall not be less than seven alternative vendors;

(c) the duration of the framework agreement which shall not exceed three years;

(d) the evaluation criteria;

(e) an estimate of the total volume or scope of work or quantity of purchases expected to be made for the duration of the framework agreement, as appropriate; and

(f) any other information as may be deemed relevant."

Accordingly, a procuring entity entering into a framework agreement through open tender using an invitation to tender, is required to specify the foregoing terms in its invitation to tender, including its intention to establish a framework agreement, the duration of the framework agreement and the number of suppliers or contractors under the said agreement which shall not be less than seven (7) alternative vendors.

Having considered the foregoing provisions, the Board studied the Procuring Entity's Tender Document, specifically Section I Invitation to Tender which provides as follows: -

"Tender to offer Pre-Export Verification of Conformity (PVOC) to Standards Services in accordance with the provisions of the Standards Act and any other enabling provisions of the Laws of Kenya

1.1. The Kenya Bureau of Standards (KEBS) invites sealed technical and financial proposals from eligible companies for the provision of pre-export verification of conformity to standards for a period of three years. The verification of conformity is to be conducted on the basis of Kenya Standards or specifications approved by the Kenya Bureau of Standards.

1.2. Interested eligible companies may obtain further information from and inspect the tender documents at The Procurement Office, Kenya Bureau of Standards KEBS CENTRE Popo Road off Mombasa Road during normal working hours (between 0800hrs and 1700hrs).

1.3. A complete set of tender documents may be obtained by interested companies from the procurement office upon payment of a non-refundable fee of KES 1,000 in cash or bankers cheque payable to Kenya Bureau of standards or downloaded for free from the KEBS website:

www.kebs.org. Companies which download the tender documents from the website must notify KEBS through renam@kebs.org and procurement@kebs.org and info@kebs.org immediately.

1.4. Prices quoted must be expressed in United States Dollars (USD) and shall remain valid for a period of 180 days from the closing date of the tender.

1.5. Completed tender documents shall be enclosed in plain sealed envelopes, marked with the tender number and be deposited in the tender box provided at KEBS CENTRE, Popo Road off Mombasa Road or be addressed and posted to

Managing Director

Kenya Bureau of Standards

P.O. Box 54974-00200

NAIROBI-Kenya

Email address: info@kebs.org; procurement@kebs.org and renam@kebs.org to be received on or before Wednesday 10th February 2021 at 1200hrs (East African Time).

1.6. Tenders must be accompanied by Tender Security of USD 200,000 in the form of a bank guarantee from a reputable bank.

1.7. Tenders will be opened immediately thereafter in the presence of the tenderers representatives who choose to

attend the opening at KEBS CENTRE, Popo Road off Mombasa Road. Tenders delivered outside the required time will not be accepted.”

From the foregoing and from the title of the subject tender which is cited hereinbefore, the Board observes that the subject tender is an **international open tender**. Further, the subject services, that is, the provision of pre-export verification of conformity to standards are to be undertaken for a period of three years. However, the Board observes that the Procuring Entity’s Invitation to Tender does not specify that the Procuring Entity intends to establish a framework agreement, the number of supplier or contactors in the said agreement, the evaluation criteria or an estimate of the total volume or scope of work to be made for the duration of the framework agreement as required under Regulation 102 (1) of the Regulations 2020.

The Board then examined Clause 6.1.1 of Section VI Description of Services under the Appendix: Instructions to Tenderers as cited hereinbefore to establish the scope of work and notes that the subject services Pre-Export Verification of Conformity to Standards which is a conformity assessment programme to certify that products imported into Kenya comply with the applicable Kenya Standards, approved specifications and/or technical regulations before shipment. The subject services are to be provided by qualified companies on behalf of the Procuring Entity and they include but are not limited to physical inspection prior to shipment, sampling, testing and analysis in accredited or approved laboratories, audit of production processes and systems,

and documentary check of conformity to regulations and overall assessment of conformity to specifications.

Further, the list of countries that a bidder may elect to tender for and in doing so, must demonstrate its existence and physical presence are sixty (60) countries as outlined in Annex 6 of the Tender Document cited hereinbefore.

Moreover, the Board observes Clause 2.22.3 'Determination of Successful tenderers' of Section 2.0 Appendix to Instructions to the Tenderers on page 28 of the Tender Document which outlines the award criteria of the subject tender as follows: -

"KEBS shall award the tender to the tenderer(s) that is (are) responsive to Technical and Financial bids with the highest royalty fee offer subject to a minimum of eight (8) tenderers."

Accordingly, the subject tender would be awarded to a minimum of eight (8) tenderers responsive at the Technical Evaluation Stage with the highest royalty fees.

Notably, section 86 (1) of the Act provides as follows: -

"The successful tender shall be the one who meets any one of the following as specified in the tender document—

(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.”

The wording of this provision of the Act refers to one tender being the successful tender and not many tenders.

In view of the foregoing, the Board observes from the Tender Document that it is the Procuring Entity’s intention that the subject services, would be undertaken on behalf of the Procuring Entity in sixty (60) countries. It is therefore evident that the scope of work to be undertaken in the subject tender is not only to be performed/implemented in sixty different jurisdictions but is also considerably massive and thus may be challenging if not impossible for one tenderer to handle on its own. This is also in view of the fact that eligible tenderers must be legally registered companies with the technical infrastructure and qualified personnel required for performing the required services in the countries it elects to tender for.

In this regard therefore, the Board finds that an award of the subject tender to more than one tenderer is justifiable in this instance noting that it is the Procuring Entity's intention to award multiple tenderers to effectively perform/implement the subject services.

However, as established hereinbefore, the Procuring Entity ought to expressly indicate in its Invitation to Tender of its intention to establish a framework agreement, the number of suppliers or contactors in the said agreement (which should not be less than seven alternative vendors), the evaluation criteria and an estimate of the total volume or scope of work to be undertaken for the duration of the framework agreement as required under Regulation 102 (1) of the Regulations 2020.

In the alternative, the Procuring Entity may elect to unbundle the subject tender into lots, with one lot representing one of the sixty (60) countries or regions where the Procuring Entity intends to implement/perform the subject tender. The Procuring Entity would then award the tender with the lowest evaluated price in accordance with section 86 (1) of the Act with respect to each lot, with one tenderer assigned to a specific lot.

In determining the appropriate orders to issue in the circumstances, the Board observes from the Procuring Entity's confidential file that it issued an Addendum to the Tender Document titled 'Extension and Clarification of Tenders' dated 3rd February 2021 which provides as follows: -

"Kenya Bureau of Standards (KEBS) wishes to inform firms participating in the tenders below that clarifications have been deemed necessary calling for an addendum to the Tenders. The closing date has therefore been extended as shown below to give bidders adequate time to respond appropriately.

TENDER NAME	ITEM DESCRIPTION	ORIGINAL CLOSING DATE	NEW CLOSING DATE
KEBS/TO12/2020/2021	International Tender for Provision of Pre-Export Verification of Conformity (PVoC) to Standards Services For Used Motor Vehicles, Equipment and Spare Parts	10 th February 2021 1100hrs (East African Time)	25 th February 2021 1100 hrs (East African Time)
KEBS/T013/2020/2021	International Tender for Provision of Pre-Export Verification of Conformity (PVoC) To Standards Services For Services For Goods	10 th February 2021 1100hrs (East African Time)	25 th February 2021 1100 hrs (East African Time)

From the foregoing addendum, the Board notes the Procuring Entity extended the tender submission deadline from 10th February 2021 to 25th February 2021 vide a notice in the Daily Nation Newspaper dated 3rd February 2021.

Noting that the Request for Review was filed on 2nd February 2021, the Board would like to point out that once a request for review application is filed, all procurement proceedings are suspended forthwith.

This was explained by the Honourable Justice Nyamweya in **Judicial Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR** as follows: -

"section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound.

53. Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point, at least for any deadlines defined by reference to a period of time, which in this case included the tender validity period. It would also be paradoxical and absurd to find that procurement

proceedings cannot proceed, but that time continues to run for the same proceedings.”

This means that upon filing of a request for review application, an automatic stay of proceedings takes effect which suspends all procurement proceedings and prevents any further steps from being taken in the tender in question. Further, procurement proceedings shall resume at the point they were, when the stay comes to an end, once the request for review has been heard and determined by the Board.

In this regard therefore, the Board finds that the Procuring Entity’s Addendum to the Tender Document titled ‘Extension and Clarification of Tenders’ dated 3rd February 2021, was issued after filing of the Request for Review on 2nd February 2021, which filing stayed any further steps being taken with respect to the subject procurement process as from 2nd February 2021, rendering the said addendum null and void.

Moreover, the Board takes cognizance of section 173 (b) of the Act, which states that: -

“Upon completing a review, the Review Board may do any one or more of the following-

(a).....;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings...”

The Board has established that the Procuring Entity breached the provisions of section 158 of the Act read together with section 157 (8) (b) of the Act and Regulation 164 of Regulations 2020 for failure to provide for a margin of preference in the Tender Document. Further, the Board has established that the Tender Document does not provide for financial evaluation criteria in compliance with Regulation 77 of Regulations 2020, noting the Procuring Entity's failure to provide in its financial evaluation criteria how it shall apply any margin of preference in the subject tender in accordance with Regulation 77 (2) (d) of the 2020 Regulations. Moreover, the Board has established that the Procuring Entity did not expressly indicate in its Invitation to Tender of its intention to establish a framework agreement, the number of suppliers or contactors in the said agreement (which should not be less than seven alternative vendors), the evaluation criteria and an estimate of the total volume or scope of work to be undertaken for the duration of the framework agreement in compliance with Regulation 102 (1) of the Regulations 2020.

The Board considered section 75 of the Act which reads as follows: -

"(1) A *procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender.*

(2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.

(3) A procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.

(4) The addendum shall be deemed to be part of the tender documents.

(5) If the tender documents are amended when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, or the time remaining is less than the period indicated in instructions to tenderers, the accounting officer of a procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.

According to this provision, a procuring entity may amend a tender document at any time before the deadline for submitting tenders, on its own initiative or in response to an inquiry by a candidate or tenderer, by issuing an addendum without materially altering the substance of the original tender, which shall be deemed to be part of the original tender document. Further, the accounting officer of a procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.

In this regard therefore, the Board finds it necessary to direct the Procuring Entity to issue an addendum to the Tender Document

directing bidders on the applicable margin of preference at the Financial Evaluation Stage and further clarify to all bidders of its intention to establish a framework agreement in the subject tender in accordance with section 114 of the Act read together with Regulation 102 and 103 of the Regulations 2020 or its intention to unbundle the subject procurement into lots, noting that the choice of a procurement method is at the discretion of the Procuring Entity, taking into consideration the Board's findings in this review.

Accordingly, the Board finds that the Request for Review Application succeeds with 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, 2015, the Board makes the following orders in the Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's Addendum to the Tender Document in International Tender No. KEBS/T013/2020-2023 for Provision of Pre-Export Verification of Conformity (PVOC) to Standards Services titled 'Extension and Clarification of Tenders' dated 3rd February 2021 be and is hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity is hereby directed to issue an addendum to amend the Tender document in International Tender No. KEBS/T013/2020-2023 for Provision of Pre-export Verification of Conformity**

(PVOC) to Standards Services to provide for a margin of preference, application of a margin of preference as a criterion for evaluation at the financial evaluation stage and at its discretion, provisions to satisfy the requirements for a framework agreement in accordance with section 114 of the Act read together with Regulation 102 and 103 of the Regulations 2020 or to unbundle the tender to provide for lots, within thirty (30) days from the date of this decision, taking into consideration the findings of this Board in this review.

- 3. The Accounting Officer of the Procuring Entity is hereby directed to extend the tender submission deadline for a further fourteen (14) days from the date of issuance of the addendum referred to in Order No. 2.**
- 4. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 23rd Day of February 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB