

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATIONS NO. 23/2021 OF 15TH FEBRUARY 2021

BETWEEN

GIBB AFRICA LIMITED.....APPLICANT

AND

THE PRINCIPAL SECRETARY,

NATIONAL TREASURY.....1ST RESPONDENT

THE NATIONAL TREASURY.....2ND RESPONDENT

KINGSWAY BUSINESS SYSTEMS.....1ST INTERESTED PARTY

SYBYL KENYA LIMITED.....2ND INTERESTED PARTY

Review against the decision of The National Treasury with respect to Tender No. TNT/025/2020-2021 for the Development of a Public Investment Management Information System (PIMIS).

BOARD MEMBERS

- | | |
|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Qs. Hussein Were | -Member |
| 3. Dr. Paul Jilani | -Member |
| 4. Mr. Jackson Awele | -Member |
| 5. Mr. Nicholas Mruttu | -Member |

IN ATTENDANCE

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

The Bidding Process

The National Treasury (hereinafter referred to as "the Procuring Entity") invited sealed bids for Tender No. TNT/025/2020-2021 for the Development of a Public Investment Management Information System (PIMIS) (hereinafter referred to as "the subject tender") through an advertisement in the Public Procurement Information Portal website www.tenders.go.ke and the Procuring Entity's website www.treasury.go.ke on 20th November 2020.

Bid Submission Deadline and Opening of Bids

By the bid submission deadline of 11th December 2020, the Procuring Entity received five (5) bids which were opened shortly thereafter by a Tender Opening Committee in the presence of bidders' representatives and recorded as follows: -

S/No.	Tenderer's Name	No of Copies	Bid Bond Amount	Financial Institution	Remarks
1	M/s Sybyl Kenya Limited of P.O. Box 12129 – 00100 Nairobi	6	1,000,000	African Banking Corporation Limited	Financial Proposal Attached & Original Bid bond
2	M/s Softclan Technology Limited of P.O. Box 36907 – 00200 Nairobi	6	1,000,000	Kenya Orient Insurance Ltd	Financial Proposal Attached & Original Bid bond
3	M/s Agile Business Solutions Ltd of P.O. Box 3503 – 00506 Nairobi	6	1,000,000	The Monarch Insurance	Financial Proposal Attached & Original Bid bond
4	M/s GIBB Africa Ltd of P.O. Box 30020 – 00100 Nairobi	6	1,000,000	Stanbic Bank	Financial Proposal Attached &

S/No.	Tenderer's Name	No of Copies	Bid Bond Amount	Financial Institution	Remarks
					Original Bid bond
5	M/s Kingsway Business Systems Ltd (Joint Ventures) with United Business Solutions Ltd of P.O. Box 79048 – 00400 Nairobi	6	1,000,000	Family Bank	Financial Proposal Attached & Original Bid bond

Evaluation of Bids

The evaluation process was conducted in the following stages: -

- 1) Mandatory Preliminary Evaluation;
- 2) Detailed Technical Evaluation;
- 3) Financial Evaluation.

1. Mandatory Preliminary Evaluation

At this stage of evaluation, the Evaluation Committee evaluated bids against the mandatory requirements in the Tender Document which were outlined as follows: -

1. Certified copy of certificate of Incorporation or Certificate of Registration or equivalent for International Firms which MUST be certified by the Kenyan Mission in the respective countries of origin or the respective firm's mission in Kenya (For each party/member of consortium)
2. Copy of Current Tax Compliance Certificate or equivalent for International Firms which MUST be certified by the Kenyan Mission in the respective countries of origin or the respective firm's mission

in Kenya (For each party/member of consortium in case of a joint venture)

3. Duly filled, signed and stamped Confidential Business Questionnaire (For each party/member of consortium in case of a joint venture)

4. Certified copy of County Government Single Business Permit (Prime / Lead bidder to provide)

5. Certified copy of certificate of Confirmation of Directors and Shareholding (CR 12) or equivalent for International Firms which MUST be certified by the Kenyan Mission in the respective countries of origin or the respective mission in Kenya (Issued within the last 12 Months to Tender Opening Date) (For each party/member of consortium in case of a joint venture)

6. Original Bid Security of Kenya Shillings One Million Only (Kshs. 1,000,000.00) from a reputable financial institution in Kenya valid for 30 days beyond the Tender Validity period. (To be attached in the Technical Proposals)

7. Must have an Original Manufacturer's Authorization Form (MAF) for the proposed Hardware ((Prime / Lead bidder to provide)

8. Dully filled, signed and stamped Self-Declaration Form that the Tenderer is Not Debarred (For each party/member of consortium in case of a joint venture)

9. Dully filled, signed and Stamped Self Declaration form that the Tenderer will not engage in any Corrupt or Fraudulent

Practice. (For each party/member of consortium in case of a joint venture)

10. Power of Attorney giving the name of the person who should be signing the bid, authorizing him to submit / execute the agreement as a bidding document

11. The bid document "Original" and "Copies" must be sequentially paginated / serialized.

12. Submitted the required number of copies for both the Technical Proposal i.e. one (1) original and Five (5) copies

Three (3) bidders, including M/s GIBB Africa Limited were found non-responsive to the mandatory requirements and thus disqualified from further evaluation. M/s GIBB Africa Limited was found non-responsive for the following reasons: -

- The Confidential Business Questionnaire was not stamped
- The bidder did not stamp the Self-Declaration Form that the Tenderer is Not Debarred.
- The bidder did not stamp the Self Declaration form that the Tenderer will not engage in any Corrupt or Fraudulent Practice.

Bidder No. 1, M/s Sybyl Kenya Limited and Bidder No. 5, M/s Kingsway Business Systems Limited in Joint Venture with United Business Solutions Limited met all the mandatory requirements and thus qualified to proceed to the next stage of evaluation.

2. Detailed Technical Evaluation

At this stage of evaluation, the Evaluation Committee evaluated bids against the technical requirements in the Tender Document. The minimum technical score specified in the Tender Document was 70% and any firm that scored 70% and above would be recommended for Financial Evaluation while any firm that scored less than 70% would be disqualified from further evaluation.

Upon conclusion of this stage of evaluation, Bidder No. 1, M/s Sybyl Kenya Limited scored 88% while Bidder No. 5, M/s Kingsway Business Systems Limited in Joint Venture with United Business Solutions Limited scored 77%. The Evaluation Committee therefore recommended the two bidders be invited for the opening of their financial proposals.

First Professional Opinion

In a professional opinion dated 7th January 2021, the Deputy Director Supply Chain Management Services considered the Evaluation Report and noted that Bidder No. 1 M/s Sybyl Kenya Limited (Lead Bidder) with M/s Synergy International Systems Inc should have been disqualified at the Mandatory Preliminary Evaluation Stage and thus recommended that only Bidder No. 5, M/s Kingsway Business Systems Limited in Joint Venture with United Business Solutions Limited be invited for the opening of its financial proposal.

3. Financial Evaluation

The Financial Proposal for Bidder No. 5, M/s Kingsway Business Systems Limited (Joint Venture) with United Business Solutions Limited was opened on 15th January 2021 in the presence of the bidder's representatives and financial evaluation was conducted by the Evaluation Committee in accordance with the criteria outlined in the Tender Document.

Upon conclusion of Financial Evaluation, the Evaluation Committee recommended that a post-qualification exercise be conducted on M/s Kingsway Business Systems Limited in Joint Venture with United Business Solutions Limited prior to award of the subject tender.

Post-Qualification

A post-qualification exercise was conducted on M/s Kingsway Business Systems Limited in Joint Venture with United Business Solutions Limited by the Evaluation Committee as captured in the Post Qualification report signed on 29th January 2021.

The Evaluation Committee's Recommendation

In view of the evaluation process and due diligence exercise, the Evaluation Committee recommended award of the subject tender to **M/s Kingsway Business Systems Limited in Joint Venture with United Business Solutions Limited** at its total quoted price of **Three Hundred and Twenty Million, Eight Hundred and Twenty-Three**

Thousand, Five Hundred and Twenty-Four Only (Kshs. 320,823,524.00) inclusive of VAT (14%).

Second Professional Opinion

In a professional opinion dated 29th January 2021, the Head of Supply Chain Management Services expressed his views on the procurement process stating that the same met the requirements of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and thus, concurred with the Evaluation Committee's recommendation that the subject tender be awarded to M/s Kingsway Business Systems Limited in Joint Venture with United Business Solutions Limited. This professional opinion was thereafter approved by the Accounting Officer.

Notification to Bidders

In letters dated 1st February 2021, the Accounting Officer notified the successful bidder and the unsuccessful bidders of the outcome of their respective bids.

REQUEST FOR REVIEW NO. 23 OF 2021

M/s GIBB Africa Limited (hereinafter referred to as 'the Applicant') lodged a Request for Review dated 12th February 2021 and filed on 15th February 2021 together with the Statement by Paul Karekezi in Support of the Request for Review dated 12th February 2021 and filed on 15th February 2021 and written submissions dated 1st March 2021 and filed

on 3rd March 2021, through the firm of Kihara & Wyne Advocates, seeking the following orders: -

- i. An order annulling and setting aside the award of Tender No. TNT/025/2020-2021 for the Development of a Public Investment Management Information System (PIMIS) to Messrs. Kingsway Business Systems Limited joint venture with Messrs United Business Solutions Limited;***
- ii. An order annulling and setting aside the 1st Respondents' Letter of Notification of Unsuccessful bid dated 1st February 2021 dated and addressed to the Applicant with respect to the said tender;***
- iii. An order declaring that the Applicant's bid was substantially responsive;***
- iv. An order declaring that the Respondents' actions have resulted in the Applicant being treated unfairly;***
- v. Any other relief that the Board may deem fit and just to grant;***
- vi. An order awarding costs of the Review to the Applicant herein.***

In response, the 1st and 2nd Respondents lodged a Notice of Preliminary Objection dated and filed on 3rd March 2021, a 1st and 2nd Respondents' Statement of Response dated 18th February 2021 and filed on 19th February 2021 and 1st and 2nd Respondents' written submissions dated and filed on 3rd March 2021, through the Procuring Entity's Deputy Director/Head Supply Chain Management Services.

M/s Kingsway Business Systems Limited (hereinafter referred to as 'the 1st Interested Party') lodged an Interested Party's Replying Affidavit sworn on 21st February 2021 and filed on 22nd February 2021, a Notice of Preliminary Objection dated and filed on 2nd March 2021, a 1st Interested Party's List of Authorities in support of the Preliminary Objection dated 2nd March 2021 and filed on 5th March 2021 and a 1st Interested Party's written submissions dated and filed on 5th March 2021, through the firm of Gerivia Advocates LLP.

M/s Sybyl Kenya Limited (hereinafter referred to as 'the 2nd Interested Party') lodged an Affidavit in Support of the Request for Review, sworn and filed on 26th February 2021 through the firm of MW & Company Advocates, LLP.

Pursuant to the Board's 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 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 Act.

BOARD'S DECISION

The Board has considered each of the parties' cases, the pleadings and written submissions filed before it, including confidential documents submitted by the Procuring Entity pursuant to section 67 (3) (e) of Act and thus, finds that the following issues call for determination: -

- I. Whether the 2nd Interested Party's Affidavit in Support of the Request for Review lodged on 26th February 2021 is properly filed before this Board**
- II. Whether the Applicant's bid satisfied the following mandatory requirements at the Preliminary Evaluation Stage in accordance with Clause 2.20 of the Appendix to Instructions to Tenderers of the Tender Document read together with section 79 (1) of the Act so as to proceed to the Detailed Technical Evaluation Stage: -**

a) MR 1: Certified copy of certificate of Incorporation or Certificate of Registration or equivalent for International Firms which MUST be certified by the Kenyan mission in the respective countries of origin or the respective firms mission in Kenya (For each party/member of consortium in case of a joint venture).

b) MR 3: Dully filled, signed and stamped Confidential Business Questionnaire (For each party/member of consortium in case of a joint venture)

c) MR 4: Certified copy of County Government Single Business Permit (Prime/Lead Bidder to provide).

d) MR 5: Certified copy of certificate of Confirmation of Directors and Shareholding (CR 12) or equivalent for International Firms which MUST be certified by Kenyan mission in the respective countries of origin or the respective mission in Kenya (issued within the last 12 months to Tender Opening Date) (For each party/member of consortium in case of a joint venture.)

e) MR 8: Dully filled, signed and stamped Self Declaration Form that the Tenderer is not debarred (For each party/member of consortium in case of a joint venture).

f) MR 9: Dully filled, signed and stamped Self-Declaration Form that the Tenderer will not engage in any corrupt or fraudulent practice (For each party/member of consortium in case of a joint venture).

III. What are the appropriate orders to grant in the circumstances?

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

The nature of a preliminary objection, was explained in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696** as follows: -

"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

This Board therefore deems it necessary to first address the preliminary objections raised before it at this given opportune moment.

The 1st and 2nd Respondents lodged a Notice of Preliminary Objection on 3rd March 2021 objecting to the Affidavit in Support of the Request for Review filed by the 2nd Interested Party for the following reasons: -

- i. That the Affidavit in Support is fatally defective because it has not been dated contrary to section 5 of the Oaths and Statutory Declarations Act, Cap 15. It contravenes all the legal requirements for making an affidavit.***
- ii. That the Affidavit in Support raises new issues directly affecting the 2nd Interested Party, which issues were not pleaded on by the Applicant. The Affidavit in Support should flow from the Applicant's pleadings and must therefore be disregarded.***
- iii. That the Affidavit in Support having raised new issues should be treated as an Application for Review which pursuant to section 167 (1) of the Public Procurement and Asset Disposal Act, 2015 and Regulation 203 of the Public Procurement and Asset Disposal Regulations, 2020 is filed out of time;***

iv. For the reasons hereinabove, the Honourable Board should strike out the Affidavit in Support.

The 1st Interested Party also lodged a Notice of Preliminary Objection on 2nd March 2021 objecting to the Affidavit in Support of the Request for Review filed by the 2nd Interested Party on the following grounds: -

- i. That the Affidavit in Support is fatally incompetent for lack of a date contrary to section 5 of the Oaths and Statutory Declarations Act and should be struck out.***
- ii. This Affidavit in Support is a Request for Review pursuant to section 167 (1) of the Public Procurement and Asset Disposal Act, 2015 (the Act) disguised as an Affidavit in Support as it raises new issues specific to the 2nd Interested Party and is filed out of time. The Honourable Board therefore lacks the requisite jurisdiction to entertain it.***
- iii. The Affidavit in Support/Request for Review has been lodged by the proposed 2nd Interested Party contrary to the express provisions of section 167 (1) of the Act and Regulation 203 of the Public Procurement and Asset Disposal Regulations, 2020 having been filed out of time and without payment of the requisite filing fees."***

The Board observes that the preliminary objections filed by the 1st and 2nd Respondents and the 1st Interested Party are both challenging the Affidavit in Support lodged before this Board by the 2nd Interested Party.

As such, the Board has the obligation to first determine whether the Affidavit in Support lodged by the 2nd Interested Party is properly filed before this Board.

The Board examined the Affidavit in Support of the Request for Review lodged by the 2nd Interested Party on 26th February 2021. Contrary to allegations by the Respondents' and the 1st Interested Party, the 2nd Interested Party's Affidavit was sworn at Nairobi on 26th February 2021 in accordance with section 5 of the Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya, which provides as follows: -

"Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

It is therefore clear that the allegations raised by the Respondents and the 1st Interested Party are untrue.

Some of the grounds raised in the 2nd Interested Party's Affidavit in support of the Applicant's Request for Review are outlined herein as follows: -

2. THAT I swear this affidavit in support of the Request for Review in so far as it seeks the annulment and setting aside of the award of Tender Number TNT/025/2020-201 for the Development of a Public Investment Business Systems Limited (the Award) joint venture with United Business Solutions is merited and an order as to costs.

3. THAT I wish to categorically state that the 1st and 2nd Respondent unreasonably, unfairly and irrationally rejected and disqualified the bid submitted by the Proposed 2nd Interested Party and its joint venture partner Synergy International Systems Inc....

5. THAT I am advised by our Advocates on record, MW & Company Advocates, LLP, whose advice I believe to be true, that the failure to certify the Proposed 2nd Interested Party's CR12 before a Commissioner of Oaths constituted a minor informality or non-conformity in the tender and that it did not constitute a material deviation...

11. THAT, moreover, I am advised by our Advocates on record, whose advice I believe to be true, that the rejection of disqualification of our bid was unfair, unreasonable and irrational without due regard to the provisions of clauses 2.20.3, 2.20.4 and 2.20.5 of the Invitation to Tender, which meant that the 1st and 2nd Respondent are in violation of section 4 (1) of the Fair Administrative Action Act, 2015...

12. THAT according to the foregoing paragraphs, I wish to humbly state that for the Honourable Board to render justice to the Applicant and Proposed 2nd Interested Party, the most logical and rational order is to annul and set aside the award of the tender to the Interested Party and subject the tender to fresh re-evaluation in strict compliance with the Invitation to Tender, the Constitution and the laws of Kenya."

Accordingly, the 2nd Interested Party is seeking orders that touch on the present Request for Review Application and is also raising grounds that are specific to its bid. According to grounds 3 to 12 of its Affidavit in Support of its Request for Review, the 2nd Interested Party avers that the Procuring Entity disqualified its bid for failure to certify the 2nd Interested Party's CR12 before a Commissioner of Oaths. In the 2nd Interested Party's view, its CR12 was certified as a true copy of the original by an Advocate of the High Court of Kenya and the only departure was the fact that the said CR12 was not certified by a Commissioner of Oaths. The 2nd Interested Party terms this as a minor informality, which ought not to have rendered its bid non-responsive.

With this in mind, the Board considered the meaning and role of an Interested Party in Request for Review proceedings before this Board.

The Black's Law Dictionary (Ninth Edition) defines an 'interested party' as follows: -

"A party who has a recognizable stake (and therefore standing) in the matter"

Order 10 Rule 2 of the Civil Procedure Rules (2010) further states that an Interested Party is one: -

".... whose presence before the court may be necessary in order to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit...."

Accordingly, an interested party is a party who has a recognizable stake or interest in a matter, whose presence may be necessary to enable a court or any other decision making body to effectively and completely settle all questions raised in the matter.

The role of an Interested Party in legal proceedings was explained by the Honourable Justice Munyao in the case of **Civil Case 172 of 2012 Marigat Group Ranch & 3 others v Wesley Chepkoimet & 19 others [2014] eKLR** where he stated as follows: -

"An interested party would be a person who has a close connection to the subject matter of the suit yet, not claiming any rights over it."

An Interested Party is therefore a person who is closely connected to the subject matter of a suit, (in this case a request for review touching on procurement proceedings, where an interested party participated) but who's role in the proceedings is limited, in that, they cannot claim any rights with respect to the matter under review or determination.

In this regard therefore, an interested party in request for review proceedings is a tenderer who participated in a procurement process that is the subject of administrative review before the Board.

It is important to note that once the Applicant filed the Request for Review, the Board Secretary notified all tenderers who participated in the subject tender of the existence of the request for review application, pursuant to section 168 of the Act, through a letter dated 15th February 2021, inviting them 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. An interested party invited to participate in request for review proceedings is required to either support the Applicant's Request for Review or the Respondents' case.

However, the 2nd Interested Party's Affidavit raised grounds and prayers touching on its own bid in relation to the criterion under Clause 2.20 (5) of the Appendix to Instruction to Tenderers of the Tender Document which deals with providing a certified copy of certificate of Confirmation of Directors and Shareholding (CR12).

In this regard therefore, it is the Board's considered view that the orders sought by the 2nd Interested Party in respect to its bid are ordinarily sought through a request for review application but in this instance have been sought through the 'back door' given the 2nd Interested Party filed a 'Request for Review' disguised as an Affidavit in Support of the Applicant's Request for Review. In doing so, the 2nd Interested Party has advanced its 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 relevant filing costs which would be incurred in this respect. The 2nd Interested Party ought to have filed a

request for review application pursuant to section 167 (1) of the Act in accordance with the procedure specified in Regulation 203 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020').

Accordingly, the Board finds that the orders sought and grounds raised by the 2nd Interested Party in so far as it relates to the Procuring Entity's decision on its bid with respect to the criterion under Clause 2.20 (5) of the Appendix to Instruction to Tenderers of the Tender Document are not properly filed before this Board and are hereby struck out from the record of these proceedings.

The Board would like to point out that the 2nd Interested Party deponed at paragraph 2 of its Affidavit that it is supporting the Applicant's Request for Review in so far as the same is seeking the annulment and setting aside of the award of the subject tender to the 1st Interested Party. This ground has been properly raised before Board therefore the Board shall address the same in determining the appropriate orders to grant upon completing the instant request for review proceedings.

On the second issue framed for determination, the Board observes that vide a letter dated 1st February 2021, which the Applicant received on 5th February 2021 as pleaded in paragraph 6 of its Statement in Support of the Request for Review, the Applicant was notified by the Procuring Entity that its bid was unsuccessful for the following reasons: -

- ***"You attached a copy of Certificate of Incorporation/Registration which was not certified by a Commissioner of Oaths as required in the Tender Document.***
- ***You attached a copy of County Government Single Business Permit which was not certified by a Commissioner of Oaths as required in the Tender Document.***
- ***You attached a copy of Certificate of Confirmation of Directors and Shareholding (CR12) which was not certified by a Commissioner of Oaths as required in the Tender Document.***
- ***The Confidential Business Questionnaire for GIBB International was not stamped***
- ***You did not stamp the Self Declaration Form that the tenderer is not debarred for GIBB International***
- ***You did not stamp the Self Declaration Form that the Tenderer will not engage in any corrupt or fraudulent practice for GIBB International.***

Aggrieved with the Procuring Entity's decision, the Applicant moved the Board through this Request for Review.

The Applicant contends that the grounds for disqualification of its bid, that is, submission of documents certified by an advocate instead of a commissioner of oaths and failure to stamp forms which were duly

completed and signed by an authorized representative of the Applicant should not have rendered its bid non-responsive since such an omission was not a serious or a material deviation as defined under Clause 2.20.3 and 2.20.4 of the Tender Document read together with section 79 (2) and (3) of the Act and Regulations 74 (2) and 75 (1) of Regulations 2020. According to the Applicant, a commissioner of oaths is a person who administers oaths and declarations and not a person who certifies documents as true copies of the original. The Applicant further submits that it made an inadvertent/innocent mistake, of form rather than substance, and it would only have been fair to allow it correct these errors and proceed to the Technical Evaluation Stage.

Similarly, the 2nd Interested Party in support of the Applicant's view in this regard, contends that the 1st and 2nd Respondents paid undue regard to a procedural requirement which was a minor informality and in view of Article 159 (2) (d) of the Constitution, unnecessary weight ought not to be placed on minor informalities.

In response, the 1st and 2nd Respondents contend that they acted according to the provisions of the Act and its attendant Regulations 2020 by rejecting the Applicant's bid at the Preliminary Evaluation Stage, since the Applicant failed to meet specific mandatory requirements. The 1st and 2nd Respondents aver in paragraph 4 of their Statement of Response that vide an email dated 25th November 2020, the Applicant sought clarification on the issue of certification following which the Procuring Entity issued Addendum No. 1 of the Tender Document dated

27th November 2020 and clarified that certification can only be done by a Notary Public or Commissioner of Oaths in Kenya. It is therefore the 1st and 2nd Respondents' submission that the Applicant cannot claim that it made an inadvertent mistake yet it sought clarification on the issue of certification from the Procuring Entity prior to submission of its bid in response to the subject tender.

On its part, the 1st Interested Party contends that the Applicant in its Request for Review has clearly admitted that its Certificate of Incorporation, County Government Single Business Permit and Certificate of Confirmation of Directors and Shareholding (CR12) were not certified as true copies of the original by a Commissioner of Oaths and thus the Applicant's bid was rightfully disqualified from further evaluation at the Preliminary Evaluation Stage for failure to meet the said mandatory requirements. According to the 1st Interested Party, the Applicant through this review is now seeking to be accorded favorable treatment in its attempt to downplay the said mandatory requirements as minor deviations yet the Procuring Entity clearly indicated in its Tender Document that certification of documents was to be undertaken by a Commissioner of Oaths or a Notary Public for Foreign Firms. It is therefore the 1st Interested Party's position, that the Request for Review has no merit and ought to be dismissed forthwith.

Having considered parties' pleadings and written submissions, the Board observes that the mandatory requirements in issue are outlined in

Clause 2.20 Preliminary Examination of the Appendix to Instructions to Tenderers on page 18 of the Tender Document as follows: -

"Preliminary Examination:

The preliminary evaluation criteria will be as follows: -

Note: The Lead/Prime Bidder Must be a Locally Owned Firm

Mandatory Requirements:

1. Certified copy of certificate of Incorporation or Certificate of Registration or equivalent for International Firms which MUST be certified by the Kenyan mission in the respective countries of origin or the respective firms mission in Kenya (For each party/member of consortium in case of a joint venture).

2.....

3. Dully filled, signed and stamped Confidential Business Questionnaire (For each party/member of consortium in case of a joint venture)

4. Certified copy of County Government Single Business Permit (Prime/Lead Bidder to provide).

5. Certified copy of certificate of Confirmation of Directors and Shareholding (CR 12) or equivalent for International Firms which MUST be certified by Kenyan mission in the respective countries of origin or the respective mission in Kenya (issued within the last 12 months to Tender Opening Date) (For each party/member of consortium in case of a joint venture.)

6.....

7.....

8. Dully filled, signed and stamped Self Declaration Form that the Tenderer is not debarred (For each party/member of consortium in case of a joint venture).

9. Dully filled, signed and stamped Self-Declaration Form that the Tenderer will not engage in any corrupt or fraudulent practice (For each party/member of consortium in case of a joint venture).

10.....

11.....

12.....

Financial Mandatory Criteria

1.....

2.....

3.....

4.....

N/B: All copies that require certification to be certified by a Commissioner of Oaths or a Notary Public for Foreign Firms.

At this stage, the tenderer's submission will either be responsive or non-responsive. The non-responsive submissions will be eliminated from the entire evaluation process and will not be considered further."

Accordingly, bidders were required to provide a certified copy of the following documents: -

- a) A Certificate of Incorporation or Certificate of Registration or its equivalent for International firms, which must be certified by the Kenyan Mission in the respective countries of origin or the respective firms mission in Kenya (for each party/member of consortium in case of a joint venture)
- b) A County Government Single Business Permit to be provided by the Lead Bidder;
- c) A certificate of Confirmation of Directors and Shareholding (CR 12) or equivalent for International firms, which must be certified by the Kenyan Mission in the respective countries of origin or the respective mission in Kenya, issued within the last 12 months to tender opening date (for each party/member of consortium in case of a joint venture).

All copies that require certification were to be certified by a Commissioner of Oaths or a Notary Public for Foreign Firms.

Further, bidders were required to submit the following forms which ought to be duly completed, signed and stamped:

- a) Confidential Business Questionnaire (for each party/member of consortium in case of a joint venture),
- b) Self Declaration Form that the Tenderer is not debarred (for each party/member of consortium in case of a joint venture) and

c) Self-Declaration Form that the Tenderer will not engage in any corrupt or fraudulent practice, (for each party/member of consortium in case of a joint venture).

Non-responsive submissions would be eliminated from the entire evaluation process and would not be considered further.

The Board observes that the Applicant does not dispute that its Certificate of Incorporation (CR12), its County Government Single Business Permit and Certificate of Confirmation of Directors and Shareholding were not certified by a Commissioner of Oaths but avers that the said documents were certified by an advocate and signed by an authorized representative and thus did not amount to a serious or material deviation which would render its tender non-responsive. Further, the Applicant does not dispute that its Confidential Business Questionnaire, Self-Declaration Form that it is not Debarred and its Self-Declaration Form that it will not engage in any corrupt or fraudulent practice are not stamped but justifies the said omissions as 'minor deviations' which ought not to have rendered its bid non-responsive and that it made an inadvertent mistake that should have been clarified by the Procuring Entity in accordance with section 81 (1) of the Act.

To begin with the term 'certified copy' is defined in the Cambridge English Dictionary as follows: -

"a copy of a document that can be used instead of the original one because an official has checked it and

formally approved it as a true and accurate copy by signing it"

Moreover, the Black's Law Dictionary defines the term 'certified copy' as follows: -

"A copy of a document signed and certified as a true copy by the officer to whose custody the original is entrusted."

In view of the foregoing definitions, a certified copy of a document refers to a copy of document which is authoritatively and formally confirmed and approved by an official to be a true and accurate copy of the original document.

Notably, Clause 2.20 Preliminary Examination of the Appendix to Instructions to Tenderers on page 18 of the Tender Document stipulates that all copies that require certification are to be certified by a specific official, that is, a Commissioner of Oaths or a Notary Public for Foreign Firms, which leads the Board to determine who is a Commissioner of Oaths or a Notary Public.

The Black's Law Dictionary defines a 'Commissioner of Oaths' as follows:

-

"A person that can administer oaths and take affidavits. They may only do this for other clients not their own"

Section 2 of the Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya (hereinafter referred to as 'the Oaths and Statutory Declarations Act') provides for the appointment of commissioners for oaths and states in subsection (1) thereof -

"(1) The Chief Justice may, by commission signed by him, appoint persons being practising advocates to be commissioners for oaths, and may revoke any such appointment."

Section 3 of the Oaths and Statutory Declarations Act provides -

"Every advocate appointed a commissioner for oaths shall, on appointment sign a roll, which shall be kept by the Registrar of the High Court."

Section 4 of the Oaths and Statutory Declarations Act sets out the powers of a commissioner for oaths as follows in subsection (1) thereof:

-

"(1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognise in or for the purpose of any civil proceedings in the High Court or any subordinate court."

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceedings or matter in which he is the advocate for any of the parties to the proceedings or concerned in the matter, or clerk to any such advocate, or in which he is interested."

From the above quoted provisions of statute, it is clear that a commissioner for oaths is not only a practicing advocate, but a practicing advocate who has been duly appointed by the Chief Justice as a commissioner of oaths and whose name is recorded in a roll kept by the Registrar of the High Court. Further, a commissioner of oaths may administer oaths and take affidavits, only for clients other than their own.

Moreover, Rule 2 of the Oaths and Statutory Declarations Rules, Legal Notice No. 117/1983 (Revised 2018) provides as follows: -

"An advocate who has practised in Kenya for not less than three years may apply to the Chief Justice to be appointed a commissioner for oaths."

On the other hand, the term 'Notary Public' is defined by the Black's Law Dictionary as follows: -

"A public officer whose function is to attest and certify, by his hand and official seal, certain classes of documents, in order to give them credit and authenticity in foreign

jurisdictions; to take acknowledgments of deeds and other conveyances, and certify the same; and to perform certain official acts, chiefly in commercial matters, such as the protesting of notes and bills, the noting of foreign drafts, and marine protests in cases of loss or damage.”

Accordingly, a Notary Public is a public officer whose function is to attest and certify by hand and officially seal certain classes of documents in order to give them credit and authenticity in foreign jurisdictions.

It is important to point out that the requirement for all copies that require certification to be certified by a Commissioner of Oaths or a Notary Public for Foreign Firms was a mandatory requirement in the subject tender. Further, the requirement to submit duly filled, signed and stamped forms as outlined under Clause 2.20 of the Appendix to Instructions to Tenderers on page 18 of the Tender Document was also a mandatory requirement in the Tender Document.

With this in mind, the Board examined the Applicant’s original technical proposal which forms part of the Procuring Entity’s original file submitted to the Board in accordance with section 67 (3) (e) of the Act and observes that the Applicant submitted a bid in response to the subject tender as a joint venture and stated as follows on page 3 thereof: -

“...we the undersigned, offer to provide consultancy services for Tender No. TNT/025/2020-2021 for supply, deliver, install and commission of the Development of a Public Investment Management Information System

(PIMIS) in accordance with your Request for Proposals and our Proposal. We are hereby submitting our Proposal, which includes this Technical Proposal and a Financial Proposal sealed in a separate envelope.

We:

GIBB Africa Limited

In association with

- Parker Randall Eastern Africa; and***
- International Public Private Partnership Institute Limited***

.....

Are submitting our proposal as the Prime Bidder in a Joint Venture with:

Cambridge Resources International Inc.....”

From the foregoing excerpt, the Board observes that the Applicant submitted a bid in response to the subject tender as a joint venture, that is, GIBB Africa Limited (Prime Bidder) [as stated at page 3 of the Applicant’s original bid] in Joint Venture with Cambridge Resources International Inc.

In response to Mandatory Requirement No. 1 of Clause 2.20 (1) of the Appendix to Instructions to Tenderers of the Tender Document, the Applicant provided the following documents in its original technical proposal: -

- a) On page 11 – A copy of a Certificate of Change of Name issued by the Registrar of Companies on 17th December 2003 from 'GIBB (Eastern Africa) Limited' to 'GIBB Africa Limited' certified on 7th December 2020 by one Hadassah Rimunya Advocate No. P/105/13878/17;
- b) On page 12 – A copy of a Certificate of Incorporation issued by the Registrar of Companies on 24th December 1998 to GIBB Kenya Limited certified on 7th December 2020 by one Hadassah Rimunya Advocate No. P/105/13878/17;
- c) On page 13 - A copy of a Certificate of Change of Name issued by the Registrar of Companies on 3rd November 1993 from 'GIBB Kenya Limited' to 'GIBB Eastern Africa Limited' certified on 7th December 2020 by one Hadassah Rimunya Advocate No. P/105/13878/17;
- d) On page 14 – A copy of a document issued by one Joseph Bullock, Secretary of State of the State of Delaware on 21st November 2019 stating that '***the attached is a true and correct copy of the certificate of incorporation of 'Cambridge Resources International Inc' filed in this office on the fifteenth day of October, A.D. 2007, at 6:33 o'clock P.M.***
- e) On page 15- 17 – A copy of a Certificate of Incorporation of Cambridge Resources International Inc dated 29th September 2007 and filed at the State of Delaware, Secretary of State, Division of Corporations on 15th October 2007.

It is worth noting that the Applicant was previously incorporated as GIBB Kenya Limited, thereafter changed its name to GIBB Eastern Africa

Limited and later to GIBB Africa Limited. The Board observes that the two Certificates of Change of Name and the Certificate of Incorporation submitted by the Applicant for GIBB Africa Limited, as the lead bidder, were not certified by a Commissioner of Oaths, but were certified by an Advocate, that is, one Hadassah Rimunya Advocate No. P/105/13878/17. In any event, the Applicant did not provide any evidence in its original bid showing that Hadassah Rimunya Advocate is a commissioner of oaths appointed by the Chief Justice, pursuant to Rule 2 of the Oaths and Statutory Declarations Rules, having satisfied the requirement of being an advocate who has practiced in Kenya for not less than three years.

Further, the Certificate of Incorporation submitted by the Applicant's joint venture partner, Cambridge Resources International Inc, was certified by the Secretary of State of the State of Delaware, that is, one Joseph Bullock. However, the Board observes that the said certificate was not certified by the Kenyan Mission in the respective country of origin or the respective firm's mission in Kenya as required under the mandatory criterion in issue.

The Board notes, from an examination of the website of the State of Delaware, Division of Corporation (www.delaware.gov), the Secretary of State is a public officer who may certify documents issued by the Division of Corporation. However, the said website does not clarify whether the Secretary of State of the State of Delaware is a Notary Public. Furthermore, having studied the Applicant's original bid, the

Board observes that the Applicant never provided any documentation that would assist the Evaluation Committee in determining whether or not the Secretary of State of the State of Delaware is a Notary Public. In the absence of any documentation, the Evaluation Committee had no way of ascertaining that the Secretary of State of the State of Delaware had the necessary qualifications of a Notary Public applicable in that State.

In this regard therefore, the Board finds that the Applicant failed to satisfy Mandatory Requirement No. 1 of Clause 2.20 of the Appendix to Instructions to Tenderers on page 18 of the Tender Document, for failure to provide a copy of a certificate of Incorporation for GIBB Africa Limited, as the lead bidder, certified by a Commissioner of Oaths and a copy of a Certificate of Incorporation for its joint venture partner, that is, Cambridge Resources International Inc. without evidence that the same was certified by a Notary Public.

In response to Mandatory Requirement No. 3 of Clause 2.20 (3) of the Appendix to Instructions to Tenderers of the Tender Document of the Tender Document, the Applicant provided the following documents in its original bid:

- a) On page 39 – A duly completed Confidential Business Questionnaire dated 11th December 2020, indicating GIBB Africa Limited, as the lead bidder. The same was signed but not stamped.

b) On page 40 - A duly completed Confidential Business Questionnaire for the Applicant's joint venture partner, Cambridge Resources International Inc. dated 1st December 2020, signed by one Glen P. Jenkins and stamped with the official stamp of Cambridge Resources International Inc.

Notably, the criterion in issue required each partner in a joint venture to provide their respective confidential business questionnaire that are signed and stamped. However, the Applicant submitted two confidential business questionnaires; one for GIBB Africa Limited as the lead bidder, which was duly completed, signed but not stamped and the second one for the Applicant's joint venture partner, Cambridge Resources International Inc., which was duly completed, signed and stamped with its official stamp.

Given that the Confidential Business Questionnaire of GIBB Africa Limited was not stamped, the Board finds that the Applicant failed to satisfy Mandatory Requirement No. 3 under Clause 2.20 (3) of the Appendix to Instructions to Tenderers on page 18 of the Tender Document.

In response to Mandatory Requirement No. 4 under Clause 2.20 (4) of the Appendix to Instructions to Tenderers on page 18 of the Tender Document, the Applicant provided on page 22 of its original bid, a copy of a single business permit issued by the Nairobi City County to GIBB Africa Limited on 6th February 2020, valid from 1st January 2020 to 31st December 2020, certified on 9th December 2020 by

one Hadassah Rimunya Advocate No. P/105/13878/17. The Board has already established that the Applicant failed to provide any evidence in its original bid showing that Hadassah Rimunya Advocate is a commissioner of oaths appointed by the Chief Justice, pursuant to Rule 2 of the Oaths and Statutory Declarations Rules, having satisfied the requirement of being an advocate who has practiced in Kenya for not less than three years. The criterion in issue required certification to be done by a commissioner of oaths or a notary public with respect to foreign firms. In this instance, the Applicant needed to provide evidence that Hadassah Rimunya Advocate is a commissioner of oaths, which it failed to do.

In this regard therefore, the Board finds that the Applicant failed to satisfy Mandatory Requirement No. 4 under Clause 2.20 of the Appendix to Instructions to Tenderers on page 18 of the Tender Document, because its copy of a county government single business permit issued on 6th February 2020 to GIBB Africa Limited, the lead bidder, was not certified by a Commissioner of Oaths.

In response to Mandatory Requirement No. 5 under Clause 2.20 of the Appendix to Instructions to Tenderers on page 18 of the Tender Document, the Applicant provided the following documents in its original bid document:

- a) On page 24 – A copy of a Certificate of Confirmation of Directors and Shareholding (CR12) issued by the Business Registration Services to GIBB Africa Limited for the said firm on 2nd

March 2020 certified on 7th December 2020 by one Hadassah Rimunya Advocate No. P/105/13878/17.

b) On page 25 – A copy of a Certificate of Confirmation of Directors and Shareholding (CR12) issued by the Business Registration Services to First Registrar and Secretaries for one Kamase Holdings Limited on 3rd July 2020, certified on 7th December 2020 by one Hadassah Rimunya Advocate No. P/105/13878/17.

c) On page 26 – A copy of a Certificate of Incorporation issued by the Registrar of Companies for Kamase Holdings Limited on 12th October 2005, certified on 7th December 2020 by one Hadassah Rimunya Advocate No. P/105/13878/17.

d) on page 27 – A copy of a Certificate of incumbency for Cambridge Resources International Inc issued by Harvard Business Services on 10th June 2020 and notarized by one Corrine E. Hitch, Notary Public, State of Delaware.

The Board observes that the Applicant provided a copy of a notarized Certificate of Incumbency issued on 10th June 2020 for its joint venture partner, that is Cambridge Resources International Inc, as the equivalent of a Certificate of Confirmation of Directors and Shareholding (CR12), issued on 10th June 2020, which was within twelve (12) months from tender opening (4th December 2020). However, said certificate was not certified by the Kenyan Mission in its respective country of origin or the respective firm's mission in Kenya as required under the mandatory criterion in issue. Further, the Applicant provided a copy of a CR12 Certificate for GIBB Africa Limited, as the lead bidder, which was

certified by an Advocate but not a commissioner of oaths. The Board would like to reiterate that the Applicant failed to provide any evidence in its original bid showing that Hadassah Rimunya Advocate is a commissioner of oaths appointed by the Chief Justice, pursuant to Rule 2 of the Oaths and Statutory Declarations Rules, having satisfied the requirement of being an advocate who has practiced in Kenya for not less than three years. The criterion in issue required certification to be done by a commissioner of oaths or a notary public with respect to foreign firms. In this instance, the Applicant needed to provide evidence that Hadassah Rimunya Advocate is a commissioner of oaths, which it failed to do.

It is also worth noting that the criterion under consideration required both members of a joint venture to provide a Certificate of Confirmation of Directors and Shareholding (CR12) or equivalent for International firms. This therefore means, both members' respective certificates needed to be certified by a Commissioner of Oaths (if applicable to the joint venture partner) or a Notary Public for foreign firms if applicable to the Joint Venture Partner.

Having found that the copy of a CR12 Certificate for GIBB Africa Limited was not certified by a Commissioner of Oaths and that the copy of the Certificate of Incumbency for the Applicant's joint venture partner, that is Cambridge Resources International Inc, was not certified by the Kenyan Mission in its respective country of origin or the respective firm's mission in Kenya, the Board finds that the Applicant failed to satisfy

Mandatory Requirement No. 5 of Clause 2.20 of the Appendix to Instructions to Tenderers on page 18 of the Tender Document.

In response to Mandatory Requirement No. 8 of Clause 2.20 of the Appendix to Instructions to Tenderers of the Tender Document, the Applicant provided the following documents in its original technical proposal: -

- a) On page 31 – A Self Declaration Form – Debarred duly completed and signed by one Paul Karekezi, Managing Director of GIBB Africa Limited on 8th December 2020 but not stamped with the bidder’s official stamp;
- b) On page 31 – A Self Declaration Form – Debarred duly completed and signed by one Glenn P Jenkins, the President of Cambridge Resources International Inc on 1st December 2020 and stamped with the official stamp of Cambridge Resources International Inc.

Notably, the Applicant provided a duly completed, signed and stamped Self-Declaration Form – Debarred for its joint venture partner, Cambridge Resources International Inc. However, the Applicant provided a Self-Declaration Form – Debarred for GIBB Africa Limited, as its lead bidder, which was duly completed and signed but was not stamped. The criterion under consideration required each member of a joint venture to provide a duly filled, signed and stamped Self-Declaration Form demonstrating each member of the joint venture is not debarred.

Having established the Self-Declaration Form - Debarred for GIBB Africa Limited was not stamped, the Board finds that the Applicant failed to satisfy Mandatory Requirement No. 8 under Clause 2.20 of the Appendix to Instructions to Tenderers on page 18 of the Tender Document.

In response to Mandatory Requirement No. 9 under Clause 2.20 of the Appendix to Instructions to Tenderers on page 18 of the Tender Document, the Applicant provided the following documents in its original bid: -

a) On page 34 – A Self-Declaration Form 'Corrupt or Fraudulent Practice Self Declaration That the Person/Tenderer Will Not Engage In Any Corrupt Or Fraudulent Practice' duly completed and signed by one Paul Karekezi, Managing Director of GIBB Africa Limited on 8th December 2020 but not stamped.

b) On page 35 - A Self Declaration Form 'Corrupt or Fraudulent Practice Self Declaration That the Person/Tenderer Will Not Engage In Any Corrupt Or Fraudulent Practice' duly completed and signed by one Glenn P Jenkins, the President of Cambridge Resources International Inc on 1st December 2020 and stamped with the official stamp of Cambridge Resources International Inc.

Notably, the Applicant provided a duly completed, signed and stamped Self Declaration Form '**Corrupt or Fraudulent Practice Self Declaration That the Person/Tenderer Will Not Engage In Any Corrupt Or Fraudulent Practice**' for its joint venture partner, Cambridge Resources International Inc. However, the Applicant provided a Self-Declaration Form '**Corrupt or Fraudulent Practice Self**

Declaration That the Person/Tenderer Will Not Engage In Any Corrupt Or Fraudulent Practice' for GIBB Africa Limited, as its lead bidder, which was duly completed and signed but not stamped. The criterion under consideration required each member of a joint venture to provide a duly filled, signed and stamped Self-Declaration Form demonstrating each member of the joint venture will not engage in any corrupt or fraudulent practice.

Having found the Self-Declaration Form '**Corrupt or Fraudulent Practice Self Declaration That the Person/Tenderer Will Not Engage In Any Corrupt Or Fraudulent Practice'** for GIBB Africa Limited was not stamped, the Board finds that the Applicant failed to satisfy Mandatory Requirement No. 9 of Clause 2.20 Preliminary Examination of the Appendix to Instructions to Tenderers on page 18 of the Tender Document.

In view of the foregoing, the Board has established that the Applicant failed to satisfy the following mandatory requirements: -

- a) MR 1: Certified copy of certificate of Incorporation or Certificate of Registration or equivalent for International Firms which MUST be certified by the Kenyan mission in the respective countries of origin or the respective firms mission in Kenya (For each party/member of consortium in case of a joint venture).
- b) MR 3: Dully filled, signed and stamped Confidential Business Questionnaire (For each party/member of consortium in case of a joint venture)

- c) MR 4: Certified copy of County Government Single Business Permit (Prime/Lead Bidder to provide).
- d) MR 5: Certified copy of certificate of Confirmation of Directors and Shareholding (CR 12) or equivalent for International Firms which MUST be certified by Kenyan mission in the respective countries of origin or the respective mission in Kenya (issued within the last 12 months to Tender Opening Date) (For each party/member of consortium in case of a joint venture.)
- e) MR 8: Dully filled, signed and stamped Self Declaration Form that the Tenderer is not debarred (For each party/member of consortium in case of a joint venture).
- f) MR 9: Dully filled, signed and stamped Self-Declaration Form that the Tenderer will not engage in any corrupt or fraudulent practice (For each party/member of consortium in case of a joint venture).

Nevertheless, the Board considered the Applicant's submissions that the grounds for disqualification of its bid, that is, submission of documents certified by an advocate instead of a commissioner of oaths and failure to stamp forms which were duly completed and signed by an authorized representative of the Applicant should not have made its tender non-responsive since such an omission was not a serious or a material deviation but amounted to a 'minor deviation'.

The question that arises in this regard is what is a mandatory requirement and what is its purpose?

The Board notes that section 79 of the Act is instructive on this aspect as it states as follows: -

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

Accordingly, a responsive tender is one that conforms to all the eligibility and mandatory requirements in the tender document.

These eligibility and mandatory requirements were considered by the Honourable Justice Mativo in **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** (hereinafter referred to as Miscellaneous Civil Application No. 85 of 2018)

"Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril. Such formalities are usually listed in bid documents as mandatory requirements – in other words

they are a sine qua non for further consideration in the evaluation process. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing, empowerment or post qualification. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.....

.....Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected. It is on the basis of the mandatory criteria that "competent" tenders are established....."

Accordingly, a responsive bid is one that meets all the mandatory requirements as set out in the bid document which are in essence the first hurdle that bidders must overcome for further consideration in an evaluation process. These eligibility and mandatory requirements are mostly considered at the Preliminary Evaluation Stage following which other stages of evaluation are conducted. Further, bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids.

The next question that arises is what is a 'minor deviation'?

Following the definition of a responsive tender as provided hereinabove, section 79 (2) and (3) of the Act provides as follows with respect to minor deviations: -

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

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2) (a) shall—

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders. [Emphasis by the Board]

This provision stipulates that the responsiveness of a tender shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document. It further defines a minor deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

The Honourable Justice Mativo in **Miscellaneous Civil Application No. 85 of 2018** considered what amounts to a minor deviation and determined as follows: -

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

In this regard therefore, a minor deviation:

- a) Does not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents;
- b) Does not touch on the substance of the tender.
- c) Can be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

The Honourable Justice Mativo continued as follows: -

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

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

From the foregoing, it is evident that a mandatory requirement cannot be waived by a procuring entity or termed as a ‘minor deviation’ as a mandatory requirement is instrumental in determining the responsiveness of a bid and is the first hurdle a bid must overcome in order to be considered for further evaluation.

As explained by the Honourable Justice Mativo in the aforementioned decision, it is important for bidders to compete on an equal footing and therefore where a procuring entity waives a mandatory requirement in favour of only one bidder, the same runs contrary to the public procurement principles of fairness and equity as espoused under Article 227 (1) of the Constitution which states as follows: -

"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]

To buttress this point, the High Court in **Miscellaneous Civil Application 140 of 2019 Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR** stated as follows: -

"It is evident that compliance with the requirements for a valid tender process including terms and conditions set out in the bid documents, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that a bidder or the Respondent may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Mandatory requirements in bid document must be complied with. Deviations from mandatory bid requirements should not be permissible.

In this regard therefore, a bidder is required to satisfy all mandatory requirements in order to qualify to proceed for further evaluation. Furthermore, it disenfranchises bidders who complied with all mandatory requirements to learn later that a particular bidder was given favourable

treatment in that, its failure to comply with mandatory requirements was considered a minor deviation. The principle of fairness under Article 227 (1) of the Constitution, requires all bidders to compete on an equal footing for award of a tender. In doing so, all bidders are subjected to the same eligibility and mandatory requirements (including technical specifications) before a consideration of price can be made at the Financial Evaluation Stage.

The Board observes that the 1st and 2nd Respondents annexed a copy of an email dated 25th November 2020 to its Statement of Response. The said email is addressed to the Procuring Entity through its email procurement@treasury.go.ke by one Mikhaili Miklyaev, Senior Associate of Cambridge Resources, International Inc, with the subject as 'Clarifications Request for Tender No. TNT/025/2020-2021 Development of PIMIS' with the following details:

"Dear Procurement,

With the reference to Tender No. TNT/025/2020-2021 Development of PIMIS, Cambridge Resources International Inc and GIBB Africa would like to submit several questions:

1. Page 19 states "All copies that require certification to be certified by a Commissioner of Oaths or a Notary Public for Foreign Firms'. Question: When foreign firms are considered the certification to done by the Notary Public in Kenya or in the country of origin?..."

In response to the foregoing and to other clarifications raised by interested bidders, the Procuring Entity issued Addendum No. 1 to the Tender Document, which is also attached to the 1st and 2nd Respondents' Statement of Response which stated as follows: -

"....The National Treasury has issued the following addendum to the Tender for Development of a Public Investment Management Information System (PIMIS) following request from interested bidders.

<i>S/No</i>	<i>Request</i>	<i>Clarification</i>
<i>1.</i>	<i>Page 19 states "All copies that require certification to be certified by a Commissioner of Oaths or a Notary Public for foreign firms"</i> <i>Question: When foreign firms are considered, the certification is done by the Notary Public in Kenya or in the country of origin?</i>	<i>Can be done by Notary Public in the country of origin or by Commissioner of Oaths</i>
<i>2</i>	<i>.....</i>	<i>.....</i>
<i>3</i>	<i>.....</i>	<i>.....</i>

It is therefore evident that the Applicant and its joint venture partner, had full knowledge of the implication of the requirement for all copies that require certification to be certified by a Commissioner of Oaths or a Notary Public for Foreign Firms as outlined under Clause 2.20 of the Appendix to Instructions to Tenderers on page 18 of the Tender Document as it sought clarification on the said requirement from the Procuring Entity as evidenced in the foregoing email dated 25th November 2020. Further, the Applicant participated in the subject procurement process and subjected itself to the process but now seeks to have the said requirement treated as a 'minor deviation' since its bid was found non responsive on a mandatory requirement that was known to it from the onset. The Applicant is estopped from challenging the

requirement for all copies that require certification to be certified by a Commissioner of Oaths or a Notary Public for Foreign Firms and the requirement to submit duly filled, signed and stamped forms as outlined under Clause 2.20 Preliminary Examination of the Appendix to Instructions to Tenderers on page 18 of the Tender Document since its participation in the subject procurement proceedings shows that the Applicant all along had knowledge of and was comfortable with this requirement.

In totality, the Board finds that the Applicant failed to satisfy Mandatory Requirement No. 1, 3, 4, 5, 8 and 9 at the Preliminary Evaluation Stage outlined under Clause 2.20 of the Appendix to Instructions to Tenderers on page 18 of the Tender Document read together with section 79 (1) of the Act, thus did not qualify to proceed to the Detailed Technical Evaluation Stage.

In determining the appropriate orders to grant as the third issue for determination, the Board would like to point out that upon examining the Procuring Entity's confidential documents relevant to the subject tender, the Board observes in the Evaluation Report signed on 7th January 2021 on page 11 thereof that the Applicant's bid was found non-responsive for the following reasons: -

- ***"The Confidential Business Questionnaire for GIBB International was not stamped***
- ***The bidder did not stamp the Self-Declaration Form that the Tenderer is not debarred for GIBB International***

- ***The bidder did not stamp the Self Declaration Form that the Tenderer will not engage in any corrupt or fraudulent practice for GIBB International***

Notably the Evaluation Committee highlighted three reasons why the Applicant's bid was found non-responsive at the Preliminary Evaluation Stage and not six reasons as listed in its letter of notification of unsuccessful bid dated 1st February 2021 which is cited hereinbefore.

Further, the Board observes the following remarks made by the Evaluation Committee on page 21 thereof: -

"The Evaluation Committee recommends as follows: -

1. That Bidders No. 1 and 5 M/s Sybyl Kenya Limited (Joint Ventures) with Synergy International Systems, Inc of P.O. Box 12129 – 000100 and M/s Kingsway Business Systems Ltd) Joint Venture) with United Business Solutions Limited of P.O. Box 79048 – 00400 Nairobi respectively be invited for the opening of the financial proposal for the tender for development of a Public Investment Management Information System (PIMIS) having scored 88% and 77% respectively in which both cases was above the required pass mark of 70% at the technical evaluation stage..."

From the above excerpt, the Evaluation Committee recommended the opening of financial proposals for two bidders, that is, M/s Sybyl Kenya Limited in Joint Venture with Synergy International Systems, Inc and

M/s Kingsway Business Systems Ltd in Joint Venture with United Business Solutions Limited.

However, in a professional opinion dated 7th January 2021, the Deputy Director, Supply Chain Management Services noted the following issues concerning the technical evaluation process: -

"a. That Bidder No. 1 M/s Sybyl Kenya Limited (Lead Bidder) with M/s Synergy International Systems, Inc. of P.O. Box 12129 – 00100 Nairobi was found to be responsive by the Evaluation Committee yet they submitted a copy of certificate of Confirmation of Directors and Shareholding (CR 12) issued within the last 12 Months to Tender Opening Date certified by an Advocate and not a Commissioner of Oaths as was required in the Tender Document as part of the mandatory requirements.

b. That Bidder No. 1 M/s Sybyl Kenya Limited (Lead Bidder) with M/s Synergy International Systems, Inc. of P.O. Box 12129 – 00100 Nairobi should have therefore been disqualified at the Preliminary Evaluation (Mandatory) Stage.

c. That M/s Sybyl Kenya Limited, Lead Bidder, certified other copies as per the tender requirements i.e. copies of Certificate of Registration / Incorporation and County Government Single Business Permit by a Commissioner of

Oaths but elected not to certify the copy of certificate of Confirmation of Directors and Shareholding (CR 12) as per the provisions of the tender requirements therefore failing to comply with the mandatory requirements.

d. That upon conclusion of the Tender Evaluation, the Evaluation Committee should conduct Post Qualification procedure to determine how the omitted capability shall be addressed by the bidder, before recommendation for award of contract.

Based on the above, I therefore recommend as follows;

That M/s Kingsway Business Systems Limited (Joint Ventures) with M/s United Business Solutions Limited of P.O. Box 79048 – 00400 Nairobi be Invited for the opening of the Financial Proposal having scored 77% which is above the required pass mark of 70% at the technical evaluation stage.”

The Deputy Director, Supply Chain Management Services noted that Bidder No. 1 M/s Sybyl Kenya Limited (Lead Bidder) with M/s Synergy International Systems, Inc. ought to have been disqualified at the Preliminary Evaluation Stage for having submitted a copy of a certificate of Confirmation of Directors and Shareholding (CR 12) certified by an Advocate and not a Commissioner of Oaths. He therefore recommended that only one bidder, M/s Kingsway Business Systems Limited in Joint Venture with M/s United Business Solutions Limited be invited to the opening of its financial proposal.

Following this Professional Opinion, the Board observes from the Procuring Entity's confidential file that the Evaluation Committee proceeded to open the financial proposal of M/s Kingsway Business Systems Limited in Joint Venture with M/s United Business Solutions Limited as captured in its Financial Evaluation Report signed on 21st January 2021 whereby it made the following remarks on page 4 thereof:

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"That arising from the clarifications by the Head, Legal Unit vide memo TNT/025/2020-2021 (51) dated 14th January 2021 as regards certification by a Commissioner for Oaths or a Notary Public for foreign firms, the same fate also befalls the three 3 No. bidders found to be non-responsive based on other mandatory requirements."

This was further elaborated in the Deputy Director, Supply Chain Management Services second professional opinion dated 29th January 2021, whereby he stated as follows on page 14 thereof:

"...10. That the Head of Procurement in his Professional Opinion recommended the opening of the Financial Proposal for the tender for the development of a Public Investment Management Information System (PIMIS) for only one bidder who was technically responsive.

11. The Accounting Officer sought for clarification from the Head of Legal Unit on the differing opinions between

the Head of Supply Chain Management Services and the Evaluation Committee

12. That the Head Legal Unit vide memo Ref TNT/025/2020-2021 dated 12th January 2021 requested the Head of Supply Chain Management to provide the bid documents for perusal so as to advise the Accounting Officer appropriately.

13. That the Head Legal Unit vide memo Ref TNT/025/2020-2021 (51) dated 14th January 2021 to the Accounting Officer concurred with the Professional Opinion by the Head Supply Chain Management Services

14. That arising from the clarifications by the Head Legal Unit vide memo Ref TNT/025/2020-2021 (51) dated 14th January 2021 as regards certification by a Commissioner for Oaths or a Notary Public for foreign firms, the same fate therefore also befalls the three 3No. bidders found to be non-responsive based on other mandatory requirements.

15. That the financial proposal for the technically responsive bidder was opened on 15th January 2021 at 2:00pm.

16. That the financial evaluation for the opened financial proposal was conducted on 18th January 2021.

17. That the post qualification exercise was conducted at the prime/lead bidder's premises on Thursday 28th January 2021.....

I have examined the Financial Evaluation Report as read together with the relevant provisions of the PPAD Act, 2015, and recommend that the tender for development of PIMIS be awarded to M/s Kingsway Business Systems Limited (Joint Ventures) with M/s United Business Solutions Limited ”

Notably, following the Deputy Director, Supply Chain Management Services' first professional opinion dated 7th January 2021, the Accounting Officer of the Procuring Entity sought clarifications from the Head of Legal Unit on the differing opinions between the Evaluation Committee and the Deputy Director, Supply Chain Management Services. Vide an Internal Memo Reference No. TNT/025/2020-2021 (51) dated 14th January 2021, the Head of Legal Unit concurred with the Deputy Director, Supply Chain Management Services' first professional opinion dated 7th January 2021 as regards the requirement for certification by a Commissioner of Oaths or a Notary Public for foreign firms and thus three other bidders found to be non-responsive based on other mandatory requirements were also to be found non-responsive on this requirement. The Evaluation Committee then proceeded to open the financial proposal of M/s Kingsway Business Systems Limited in Joint Venture with M/s United Business Solutions Limited and following a due diligence exercise, recommended the said bidder for award of the subject tender. The Deputy Director, Supply Chain Management concurred with this recommendation of award, which was thereafter approved by the Accounting Officer of the Procuring Entity.

The Black's Law Dictionary, 6th Edition defines "Bid Evaluation" as follows: -

"After the submission deadline, the process of examining, and evaluating bids to determine the bidders' responsiveness, and other factors associated with selection of a bid for recommendation for contract award."

Section 80 (4) of the Act provides as follows: -

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

An Evaluation Committee having conducted an evaluation of tenders, recommends a bidder for award of tender which process is captured in a report and submitted to the Head of Procurement Function for his or her review and recommendation.

Further, section 84 of the Act provides as follows: -

"(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed

professional opinion to the accounting officer on the procurement or asset disposal proceedings.

- (2) *The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.***
- (3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).**"

Section 84 of the Act demonstrates that a professional opinion is a central aspect between tender evaluation and award recommendations. The professional opinion emanates from the Head of Procurement and offers guidance or what may be referred to as an overview of the entire procurement process to the accounting officer. The Head of Procurement function reviews the Evaluation Report and offers his/her opinion/advice/views to the Accounting Officer on the appropriate decision to make with respect to a procurement process.

However, section 85 of the Act provides as follows: -

"Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to

inform the decision of the award of contract to the successful tenderers”

This provision of the Act is categorical that an evaluation committee is the one responsible for evaluation of bids and charged with the responsibility of making recommendations to an accounting officer through the head of procurement, to inform the decision of the award of contract to the successful tenderer.

The Board would like to point out that given an evaluation committee is required to provide a summary of evaluation and comparison of tenders in its evaluation report, an evaluation committee may recommend an award of a tender (in a one enveloped tender) in accordance with the applicable award criteria, to the method of procurement used.

In a two enveloped tender, such as the subject procurement proceedings, upon conclusion of evaluation of the technical proposals (preliminary and technical evaluation), the evaluation committee may recommend that the bidders found responsive at the end of technical evaluation stage, to proceed to opening of the financial proposals. It is not lost to the Board that through the professional opinion of the head of procurement function, he/she may provide his/her opinion/advice/views to the accounting officer which may be termed as recommendations on the appropriate step to be taken in view of the evaluation committee’s recommendation. The advice/opinion/views of the head of procurement, may include; re-evaluation of tenders or

approval of opening of the financial proposals (in a two enveloped tender).

The accounting officer will then take the opinion/advice/views of the head of procurement function in making a decision on the appropriate action to be undertaken.

It is therefore evident that the Procuring Entity's Head of Procurement function cannot usurp the role of an evaluation committee of evaluating tenders and in so doing, disqualify the bid of M/s Sybyl Kenya Limited in Joint Venture with M/s Synergy International Systems Incorporated. Instead, the Head of Procurement function ought to have advised the Accounting Officer that a re-evaluation of tenders at the Preliminary Evaluation Stage was appropriate in the circumstances. The Accounting Officer would then consider whether or not it was appropriate to order a re-evaluation in the circumstances.

Turning to the instant case, the Board would like to point out that once the Deputy Director, Supply Chain Management noted certain issues in his consideration of the Technical Evaluation Report as captured in his professional opinion dated 7th January 2021, he ought to have recommended for a re-evaluation of bids by the Evaluation Committee based on the issues raised in the said professional opinion. This, is in view of the fact that evaluation of tenders is conducted by the Evaluation Committee and not by the Head of Procurement Function. Once the Evaluation Committee concluded the technical re-evaluation process, it would then make a recommendation for the opening of financial

proposals, based on the results of the technical evaluation process. The Head of Procurement will then consider the Evaluation Committee's report capturing the technical evaluation process and offer his opinion/advice/views to the Accounting Officer on the appropriate decision to make with respect to the procurement process.

In this regard therefore, the Board finds that the procedure for recommendation for the opening of financial proposals was unlawful because the Head of Procurement usurped the role of the Evaluation Committee instead of providing advice to the Accounting Officer on the question whether a re-evaluation was appropriate in the circumstances.

The Board is cognizant 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 Applicant failed to satisfy Mandatory Requirement No. 1, 3, 4, 5, 8 and 9, outlined under Clause 2.20 of the Appendix to Instructions to Tenderers on page 18 of the Tender Document read together with section 79 (1) of the Act, thus did not qualify to proceed to the Detailed Technical Evaluation Stage.

Given the Head of Procurement Function raised issues regarding evaluation at the Preliminary Evaluation Stage in his professional opinion dated 7th January 2021, the Board deems it fit to order the 1st Respondent to direct the Evaluation Committee to re-admit all bids at the Preliminary Evaluation Stage and conduct a re-evaluation of bids at the Preliminary Evaluation Stage taking into consideration the issues raised by the Deputy Director, Supply Chain Management in his professional opinion dated 7th January 2021. Thereafter, the 1st Respondent must ensure that the subject procurement proceedings proceeds to its logical conclusion, taking into consideration the Board's findings in this review.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's Letter of Notification of Award dated 1st February 2021 in Tender No. TNT/025/2020-2021 for the Development of a Public Investment Management Information System (PIMIS), issued to M/s Kingsway Business Systems Limited in Joint Venture with M/s United Business Solutions Limited, be and is hereby cancelled and set aside.**

- 2. The Accounting Officer of the Procuring Entity's Letters of Notification of Award dated 1st February 2021 in Tender No. TNT/025/2020-2021 for the Development of a Public Investment Management Information System (PIMIS) issued to all unsuccessful bidders, including the Applicant herein, be and are hereby cancelled and set aside.**

- 3. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to re-admit all bids at the Preliminary Evaluation Stage and conduct a re-evaluation of bids at the Preliminary Evaluation Stage in accordance with Clause 2.20 of the Appendix to Instructions to Tenderers of the Tender Document read together with Section 79 (1) of the Act, taking into consideration the issues raised by the Deputy Director, Supply Chain Management in his professional opinion dated 7th January 2021 and the Board's findings in this review.**

- 4. Further to Order No. 3, the Accounting Officer of the Procuring Entity is hereby directed to proceed with the subject procurement process, including the making of an award, within fourteen (14) days from the date of this decision.**

5. 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 8th Day of March, 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB