

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 132/2020 OF 7TH OCTOBER 2020

BETWEEN

NEWSPACE CREATORS LTD.....APPLICANT

AND

THE ACCOUNTING OFFICER,

MERU UNIVERSITY OF SCIENCE

& TECHNOLOGY.....RESPONDENT

AMBER CONSTRUCTION LIMITED.....INTERESTED PARTY

Review against the decision of The Accounting Officer, Meru University of Science and Technology with respect to Tender No. MUST/ONT/LIBRARY/07/2020-2023 For Proposed Construction of Modern Library at Mariene Research Institute (Phase One).

BOARD MEMBERS

- | | |
|----------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Mr. Ambrose Ngari | -Member |
| 3. Ms. Rahab Chacha | -Member |

IN ATTENDANCE

- | | |
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| 1. Mr. Stanley Miheso | -Holding brief for Secretary |
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BACKGROUND TO THE DECISION

The Bidding Process

Meru University of Science and Technology (hereinafter referred to as "the Procuring Entity") invited interested and eligible to submit bids for Tender No. MUST/ONT/LIBRARY/07/2020-2023 For Proposed Construction of Modern Library at Mariene Research Institute (Phase One) (hereinafter referred to as "the subject tender") via an advertisement dated 4th August 2020.

Bid Submission Deadline and Opening of bids

A total of seventeen (17) firms/bidders submitted bids and the same were opened on 26th August 2020 in the presence of bidders and their representatives who chose to attend and which bids were recorded as follows:

S/NO	COMPANY NAME	NO. OF TENDER DOCUMENTS RECEIVED	NO. OF PAGES RECEIVED	BID BOND	TENDER SUM
1.	Marquee Services Ltd	2	394	2,300,000	123,955,517.40
2.	Enserve Holdings Ltd	2	715	2,300,000	149,023,719.54
3.	Stepal Builders	2	597	2,300,000	160,000,000
4.	Corban Construction Ltd	2	504	2,300,000	145,554,073
5.	Aggregate Construction Ltd	2	493	2,300,000	179,498,565
6.	Floors & Interiors Ltd	2	408	2,300,000	161,358,176.40
7.	Mbame Construction	2	419	2,300,000	165,581,117.20
8.	Amber Construction	2	697	2,300,000	156,098,394.40
9.	Tulsi Construction	4	686	2,300,000	173,557,174
10.	Mell Court Ltd	2	421	2,300,000	144,614,975
11.	Newspace Creators Ltd	2	410	2,300,000	143,862,280.62
12.	Columbia Developers	2	398	2,300,000	155,446,467
13.	Jedy General Contractors	2	471	2,300,000	174,319,348.26
14.	Jofrim (E.A) Limited	2	681	2,300,000	162,469,900.80
15.	Parklane Construction Ltd	6	489	2,300,000	161,976,976
16.	Triospan Limited	2	355	2,300,000	150,350,256.60

17.	Solitaire Construction	4	436	2,300,000	167,300,907.90
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Evaluation of Bids

The evaluation process was conducted in four stages:

1. Mandatory Requirements Evaluation;
2. Technical Evaluation;
3. Financial Evaluation;
4. Post – qualification.

1. Mandatory Requirements Evaluation

At this stage of evaluation, documents submitted by bidders were subjected to an examination to confirm the following:

- Copy of certificate of Incorporation under the Company's Act and must have been in existence for the last five (5) years).
- Copy of recent CR12 issued within the last 12 months from the date of Tender Opening. (This will be verified with the Registrar of Companies).
- Copy of Valid Tax Compliance Certificate issued by the Kenya Revenue Authority (Will be verified on the KRA TCC Checker).
- Attach a Valid copy of PIN/VAT Certificate.
- Must submit copies of certified Audited Financial Accounts for the last 3 years (2017, 2018 & 2019).
- Attach a valid copy of National Hospital Insurance Fund (NHIF) compliance certificate.

- Attach a Valid copy of National Social Security Fund (NSSF) Compliance Certificate).
- Tender Form Duly Completed, Signed and Stamped by the Tenderer in the format provided.
- Bills of Quantities Duly Completed, Signed and Stamped by the Tenderer in the format provided.
- Must Submit a Bid Bond of Kshs. 2,300,000.00/- valid for 120 days from the day of tender opening.
- Must submit a dully filled up Confidential Business Questionnaire in format provided.
- Must submit a copy of relevant Valid National Construction Authority Registration Certificate (NCA 3 and above).
- Must submit a copy of relevant current National Construction Authority Practicing License (NCA 3 and above).
- For Electrical and Mechanical Engineering sub-contractors, they MUST be registered with National Construction Authority Class NCA 5 and above. Attach both NCA5 registration certificates together with valid practicing licenses (Electrical and Mechanical).
- Attach proof of agreement to work with a domestic specialist sub-contractor for both electrical and mechanical.
- Submit a valid relevant current Trading License / Business Permit.
- Submit a signed Declaration form (sworn affidavit).
- Must provide Litigation and arbitration History if any. (If none please indicate so.)

- Must fill, sign and stamp anti-fraudulent practice declaration form provided in the tender document.
- Must fill, sign and stamp anti-corruption practice form provided in the tender document.
- Must fill, sign and stamp non-debarment declaration form provided in the tender document.
- Properly bound, good presented document. The tender document MUST be paginated / serial numbered. No loose documents shall be accepted.

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

Upon conclusion of Mandatory Requirements Evaluation, the following thirteen (13) bidders were found non-responsive for various reasons: -

- a) Marquee Services Ltd – Bidder No.1
- b) Corban Construction Ltd – Bidder No.4
- c) Aggregate Construction Ltd – Bidder No.5
- d) Flooring & Interiors Ltd – Bidder No.6
- e) Mbame Construction Ltd – Bidder No.7
- f) Tulsi Construction Ltd – Bidder No.9
- g) Mellcourt Ltd – Bidder No.10
- h) Newspace Creators Ltd – Bidder No.11
- i) Columbia Developers (K) Ltd – Bidder No.12

- j) Jedy General Contractors Ltd – Bidder No.13
- k) Parklane Construction Ltd – Bidder No.15
- l) Triospan Limited – Bidder No.16
- m)Solitaire Construction Ltd – Bidder No.17

The Applicant was among the thirteen (13) bidders who were found non-responsive at the Mandatory Requirements Evaluation Stage for the following specific reasons: -

- i. Audited accounts were not certified
- ii. Did not attach details of sub-contractors
- iii. Did not attach proof of agreement to work with a domestic specialist sub-contractor for mechanical.

The following four (4) bidders met the mandatory requirements and thus qualified to proceed to the Technical Evaluation Stage: -

- a) Bidder No.2: M/s. Enserve Holdings Ltd
- b) Bidder No.3: M/s. Stepal Builders
- c) Bidder No.8: M/s. Amber Construction Co. Ltd
- d) Bidder No.14: M/s. Jofrim (E.A) Company Ltd

2. Technical Evaluation

At this stage of evaluation, bids were evaluated against the technical specifications in the Tender Document as follows: -

Item	Description	Scoring breakdown	Max-points
1	<p>Building construction experience (as evidenced in business registration/certificate of incorporation)</p> <p>Over ten (10) years 5-10 years</p>	<p>(Aggregate score)</p> <p>10 6</p>	10
2	<p>Physical Facilities Evidence of Physical address e.g. title deed/lease agreement/utility bills</p> <p>Provided and satisfactory Not provided</p>	<p>(Aggregate score)</p> <p>2 0</p>	2
3	<p>Similar Works: Experience as a main Contractor in works of a similar nature and size completed within the last five years'</p> <p>Similar works completed in the last five (5) years.</p> <p>Similar works completed within the last five (5) years each with a value of at least Kshs. Twenty (25) Million, that have been successfully and substantially completed (Present in a table format and attach completion certificates, handing over certificates LSO)</p> <p>5 projects and above successfully completed 4 projects and above successfully completed 3 projects and above successfully completed 2 projects and above successfully completed 1 project successfully completed None or no relevant project</p>	<p>(Aggregate score)</p> <p>15 12 9 6 3 0</p>	15
4	<p>Current Commitments: Details of similar work underway or contractually committed i.e. Schedules of on-going projects each with a value of at least Kshs. Fifty (50) million. (Attach award letters or interim certificates or contracts)</p> <p>5 projects and above ongoing well 4 projects and above ongoing well</p>	<p>(Aggregate score)</p> <p>5 4</p>	5

Item	Description	Scoring breakdown	Max-points
	3 projects and above ongoing well 2 projects and above ongoing well 1 project ongoing well None or no relevant project	3 2 1 0	
5	<p>Names and addresses of clients who may be contacted for further information on the completed projects. (in a table format with the following details; Name of the contact person, Firm, Project/Assignment and Contact - Postal Address, E-mail Address, Tel: No. etc.). Also attach reference letters from the clients.</p> <p>5 Clients and above 4 Clients 3 Clients 2 Clients 1 Client No Client</p>	<p>(Aggregate score)</p> <p>5 4 3 2 1 0</p>	5
6	<p>Equipment Holding: Major items of construction equipment proposed to carry out the Contract (Owned, leased or hired) and an undertaking that they will be available for the Contract i.e. Schedule of contractor's equipment <i>(Submit Evidence of Ownership/Leasing (Mandatory) e.g. log books for vehicles, purchase receipts for equipment or lease agreements or any other acceptable documentary evidence)</i></p> <p>Excavation equipment Concrete mixer Transportation vehicles Grading Machine Compaction Machine Any other acceptable relevant major item of construction equipment not listed above will be awarded 1 mark each up to a Max. of 5 (Total marks will however not exceed 10)</p> <p>Total</p>	<p>(Add Individual item score)</p> <p>2 2 2 2 2</p> <p><u>10</u></p>	10
7	<p>Qualifications and experience of key site management and technical personnel</p>	<p>(Add individual item</p>	20

Item	Description	Scoring breakdown	Max-points
	<p>proposed for the Contract and an undertaking that they shall be available for the Contract i.e. Qualifications and experience of key personnel (Attach current signed original CVs (signed by both the employer and owner) and copy of relevant certificates).</p> <p>Project Engineer to have at least a degree in Engineering and be a member of a relevant professional body with at least Six (6) years relevant experience. <i>Academic Qualification (2 points) & Experience for the Period Indicated (4 Points). Submission of detailed C.V and membership of a relevant professional body (1 Point each)</i></p> <p>Site Manager to have at least a relevant professional qualification with Five (5) years' experience in the proposed position or works of a similar nature. Academic Qualification (2points) & Experience for the Period Indicated (3 Points). Submission of detailed C.V (1 Points)</p> <p>Supervisor to have at least a relevant professional qualification with Three (3) years' experience in the proposed position or works of a similar nature. <i>Academic Qualification (1 points) & Experience for the Period Indicated (2 Points). Submission of detailed C.V (1 Points)</i></p> <p>Any other qualified and relevant personnel proposed with adequate experience and with necessary documentation submitted as above will be awarded 1 marks each up to a maximum of 2 marks</p>	<p><u>score)</u></p> <p>8</p> <p>6</p> <p>4</p> <p>2</p>	
8	<p>Financial Situation: The current soundness of the applicant's financial position and its respective long-term profitability. Submit Audited financial statements reported within the last three (3) years (2018, 2017, and 2016).</p>	<p><u>(Aggregate score)</u></p>	3

Item	Description	Scoring breakdown	Max-points
	Turnover greater or equal to 3 times the cost of the project Turnover greater (but less than 3 times the cost of the project) or equal to the cost of the project Turnover below the cost of the project	3 2 0	
9	Reports on financial Standing such as profit and loss statement and auditors report for the past three years signed by Auditor(s) who are approved by ICPAK for Determining solvency and liquidity of the company Letter from banker regarding credit worthiness of the firm Clearance certificate from Credit Reference Bureau for the firm	<u>(Aggregate score)</u> 3 3 3	9
10	Authority to seek references from the tenderer's bankers with details of Name, address and telephone numbers and Account numbers Provided and satisfactory None	<u>(Aggregate score)</u> 2 0	2
11	Litigation and arbitration history. Information regarding any litigation, current or during the last five years, in which the tenderer is involved, the parties concerned and disputed amount (Provide current affidavit) Provided and satisfactory None	<u>(Aggregate score)</u> 2 0	2

Item	Description	Scoring breakdown	Max-points
12	Completeness and clarity of the tender documents Satisfactory Not satisfactory	(Aggregate score) 2 0	2
13	Work plan and methodology of the execution of works		15
	Total		100

To qualify for the Financial Evaluation Stage, bidders were required to score at least 70 marks out of a maximum 100 marks at this stage of evaluation.

Upon conclusion of the Technical Evaluation, the following two (2) bidders met the 70 marks threshold, hence qualified to proceed to Financial Evaluation Stage, that is: -

- a) Bidder No. M/s Amber Construction Company Limited
- b) Bidder No. 14 M/s Jofrim (E.A.) Company Limited

3. Financial Evaluation

At this stage of evaluation, the Evaluation Committee undertook financial evaluation as follows: -

Stage 1

- 1) This included the following: -

- a) Confirmation of and considering Bill of Quantities completed and signed.
- b) Conducting a financial comparison for the firms that passed technical evaluation

2) Tenders checked for errors, inconsistencies and frontloading.

The following tenders would be **automatically disqualified**.

- i) Tenders with an arithmetic error of more than 5%, unless the tenderers demonstrated and confirmed in writing that they would satisfactorily deliver.
- ii) Tenders that were frontloaded, unless the tenderer (if successful) agreed with the employer on interim certificates payment plan that did not disadvantage the employer and enhancement of performance security.
- iii) Tenders that had errors or inconsistencies in pricing that were significant enough to cause distortion in a successful contractor's cash flow or put the client in a contractually unfavorable or risky position.

3) The Tenderer should have at least 20% of the total tender value in cash assets in the Balance Sheet provided as part of the audited financial statements.

The tenderers were ranked as follows:

S/NO	COMPANY NAME	TENDER SUM
8.	Amber Construction Ltd	156,098,394.40
14.	Jofrim (E.A) Limited	162,469,900.80

4. Post-Qualification

In line with best practices and bearing in mind that the project is capital intensive, the Evaluation Committee requested the Procuring Entity to carry out due diligence on the successful bidder **M/s. Amber Construction Ltd** for consideration for award of the subject tender.

The following public entities where the successful bidder had previously undertaken similar works were visited for due diligence:

S/NO.	PROJECT NAME	VALUE (Kshs)	CLIENT	STATUS OF PROJECT	LOCATION
1.	Proposed renovations to Forodha House	157M	Judiciary of Kenya	Ongoing	Nairobi
2.	Proposed refurbishment, addition and alteration to the county house building	247M	Parliamentary Service Commission	Ongoing	Nairobi
3.	Proposed construction of Nakuru County Chambers	303M	Nakuru County Assembly	Ongoing	Nakuru
4.	Proposed construction of Machakos County Assembly Chambers	349M	Machakos County Assembly	Ongoing	Machakos

Findings

The entities visited for due diligence expressed their satisfaction with the services provided by **M/s. Amber Construction Ltd**.

The Evaluation Committee's Recommendation

In view of the evaluation and the post-qualification process, the Evaluation Committee recommended award of the subject tender to **M/s. Amber Construction Ltd** at a tender sum of **Kshs.**

156,098,394.40 (Kenya Shillings One Hundred and Fifty-Six Million Ninety-Eight Thousand Three Hundred and Ninety-Four and Forty Cents Only) inclusive of ALL taxes.

Professional Opinion

The Procurement Officer reviewed the Evaluation Report and concurred with the Evaluation Committee's recommendation of award, vide a Professional Opinion dated 24th September 2020, which recommendation of award was approved by the Accounting Officer on the same date.

REQUEST FOR REVIEW NO. 132 OF 2020

M/s Newspace Creators Limited, (hereinafter referred to as "the Applicant"), lodged a Request for Review dated and filed on 7th October 2020 together with a Statement in Support of Request for Review (hereinafter referred to as "the Applicant's Statement") dated and filed on even date through the firm of Gerivia Advocates LLP. The Applicant further filed a Further Statement dated 26th October 2020 on 27th October 2020 (hereinafter referred to as 'the Applicant's Further Statement').

In response, the Procuring Entity, acting in person, lodged a Response dated 9th October 2020 and filed on 12th October 2020 (hereinafter referred to as 'the Procuring Entity's Response').

The Applicant sought for the following orders in the Request for Review:

- a. An order annulling and setting aside the Respondent's decision to award Tender No. MUST/ONT/LIBRARY/07/2020-2023 For Proposed Construction of Modern Library at Mariene Research Institute (Phase One) to Amber Construction;***
- b. An order annulling and setting aside the Respondent's letter dated 26th September 2020 notifying the Applicant that it had not been successful in Tender No. MUST/ONT/LIBRARY/07/2020-2023 For Proposed Construction of Modern Library at Mariene Research Institute (Phase One);***
- c. An order declaring that the Procuring Entity failed to evaluate the Applicant's bid at the Preliminary/Mandatory Stage in accordance with the criteria and procedures under the Tender Document and the provisions of the Act (section 80 (2));***
- d. An order directing the Procuring Entity to re-admit the Applicant at the Preliminary/Mandatory Stage and to carry out a re-evaluation at the Preliminary/Mandatory Stage noting to observe and apply the criteria in the Tender Document as required by the Act at section 80 (2) or in the alternative, the Board in exercise of its discretion, to give directions to the Respondent to redo or correct anything within the entire procurement***

process found to not have been done properly to ensure compliance with the law;

e. An order compelling the Respondent to pay the Applicant the costs arising from/and incidental to this Application; and

f. The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

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

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

The Request for Review was lodged on 7th October 2020. The Procuring Entity was then served with the Request for Review on 8th October 2020. Thereafter, emails were sent to all bidders who participated in the subject tender, including the successful bidder, that is, the Interested Party, on 12th October 2020. However, the Interested Party did not file any pleadings in response to the Request for Review.

The Applicant lodged Written Submissions dated 26th October 2020 on 27th October 2020 whereas the Procuring Entity and the Interested Party did not file any Written Submissions.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, including confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act").

The issue that arises for determination is as follows: -

Whether the Applicant's bid at the Mandatory Requirements Evaluation Stage satisfied the following mandatory requirements in the Tender Document to qualify for further evaluation: -

- a) MR 5: Must submit copies of certified Audited Financial Accounts for the last 3 years (2017, 2018 & 2019);*
- b) MR 14: For Electrical and Mechanical Engineering sub-contractors, they MUST be registered with National Construction Authority Class NCA 5 and above. Attach both NCA 5 registration certificates together with valid practising licenses;*
- c) MR 15: Attach proof of agreement to work with a domestic specialist sub-contractor for both electrical and mechanical.*

A brief background to the Request for Review is that the Procuring Entity advertised the subject tender on 4th August 2020 and invited interested and eligible bidders to submit bids in response to the same.

By the bid submission deadline of 26th August 2020, the Procuring Entity received a total of seventeen (17) bids which were opened and read out by the Procuring Entity's Tender Opening Committee in the presence of bidders and their representatives.

At the conclusion of the evaluation process, the Procuring Entity's Evaluation Committee recommended award of the subject tender to M/s Amber Construction Limited for having the lowest evaluated responsive

bid which recommendation of award was approved by the Procuring Entity's Accounting Officer, having been reviewed by the Head of Procurement function. The successful bidder including all unsuccessful bidders, were duly notified of the outcome of their bids.

The Applicant contended in paragraph 5 of its Request for Review that vide a letter dated 16th September 2020, it was informed by the Procuring Entity that its bid was unsuccessful for the following reasons: -

"1. Audited accounts were not certified

1. You did not attach details of sub-contractors

2. You did not attach proof of agreement to work with a domestic specialist sub-contractor for mechanical

The tender was awarded to M/s Amber Construction Limited.

On behalf of the University, we take this opportunity to thank you for showing interest in doing business with us."

Aggrieved by the Procuring Entity's decision, the Applicant lodged the instant Request for Review.

Having considered parties' pleadings and documentation, the Board observes that the Applicant is challenging the reasons why its bid was declared unsuccessful with respect to the following mandatory

requirements as set out under Clause 1.3 of the Evaluation Tool in the Appendix to Instructions to Tenderers:

- a) **MR 5:** Must submit copies of certified Audited Financial Accounts for the last 3 years (2017, 2018 & 2019);
- b) **MR 14:** For Electrical and Mechanical Engineering sub-contractors, they **MUST** be registered with National Construction Authority Class NCA 5 and above. Attach both NCA 5 registration certificates together with valid practising licenses;
- c) **MR 15:** Attach proof of agreement to work with a domestic specialist sub-contractor for both electrical and mechanical.

In determining whether or not the Applicant satisfied the above mentioned mandatory requirements at the Mandatory Requirements Evaluation Stage, the Board addressed its mind to each of the aforementioned criteria as follows: -

i. MR 5: Must submit copies of certified Audited Financial Accounts for the last 3 years (2017, 2018 & 2019);

According to this mandatory requirement, bidders were required to submit copies of certified audited financial accounts for the last three (3) years, that is, for 2017, 2018 and 2019. Failure to comply with this mandatory requirement would result in a bidder's elimination from the evaluation process.

The Cambridge Dictionary defines a financial account which is also referred to as a financial statement to mean: -

"financial documents showing a company's profits, debts, cash flow, etc. during a particular period, which are used by investors, banks, etc. to measure a company's performance"

Section 620 of the Companies Act No. 17 of 2015 (hereinafter referred to as 'the Companies Act') defines the term 'annual financial statements' as follows: -

"(1) In this Part—

"annual financial statement" in relation to a company, means the company's individual financial statement for a financial year, and includes any group financial statement prepared by the company for that year.

(2) In the case of an unquoted company, its annual financial statement and reports for a financial year consist of—

(a) its annual financial statement;

(b) the directors' report; and

(c) the auditor's report on the financial statement and directors' report unless the company is exempt from audit.

(3) In the case of a quoted company, its annual financial statement and reports for a financial year consist of—

(a) its annual financial statement;

(b) the directors' remuneration report;

(c) the directors' report; and

(d) the auditor's report on—

(i) the financial statement;

(ii) the auditable part of the directors' remuneration report; and

(iii) the directors' report.

(4)..... "

From this provision, the Board observes, an annual financial statement is a company's individual financial statement for a financial year and includes for both quoted and unquoted companies (companies listed and not listed in the stock exchange respectively), the companies annual financial statement, director's report and auditor's report.

Section 635 of the Companies Act provides that the financial statements of a company should be prepared by the directors of the company and further section 636 (1) provides that a company's annual financial statements should give a company's *'true and fair view of the assets, liabilities and profit or loss'*.

Further, section 658 (1) of the Companies Act provides as follows: -

"As soon as practicable after the directors have finished preparing their annual report for the company, they shall

approve the report and arrange for one of them or the secretary of the company to sign it. "

In this regard therefore, after preparation of the annual financial statements and report for the company, the directors of a company are required to approve the said report and arrange for one of the directors or the secretary of the company to sign the said report.

Having established the meaning of annual financial statements, the Board further examined the Companies Act and observes section 709 of the said Act requires for a company's annual financial statements for a financial year to be audited in accordance with Part XXVII of the Companies Act.

Notably the Black's Law Dictionary assigns the following meaning to the term 'audit' : -

"to make an official investigation and examination of accounts and vouchers"

Further, the Companies Act defines an 'auditor' as follows: -

"auditor" means—

(a) a person or firm appointed as an auditor of a company under Part XXVII; or

(b) a person or firm appointed as an auditor of a body of a kind prescribed by the regulations for the purposes of this definition"

According to Part XXVII of the Companies Act, a company is required to appoint an independent auditor who shall make a report to the members of the company on all annual financial statements of the company.

Section 727 (3) provides that the auditor shall:

"...clearly state in the report whether, in the auditor's opinion, the annual financial statements—

(a) gives a true and fair view of—

(i) the case of an individual balance sheet — of the financial position of the company as at the end of the relevant financial year;

(ii) in the case of an individual profit and loss account—of the profit or loss of the company for the financial year; and

(iii) in the case of a group financial statements — of the financial position as at the end of the financial year and of the profit or loss for the financial year of the undertakings to which the statements relate, taken as a whole, so far as concerns members of the company"

Accordingly, an auditor is required to examine the prepared and signed annual financial statements of a financial year of a company which includes documents such as the profit and loss account and balance sheet and provide his/her opinion/report as to whether the said

documents are a true and fair presentation of the financial situation of a company.

Upon conclusion of the auditor's examination of a company's annual financial statements for a financial year, section 735 (1) requires the auditor who conducted the said examination to sign and date his/her report and ensure that his/her name is prominently displayed in the report.

In this regard therefore, Audited Financial Accounts or Audited Financial Statements are financial documents showing a company's profits, debts, cash flow during a financial year which documents have been examined by an independent auditor and the said auditor has provided his/her opinion/report on whether the said documents are a true and fair presentation of the financial situation of a company.

The question that now arises is what are certified audited financial accounts?

The Black's Law Dictionary defines the term 'certified' as follows: -

"A qualification or attribute meaning to being officially attested or authoritatively confirmed as being genuine or true as represented, or complying or meeting specified requirements or standards."

Accordingly, 'certified' can be interpreted in three ways: -

- a) officially attested or
- b) authoritatively confirmed as being genuine or true as represented or
- c) complying with a specified requirement or standard.

Applying the foregoing interpretation, certified audited financial accounts are audited financial accounts which have been officially attested as required under law.

A distinction can therefore be made between copies of certified audited financial accounts and certified copies of audited accounts.

Copies of certified audited financial accounts which is the mandatory requirement in issue refers to copies of audited financial accounts which have been duly attested/signed as required under law by both the directors of the company and an independent auditor.

Certified copies of audited accounts refers to copies of audited financial accounts which have been authoritatively confirmed to be genuine or true as represented.

With this in mind, the Board examined the Applicant's original bid which forms part of the Procuring Entity's confidential file and observes that the Applicant provided the following documents in response to this criterion:

- a) On page 143 to page 158 – A copy of an Audited Report and Financial Statements for the year ended 31st December 2019
- b) On page 159 to page 174 – A copy of an Audited Report and Financial Statements for the year ended 31st December 2018, stamped with a Newspace Creators Limited Stamp dated 3rd August 2019;
- c) On page 175 to page 192 – A copy of an Audited Report and Financial Statements for the year ended December 2017, stamped with a Newspace Creators Limited Stamp dated 3rd August 2019;

From the foregoing, the Board made the following observations: -

With respect to the Applicant's Annual Report and Financial Statements for the year ended 31st December 2019, the Board observes that the said statements were not signed and dated by a director or secretary of the company as evidenced on page 2 of the Annual Report and Financial Statements which is contained on page 146 of the Applicant's bid.

Further, the Board observes that the Applicant's Annual Report and Financial Statements were audited by the firm of Roshem & Associates, Certified Public Accountants. Although the auditor responsible, that is, CPA Mukani Shem Rodgers appended his signature on the auditors' report as contained on page 148 of the Applicant's bid, the said auditor's stamp was not dated accordingly.

Secondly, the Applicant's Annual Report and Financial Statements for the year ended 31st December 2018, were not signed and dated by a director or secretary of the company as evidenced on page 2 of the Annual Financial Statements as contained on page 162 of the Applicant's bid.

Further, although the auditor responsible, that is, CPA Mukani Shem Rodgers appended his signature on the auditors' report as contained on page 164 of the Applicant's bid, the said auditor's stamp was not dated accordingly.

As explained hereinbefore, an auditor is required to examine the prepared and signed annual financial statements of a financial year of a company which includes documents such as the profit and loss account and balance sheet and provide his/her opinion/report as to whether the said documents are a true and fair presentation of the financial situation of a company. This means that an auditor can only sign and submit its report after the directors have signed the Annual Report and Financial Statements of a company for a financial year and not before.

In this regard therefore the Applicant's Annual Report and Financial Statements for the year ended 2018 and 2019 were not certified Audited Annual Financial Accounts, noting that the said financial accounts were not properly attested by the directors of the company and the auditor's stamp was not dated accordingly.

However, the Board observes that the Applicant's Annual Report and Financial Statements for the year ended 2017 were properly attested/signed and dated by both the directors of the company and the auditor and were therefore certified audited financial accounts for the year ended 2017.

This notwithstanding, the mandatory requirement in issue required bidders to provide copies of certified audited financial accounts for the last three years, that is, 2017, 2018 and 2019.

In this regard therefore, the Board finds that the Applicant did not satisfy Mandatory Requirement No. 5 in the Tender Document, noting the Applicant's failure to provide certified Audited Financial Accounts for the years 2018 and 2019.

- ii. MR 14: For Electrical and Mechanical Engineering sub-contractors, they MUST be registered with National Construction Authority Class NCA 5 and above. Attach both NCA 5 registration certificates together with valid practising licenses**

According to this mandatory requirement read together with the standard form in the blank Tender Document titled 'Details of Sub-contractors', if the tenderer wished to sub-let any portion of the works under any heading, the tenderer was required to give details of the sub-contractor it intends to employ for each portion and to attach both NCA 5 registration certificates together with valid practising licence of such

sub-contractor. Failure to comply with this mandatory requirement would result in a bidder's elimination from the evaluation process.

The Board examined the Applicant's original bid and observes on page 321 thereof a document titled 'Details of Sub-contractors' whereby the Applicant stated as follows: -

"(1) Portion of Works to be sublet: Electrical Works

- Full names of Sub-contractor and address of head office

ODD-MAC Engineering Limited Road A, Off Enterprise Road, Nairobi

- Sub-contractor's experience of similar works carried out in the last 3 years with contract value: Over 100 million

(2) Portion of Works to sublet: Electrical Works

(i) Full name of sub-contractor and address of head office:

Newspace Creators Limited P.O. Box 13834 – 00400 Nairobi

(ii) Sub-contractor's experience of similar works carried out in the last three years with contract value: Over 120 million"

Further, the Applicant provided the following certificates in its bid: -

- a) On page 25 – A Certificate of Registration issued to Newspace Creators Ltd for registration as a Building Works Contractor

Category NCA 2 by the National Construction Authority on 21st July 2020 and valid until 30th June 2022

- b) On page 26 – A Certificate of Registration issued to Newspace Creators Ltd for registration as a Road Works Contractor Category NCA 2 by the National Construction Authority on 21st July 2020 and valid until 30th June 2022
- c) On page 27 - A Certificate of Registration issued to Newspace Creators Ltd for registration as a Water Works Contractor Category NCA 2 by the National Construction Authority on 21st July 2020 and valid until 30th June 2022
- d) On page 28 - A Certificate of Registration issued to Newspace Creators Ltd for registration as a Mechanical Engineering Service Contractor Category NCA 2 by the National Construction Authority on 21st July 2020 and valid until 30th June 2022
- e) On page 29 – A Contractor Annual Practising Licence issued to Newspace Creators Ltd for registration as a Building Works Contractor Category NCA 2 by the National Construction Authority on 21st July 2020 and valid from 1st July 2020 until 30th June 2021
- f) On page 30 - A Contractor Annual Practising Licence issued to Newspace Creators Ltd for registration as a Road Works Contractor Category NCA 2 by the National Construction Authority on 21st July 2020 and valid from 1st July 2020 until 30th June 2021
- g) On page 31 - A Contractor Annual Practising Licence issued to Newspace Creators Ltd for registration as a Water Works Contractor Category NCA 2 by the National Construction Authority on 21st July 2020 and valid from 1st July 2020 until 30th June 2021

h) On page 32 - A Contractor Annual Practising Licence issued to Newspace Creators Ltd for registration as a Mechanical Engineering Service Contractor Category NCA 2 by the National Construction Authority on 21st July 2020 and valid from 1st July 2020 until 30th June 2021

From the foregoing, the Board observes that the Applicant did not provide any NCA 5 and above Certificates or valid practising licences for its electrical sub-contractor, that is, ODD-MAC Engineering Limited or for any other electrical sub-contractor, neither did it provide an NCA 5 or above certificate issued to itself for electrical work.

Instead the Board observes that the Applicant provided an NCA 2 Certificate in its name for Mechanical Engineering in addition to a valid practising certificate issued to it by the National Construction Authority for registration as a Mechanical Engineering Service Contractor.

The Board observes that Mandatory Requirement No. 14 required bidders to provide NCA 5 and above registration certificates together with a valid practising licence for both its Electrical and Mechanical Engineering sub-contractors.

In this regard therefore, the Board finds that Applicant failed to satisfy Mandatory Requirement No 14 in the Tender Document, noting the

Applicant's failure to provide an NCA 5 and above registration certificate together with a valid practising licence for its electrical sub-contractor.

iii. MR 15: Attach proof of agreement to work with a domestic specialist sub-contractor for both electrical and mechanical

According to this mandatory requirement, bidders were required to provide proof of an agreement to work with a domestic specialist sub-contractor for both electrical and mechanical. Failure to comply with this mandatory requirement would result in a bidder's elimination from the evaluation process.

The Board examined the Applicant's original bid document and observes on page 249 – 250 thereof a contract agreement executed on 20th August 2020 between the Applicant and one ODD-MAC Engineering Limited for sub-letting to the latter company the electrical works for the subject tender.

However, the Applicant did not provide proof of an agreement to work with a domestic specialist sub-contractor for mechanical works and contended that it had the capacity to act as a domestic specialist for mechanical works and thus did not have to engage any sub-contractor or enter into an agreement with a mechanical sub-contractor to carry out the subject works.

The Board is of the view that a tender document should be examined as a whole and interpreted conjunctively and not disjunctively.

The Board examined the Standard Form in the Tender Document titled 'Details of Sub-Contractors' and observes the following statement therein: -

"If the tenderer wishes to sub-let any portions of the works under any heading, he must give below details of the sub-contractors he intends to employ for each portion..."

From the above excerpt, the use of the word 'wishes' implies a discretion. In this regard therefore, a bidder had the option to sub-let any portions of the subject works. It therefore follows that if a bidder elected to sub-let any portion of the subject works, the said bidder was required to provide details of the sub-contractors as required under Mandatory Requirement No. 14 of the Tender Document and further provide proof of an agreement to work with a domestic specialist sub-contractor in accordance with Mandatory Requirement No. 15 of the Tender Document.

In this instance, the Board has established that the Applicant provided the necessary certifications and licence required to carry out mechanical works in its own capacity. It is therefore evident that the Applicant did not require to engage a domestic specialist sub-contractor for mechanical works as it had the necessary skills and qualifications to undertake the same.

In this regard therefore, the Board finds that the Applicant satisfied Mandatory Requirement No. 15 in the Tender Document, noting that the Applicant provided proof of an agreement to work with a domestic specialist sub-contractor for electrical works and did not need to provide proof of an agreement to work with a domestic specialist sub-contractor for mechanical works.

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

- a) **MR 5:** Must submit copies of certified Audited Financial Accounts for the last 3 years (2017, 2018 & 2019);
- b) **MR 14:** For Electrical and Mechanical Engineering sub-contractors, they **MUST** be registered with National Construction Authority Class NCA 5 and above. Attach both NCA 5 registration certificates together with valid practising licenses;

However, the Board has established that the Applicant satisfied Mandatory Requirement No. 15: Attach proof of agreement to work with a domestic specialist sub-contractor for both electrical and mechanical.

The Board observes that the two requirements that the Applicant did not satisfy are mandatory requirements.

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**

"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.

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.

Having established that the Applicant failed to satisfy Mandatory Requirement No. 5 and Mandatory Requirement No. 14 of the Tender Document, the Board finds that the Applicant's bid at the Mandatory Requirements Evaluation Stage did not satisfy all the mandatory requirements and therefore did not qualify to proceed for further evaluation.

In view of the foregoing and in totality of the same, the Request for Review is hereby dismissed.

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. Request for Review No. 132 of 2020 filed on 7th October 2020 with respect to Tender No. MUST/ONT/LIBRARY/07/2020-2023 For Proposed Construction of Modern Library at Mariene Research Institute (Phase One) be and is hereby dismissed.**

- 2. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi, this 28th Day of October 2020

CHAIRPERSON

PPARB

SECRETARY

PPARB