

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 106/2021 OF 2<sup>ND</sup> AUGUST 2021**

**BETWEEN**

**SPRING ENGINEERING GROUP INC .....APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

**SPORTS KENYA .....1<sup>ST</sup> RESPONDENT**

**SPORTS KENYA .....2<sup>ND</sup> RESPONDENT**

**AND**

**ASAL FRONTIERS LIMITED ..... INTERESTED PARTY**

Review against the decision of Sports Kenya dated 19<sup>th</sup> July 2021 in the matter of Tender No. SK/012/2020-2021 for Supply and Installation of Stadium Seats at Moi International Sports Centre, Kasarani.

**BOARD MEMBERS**

- |                        |         |
|------------------------|---------|
| 1. Ms. Faith Waigwa    | - Chair |
| 2. Mr. Ambrose Ngare   | -Member |
| 3. Mrs. Njeri Onyango  | -Member |
| 4. Mr. Nicholas Mruttu | -Member |
| 5. Mr. Jackson Awele   | -Member |

## **IN ATTENDANCE**

Philemon Kiprop

- Holding Brief for Acting Board Secretary

## **BACKGROUND TO THE DECISION**

### **The Tendering Process**

Sports Kenya (hereinafter referred to as the "Procuring Entity") advertised for an open Tender No. SK/012/2020-2021 for Supply and Installation of Stadium Seats (hereinafter referred to as the "subject tender") with respect to Moi International Sports Centre, Kasarani, through an advertisement in the Standard Newspaper, MyGov Newspaper on 22<sup>nd</sup> June 2021 as well as on the Public Procurement Information Portal (PPIP) (<https://www.tenders.go.ke>) and the Procuring Entity's website ([www.sportskenya.org](http://www.sportskenya.org)).

### **Tender submission deadline and opening of tenders**

The Procuring Entity received five (5) tenders by the tender submission deadline of 7<sup>th</sup> July 2021 at 11:00hrs. The tenders were opened shortly thereafter by a tender opening committee and the following tenderers were recorded as having submitted their respective tenders: -

- 1. Shuriye Contractors Ltd;**
- 2. Pearltek Kenya Ltd;**
- 3. Spring Engineering Ltd;**
- 4. Bakath Enterprises; and**

## **5. Asal Frontiers.**

### **Evaluation of Tenders**

The Procuring Entity's Evaluation Committee (hereinafter referred to as the "Evaluation Committee") evaluated tenders in the following three stages:-

- i. Preliminary Evaluation/Examination;
- ii. Technical Evaluation; and
- iii. Financial/Economic Evaluation

### **Preliminary Evaluation/Examination**

At this stage, the Evaluation Committee applied the criteria set out in Clause 2-Preliminary Examination for determination of responsiveness of Section III- Evaluation and Qualification Criteria of the Tender Document read together with the Mandatory Requirements set out at page 27 of the Tender Document. At the end of this stage of evaluation, three (3) tenders were found non-responsive, while two (2) tenders were found responsive thus eligible to proceed to the next stage of evaluation. The Applicant's tender was among the three (3) tenders found non-responsive whilst the Interested Party's tender was among the two (2) tenders found responsive at this stage of evaluation.

## **Technical Evaluation**

At this stage of evaluation, the Evaluation Committee applied the criteria outlined in Clause 3.1 – Technical Evaluation of Section III– Evaluation and Qualification Criteria of the Tender Document. At the end of this stage of evaluation, one tender was found non-responsive and one tender was found responsive thus eligible to proceed to the next stage of evaluation. The Interested Party’s tender was found responsive at this stage of evaluation.

## **Financial/Economic Evaluation**

At this stage of evaluation, the Evaluation Committee applied the criteria outlined in Clause 3.2 – Economic Evaluation of Section III – Evaluation and Qualification Criteria of the Tender Document. The Interested Party’s tender was the only tender evaluated and found responsive at this stage of evaluation.

## **Recommendation**

The Evaluation Committee recommended the Interested Party for award of the subject tender at its tender sum of Kshs. 107,031,250.00 (Kenya Shillings One Hundred and Seven Million Thirty One Thousand Two Hundred and Fifty).

## **Professional Opinion**

In a professional opinion dated 19<sup>th</sup> July 2021 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Chief Supply Chain Management Officer one Mr. Fredrick Muema, reviewed the evaluation process and concurred with the Evaluation Committee's recommendation to award the subject tender to the Interested Party at its quoted price of Kshs. 107,031,250.00 (Kenya Shillings One Hundred and Seven Million Thirty One Thousand Two Hundred and Fifty). The Professional Opinion was approved by the 1<sup>st</sup> Respondent on 19<sup>th</sup> July 2021.

## **Letters of Notification**

Vide letters dated 19<sup>th</sup> July 2021, the 1<sup>st</sup> Respondent notified all tenderers of the outcome of their respective tenders.

## **THE REQUEST FOR REVIEW**

The Applicant lodged a Request for Review dated 2<sup>nd</sup> August 2021 together with a Supporting Affidavit sworn by Samuel Gathanga Mukira on 2<sup>nd</sup> August 2021 and filed on even date through the firm of Kosgey & Masese Advocates seeking the following orders as paraphrased:

- a. An order summoning the Engineer of the Respondent's Tender Opening Committee before the Board to adduce evidence on***

- the quality of samples submitted by tenderers to enable the Board arrive at a just conclusion;***
- b. An order annulling and setting aside award of the subject tender as contained in the Respondent's letter dated 19<sup>th</sup> July 2021;***
- c. An order directing the Respondent to admit the Applicant's tender for Technical and Financial Evaluation and Assessment;***
- d. A declaration that the Applicant's tender is the most responsive and the award of the subject tender be made to the Applicant; and***
- e. The costs of the review be borne by the Respondent.***

Vide a letter dated 2<sup>nd</sup> August 2021, the Acting Board Secretary notified the Respondents of the existence of the Request for Review and invited them to file their response on the same. On 5<sup>th</sup> August 2021, the Respondents filed a Response to the Grounds of Appeal signed by the 1<sup>st</sup> Respondent.

Vide letters dated 5<sup>th</sup> August 2021, the Acting Board Secretary notified tenderers in the subject tender of the existence of the Request for Review while inviting them to supply the Board with any information and arguments touching on the subject tender and to respond to the Request for Review if they wished to do so. Further, the Acting Board Secretary furnished all tenderers with the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020,

detailing administrative and contingency measures to mitigate the spread of Covid-19. The Interested Party filed a Notice of Appointment of Advocates dated 6<sup>th</sup> August 2021 and a Replying Affidavit sworn on 6<sup>th</sup> August 2021 by Fatuma Abdi Mahamud and filed on 9<sup>th</sup> August 2021.

Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency plans 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. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

The Applicant filed its Written Submissions dated 10<sup>th</sup> August 2021 on 11<sup>th</sup> August 2021 whilst the Interested Party filed its Written Submissions dated 16<sup>th</sup> August 2021 and filed on even date.

### **BOARD'S DECISION**

The Board has considered each of the parties' pleadings and written submissions together with their respective supporting documentation and confidential documents submitted to the Board by the Procuring Entity pursuant to section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the "Act") and finds the following issues call for determination: -

- 1. Whether the Applicant's tender was found non-responsive at the Preliminary Evaluation/Examination stage in accordance with Section 79(1) and 80(2) of the Act read together with the Mandatory Requirements of Section III-Evaluation and Qualification Criteria set out at page 27 of the Tender Document;**
  
- 2. Whether the Applicant substantiated its allegation that the quality of the sample seat submitted by the Interested Party is of the poorest quality and not fit for purpose.**

On the first issue framed for determination, the Applicant avers that the 2<sup>nd</sup> Respondent had previously advertised for supply and installation of stadium seats with respect to Moi International Sports Centre, Kasarani while reserving the same for eligible women, but later on cancelled the same following an uproar from interested tenderers. It is the Applicant's allegation that the Respondent deliberately and by craft, ingenuity and design, devised a method of tailor making the tender document for the subject tender (hereinafter referred to as the "Tender Document") to suit a particular tenderer, the Interested Party herein, whose single director and shareholder is Fatuma Abdi Mahamud, a woman for whom the tender was at all costs designed to be awarded to.



The Applicant avers that vide a letter of notification dated 19<sup>th</sup> July 2021, the 2<sup>nd</sup> Respondent notified it that its tender did not go beyond the Preliminary Evaluation stage because its documents were not certified by a Commissioner of Oaths. The Applicant denies that its tender documents were not certified by a Commissioner for Oaths as alleged and in any event, non-certification of documents is a non-material non-conformity under clause 33 of the Tender Document and its tender ought not to have been peremptorily and arbitrarily disregarded. This is especially so because the 2<sup>nd</sup> Respondent had previously contracted the Applicant for the supply and installation of 30,000 stadium seats for Nyayo Stadium and has in its possession all its mandatory documents.

The Applicant avers that the Respondent in awarding the subject tender to the Interested Party contravened Article 227(1) of the Constitution and that its tender satisfied all the mandatory requirements, was responsive and ought to have been admitted for technical and financial evaluation. It is the Applicant's position that it has the requisite expertise and professional competence to execute a contract with respect to the subject tender having supplied and installed 30,000 stadium seats at Nyayo National Stadium.

The provision of the Constitution relied upon by the Applicant reads as follows:

**Article 227. Procurement of public goods and services**

**(1) 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.**

**(2) .....**

In response, the 1<sup>st</sup> Respondent contends the subject tender was through open tender in line with Section 91(a) and 96 of the Act as well as Regulation 85 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") and that the Evaluation Committee adhered to the criteria set out in the Tender Document and constitutional requirements of Article 227(1) of the Constitution, the Act and Regulations 2020. The 1<sup>st</sup> Respondent contends that the fact the Applicant previously executed a similar contract does not mean the Applicant has a monopoly in the country which monopoly would be discriminative and against the spirit of the law. It is the 1<sup>st</sup> Respondent's contention that the notion that the Applicant is the only capable contractor to execute works with respect to the subject tender beats the logic for open tendering as espoused in the Act and the Constitution.

The 1<sup>st</sup> Respondent contends that the Applicant failed at the Preliminary Evaluation stage because it did not adhere to the mandatory requirement

that all the submitted documents be certified by a Commissioner for Oaths. Accordingly, it is the 1<sup>st</sup> Respondent's contention that the Applicant's tender did not proceed to the Technical Evaluation Stage. It is the 1<sup>st</sup> Respondent's position that the Applicant's tender was rejected at the Preliminary Evaluation stage in accordance with Section 79(1) of the Act read together with Regulation 74 and 75 of Regulations 2020. The 1<sup>st</sup> Respondent contends that the Request for Review lacks merit and prays for the same to be dismissed with costs.

The provisions of law not cited herein before but relied upon by the 1<sup>st</sup> Respondent provide as follows:

***Section 79 of the Act. Responsiveness of Tenders***

***(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.***

***Section 91 of the Act. Choice of Procurement Procedure***

***(1) Open tendering shall be the preferred procurement method for procurement of goods, works and services.***

***Section 96 of the Act. Advertisement***

***(1) The accounting officer of a procuring entity shall take such steps as are reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders.***

***(2) Despite the provisions of subsection (1), if the estimated value of the goods, works or services being procured is equal to, or more than the prescribed threshold for county, national and international advertising, the***

***procuring entity shall advertise in the dedicated Government tenders' portals or in its own website, or a notice in at least two daily newspapers of nationwide circulation.***

***(3) In addition to subsection (2) a procuring entity shall —***

***(a) use Kenya's dedicated tenders portal or any other electronic advertisements as prescribed; and***

***(b) post advertisements at any conspicuous place reserved for this purpose in the premises of the procuring entity.***

***(4) In regard to county-specific procurements pursuant to section 33, the procuring entity shall advertise the notice inviting expressions of interest in the dedicated Government tenders portal; in its own website, or in at least one daily newspaper of county-wide circulation.***

***(5) Where the estimated value of the goods, works or services being procured is below the prescribed threshold for national***

***advertising, the procuring entity shall advertise using the options available in subsection (3)(a) and (b).***

***Regulation 74 of Regulations 2020. Preliminary evaluation of open tender***

***(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether —***

***(a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;***

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

***(c) any tender security submitted is in the required form, amount and validity period, where applicable;***

***(d) the tender has been duly signed by the person lawfully authorised to do so through the power of attorney;***

***(e) the required number of copies of the tender have been submitted;***

***(f) the tender is valid for the period required;***

***(g) any required samples have been submitted; and***

***(h) all required documents and information have been submitted.***

***(2) Subject to section 79(2)(b) of the Act, any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive.***

***Regulation 75 of Regulations 2020. Non responsiveness of tenders***

***(1) A procuring entity shall reject all tenders, which are not in conformity to the requirements of section 79 of the Act and regulation 74 of these Regulations.***

***Regulation 85 of Regulations 2020. Open tender***

***(1) The threshold for national advertising envisaged under section 96(2) and (5) of the Act shall be as specified in the matrix in the Second Schedule to these Regulations.***

The Interested Party submits that the Respondents acted in accordance with Section 79(1) and 80 of the Act. It states that it was an express mandatory requirement under the Tender Document that all documents be certified by a Commissioner for Oaths. It submits that failure to comply with a mandatory requirement cannot be considered a minor deviation under section 79(2) and (3) of the Act. Further, that Regulation 75 of Regulations 2020 provides for a Procuring Entity rejecting all tenders which are not in conformity with

Section 79 of the Act and Regulation 74 of Regulations 2020. The Interested Party submits that to the best of its knowledge, the 2<sup>nd</sup> Respondent conducted the evaluation of tenders within the parameters set out in the Tender Document, the Act and Regulations 2020. The Interested Party submits that the Board should examine the manner in which tenders were evaluated from the evaluation report and determine whether tenders were evaluated in accordance with the provisions of the law and the Tender Document. Further, that procurement processes are competitive and are not for monopolization by a single entity, and the fact that the Applicant completed works of similar nature does not disqualify or discredit the Interested Party's ability to conduct the work required in the subject tender.

The provisions of law not cited hereinbefore but relied upon by the Interested Party provide as follows:

***79. Responsiveness of tenders***

***(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.***

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

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

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

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

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

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

***Section 80. Evaluation of tenders***

***(1) .....***

***(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.***

***(3) .....***

***(4) .....***

***(5) .....***

***(6) .....***

***(7) .....***

The Board has carefully studied the confidential documents forwarded to it by the Procuring Entity pursuant to section 67(3)(e) of the Act and notes the 1<sup>st</sup> Respondent notified the Applicant that its tender was not successful vide



a letter dated 19<sup>th</sup> July 2021. The said letter of notification dated 19<sup>th</sup> July 2021 reads as follows in part;

“ .....

**Your tender was unsuccessful because the documents you submitted were not certified by Commissioner of Oaths as well as required in the Preliminary stage of the tender.”**

The Board has carefully studied the Evaluation Report signed by all the members of the Evaluation Committee (hereinafter referred to as the “Evaluation Report”) and notes that the Applicant’s tender was found non-responsive at the Preliminary Evaluation stage for reasons that the Applicant submitted documents seeking to satisfy mandatory requirements but the said documents were not certified by a Commissioner for Oaths.

Section 80(2) of the Act cited hereinbefore is prescriptive that evaluation and comparison of tenders is done using the procedures and criteria set out in the Tender Document. Guided by this provision of law, the Evaluation Committee was bound to evaluate tenders in the subject tender based on the procedures and criteria set out in the Tender Document.

The Board has studied the Tender Document in the subject tender and notes the criteria for evaluation of tenders is outlined in Section III-Evaluation and

Qualification Criteria at page 23-34 of the Tender Document. Clause 2 of Section III-Evaluation and Qualification Criteria reads as follows:

***"The Procuring Entity will start by examining all tenders to ensure they meet in all respects the eligibility criteria (including requirements in the qualification forms, tenderer's eligibility-confidential business questionnaire) and other requirements in the ITT and that the tender is complete in all aspects in meeting the requirements of "Part 2-Procuring Entity's Requirments", including checking for tenders with unacceptable errors, abnormally low tenders, and abnormally high tenders. The Standard Tender Evaluation Report for Goods and Works provides clear guidelines on how to deal with review of these requirements. Tenders that do not pass the Preliminary Examination will not be considered further."***

The Tender Document at page 27 thereof stipulates the following Mandatory Requirements:

***"MANDATORY REQUIREMENTS – ALL CERTIFIED BY COMMISSIONER OF OATHS***

- 1. Certificate of registration from the Registrar of Companies either as a limited liability company, partnership or sole proprietorship.***

- 2. PIN & VAT registration certificates.***
- 3. Copy of current Tax Complince certificate.***
- 4. Must be registered with National Consruction Authority  
Regstration NCA 4 and above.***
- 5. Copy of current Business permit***
- 6. Other statutory compliances that includes NHIF, NSSF &  
PAYE.***
- 7. Manufacturers authorization***
- 8. Audited accounts for the last three years certified by the  
auditing firm (2018, 2019 & 2020).***
- 9. Proof of Ownership of the plant and equipment necessary for  
this contract execution.”***

The aforementioned provisions of the Tender Document required tenderers to submit copies of all the documents listed hereinbefore and which documents must have been certified by a Commissioner of Oaths.

On perusal of the Applicant's original tender, the Board notes that, the Applicant in seeking to fulfil the Mandatory Requirements submitted copies of its (i) PIN and VAT Registration Certificates at page 2 and 3 of its original tender, (ii) Tax Compliance Certificate at page 4 of its original tender, (iii) National Construction Authority Certificate at page 5 of its original tender and Contractor Annual Practice Licence from National Construction Authority at page 6 of its original tender (iv) Nairobi City County Business permit for the year 2021 at page 7 of its original tender (v) NHIF Compliance Certificate

at page 8 of its original tender and NSSF Compliance Certificates at page 9 of its original tender (vi) Manufacturer's Authorization at page 9 (A) of its original tender, (vii) Certificate of Registration from the Registrar of Companies at page 10 of its original tender, (viii) Annual reports and Financial Statements at pages 35-46 of its original tender. (ix) An agent Agreement at page 113-116 of its original tender. All these documents bear the Applicant's stamp and a signature but have not been certified by a Commissioner for Oaths as required by the Tender Document.

Section 79(1) of the Act states that a tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents. This means, a tender that does not conform with mandatory requirements of a tender document is non-responsive. The Applicant having failed to submit documents that were certified by a Commissioner for Oaths as mandatorily required by the Tender Document essentially submitted a non-responsive tender.

The Applicant argues that failure to submit documents that are certified by a Commissioner for Oaths is a non-material non conformity and its tender ought not to have been peremptorily and arbitrarily disregarded under clause 33 of the Tender Document, which provides as follows;

**"33. Nonmaterial Non-conformities**

**33.1 Provided that a Tender is substantially responsive, the Procuring Entity may waive any non conformity in the Tender.**

**33.2 Provided that a Tender is substantially responsive, the Procuring Entity may request that the Tenderer submit the necessary information or documentation, within a reasonable period of time, to rectify non material non-conformities in the Tender related to documentation requirements. Requesting information or documentation on such non-conformities shall not be related to any aspect of the price of the Tender. Failure of the Tenderer to comply with the request may result in the rejection of its Tender.**

**33.3 Provided that a Tender is substantially responsive, the Procuring Entity shall rectify quantifiable nonmaterial non-conformities related to the Tender Price. To this effect, the Tender Price shall be adjusted,for comparison purposes only,to reflect the price of a missing or non-conforming item or component in the manner specified in the TDS.”**

The aforementioned provisions of the tender Document grants an Evaluation Committee discretion to waive any non conformity in a tender where a tender is substantially responsive. We have already established that the Applicant’s tender was non-responsive following the Applicant’s submission of documents that were not certified by a Commissioner for Oaths as mandatorily required by the Tender Document. In the circumsatnces, the Applicant’s tender cannot be said to be substantially responsive to invoke the provisions of clause 33 of the Tender Document.

In deciding whether mandatory requirements of a tender document can be waived, the Board is guided by ***Republic v. Public Procurement Administrative Review Board & another Ex Parte Meru University of Science and Technology [2016] eKLR*** where it was held as follows:

***"A Procuring Entity is bound by its Bid Documents. Mandatory conditions cannot be waived. No argument was advanced before me to the effect that such deviations do not prejudice the other bidders or confer a benefit to the Interested Party."***

In ***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*** the High Court pronounced itself on mandatory requirements 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."***

Further in **Republic v Public Procurement and Administrative Review Board and 2 Others Ex Parte BBAS Security Services Limited [2015] eKLR** the High Court held that;

***"....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...."***

From a reading of the aforementioned decisions, it is evident that mandatory requirements cannot be waived by a procuring entity and deviations from mandatory tender requirements are not permissible. This allows tenderers to compete on an equal footing while the procuring entity satisfies tenderers legitimate expectation that it will comply with its own tender condition. Furthermore, Article 227(1) of the Constitution cited hereinbefore requires a state organ or any other public entity while contracting for goods or services, to do so in accordance with a system that is fair. It follows therefore, that all tenderers should be subjected to the same eligibility and mandatory requirements criteria stipulated in the Tender Document before a consideration of technical and financial requirements is made.

Mandatory requirements are instrumental in determining the responsiveness of a tender and is in most cases the first hurdle a tender must overcome in order to be considered for further evaluation. In this regard, a tenderer ought to satisfy all mandatory requirements in order to proceed for further

evaluation. Furthermore, it disenfranchises tenderers who complied with all mandatory requirements to learn later that a particular tenderer was given favourable treatment where a failure to comply with a mandatory requirement was waived. Further, Clause 2 of Section III- Evaluation and Qualification Criteria of the Tender Document is clear that tenders that do not pass the Preliminary Examination will not be considered further.

Having found that the documents submitted by the Applicant seeking to satisfy Mandatory Requirements 1-9 were not certified by a Commissioner for Oaths as mandatorily required by the Tender Document, the Board finds the Applicant's tender was found non-responsive at the Preliminary Evaluation/Examination stage in accordance with Section 79(1) and 80(2) of the Act read together with the Mandatory Requirements of Section III- Evaluation and Qualification Criteria set out at page 27 of the Tender Document.

On the second issue framed for determination, the Applicant avers the Tender Document provided as a mandatory requirement that all tenderers should, in addition to completing tenders, furnish the 2<sup>nd</sup> Respondent with a sample of the stadium seat that tenderers were going to supply and install. Further, the Applicant alleges that it complied with this requirement and noted at tender opening that all other tenderers did not supply sample seats that conformed to the specifications and requirements of the Tender Document. It is the Applicant's position that save for its sample seat, all the other sample seats provided by other tenderers were weak, fragile, delicate



and lacked the quality to meet the recommended stress destruction test by Kenya Bureau of Standards and did not meet the specifications in the Tender Document and it is imperative that the Respondent's Engineer at the tender opening committee be summoned by the Board to give evidence on the quality of the samples provided by the tenderers. Further, that the award of the subject tender to the Interested Party, would lead to the supply and installation of seats that are not fit for purpose and the tax payer shall invariably not receive value for money in contravention of Article 201 of the Constitution because the sample seat supplied by the Interested Party is of the poorest quality.

At paragraph 2 of its submission, the Applicant submits it duly provided a sample seat that conformed with the specifications set out in the Tender Documents and that the Technical Engineer of the 2<sup>nd</sup> Respondent's Tender Opening Committee, one Mr. John Ruga, duly observed and stated at tender opening that the only sample seat that met specifications of the tender document was that of the Applicant. It is the Applicant's contention that no defect whatsoever with regard to its tender was noted by the Respondent during submission.

Article 201 of the Constitution provides as follows:-

***Article 201. Principles of public finance***

***The following principles shall guide all aspects of public finance in the Republic—***

***(a) there shall be openness and accountability, including public participation in financial matters;***

***(b) the public finance system shall promote an equitable society, and in particular—***

***(i) the burden of taxation shall be shared fairly;***

***(ii) revenue raised nationally shall be shared equitably among national and county governments; and***

***(iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;***

***(c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;***

***(d) public money shall be used in a prudent and responsible way; and***

***(e) financial management shall be responsible, and fiscal reporting shall be clear.***

In response, the Respondents contend that the Applicant's claim that all other seat samples did not meet the destruction test by Kenya Bureau of Standards is farfetched and ultimately intended to portray them as incompetent as to what they are mandated to do. The 1<sup>st</sup> Respondent casts doubt on the integrity of the review proceedings initiated by the Applicant

inlight of the Applicant's prayer that the 2<sup>nd</sup> Respondent's engineer who was at the Tender Opening Committee be invited to the Review Board to provide evidence on the quality of seats. This is because, the 2<sup>nd</sup> Respondent's engineer who was not a member of the Evaluation Committee but a member of the tender opening committee could not know the quality of the sample seats submitted by tenderers because such an engineer had not gone through the manufacturers authorization and the data sheets of the samples provided.

On its part, the Interested Party contends that the engineer who supposedly evaluated the standards of the sample seats at the tender opening had no locus to do so because evaluation of tenders is not carried out at this stage. In addition, the evaluation criteria for the tenders are provided for under the Tender Document and the Applicant's request to summon the said engineer to give evidence on the quality of samples is tantamount to amending the Tender Document. In any event, the samples are private information whose quality and form are considered as part of confidential information.

Other than the allegation made by the Applicant that the sample seat provided by the Interested Party is of poor quality and that only the Applicant's sample seat conforms to the specifications of the Tender Document, the Board notes that the Applicant has failed to particularise which specifications of the Tender Document the Interested Party's sample seat did not conform to. The Board notes that the Applicant's allegation that the sample seat submitted by the Interested Party cannot withstand

destruction test has not been supported by any test results from Kenya Bureau of Standards.

**The Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 17**, at paragraph 13 and 14 describes the burden of proof as follows:

*"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."*

*The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence"*

It is a principle of law that whoever lays a claim before the Court against another has the burden to prove it. Sections 107 read together with 108 and 109 of the Evidence Act provide as follows:

***107 "(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

***108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.***

***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***

In **Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015]** eKLR where the court held as follows with regard to the burden of proof:

*".....As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided.....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant.....The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein."*

The Board has already noted that the Applicant failed to particularise what specifications of the Tender Document the sample seat submitted by the Interested Party did not conform to. No comparison of the sample seat provided by the Applicant with the one provided by the Interested Party has

been brought out by the Applicant. No destructive test result conducted by Kenya Bureau of Standards have been supplied to the Board with respect to the sample seat submitted by the Interested Party. All the Applicant is relying on is an alleged observation made and stated by the 2<sup>nd</sup> Respondent's engineer during tender opening.

The Board has studied the tender opening minutes of 7<sup>th</sup> July 2021 and notes that John Ruga was the Chairman of the Tender Opening Committee for the subject tender. However, nothing in the tender opening minutes captured what the Applicant alleges of John Ruga having observed and stated, that only the Applicant's sample seat conformed to the specifications of the Tender Document. This is understandable because it is only the Evaluation Committee during evaluation that would determine whether the sample seats submitted by tenderers conformed with the specifications set out in the Tender Document.

It is worth noting that the Chairman or any member of a tender opening committee has no locus to evaluate a sample seat submitted by a tenderer because no evaluation takes place during tender opening and no tender can be disqualified at tender opening as provided in section 78(7) of the Act. We also note from the Evaluation Report, John Ruga was not a member of the Evaluation Committee that evaluated tenders.

We find the Applicant to be on a fishing expedition with respect to the allegation that the Interested Party's sample seat is of the poorest quality

noting that no evidence has been adduced by the Applicant in support of the allegation. In the circumstances, the Board finds the Applicant has failed to substantiate its allegation that the quality of the sample seat submitted by the Interested Party is of the poorest quality and not fit for purpose. In totality of the foregoing, the Board finds the Request for Review lacks merit and proceeds to make the following orders.

### **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Act, the Board issues the following orders in the Request for Review dated 2<sup>nd</sup> August 2021:

- 1. The Request for Review dated 2<sup>nd</sup> August 2021 and filed by the Applicant on even date with respect to Tender No. SK/012/2020- 2021 for Supply and Installation of Stadium Seats with respect to Moi International Sports Centre, Kasarani be and is hereby dismissed.**
- 2. Each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 23<sup>rd</sup> day of August 2021**

**CHAIRPERSON  
PPARB**

**SECRETARY  
PPARB**