

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 161 OF 2021

BETWEEN

PINNIE AGENCY LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER

COUNTY ASSEMBLY OF KISUMU 1ST RESPONDENT

COUNTY ASSEMBLY OF KISUMU 2ND RESPONDENT

AND

ASTRONEA CONSTRUCTION LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer, County Assembly of Kisumu in relation to tender number CAK/OT/UMCAC/10/2020/2021/02 for construction of ultra-modern county assembly chambers, offices and associated works.

BOARD MEMBERS

1. Mrs. Njeri Onyango -Vice Chairperson (Panel Chair)
2. QS Hussein Were - Member

3. Ms. Rahab Chacha - Member
4. Eng. Mbiu Kimani, OGW - Member

IN ATTENDANCE

Mr. Philip Okumu - Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

The 2nd Respondent invited tenders for tender number **CAK/OT/UMAC/10/2020/2021/02** for construction of ultra-modern county assembly chambers, offices and associated works (hereinafter referred to as the "subject tender") from qualified and eligible tenderers through an open national tender advertised in the Daily Nation Newspaper, the Star Newspaper, government supplier's portal (<https://supplier.treasury.go.ke>) and the 2nd Respondent's website (www.kisumuassembly.go.ke) on 21st October 2021.

Tender Submission Deadline and Opening of Tenders

Vide an online portal the 2nd Respondent received a total of (4) tenders by the tender submission deadline of 5th November, 2021 at 11.00am. The tenders were opened shortly thereafter in the presence of tenderers

representatives present and the following tenderers were recorded as having submitted their tenders with the following outcomes recorded

1. Astronea Construction Limited –Kshs 418,356,348.60
2. Guumba Contractors- Kshs 428,847,593.50
3. Pinnie Agency Limited- Kshs 479,142,470.00
4. Veevee Enterprises Limited –Kshs 561,030,000.00

The public tender opening was carried out at the Boardroom of the County Assembly of Kisumu. The Tender Opening Panel consisted of the following members

1. Kennedy Oliech-Chairperson
2. Hezekiah Awinda- Member
3. Ruth Ratemo – Member
4. Daniel Rading – Member
5. Rose Ainda – Secretariat
6. Hillary Okoth – Secretariat

Evaluation of Tenders

Going by an Evaluation Report executed by the 2nd Respondent's Evaluation Committee members on 22nd November, 2021 (hereinafter referred to as the '**Evaluation Report**'), the 2nd Respondent's Evaluation Committee (hereinafter referred to as the "Evaluation Committee") evaluated tenders with respect to the subject tender in the following

1. Preliminary Examination

2. Technical Evaluation

3. Financial Evaluation

Preliminary Examination/Mandatory

At this stage, the Evaluation Committee applied the criteria outlined in Preliminary Evaluation under the selection process of the proposed construction of ultra-modern county assembly chambers, offices and associated works (hereinafter referred to as the 'tender document').

According to the Evaluation Report, at the end of this evaluation stage only two tenders were found to be responsive including the Interested Party's were found to be responsive.

Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined under the Technical Evaluation of the Tender Document. At the end of this stage of evaluation, (2) two tenders were found to be responsive and therefore fit to proceed to the Financial Evaluation Stage.

Financial Evaluation

The Evaluation Committee applied the criteria under Financial Evaluation in the Tender Document. At this stage the Interested Party's bid was found to be the lowest quote at a tender sum of Kshs four hundred and eighteen

million three hundred and fifty-six thousand three hundred forty-eight shillings and sixty cents.

Recommendation

The Evaluation Committee recommended the award of the subject tender to the Interested Party at a tender sum of Kshs four hundred and eighteen million three hundred and fifty-six thousand three hundred forty-eight shillings and sixty cents.

Professional Opinion

In a professional opinion dated 23rd November, 2021 the 2nd Respondent's Director of Supply Chain Management- Mr. Edwin Kisia reviewed the tender procurement process in the subject tender, including the evaluation of tenders and was of the opinion that pursuant to Section 84(1) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), the subject procurement satisfied the constitutional requirements of Article 227(1) of the Constitution of Kenya, 2010 (hereinafter referred to as the 'Constitution') and statutory requirements of the Act.

The Director of Supply Chain Management further recommended that the 1st Respondent considers and approves award of the subject tender at a Tender Sum of Kshs Four Hundred and Eighteen Million, Three Hundred and Fifty Six Thousand, Three hundred and Forty Eight Shillings and Sixty Cents (Kshs 418,356,348.60) to the Interested Party for having met all the requirements

under the subject tender and the tender sum provided for was within the approved budget and procurement plan and also within the prevailing market value.

Notification of Tenderers

Vide a Notification of Intention to Award bearing transmission date of 14th December, 2021, the Applicant was notified of the 1st Respondent's decision to award the tender to the Interested Party.

THE REQUEST FOR REVIEW

Pinnie Agency Limited, the Applicant herein, lodged a request for review dated 28th December, 2021 and filed on the same day together with a Statement in support of the Request for Review drawn by Gerivia Advocates LLP dated 28th September, 2021 seeking the following orders: -

- a. The 1st Respondent's decision awarding Tender Number CAK/OT/UMCAC/10/2020/2021/02 for Construction of Proposed Ultra-Modern Kisumu County Assembly Chambers, Offices and Associated Works to the Interested Party be annulled and set aside;
- b. The 1st Respondent's letter dated 14th December 2021 notifying the Applicant that it had not been successful in Tender Number CAK/OT/UMCAC/10/2020/2021/02 for Construction of Proposed Ultra-Modern Kisumu County Assembly Chambers, Offices and Associated Works to the Interested Party be annulled and set aside;

- c. A declaration that the 2nd Respondent should have declared the Interested Party's bid non responsive at the Preliminary Evaluation Stage in line with Section 79 and Regulations 74, and 75 and further in line with Section III (Evaluation and Qualification Criteria) Clause 2.0 Preliminary Examination for Determination of Responsiveness by allowing further evaluation of the Interested Party's bid to proceed for further evaluation having not met such preliminary qualifications as outlined under the tender.
- d. The 1st and 2nd Respondents be directed to proceed with the procurement to its logical conclusion by making award to the lowest evaluated bidder in line with its findings of the evaluation of the Applicant's bid.
- e. The Board in exercise of its discretion, to give directions to the Respondents to redo or correct anything within the entire procurement process found to not have been done in compliance with the law;
- f. The Respondents be compelled to pay to the Applicant the costs arising from/and incidental to this Application; and
- g. 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.

The 1st and 2nd Respondents through their Advocate on record filed a Memorandum of Response together with their submissions in opposition for the Review both dated 5th January, 2022 and filed on the same day.

The Interested Party initially filed a Memorandum of response and submissions dated 12th January 2022 on the 13th January 2022. Subsequently, an Amended Statement of Response was filed on 14th January, 2022.

The other tenderers though notified of the filing of this Application did not file any response.

APPLICANT'S CASE

The Applicant contends that they met all the tender requirements to the satisfaction of the Procuring Entity only for its bid to be rejected on the basis of unfounded, illegal, irregular and illogical second thoughts by the Accounting Officer.

The Applicant contends that the Procuring Entity visited one of their projects and requested for various documents including approved construction drawings, NEMA project permit, NCA registration and Project Contract Agreement. The Procuring Entity did not raise any query in regards to due diligence after receiving these documents.

The Applicant states that they had proved and by the Procuring Entity conducting due diligence on them, had also confirmed that they were the lowest evaluated bidder in terms of Section 83 of the Act as read together with Regulation 80 of the Public Procurement and Asset Disposal Regulations 2020, (hereinafter referred to as 'Regulation 2020'). They were therefore shocked to learn that the Procuring Entity intended to award the tender to the Interested Party as the lowest evaluated bidder.

The Applicant wrote a letter dated 16th December,2021, to the Procuring Entity raising issue with the notification of intention to award dated 14th December,2021. The Respondents made a commitment to respond within 5 days but they never wrote back to the Applicant prompting the Applicant to file this Application for Review.

The Applicant contends that they are convinced that the Interested Party has never undertaken a project of such a magnitude as intended in the subject tender, and it is therefore imperative that the Procuring Entity demonstrate that the Interested Party possess experience of handling the tender.

The Applicant avers that they should have been awarded the tender as they were the lowest evaluated and therefore the most deserving bidder and they should not be denied without justification. According to the Applicant, awarding the tender to the Interested Party will cost the taxpayer 17million shillings more for those services.

The Applicant therefore prays that the Board should scrutinize the whole evaluation process in the tender to ensure the law was observed.

The Applicant through their Director filed a Further Statement dated 12th January 2022 and filed on the same day in reaction to the Statement of Response filed by the Respondents. According to the Applicant the decision by the Evaluation Committee to conduct due diligence on the lowest and second lowest bids offends the provisions of Section 83 of the Act, Regulation 80 of Regulations 2020 and the criteria under the Tender Document, is

irregular, procedural and contrary to the provisions of the law and the Tender document.

The Applicant in the Further Statement contends that the parameters used by the evaluation Committee to carry out due diligence on the Applicant and the Interested Party are inconsistent and the two were not assessed using the same criteria which is unfair lacking in equity and contrary to Section 227 of the Constitution. The Applicant further states that the Evaluation Committee carried out due diligence on it because the Interested Party had yielded a negative result and therefore disqualified.

The Applicant states that they yielded a positive result after due diligence was conducted on them. The Applicant further states that both them and the Interested Party were required to provide; NEMA project permit, NCA project Registration, Construction Agreement and Approved Drawings in respect to the project in question as part of due diligence. According to the Applicant, the Evaluation Committee reviewed the Applicant's documents and not the Interested party's and therefore this action by the Procuring Entity is unfair and violates Article 227(1) of the Constitution.

The Applicant further states that Evaluation Committee did not carry out proper verification on the Interested Party because they did not inspect the above-mentioned documents of the Interested Party and that physical inspection of a building cannot be said to amount to verification, confirmation, investigation and audit as to whether a bidder undertook a project.

The Applicant in its Further Statement claims that they did an official search on the Interested Party and discovered that the Interested Party was incorporated in 7th March, 2018.

The Applicant further contends that the Tender Document has provisions that bidders could propose subcontractors and it was not mandatory for such a proposal to be made.

The Applicant requests the Board to allow the Request for Review. The Applicant makes this request as it contends that their bid yielded a positive outcome after the due diligence process and if the Procuring Entity had followed the correct Evaluation Criteria it would have declared the Applicant as the lowest evaluated bid.

RESPONDENTS CASE

The Respondents filed a Memorandum of Response and submissions in response to the Applicant's Statement of Review. The Respondents contend that their decision to carry out due diligence on the lowest and the second lowest bidder does not contravene Section 83 of the Act.

The Respondents submit that they were bound by Section 86 of the Act in making an award to the lowest evaluated bidder and this was done on the basis of tendered prices shown in the form of tender.

The Respondents contend that based on the records availed to the Board, the most competitive and technically compliant was that of the Interested Party.

The Respondents also contend that they received no request to provide a debrief as they would have no problem doing the same and this is therefore an afterthought by the Applicant.

INTERESTED PARTY'S CASE

The Interested Party filed a Memorandum of response dated 12th January 2022 and filed it on 13th January, 2022 through their Advocates on record Aoko Githara and Company Advocates. Later on, 14th January 2022, the Interested Party filed an Amended Statement of Response due to what was stated to have been an error on the part of their staff who in error filed a draft document instead of the final document

The Interested Party in its documents stated that it submitted a responsive bid which met all the requisite requirements and after the technical evaluations their bid was subjected to Financial Evaluation and turned out to be the lowest financial bid. The Interested Party further states that Applicant's bid was the least competitive at the financial stage.

The Interested Party further claims that the Applicant did not meet all the tender requirements as they did not propose a schedule of subcontractors to be subcontracted for the associated works listed in the tender document. The Interested Party claims that this was a basic requirement and the Applicant having failed to meet this requirement cannot claim to have had the most responsive bid.

According to the Interested Party there was no request for a debrief by the Applicant and in any case if the Applicant requested for a debrief, the Interested Party was not informed.

The Interested Party further avers that its bid had the lowest evaluated price by Kshs 10,000,000/= and the Respondents were right in awarding them the tender. The Interested Party therefore takes issue with the Applicant's assertion that its bid was not the lowest evaluated. Furthermore, the Applicant according to the Interested Party has not adduced any evidence to support their claim that the Interested Party's bid was not the lowest evaluated.

Further, the Interested Party denies Applicant's claim that it produced the lowest evaluated bid and states that the documents show that the Applicant's bid was the highest in terms of price.

The Interested Party further states that the Evaluation team visited the Midland Shopping Project during the due diligence process, met the owner of the building, inspected the building, took photos and satisfied itself of the condition and viability. Midland Emporium Limited Company in response wrote to the Respondents confirming that the Interested Party was the contractor of Midland Shopping Mall.

The Interested Party avers that the evaluation of its tender was above board and its tender the most compliant. The Interested Party requests the Board to dismiss the Request for Review with costs as setting aside of the Award of tender will prejudice them.

BOARD'S DECISION

The Board has carefully considered the parties pleadings including the confidential documents submitted by the Procuring Entity pursuant to Section 67 (3) (e) of the Act) and finds that the following issues present themselves for consideration and determination

- i) Whether the Procuring Entity properly evaluated the Interested Party's tender in accordance with the mandatory requirements under the Evaluation and Qualification Criteria section of the Tender Document and also in accordance with Section 80 (2) of the Act;**
 - ii) Whether the post qualification evaluation and due diligence was conducted within the realm of Section 83 of the Act as read together with Regulation 80 of Regulations 2020 and the provisions of the Tender;**
 - iii) Whether the Respondent acted in default of the provisions of the Tender document Clause 45.0 and failed to conduct a debriefing request by the Applicant?**
 - iv) What are appropriate orders in the circumstances of this matter?**
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- i) Whether the Procuring Entity properly evaluated the Interested Parties tender in accordance with the mandatory requirements under the Evaluation and Qualification Criteria**

**section Of the Tender Document and also in accordance with
Section 80 (2) of the Act**

The Board now proceeds to address this issue. The Tender document at the Preliminary Evaluation Sheet had a total of 23 mandatory requirements as follows

- 1. Certified copy of Certificate of Registration/Incorporation***
- 2. Certified copy of a Valid Tax Compliance Certificate from KRA***
- 3. Certified copy of Trade License.***
- 4. Certified copies of PIN and VAT certificate***
- 5. Certified Audited Accounts for the last three years (2018, 2019 & 2020)***
- 6. The tenderer must not bid for tender(s) on items or services which they do not offer.***
- 7. The tenderer's name must not be appearing in the Public Procurement Regulatory Authority's black list or a debarment list; and or any other list barring them from participating in public tenders.***
- 8. The tenderer must have completed a project of over Five (500) million in the last five years***
- 9. The tenderer must complete the Confidential Business Questionnaire as appropriate duly signed and stamped.***
- 12. The tenderer must have undertaken similar assignments (at least a four storied building) in the last five years***

- 13. A valid & notarized National Hospital Insurance Fund (NHIF) Compliance certificate by the Notary Public.***
- 14. A valid & notarized National Social Security Fund (NSSF) Compliance certificate by the Notary Public.***
- 15. Must be registered by the National Construction Authority under Class 2 and above.***
- 16. Must provide litigation history, if any.***
- 17. Must have been in existence for the last 5 years. Provide evidence of the firms
Physical location.***
- 18. Must submit at least five referees (give full contact details)***
- 19. Must provide a letter authorizing the County to access your (tenderer's) financial records from your respective bankers.***
- 20. Must respond online through IFMIS Supplier Portal using IFMIS Response No. 898999 and also submit original tender document.***
- 21. Tenders must be accompanied by a tender security of Kshs.8,000,000 (Kenya Shillings Eight Million only) in form of a guarantee from a reputable Bank.***
- 22. Certification must be done by Commissioner of Oaths.***
- 23. Must Submit the document in the right format. The tender document shall be paginated / serial numbered. All bidders are required to submit their documents paginated in a continuous ascending order from the first page to the last in this format; (i.e. 1, 2, 3..... n where n is the last page) both Hard Copies and Electronically Submitted documents.***

It is the Applicant's contention that the Interested Party could not and did not meet the requirements of mandatory item number 8 above, and thus should not have passed the preliminary stage.

The tender document at clauses 1.3 of section III provided as follows:

"1.3 EVALUATION AND CONTRACT AWARD CRITERIA

The Procuring Entity shall use the criteria and methodologies listed in this section to evaluate tenders and arrive at the lowest evaluated tender. The evaluated tender that (I) meets qualification criteria, (II) Has been determined to be substantially responsive to the Tender Documents and, (III) Is determined to have the Lowest Evaluated Tender Price shall be "selected for award of contract."

On its part, section 39 and 40 of the instructions to tenderers is set out as follows:

39.0 Qualifications of the tenderer

39.1 The Procuring Entity shall determine to its satisfaction whether the eligible Tenderer that is selected as having submitted the lowest evaluated cost and substantially responsive Tender, meets the qualifying criteria specified in Section III, Evaluation and Qualification Criteria.

39.2 The determination shall be based upon an examination of the documentary evidence of the Tenderer's qualifications submitted

by the Tenderer, pursuant to ITT 17. The determination shall not take into consideration the qualifications of other firms such as the Tenderer's subsidiaries, parent entities, affiliates, subcontractors (other than Specialized Sub-contractors if permitted in the Tender document), or any other firm(s) different from the Tenderer.

39.3 An affirmative determination shall be a prerequisite for award of the Contract to the Tenderer. A negative determination shall result in disqualification of the Tender, in which event the Procuring Entity shall proceed to the Tenderer who offers a substantially responsive Tender with the next lowest evaluated price to make a similar determination of that Tenderer's qualifications to perform satisfactorily.

40.0 Lowest evaluated tender

Having compared the evaluated prices of Tenders, the Procuring Entity shall determine the Lowest Evaluated Tender. The Lowest Evaluated Tender is the Tender of the Tenderer that meets the Qualification Criteria and whose Tender has been determined to be:
a) Most responsive to the Tender document; and b) the lowest evaluated price.

The Applicant states that it received a letter dated 14th December, 2021 (which was received on the same day). The letter notified the Applicant of the fact that its tender had not succeeded as it had not been found to be the lowest qualified and that the Respondent intended to award the tender to the Interested Party who had been found to be the lowest evaluated bidder. The letter is set out as follows.

COUNTY ASSEMBLY OF ASSEMBLY

NOTIFICATION OF INTENTION TO AWARD

1. *For the attention of Tenderer's Authorized Representative*

- i) *Name: PINNIE AGENCY LTD*
- ii) *Address: P.O. BOX 104080 -00101 NAIROBI*
- iii) *Telephone: 0721707010*
- iv) *Email Address: info@pinnie.co.ke or
pinnieagency@gmail.com*

2. *Date of transmission: kisumuasembly@gmail.com 14th December,
2021 at 11.30am*

*This Notification is sent by: ELIUD OWEN ODHIAMBO OJUOK - CLERK
OF ASSEMBLY*

3. *Notification of Intention to Award*

- i) *Procuring Entity: COUNTY ASSEMBLY OF KISUMU*
- ii) *Project: Proposed Construction of Ultra-Modern County
Assembly Chamber, Offices and Associated Works.*
- iii) *Contract title: Proposed Construction of Ultra-Modern County
Assembly Chamber, Offices and Associated Works.*
- iv) *Country: Kenya*
- v) *ITT No: CAK/OT/UMCAC/10/2020/2021/02*

*This Notification of Intention to Award (ASTRONEA CONSTRUCTION
CO. LTD) notifies you of our decision to award the above contract.
The transmission of this Notification begins the Standstill Period.
During the Standstill Period, you may:*

4. Request a debriefing in relation to the evaluation of your tender by submitting a Procurement-related Complaint in relation to the decision to award the contract.

a) The successful tenderer

- i) Name of successful Tender ASTRONEA CONSTRUCTION CO. LTD*
- ii) Address of the successful Tenderer P.O. BOX 39-40100 KISUMU*
- iii) Contract price of the successful Tender Kenya Shillings Four Hundred and Eighteen Million, Three Hundred and Fifty-Six Thousand, Three hundred and Forty-Eight Shillings and Sixty Cents (Kshs 418,356,348.60)*

b) Other Tenderers

The Board notes that the Applicant questions the compliance of the Interested Party to the specific requirements of Mandatory requirement number 8 which is as follows.

8. The tenderer must have completed a project of over Five (500) million in the last five years

The Board from the confidential documents provided has reviewed the Evaluation report from the Evaluation Committee in regard to the Evaluation of Section III clause 2.0 – Preliminary Examination for Determination of Responsiveness; the Evaluation committee evaluated on mandatory requirements for the 4 bidders who submitted their tenders as follows:

PRELIMINARY EXAMINATION FOR DETERMINATION OF RESPONSIVENESS

Preliminary examination for Determination of Responsiveness

The Procuring Entity will start by examining all tenders to ensure they meet in all respects the eligibility criteria and other mandatory requirements in the ITT, and that the tender is complete in all aspects in meeting the requirements provided for in the preliminary evaluation criteria outlined below. The Standard Tender Evaluation Report Document for Goods and Works for evaluating Tenders provides very clear guide on how to deal with review of these requirements. Tenders that do not pass the Preliminary Examination will be considered non-responsive and will not be considered further.

To meet the specific requirements of requirement number 8 the bidder had to support the same with documentation in proof of having undertaken such a project as the subject tender, in the preceding 5 years. And more specifically, the project should have been at least four storied and a construction value of 500 million. The Respondent submits that its Evaluation Committee followed the Evaluation criteria at the Preliminary Mandatory requirements stage.

The Board's attention is drawn to section 79 of the Act which provides as follows

- (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.*

Further Regulations 74 and 77 of Regulations 2020, provide as follows

74. (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 — Preliminary evaluation of open tender.

- (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. 786 Kenya Subsidiary Legislation, 2020

(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.

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

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

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

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

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

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

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

In order to determine whether or not the Interested Party met the mandatory requirements of the tender it should be remembered that such an evaluation must be done based on the requirements of the tender documents itself and the law. In this instance the requirements of that mandatory requirement number 8 simply required a tenderer to state and demonstrate to a satisfactory level that they had within the last five years undertaken a project of a value up to five hundred million, (500,000,000/=)

The tender document at clause 29 made provision on the determination of responsiveness in the following terms:

"29.0 Determination of Responsiveness

29.1 The Procuring Entity's determination of a Tender's responsiveness is to be based on the contents of the tender itself, as defined in ITT 11.

29.2 A substantially responsive Tender is one that meets the requirements of the Tender document without material deviation, reservation, or omission. A material deviation, reservation, or omission is one that, if accepted, would:

a) Affect in any substantial way the scope, quality, or performance of the Works specified in the Contract;

- b) limit in any substantial way, inconsistent with the tender document, the Procuring Entity's rights or the tenderer's obligations under the proposed contract;**
- c) if rectified, would unfairly affect the competitive position of other tenderers presenting substantially."**

Responsive tenders

29.3 The procuring Entity shall examine the technical aspects of the tender submitted in accordance with ITT 16, to confirm that all requirements of section VII, works' Requirements have been met without any material deviation, reservation or omission.

29.4 If a tender is not substantially responsive to the requirements of the tender document, it shall be rejected by the Procuring Entity and may not subsequently be made responsive by correction of the material deviation, reservation, or omission."

According to the Evaluation Report the Evaluation Committee was satisfied that the Interested Party had met this requirement as it had named a project which was a construction in Kakamega town known as Midland Shopping Mall, whose developer is Midland Emporium Limited. From the confidential documents, the Board notes that at page 141 of the Interested Party's original tender document what is called "**FORM EXP 4.2(a)**" specific construction and contract management experience in which the Interested Party provided details of the construction of the said premises at Kakamega whose total contract sum is stated to be Kshs 508,700,000. The address of the developer was given as P.O Box 1009 Kakamega and the contact person as one Raj Kotecha. His telephone number and email address are also provided.

The Board has also noted from the confidential documents a certificate of practical completion dated 20th June, 2020 whose details are in respect of construction of Midland Shopping Mall in Kakamega, the reference number is **MED/M/2020-ACL**. The contractor is shown to be the Interested Party herein and the Client is Midland Emporium Limited and the location of the works is Kakamega town. The certificate issued on 17th June, 2020 signed by Architect Isaac N. Jami Registration number A509 whose designation is the project Architect verifies the completion of works in respect of the project. The same appears to also be signed by the Client and the Contractor and is certified on the 7th November, 2021 by Advocate Ojok Odumbe - Commissioner for Oaths. It is found at page 151 of the Interested Party's tender documents.

At page 137 of the Interested Party's tender documents "**FORM EXP- 4.1**" the description of the construction is provided and that document is also verified by the same Advocate Ojok Odumbe. Further, at page 150 of the Interested Party's tender document is a letter dated 20th July, 2019 issued by the developer Midland Emporium Limited addressed to the Interested Party accepting the Interested Party's quote for development of the Midland Shopping Mall at Kakamega County at a price of Kshs 508,700,000. This document bears the stamp of the developer and signed by Mr. Raj Kotecha.

Having reviewed the above, the Evaluation Committee was satisfied that the Interested Party had met the requirements of mandatory requirement number 8 of the Preliminary Evaluation which has been referred to above and therefore satisfied the requirement of having undertaken a project of a value of Kshs 500,000,000. It is the Board's view therefore that the Interested Party's bid did qualify to proceed to the Technical stage. It has not been claimed, shown or proved that there were other documents at this preliminary stage that were mandatory to be provided in support of that requirement.

The Applicant has raised in its submission an issue for determination as to whether the Evaluation of its bid was properly undertaken. The Board's view is that there has been no question as to the responsiveness of the Applicant's tender to the specific criteria for evaluation set out in the tender documents arising from the evaluation report. Indeed, as notified in the Letter of Notification of Intention to Award, the only reason that the Applicant was not awarded the tender was that its bid was ranked second after the Financial Evaluation. To that end, the Applicant's and the Interested Party's

bids had been found to be responsive. The Board has however noted the issue raised by the Interested Party regarding the Applicant's failure to give details of sub-contractors, which shall be dealt with below.

The Board has also noted from the Evaluation Report that in regard to Technical evaluation, that upon evaluation by the 5 members of the Evaluation Committee the Applicant and the Interested Party returned an average score of 95.8 and 93.6 respectively. Therefore, both the Applicant and the Interested Party did meet the minimum threshold of 80% score as set out at pages 27 to 31 of the Tender document and the specific Technical criteria was set out as follows

"The Technical Evaluation shall be 80%. Only bidders who shall have attained the cut off mark shall proceed to financial evaluation where the bidder with lowest financial quote (tender sum) as read from the form of tender shall be recommended for award."

Having observed the above, it is the Board's view that the Evaluation both at preliminary and Technical stages were conducted based on the criteria found in the Tender document and in accordance with the Act. The other complaint by the Applicant appears to arise from the actions that were undertaken by the Respondents after the Technical Evaluation stage which we shall deal with as per the issue below.

- ii) Whether the post qualification evaluation and due diligence was conducted within the realm of Section 83 as read together**

with Regulation 80 of the Public Procurement and Asset Regulation

In PPARB Application *No. 134 of 2019, Trident Insurance Company Ltd vs Accounting Officer, County Assembly Nyamira & another* the Board defined Due diligence on page 21 as follows

"Due Diligence is in this regard defined in Black's Law Dictionary, Ninth Edition at page 523 thereof as the diligence reasonably expected from, and ordinarily exercised by a person who seeks satisfy a legal requirement or discharge an obligation." Diligence on the other hand is defined "the attention and care required from a person in a given situation."

In essence, a due diligence exercise is an important component of a procurement process that assists a procuring entity to exercise the attention and care required to satisfy itself that the lowest evaluated responsive tenderer can execute a tender (Emphasis added)

Section 80 of the Act provides as follows

80. (1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected under section 82(3).

(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) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2) —

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4) 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.

(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations

(6) The evaluation shall be carried out within a maximum period of thirty days.

(7) The evaluation report shall be signed by each member of evaluation committee.

Section 83 on its part provides as follows

83. (1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

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2019***

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.

In ***Judicial Review Miscellaneous Civil Application number 86 of 2018***; *Mativo J*, at paragraph 86 thereof stated as follows

"86. A core aim of the process is to select a competent firm with the capacity to implement the project. It is important to consider the qualifications of the firms behind each proposal. This can be done through a pre-qualification process to

identify bidders or as part of the first stage of the tender process (sometimes called post qualification). The qualification criteria can be qualitative or quantitative. It typically involves considering the firm's financial robustness, previous experience with similar projects, and the experience of members of its management team. In its broadest sense, the term "due diligence" simply refers to taking reasonable steps or exercising reasonable care in relation to a particular cause of action."

In regard to the issue of Due Diligence, the Applicant's specific complaint appears to be two-fold

- a) That it was undertaken un-procedurally, or
- b) That it could only have been undertaken upon it (the Applicant) on account of it being the lowest evaluated tender after the Interested Party's failure to satisfy the due diligence conducted on it.

In regard to the process, the Applicant states that at page EC/3 of the tender document contains the following criteria with regard to post qualification

STEP 3: FINANCIAL EVALUATION

This will include the following: -

- a) Confirmation and considering Bills of Quantities duly completed and signed.*
- b) Conducting a financial comparison*
- c) Correction of arithmetical errors*

d) Subject to the outcome of the above processes due diligence will be conducted by the Client on Tenderers who will have qualified for the award.

The Applicant therefore alleges that the Procuring Entity having breached these specific requirements of the tender document and Section 80 of the Act acted in violation of the law and the eventual award of the tender to the Interested Party is tainted with illegality and should therefore be nullified.

On its part the Procuring Entity has relied on the reasons given by the Evaluation Committee for conducting the process of due diligence after the Technical Stage and before the Financial Evaluation. On this aspect in its Memorandum of Response at paragraphs J to I the Procuring Entity states as follows.

"J. The evaluation committee further noted that there was need to carry out due diligence to establish whether the Interested Party's information on especially past projects meeting the Procuring Entity's requirements were verifiable.

k. As a prudent measure and to ensure timely decision making, the evaluation committee recommended due diligence on the Applicant's projects as well for the reason that should turn it out that the lowest evaluated bidder's projects are not verifiable, the evaluation committee would easily recommend for award the second lowest evaluated bidder.

l. the due diligence was communicated to the parties and duly carried out upon which it was verified that both the Interested

Party and the Applicant's projects were verifiable and met the procuring entity's requirements. The Interested Party had undertaken a comparable project worth at least Kshs 500 million in the project known as Midland Emporium Kakamega Limited."

Further, at paragraphs q to s of the said Memorandum of Response, the Procuring Entity has stated as follows:

"q. The decision to carry out successive due diligence on the lowest evaluated bidder and the second lowest evaluated bidder does not in any way offend the law or even contravene section 83 of the Act. To the contrary, the decision was a prudent one that gave the Procuring Entity complete facts upon which it could decide and even make a necessary change would it have turned out that the lowest evaluated bidder's past projects were not satisfactory or verifiable.

r. The decision to carry out due diligence on both bidders followed clause 30 of the Instruction to Tenderers that provided that upon determination of the lowest evaluated bid, the Procuring Entity shall verify its qualification as well. In the event that it is found non-conforming or non-compliant, the Procuring Entity should make an award to the second lowest evaluated bidder whose qualification shall have similarly been verified. The due diligence was therefore a compliance process to inform decision making in either scenario contemplated by clause 39.

s. In any case, the due diligence on the Applicant was superfluous in view of the fact that the Interested Party remained the lowest evaluated bid and was therefore the one entitled to be subjected to post-qualification due diligence under section 83 of the Act. The Applicant cannot rely on the superfluous reason to claim that it was the lowest evaluated bid when the facts and documents speak a contrary position."

The Board has on various occasions addressed the issue of the conduct of due diligence and the proper timelines on the same. In ***Application no 158 of 2021*** between ***Liga Holdings Limited and The Accounting Officer, National Hospital Insurance Fund and others*** The Board stated as follows

"The Procuring Entity conducted due diligence on the 1st, 2nd and 3^d lowest evaluated bidders as opposed to the lowest evaluated tenderer recommended for award and where the lowest evaluated tenderer is non-responsive at this stage, to proceed to conduct due diligence to the next lowest evaluated tenderer and this procedure is repeated until a successful tenderer is found at due diligence stage.

The Board finds that due diligence in Section 83 (1) of the Act and Regulation 80 of the Regulations 2020 also known as post qualification evaluation, is to be conducted sequentially starting with the lowest evaluated tenderer and if they fail

then the next lowest evaluated tenderer is considered and should they fail too then the next (third) lowest evaluated tenderer is then subjected to due diligence as was done in this tender."

The question for the board to consider then, is whether, the failure by the procurement entity to follow that process and to contemporaneously conduct due diligence on both the Applicant and the Interested Party before the financial evaluation is fatal.

In the Applicant's further statement filed on 12th January, 2022, the Applicant depones that

"7. Interestingly the committee conducted due diligence on the Applicant on 13th November, 2021 (2 days after it conducted due diligence on the Interested Party). The Applicant observed from the due diligence report that the committee only proceeded to carry out due diligence on it on 13th November, 2021 because at Due Diligence, the Interested Party yielded a negative outcome and was therefore disqualified. This can also be deduced from the Due Diligence committee's findings on page 62 of the list of documents that the Interested Party's projects had average workmanship used on the project compared to findings on the Applicant's project at page 67 that it had, high end finishes with quality."

The Board observes that the allegation by the Applicant that due diligence conducted upon it was after failure by the Interested Party to meet the due diligence check, cannot be supported based on the conclusions and findings of the due diligence report and eventually by the Evaluation Committee. Both seem to have been satisfied that the Kakamega project was a satisfactory demonstration that the Interested Party had undertaken the project and the project's value was in conformity with the requirement at mandatory requirement number 8 in the Tender Document.

In the tender document at clauses 17.0 to 17.2 in regard to eligibility, the following is provided:

17.0 Documents Establishing the Eligibility and Qualifications of the Tenderer

17.1 Tenderers shall complete the Form of Tender, included in Section IV, Tender Forms, to establish Tenderer's eligibility in accordance with ITT 4.

17.2 In accordance with Section III, Evaluation and Qualification Criteria, to establish its qualifications to perform the Contract the Tenderer shall provide the information requested in the corresponding information sheets included in Section IV, Tender Forms.

Therefore, the information in support of that requirement was to be found in the respective bidders Tender document itself and had to satisfy the Evaluation Committee sufficient for it to allow any tenderer to proceed to the Technical evaluation.

As stated earlier the Board has previously determined that the sequence to follow is as set out at Section 83 of the Act. However, the Board is of the view that a deviation therefrom in the manner effected by the Procuring Entity in the present case should not be fatal to the entire process. It is notable that none of the parties has claimed or shown that they were adversely prejudiced by that deviation in the form. To consider that deviation fatal would in the Board's view be overemphasizing form over substance and the Board therefore finds that the deviation from the form is not fatal in this instance. The legal and economic purpose for which due diligence in public procurement is conducted was met. The Board would however wish to admonish the Procuring Entity and to remind procuring entities of the need to observe and adhere to the process as outlined above.

The Board now turns to the issue raised by the Applicant in regard to the due diligence report and the recommendations made therein. The Applicant has stated that they were asked and they did provide the following documents: -

- a) The developer's forwarding letter
- b) NEMA project permit
- c) NCA project registration
- d) Construction contract agreement
- e) An approved part structural drawing

The Applicant therefore states that similar documents ought to have been obtained from the Interested Party and without them, the Interested Party's bid should fail.

The Board has looked at the Due Diligence Report and bearing in mind the purposes for which Due Diligence is performed and has also considered the decision of Mativo J in ***Miscellaneous Civil Application No. 85 of 2018 Republic vs The Public Procurement Administrative Review Board and 2 others***. In this decision Mativo J stated as follows in paragraph 86:

"86. A core aim of the process is to select a competent firm with the capacity to implement the project. It is important to consider the qualifications of the firms behind each proposal. This can be done through a pre-qualification process to identify bidders or as part of the first stage of the tender process (sometimes called post qualification). The qualification criteria can be qualitative or quantitative. It typically involves considering the firm's financial robustness, previous experience with similar projects, and the experience of members of its management team. In its broadest sense, the term "due diligence" simply refers to taking reasonable steps or exercising reasonable care in relation to a particular cause of action."

The Due Diligence report was prepared and properly signed by the four members that conducted due diligence on 17th November, 2021 and as required, all the members did append their signature to the report and each page is also properly signed by each member. Page 1 thereof sets as follows

"Due Diligence is the process of verification, investigation and audit of information provided by a potential service provider

or contractor for potential engagement to deliver a service and to confirm and verify all relevant facts that were brought up during the Evaluation Process. Due Diligence is completed before the Evaluation Process closes to provide the Client with an assurance of all levels of capacities of the potential service provider. The data and information provided during due diligence is to objectively inform the decision of management on this particular project. The Evaluation Committee conducted Due Diligence on the two (2) projects from two bidders as was highlighted in the appointment letter. The two projects included:

- 1. Midland Shopping Mall in Kakamega County***
- 2. Westin Apartment in Nairobi City County***

The Board has noted that a physical visit was conducted on the Kakamega project on 11th November 2021 and the findings were as per the table below

SR N O	ITEM	OBSERVATIONS/FINDINGS
	PROJECT	MIDLAND SHOPPING MALL
	DATE VISITED	11TH NOVEMBER, 2021
1	DEVELOPER/CLIENT OR OWNER	MIDLAND EMPORIUM LIMITED (GROUP OF COMPANIES) P.O BOX 4 KAKAMEGA

	CONTRACTOR	ASTRONEA CONSTRUCTION COMPANY LIMITED P.O BOX 39-40100 KISUMU
	PROJECT COST (KENYA SHILLINGS)	AS PER INFORMATION PROVIDED IN REFERENCE LETTER
	NUMBER OF FLOORS	FIVE (5)
	MAIN USE/FUNCTIONALITY	MIXED USE (SHOPS TO LET, LETTABLE OFFICE/FLEXIBLE SPACES TO ACCOMMODATE VARIOUS FUNCTIONS/USES
	COMPLETION PERIOD/YEAR	2020
	PROJECT PHOTO ILLUSTRATIONS	

The Board has observed photographs taken of the building and its neighbourhood which are found at page 3, 4 and 5. At the end of that exercise the committee's observations were as follows

1. A five (5) storey mixed used development.

2. *Average workmanship used on the project*
3. *The project was steel-frame structure with masonry in fields and conventional finishes*
4. *Open plan space lettable to Tenants*

The Committee relied on physical observations at the site and the developer's letter of confirmation. (annexture 1)
However, the committee recommends that the Client to request for additional information that may include:
(Emphasis Added)

1. *NEMA project permit*
2. *NCA project registration*
3. *Construction Contract Agreement*
4. *Approved development drawings'*

From the report the Board notes that a similar visit was conducted at Westin Apartments Parklands area Nairobi and information found out is tabulated as per the table below.

SR N O	ITEM	OBSERVATIONS/FINDINGS
	PROJECT	WESTIN APARTMENTS
	DATE VISITED	13TH NOVEMBER, 2021
1	DEVELOPER/CLIENT OR OWNER	WESTIN DEVELOPERS LIMITED P.O BOX 104080-00101

		NAIROBI
	CONTRACTOR	PINNIE AGENCY LTD P.O BOX 104080-00101 NAIROBI
	PROJECT COST (KENYA SHILLINGS)	KSHS 705,000,000.00
	NUMBER OF FLOORS	ELEVEN (11)
	MAIN USE/FUNCTIONALITY	PURE RESIDENTIAL APARTMENTS WITH ASSOCIATED AMMENITIES LIKE SWIMMING POOL AND PARKING
	COMPLETION PERIOD/YEAR	2020
	PROJECT PHOTO ILLUSTRATIONS	

The Board has also observed photos of the development which are page 7 to 10 of the report

The report further states that it obtained a letter from the developer Westin Developer's Limited dated 15th November, 2021 confirming that the bidder number 3, the Applicant herein had undertaken the construction as indicated

in the bid document at a contract cost of 705,209,790/=. The observations of the Due Diligence committee are as follows

"1. An Eleven (11) storey apartment with other amenities such as swimming pool, gym and sauna

2. Basement and ground floor parking and central house

3. High end finishes with quality workmanship

4. Reinforced concrete structure

Further to the physical observation, the developer also provided the following documents:

1. Developer's forwarding letter (annexture 2)

2. NEMA project permit (annexture 3)

3. NCA project registration (annexture 4)

4. Construction contract Agreement (annexture 5)

5. An approved part structural drawing (annexture 6)

The committee relied on the physical observations at the site and documents submitted by the bidder and developer's documents listed above (annexed)

CONCLUSION AND RECOMMENDATION

From the foregoing and information given in the tables above, we the undersigned hereby confirm to the accounting officer that the information provided herein are a true data established from the physical visits of the projects and the documentation submitted by bidders."

At page 12 of the Due Diligence Report there is a letter from the Midland Emporium Kakamega Limited dated 16th November, 2021. It is addressed to the Clerk of the County Assembly of Kisumu as follows

"RE: DUE DILIGENCE ON ASTRONEA CONSTRUCTION LTD

Reference is made to the above-mentioned subject and your visit to our shopping mall in Kakamega.

We confirm hereby that ASTRONEA CONSTRUCTION LTD, were the contractors to this project for a contract sum of Kshs 508,700,000/=

They have a dedicated team of experts and recommend them in similar construction jobs.

Please free to contact us for any further information.

Regards

RAJ KOTECHA

Managing Director

At page 13 of the same report there is a letter dated 15th November, 2021 from MS Westin Developers Limited addressed to the Clerk of the County Assembly of Kisumu, it's in the following terms:

"Dear Sir/Madam

RE: DUE DILIGENCE ON WESTIN APARTMENTS

We refer to the Due Diligence exercise carried out by your Evaluation Team in our property on 13th November, 2021.

Attached below are the relevant documentation as agreed on the project for your further action. Hard copies will be delivered to your offices via courier.

Yours Faithfully

Mohammed Hussein

Director

The issues to note from the Due Diligence report are:

- a) That the members involved in the Due Diligence exercise were satisfied by the physical projects they saw, which the report indicates that the physical structures and the documents availed, agree or confirm matters contained in the bid documents of the two bidders
- b) It is noted that the committee **RECOMMENDED** to the Client in this case the Accounting Officer to request for further documents which "**MAY INCLUDE**" the documents listed in respect of the Interested Party. It is however noted from the Interested Party's amended Memorandum of Response, that the only request was by a letter dated 24th November, 2021 which only requested for the Developer Midland Emporium Ltd to provide the Procuring Entity with a

copy of the Contract for construction executed between it and the Interested Party herein. A copy of the same was provided.

- c) The above listed documents further supporting the Applicant's bid appear to have come from the developer following verbal discussions between the Developer and the the Due Diligence Committee during their visit on 13th November, 2021 and there is nothing to show that this were made mandatory to be provided.
- d) The letter of 16th November issued by Mr. Raj Kotecha offers to provide any further information if requested.

And further, clause 17.8 of instructions to tenderers provides as follows:

"17.8 If a tenderer fails to submit the information required by these requirements, its tender will be rejected. Similarly, if the Procuring Entity is unable, after taking reasonable steps, to verify to a reasonable degree the information submitted by a tenderer pursuant to these requirements, then the tender will be rejected."

Turning to the Evaluation Report, at page 48 of the said report **MIN/CAK/JTEC/05/11/2021: DUE DILIGENCE REPORT** the following is the record

"the members of the committee tasked to carry out due diligence completed the assignment on 15th November 2021

and presented the report before all members for decision making. (annexed)

Having carried out due diligence on all the two (2) bidders who met the preliminary, technical and were within the approved budget, the committee agreed that both bidders have demonstrated that they have undertaken similar projects in the past and are capable of implementing the projects at the County Assembly of Kisumu.” (Emphasis added)

With the above the Evaluation Committee proceeded to conduct a Financial Evaluation on the two bidders the Applicant and the Interested Party who had passed the Preliminary Evaluation stages and recommended the award to the Interested Party being the lowest ranked financial bid or quote. This is based on the criteria contained in the Tender Document which simply states that the ranking and award will be based on the lowest evaluated financial quote. Nowhere in the Evaluation report or due diligence report, is it suggested or stated that the Evaluation committee or due diligence committee were unable to verify any of the documents relied upon by the Interested Party in its bid documents. The financial evaluation was provided for as follows:

“36.0 Comparison of tenders

The Procuring Entity shall compare the evaluated costs of all substantially responsive Tenders established in accordance with

ITT 35.2 to determine the Tender that has the lowest evaluated cost."

"42.0 Award criteria

The Procuring Entity shall award the Contract to the successful tenderer whose tender has been determined to be the Lowest Evaluated Tender."

The Board from the above therefore forms the view that the Financial evaluation was in conformity with the criteria set out in the Tender Document.

The professional opinion by the Director Supply Chain Management is dated 23rd November, 2021 addressed to the Accounting Officer. His professional opinion pursuant to Section 84 (1) of the Act was that the subject procurement had satisfied the Constitutional requirement of Article 227 (1) of the Constitution and statutory requirements in the Act. He therefore pursuant to Section 84 (3) of the Act requested the Accounting Officer to consider and approve the award of the contract under the subject tender to the Interested Party at the quoted tender sum of Kshs 508,356,348.60 and he stated ***"this is because the bidder has met all requirements under this particular tender and the tender sum provided for is within the approved budget and procurement plan and also within the prevailing market value."***

The Accounting Officer approved the recommendations as remitted to him in the Professional opinion on 23rd November, 2021 and signed the same.

He did not depart from the opinion given. His comments were that the approval is based on

- Departmental requests and specifications
- Tender opening minutes
- Tender documents
- Evaluation committee's report and recommendation
- Procurement officer's professional opinion

It is the Board's view that this approval is in line with the requirements of Regulation 79 of the Public Procurement and Asset Disposal Regulations

"79. (1) Upon receipt of the evaluation report and professional opinion, the accounting officer shall take into account the contents of the professional opinion and shall within a day, in writing—

(a) approve award to the successful tenderer;

(b) seek clarification from the head of the procurement function or the evaluation committee prior to approving or rejecting the award; or

(c) reject the recommendations.

(2) Where the accounting officer rejects the recommendations under paragraph (1)(c), the accounting officer shall give reasons and provide further directions to the head of the procurement function, in writing.

(3) Pursuant to section 68(2)(g) of the Act, any further

directions, approval or rejection by the accounting officer shall form

part of the procurement records.”

In this instant, the Accounting Officer approved the recommendations given to him.

The Board having reviewed the Original Tender Document, the Evaluation Report, the Due Diligence Report and the Professional Opinion as set out above observes that the decision or conclusion of the Evaluation Committee to adopt and accept the Due Diligence Report was unequivocal and indicates that the Committee fully relied on the satisfactory comments contained in the Due Diligence Report. the Due Diligence Report does not make its findings subject to the further documents stated being availed. To that extend, the due diligence report is unequivocal on the suitability of the Interested Party to undertake the Tender. The professional opinion of the Director of Procurement also is clear and relied on the Recommendations of the Evaluation Committee as well as the Due Diligence Report.

The main tenets of the Act and the Regulations 2020 as read together with Article 227 of the Constitution is to encourage equal treatment of bidders in the process of Evaluation. Further, The Board has considered the remarks of Mativo J in ***High Court Judicial Review Case Miscellaneous Civil Application No. 85 of 2018: Republic vs Public Procurement Administrative Review Board and others.*** In which he stated as follows

"47. Evaluation Criteria is a series of standards and measures used to determine how satisfactorily a proposal has addressed

the requirements in a bidding opportunity. They also play a major role in identifying the best overall cost-effective solution to the proposal requirement. The complete evaluation process consists of: - Establishing appropriate criteria and respective weights placing the criteria in the proposal documents. Selecting an evaluation team, Evaluating the proposal using the criteria, and preparing the evaluation report, including recommendations. The need for the evaluation process is two-fold. First, it offers all potential bidders a fair and equitable method of having their proposal reviewed and considered as a potential solution in a consistent and fair manner. Second, it provides the evaluators with a clear and concise method of identifying the competent proposals and ultimately the best overall bid.

48. Evaluation criteria are the standards and measures used to determine how satisfactorily a proposal has addressed the requirements identified in the request for proposal. Suppliers either meet or do not meet mandatory criteria. Mandatory criteria establishes the basic requirement of the evaluation. Any bidder that is unable to satisfy those 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. The due diligence was in my view a mandatory requirement. The Evaluation

committee is required to conduct a post qualification of the lowest evaluated responsive tenderer, to determine the tenderer's physical capability to perform the contract. Using the criteria specified in the bidding documents, this review include an assessment of the tenderer's technical, financial and physical resources available to undertake the contract, including his current and past similar projects."

Based on the above, the Board does observe that the documents that the Applicant now insists should have been produced by the Interested Party were not part of the mandatory requirements under the preliminary evaluation which the evaluation committee would rely upon in assessing whether or not any of the bidders bid was responsive. In any event it would appear that as at the Due Diligence stage, the Evaluation Committee had been satisfied that the Interested Party had sufficiently demonstrated that it had undertaken a project of the value required of Kshs 500,000,000/=, based on the documents contained in their bid documents and Physical inspection of the projects cited by each of them and the confirmations received from the respective Developers.

The Applicant has pleaded that failure by the Interested Party to provide those documents meant that the Interested Party failed to meet the requirements under Due Diligence and should therefore have been disqualified and the tender be awarded to it. However, it's the Board's observation that doing so would be to assess and disqualify any of the parties based on parameters and criteria not contained in the Tender Documents

contrary to Section 79 of the Act. It would amount to introducing new requirements at an advanced stage in the tender Evaluation.

The Board has seen the amended Statement of Response by the Interested Party filed on 14th January, 2022 at paragraph 15 (k) the Interested Party states as follows

"k) The evaluation team visited the Midland Shopping project during the due diligence process, met the owner of the building, being Midland Emporium Limited Group of Companies; the committee inspected the building, took photos and satisfied itself as to its condition and viability."

An important observation from the above statement is that the Due Diligence visit was conducted in the absence of the Interested Party but in the presence of the developer.

The Board has observed that there is annexed to the said Response a form of Contract Agreement executed between the Interested Party and MS Midland Emporium Ltd- the developer of the Midland Shopping Mall in Kakamega County which is the project relied upon by the Interested Party in meeting mandatory requirement number 8 in the Tender Document. It is shown to be of a value of over Kshs 500,000,000/=. In the said document it is stated at Clause 4 as follows:

"4. Permits and Approvals

The Employer shall be responsible for determining all regulatory permits necessary for performing the specific work, and for obtaining and paying for the permits.

Based on the above it is safe for the Board to hold the view that the specific documents contained in the due diligence report were in the circumstances of the relationship between the Interested Party and the Developer, to be obtained and would ordinarily therefore be in the custody of the Developer. The Board has not been made aware of an industry requirement to the contrary. It is therefore not surprising that the documents in regard to the Westin Development were remitted to the Procuring Entity by the Developer- MS Westin Developers Limited.

From paragraph 15 (m) of the Amended Interested Party's Response, the Interested Party has referred to a letter of 24th November, 2021 which is addressed to the Respondent and it's in the following terms: -

"m) Further, the Respondents herein on 24th November, 2021 wrote to Emporium Limited Group of Companies to confirm the information provided by the Interested Party as well as copy of the contract in respect to the same; which contract was duly furnished to the Respondents and they were satisfied with the fact that the Interested Party had previously handled a contract in the amount of Kshs 508, 700,000 (Copy of the contract dated 20th July, 2019 and letter dated 24th November, 2021 are shown as annexure 4 and 5 (page 4121-4126)

By a letter of 24th November, 2021, the Procuring Entity wrote to request for the contract document from MS Midland Emporium Ltd. That letter issued by the Accounting Officer of the Procurement Entity is set out as follows

"RE: DUE DILIGENCE ON ASTRONEA CONSTRUCTION LTD

The above subject matter refers to your letter dated 16th November, 2021 confirming the Astronea Construction Ltd were the contractors of MIDLAND SHOPPING MALL of which you were the Client.

However, kindly avail to us the Certified copy of Contract Agreement with Astronea Construction Ltd as part of due diligence process.

Kind Regards

Owen Ojuok

CLERK OF THE COUNTY ASSEMBLY"

In view of the forgoing, it would be safe for the Board to find that the Accounting Officer was satisfied with the contents of the Contract provided by the Developer in respect of the Kakamega Midland project undertaken by the Interested Party.

On its part, the Interested Party has alleged that the applicant's bid document did not meet the relevant technical criteria for failure to provide

details for sub-contractors. The Board has looked at the tender document, and especially clause 34 in respect of specialized sub-contractors. The same provides as follows:

"34.0 Nominated Subcontractors

not intend 34.1 Unless otherwise stated in the TDS, the Procuring Entity does to execute any specific elements of the Works by subcontractors selected/nominated by the Procuring Entity. Incase the Procuring Entity nominates a subcontractor, the subcontract agreement shall be signed by the Subcontractor and the Procuring Entity. The main contract shall specify the working arrangements between the main contractor and the nominated subcontractor.

34.2 Tenderers may propose sub-contracting up to the percentage of total value of contracts or the volume of works as specified in the TDS. Subcontractors proposed by the Tenderer shall be fully qualified for their parts of the Works.

34.3 Domestic subcontractor's qualifications shall not be used by the Tenderer to qualify for the Works unless their specialized parts of the Works were previously designated so by the Procuring Entity in the TDS a scan be met by subcontractors referred to hereafter as 'Specialized Subcontractors', in which case, the qualifications of the Specialized Sub contractors proposed by the Tenderer may be added to the qualifications of the Tenderer."

In the instructions to tenderers at **ITT 34.2** and **34.3**, the following was provided in regard to sub-contractors:

ITT 34.2 Contractor's may propose subcontracting: Maximum percentage of subcontracting permitted is: 20 % of the total contract amount. Tenderers planning to subcontract more than 10% of total volume of work shall specify, in the Form of Tender, the activity (ies) or parts of the Works to be subcontracted along with complete details of the subcontractors and their qualification and experience.

ITT 34.3 [Indicate N/A if not applicable]

The parts of the Works for which the Procuring Entity permits Tenderers to propose Specialized

Subcontractors are designated as follows:

- **Electrical Installations and Associated works**
- **Fire Alarm System**
- **Standby Generator Installation**
- **Passenger Lift Installation**
- **UPS Equipment Installation**
- **Communication Services**
- **Security and Access Control Installation**
- **Multimedia Digital Congress Network System and Associated Works**
- **Plumbing, Drainage and Fire Fighting Installation**
- **Air Conditioning and Mechanical Ventilation Installation**

For the above-designated parts of the Works that may require Specialized Subcontractors, the relevant qualifications of the proposed Specialized Subcontractors will be added to the qualifications of the Tenderer for the purpose of evaluation. Subcontractors shall not have been debarred from procurement proceedings for goods, works and services related to the contract.

The Board has considered the above provisions, and is of the view that there was no mandatory requirement in the tender document for any bidder to provide for sub-contracting of any portion of the works, as the term used **MAY** does not connote a mandatory requirement, and indeed there was provision to indicate that the same was not applicable (**N/A**). Consequently, the Interested Party's complaint cannot be upheld. The Board considers it the duty of the Evaluation Committee to have satisfied itself that where a bidder elected to not engage sub-contractors, then the said bidder had to show that it had capacity and has demonstrated that it possessed the relevant Certifications and approvals that a sub-contractor would have had to provide as mandatory requirements in the bid document, as set out in the Pre bid minutes.

iii) Whether the Respondent Acted in default of the provisions of the Tender Document Clause 45.0 and failed to conduct a debriefing as requested by the Applicant

The Applicant through the statement of Mr. ABDIRAZAK HUSSEIN SHEIKH AT PARAGRAPH 12 TO 15 states as follows

12. The Applicant, by a letter dated 16th December, 2021

raised a query with regard to the award to the successful bidder along the debrief guidelines stated in the Notification of Award letter. The Respondents, despite committing to making a response within 5 days upon request for a debrief, have never to this day written back to the Applicant.

13. In the above-mentioned letter, the Applicant raised an

issue with regard to the projects of Kshs. 500 million and above (see Preliminary Evaluation item 8) that were undertaken by the Interested Party. This, in the Applicant's view, is an issue that simply needed a response as to whether or not the Interested Party submitted such a project and which project that would be. In any event, the evidence of a Kshs. 500 million contract is confidential information, the building of such magnitude cannot be confidential and a simple disclosure would have sufficed.

14. The Applicant, being an active player in the building industry

for over 8 years and just like any other diligent business entity possesses good knowledge of the sector including other players in the sector, their capabilities and qualifications. The Applicant is well convinced that the Interested Party has

never undertaken a project of that magnitude (complete project of Kshs. 500 million and above) and could never have met that requirement among other tender requirements to enable it emerge as the lowest evaluated bidder in this exercise.

15. That in this scenario, it would only be fair for the Procuring

Entity to therefore demonstrate that it was fully convinced, through tender documentation and due diligence, that the Interested Party indeed possesses such experience. This is in line with the spirit of transparency as captured in Article 227 of the Constitution and Section 3 of the Act

The Applicant states that upon receipt of the said letter of Notification and following the process set out in the said letter it made a decision to seek a debrief. It therefore wrote a request for debrief dated 16th December, 2021 which is in the following terms

16th December 2021

PINNIE AGENCY LIMITED

Ref; PAL/TENDER/2021

Clerk of the County Assembly

County Assembly of Kisumu.

P.O Box 86-40100

KISUMU

Dear Sir,

RE: **NOTIFICATION OF INTENTION TO AWARD - THE**
PROPOSED CONSTRUCTION OF ULTRA-MODERN
KISUMU COUNTY ASSEMBLY CHAMBERS, OFFICES AND
ASSOCIATED WORKS TENDER NO.
CAK/OT/UMCAC/10/20 20-2021/02

We acknowledge receipt of your letter of 14th December 2021 in which you notify us of an intention to award Astronea Construction Co. Ltd the above-mentioned works. Whereas we have no objection in the awarding of the most responsive bidder, part of the evaluation criteria set provided that the tenderer must have completed a project of over Five (500) million in the last five years and the tenderer must have undertaken similar assignments (at least a four storied building) in the last five years.

During the evaluation process, your team visited one of our completed projects listed in our documentation as part of the due diligence exercise. The team requested the following documentation from our Client which were provided;

- a) Approved Construction Drawing*
- b) NEMA Project Permit*
- c) NCA Project Registration*
- d) Construction Contract Agreement*

This was done to ascertain that we indeed did the project.

We believe the same was conducted on a project listed by Astronea Construction Co. Ltd.

Before the issuance of the award letter to Astronea Construction Co. Ltd we wish to see copies of the same documentation as listed above for our reaffirmation.

Yours Faithfully,

Pinnie Agency Ltd

In that letter, the Applicant did seek to be satisfied on the documentation of the Interested Party that would support the position that the said parties bid complies with the specific mandatory requirements of item 8 of the preliminary mandatory requirements. The Applicant complains that it did not receive a response to that letter hence it filed the present Application.

On its part, the Respondent in its Memorandum of Response filed on 5th January 2022, deny receipt of the said letter of request for debriefing.

The Board notes that the letter of Notification of 14th December, 2021(which has been cited above) was elaborate in its directions on how a tenderer could raise a request for debriefing. It was required that

- i) The Complaint or request be in writing
- ii) It be submitted within the 14 days standstill period
- iii) It be specifically addressed to
 - a. Attention ELIUD OWEN ODHIAMBO

- b. Title position –CLERK
 - c. Agency-County Assembly of Kisumu
 - d. Email address: kisumuassembly@gmail.com
 - e. Telephone company +254 721 395 600 was also provided
- iv) Debriefing could also be conducted physically provided the request was in writing.

The letter of Notification sufficiently captured the requirements of clause 45 of the tender document which was set out as follows:

"45.0 Debriefing by The Procuring Entity

45.1 On receipt of the Procuring Entity's Notification of Intention to Enter into a Contract referred to in ITT 43, an unsuccessful tenderer may make a written request to the Procuring Entity for a debriefing on specific issues or concerns regarding their tender. The Procuring Entity shall provide the debriefing within five days of receipt of the request.

45.2 Debriefings of unsuccessful Tenderers may be done in writing or verbally. The Tenderer shall bear its own costs of attending such a debriefing meeting."

in the tender document clause 1.2, defines the term in writing as follows:

"1.2 Throughout this tendering document:

a) The term "in writing" means communicated in written form (e.g. by mail, e-mail, fax, including if specified in the TDS,

distributed or received through the electronic-procurement system used by the Procuring Entity) with proof of receipt;"

In any event, the Applicant's request of 16th December, 2021 seems to have been limited to one request that: -

"Before the issuance of the award letter to Astronea Construction Company Limited, we wish to see copies of the same documentation as listed above for our reaffirmation."

The Documents in question were: -

- a. Approved construction Drawing
- b. NEMA project permit
- c. National Construction Authority Project Registration
- d. Construction contract Agreement

The Board notes that the Applicant while admitting receipt of the Notification has not shown how or when the letter of 16th December, 2021 was delivered or served upon the Respondent. The Board has not seen or been told of the mode of postage with a postal Certificate, delivery against a delivery book or stamp on the document to signify receipt, email remittance with an email remittance advise directed to the email address provided as above or even by phone (WhatsApp).

Further, the Board observes that the Applicant has upon receipt of the Memorandum of Response from the Respondents filed an elaborate Further Statement dated 12th January 2022 and filed on the same date. In the said Statement and in the Written Submissions filed on the same day, the Applicant has not addressed this important issue on how and when its

request for a debrief was served upon the Procuring Entity or specifically upon the Clerk of the County Assembly as explicitly provided for in the Letter of Notification of Intent to Award.

Consequently, the Board finds that, the Letter of 16th December, 2021, has not been shown to have been remitted and received by the Respondent and therefore any prayers in the Request for Review relating to the contents or requests of that letter cannot be deliberated upon any further. It is the duty of the Applicant to prove service which it has failed to do.

Before the Board embarks on setting out its orders, it is necessary to note that the Applicant has filed a Replying Affidavit on 17th January 2021, the same raises new issue on the qualification of the Interested Party with respect to having been incorporated less than five years. It is worth noting that the Board is required to make a determination of this review by the 18th January 2021 in accordance with Section 171 of the Act. In this case, the Interested Party is not able to respond to these late allegations and the Board making adverse decision against the Interested Party will be doing so against the rules of natural justice which require the Interested Party is afforded an opportunity to be heard. In the circumstances, the Board will not address the new issues raised by the Applicant against the Interested Party.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:

1. The Applicant's Request for Review herein is dismissed for lack of merit.

2. Each Party shall bear its own costs.

DATED at NAIROBI, Kenya on this 18TH Day of January, 2022



.....
CHAIRPERSON
PPARB



.....
SECRETARY
PPARB