

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.22/2022 OF 11th MARCH 2022

BETWEEN

STEPHEN THIIRU NJENGA

T/A EVERSTEP ENTERPRISES APPLICANT

AND

THE SENIOR DEPUTY COUNTY COMMISSIONER,

LIMURU SUB-COUNTY RESPONDENT

Review against the decision of the Senior Deputy County Commissioner, Limuru Sub-County in relation to Tender Number: LMR/T/NSCHOB/01/2022 for Proposed Construction of Ndeiya Sub-County Headquarters Office Block in Limuru Constituency.

BOARD MEMBERS

- | | |
|-----------------------|--------------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Mrs. Njeri Onyango | - Vice Chairperson |
| 3. Mr. Ambrose Ogeto | - Member |
| 4. QS. Hussein Were | - Member |
| 5. Eng. Mbiu Kimani | - Member |

IN ATTENDANCE

Mr. Stanley Miheso - Holding brief for the Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

The Senior Deputy County Commissioner, Limuru Sub-County, the Procuring Entity and who is the Respondent herein, invited sealed tenders from interested, eligible and competent firms for Tender Number: LMR/T/NSCHOB/01/2022 for Proposed Construction of Ndeiya Sub-County Headquarters Office Block in Limuru Constituency (hereinafter referred to as the 'subject tender') by way of open tender method through advertisement on MyGov Newspaper (www.mygov.go.ke) and at conspicuous places reserved for that purpose in the premises of the Procuring Entity on 14th January 2022.

Tender Submission Deadline and Opening of Tenders

At the tender submission deadline of 25th January 2022 at 11.00 a.m., the Respondent received a total of eleven (11) tenders. Members of a tender opening committee appointed by the Respondent (hereinafter referred to as the 'Tender Opening Committee'), opened the tenders shortly thereafter in the presence of tenderers' representatives present and recorded the following tenderers as having submitted their respective tenders as captured in the minutes of the Tender Opening Committee of 25th January 2022 (hereinafter referred to as the 'Tender Opening Minutes'):

Tenderer No. Tenderer Name

1. Marc Construction Works Limited
2. Infinix Road & Bridge Contractors Limited

3. Dual Deluxe Dealing Limited
4. Miles Construction Limited
5. Everstep Enterprises
6. Alternative Communications Limited
7. Mopety Prime Limited
8. Satin Technologies Limited
9. Ginard Construction Company Limited
10. Agim Enterprises LTD
11. Ventura Ventures & Enterprises Limited

Evaluation of Tenders

Members of a tender evaluation committee appointed by the Respondent (hereinafter referred to as the 'Evaluation Committee') evaluated the eleven (11) tenders in the following stages as captured in a tender evaluation report signed on 2nd February 2022 (hereinafter referred to as the 'Technical Evaluation Report') and a financial/commercial evaluation report signed on 2nd February 2022 (hereinafter referred to as the 'Financial Evaluation Report'):

- i. Preliminary Evaluation;
- ii. Technical Evaluation; and
- iii. Financial Evaluation

Preliminary Evaluation Stage

At this stage, the Evaluation Committee was required to apply the criteria outlined in Clause 2.0 Preliminary Examination for Determination of Responsiveness of Section III- Evaluation and Qualification Criteria of the blank tender document issued to prospective tenderers by the Respondent (hereinafter referred to as the 'Tender Document'). Tenders that would not pass this stage were required to be considered non-responsive and were not to be considered at the next stage of evaluation.

At the end of evaluation at this stage, the Evaluation Committee determined seven (7) tenders to be non-responsive while four (4) tenders, which included the Applicant's tender, were determined to be responsive. The four (4) tenders determined to be responsive proceeded to the next stage of evaluation.

Technical Evaluation

At this stage, the Evaluation Committee was required to apply the criteria comprising of nationality, tax obligations for Kenyan tenderers, conflict of interest, PPRA eligibility, state owned enterprise, goods, equipment and services to be supplied under the contract, history of non-performing contracts, suspension based on execution of tender/proposal securing declaration by the Procuring Entity, pending litigation, litigation history, financial capabilities, average annual construction turnover, general construction experience and specific construction & contract management experience of Section III- Evaluation and Qualification Criteria of the Tender

Document. Tenders were required to meet the criteria at this stage to proceed to the next stage of evaluation.

During evaluation at this stage, the Evaluation Committee set out a minimum score of 70% to be attained by tenders and proceeded to assign scores to the four (4) tenders that made it to this stage.

At the end of evaluation at this stage, the Evaluation Committee determined two (2) tenders, which included the Applicant's tender, not to have attained the minimum score whilst two (2) other tenders were determined to have attained more than the minimum score.

Financial Evaluation

At this stage, the Evaluation Committee was required to apply the criteria outlined in Clause 3.1 Tender Evaluation (ITT 35) of Section III- Evaluation and Qualification Criteria of the Tender Document.

During evaluation at this stage, the Evaluation Committee determined arithmetic errors, compared rates and consistency of rates of the four (4) tenders that had made it to the Technical Evaluation stage including the Applicant's tender which had been determined not to have attained the minimum score at the Technical Evaluation Stage.

The Evaluation Committee determined the lowest evaluated tender to be the one that was submitted by Miles Construction Limited at Kshs.28,448,860.00 and proceeded to determine the same as the most responsive tender having offered the lowest evaluated price.

Recommendation

The Evaluation Committee recommended Miles Construction Limited to be awarded the subject tender for having submitted the most responsive tender and having offered the lowest evaluated price of Kshs.28,448,860.00 (Kenya Shillings Twenty-Eight Million, Four Hundred and Forty-Eight Thousand, Eight Hundred and Sixty).

Professional Opinion

Pursuant to Section 84(1) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') the Head of Procurement Function, Limuru Sub-County (hereinafter referred to as the 'Head of Procurement Function'), Mr. Joseph Kagwima Kang'ethe, vide a professional opinion dated 8th February 2022 (hereinafter referred to as the 'Professional Opinion') noted that due diligence was conducted to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender in accordance with Section 83(1) of the Act. Having reviewed the tender evaluation report, the Head of Procurement Function opined that the subject procurement satisfied the requirements of the Act and proceeded to recommend to the Respondent to award the subject tender to Miles

Construction Limited for having submitted the most responsive tender and for offering the lowest evaluated price of Kshs.28,448,860.00.

The Respondent approved the recommendation of the Head of Procurement Function as contained in the Professional Opinion.

Notification to Tenderers

In letters dated 21st February 2022 the Respondent notified tenderers of the outcome of evaluation of the subject tender.

THE REQUEST FOR REVIEW NO.22 OF 2022

On 11th March 2022, the Applicant filed a Request for Review dated 11th March 2022 together with a Statement in Support of the Request for Review signed by Stephen Thiiru Njenga, the sole proprietor of the Applicant, on 11th March 2022 through the firm of A.E Kiprono & Associates, seeking the following orders:

- a) An order annulling and setting aside the Respondent's letter to the Applicant dated 21st February 2022.**
- b) An order annulling and setting aside the Respondent's decision to award Tender LMR/T/NSCHOB/01/2022 to the 'successful tenderer'.**
- c) A declaration that the Applicant's bid is responsive to the tender requirements within the provisions of section 79(1) of the Act and clauses 29.1 to 29.5 of the tender document.**

- d) An order directing the Respondent to re-evaluate the Applicant's tender taking into consideration the Boards' directions/determination in this request for review.**
- e) Costs of the request for review to the Applicant.**
- f) Any other relief that the Review Board deems fit to grant under the circumstances.**

In a Notification of Appeal and a letter dated 11th March 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') notified the Respondent of the existence of the Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the Respondent a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 11th March 2022. Vide a letter dated 18th March 2022, the Ag. Board Secretary wrote to the Respondent reminding him to file his response and all the necessary documents with the Board since the five (5) days within which he ought to have responded had lapsed on 17th March 2022.

On 25th March 2022, the Respondent filed its Response to the Grounds of Appeal while submitting to the Board confidential information and

documents with respect to the subject tender pursuant to Section 67(3)(e) of the Act.

Vide letters dated 28th March 2022, the Acting Board Secretary notified all tenderers in the subject tender, via their respective addresses as provided by the Respondent, of the existence of the Request for Review while forwarding to tenderers a copy of the Request for Review together with the Board's Circular No.02/2020 dated 24th March 2020. Further, all tenderers were invited to submit to the Board any information and arguments about the subject tender within 3 days from 28th March 2022.

Pursuant to the Board's Circular No.2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

On 29th March 2022, the Applicant filed its written submissions dated 28th March 2022.

APPLICANT'S CASE

The Applicant avers it submitted its tender following the subject tender being floated by the Respondent on 14th January 2022. According to the Applicant, its representative attended the subject tender's opening on 25th January

2022 and noted that the Applicant's tender price was the fourth lowest. Further, the Applicant's representative also noted on the opening date that the tenderer who submitted the lowest price did not fill the form of tender, the tenderer that submitted the 2nd lowest price did not submit a copy of its tender whilst the tenderer that submitted the 3rd lowest price submitted a tender that was valid for less than 120 days.

The Applicant avers that on 8th March 2022, it received through the post office, a letter of notification of unsuccessful tender dated 21st February 2022 with the mailing envelope showing that the letter was delivered to the post office on 25th February 2022 by the Respondent. This letter of notification of unsuccessful tender informed the Applicant that its tender was unsuccessful because a) the lowest evaluated tenderer was considered, (b) its tender attained a lower score in terms of technical evaluation, for instance proof of works of similar magnitude or nature, and c) arithmetic errors led to the disqualification of its tender as non-responsive. The Applicant is aggrieved with the Respondent's decision determining the Applicant's tender unsuccessful.

The Applicant alleges that the decision by the Respondent and communicated to the Applicant through the letter of notification of unsuccessful tender dated 21st February 2022, was a nullity because it was in breach of Sections 79 (1) and 80 (2) of the Act and that in arriving at the decision to declare the Applicant's tender unsuccessful, the Evaluation Committee applied a tender evaluation criterion not in the Tender Document thus acted contrary to section 80 (2) of the Act, Regulation 30 (a) of the

Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') and Clauses 29.1, 29.2, 29.3, 29.5 and 31.4 of the Tender Document in that; a) the tender evaluation criteria did not provide for technical requirements in the Tender Document to be assigned scores, b) the Applicant provided proof of similar projects in its tender thus met the requirements of Clauses 29.1 to 29.5 of the Tender Document and the letter of notification of unsuccessful tender dated 21st February 2022 failed to notify the Applicant of the error detected, if any.

The Applicant alleges, the Respondent failed to ensure the Evaluation Committee carried out evaluation process with due diligence contrary to Regulation 30 (b) of Regulations 2020 thus allowed the Evaluation Committee to arrive at an erroneous conclusion on the Applicant's tender and failure to award the subject tender to the Applicant despite the Applicant having submitted the lowest evaluated price, was in breach of the provisions of Section 86 (1) (a) of the Act and Clauses 40.1 and 42.0 of the Tender Document.

The Applicant alleges that the letter of notification of unsuccessful tender dated 21st February 2022 was issued in breach of Section 87 (3) of the Act, Regulation 82 (3) of Regulations 2020 and Clause 43.1 of the Tender Document thus null and void.

According to the Applicant, the Respondent having considered the Applicant's tender price, is estopped from declaring the Applicant's tender non-responsive at the Preliminary and Technical Evaluation stages and doing

so, the Respondent would be in breach of Regulations 74, 75, 76 and 77 of Regulations 2020 and Clause 2.0 of Section III - Evaluation and Qualification Criteria of the Tender Document.

The Applicant alleges that the Respondent's failure to ensure the Applicant's tender is diligently evaluated in accordance with the set criteria is contrary to Section 46 (4) (e) of the Act which enjoins the Respondent to adopt an evaluation process that adheres to Article 227 (1) of the Constitution of Kenya, 2010 (hereinafter referred to as the 'Constitution').

The Applicant alleges that the Respondent's decision to declare the Applicant's tender unsuccessful on grounds that are contrary to the Act and the criteria set out in the Tender Document was tainted with opaqueness, lack of transparency, integrity, and accountability and was therefore not in consonance with the Constitutional values and principles espoused in Articles 10 and 227 (1) of the Constitution.

According to the Applicant the 'successful tenderer' took over the site in breach of Sections 135 (3) and (4) of the Act as read with Clauses 44.2, 44.3, 47.2, 47.3 and 47.4 of the Tender Document.

The Applicant alleges that the Respondent is in breach of Section 44 (1) of the Act for abdicating his responsibility of ensuring the Evaluation Committee complies with the provisions of the Act and in particular Sections 3, 44 (2), 46 (4), 80 (2), 86 (1) (a), 87 (3) and 135 (3) & (4) of the Act and Article 227 (1) of the Constitution.

The Applicant alleges it has been denied a legitimate expectation to secure an award of the subject tender and risks suffering loss and damage as a result of the Respondent's breach of the Constitution, the Act and Regulations 2020.

Given the foregoing, the Applicant avers that the Request for Review has merit and prays for the Respondent's decision to declare the Applicant's tender unsuccessful and award of the tender to the 'successful party' be nullified and set aside.

RESPONDENT'S RESPONSE

In response to the allegations made by the Applicant, the Respondent confirms notifying the Applicant, that its tender was unsuccessful through a letter of notification of unsuccessful tender dated 21st February 2022 and which letter was sent through registered mail services by Postal Corporation of Kenya, Limuru Branch, Receipt Number; M00217-02229412585 dated 25th February 2022.

The Respondent contends that the lowest evaluated tenderer was considered in accordance with Instructions to Tenderers ITT 40.1 of the Tender Document.

According to Respondent, concerning lower score, Section 79 (3) (a) of the Act requires responsiveness of tenders to be quantified to the extent possible and that tender responsiveness minimum evaluation criteria had been outlined in the Tender Advert Notice and the Tender Documents.

According to the Respondent, the legible error in the Applicant's Tender Document was Kshs.303,716.00, the correct amount was not inestimable and the total error was incalculable because several figures were not legible and had been circled with a red pen during evaluation therefore, the error in the Applicant's tender was considered a major deviation in accordance with ITT 31.3(a) and (b) of the Tender Document.

The Respondent contends that the decision taken by it, did not breach Section 79(1) and Section 80 (2) of the Act because the Applicant's tender did not conform to all the eligibility and other mandatory requirements in the Tender Document as expressed in the Evaluation Report and the evaluation and comparison was done using the procedures and criteria set out in the Tender Document.

The Respondent contends that the Evaluation Committee did not apply a tender evaluation criterion not in the Tender Document and therefore did not act contrary to Section 80 (2) of the Act, Regulation 30(a) of Regulations 2020 and Clauses 29.1, 29.2, 29.3, 29.5. Clause 35.1 of the Tender Document.

According to the Respondent, concerning Clause 31.4 of the Tender Document, the errors in the Applicant's tender were many and were incalculable as evidenced by the Applicant's original tender and concerning proof of works of similar nature, complexity or magnitude, the Evaluation Committee established the attached copies of Certificates of Practical Completion by the Applicant were invalid and had been falsified in order to

knowingly lie or mislead the Evaluation Committee in making the recommendation of contract award.

The Respondent contends that the Evaluation Committee performed evaluation with due diligence pursuant to Regulation 30(b) of Regulations 2020 and the Evaluation Committee's due diligence noted the falsified documents (Copies of Certificates of Practical Completion) attached in the Applicant's tender thus the Evaluation Committee did not make erroneous conclusion and recommendation.

The Respondent contends the Evaluation Committee did not determine the Applicant as the lowest evaluated tenderer as evidenced by the Evaluation Report and therefore did not act contrary to the provisions of Section 86(1) of the Act and Clauses 40.1 and 42.0 of the Tender Document.

According to the Respondent, he notified the Applicant of its unsuccessful tender on the same date of 21st February 2022 that the person who submitted the successful tender was notified pursuant to Section 87(3) of the Act 2015 to allow the Applicant the required period of fourteen (14) days stand still period, which commenced on the day that the letter of notification of unsuccessful tender dated 21st February 2022 was transmitted to the Applicant on 25th February, 2022.

According to the Respondent, the Applicant's correct tender price could not be determined as its tender had many arithmetic errors that were considered a major deviation which affected the substance of the tender in accordance

with Clause 31.3(a) and (b) of the Tender Document therefore, the determination by the Respondent was not contrary to Regulations 74, 75, 76 and 77 of Regulations 2020.

The Respondent contends that he ensured the Applicant's tender was diligently evaluated in accordance with the set criteria in the Tender Document which was not contrary to Section 46(4) (e) of the Act and the Evaluation Committee adopted a process that ensured the evaluation process utilized and adhered to Articles 201(d) and 227(1) of the Constitution.

The Respondent contends that his decision to declare the Applicant's tender unsuccessful had clarity, transparency, integrity and accountability as evidenced by the Tender Opening Minutes, Evaluation Report and signed Procurement Professional Opinion from the Head of Procurement Function thus in consonance with the Constitutional values and principles espoused in Articles 10 and 227(1) of the Constitution.

The Respondent contends that the person determined as the lowest evaluated tenderer being the successful tenderer, has not signed a contract with respect to the subject tender because the Acting Board Secretary's letter of Notification of Appeal was delivered to the Respondent on 11th March 2022 being the last (14th) day of the Stand Still Period. In addition, the Respondent contends that the successful tenderer has not taken over the site and therefore there is no breach of Sections 135(3) and (4) of the Act read with Clauses 44.2, 44.3, 47.2 , 47.3 and 47.4 of the Tender Document. Further,

that the unsubstantiated claim by the Applicant that the successful tenderer has taken over the site, could be as a result of clearing of the proposed site by a person who had previously illegally acquired part of that land and was ordered by the Cabinet Secretary, Ministry of Interior and Coordination of National Government, Dr. Fred Matiang'i to vacate the site where domestic animal sheds and shelter for farm labourers had been built and have since been demolished.

The Respondent contends that he ensured compliance with the Act and he is not in breach of Section 44(1) of the Act. Further, that he ensured the Evaluation Committee complied with the provisions of the Act and in particular Sections 3, 44(2), 46(4), 80(2), 86(1)(a), 87(3) and 135(3) and (4) of the Act and Article 227(1) of the Constitution.

The Respondent contends that the Applicant has not been denied legitimate expectation to secure an award of the subject tender and contends that it is the Applicant that acted in breach of Section 176(1) (b) and (i) of the Act by knowingly lying to or misleading the Evaluation Committee in carrying out a duty or function or exercising a power under the Act and committing a fraudulent act by attaching invalid (falsified) Copies of Certificates of Practical Completion of very huge amounts of money to mislead the Evaluation Committee in making a recommendation of award of the subject tender.

The Respondent contends that the Request for Review lacks merit and prays for its dismissal by the Board. In addition, the Respondent prays for his decision to award the lowest evaluated tenderer to be upheld by the Board.

BOARDS DECISION

The Board has considered each of the parties' cases, documents, pleadings, written submissions together with confidential documents submitted to it by the Respondent pursuant to Section 67 (3) (e) of the Act and finds the issues that crystalize for determination are as follows:

- 1. Whether the Evaluation Committee evaluated the Applicant's tender at the Technical and Financial Evaluation stages in accordance with Section 80(2) of the Act read with Regulations 76 and 77 of Regulations 2020;**
- 2. Whether the Evaluation Committee conducted due diligence with respect to the subject tender in accordance with Section 83 of the Act, Regulation 80 of Regulations 2020 read with Clause 7. Post-qualification and Contract Award (ITT39) of Section III – Evaluation and Qualification Criteria of the Tender Document;**
- 3. Whether the Letter of Notification of Unsuccessful Tender dated 21st February 2022 issued to the Applicant by the Respondent complied with Section 87 of the Act read with Regulation 82 of Regulations 2020;**
- 4. What orders should the Board grant in the circumstances.**

We note that there is need for us to first dispense with two preliminary issues before we embark on considering the issues framed for determination.

In a letter dated 24th March 2022 by the Respondent and addressed to the Board Secretary under the cover of confidential report, the Respondent brought to the attention of the Board, *inter alia*, attempts by the Applicant to influence award decision in the subject tender, delay in executing previous contracts by the Applicant, coercion of an accounting officer by the Applicant to vary contract price upward in an ongoing project, issuance of unspecified threats to an accounting officer by the Applicant if the Applicant is not awarded in an ongoing evaluation exercise and the need for the Public Procurement Regulatory Authority (hereinafter referred to as the 'Authority') to debar the Applicant. We however note that all this has not been made known to the Applicant and consequently, the Applicant has not been offered an opportunity to defend itself which goes against the principle of natural justice of *audi alteram partem*, meaning, let the other side be heard or no person should be judged without a fair hearing in which, each party is given the opportunity to present their case and respond to evidence against them. To this end, we shall not entertain these allegations against the Applicant by the Respondent because the Applicant was not informed of the same so as to respond to the same.

The Applicant alleged that the 'successful tenderer' of the subject tender had taken over the site on which the construction works of the subject tender were to be effected. However, upon the Respondent explaining that the site on which the construction works of the subject tender are to be effected had

been trespassed by a person who had built animal sheds and labourers shelter and that the trespasser had demolished the illegal structures following an order that such trespasser vacates the site by the Cabinet Secretary, Dr. Fred Matiangi, the Applicant in its written submission abandoned this allegation. To this end, we mark this allegation by the Applicant as abandoned.

Whether the Evaluation Committee evaluated the Applicant's tender at the Technical and Financial Evaluation stages in accordance with Section 80(2) of the Act read with Regulations 76 and 77 of Regulations 2020.

The Applicant alleges that the reasons given by the Respondent for finding its tender unsuccessful being a) that the Respondent considered the lowest evaluated tenderer, b) that the Applicant's tender attained a lower score in terms of technical evaluation and c) that arithmetic errors led to the disqualification of the Applicant's tender were invalid reasons. In explaining the invalidity of these reasons for determining the Applicant's tender as unsuccessful, the Applicant alleges that the Evaluation Committee applied a tender evaluation criterion not in the Tender Document thus acted contrary to Section 80 (2) of the Act, Regulation 30 (a) of Regulations 2020 and Clauses 29.1, 29.2, 29.3, 29.5 and 31.4 of the Tender Document in that, a) the tender evaluation criteria did not provide for technical requirements in the Tender Document to be assigned scores, b) the Applicant provided proof of similar projects in its tender thus met the requirements of Clauses 29.1 to 29.5 of the Tender Document and c) the letter of notification of unsuccessful

tender dated 21st February 2022 failed to notify the Applicant of the error detected in its tender, if any.

In response, the Respondent contends that a) the lowest evaluated tenderer was considered in accordance with Instructions to Tenderers ITT 40.1 of the Tender Document, b) that with respect to lower score, Section 79 (3) (a) of the Act requires responsiveness of tenders to be quantified to the extent possible and that tender responsiveness minimum evaluation criteria had been outlined in the Tender Advert Notice and the Tender Documents, c) that the legible error in the Applicant's Tender Document was Kshs.303,716.00, the correct amount was not inestimable and the total error was incalculable because several figures were not legible hence the error in the Applicant's tender was considered a major deviation in accordance with ITT 31.3(a) and (b) of the Tender Document. Further, that the decision taken to determine the Applicant's tender unsuccessful did not breach Section 79(1) and Section 80 (2) of the Act because the Applicant's tender did not conform to all the eligibility and other mandatory requirements in the Tender Document as expressed in the Evaluation Report and the evaluation and comparison was done using the procedures and criteria set out in the Tender Document. Accordingly, the Respondent contends that the Evaluation Committee did not apply a tender evaluation criterion not in the Tender Document and therefore did not act contrary to Section 80 (2) of the Act, Regulation 30(a) of Regulations 2020 and Clauses 29.1, 29.2, 29.3, 29.5. Clause 35.1 of the Tender Document.

Section 80(1) to 80(4) of the Act is instructive on who conducts evaluation and comparison of responsive tenders, how such evaluation and comparison of tenders is carried out, who prepares and what is contained in an evaluation report. The said Section 80(1) to 80(4) of the Act provides as follows:

80. Evaluation of tenders

(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.

(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.

The above provisions of Section 80(1) to 80(4) of the Act requires; (a) evaluation and comparison of tenders to be conducted by an evaluation committee, (b) such evaluation and comparison of tenders should strictly be conducted in accordance with procedures and criteria stipulated in a tender document, (c) the criteria stipulated in a tender document, where possible, should be objective and quantifiable and expressed in a manner when applied, is in accordance with the procedures stipulated in the tender document while taking into consideration price, quality, service for the purpose of evaluation, and (d) a summary of evaluation and comparison of tenders is contained in an evaluation report that is prepared by an evaluation committee. Simply put, an evaluation committee should stick to the procedures and criteria set out in a tender document when evaluating tenders. If a tender document sets out a criteria that requires assigning of scores against each criterion (i.e. quantifiable in nature), an evaluation committee while evaluating tenders, shall assign scores to each criterion as assigned in a tender document. If a tender document sets out a criteria that does not provide for assigning of scores against each criterion, then an

evaluation committee while evaluating tenders, shall not assign any scores against such criteria as set out in a tender document.

We have carefully studied the Tender Document which forms part of the confidential documents submitted to the Board by the Respondent and note that the criteria for evaluation of the subject tender was set out in Section III - Evaluation and Qualification Criteria thereof. Clause 1.1 of Section III - Evaluation and Qualification Criteria of the Tender Document provides as follows:

1.1 GENERAL PROVISIONS

This section contains the criteria that the Employer shall use to evaluate tender and qualify tenderers. No other factors, methods or criteria shall be used other than specified in this tender document.

In essence the Tender Document communicated to prospective tenderers that the criteria for evaluation of tenders in the subject tender was only contained in Section III - Evaluation and Qualification Criteria of the Tender Document.

We note that Clause 2.0 of Section III - Evaluation and Qualification Criteria of the Tender Document provided the criteria for evaluation of tenders at the preliminary examination for determination of responsiveness (preliminary evaluation) whilst Clause 3.1 (i) of Section III -Evaluation and

Qualification Criteria of the Tender Document provided the criteria for price evaluation (financial evaluation).

The Evaluation Committee determined the Applicant's tender to be responsive at the Preliminary Evaluation stage and proceeded to evaluate the Applicant's tender at the Technical Evaluation stage.

Regulation 76 of Regulations 2020 provides as follows with respect to evaluation at the Technical Evaluation stage:

"76 (1) Upon completion of the preliminary evaluation under Regulation 74, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the goods, works or services in the tender document.

(2) The evaluation committee shall reject tenders which do not satisfy the technical requirements under paragraph (1)."

The Tender Document provided for the following criteria that normally falls under technical evaluation stage:

"

<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>
<i>Item No.</i>	<i>Qualification Subject</i>	<i>Qualification Requirement</i>	<i>Document to be Completed by Tenderer</i>	<i>For Procuring Entity's use (Qualificati</i>

				<i>on met or Not me</i>
1	<i>Nationality</i>	<i>Nationality in accordance with ITT 3.6</i>	<i>Forms ELI – 1.1 and 1.2, with attachmen ts</i>	
2	<i>Tax Obligations for Kenyan Tenderers</i>	<i>Has produced a current tax clearance certificate or tax exemption certificate issued by Kenya Revenue Authority in accordance with ITT 3.14.</i>	<i>Attachmen t</i>	
3	<i>Conflict of Interest</i>	<i>No conflicts of interest in accordance with ITT 3.3</i>	<i>Form of Tender</i>	
4	<i>PPRA Eligibility</i>	<i>Not having been declared ineligible by the PPRA as</i>	<i>Form of Tender</i>	

		<i>described in ITT 3.7</i>		
5	<i>State- owned Enterprise</i>	<i>Meets conditions of ITT 3.8</i>	<i>Forms ELI – 1.1 and 1.2, with attachments</i>	
6	<i>Goods, equipment and services to be supplied under the contract</i>	<i>To have their origin in any country that is not determined ineligible under ITT 4.1</i>	<i>Forms ELI – 1.1 and 1.2, with attachments</i>	
7	<i>History of Non-Performing Contracts</i>	<i>Non-performance of a contract did not occur as a result of contractor default since 1st January [.....].</i>	<i>Form CON-2</i>	
8	<i>Suspension Based on Execution of Tender/Proposal Securing</i>	<i>Not under suspension based on-execution of a Tender/Propos</i>	<i>Form of Tender</i>	

	<i>Declaration by the Procuring Entity</i>	<i>al Securing Declaration pursuant to ITT 19.9</i>		
<i>9</i>	<i>Pending Litigation</i>	<i>Tender's financial position and prospective long-term profitability still sound according to criteria established in 3.1 and assuming that all pending litigation will NOT be resolved against the Tenderer.</i>	<i>Form CON – 2</i>	
<i>10</i>	<i>Litigation History</i>	<i>No consistent history of court/arbitral award decisions against the</i>	<i>Form CON – 2</i>	

		<i>Tenderer since 1st January [insert year].</i>		
11	<i>Financial Capabilities</i>	<i>(i) The Tenderer shall demonstrate that it has access to, or has available, liquid assets, unencumbered real assets, lines of credit, and other financial means (independent of any contractual advance payment) sufficient to meet the construction cash flow requirements estimated as Kenya Shillings</i>	<i>Form FIN – 3.1, with attachmen ts</i>	

		<p><i>[insert amount] equivalent for the subject contract(s) net of the Tenderer's other commitments.</i></p> <p><i>(ii) The Tenderers shall also demonstrate, to the satisfaction of the Procuring Entity, that it has adequate sources of finance to meet the cash flow requirements on works currently in progress and for future</i></p>		
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		<p><i>contract commitments.</i></p> <p><i>(iii) The audited balance sheets or, if not required by the laws of the Tenderer's country, other financial statements acceptable to the Procuring Entity, for the last [insert number of years] years shall be submitted and must demonstrate the current soundness of the Tenderer's financial</i></p>		
--	--	--	--	--

		<i>position and indicate its prospective long-term profitability.</i>		
12	Average Annual Construction Turnover	Minimum average annual construction turnover of Kenya Shillings [insert amount], equivalent calculated as total certified payments received for contracts in progress and/or completed within the last [insert of year] years, divided by [insert number of years] years	Form FIN – 3.2	

13	General Construction Experience	Experience under construction contracts in the role of prime contractor, JV member, sub-contractor, or management contractor for at least the last [insert number of years] years, starting 1st January [insert year].	4. Form EXP – 4.1 Experience	
14	Specific Construction & Contract Management Experience	A minimum number of [state the number] similar contracts specified below that have been satisfactorily and substantially	Form EXP 4.2(a)	

		<p><i>completed as a prime contractor, joint venture member, management contractor or sub-contractor between 1st January [insert year] and tender submission deadline i.e. (number) contracts, each of minimum value Kenya shillings..... equivalent. [In case the Works are to be tender as individual contracts under multiple</i></p>		
--	--	--	--	--

		<p><i>contract procedure, the minimum number of contracts required for purposes of evaluating qualification shall be selected from the options mentioned in ITT 35.4]</i></p> <p><i>The similarity of the contracts shall be based on the following:</i> <i>[Based on Section VII, Scope of Works, specify the minimum key requirements in</i></p>		
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		<i>terms of physical size, complexity, construction method, technology and/or other characteristics including part of the requirements that may be met by specialized subcontractors, if permitted in accordance with ITT 34.3]</i>		
--	--	--	--	--

”

Tenders were required to have met this criteria. The last column of the above table required the Evaluation Committee to indicate whether a tenderer had met or had not met against each specific criterion. There was no provision whatsoever for assigning scores against each specific criterion and no mention of the minimum score a tender required to meet to be determined responsive at this stage of evaluation.

We have carefully studied the Evaluation Report by the Evaluation Committee and note that the Evaluation Committee while evaluating tenders assigned scores against each criterion at the Technical Evaluation Stage as follows:

"5.2 STAGE 2: TECHNICAL EVALUATION

The technical evaluation score scale is as shown in table 3. Below Table 3. Technical score matrix (TS)

<i>Item</i>	<i>Description of Criteria</i>	<i>Maximum points (%)</i>
<i>1</i>	<i>Tender Questionnaire</i>	<i>5</i>
<i>2</i>	<i>Key personnel</i>	<i>20</i>
<i>3</i>	<i>Contracts completed in the last Ten (10) years</i>	<i>30</i>
<i>5</i>	<i>Schedules of contractor's equipment</i>	<i>20</i>
<i>6</i>	<i>Audited Financial Reports for the last 3 years</i>	<i>10</i>
<i>7</i>	<i>Evidence of Financial Resources</i>	<i>15</i>
	<i>Total</i>	<i>100</i>

Having carefully studied the entire Tender Document of the subject tender, we note that the Tender Document never provided for assigning of any scores for any criteria of evaluation and therefore, prospective tenderers were never informed of any assigning of scores against any criteria of evaluation either at the preliminary, technical or financial evaluation stages.

We also note that the Evaluation Committee proceeded to evaluate the Applicant's tender at the Technical Evaluation stage having determined the Applicant's tender responsive at the Preliminary Evaluation stage. The Evaluation Committee scored the Applicant's tender as follows at the Technical Evaluation stage:

“

S/ NO	REQUIREMENT	Max score	
			B5 (Applicant)
1.	Tender Questionnaire Form • Completely filled ..5 • Not filled.....0	5	5
2.	Key Personnel (Attach evidence i.e Copy of CVS and Academic / Professional Certificates)		
	a) Director or Owner of the firm <ul style="list-style-type: none"> • Holder of degree in relevant Engineering field-----6 • Holder of diploma in relevant Engineering field-5 • Holder of certificate in relevant Engineering field--3 • Holder of trade test certificate in relevant Engineering field----2 	6	1

S/ NO	REQUIREMENT	Max score	
			B5 (Applicant)
	<ul style="list-style-type: none"> <i>No relevant certificate-----1</i> 		
	<p>b) At least 1 No. degree/diploma holder of key personnel in relevant Engineering field</p> <ul style="list-style-type: none"> <i>With over 10 years relevant experience-----6</i> <i>With over 5 years relevant experience-----4</i> <i>With under 5 years relevant experience-----2</i> 	6	4
	<p>c) At least 1 No certificate holder of key personnel in relevant field</p> <ul style="list-style-type: none"> <i>With over 10 years relevant experience-----4</i> <i>With over 5 years relevant experience-----3</i> <i>With under 5 years relevant experience-----1</i> 	4	4
	<p>d) At least 2 No artisan (trade test certificate in relevant field)</p> <ul style="list-style-type: none"> <i>Artisan with over 10 years relevant</i> 		

S/ NO	REQUIREMENT	Max score	B5 (Applicant)
	<p><i>experience---2</i></p> <ul style="list-style-type: none"> • <i>Artisan with under 10years relevant experience---1</i> • <i>Non skilled worker with over 10 years relevant experience-----1</i> 	4	2
3.	<p><i>Contracts completed in the last Ten (10) years(Max of 6 No.Projects)-<u>Provide Evidence</u></i></p> <ul style="list-style-type: none"> • <i>Project of similar nature, complexity or magnitude--5</i> • <i>Project of similar nature, complexity or magnitude but of lower value than the one in consideration----3</i> ▪ <i>No completed project of similar nature / Magnitude-----0</i> 	30	<p>6</p> <p><i>Only two completi on certificat es were accepted and were</i></p>

S/ NO	REQUIREMENT	Max score	
			B5 (Applicant)
			<i>of lower value than the ones in consideration. The other Attached copies of completion certificates were invalid and therefore were rejected</i>
4.	<i>Schedule of contractor's equipment and transport (proof Or evidence of ownership/Lease)</i>		

S/ NO	REQUIREMENT	Max score	
			B5 (Applicant)
	a) Relevant Transport <ul style="list-style-type: none"> Means of transport (Vehicles)-----10 No means of transport-----0 	10	10
	b) Relevant Tools and Equipment <ul style="list-style-type: none"> Has relevant equipment for work being tendered-----10 No relevant equipment for work being tendered-----0 	10	10
5.	Audited Financial Reports		
	Attach Audited financial report (last three (3) years)-2019, 2018, 2017 <ul style="list-style-type: none"> Average Annual Turn-over equal to or greater than the cost of the project---10 Average Annual Turn-over above 50% but below 100% of the cost of the project-----6 Average Annual Turn-over below 50% of the cost of the project-----3 	10	10
6.	Evidence of Financial Resources		

S/ NO	REQUIREMENT	Max score	
			B5 (Applicant)
	<ul style="list-style-type: none"> • <i>Has financial resources to finance the projected monthly Cash flow* for three month-----15</i> • <i>Has financial resources equal to the projected monthly cash flow *---10</i> • <i>Has financial resources less the projected monthly cash flow*-----5</i> • <i>Has not indicated sources of financial resources-----0</i> 	15	15
	TOTAL SCORES	100	67

The Evaluation Committee noted the following in the Evaluation Report with respect to evaluation of the Applicant's tender:

"NOTE: Bidder B5, EVERSTEP ENTERPRISES knowingly lied to the Tender Evaluation Committee by attaching several Invalid (falsified) Certificates of Practical Completion of very huge amounts of money to mislead the Evaluation Committee in making a recommendation of Award.

..... Bidder B5 several copies of Certificates of Practical Completion were invalid (falsified) and therefore could not proof performance of works of similar nature, complexity or magnitude as part of Technical Evaluation requirements:-

1)

*2) BIDDER NO. 5: EVERSTEP ENTERPRISES P.O. BOX 860-00217
LIMURU*

- *The Evaluation Committee accepted only thre copies of Certificates of practical completion attached and were of lower value than the ones in consideration, namely;*
 - i) For the proposed completion of a Dormitory at Kamandura Girls High School worth kshs. 5,200,000.00.*
 - ii) For the proposed construction of additional classrooms at Uthiru Girls High School worth kshs. 7,553,720.00.*
 - iii) For the proposed provision of Labour for construction of two number classrooms at Lari Boys High School worth kshs. 1,019,750.00.*
- *The following attached copies of Certificates of Practical Completion were considered invalid and therefore rejected due the following reasons;*

- i) The attached copy of Practical Completion certificate serialized as number 341 by the Bidder for the Proposed mixed use development on plot No. LR. No. LOITOKTOK / KIMANA TIKONDO / 4059. LOITOKTOK was issued on 4th March, 2017 before the works were practically completed on 9th January, 2019. In addition, attached copy of the Letter of Acceptance serialized as number 342 was dated 30th May, 2018 indicating duration of the contract as 56 (Sixty) weeks at a cost of kshs. 92,748,110.75 (Ninety Two Million, Seven Hundred and Forty Eight Thousand, One Hundred and Ten Shillings and Seventy Five Cents Only). The copy of Practical Completion certificate had no Letter Head either from Ministry of Public Works or The Architectural Association of Kenya (A.A.K).**
- ii) The attached copy of Practical Completion certificate serialized as number 345 by the Bidder for the Proposed Residential development on plot No. LR. No. KILIFI / 20252 / 37. KILIFI COUNTY was issued on 4th March, 2017 before the works were practically completed on 10th March, 2017. In addition, attached copy of the Letter of Acceptance serialized as number 346 was dated (Invisible date) March, 2016 indicating duration of the contract as 56 (Sixteen) weeks at a cost of kshs. 94,708,312.00 (Ninety Four Million, Seven Hundred and Eight Thousand, Three Hundred**

and Twelve Shillings Only). The copy of Practical Completion certificate had no Letter Head either from Ministry of Public Works or The Architectural Association of Kenya (A.A.K).

- iii) The attached copy of Practical Completion certificate serialized as number 348 by the Bidder for the Proposed Residential development on plot No. LR. No. 4062, MALINDI, MOMBASA COUNTY was issued on 5th January, 2016 before the works were practically completed on 10th January, 2017. In addition, attached copy of the Letter of Acceptance serialized as number 349 was dated 11th January, 2016 indicating duration of the contract as 54 (Fifty Four) weeks at a cost of kshs. 71,258,180.25 (Seventy One Million, Two Hundred and Fifty Eight Thousand, One Hundred and Eighty Shillings and Twenty Five Cents Only). The copy of Practical Completion certificate had no Letter Head either from Ministry of Public Works or The Architectural Association of Kenya (A.A.K).*
- iv) The attached copy of Practical Completion certificate serialized as number 351 by the Bidder for the Proposed Residential development on plot No. LR. No. 2951/108, FARASI LANE, OFF, LOWER KABETE ROAD NAIROBI was issued on 1st November, 2015 before the works were practically completed on 8th February, 2017. In addition, attached copy of the Letter of*

Acceptance serialized as number 352 was dated 4th November, 2015 indicating duration of the contract as 104 (One Hundred and Four) weeks at a cost of kshs. 150,250,000.00 (One Hundred and Fifty Million, Two Hundred and Fifty Thousand Shillings Only). The copy of Practical Completion certificate had no Letter Head either from Ministry of Public Works or The Architectural Association of Kenya (A.A.K).

- v) The attached copy of Practical Completion certificate serialized as number 358 by the Bidder for the Proposed Erection to completion of residential Apartments, 18 number Units together with Associated Electrical, mechanical and Civil Works on Plot No. LIMURU/RIRONI/1145 was issued on 10TH December, 2021 for the works whose Contract date was 5th August, 2018 and which were practically completed on 10th July, 2020. The defects liability period expired on 9th January, 2021. It indicated duration of the contract as 84 weeks and cost of contract as kshs. 65,000,000.00. In addition, there was no attached copy of the Letter of Acceptance from the Procuring Entity indicating duration of the Contract and cost of the project or Letter of Notification of Award. According to General Conditions of Contract (GCC) 11.9.2 in the Tender Document, 'The Architect shall issue the Completion*

Certificate within Thirty (30) days after the latest of the expiry dates of the Defects Liability Period, or as soon thereafter as the Contractor has supplied all the Contractor's Documents and completed and tested all the works, including remedying any defects.'"

The assigning of scores to each of the purported criterion at the Technical Evaluation stage by the Evaluation Committee without informing prospective tenderers vide the contents of the Tender Document was in breach of the principle of transparency under Article 227(1) of the Constitution that requires a procuring entity when contracting for goods or services, to do so in accordance with a system that is, *inter alia*, transparent. To this end, the assigning of scores to each of the purported criterion at the technical evaluation by the Evaluation Committee was in breach of Section 80(2) of the Act read with Regulation 76 of Regulation 2020 because the same was not provided for in the procedures and criteria set out in the Tender Document but was instead effected by the Evaluation Committee on its own volition during evaluation of tenders at the Technical Evaluation stage.

We note from the Evaluation Report that after evaluation of tenders at the technical evaluation stage, the Evaluation Committee determined two tenders, which did not include the Applicant's tender, to have met the minimum mandatory technical evaluation requirements. However, the Evaluation Committee proceeded to evaluate the Applicant's tender at the Financial Evaluation stage and made the following determination with respect to the Applicant's tender:

"6. STAGE 3: FINANCIAL EVALUATION

Upon completion of the technical evaluation, a detailed financial evaluation followed. The evaluation involved the following;

- a) Determination of arithmetic errors;***
- b) Comparison of rates; and***
- c) Consistency of the Rates.***

6.1 Determination of Arithmetic Errors

Tenders were checked to determine if there were any arithmetic errors. Subject to section 74(2) of the Public Procurement and Asset Disposal Regulations 2020 and Instruction to Tenderers (ITT 31.3) in the Tender Document, any errors in the submitted tender arising from a miscalculation of unit price, quantity, sub-total 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.

Error Calculation.

Percentage Error

Error (E) = Corrected Tender Sum (CTS) - Tender Sum (TS)
X 100

Corrected Tender Sum (CTS) - Provisional Sum (PS)

Table 4: Arithmetic Error Check

<i>Bid der No.</i>	<i>Bid Amount</i>	<i>Corrected Amount</i>	<i>Error</i>	<i>% Error</i>	<i>Remark</i>
<i>B 5 (Ap pli ca nt)</i>	<i>28,437,04 0.00</i>	<i>INESTIMABLE</i>	<i>LEGIBLE ERROR WAS KSHS. 303,716.00</i>	<i>INCA LCUL ABLE</i>	<i>IMMEASUR ABLE AS SEVERAL FIGURES ARE NOT LEGIBLE AND HAVE BEEN CIRCLED WITH A RED PEN DURING EVALUATIO N (Error considered a major Deviation)</i>

6.2 Comparison of Rates

In this section, a comparative analysis of the tender rates for Major items in the BQs was done and results are as shown in Table 4.

Table 5: Comparison of Rates

NO	ITEM DESCRIPTION	UNIT	Estimate	B5 (Applicant)
1.	Steel reinforcement 8mm diameter bars	KG	120	150
2.	Vibrated Reinforced Concrete class 25/20mm	CM	13,000	11,000
4.	200mm thick walling		1,500	11,000**
5.	Window 3900 x 600mm high	NO	20,280	14,040*
6.	Heavy duty door closer as Union	NO	6,500	12,000
7.	Lighting Points Wired using 2.5mm x 3 single core copper conductor cables drawn in 25mm p.v.c/Hg conduits with all accessories except the socket outlets	NO	1,500	2,800

KEY:

**** - High Rate**

*** - Low Rate**

OBSERVATIONS

From table 5:-

-;
-
- ***B5 had however priced some of the rates below the market rates and some above market rates.***

6.3 Consistency of Rates

In this section, the rates of similar items were examined for consistency. It was noted that similar items had consistent rates for the bidders except and B5 who had some items which were not consistent.”

Having carefully studied the Tender Document, we note that no formula for calculating percentage error was provided in the Tender Document. However, as noted hereinbefore, the Evaluation Committee on its own volition devised a formula which they used to calculate percentage of error in tenders when evaluating tenders at the Financial Evaluation.

In addressing arithmetic errors in a tender, it is important to point out that the Act changed the manner in which a procuring entity treats errors found in a tender during Financial Evaluation. Under the Public Procurement and Disposal Act, 2005 (Repealed) (hereinafter referred to as “the Repealed Act”), a tenderer in a procurement process would quote a tender price, or

what it referred to as the total price of a tender which would be read out during the opening of tenders in accordance with Section 60 (5) (b) of the Repealed Act which provided as follows: -

"As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register —

(a);

(b) the total price of the tender including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed;"

We note that Section 66 (4) of the Repealed Act provided that: -

"The successful tender shall be the tender with the lowest evaluated price."

This means, award of a tender would be based on the lowest evaluated price as determined by a procuring entity at the conclusion of financial evaluation. In arriving at the lowest evaluated price during financial evaluation, a procuring entity would correct arithmetic errors as explained in Section 63 of the Repealed Act which provided as follows: -

"(1) The procuring entity may correct an arithmetic error in a tender.

(2) The procuring entity shall give prompt notice of the correction of an error to the person who submitted the tender.

(3) If the person who submitted the tender rejects the correction, the tender shall be rejected and the person's tender security shall be forfeited."

This meant that during the process of financial evaluation of tenders, a procuring entity would determine if there were any discrepancies in the amount quoted in a tender. If any discrepancies or errors were detected, a procuring entity would correct arithmetic errors only if the tenderer in question accepted the corrections as made by the procuring entity. If the respective tenderer rejected the corrections, the tender in question would be rejected at this stage of evaluation.

The process of arriving at the lowest evaluated price was further explained in Regulation 50 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as 'Repealed Regulations 2006') made pursuant to the Repealed Act and which were repealed by Regulations 2020. The said provision states as follows: -

"(1) Upon completion of the technical evaluation under Regulation 49, 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, as read out at the bid opening;

(b) taking into account any corrections made by a procuring entity relating to arithmetic errors in a tender;

(c) taking into account any minor deviation from the requirements accepted by a procuring entity under section 64(2) (a) of the Act;

(e) where applicable, converting all tenders to the same currency, using a uniform exchange rate prevailing at the date indicated in the tender documents;

(f) applying any discounts offered in the tender;

(g) applying any margin of preference indicated in the tender documents.

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be the tender with the lowest evaluated price in accordance with section 66(4) of the Act (now section 86 (1) in the 2015 Act)”

The Repealed Regulation 2006 introduced steps for arriving at the lowest evaluated price during financial evaluation. This is due to the fact that, inevitably, a tender may contain arithmetic errors, minor deviations, and there may be need to convert tenders to the same currency using the

prevailing exchange rates in the case of international competitive tenders, to apply discounts offered by a tenderer and to apply a margin of preference as specified in the Tender Document and as required by the Act.

As far as corrections were concerned, an evaluation committee in determining the evaluated price of a tender would include any corrections made by a procuring entity relating to arithmetic errors in a tender in accordance with Regulation 50 (2) (b) of the Repealed Regulations 2006. As explained and outlined hereinbefore in Section 63 of the Repealed Act, a procuring entity would correct arithmetic errors only if there was concurrence with the tenderer in question. Following acceptance of these corrections by a tenderer, and taking into consideration other factors as listed under Regulation 50 of the Repealed Regulations 2006, an evaluation committee would arrive at the evaluated price of a tender.

An evaluation committee would then proceed to rank tenders in order to determine the lowest evaluated tender in accordance with Regulation 50 (3) of the Repealed Regulations 2006. An award of tender was therefore made based on the lowest evaluated price pursuant to Section 66 (4) of the Repealed Act and which evaluated price would at times be different from the tender price, now known as the tender sum.

The enactment of the Act changed the manner in which a procuring entity treats any discrepancies or errors that it may find in a tender during financial evaluation. Section 82 of the Act states as follows: -

"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity."

This provision of the Act expressly prohibits any alterations or corrections to the tender sum which remains absolute and final and is not subject to any correction, adjustment or amendment.

Regulation 77 of Regulations 2020 is instructive on how financial evaluation of tenders is to be carried out and how an evaluated price of each tender is determined by an evaluation committee as it provides as follows:-

77. Financial evaluation

(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.

We note Regulation 77 of Regulation 2020 is similar to Regulation 50 of the Repealed Regulation 2006 save for Regulation 77 of Regulation 2020 has done away with taking into consideration correction of arithmetic errors and applying discounts offered in a tender. This is a clear indication that the framers of the Act and Regulations 2020 were clear that no correction of errors should be considered when determining an evaluated price. Accordingly, any corrections made by a procuring entity to a tenderer's tender sum would therefore serve no purpose because an evaluation committee cannot consider such correction of arithmetic errors to determine an evaluated price for purposes of ranking tenders or amending tender sums

in the form of tender, which tender sum must remain absolute and final in accordance with Section 82 of the Act.

At this point, it is important to emphasize that applicability of Regulation 74(2) of Regulations 2020 which is subject to Section 79(2)(b) and which provides for any errors arising from a miscalculation of unit price, quantity, subtotal and total tender price to be considered as major deviation that affects the substance of a tender that leads to disqualification of tender as non-responsive cannot override the provisions of Section 82 of the Act that prohibits correction, adjustment or amendment of a tender sum in the form of tender by any person or entity. We say so because it is a well settled position in law that provisions of a subsidiary legislation (in this case, Regulation 74(2) of Regulations 2020) cannot override provisions of an Act of Parliament (in this case, Section 82 of the Act).

Section 24 (2) of Statutory Instruments Act, 2013 (hereinafter referred to as the Statutory Instruments Act) provides that: -

"A statutory instrument shall not be inconsistent with the provisions of the enabling legislation, or of any Act, and the statutory instrument shall be void to the extent of the inconsistency."

Section 2 of the Statutory Instruments Act defines a statutory instrument to mean, *inter alia*, regulation such as Regulations 2020.

The High Court in **Petition No. 20 of 2019, Victor Juma v Kenya School of Law; Council of Legal Education (Interested Party) [2020] eKLR** had occasion to address the import of Section 24 (2) of the Statutory Instruments Act, where it held as follows: -

"I agree with the decisions of my brothers in the cited cases and only add that the decisions are consistent with the provisions of Section 24 (2) of the Statutory Instruments Act, 2013 which states that a statutory instrument should not be inconsistent with the provisions of the enabling legislation, or of any Act, and the statutory instrument shall be void to the extent of the inconsistency. I see no reason why the provisions of a subsidiary legislation should override the express provisions of an Act of Parliament. It is therefore my finding that the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 are not applicable in this case, and the relevant legislative instrument to be applied is the KSL Act."

It is also important for this Board to point out that Regulations 2020 were made pursuant to Section 180 of the Act which provides as follows: -

"The Cabinet Secretary shall make Regulations for the better carrying out of the provisions of this Act and, without limiting the generality of the foregoing, may make Regulations to facilitate the implementation of this Act, and such regulations shall not take effect unless approved by Parliament pursuant to the Statutory Instruments Act, 2013."

In essence, pursuant to Section 24 (2) of the Statutory Instruments Act, Regulations 2020 which took effect on 2nd July 2020 vide Gazette No.4957 in Vol.CXXII-No.142 of Kenya Gazette of 10th July 20220 should not be inconsistent with its enabling Act, which is the Act, and where an inconsistency arises, the Act must prevail.

It is our considered view that the mischief the Act has cured is a scenario where a tenderer can quote figure 'X' as its tender sum in the Form of Tender in anticipation of being the lowest evaluated tenderer. However, upon realization that such a tenderer is not the lowest evaluated tenderer, it would collude with a procuring entity to correct arithmetic errors which it deliberately created in its breakdown of prices (i.e. in the Bills of Quantities) so that upon correction, its tender sum is revised downwards, lower than the initial lowest tenderer and be awarded the tender based on the corrected figure.

Notably, Section 79 (2) (b) of the Act states that: -

"79. (1)

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

A responsive tender shall not be affected by—

(a); or

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

Pursuant to Section 79 (2) (b) of the Act, a responsive tender is not affected by errors or oversights that can be corrected without affecting the substance of a tender. It is our considered view that, certain errors or oversights can be corrected without affecting the substance of a tender as stated in Section 79 (2) (b) of the Act. That notwithstanding, the tender sum remains the same and thus any error that leads to correction, adjustment and amendment of a tender sum is prohibited by Section 82 of the Act. This explains why a tenderer is bound by its tender sum hence ought to be prepared to implement a tender at its tender sum because award is made based on such tender sum. In this regard therefore, the Evaluation Committee herein did not have leeway to apply Regulation 74(2) of Regulations 2020, without considering the import of Section 79 (2) (b) and 82 of the Act as already explained hereinbefore.

In view of the foregoing, we find there was no room for the Evaluation Committee to correct arithmetic errors in tenderers' tenders at the Financial Evaluation stage. The Evaluation Committee ought to have been guided by Section 82 of the Act read with Regulation 77 of Regulations 2020 when evaluating tenders at the Financial Evaluation stage noting that the provisions of the Act and Regulations 2020 superseded Clause 31.1, 31.3 and 31.4 of Section I – Instructions To Tenderers of the Tender Document with respect to arithmetic errors which makes tender sums submitted by tenderers in their respective Forms of Tender, final and binding to them.

Accordingly, with respect to the first issue framed for determination, we find that the Evaluation Committee did not evaluate the Applicant's tender at the Technical and Financial Evaluation stages in accordance with Section 80(2) of the Act read with Regulations 76 and 77 of Regulations 2020.

Whether the Evaluation Committee conducted due diligence with respect to the subject tender in accordance with Section 83 of the Act, Regulation 80 of Regulations 2020 read with Clause 7. Post-qualification and Contract Award (ITT39) of Section III – Evaluation and Qualification Criteria of the Tender Document.

The Respondent contends that the Evaluation Committee evaluated the Applicant's tender with due diligence which resulted to the Evaluation Committee discovering falsified documents (Copies of Certificates of Practical

Completion) attached to the Applicant's tender. Further, the Head of Procurement Function in his Professional Opinion noted that due diligence was conducted to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender, Miles Construction Limited, in accordance with Section 83(1) of the Act.

Black's Law Dictionary, Ninth Edition at page 523 defines 'due diligence as ***"the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation"*** with the term 'diligence' meaning ***"the attention and care required from a person in a given situation"***.

A due diligence exercise is therefore a fundamental element 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.

Section 83 of the Act read with Regulation 80 of Regulations 2020 govern how post-qualification or what is otherwise known as due diligence exercise should be conducted.

Section 83 of the Act provides as follows:

83. Post-qualification

(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—

(a) initial each page of the report; and

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

Regulation 80 of Regulations 2020 provides as follows:

80. Post-qualification

(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.

(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—

(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or

(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method.

Accordingly, an evaluation committee may elect to conduct a due diligence exercise to satisfy itself of the qualifications of the tenderer it has determined to be the lowest evaluated responsive tenderer.

When a procuring entity advertises a tender, tenderers submit their respective tenders attaching evidence of their qualifications. In arriving at the responsive tender, an evaluation committee considers documents that support the eligibility and mandatory requirements specified in a tender document.

Section 79 of the Act is instructive on this aspect as it states: -

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

These eligibility and mandatory documents/requirements are considered at the preliminary and technical evaluation stages after which financial evaluation is conducted following a tender being determined responsive at the preliminary and technical evaluation stages. During financial evaluation in open tenders, where request for proposal method of tendering is not used, the successful tender is the tender with the lowest evaluated price in accordance with Section 86(1)(a) of the Act and, which tender, is known as the lowest evaluated responsive tender. Hence, when an accounting officer awards a tender, he or she does so to the tenderer determined to have submitted the lowest evaluated responsive tender.

This means, the lowest evaluated responsive tenderer is determined by looking at its qualifications that meet the minimum eligibility and mandatory requirements in a tender document.

In this regard therefore, an evaluation committee conducts a due diligence exercise in accordance with Section 83(1) of the Act read with Regulation 80(1) of Regulations 2020 to verify and confirm the qualifications of the lowest evaluated responsive tenderer, which exercise would be based on documents and qualifications considered during evaluation that met the minimum eligibility and mandatory requirements of the Tender Document.

In addition to conducting due diligence with respect to documents and qualifications considered during evaluation of the tender submitted by the lowest evaluated responsive tenderer, an evaluation committee is at liberty to obtain confidential references from persons with whom the lowest

evaluated responsive tenderer has had prior engagement in accordance with Section 83(2) of the Act.

Section 83 (3) read with Section 83(1) of the Act as outlined hereinbefore, clearly stipulates the procedure that must be followed in a due diligence process. One, due diligence is conducted after tender evaluation but prior to award of the tender.

Secondly, the evaluation committee must prepare a due diligence report outlining how due diligence was conducted and the findings of the process. The said report is signed only by members of an evaluation committee who took part in the due diligence exercise, and they must include their designation. Further, the report must be initialled on each page.

If the qualifications of the lowest evaluated responsive tenderer are satisfactory, the due diligence report is submitted to the head of procurement function for his/her professional opinion and onward transmission to the accounting officer who will consider whether or not to award the tender to that lowest evaluated responsive tenderer.

If the lowest evaluated tenderer is disqualified after due diligence, this fact must be noted in a due diligence report with reasons. In view of the findings of this report that the lowest evaluated responsive tenderer be disqualified after due diligence, the evaluation committee then recommends award to the next lowest evaluated responsive tenderer, subject to a similar due

diligence process conducted on such tenderer, as outlined hereinbefore in accordance with Regulation 80(2) of Regulations 2020.

This procedure is applied until the successful tenderer for award of the tender is determined.

We note that the Tender Document at Clause 7. Post qualification and Contract award (ITT 39) of Section III – Evaluation and Qualification Criteria of the Tender Document provided as follows:

- a) In case the tender was subject to post-qualification, the contract shall be awarded to the lowest evaluated tenderer, subject to confirmation of pre-qualification data, if so required.***
- b) Incase the tender was not subject to post-qualification, the tender that has been determined to be the lowest evaluated tenderer shall be considered for contract award, subject to meeting each of the following conditions.***
 - i) The Tenderer shall demonstrate that it has access to, or has available, liquid assets, unencumbered real assets, lines of credit, and other financial means (independent of any contractual advance payment) sufficient to meet the construction cash flow of Kenya Shillings_____***
 - ii) Minimum average annual construction turnover of Kenya Shillings[insert amount], equivalent calculated as total certified payments received for contracts in***

progress and/or completed within the last____[insert of year]years.

iii) At least____(insert number) of contract(s) of a similar nature executed within Kenya, or the East African Community or a broad, that have been satisfactorily and substantially completed as a prime contractor, or joint venture member or sub-contractor each of minimum value Kenya shillings_____equivalent.

iv) Contractor's Representative and Key Personnel, which are specified as____

v) Contractors key equipment listed on the table "Contractor's Equipment" below and more specifically listed as [specify requirements for each lot as applicabl_

vi) Other conditions depending on their seriousness.

a) History of non-performing contracts:

Tenderer and each member of JV in case the Tenderer is a JV, shall demonstrate that Non-performance of a contract did not occur because of the default of the Tenderer, or the member of a JV in the last____(specify years). The required information shall be furnished in the appropriate form.

b) Pending Litigation

Financial position and prospective long-term profitability of the Single Tenderer, and in the case the Tenderer is a JV, of each member of the JV, shall remain sound according to criteria established with respect to Financial Capability under Paragraph (i) above if all pending litigation will be resolved against the Tenderer. Tenderer shall provide information on pending litigations in the appropriate form.

c) Litigation History

There shall be no consistent history of court/arbitral award decisions against the Tenderer, in the last ___(specify years). All parties to the contract shall furnish the information in the appropriate form about any litigation or arbitration resulting from contracts completed or on going under its execution over the years specified. A consistent history of awards against the Tenderer or any member of a JV may result in rejection of the tender.

Turning to the circumstances of the instant Request for Review, there is no evidence that a due diligence exercise was conducted by the Evaluation Committee on the lowest evaluated responsive tenderer. We say so because, no due diligence report was furnished to the Board as part of confidential

documents for the Board to interrogate the legality or lack thereof of such due diligence. Secondly, the finding by the Evaluation Committee on alleged falsified documents submitted by the Applicant in its tender was prematurely determined at the Technical Evaluation stage yet this was a matter that should have been observed perhaps at due diligence stage if the Applicant had been determined to be the lowest evaluated responsive tenderer. Lastly, the Tender Document provided for the criteria to be used when conducting due diligence exercise as outlined hereinbefore but the Respondent has not demonstrated how they used such criteria with respect to conducting due diligence on the lowest evaluated responsive tenderer.

Given the foregoing, we find the Evaluation Committee failed to conduct due diligence with respect to the subject tender in accordance with Section 83 of the Act, Regulation 80 of Regulations 2020 read with Clause 7. Post qualification and Contract award (ITT39) of Section III – Evaluation and Qualification Criteria of the Tender Document.

Whether the Letter of Notification of Unsuccessful Tender dated 21st February 2022 issued to the Applicant by the Respondent complied with Section 87 of the Act read with Regulation 82 of Regulations 2020.

The Applicant alleges that the letter of notification of unsuccessful tender dated 21st February 2022 notifying it of its unsuccessful tender did not

comply with Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020 for failure to disclose the specific arithmetic error contained in the Applicant's tender, for failure to disclose the successful tenderer and the amount at which the successful tenderer was being awarded.

On his part, the Respondent contends that, he notified the Applicant of its unsuccessful tender on the same date of 21st February 2022 that the person who submitted the successful tender was notified pursuant to Section 87(3) of the Act to allow the Applicant the required stand still period of fourteen (14) days, which commenced on the day that the letter of notification of unsuccessful tender dated 21st February 2022 was transmitted to the Applicant on 25th February, 2022.

Section 87 of the Act provides as follows with respect to notification of intention to enter into a contract:

87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

Regulation 82 of Regulations 2020 provides as follows with respect to notification of intention to enter into a contract:

82. Notification of intention to enter into a contract

(1) The notification to the unsuccessful bidder under section 87 (3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.

(2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.

(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86(1) of the Act.

On this issue, the Board notes that Section 87 of the Act and Regulation 82 of Regulations 2020 require a successful tenderer to be notified that its tender is successful at the same time unsuccessful tenderers are notified that their tenders are unsuccessful so as to enable unsuccessful tenderers to challenge the decision with respect to their respective tenders, if they so wish. Secondly, Section 87 of the Act and Regulation 82 of Regulations 2020 provide the ingredients of a letter of notification.

Having outlined the provisions of Section 87 (3) of the Act read with Regulation 82 of Regulations 2020 hereinbefore, we note that a letter of notification of unsuccessful tender (i) is issued in writing and made at the same time the successful tenderer is notified, (ii) it discloses the reasons relating to non-responsiveness of the unsuccessful tenderer's tender, (iii) it discloses who the successful tenderer is, the tender price at which the successful tenderer has been awarded a tender and the reason why the successful tenderer's tender was successful in accordance with Section 86 (1) of the Act and in this case such reason would be that the successful tenderer submitted the lowest evaluated tender price.

Turning to the circumstances of the instant Request for Review, we note the Respondent notified the successful tenderer and the unsuccessful tenderers on separate letters addressed to the tenderers but all letters were dated 21st February 2022.

The letter of notification of unsuccessful tender dated 21st February 2022 issued to the Applicant by the Respondent reads as follows in part:

"Pursuant to the provisions of Section 87(3) of the Public Procurement and Asset Disposal Act, 2015, you are hereby notified that your tender dated 22nd January, 2022 for the above mentioned works amounting to Kshs.28,437,040.00 (Twenty Eight Million, Four Hundred and Thirty Seven Thousand and Forty Shillings only) was not successful.

Reasons for not successful;

- i) Lowest Evaluated Bidder considered.***
- ii) Attained a lower score in terms of technical evaluation, for instance proof of works of similar magnitude or nature.***
- iii) Arithmetic Errors also led to disqualification of the tender as non-responsive.***

This should not discourage you from participating in our future Tenders. Thank you for your participation.

[Signature]

....."

It is clear that the letter of notification of unsuccessful tender issued to the Applicant by the Respondent only disclosed the reasons why the Applicant's tender was unsuccessful but omitted to disclose who the successful tenderer was, the amount at which the successful tenderer was awarded the subject tender and the reason why the successful tenderer's tender was successful in accordance with Section 86(1) of the Act.

Accordingly, we find that the Letter of Notification of Unsuccessful tender dated 21st February 2022 issued to the Applicant by the Respondent did not comply with Section 87 of the Act read with Regulation 82 of Regulations 2020.

What orders should the Board grant in the circumstances.

We have hereinbefore held that the Evaluation Committee did not evaluate the Applicant's tender at the Technical and Financial evaluation stages in accordance with Section 80(2) of the Act read with Regulations 76 and 77 of the Act, the Evaluation Committee did not conduct a due diligence exercise in accordance with Section 83 of the Act read with Regulation 80 of Regulations 2020 and the letter of notification of unsuccessful tender dated 21st February 2022 did not meet the requirements of Section 87 of the Act and Regulation 82 of Regulation 2020.

We therefore deem it fit to cancel the letter of notification of intention to enter into a contract together with the letters of notification of unsuccessful tender all dated 21st February 2022, order the Respondent to re-admit the Applicant's tender at the Technical Evaluation stage and to direct the Evaluation Committee to conduct a re-evaluation at the Technical Evaluation stage and proceed with the procurement proceedings of the subject tender to its logical conclusion including making of an award to the lowest evaluated responsive tenderer subject to due diligence being conducted on the lowest evaluated responsive tender.

In totality, the Request for Review succeeds with respect to the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon it under Section 173 of the Act, the Board makes the following orders with respect to the Request for Review dated 11th March 2022:

- 1. The Letter of Notification of Intention to Enter into Contract with respect to Tender Number: LMR/T/NSCHOB/01/2022 for Proposed Construction of Ndeiya Sub-County Headquarters Office Block in Limuru Constituency dated 21st February 2022 issued to to Miles Construction Limited by the Respondent be and is hereby cancelled and set aside.**
- 2. The Letters of Notification of Unsuccessful Tenders with respect to Tender Number: LMR/T/NSCHOB/01/2022 for Proposed Construction of Ndeiya Sub-County Headquarters Office Block in Limuru Constituency dated 21st February 2022 issued to all unsuccessful tenderers by the Respondent be and are hereby cancelled and set aside.**
- 3. The Respondent is hereby ordered to direct the Evaluation Committee to re-admit the Applicant's tender at the Technical Evaluation stage and re-evaluate the Applicant's tender together with all tenders that made it to the Technical Evaluation stage, at the Technical Evaluation stage, taking into consideration the findings of the Board in this decision.**

4. Further to Order 3 above, the Respondent is hereby ordered to ensure the procurement proceedings of Tender Number: LMR/T/NSCHOB/01/2022 for Proposed Construction of Ndeiya Sub-County Headquarters Office Block in Limuru Constituency proceeds to its logical conclusion, including the making of an award to the lowest evaluated responsive tenderer subject to a due diligence exercise being conducted on the lowest evaluated tenderer, within 14 days from the date of this decision.
5. Given that the procurement proceedings of the subject tender are not complete, each party shall bear its own costs in this Request for Review.

Dated at Nairobi this 1st Day of April 2022.



CHAIRPERSON
PPARB



SECRETARY
PPARB