REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 44/2022 OF 18TH MAY 2022

PRECISE ARCHITECTS LIMITED ..... APPLICANT

VERSUS

THE ACCOUNTING OFFICER,

MINISTRY OF EDUCATION

(STATE DEPARTMENT FOR VOCATIONAL AND

TECHNICAL TRAINING).....RESPONDENT

DAMA SERVICES LIMITED ..... INTERESTED PARTY

Review against the decision of the Accounting Officer of the Ministry of Education (State Department for Vocational and Technical Training) with respect to Tender No. NCB/MOE-VTT/TVET PHASE III/3/2020-2021for Consultancy Services for Development of Designs, Masterplans, Tender Documents and Supervision of Construction Works of Additional Departmental Blocks in Eleven (11) Technical & Vocational Education & Training (TVET) Institutions, Construction of Twin Hostels in Eight (8) Technical Vocational Colleges and a Publishing and Printing Complex for Curriculum and Training Materials.

BOARD MEMBERS

1. Ms. Faith Waigwa - Chairperson
2. Dr. Paul Jilani - Member
3. Mrs. Irene Kashindi - Member
4. Ms. Njeri Onyango - Member
5. Eng. Kimani Mbiu, OGW - Member

IN ATTENDANCE

Stanley Miheso - Holding brief for the Acting Board Secretary

BACKGROUND OF THE TENDER

The Tendering Process

Ministry of Education (State Department for Vocational and Technical Training) (hereinafter referred to as "the Procuring Entity") invited interested consulting firms to participate in a Request for Expressions of Proposals with respect to Tender No. NCB/MOE-VTT/TVET PHASE III/3/2020-2021for Consultancy Services for Development of Designs, Masterplans, Tender Documents and Supervision of Construction Works of Additional Departmental Blocks in Eleven (11) Technical & Vocational Education & Training (TVET) Institutions, Construction of Twin Hostels in Eight (8) Technical Vocational Colleges and a Publishing and Printing Complex for Curriculum and Training Materials (hereinafter referred to as "the subject tender").

The expression of interest was advertised on 11th May 2021 and opened on 24th May 2021 at 10:00am in the presence of tenderers' representatives who chose to attend. Thirty-five (35) firms returned their expression of interest documents by the closing/opening date.

Invitation and Opening of Request for Proposals (RFPs)

Sixteen (16) firms were shortlisted and recommended to continue to the next stage of Request for Proposals. The letters of invitation and the Request for Proposal documents were issued to all the shortlisted firms on 20th September 2021. The Sixteen (16) firms that were invited to submit their detailed Request for Proposals (RFPs) were: -

No.	Name of Bidders
1.	Intershelter Sullivan Architects
2.	Space and Systems
3.	Clarion Architects
4.	Symbion Kenya Limited
5.	Consortium Tectura International Limited
6.	Archipoint Consulting Architects Limited
7.	Scope Design Systems Limited
8.	Heritage Associates Limited
9.	Triad Architects
10.	Precise Architects
11.	Trioscape Space Planning Limited
12.	Makro Consultancy Limited

13.	Dama Services Ltd
14.	Edon Consultants International Limited
15.	Tej Architects
16.	Skylon Designs Limited

Submission of Request for Proposals

The following nine tenderers submitted their tenders by the submission deadline:

Bidder No.	Name of Bidder
B1	Symbion Kenya Limited
B2	Consortium Tectura International Limited
B3	Scope Design Systems Limited
B4	Triad Architects
B5	Precise Architects
B6	Trioscape Space Planning Limited
B7	Dama Services Limited
B8	Tej Architects
B9	Skylon Designs Limited

Evaluation

The Accounting Officer thereafter appointed an Evaluation Committee to undertake evaluation in three stages, namely: -

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

i. First Preliminary Evaluation

The Preliminary Evaluation entailed the consideration of whether the tenderers were "responsive" or "non-responsive" on submission of mandatory documentary evidence. Five (5) firms **"1", "3", "5" "7"** and **"9"** were found to be responsive and the rest were eliminated for being non-responsive

ii. First Technical Evaluation

The five firms thereafter proceeded to the Technical Evaluation stage. The firms were assessed based on the criteria set out in the Tender Document on a scale of 1 to 100 and the pass mark was 80 marks. Four firms met the required pass mark and were therefore recommended by the committee to proceed to Financial Evaluation. The Applicant scored 84 marks at this stage.

iii. First Professional Opinion

By a Professional Opinion dated 9th December 2021, the Procuring Entity's Head of Supply Chain Management differed with the Evaluation Committee's evaluation and recommendation. He alluded to lack of expertise of the members of the Evaluation Committee. He recommended that the Evaluation

Committee be disbanded and a new Evaluation Committee be constituted with membership drawn from the State Department of Public Works.

Re-evaluation

Pursuant to the recommendations from the first Professional Opinion, a new Evaluation Committee was appointed by the Accounting Officer. The new Evaluation Committee proceeded with evaluation as follows: -

i. Second Preliminary Evaluation

The Preliminary Evaluation entailed the consideration of whether the tenderers were "responsive" or "non-responsive" on submission of mandatory documentary evidence. Four (4) firms namely, **"B1", "B5", "B7"** and **"B8"** were found to be responsive and the rest were eliminated for being non-responsive.

ii. Second Technical Evaluation

The four firms thereafter proceeded to the Technical Evaluation stage. The firms were assessed based on the criteria set out in the Tender Document on a scale of 1 to 100 and the pass mark was 80 marks. Two firms, namely M/s Precise Architects Limited (herein after referred to as "the Applicant") and M/s Dama Services Limited (herein after referred to as "the Interested Party") met the required pass mark and were therefore recommended by the new Evaluation Committee to proceed to the Financial Evaluation stage. The Applicant scored 85.9 marks at this stage.

iii. Second Professional Opinion

By a Professional Opinion dated 14th March 2022, the Procuring Entity's Head of Supply Chain Management agreed with the new Evaluation Committee's recommendation. He recommended the approval to open the Financial Proposals for the Applicant and the Interested Party.

Opening of Financial Proposals

The new Evaluation Committee scheduled the opening of Financial Proposals for 7th April 2022. The opening was however suspended after the Applicant objected to the said opening and demanded to be furnished with reasons why they did not attain the maximum scores at the technical evaluation stage. The Applicant sought for the reasons by a letter dated 7th April 2022. The Procuring Entity responded vide a letter dated 13th April 2022 stating that the reasons would be availed upon completion of the Financial Evaluation when notifying tenderers of the outcome of the tender process. The Procuring Entity invited the Applicant and the Interested Party for Financial Opening scheduled for 22nd April 2022. The opening did not however take place given that this Request for Review was filed on 20th April 2022 thus suspending the procurement process of the subject tender pursuant to Section 168 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act').

Request for Review Number 33 of 2022

The Applicant previously lodged a Request for Review before the Board **(herein after "Review No 33 of 2022)**, on 20th April 2022 and sought for the following orders:

i. ***The Respondent's decision communicated on 7th April 2022 in relation to the Applicant's technical score be cancelled and set aside;***

ii. ***The Respondent be directed to suspend the planned financial opening scheduled for 22nd April 2022 at 10:00AM as communicated to the Applicant through the letter dated 13th April 2022 pending the hearing and conclusion of these proceedings;***

iii. ***The Respondent be directed to re-admit the Applicant's bid at technical evaluation stage and to re-evaluate the bid in accordance with the criteria and procedures under the Tender Document in line with Section 80 (2) & (3) of the Act and as may be directed by the Board in exercise of its mandate under Section 173 of the Act;***

iv. ***Following conclusion of the re-evaluation at the technical evaluation stage, the Respondent be ordered to issue a directive to the Procuring Entity's Evaluation Committee to proceed with financial evaluation of the subject Tender and carry on with the procurement proceedings to their logical conclusion including making award in line with Section 86 of the Act;***

v. ***The Board in exercise of its discretion, to give directions to the Respondent to redo or correct anything within the entire procurement process found to not have been done in compliance with the law; and***

vi. The Respondent be compelled to pay to the Applicant the costs arising from/and incidental to this Application.

The Public Procurement Administrative Review Board (hereinafter referred to as the "Board") made the following orders in Review No. 33 of 2022:-

i. The Accounting Officer of the Procuring Entity to issue the Applicant with a summary of the Applicant's tender's technical evaluation in line with Section 67(4) read with Section 68 (2) (d) (iii) of the Act and in particular to give a breakdown of the Applicant's technical score of 85.9 marks with respect to the subject tender;

ii. The Procuring Entity to complete the procurement process for the subject tender, to its logical conclusion within 14 days of this decision; and

iii. Each party to bear its own costs.

Request for Review Number 44 of 2022

The Applicant lodged a Request for Review dated and filed on 18th May 2022, together with the Statement in support of the Request for Review, signed by Arthur Mugo Mwangi on 18th May 2022 and filed on even date through the firm of Gerivia Advocates LLP, seeking for the following orders: -

i) The Respondent's decision communicated on 13th May 2022 in relation to the breakdown of the evaluation of the Applicant's technical proposal be cancelled and set aside;

ii) The Respondent be directed to re-admit the Applicant's bid at evaluation stage and to re-evaluate the bid in accordance

with the criteria and procedures under the Tender Document in line with Section 80 (2) & (3) of the Act and award the correct scores as appropriate and as may be directed by the Board in exercise of its mandate under Section 173 of the Act;

iii) Following conclusion of the re-evaluation at the technical evaluation stage, the Respondent be ordered to carry on with the procurement proceedings to their logical conclusion including making an award in line with Section 86 of the Act;

iv) The Board, in exercise of its discretion, to give directions to the Respondent to redo or correct anything within the entire procurement process found not to have been done in compliance with the law; and

v) The Respondent be compelled to pay to the Applicant the costs arising from/and incidental to this Application.

By a Notification of Appeal and letter dated 18th May 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 the 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 five days of 18th May 2022.

The Respondent filed a Response on 25th May 2022, signed by the Head of Supply Chain Management for the Principal Secretary of the Respondent.

Vide letters dated 23rd May 2022, the Acting Board Secretary notified all the tenderers in the subject tender, via their respective addresses as provided by the Respondents, of the existence of the Request for Review while forwarding to the 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 three days of 23rd May 2022.

The Interested Party filed on 25th May 2022 an undated Replying Affidavit sworn by David Kanja, through the firm of Mbugwa,Atudo & Macharia Advocates.

The Interested Party also filed a Preliminary Objection dated 25th May 2022 and filed on even date seeking that the matter be dismissed with costs, on grounds that: -

i) ***The matter is res judicata as Application for Review No. 33 of 2022 has already been determined by the Honourabe Board between the exact same parties as those in the matter herein and which was filed by the Applicant herein.***

ii) ***This Honorable Board lacks jurisdiction to entertain a matter on issues which have already been heard and determined through a decision of 11th May, 2022 and filing the instant review is clearly a blatant abuse of the Board's process and therefore the board ought to strike out this review with costs.***

The Applicant filed a Preliminary Objection dated and filed on 31st May 2022 seeking the striking out of the Applicant's Replying affidavit for the reason that it was fatally incompetent for failure to state what date the Affidavit was made.

The Applicant filed a further supporting statement dated 31st May 2022 signed by Arthur Mugo Mwangi, seeking that the validity of the Tender be extended to allow implementation of the orders of the Board issued in the application and carrying on with the Procurement proceedings under the subject Tender to their logical conclusion. It also averred that the application before the Board is not res judicata and therefore has jurisdiction to hear and determine the Request for Review.

Pursuant to the Board's Circular No. 20/2020 dated 24th March 2020, detailing an administrative and contingency management plan to mitigate the effects of COVID-19 pandemic, the Board dispensed with physical hearings and directed that all Request for Review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specifies that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

The Applicant filed written submissions dated 31st May 2022 and filed with the Board on even date. The Applicant also filed submissions dated 31st May 2022 in opposition of the Interested Party's Preliminary Objection and filed with the Board on the even date.

BOARD'S DECISION

The Board has considered each party's case, the pleadings and the written submissions filed before it, including the confidential documents submitted by the Procuring Entity pursuant to Section 67(3) (e) of the the Actand frames the issues for determination as follows;

I. Whether the Request for Review is barred by the doctrine of res judicata

Depending on the outcome of (I) above:-

II. Whether the Interested Party's undated Replying Affidavit should be struck out.

III. ***Whether the Applicant's tender was evaluated in accordance with the criteria set out in the tender document as read with Section 80 of the Act.***

IV. ***What are the appropriate orders to grant in the circumstances?***

Issue 1: *Whether the Request for Review is barred by the doctrine of res judicata*

In its Preliminary Objection, the Interested Party contended that the Applicant's Request for Review filed on 18th May, 2022 should be dismissed or struck out with costs, on the grounds that:-

1. The matter is barred by *res judicata* in that the Board in Review No. 33 of 2022 already determined the matters raised herein by its decision of 11th May 2022.
2. This Board lacks jurisdiction to entertain issues which have already been heard and determined in Review No. 33 of 2022.
3. Filing the instant review is clearly a blatant abuse of the Board's process.

The Interested Party avers that the Applicant in Review Application No. 33 contended that the Respondent failed to apply the applicable evaluation criteria in awarding the Applicant 85.9 marks at the technical evaluation stage and that this amounted to a breach of Section 80(3) of the Act. The Interested Party added that the Board determined the issue by its decision of 11thMay, 2022. The Interested Party added that the Respondent was directed

to avail a summary of the technical evaluation score to the Applicant, and also proceed with the procurement process to its logical conclusion within 14 days from the date of judgement.

In compliance with the orders of the Board, the Respondent invited the parties for financial opening on 19th May, 2022 through a letter dated 16th May, 2022. The Applicant participated in the said meeting of opening the financial proposals and the same was concluded and now awaiting notification of award to the successful tenderer.

The Interested Party avers that in total disregard to the ongoing procurement process, and after participating in the tender process to conclusion, the Applicant filed the instant Requestfor Review, a day to the financial opening, seeking similar orders as sought in Review Application No. 33 of 2022, requiring the Board to direct the Respondent to re-admit the Applicant's tender at the technical evaluation stage.

The Interested Party avers that just like inReview No 33 of 2022, the Applicant has sought to re-evaluate its own tender and award itself marks in total disregard and ignorance of the Respondent's statutory mandate to conduct the said valuation. The Interested Party thus contends that the instant Request for Review application is thus barred by Res judicata and this Board lacks jurisdiction to entertain this matter in the sense that;

a. The issue in this application was directly and substantially in issue in the Review No. 33 of 2022.
b. Review No. 33 of 2022 was between the same parties
c. Those parties were and are litigating under the same title
d. The issue was heard and finally determined in the Application for Review No. 33 of 2022 through a decision rendered on 11th May, 2022.
e. This Board which heard and determined the issue was competent to try and determine the matter.

On its part, the Applicant disputes the contention that this Request for Review is barred by *Res Judicata*. It is the Applicant's submission that the issue of whether or not the Application is Res Judicata will require the ascertaining of facts. The Applicant adds that the Preliminary Objection does not therefore raise a pure point of law and does not meet the threshold set in the case of ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd [1969] EA 696***.

The Applicant further contends that the issues in the present Request for Review are substantially different from the issues raised in Review No. 33 of 2022. According to the Applicant, Review No 33 of 2022 was necessitated by the decision of the Accounting Officer orally as communicated on 7thApril 2022, while the present application is based on letter of 13th May 2022 which has different contents and issues.

The Applicant avers that one of the issues raised in the present Application which was not raised in Application 33 of 2022 is the negligent/reckless and subjective evaluation leading to unfair deduction of marks and/or failure to accurately summate the tabulated marks. This issue, according to the Applicant, is evident from the letter dated 13th May 2022 containing a breakdown of the evaluation of the Applicant's technical proposal and was neither raised nor determined in Review No. 33 of 2022 as the Applicant was not in possession of this information at the time it filed Review No. 33 of 2022.

The Applicant submitted that the factors to be considered when considering the issue of Res Judicata were laid out by the Supreme Court in the case of ***Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016] eKLR***. Applying the principles in this authority, the Applicant contends that the matter is not *Res Judicata* in that:

a. The matters in issue in the present Request for Review 44 of 2022 are distinct from those in Review 33 of 2022. In Review No. 33 of 2022, the Applicant invited the Board to consider the lapses in evaluation of its technical proposal as pointed out in its pleadings and the Applicant's self-assessment sheet. The Board, after reviewing the matter concluded that evaluation of tenders is undertaken by procuring entities, it was not open for the Applicant to undertake a self-evaluation and it was not open to the Applicant to invite the Board to conduct a re-evaluation.

b. The Ruling of 11th May 2022 in respect to Review No. 33 of 2022 did not conclusively determine whether the Applicant's technical proposal was evaluated in accordance with the criteria under the Tender Document as read with Section 80 of the Act.

c. The Board did not pronounce itself on whether the evaluation was fair, carried out in accordance with the Act and the criteria under the Tender Document.

d. While the Board concluded that it could not consider the lapses in the evaluation of the Applicant's technical proposal based on its self-assessment, the question of whether Applicant's proposal was evaluated in accordance with the criteria under the Tender Document as read with Section 80(2) & (3) of the Act was not canvassed. The issue cannot be said to have been dealt with to its logical conclusion.

The Applicant submits that unlike ordinary civil litigation, where disputes arise out of concluded transactions, new matters will often arise in procurement and disposal proceedings due to the likelihood of breach especially where such procurement and disposal proceedings have not been concluded (such as is the case here). The Applicant added that the letterdated 13th May 2022, containing a breakdown of evaluation of the Applicant's technical proposal raised new issues, including deduction of marks and/or failure to accurately summate the tabulated marks, which issues the Board has not heard and determined.

The Applicant prays that the Preliminary Objection be dismissed and the Board proceeds to hear and determine the Request for Review.

Res judicata is defined in the Black's law Dictionary as follows: -

> ***"An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."***

The doctrine is therefore a method of preventing injustice to the parties to a case. It acts to avoid unnecessary waste of resources in the dispute adjudication system by barring the reconsideration of a matter which has been heard and finally determined by a competent court or other adjudicating body.

Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya (hereinafter referred to as "the Civil Procedure Act"), which codifies the doctrine of res judicata in our laws, states as follows: -

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has***

been subsequently raised, and has been heard and finally decided by such court."

In Civil Appeal No. 105 of 2017, ***Independent Electoral and Boundaries Commission v MainaKiai& 5 others, [2017] eKLR),*** (hereinafter referred to as 'the IEBC Case') the Court of Appeal addressed the components of the doctrine of *res judicata* as outlined in Section 7 of the Civil Procedure Act and in so doing held that: -

"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

a. The suit or issue was directly and substantially in issue in the former suit.

b. That former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title.

d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

Considering the foregoing, it is clear that for the doctrine of *res judicata* to apply herein, all of the following conditions have to be met;

(i) That former suit (in this case Review No 33 of 2022) was between the same parties or parties under whom they or any of them claim.

(ii) Those parties were litigating under the same title.

(iii) The judicial body that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

(iv) The suit or issue was directly and substantially in issue in the former suit.

(v) The issue was heard and finally determined in the former suit.

Conditions (i) to (iii) are not in issue. What is in contention is conditions (iv) and (v) namely, whether the similar or same matters raised in Review No 33 of 2022 were finally determined by this Board's decision of 11th May 2022.

The Board notes that in both this Request for Review and Review Number 2022, the Applicant's case is centred on the manner on which the Respondent evaluated it technical tender and awarded the Applicant 85.9 marks. The question to be considered is whether this common issue was finally determined in Review No. 33 of 2020.

The Board in its Decision of 11th May, 2022 in the last paragraph on page 14 of its noted that:-

"The Board notes that the gist of the Applicant's case is that the Procuring Entity allegedly allocated the Applicant relatively

low scores at the technical evaluation stage. The Applicant states at paragraph 6 of the supporting statement that it was informed of its technical score of 85.9 marks by a representative of the procuring entity on 7th April, 2022. This was confirmed by the Procuring Entity in its response."

The Board at page 17 of the same decision noted that:-

"The Applicant wishes the Board to consider the alleged lapses in the evaluation of its technical proposal as pointed out in the Applicant's Self-Assessment and cancel the technical score given by the Procuring Entity. Doing so would amount to converting the Board to an evaluation committee which is not permissible as was made clear by the court in the case of Republic v Public Procurement Administrative Review Board & 2 others Masinde Muliro University of Science and Technology [2016] eKLR (supra)."

The Board thus noted that:-

"The Applicant is however, entitled to information as to how it scored 85.9 marks at the technical stage. This is pursuant to Section 67 (4) as read with Section 68 (2)(d)(iii) of the Act which permits the disclosure to an applicant in a request for review to, inter alia,a summary of evaluation its tender."

The Board issued the following final orders in its Decision of 11th May, 2022:-

I. ***The Accounting Officer of the Procuring Entity is directed to issue the Applicant with a summary of the Applicant's tender's technical evaluation in line with Section 67(4) read with Section 68 (2) (d) (iii) of the Act and in particular to give a breakdown of the Applicant's technical score of 85.9 marks with respect to Tender No. NCB/MOE-VTT/TVET PHASE III/3/2020-2021 for Consultancy Services for Development of Designs, Masterplans, Tender Documents and Supervision of Construction Works of Additional Departmental Blocks in Eleven (11) Technical & Vocational Education & Training (TVET) Institutions, Construction of Twin Hostels in Eight Technical Vocational Colleges and a Publishing and Printing Complex for Curriculum and Training Material.The said summary of the Applicant's tender evaluation to be furnished to the Applicant within 14 days of this decision.***

II. ***The Procuring Entity to complete the procurement process for Tender No. NCB/MOE-VTT/TVET PHASE III/3/2020-2021 for Consultancy Services for Development of Designs, Masterplans, Tender Documents and Supervision of Construction Works of Additional Departmental Blocks in Eleven (11) Technical & Vocational Education & Training (TVET) Institutions, Construction of Twin Hostels in Eight Technical Vocational Colleges and a Publishing and Printing***

Complex for Curriculum and Training Material, to its logical conclusion within 14 days of this decision.

III. Each party to bear its own costs.

The Board notes from the papers filed herein, that after delivery of the Decision in Review No 33 of 2022, the Procuring Entity wrote to the Applicant on 13th May, 2022 giving a breakdown of the Applicant's technical score of 85.9 marks. The present Application is predicated on the information set out in the letter of 13th May 2022 which was issued after the decision of 11th May 2022.

While the issue of whether or not the Applicant's tender was evaluated according to the applicable criteria was substantially in issue in both the present Request for Review and Review No. 33 of 2022, it is evident from the analysis above that the Board did not finally determine the issue.

The Board, therefore, agrees with the Applicant that the matter is not barred by the doctrine of *Res Judicata*. The Board accordingly overrules the Interested Party's Preliminary Objection. The Board will now proceed to consider the other framed issues for determination.

Issue 2. Whether the Interested Party's undated Replying Affidavit should be struck out.

The Applicant raised a Preliminary Objection regarding the Replying Affidavit signed by David Kanja, the Managing Director of the Interested Party. The Applicant sought that the Replying Affidavit shouldbe struck for the reason that it is fatally incompetent for failure to state the date it was made contrary to Section 5 of the Oaths and Statutory Declarations Act.

The Board indeed notes that the Interested Party's Replying Affidavit was indeed not dated.

Section 5 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya provides, that:

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

The Supreme Court considered the fate of an undated affidavit in the case of ***Gideon SiteluKonchellah v Julius Lekakeny Ole Sunkuli& 2 others [2018]*eKLR (Supreme Court) and stated as follows;**

> ***"We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated.Consequently, as the same is defective, it is deemed that***

there is no Replying Affidavit on record filed by the 1st Respondent."

Given the foregoing, we sustain the Applicant's Preliminary Objection and hereby strike out the Interest Party's Replying Affidavit signed by David Kanja.

Issue 3: Whether the Applicant's tender was evaluated in accordance with the criteria set out in the tender document as read with Section 80 of the Act.

The Applicant avers that the Respondent breached Sections 3 and 80(2) of the Act and violated Article 227(1) of the Constitution by failing to ensure that the Evaluation Committee evaluated the Applicant's tender fairly and in accordance with the criteria and procedures under the Tender Document.

The Applicant added that the Respondent breached Section 44(2)(g) of the Act by failing to ensure that the Tender Evaluation Committee evaluated the Applicant's proposal at the Technical Evaluation Stage in accordance with Section 80(2) and (3) of the Act and Article 227(1) of the Constitution with respect to the following criteria:-

a. Position K-1 Team Leader,

b. Position K-2: [Technical Staff]-Environmental Expert,

c. Position K-3 (Support Staff).

The Applicant added that the Respondent was negligent/reckless and subjective in the evaluation process leading to unfair deduction of marks and/or failure to accurately summate the tabulated marks, leading to an award of lower average of 89.5 instead of 88 marks.

In response the Procuring Entity avers that the Public Procurement Administrative Review Board (PPARB) rendered its decision dated 11th May, 2022 in Application No. 33 of 2022 and directed the procuring entity to issue the applicant, Precise Architects Limited, with a summary of the applicants tender technical evaluation in line with Sections 67(4) read with Section 68(2)(d)(iii) of the Act and in particular to be given a breakdown of the applicants technical score of 85.9 marks.

The Procuring Entity avers that vide letter No. MOE/VTT/2/6 VOL IV (10) of 13th May 2022, it furnished the Applicant with the breakdown of the technical evaluation as ordered by the board. It then invited the Applicant vide its letter ref no. MOE/VTT/2/6/VOL IV (11) of 16th May, 2022 to the financial evaluation opening on 19th May, 2022.

The financial proposals were opened on 19th May, 2022 and are yet to be submitted to the evaluation committee pending the determination of this Application.

The Procuring Entity avers that the Evaluation Committee pursuant to Section 46 of the Act, is mandated to subject the tenders to an evaluation process as per the set out criteria in the TenderDocuments. The Procuring Entity added that the Respondent did not breach any duty as alleged by the applicant.

On its part, the Interested Party avers that the Procuring Entity duly evaluated all the tenders in accordance with Sections 79(1) and 80(2) of the Act and only two firms passed the Technical Stage being the Interested Party herein and the Applicant.

The Interested Party further avers that it is clear the Applicant has come to this Board in bad faith in a quest to defeat justice, and delay and or frustrate the logical conclusion of the procurement proceedings.

The evaluation of public procurement tenders should be undertaken in accordance with the criteria set out in the Tender Documents. This is captured at Section 80(2) of the Act which provides as follows;

> ***"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."*** [Emphasis added]

Considering the provisions of section 80(2), it is incumbent upon the Board to establish if the Procuring Entity evaluated the Applicant's tender according to the criteria set out in the Tender Document.

As is evident from the analysis set out above, the Applicant contends that the technical evaluation in as far as it related to the scoring for the positions K1 Team leader, K2 Technical staff environmental expert and K3 for support staff was flawed. The Applicant believes it should have been awarded more marks in these areas.

The Board has noted that the relevant technical evaluation criteria is found in the particulars to Appendix to Instructions to Tenderers clause 22.2 at pages 24 and 25 of the blank Tender Document.

The Board further notes that the Respondent's letter of 13th May 2022 which was issued pursuant to the Board's decision in Review No 33 of 2022, broke down the marks awarded to the Applicant (B5 as follows):-

Table 1

S/No.	DESCRIPTION	B5				
		E1	E2	E3	E4	E5
1.	**Specific experience of the Consultant, as a firm, relevant to the Assignment: (Max 10 marks)**					
	Evidence of 5 similar undertakings in consultancy for supervision of works over the last 5 years (Award letters, contracts,	10	10	10	10	10

S/No.	DESCRIPTION	B5				
		E1	E2	E3	E4	E5
	completion certificates, recommendation letters) – **(2 marks per assignment)**					
2.	**Adequacy and quality of the proposed methodology, and work plan in responding to the Terms of Reference (TORs): (Max 45 marks)**					
	(a) Technical approach and methodology Detailed Methodology or Approach for implementing the assignment/ Understanding the scope of work / interpretation of TOR's **(30 marks)**					
	(i) Detailed Methodology or Approach for implementing the assignment (10 marks)	8	7	9	8	8
	(ii) Understanding the scope of work / interpretation of TOR's (20 marks)	18	20	18	18	16
	Sub criteria - Total	**26**	**25**	**27**	**26**	**24**
	(b) Work plan Work plan/programme of action incorporating all the activities to be undertaken as per the terms of reference, realistic and implementable/Understanding the scope of work/interpretation of TOR's **(10 marks)**					
	Scope of activities **(5marks)**	5	5	5	5	5
	Time **(2 marks)**	2	2	2	2	2
	Logical flow of work (**3 marks)**	3	3	3	3	3
	Sub criteria - Total	**10**	**10**	**10**	**10**	**10**
	(C) Organization and staffing (Max 5marks)					
	Organization chart **(2 marks)**	2	2	2	2	2
	Clear definition of duties and responsibilities of staff **(3 marks)**	3	3	2	3	3
	Sub criteria - Total	**5**	**5**	**4**	**5**	**5**
3.	**Key Experts' qualifications and competence for the Assignment: (Max 35 marks)**					
	(a) Position K-1: [Team Leader] (10 marks)					
	Degree in Architecture / Registered as an Architect with 10 years post-registration	3	3	3	3	3

S/No.	DESCRIPTION	B5				
		E1	E2	E3	E4	E5
	experience (Lead Architect). **(3 marks)**					
	Undertaken design and supervision of at least 3 similar works of above 150 million as a team leader within the last 3 years. **(6 marks)**	0	5	2	0	0
	Relevant experience in Kenya **(1 mark)**	1	1	1	1	1
	Sub criteria - Total	**4**	**7**	**4**	**4**	**4**
	(b) Position K-2: [All Technical Staff] (Max 15 Marks) (General Qualifications 5 marks, adequacy for the assignment 8.5 marks, relevant experience in Kenya 1.5 marks)					
	(i) Project Architect	5	5	5	5	5
	Degree in Architecture / Registered as an Architect / 10 years post-registration experience	8.5	8.5	8.5	8.5	8.5
		1.5	1.5	1.5	1.5	1.5
	(ii) Project Quantity Surveyor	5	5	5	5	5
	Degree in Building Economics or Quantity Surveying/ /Registered as a Quantity Surveyor / 5 years post-registration experience	8.5	8.5	8.5	8.5	8.5
		1.5	1.5	1.5	1.5	1.5
	(iii) Project Civil / Structural Engineer	5	5	5	5	5
		8.5	8.5	8.5	8.5	8.5
	Degree in Civil / Structural Engineering / Registered as an Engineer / 5 years post-registration experience	1.5	1.5	1.5	1.5	1.5
	(iv) Project Electrical Engineer	5	5	5	5	5
	Degree in Electrical Engineering / Registered as an Engineer / 5 years post-registration experience	8.5	8.5	8.5	8.5	8.5
		1.5	1.5	1.5	1.5	1.5
	(v) Project Mechanical Engineer	5	5	5	5	5
	Degree in Mechanical Engineering / Registered as an Engineer / 5 years post-registration experience	8.5	8.5	8.5	8.5	8.5
		5	1.5	1.5	1.5	1.5
	(vi) Landscape Architects	5	5	5	5	5

S/No.	DESCRIPTION	B5				
		E1	**E2**	**E3**	**E4**	**E5**
	Degree in Landscape Architects/ Master's Degree in a relevant field/Member of a professional organization e.g., AAK/5 years of professional experience	8.5	8.5	8.5	8.5	8.5
		1.5	1.5	1.5	1.5	1.5
	(vii) Environmental Expert	0	5	0	0	0
	Minimum Master's Degree in Environmental studies or related in good standing with NEMA /5 years of professional experience	0	8.5	0	0	0
		1.5	1.5	1.5	1.5	1.5
	(viii) Land Surveyor	5	5	5	5	5
	Degree in Land surveying, currently practicing and 5 years of professional experience	8.5	8.5	8.5	8.5	8.5
		1.5	1.5	1.5	1.5	1.5
	(ix) Geotechnical Engineer	5	5	5	5	5
	Minimum of a Degree in Geotechnical engineering and/or Degree in civil Engineering with a specialization and experience in soil mechanics, currently practicing and 5 years of professional experience	8.5	8.5	8.5	8.5	8.5
		1.5	1.5	1.5	1.5	1.5
	Sub criteria - Total	**121.5**	**121.6**	**121.5**	**121.5**	**121.5**
	Sub criteria average	**13.5**	**13.5**	**13.5**	**13.5**	**13.5**
	(c)Position K-3: [Support Staff](Max 10 marks)					
	Provision of 23 Number Clerks of work (one per site) with Minimum diploma in Building Construction, Civil/Structural, Construction management or equivalent with minimum 3 years relevant experience **(General Qualifications 3 marks, adequacy for the assignment 6 marks, relevant experience in Kenya 1 marks) (Max 10 marks)**	2	2	2	2	2
		5	5	5	5	5
		1	1	1	1	1
	Sub criteria - Total	**8**	**8**	**8**	**8**	**8**
4.	**Transfer of knowledge and training program (relevance of approach and**					

S/No.	DESCRIPTION	B5				
		E1	E2	E3	E4	E5
	methodology): (Max 5 marks)					
	Provision for opportunities for internship/ Industrial attachment **(5 marks)**	5	5	5	5	5
5.	Participation by Kenya citizens among proposed Key Experts **(5 marks)**	5	5	5	5	5
	GRAND TOTAL OUT OF 100	**86.5**	**85.5**	**86. 5**	**86.5**	**84.5**
	AVERAGE%	**85.9**				
	REMARKS	**the bidder meets pass mark of 80 and proceeds to the financial evaluation stage**				

The Applicant contends the Procuring Entity's Breakdown of Evaluation shows instances where the Applicant's marks have been deducted/the Evaluation Committee failed to accurately take into account the marks each member of the Committee awarded the Applicant, which led the Procuring Entity to conclude that the Applicant scored an average of 85.9 marks while in fact, based on an accurate summation of the scores tabulated therein, the Applicant scored an average of 88 marks. The Applicant explained the average score of 88 marks as follows:

1. Regarding the Item 2 of the letter of 13th May 2022, under ***"Adequacy and quality of the proposed methodology, and work plan in responding to the Terms of Reference (TORs)"***, the second evaluator (E2) under criteria (i) and (ii) in the table awarded the Applicant a score of 7 and 20 respectively. This according to the Applicant, means that the Applicant's sub-criteria total with respect to E2 was **27** and not 25 as indicated by the Procuring Entity in the

breakdown. This failure to accurately tabulate/deduction of 2 marks from the Applicant is according to the Applicant, unfair and affects the total average score of the Applicant.

2. With respect to the Team Leader's qualifications under item 3 (a) of the letter dated 13th May 2022, that is- degree in Architecture/Registered as an Architect with 10 years post registration experience (Lead Architect), undertaking design and supervision of works above 150 million as team leader within the last 3 years and relevant experience in Kenya, E2 awarded 3 marks, 5 marks and 1 mark respectively. According to the Applicant, the sub-criteria total for E2 should therefore be **9** and not 7 as indicated in the Breakdown of Evaluation. This according to the Applicant, shows that 2 marks which had been awarded to the Applicant were deducted/not taken into account.
3. Still with respect to the Team Leader's qualifications under item 3 (a) of the letter dated 13th May 2022, that is- degree in Architecture/Registered as an Architect with 10 years post registration experience (Lead Architect), undertaking design and supervision of works above 150 million as team leader within the last 3 years and relevant experience in Kenya, E3 awarded 3 marks, 2 marks and 1 mark respectively. The sub-criteria total for E3 should therefore be **6** and not 4 as indicated in the Breakdown of Evaluation. This according to the Applicant, shows that 2 marks which had been awarded to the Applicant were deducted/were not taken into consideration by the Procuring Entity's Evaluation Committee.

4. Under Position K-2 [All Technical Staff] under item 3 (a) of the letter dated 13th May 2022, wherein 5 marks were assigned to general qualifications, 8.5 marks for adequacy for the assignment and 1.5 marks for relevant experience in Kenya, E2 awarded full marks to all the experts listed in the Breakdown of Evaluation and the table above at numbers (i) to (ix). The total marks for each expert that is a summation of 5+8.5+1.5 is 15 marks. E2 awarded 15 marks to all the experts and therefore sub-criteria total for E2 should be 15 marks multiplied by 9 experts which is 135 marks and not 121.6 as indicated by the Procuring Entity. The Applicant's contends that by indicating the sub-criteria total for E2 as 121.6, the Procuring Entity's Evaluation deducted/failed to take into account 13.4 marks which had been awarded to the Applicant by E2. According to the Applicant, the Procuring Entity's Evaluation Committee's failure/actions led the Evaluation Committee to arrive at an erroneous conclusion with regard to the sub-criteria average since with E2's sub-criteria total at 135, the sub-criteria average for Position K-2 should be **13.8** and not 13.5 as indicated in the Breakdown of Evaluation.
5. According to the Applicant, the deduction of marks/failure to take into account the correct marks awarded to the Applicant are considered, then the Applicant's breakdown of score (summarized) should look as follows:

	DESCRIPTION	**E1**	**E2**	**E3**	**E4**	**E5**
1	**Specific Experience of the Consultant (Max 10 marks**					
		10	10	10	10	10

2	**Adequacy and quality of the proposed methodology and work plan (Max 45 marks)**					
		41	42	41	41	39
3	Key Experts' qualifications and competence for the Assignment –Position K1- Team Leader	4	9	6	4	4
	Key Experts' qualifications and competence for the Assignment –Position K2- All Technical Experts (Sub-criteria average)	13.8	13.8	13.8	13.8	13.8
	Key Experts' qualifications and competence for the Assignment –Position K3- Support Staff	8	8	8	8	8
4	**Transfer of Knowledge and training program (5 marks)**					

		5	5	5	5	5
5	**Participation by Kenya citizens among proposed Key Experts**					
		5	5	5	5	5
	GRAND TOTAL OUT OF 100	86.8	92.8	88.8	86.8	84.8
	AVERAGE %	**88**				

6. The Applicant contends that from the Breakdown of Evaluation, it is clear that the low score that was allocated to the Applicant's technical proposal during technical evaluation was unfair because the Procuring Entity's Evaluation Committee deducted marks/failed to accurately take into account the scores each member of the Committee awarded the Applicant thereby erroneously concluding that the Applicant scored 85.9 marks instead of 88 marks. According to the Applicant, this erroneous summation is reckless and only intended to affect the Applicant's combined technical and financial score in a deliberate effort to eliminate and/or limit the Applicant's chances of emerging as the successful tenderer.

Part of the confidential documents submitted to the Board by the Procuring Entity each of the five evaluators individual original score sheets with marks filled by hand. A comparison of this original score sheets as against the Procuring Entity's breakdown of 13th May 2022**(Table 1)**shows that there are differences between the two breakdowns with respect to certain scores.

There are also errors in summation of totals.The original score sheets of each evaluator is produced in Table 2 below:-

Table 2

S/No.	DESCRIPTION	B5				
		E1	E2	E3	E4	E5
1.	**Specific experience of the Consultant, as a firm, relevant to the Assignment: (Max 10 marks)**					
	Evidence of 5 similar undertakings in consultancy for supervision of works over the last 5 years (Award letters, contracts, completion certificates, recommendation letters) – **(2 marks per assignment)**	10	10	10	10	10
2.	**Adequacy and quality of the proposed methodology, and work plan in responding to the Terms of Reference (TORs): (Max 45 marks)**					
	(a) Technical approach and methodology Detailed Methodology or Approach for implementing the assignment/ Understanding the scope of work / interpretation of TOR's **(30 marks)**					
	(i) Detailed Methodology or Approach for implementing the assignment (10 marks)	8	7	9	8	8
	(ii) Understanding the scope of work / interpretation of TOR's (20 marks)	18	**18**	18	18	16
	Sub criteria - Total	**26**	**25**	**27**	**26**	**24**
	(b) Work plan Work plan/programme of action incorporating all the activities to be undertaken as per the terms of reference, realistic and implementable/Understanding the scope of work/interpretation of TOR's **(10 marks)**					
	Scope of activities **(5marks)**	5	5	5	5	5
	Time **(2 marks)**	2	2	2	2	2
	Logical flow of work (**3 marks)**	3	3	3	3	3
	Sub criteria - Total	**10**	**10**	**10**	**10**	**10**
	(C) Organization and staffing (Max					

S/No.	DESCRIPTION	B5				
		E1	E2	E3	E4	E5
	5marks)					
	Organization chart **(2 marks)**	2	2	2	2	2
	Clear definition of duties and responsibilities of staff **(3 marks)**	3	3	2	3	3
	Sub criteria - Total	**5**	**5**	**4**	**5**	**5**
3.	**Key Experts' qualifications and competence for the Assignment: (Max 35 marks)**					
	(a) Position K-1: [Team Leader] (10 marks)					
	Degree in Architecture / Registered as an Architect with 10 years post-registration experience (Lead Architect). **(3 marks)**	3	3	3	3	3
	Undertaken design and supervision of at least 3 similar works of above 150 million as a team leader within the last 3 years. **(6 marks)**	0	**0**	**0**	0	0
	Relevant experience in Kenya **(1 mark)**	1	1	1	1	1
	Sub criteria - Total	**4**	**4**	**4**	**4**	**4**
	(b) Position K-2: [All Technical Staff] (Max 15 Marks) (General Qualifications 5 marks, adequacy for the assignment 8.5 marks, relevant experience in Kenya 1.5 marks)					
	(i) Project Architect	5	5	5	5	5
	Degree in Architecture / Registered as an Architect / 10 years post-registration experience	8.5	8.5	8.5	8.5	8.5
		1.5	1.5	1.5	1.5	1.5
	(ii) Project Quantity Surveyor	5	5	5	5	5
	Degree in Building Economics or Quantity Surveying/ /Registered as a Quantity Surveyor / 5 years post-registration experience	8.5	8.5	8.5	8.5	8.5
		1.5	1.5	1.5	1.5	1.5
	(iii) Project Civil / Structural Engineer	5	5	5	5	5
	Degree in Civil / Structural Engineering / Registered as an Engineer / 5 years post-	8.5	8.5	8.5	8.5	8.5
		1.5	1.5	1.5	1.5	1.5

S/No.	DESCRIPTION	B5				
		E1	E2	E3	E4	E5
	registration experience					
	(iv) Project Electrical Engineer	5	5	5	5	5
	Degree in Electrical Engineering / Registered as an Engineer / 5 years post-registration experience	8.5	8.5	8.5	8.5	8.5
		1.5	1.5	1.5	1.5	1.5
	(v) Project Mechanical Engineer	5	5	5	5	5
	Degree in Mechanical Engineering / Registered as an Engineer / 5 years post-registration experience	8.5	8.5	8.5	8.5	8.5
		1.5	1.5	1.5	1.5	1.5
	(vi) Landscape Architects	5	5	5	5	5
	Degree in Landscape Architects/ Master's Degree in a relevant field/Member of a professional organization e.g., AAK/5 years of professional experience	8.5	8.5	8.5	8.5	8.5
		1.5	1.5	1.5	1.5	1.5
	(vii) Environmental Expert	0	**0**	0	0	**5**
	Minimum Master's Degree in Environmental studies or related in good standing with NEMA /5 years of professional experience	0	**0**	0	0	**8.5**
		1.5	1.5	1.5	1.5	1.5
	(viii) Land Surveyor	5	5	5	5	5
	Degree in Land surveying, currently practicing and 5 years of professional experience	8.5	8.5	8.5	8.5	8.5
		1.5	1.5	1.5	1.5	1.5
	(ix) Geotechnical Engineer	5	5	5	5	5
	Minimum of a Degree in Geotechnical engineering and/or Degree in civil Engineering with a specialization and experience in soil mechanics, currently practicing and 5 years of professional experience	8.5	8.5	8.5	8.5	8.5
		1.5	1.5	1.5	1.5	1.5
	Sub criteria - Total	**121.5**	**121.5**	**121.5**	**121.5**	**121.5**
	The Board's calculation of the sub criteria-total					**135**

S/No.	DESCRIPTION	B5				
		E1	E2	E3	E4	E5
	Sub criteria average	**13.5**	**13.5**	**13.5**	**13.5**	**13.5**
	The Board's calculation of the sub criteria-average					**15**
	(c)Position K-3: [Support Staff](Max 10 marks)					
	Provision of 23 Number Clerks of work (one per site) with Minimum diploma in Building Construction, Civil/Structural, Construction management or equivalent with minimum 3 years relevant experience **(General Qualifications 3 marks, adequacy for the assignment 6 marks, relevant experience in Kenya 1 marks) (Max 10 marks)**	2	2	**2.35**	2	2
		5	5	5	5	5
		1	1	1	1	1
	Sub criteria - Total	**8**	**8**	**8.35**	**8**	**8**
4.	**Transfer of knowledge and training program (relevance of approach and methodology): (Max 5 marks)**					
	Provision for opportunities for internship/ Industrial attachment **(5 marks)**	5	5	5	5	5
5.	Participation by Kenya citizens among proposed Key Experts **(5 marks)**	5	5	5	5	5
	GRAND TOTAL OUT OF 100	**86.5**	**85.5**	**86. 5**	**86.5**	**84.5**
	The Board's calculation of the Grand Total out of 100			**86.85**		**86**
	AVERAGE%	**85.9**				
	The Board's calculation of average	**86.27**				
	REMARKS	**the bidder meets pass mark of 80 and proceeds to the financial evaluation stage**				

For ease of reference, the difference between the Respondent's letter of 13th May 2022 and the scores in the original score sheet of each of the evaluator

as well as the Board's comments are highlighted in red colour and also underlined in Table 2 above. The original scoresheets of the five evaluators being primary evidence as compared to the letter of 13th May 2022, the original scoresheets of the five evaluators take precedence in confirming the breakdown of the Applicant's technical score. As can be seen from the Board's comments in Table 2, the average technical score ought to have been 86.27 as opposed to 85.9 out of 100 entitling the Applicant to additional marks of 0.37.

The summation by the Applicant of 88 marks set out above is based on the breakdown set out in the letter of 13th May 2022 which evidently has errors, and thus the 88 marks cannot be upheld.

The Applicant further challenges the evaluation of its tender as follows:

1. **Position K-1 Team Leader:**
    a. The Applicant contends that the scoring of zero by E1, E4 & E5 with respect to the criterion in question amounts to introducing a new criterion to the detriment of the Applicant who was never informed that at technical evaluation stage, tenderers would be scored an automatic zero either for failure to meet a particular requirement/failure to provide sufficient information/evidence of meeting the requirement.
    b. The Applicant contends that based on the information and documents it provided, it ought to have earned full marks from

E1, E4, E5 & E6 under the sub-criteria of similar supervision and design works undertaken by the proposed Team Leader.

2. **Position K-2 Technical Staff-Environmental Expert**

a. The Tender Document required tenderers to propose an environment expert with a Minimum Master's Degree in Environmental studies or related in good standing with NEMA and 8 years of professional experience.

b. The Applicant contends that its proposed expert Prof. Edward Ontitawho has 8 years' post-registration experience holds a PHD in Social Sciences, Master of Arts in Sociology and a Bachelor of Arts in Social Work which fields are related to environmental studies and thus meets the minimum requirements listed under number 7 at page 55 of the Tender Document. *(See the Applicant's technical proposal Form Tech 6A at page 99, Form Tech 6B (CV) at pages 131-145 and Form Tech 7 (Mandatory Support Documents) at pages 353-361).*

c. In addition to the academic qualifications, Prof. Ontita is registered with NEMA as an Environmental Impact Assessment/Audit Expert *(see Form Tech 7 at page 359 of the Applicant's proposal).*

d. The Applicant contends that the scoring of zero by E1, E3, E4 & E5 with respect to this criterion amounts to introducing a new

criterion to the detriment of the Applicant who was never informed that at technical evaluation stage, tenderers would be scored an automatic zero despite meeting a particular requirement and providing sufficient information/evidence of meeting the requirement.

The Applicant adds that the Procuring Entity's Evaluation Committee failed to take into account the qualifications and relevant experience of the proposed Team Leader and Environmental Expert as required under the Tender Document and therefore failed to evaluate the Applicant's tender fairly and objectively in accordance with the criteria and procedures set out in the Tender Document *(particularly the criteria relating to the qualifications and experience of the proposed Team Leader and Environmental Expert)* contrary to the provisions of Article 227 (1) of the Constitution and Section 80 (2) and (3) of the Act.

The Board has considered the relevant documents submitted for the three positions in question and has observed as follows;-

	Requirement under the Tender Document	Total Marks Available	Average Evaluation score	Comments	Relevant Page Number in Applicant's Bid	Board's comments and findings
3	**Key Experts' Qualifications and Competence** **Complete Form Tech 4 (organization & staffing-*page 35 of Tender Document)* Form Tech 6A *(page 37 of the Tender Document)* and Form Tech 6B *(page 38 of the Tender Document)* and provide mandatory support documents under Form Tech 7 (35 marks)**					
3a	**Position K-1 Team Leader** (i) Degree in Architecture / registered as an Architect / 10 years' post-registration experience (Lead Architect) and in addition, the person should have undertaken design and supervision of at least 3 similar works of above 150 million as a team leader within the last 3 years	10	4.6	Missed 5.4	**Arch. Jennifer Gathecha.** 1. Bachelor of Architecture 1980 (pg 310) 2. Certificate of Registration No.1986 A 579 (pg 311) 3. Practicing Certificate 1/7/2021-30/6/2022 (pg 312) 4. CV Form Tech 6B-CV (pg 104-108) - No evidence that she was a lead consultant 10 years post qualification *details of similar assignments and role* 1. Proposed Edible oils factory Machakos 1/9/2018-March 2022 - Form Tech 2 filled with all details with value of KES.3.5B plus photos	- No supporting evidence showing the value of one contract (No.1) - One project was older than required period (No.3

					(pg 16-17) - Letter of recommendation and contract (pg 265-271) - No supporting evidence of value of contract 2. Proposed garment factory, workshop EPZ in Athi River March 2019-Dec 2020 - Form Tech 2 is filled with all details with value of KES.230M plus photos (pg 18-19) - Letter of recommendation and contract (pg 273-284) - Value included 3. Proposed twin hotels Kisumu Eldoret 2014-Jan 2017 - Form Tech 2 is filled with all details with value of KES.200M plus photos (pg 20-21) - Letter of recommendation and certificate of handover, occupation permit and interim certificate (pg 285-288)	
3b	**Position K-2 Technical Staff** Bidders to have qualified experts to serve as project environmental expert *(8 years'*	15	13.5	Missed 1.5 marks	CVs & certificates for the proposed key experts • **Environmental Expert** Edward Ontita-131-145 (Form Tech 6B-CV) 353-361 (Form Tech 7-certificates)	The Applicant contends that it ought to have been awarded full marks for this category

	professional experience),				***PHD social sciences 2007, MA Sociology 1996, BA Social work 1990***	given its expert had Masters qualifications "related" to environmental studies. The requirement in the tender document was a *"Minimum Master's Degree in Environmental studies or related...":*The Applicant has not demonstratedthat its expert's Masters or PHD's qualification was related to Environmental studies. We thus see no reason to fault the awarded marks.
3c	**Position K-3 Provision of 23 Number Clerks of work (one per site) with Minimum diploma in Building Construction, Civil/Structural,**	10	8	Missed 2 marks	93 (Form Tech 4-organization and staffing) Form Tech 6B-CVs and Form Tech 7-Mandatory Support Documents (Certificates)of Clerks of the Team • Andrew Mwenda 160-162 (CV) Diploma in Civil Engineering (383)	

	Construction management or equivalent with minimum 3 years relevant experience (General Qualifications 3 marks, adequacy for the assignment 6 marks, relevant experience in Kenya 1 marks) (Max 10 marks)				• Edwin Mugo 163-165 (CV) Diploma in Building Technology (384) • Chrispinus Mukanga-166-168(CV) Diploma in Quantity Surveying (385) • OnesmusKilungya 169-171 (CV) Diploma in Building (386) • Silas Macharia 172-174 (CV) Diploma in Civil Engineering (387) • Dickson Kiambi-175-177 (CV) Diploma in Building (388) • Duncan Maithya 178-180 (CV) Diploma in Civil Engineering (389) • Fred Kinyua 181-184 (CV) Diploma in Building (390) • Gabriel Gachoka 185-188 (CV) Diploma in Civil Engineering (391) • Herbert Moturi 189-192 (CV) Diploma in Architecture (392) • Hillary Munene 193-195 (CV) Diploma in Building Technology (393-394) • Ibrahim Kibe 196-199 (CV) Diploma in Civil Engineering (395) • Moses Orwa 200-203 (CV) Diploma in Civil Engineering (396) • James Kilonzi 204-207 (CV) Diploma Technology in Architecture (397) • Nicholas Mutua 208-216 (CV) Diploma in Technology (Building Construction) (398) • John Githaiga 217-221 (CV) Diploma in Civil Engineering (399)	

					• Chester Mbeya-222-226 (CV) Diploma in Building and Civil Engineering (400) • Paul Njeru 227-229 (CV) Diploma in Building Technology (401) • Peter Njue 230-233 (CV) Diploma in Building (402) • Sam Gitau 234-237 (CV) Diploma in Technology (Civil Engineering Technology) (403) • Ben Mwangi 238-242 (CV) Diploma in Building Construction (404) • Cyrus Nyaga 243-249 (CV) Diploma in Building (405-407) Washington Mbithi 250-256 (CV) Diploma in Technology (Building Construction) (408)	

Considering the above analysis, we do not see any cogent reason to fault the scoring by the Evaluation Committee.

The scoring criteria included evaluation based on adequacy of the expert's qualifications and experience for the assignment. Such adequacy is not for this Board or the Applicant to determine. As the Board held in Review No 33, the evaluation of tenders is the mandate of a Procuring Entity.

Save for the errors in summation and discrepancies of the scores awarded to the Applicant as explained in Table 2 above, the Board does not agree that the evaluation process was flawed as contended by the Applicant.

Issue IV: What are the appropriate orders to grant in the circumstances?

The orders to be granted flow from the determinations made above.

The Interested Party's Preliminary objection is overruled while that raised by the Applicant has been upheld.

Save for the issue of computation and summation of the technical scores allocated to the Applicant, the other reliefs sought by the Applicant relating to the evaluation process are for dismissal. The Board does not consider it

necessary to order a re-evaluation on the issue of computation and summation of the technical score which is purely a mathematical issue.

The Procuring Entity requested through its Response that the Board freezes the tender validity from 20th April 2022 when the first application was requested by the Applicant. This according to the Procuring Entity, will allow the Procuring Entity adequate time to finalise the processing of the tender to its logical conclusion.The Procuring Entity stated thattender validity of the tender is set to expire on 1st June 2022 after a final extension of 30 days.

The Interested Party made averments on tender validity through its Replying Affidavit which has been struck off. The Board will thus disregard those averments. The Applicant also asked for the extension of the tender validity through its further supporting statement.

Justice Nyamweya addressed the issue of computing the tender validity during the standstill period under Section 168 of the Act, in the case of ***Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company (Interested Party) Exparte Transcend Media Group Limited [2018]eKLR("KPLC case")*** and held as follows:

> ***"51. The question that needs to be answered by this Court is whether the Respondent correctly interpreted***

the provisions of the law on the effect of the litigation before it on the tender validity period. The Respondent in this respect held that a notice by the Secretary of the Review Board and any stay order contained therein can only affect the procurement process from proceedings further but cannot act as an extension of the tender validity period, nor can it stop the tender validity period from running. It in this respect relied on its previous decisions on this interpretation, which are not binding on this Court, and which were decided before the Public Procurement and Asset Disposal Act of 2015 was enacted.

52. I find that this position is erroneous for three reasons, Firstly, section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time – specific and time-bound.

53. Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point, at least for any deadlines defined by reference to a period of time, which in this case included the tender validity period. It would also be paradoxical and absurd to find that procurement proceedings cannot proceed, but that time continues to run for the same proceedings.

54. I am in this respect persuaded by the decision in UK Highways A 55 Ltd vs Hyder Consulting (Uk) Ltd (2012) EWHC 3505 (TCC) that proceedings had automatically continued from the point they left once a stay was lifted, and therefore time for service of particulars of a claim had expired in the interim period between when the initial stay expired and a second stay was agreed upon. It was also held in R (H) vs Ashworth Special Hospital Authority (203) 1 WLR 127 that the purpose of a stay is to preserve the status quo pending the final determination of a claim for review, and to ensure that a party who is eventually successful in his or her challenge will not be denied the full benefit of his or her success. The relevant status quo that will determine a successful party's benefit in the instant case includes the tender validity period.

55. Secondly, section 135 of the Act provides for a standstill period of fourteen days between the notification of an award and the conclusion of a contract, to enable any party who wishes to challenge an award decision to do so. A plain interpretation of this section would therefore mean that as long as there is a challenge to an award decision, there is a standstill period, and no action can be taken on an award. In the event that there is no stay, there will then be a need for the Respondent or procuring entity to extend the tender validity period if it becomes necessary to do so to conclude the procurement proceedings."[Emphasis added].

The Board notes from the confidential documents that the Procuring Entity extended the tender validity by 30 days vide a letter dated 20th April, 2022 from 1st May, 2022 (which was the date when the validity was set to expire) to 1st June, 2022. Review No. 33 of 2022 was also filed the same date the letter was issued namely, 20th April, 2022.

Considering the 21 day standstill period in line with the ***KPLC case*** for both Review 33 and the present Request for Review,the computation of the tender validity period should be as follows:-

a. As at 20th April 2022 when the validity was extended, there were **11 days** which were set to run up to 1st May 2022.

b. Filing of Review No 33 of 2022 on 20th April 2022 suspended the running of the tender validity for **21 days** during the standstill periodup to 11th May 2022.

c. The 11 unspent days as per (a) above resumed running from 12th May 2022 for **6 days** upto 18th May 2022 when its the running was once again suspended upon the filing of the present Request for Review, leaving a balance of **5 days.**

d. The balance of **5 days** and the extended **30 days** will resume running a day after the delivery of this decision, that is on 9th June 2022.

e. The balance of 5 days added to the extended 30 days will lapse on **13th July 2022.**

Considering that the procurement proceedings are still ongoing and in order to give room for completion of the process and the standstill period of 14 days after which a contract is to be signed after tender award, it is important to extend the tender validity.

The Procuring Entity has already exhausted the once chance to extend the validity given by section 88 of the Act. The Board has power to extend the tender validity in such circumstances as was confirmed by the Court of Appeal in the case of ***Kenya Ports Authority & another v Rhombus Construction Company Limited & 2 others [2021] eKLR*** **("the KPA case")** in which one of the issues for determination was whether the

Board was bound by the provisions of section 88 of the Act which provides that the extension of a validity period by an Accounting Officer can only be done once and for not more than 30 days. The High Court in the primary proceedings in the ***KPA case*** had held that this section is not binding upon the Board. This position was upheld on appeal wherein the Court of Appeal held as follows:

> ***"36. From its submissions, it is clear that the appellant faults the learned Judge's decision on grounds that he erred: by failing to find that the 2nd respondent acted ultra vires by extending the validity period of the subject tender as it had no powers to do so under the law. Further, that such power was a preserve of the 1st respondent as provided for under section 88 of the Act; by failing to find that the 2nd respondent's decision and resultant order was illegal as the extension of tender validity period was contrary to section 88 which only allowed for such extension to be done once; by failing to find that the 2nd respondent's decision was unreasonable as it disregarded the allegations of forgery levelled against the 1st respondent which were pertinent governance issues.***
>
> ***37. From a close perusal of the learned Judge's decision, it is clear that the learned Judge extensively expressed himself on the issue of the extension of the tender validity period as follows: -***

37. From a close perusal of the learned Judge's decision, it is clear that the learned Judge extensively expressed himself on the issue of the extension of the tender validity period as follows: -

> ***"39. The crux of the issue in controversy is whether the Respondent (Review Board) has powers in law to order or direct the Accounting officer of the Ex-parte Applicant as a procuring entity to extend the validity period of the subject tender more than once. Section 88 of the Act(PPADA) provides for the extension of the tender validity period.....***
>
> ***40. What was the intention of the drafters of this legislation and in particular the inclusion of Section 88? In my view, this provision was intended to guard against any possible mischief or abuse of office or power by accounting officers especially where uncontrolled timelines will give them a free hand to temper with the tendering process to favour their friends or closely related persons. In other words, once the already extended validity period for a period of 30 days lapses, the tendering process in respect of that tender becomes moot or rather it extinguishes. Upon lapsing, the Procurement entity is at liberty to re-***

advertise for fresh tendering and the process then follows the full circle like it was never tendered for before.

....

47. Counsel for the I/Party contends that, Section 88(3) of the Act only limits the Accounting officer and not the Review board who have wide inherent powers under section 173 of the Act. The question begging for an answer is; whether the Review Board is bound by Section 88(3). Section 88(1) & (2) expressly refers to the powers of the Accounting officer in extending time but not the Review Board. Sub-section (3) refers to the accounting officer's powers of extension of validity period once and not beyond 30days pursuant to subsection (1).

48. From the plain reading of that Section, it is only applicable and binding on the accounting officer and nobody else. Nothing would have been easier than the legislators to include or provide the Review Board's mandate under that section. To that extent, I do agree with counsel for the I/Party that Section 88(3) of the Act does not bar the Review board from making decisions that are deemed to be necessary for the wider attainment of substantive justice...."

39. From the above excerpts is apparent that the learned Judge extensively addressed the said issues and made pronouncements on the same. Therefore, for this Court to disturb the said pronouncements, the appellants have to demonstrate that the Judge misdirected himself in law; misapprehended the facts; took account of considerations of which he should not have taken account; failed to take account of considerations of which he should have taken account; or the decision, albeit a discretionary one, is plainly wrong. (See: United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs. East African Underwriters (Kenya) Ltd [1985] eKLR.)

40. However, from the arguments as canvassed by counsel for the appellants, it is clear that he has not demonstrated how the learned Judge erred in the exercise of his discretion, but merely exhibits dissatisfaction with the learned Judge's findings. We are satisfied that the learned Judge exercised his discretion judicially in dismissing the appellant's notice of motion and we find no basis to fault him. Further, as stated in our brief decision delivered earlier, the appellant was not able to demonstrate to us what their grievance was. The Court had just affirmed what the appellants initially wanted when they awarded the 1st respondent the tender in the first place. [Emphasis added]

Given the above, the Board considers it necessary to extend the tender validity period for 30 days from 13th July 2022 when it is set to expire.

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders regarding the Request for Review dated 18th May 2022, the Interested Party's Preliminary Objection dated 25th May 2022 and the Applicant's Preliminary Objection dated 31st May 2022: -

I. **The Interested Party's Preliminary Objection dated 25th May 2022 is hereby overruled.**

II. **The Applicant's Preliminary Objection dated 31st May 2022 is hereby sustained and the Interested Party's undated Replying Affidavit signed by David Kanja is hereby struck out.**

III. **The tender validity period for Tender No. NCB/MOE-VTT/TVET PHASE III/3/2020-2021 for Consultancy Services for Development of Designs, Masterplans, Tender Documents and Supervision of Construction Works of Additional Departmental Blocks in Eleven (11) Technical & Vocational Education & Training (TVET) Institutions, Construction of Twin Hostels in Eight Technical Vocational Colleges and a Publishing and Printing Complex for Curriculum and Training Material is hereby extended for a**

further period of 30 days from the date when the same is set to expire ,that is 13th July 2022.

IV. The Procuring Entity is directed to complete the procurement process for Tender No. NCB/MOE-VTT/TVET PHASE III/3/2020-2021 for Consultancy Services for Development of Designs, Masterplans, Tender Documents and Supervision of Construction Works of Additional Departmental Blocks in Eleven (11) Technical & Vocational Education & Training (TVET) Institutions, Construction of Twin Hostels in Eight Technical Vocational Colleges and a Publishing and Printing Complex for Curriculum and Training Material, to its logical conclusion within 14 days of this decision while bearing in mind the Applicant's technical scoreis 86.27 marks.

V. Given the findings herein, each party to bear its own costs.

Dated at Nairobi, this 8thday of June 2022.

.....	.....
CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**